TENTATIVE RULINGS
LAW & MOTION CALENDAR
Wednesday, September 27, 3:00 p.m.
Courtroom 16 –Hon. Robert Boyd for the Hon. Patrick M. Broderick
3035 Cleveland Avenue, Suite 200, Santa Rosa

PLEASE NOTE: Per order of the Court, any party or representative of a party must appear remotely through Zoom for this calendar, unless you request in person appearance by 4:00 p.m. the day before the hearing.

TO JOIN "ZOOM" ONLINE,
Meeting ID: 161-460-6380
Passcode: 840359
https://sonomacourt-org.zoomgov.com/j/1614606380?pwd=NUdpOEZ0RGxnVjBzNnN6dHZ6c0ZQZz09

TO JOIN "ZOOM" BY PHONE,
By Phone (same meeting ID and password as listed above):
(669) 900-6833 US (San Jose)

The following tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument as to any motion, YOU MUST notify the Court by telephone at **(707) 521-6729**, and all other opposing parties of your intent to appear by 4:00 p.m. the court day immediately before the day of the hearing.
Parties in motions for claims of exemption are exempt from this requirement.

PLEASE NOTE: The Court WILL NOT provide a court reporter for this calendar. If there are any concerns, please contact the Court at the number provided above.

1. **MCV-256630, Looney v Garcia**

The motion of Plaintiff Gary E. Looney, dba Collectronics of California ("Plaintiff") for an order compelling Defendant Jennifer Garcia, individually, and as Personal Guarantor of Wendy's Place, Inc. ("Defendant") to provide responses to Plaintiff's post-judgment interrogatories and demand for production of documents is GRANTED. **Defendant Jennifer Garcia is ordered to provide full and complete verified responses, without objections, to Plaintiff's post-judgment interrogatories and request for production of documents within ten (10) days of the service of this order. Defendant is ordered to pay $60 in sanctions within 30 days of the service of this order.**

On January 10, 2022, Plaintiff obtained a judgment against Defendant in the amount of $2,401.99. On February 2, 2022, Plaintiff served Defendant with form interrogatories and a request for production of documents. (Looney Decl. ¶1, Ex. A.) As of the date of the motion, no responses have been provided. (*Id.*, at ¶¶2, 3.)

The motion is GRANTED.

Plaintiff is directed to submit a written order to the Court consistent with this tentative ruling.

2. MCV-260485, Looney v Mekhal

The motion of Plaintiff Gary E. Looney, dba Collectronics of California ("Plaintiff") for an order compelling Defendants Shanell, Inc., dba Best Bev, and Duraid Mekhael, Individually, and as Personal Guarantor of Shanell, Inc. ("Defendants") to provide responses to Plaintiff's post-judgment interrogatories and demand for production of documents is GRANTED. **Defendants Shanell, Inc., dba Best Bev, and Duraid Mekhael are ordered to provide full and complete verified responses, without objections, to Plaintiff's post-judgment interrogatories and request for production of documents within ten (10) days of the service of this order. Defendants are ordered to pay $60 in sanctions within 30 days of the service of this order.**

On May 4, 2023, Plaintiff obtained a judgment against Defendants in the amount of $1,672.05. On May 17, 2023, Plaintiff served Defendants with form interrogatories and a request for production of documents. (Looney Decl. ¶1, Ex. A.) As of the date of the motion, no responses have been provided. (*Id.*, at ¶¶2, 3.)

The motion is GRANTED.

Plaintiff is directed to submit a written order to the Court consistent with this tentative ruling.

3. SCV-270474, Restivo v City of Petaluma

This matter is on calendar for the motion of defendant City of Petaluma ("City") for summary judgment or, in the alternative, summary adjudication against Plaintiff Jennifer Restivo ("Plaintiff") as to Plaintiff's causes of action for general negligence and for dangerous condition of public property. **The City's motion for summary judgment is GRANTED.**

Plaintiff's complaint alleges that the City negligently maintained the premises at or near 1924 Turtle Creek Lane such that it allowed an uneven roadway to exist. Plaintiff alleges that she fell due to the uneven roadway and sustained severe and permanent injuries. Two causes of action are alleged: one for negligence and one for premises liability. Plaintiff filed a Claim Against The City of Petaluma on August 26, 2021 ("the Claim") which states that Plaintiff was lawfully riding a skateboard on Turtle Creek Lane when the wheel of her skateboard caught on a portion of uneven pavement and she fell to the ground. The Claim states that Plaintiff did not see the uneven portion of the pavement prior to getting her wheel stuck and falling.

