Judge Benson – Law & Motion – Wednesday, February 1, 2023 @ 9:00 AM
TENTATIVE RULINGS

1-2. 20CV01878 Lui, Judy v. California Insurance Guarantee Association et al.

EVENT: (1) Defendant Nevin & Witt Insurance and Financial Services, Inc.'s Motion for Summary Judgment

(2) California Insurance Guarantee Association's Motion for Summary Adjudication of Issues

Defendant Nevin & Witt Insurance and Financial Services, Inc.'s Motion for Summary Judgment is GRANTED.

It is undisputed that Plaintiff did not rebuild her home, either at the original location or anywhere else. (UMF 49 -52) Plaintiff's only complaint with Nevin & Witt is that they failed to obtain sufficient coverage for Plaintiff to rebuild her home. Nowhere in Plaintiff's opposition do they provide authority for the recovery of replacement costs when replacement costs were not incurred. The Extended Replacement Cost endorsement clearly provides that it does not extend the policy limits.

It is clear to the Court that Plaintiff is not entitled to replacement cost coverage unless she rebuilt the house. Because she did not rebuild her house, she has not been damaged. The only way she could have been damaged is if she actually incurred the costs to rebuild her home, and those costs exceed the replacement coverage under the policy. Thus, the motion is GRANTED on the issue of damages, as no triable issue of fact exists.

Defendant Nevin & Witt shall prepare and submit a form of order consistent with this ruling within 2 weeks.

California Insurance Guarantee Association's Motion for Summary Adjudication of Issues is GRANTED.

Concerning evidentiary objections the Court deems material to the motion, the Court rules as follows:

Plaintiff's Objections:

Fact # 30 – overruled.

The Debris Removal Issue

As CIGA correctly notes, Ins. Code § 1063.1(c)(4) provides:

> …
>
> "Covered claims" does not include an obligation of the insolvent insurer arising out of a reinsurance contract, an obligation incurred after the expiration date of the insurance policy or after the insurance policy has been replaced by the insured, canceled at the insured's request, or canceled by the liquidator, **or an obligation to a state or to the federal government**. [Emphasis Added]

The invoice Plaintiff received from the County clearly states "The totals provided in the enclosed invoice reflect the costs provided to the County by the **California Office of Emergency Services** (CalOES)." [Emphasis Added] Thus, the invoice is clearly a claim by the State that the County is simply passing along. As a result, pursuant to Ins. Code § 1063.1(c)(4), CIGA is not required to cover the invoice.

In reviewing Plaintiff's opposition, the Court finds no evidence of any debris removal costs incurred by Plaintiff independent from the invoice. Consequently, there is no triable issue of fact on the matter of debris removal coverage.

Extended Replacement Cost Coverage

The Extended Replacement Cost Endorsement provides in part:

> We will pay you up to an additional 25% of the Coverage A (Dwelling) limit of liability, **if necessary**, to repair or replace covered loss or damage to the dwelling. This coverage **does not increase the Coverage A (Dwelling) limit of liability**, for any purposes. [Emphasis Added]

The only reasonable interpretation of the phrase "if necessary" is that it imposes an obligation on the insured to rebuild. This is reinforced by the language that this coverage does not increase the coverage limit. If this language were interpreted to cover Plaintiff regardless of whether she rebuilt, this would effectively be an increase in the coverage limit, which as noted, it is not.

Here, it is undisputed that Plaintiff did not rebuild her home either at the original location or an alternative location. (UMF 29,30) Consequently, there is no triable issue of fact that Plaintiff is not entitled to Extended Replacement Cost Coverage as she did not rebuild.

Ordinance Coverage

Similarly, the Court finds ordinance coverage is implicated only if Plaintiff rebuilds. The relevant provision of the policy provides:

> For an additional premium, loss for damage by a Peril Insured Against to covered property or the building containing the covered property will be settled on the basis of any ordinance or law that regulates the construction, repair or demolition of this property.

The Court finds the plain language of this provision necessarily requires Plaintiff to rebuild, whether on the original location or some other location. As referenced, it is undisputed that did not occur here, as a result Plaintiff is not entitled to ordinance coverage.