1. Objections

   Plaintiff's objections are overruled.

   The court declines to rule on the City's objections. (CCP section 437c(q).)

   Plaintiff's objection to the City's separate statement in reply is sustained.

2. General Negligence
   a. Immunity

The City first argues that it is immune from liability for general negligence. Gov. Code section 815 provides: "Except as otherwise provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (Gov. Code § 815.)

The factual basis for Plaintiff's complaint against the City is based upon the alleged dangerous condition of a City street. "[S]ection 835 sets out the exclusive conditions under which a public entity is liable for injuries caused by a dangerous condition of public property." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 829.) Plaintiff has not raised any other factual basis to support liability against the City. Therefore, while the Government Claims Act does contain additional bases for liability against a public entity, the applicable statute here is section 835. Therefore, Plaintiff's complaint must be evaluated solely under section 835. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1132.) Accordingly, the motion for summary adjudication of Plaintiff's cause of action for negligence is GRANTED.

b. Condition of the Road

i. Not Dangerous

"Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

"(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

"(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (Gov. Code section 835.)

The City argues that Plaintiff cannot establish the existence of a defect in the subject road where she fell.

A dangerous condition is statutorily defined as "a condition of property that creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code § 830(a).)

The City dismisses Plaintiff's testimony as "self-serving." While that may be the case, Plaintiff's testimony still constitutes factual evidence to which the court must on this motion give preference. Summary judgment may not be denied on grounds of credibility. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 852.) Nor is her testimony of what occurred so "inherently improbable and impossible" that the court may, as a matter of law, disregard it. Photographic evidence is not required, and the City has not established that the photographs provided contradict her testimony.

ii. Due Care / Trivial Defect

The City next argues that the alleged defect was not dangerous when used with due care, and that the defect was, at most, trivial.

Plaintiff testified at her deposition that the road condition that caught her skateboard wheel was "about an inch approximately deep, maybe 6 – there was lots of long cracks all over, but, you known 6 or 7 inches in width; and then it was --- at the time I didn't realize it, but when I came back, it was – it was a deep crack. It was like a – it had split the road." (City's exhibit C, 64:23-65:5.) In further describing it, Plaintiff stated: "It was 6, 7, 8, 9 inches in length. I don't know. And it was pretty deep. It had maybe 1 or 2 inches deep, maybe an inch deep." (*Id.,* 65:12-16.) She thereafter stated that the crack was probably about 4 or 5 inches wide. (*Id.,* 65:17-19.) "It was more long than thick." (*Ibid*.) At the time of the accident, the crack in the road had not been filled. (*Id.,* 65:20-66:6.)

Subsequent to the accident, the subject crack(s) was/were filled with sealant. (City's Undisputed Material Fact ["UMF"] Nos. 37, 38.) The sealant is a "crack sealant," which the City states is only used for minor cracks in the roadway. The City's Engineer, Jeff Stutsman, states that such crack sealant "is used to stop water intrusion at discrete locations on a street, and would never be used to repair a pothole of the size described by Plaintiff, allegedly measuring 6-9 inches in length, 1-2 inches deep, and 4-7 inches wide. Rather, crack sealant is used to cover minor cracks in streets, measuring a half-inch in width or less. A different type of repair would be required to remediate a pothole of the size described by Plaintiff, such as cold patch, fill, or re-pavement." (Stutsman decl., ¶10.) Mr. Stutsman states that he does not see any evidence of any such repairs in the photographs taken by Plaintiff. (*Ibid*.) When Mr. Stutsman as asked if there was a specific written policy or criteria as to how to fill potholes, Mr. Stutsman stated: "there is no formal policy on the width." (Stutsman Deposition p.118)." (Plaintiff's Exhibit 7, ¶8.)

The City also provides evidence that there were no aggravating factors present on the day of the accident. The weather was clear, nothing obstructed Plaintiff's visibility, and the road was dry. (UMF 1, 17, 18, 20-21.)

In addition, the City had no record of any prior incidents, accidents, complaints, or injuries sustained by any person at this location prior to the subject incident. (UMF 26-36.)

In opposition, Plaintiff's expert, Zachary M. Moore, states the "[p]hotographic evidence depicting the crack sealant in the subject defect shows bubbling, which is likely due to moisture and/or debris in the repair, confirming the defect had a substantial depth prior to the repair (as well as the need for utilizing crack sealant at this location).

Plaintiff also argues that the City's road report indicated that the pavement condition in the area where Plaintiff fell was labelled as "poor." (Plaintiff's Supplemental Undisputed Fact No. 67.) Plaintiff's expert notes that the area was frequently traversed by pedestrians and users of "micro-mobility devices," and that it is industry standard not to allow hazardous conditions to exist for any period of time if it can reasonably be avoided. (PSUF 78.)

In reply, the City urges the court to disregard the testimony of Zachary Moore, calling his testimony "speculation." Speculation is the forming of a theory or conjecture without firm evidence. Here, Mr. Moore's opinion is based upon the photographs taken by Plaintiff. Photographs are firm evidence. And, while expert opinions may vary, the court may not disregard Mr. Moore's expert opinion on this motion.

Overall, in construing the evidence in Plaintiff's favor as the court must do on this motion, a triable issue of material fact remains regarding the size, depth, and width of the defect. Without this, the court cannot find as a matter of law that the defect was trivial, or that it was not dangerous when used with due care.

iii. Open and Obvious

The City argues that the allegedly dangerous condition was open and obvious and was therefore not a dangerous condition within the meaning of section 835.

"Where the condition or danger is obvious, there is no duty to specially guard or warn against it. Hence, an injury to the user of the premises from an obvious characteristic produces no liability against the possessor of land." (*Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 31.)

The City cites Plaintiff's testimony wherein she stated that, when walking, a pedestrian would presumably see the defect. (UMF No. 15.) The City attempts to construe Plaintiff's testimony to conclude that Plaintiff admitted she was only riding about as fast as someone would walk, and that she was distracted. (See UMF 13, 15, 17-22.) However, the evidence does not support this conclusion. Plaintiff's testimony that she was in charge of her son does not necessarily mean she was distracted. She testified that she was attentive to her surroundings. (PSUF 14.)

In addition, the City has not presented the average speed of a pedestrian. Nor did Plaintiff's testimony specify pedestrian speed. Plaintiff stated that the defect would likely be noticed if one was "walking." On its face, "walking" does not include skateboarding. Moreover, Plaintiff testified that if one was "cruising along," on a skateboard, she did not think the defect would be noticed. (PSUF 36.)

Moreover, while the City would not have to warn of an open and obvious condition, it must still use reasonable care to protect against the risk of harm if it is foreseeable that the condition may cause injury to someone who because of necessity encounters the condition. (CACI 1004.) Skateboarding is a foreseeable activity on City streets. The City has not addressed the foreseeability of skateboarding nor shown that Plaintiff was not, as a matter of law, using due care. Therefore, it has not met its burden to show lack of liability due to an open and obvious defect.

c. Notice

Next, the City argues that it did not have notice of the defect.

"To establish public entity liability for injury caused by a dangerous condition of its property, "The statute requires a plaintiff to prove, among other things, that either of two conditions is true: '(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.' " (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1130.)

Plaintiff has neither alleged nor provided facts to support the option of a negligent or wrongful act or omission of an employee of the public entity. Therefore, Plaintiff must establish

notice. However, on this motion, it is the City's burden to establish that Plaintiff does not have and cannot obtain needed evidence to establish the City had notice of the defect.

Constructive notice requires a plaintiff to establish "that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." (Gov. Code § 835.2(b).)

Mr. Stutsman stated that when the City conducted its own inspections of Noriel Lane and Turtle Creek Way, following receipt of the 2019 Pavement Report, any City employees who identified any issues or concerns regarding either street, such as a pothole of the size described by Plaintiff in this action, were required to report such a defect to the City. (Stutsman decl., ¶8.) He stated he was unaware of any such issues or concerns being identified or reported to the City regarding either Noriel Lane or Turtle Creek Way prior to March 5, 2021, and was unable to locate any records in which such a defect was reported to the City at any time prior to March 5, 2021. (*Ibid*.) Nor does the City have any record of any prior incidents, accidents, complaints, or injuries sustained by any person at this location prior to the subject incident. (UMF 26-36.)