Further, the Court agrees with CIGA that it is not an "insurer" for purposes of 10 CCR 2695.9. Thus, 10 CCR 2695.9 is not applicable in this case.

Inflation Guard Coverage

Assuming Plaintiff is correct and CIGA erred in in applying a 4.16% multiplier instead of a 4.161644% multiplier, Plaintiff still does not dispute that CIGA overpaid her for Coverage C, as the limit for Coverage C was $257,379.36 however Plaintiff received $264,827.20, see UMF 20. Consequently, although the 4.161644% multiplier results in an inflation guard figure that is several hundred dollars more, Plaintiff was not damaged in light of the overpayment.

Trees/Plants/Shrubs

Similarly, even if Plaintiff's contention is correct and CIGA miscalculated the Trees/Plant/Shrubs coverage by $5,147.03, that amount is still offset by CIGA's Coverage C overpayment. Thus, Plaintiff has not been damaged.

Defendant CIGA shall prepare and submit a form of Order consistent with this ruling within 2 weeks.

3. <u>20CV02380 Rosales, Jeremy Steven v. City of Chico et al.</u>

EVENT: Defendants' Motion to Set Aside and Vacate the Court's September 27, 2022 Order

The Court rules on Defendant City of Chico's objections to Plaintiffs' evidence as follows:

Nos. 1 & 2: overruled.

Nos. 3 & 5: sustained. (Nos. 4 and 6 are moot in light of the rulings on 3 and 5.)

The Court finds 1) a sufficient foundation exists concerning the body camera footage; 2) the body camera footage is not hearsay; 3) Dr. Haas' report is admissible because it relies on admissible evidence, i.e. the body camera footage.

Foundation

Case law is consistent that the threshold for foundation as it pertains to admissibility is very low. Circumstantial evidence, content and location are all valid means of authentication.

People v. Gibson (2001) 90 Cal. App. 4th 371, 383) Even a lack of evidence that the document is not what it purports to be may be sufficient, (*Id*).

The Court has reviewed the body camera footage, and based on its content, the Court finds sufficient evidence that the videos are what they purport to be. Further, the City has presented no evidence that the body camera videos are not what they are purported to be or that they have been altered in some way. As a result, an adequate foundation exists for the body camera footage.

Hearsay

The City's double hearsay argument appears to contend that the first layer of hearsay are the video recording themselves and the second layer of hearsay are the statements made in the recordings. As to the second layer, the City has failed to identify specific statements in the video and explain why they are hearsay. The Court notes, the video contains non-hearsay including directives such as "get on the ground", etc. It is not the Court's burden to attempt to determine which statements the City believes are hearsay and make the City's argument for it.

As to the first layer – the recording – a machine is not a declarant, therefore the recording is not hearsay, see People v. Goldsmith (2014) 59 Cal.4th 258, 274. As a result, we need not consider the business record exception because the recording is not hearsay.

Dr. Haas' Report

In reviewing Dr. Haas' report it relies heavily on the body camera footage. Although it references other documents including police reports, those references are primarily to evidence that is undisputed. For example, there is a reference to the officers' reports that the officers believed they were investigating a felony hit and run. This is undisputed evidence. As a result, the Court finds Dr. Haas' report admissible because it relies on the body camera footage, which as the Court noted, is separately admitted.

Thus, although the Court is not considering the defective declarations and corresponding evidence of Plaintiff's counsel and Plaintiff, the Court finds an independent basis exists supporting the admissibility of both the body camera footage as well as Dr. Haas' report. With this in mind, the Court issues the following ruling on the City's Motion for Summary Judgment.

The Court's Ruling on the Summary Judgment Motion

The Court re-incorporates its September 27, 2022 order, with the notation that it appears the Complaint was amended on October 10, 2022. In the 9/27 order the Court Granted the City's motion as to the pleading issue with 20 days leave to amend. Thus, that topic appears to be moot. Outside of that, the Court incorporates its September 27, 2022 order:

> ….
>
> While the general pleading rules provide that the Court is to use a flexible approach in reviewing the pleading with an emphasis on the factual allegations, Defendants have cited *Searcy v. Hemet Unified School Dist*. (1986) 177 Cal.App.3d 792, 802. *Searcy* provides, "Since the duty of a governmental agency can only be created by statute or

"enactment," the statute or "enactment" claimed to establish the duty must at the very least be identified." (*Id*.) The Court finds that Searcy appears to still be good law at least on the matter of the sufficiency of pleadings involving government agency liability. Consequently the Court finds that Defendants' contention concerning this pleading issue has merit.

When a motion for summary judgment is used to test whether the complaint states a cause of action, the court will apply the rule applicable to demurrers and accept the allegations of the complaint as true. (*American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1117) Because the time for a demurrer had passed by the time the Counties' motion was filed, we treat the motion as a motion for judgment on the pleadings. (Id.)

A motion for judgment on the pleadings is analogous to a general demurrer. (*Ventura Coastal, LLC v. Occupational Safety & Health Appeals Bd*., (2020) 58 Cal. App. 5th 1, 32) In the case of either a demurrer or a motion for judgment on the pleadings, leave to amend should be granted if there is any reasonable possibility that the plaintiff can state a good cause of action. (*Id*.)

In light of the foregoing, the Court views Defendants' motion as it pertains to the pleading issue identified in Searcy, supra, as essentially a motion for judgment on the pleadings. As a result, the policy favoring amendment applies, and Plaintiff is thus granted leave to amend to cure the deficiency. Plaintiff shall file an amended complaint within 20 days as proscribed above.

In the section of Defendants' Points and Authorities relating to pleading defects, Defendants also identify Government Code Sections 820.2, 820.4, and 821.6. It is unclear to the Court whether Defendants contend that the Complaint is deficient because it failed to address those statutes in the Complaint, or whether Defendants contend that no triable issue of fact exists as to those statutes. To the extent Defendants' are contending that these statutes should have been addressed in the pleading, the Court disagrees.

Unlike Gov. Code § 815.2(a) which imposes a statutory duty on government agencies, sections 820.2, 820.4 and 821.6 are essentially affirmative defenses. An affirmative defense is new matter that defendants are required to plead and prove. (*Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 Cal.App.4th 415, 424) On the other hand, a defense which demonstrates that plaintiff has not met its burden of proof as to an element plaintiff is required to prove is not an affirmative defense. (*LL B Sheet 1, LLC v. Loskutoff*, (2019) 362 F. Supp. 3d 804, 818) [Emphasis Added]

Consequently, to the extent Defendants contend the Complaint is deficient for failing to address Gov. Code §§ 820.2, 820.4, and 821.6, the motion is DENIED.

To the extent the motion contends that no triable issues of fact exist as to Gov. Code §§ 820.2, 820.4, and 821.6, the motion is DENIED on that basis as well. At its core, this is an excessive force case. In its research, the Court finds no authority suggesting that any of these statutes bar excessive force claims.

To the contrary, the Legislature has recognized that the imposition of vicarious liability on a public employer is an appropriate method to ensure that victims of police misconduct are compensated. (*Mary M. v. City of Los Angeles*, (1991) 54 Cal. 3d 202, 215-216) It has done so by declining to grant immunity to public entities when their police officers engage in violent conduct. (*Id*.) The Court finds *Blankenhorn v. City of Orange*, (2007) 485 F.3d 463 to be instructive. In the context of excessive force allegations, the Court found that section 821.6 does not confer immunity based on acts that allegedly happened during arrest, as opposed to acts pursuant to an investigation into guilt. (*Id*. at 488) Consistent with that analysis, this Court finds that excessive force inherently pertains to the arrest and not to the investigation of guilt because by definition the acts are allegedly excessive/unreasonable. As the alleged acts are excessive/unreasonable, they cannot be said to be in furtherance of the investigation, rather the acts are necessarily outside the scope of the investigation.

Finally, as referenced Defendants contend there is no triable issue of fact as to whether the officer's conduct was reasonable. Plaintiff, in his opposition has submitted an expert report of Dr. Glen Andrew Haas.

…

As to the merits of the motion, Defendants argue Plaintiffs' causes of action fail on the grounds that no triable issue of fact exists on the issue of whether the use of force by the Officers' was reasonable. The long-established principle of California negligence law that [is] the reasonableness of a peace officer's conduct must be determined in light of the totality of circumstances. (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 632) In a battery action, Plaintiff must prove unreasonable force as an element of the tort. (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272)

In addition to negligence and battery theories, the complaint contains causes of action for both intentional and negligent infliction of emotional distress. As referenced, whether the officers' conduct was unreasonable would necessarily also be a required element of any negligent infliction of emotional distress claim.