In opposition, Plaintiff argues that this issue is for the jury to decide. However, Plaintiff does not establish what evidence a jury could weigh to decide this issue as she has not presented any contrary evidence that the City did have actual or constructive notice of a dangerous condition. Nor does Plaintiff present any argument that additional evidence may be obtained to defeat the City's position on this issue. Plaintiff merely concludes without explanation that her deposition and the deposition of the City's person most knowledgeable adduced facts establishing constructive notice, and that she has shown that "negligent omissions" of the City's employees allowed the dangerous conditions to persist. These statements are allegedly supported by Stutsman's statement that the City was generally aware of cracks in the roadway, that MTC had inspected the area in September 2019, and that the City knew that the road condition where Plaintiff fell was in poor condition. (PSUF Nos. 58, 60, 63.) However, these facts do not establish the City's notice of a dangerous condition. Plaintiff has not provided any evidence that would support finding that any City employee had notice of anything more than trivial defects.

In reply, the City contests that MTC's 2019 Pavement Report indicated that Noriel Lane was in "poor" condition. It argues that it was classified as "fair," citing UMF 56, which cites to page 3 of the report. Page 3 of Exhibit F does not discuss Noriel Lane. Mr. Stutsman stated that in the pavement report, Noriel Lane received a PCI of 50. (Stutsman decl., ¶5.) While he also states that Noriel Lane and Turtle Creek Way, the latter which received a score of 61, are classified as "fair," he also testified that a PCI of 50 is classified as "poor" or "very poor." (Stutsman decl., ¶¶5, 7.) Thereafter, the City resurfaced those streets. (*Id.*, at ¶7.)

Regardless, the City has met its burden on this issue that it had no actual or constructive knowledge of a dangerous condition. Plaintiff has not provided evidence of a triable issue of material fact. Therefore, the motion on Plaintiff's second cause of action is GRANTED.

d. Doctrine of Primary Assumption of the Risk/Duty

The City argues that Plaintiff's complaint fails as it is barred by the doctrine of primary assumption of the risk.

In cases involving "primary assumption of risk"—where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury—the doctrine continues to operate as a complete bar to the plaintiff's recovery. In cases involving "secondary assumption of risk"—where the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty—the doctrine is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 314–315.)

In the cases cited by the City, summary judgment was granted on the basis that the defendant did not owe a duty to a plaintiff where the injury was caused by an inherent risk of the sport. In the context of a summary judgment motion, the court may look at the nature of the sporting activity in which a plaintiff was engaged and determine whether the defendant's conduct breached a legal duty of care to the plaintiff. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 315.)

As a general rule, persons have a duty to use due care to avoid injury to others and may be held liable if their careless conduct injures another person. (*Ibid*.) However, in sporting activities, conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself. (*Ibid*.) The nature of a sport is highly relevant in defining the duty of care owed by the particular defendant. (*Ibid*.) However, defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. (*Ibid*.) Liability in such cases turns on whether the defendant had a legal duty to avoid such conduct or to protect the plaintiff against a particular risk of harm. (*Id.*, at 316-317.)

The City argues that falling is an inherent risk of skateboarding. While true, the question in this case is whether encountering significant defects in the road is an inherent risk of skateboarding. The City has not provided authority to allow this court to affirmatively determine that question. Rather, in this specific instance, it appears that comparative negligence principles are applicable.

For example, in *Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, the plaintiff rode his skateboard in the friend's driveway and fell into a planter while performing a skateboard trick and impaled himself on a pipe in the planter. The defendant in that case did not have a duty to keep the driveway safe for skateboarding activities as imposing such a duty on residential homeowners would be too great a burden. Falling is an inherent risk of skateboarding, and the presence of the pipe or the planter had nothing to do with plaintiff's falling. In *Calhoon,* nothing on the property caused the fall.