Intentional infliction of emotional distress requires that the conduct be outrageous. Thus, intentional infliction of emotional distress is also necessarily predicated on whether the officers' use of force was unreasonable. (If no triable issue of fact exists on the issue of whether the officers' conduct was reasonable then necessarily there is no triable issue of fact as to whether the officers' conduct was outrageous)

CCP 437c(p)(2):

> A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action. Once the defendant or

> cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The plaintiff or cross-complainant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto.

In support of their contention that the officers acted reasonably in administering force against Plaintiff, Defendants highlight the factual circumstances that precede the Officers' use of force.

The Officers heard a distinct sound of a traffic collision near their location. The Officers responded to the accident and got out to render aid of the involved parties. (SS #9) Shortly thereafter dispatch reported that a hit and run was just committed. (SS#10) When the Officers exited their patrol car a citizen approached and notified them that there was a subject that had just fled the scene of the accident on Mildered Avenue. (SS #11) The Officers looked in that direction and observed a tall male about 30 yards ahead of them dressed in dark pants and a black T-shirt. (SS # 12)

The Officers made contact with Plaintiff believing there was a possible felony, DUI, or felony hit and run. (SS #13) As the officers approached Plaintiff, both Officers yelled "Stop Police." Plaintiff slowed his pace but did not stop until the officers reached Plaintiff, (SS# 14) Officer Sugastume recognized Plaintiff as they attended high school together and were fellow Marines. Based on this history with Plaintiff, Officer Sugastume was aware of Plaintiff's superior fighting skills and knew that he had trained and fought professionally in mixed martial arts competitions. (SS#16)

Officer Sugastume feared for his safety because of his knowledge of Plaintiff's fighting skills, knowledge that Plaintiff was intoxicated, and knowledge that Plaintiff possessed a concealed weapon permit and was known to carry a gun. (SS# 19) Plaintiff's continued refusal to obey the Officers' commands frightened Officer Wright. (SS #31)

Plaintiff immediately resisted the Officers' attempts to grab him and immediately began to actively resist the Officers' attempt to place Plaintiff in a rear wrist lock to gain control of him and put him in handcuffs. (SS# 21) The Officers ordered Plaintiff to put his hands behind his back and get on the ground no less than ten times and Plaintiff refused to comply, responding "No. Stop, I'm not going to do this."

Due to Plaintiff's superior size, strength, and active resistance, Officer Wright called for a Code 3 backup because he did not have the physical ability to overcome Plaintiff's active resistance. (SS #26) Plaintiff's active resistance was such that Officer Wright had to use another level of force to gain Plaintiff's compliance with the Officers' lawful commands. (SS #27) Officer Wright then withdrew his baton and again ordered Plaintiff to get on the ground. Plaintiff again did not comply with. (SS #28) To gain compliance,

Officer Wright struck Plaintiff on his left thigh, Plaintiff continued to refuse, and Officer Wright struck him two more times in the same location.

As Defendants note, there is a three factor test in determining whether the officer's conduct was reasonable:

The court pays "careful attention to the facts and circumstances of each particular case" while considering the following factors, (1) the "severity" of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of others; and, (3) whether the suspect is actively resisting or attempting to evade arrest by flight." (*Graham v. Connor* (1989) 490 U.S. 386, 396)

Here, Defendants have met their initial burden of demonstrating the Officers' conduct was reasonable: they were investigating a serious crime, the officers testified that they believe Plaintiff to be an immediate threat, and they testified that Plaintiff was actively resisting.

Thus, the burden shifts to Plaintiff to demonstrate a triable issue of fact on the issue of reasonableness. In reviewing Dr. Haas' report, Dr. Haas opinion is purportedly based on the review of various documents pertaining to the incident, including but not limited to the incident report made by the officers, the deposition testimony of the officers as well as the deposition testimony of Plaintiff, and the body camera videos. (Table of Exhibits to the Declaration of Tim S. Hodson, Exhibit 1, page 6-7) According to Dr. Haas, although the Officers had a need to determine whether Plaintiff was involved in the collision had merit but they may have accomplished this without resorting physically restraining him. (Table of Exhibits to the Declaration of Tim S. Hodson, Exhibit 1, page 20.) The contradictory statements by both Officers as to whether Plaintiff was fleeing was resolved by Officer Sugastume's body camera footage which shows Plaintiff was stopped and cooperated with the Officers until they manipulated his wrists and caused pain (*Id*.)

The Officers were not presented with violent or dynamic conduct as Plaintiff stopped after being told to do so, even making sure the Officers saw his hands. (Table of Exhibits to the Declaration of Tim S. Hodson, Exhibit 1, page 21) At no point was either Officer in immediate danger from Plaintiff. Officer Wright's use of his baton against Plaintiff was unnecessary and excessive. (Id. at p.22)

In light of Dr. Haas' report, the Court finds a triable issue of fact exists as to the reasonableness of the Officers' conduct. The inherently fact-specific determination whether the force used to effect an arrest was reasonable under the Fourth Amendment should only be taken from the jury in rare cases. (*Murchison v. County of Tehama* (2021) 69 Cal.App.5th 867, 881) Here, a trier of fact must determine whether the conduct of the Officers was reasonable.

The Court is not expressing an opinion on the evidence presented. The affidavits of the moving party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of summary judgment should be resolved against granting the motion. (*Empire West Side Irrigation Dist. V. Lovelace* (1970) 5 Cal.App.3d

911, 916) The Court finds that this is not a "rare case" as noted in Murchison. As a result, the motion is denied on the issue of the Officers' conduct.

Plaintiff shall prepare and submit a form of order consistent with this ruling within 2 weeks.

4. 21CV00485 American Express National Bank v. Bryant, Martha

EVENT: Plaintiff's Motion for Summary Judgment or Summary Adjudication

Plaintiff's Motion for Summary Judgment is GRANTED. The court finds Plaintiff has met its initial burden in submitting evidence as to both Open Book Account and Account Stated causes of action, and the motion is unopposed. The Court will sign the proposed order and judgment.

5. 22CV00614 Caput, Stephen v. Independent Dealer Group, Inc et al.

EVENT: Cross Defendant Jiffy Lube Store 837's Demurrer to Cross Complaint

Cross Defendant Jiffy Lube Store 837's Demurrer to Cross Complaint is OVERRULED. Cross-Defendant shall file an answer within 20 days. Cross-Complainant shall prepare and submit a form of order consistent with this ruling within 2 weeks.

6. 22CV02611 Modern Building, Inc. v. Builders Door and Window, Inc et al.

EVENT: Modern Building Inc.'s Petition to Compel Arbitration and Stay Action Pending Arbitration

Pursuant to the Stipulation and Order Granting Modern Building, Inc.'s Petition to Compel Arbitration and to Stay Action Pending Arbitration, the Petition is GRANTED.

7. 22CV02917 In re: Boyd-Kopiej, Martha Ann

EVENT: Change of Name (Adult)

There is no proof of publication on file. Upon the filing of the proof of publication, the Court will sign the decree provided.

8. 22CV01582 Klempa, Sandra et al v. California Capital Insurance Company et al.

EVENT: Motion to Compel California Capital Insurance Company's Further Responses to Plaintiff Ponderosa Gardens Motel, Inc's Special Interrogatories, Set One

Motion to Compel California Capital Insurance Company's Further Responses to Plaintiff Ponderosa Gardens Motel, Inc's Special Interrogatories, Set One is DENIED without prejudice. The requests clearly implicate the privacy rights of third parties. Although the Court finds the information requested is relevant at least to the extent the First Amended Complaint seeks punitive damages, as Defendant California Capital Insurance Company (CCIC) correctly notes, Plaintiff must make a showing of direct relevance when Constitutionally protected information is sought, see *Davis v. Superior Court*, (1992) 7 Cal. App. 4th 1008, 1017. As in *Davis*, the Court finds the evidence presented by Plaintiff amounts to nothing more than speculation as to how the information might be directly relevant.

Defendant shall prepare and submit a form of order consistent with this ruling within 2 weeks.