None of the cases cited by the City involve a case regarding property maintained by a government entity. However, in extrapolating to one of the cases cited, the City could be said to have supplied the equipment or arena for the activity; in *Bjork v. Mason* (2000) 77 Cal.App.4th 544, primary assumption of the risk did not apply where the defendant supplied the equipment, and the equipment's failure caused the injury. Imposing a duty when there is an organized relationship between the defendants and the plaintiff is justified because the defendants are "responsible for, or in control of, the conditions under which the [participant] engaged in the sport." (*Bertsch v. Mammoth Community Water Dist.* (2016) 247 Cal.App.4th 1201, 1208–1209.) The City has not shown that this principle is inapplicable to property it manages when that property is used in a foreseeable manner.

The manner in which an activity is performed must be considered. For example, in *Childs v. County of Santa Barbara* (2004) 115 Cal.App.4th 64, an 11–year–old child (Tatiana) fell off her scooter while riding on a public sidewalk and suffered injuries. She sued the County, through her guardian ad litem, alleging the County negligently maintained the sidewalk in a dangerous condition. The trial court granted summary judgment in favor of the County based on assumption of risk. The Court of Appeal reversed, concluding: "[T]he record does not establish as a matter of law that Tatiana was engaged in a sport or sports-related recreational activity covered by the assumption of risk doctrine. Riding a scooter may be subject to the doctrine under some circumstance[s], but we cannot conclude, as the trial court did, that riding a scooter is a recreational activity subject to the doctrine under all circumstances." (*Id*. at pp. 70–71.) The court acknowledged, "the evidence at trial may show that Tatiana was riding her scooter in an adventuresome and thrill-seeking manner," but concluded the evidence presented in support of the summary judgment motion did not establish she was doing anything more than riding the scooter to get from one place to another. (*Id*. at 71.)

In *Bertsch v. Mammoth Community Water Dist*. (2016) 247 Cal.App.4th 1201, 1210, the doctrine of primary assumption of the risk applied as the evidence established that the plaintiff was doing more than riding his skateboard as a means of transportation. While the court in *Bertsch* stated that "[t]o require road owners and water districts, whether private or public, to make their roads and utility access points safe for skateboarding would amount to an unnecessary burden," this was in the context of a skateboard for thrill-seeking—not for mere transportation. No case cited by the City establishes that the City does not have a duty to keep its streets safe for persons using skateboards as transportation. Here, the evidence does not establish that Plaintiff was riding her skateboard in a thrill-seeking, adventuresome manner. Rather, she was only traveling at approximately 5 miles per hour to go to the local park.

3. Immunity under Gov. Code section 831.7

The City argues that it is immune from liability from a cause of action for dangerous condition of public property when a plaintiff "participates in a hazardous recreational activity." Section 831.7(b) defines a "hazardous recreational activity" as one which is "conducted on property of a public entity that creates a substantial, as distinguished from a minor, trivial, or insignificant risk of injury to a participant."

In assessing whether an activity is a "hazardous recreational activity," a court looks to "the objectively foreseeable risks of participating" in the activity. (*Wood v. County of San Joaquin* (2003) 111 Cal.App.4th 960, 968.)

Again, the circumstances matter. In *Bartell v. Palos Verdes Peninsula Sch. Dist.* (1978) 83 Cal.App.3d 492, plaintiffs failed to plead a dangerous condition of public property within the meaning of Gov. Code, §§ 830 or 835, where the complaint merely alleged that either a hole in the fence of the schoolyard or an unlocked gate allowed their son access to the schoolyard and constituted a dangerous condition, when viewed in conjunction with allegations of the known use of the schoolyard for a dangerous skateboard game. In that case, the alleged defects merely allowed access to the area, and as such went to the question of the school district's duty of supervision and control, if any, over its property, and not to the existence of a dangerous condition. The plaintiffs' son's injuries were the direct result of the dangerous conduct of plaintiffs' son and his friend, and not of any defective or dangerous condition of the property.

The subject case is distinguishable as the Plaintiff alleges that the condition of the City's street caused the accident. The City has not met its burden on this issue.

4. Conclusion and Order

The City has established that it did not have notice, actual or constructive, of any dangerous defect at the location where Plaintiff fell. Plaintiff has not provided evidence that would raise a triable issue of fact. Accordingly, the motion for summary adjudication as to Plaintiff's second cause of action is also GRANTED. As the City has shown that both of Plaintiff's causes of action fail, its motion for summary judgment is GRANTED.

The City's counsel is directed to submit a written order to the court consistent with this ruling and in compliance with California Rules of Court, Rule 3.1312.