Judge Benson – Law & Motion – Wednesday, August 16, 2023 @ 9:00 AM
TENTATIVE RULINGS

1-2. 20CV01591 Vargas, Richard v. Ceres Environmental Services, Inc et al

EVENT: (1) Defendant Ceres Environmental Services, Inc.'s Motion for Summary Judgment

(2) Defendant Brad Ingram Construction's Motion For Summary Judgment on Plaintiff's First Amended Complaint

Defendant Ceres Environmental Services, Inc.'s Motion for Summary Judgment (hereinafter "Ceres") is GRANTED. Defendant Brad Ingram Construction's (hereinafter "BIC") Motion For Summary Judgment is DENIED.

Ceres' Motion

Causation

Preliminarily, the Court rules on evidentiary objections concerning this motion as follows: Plaintiff's evidentiary objection no. 38 is overruled in its entirety.

As Ceres noted, to prove causation in a toxic tort personal injury case, the law is well settled that causation must be proven within a reasonable medical probability based upon competent expert testimony. (*Cooper v. Takeda Pharms. Am*. (2015) 239 Cal.App.4th 555, 577).

Here, Ceres has met its initial burden demonstrating that Plaintiff cannot demonstrate any reasonable medical probability that his work for Garlow Transport in 2019 caused or contributed to his development of sarcoidosis, see UMF 18 and 19. Thus, the burden shifts to Plaintiff to demonstrate a triable issue of fact regarding causation.

Plaintiff relies on the declaration of Dr. Reza Ronaghi. The declaration provides in pertinent part:

> In Mr. Vargas' case, he was involved in work in an area of heavy dust and ash, and developed symptoms shortly thereafter. With no protective gear, these exposures may have led to development of Sarcoidosis and sarcoid like reaction. In a patient who was healthy previously and who then had an acute exposure to these dusts and ash, this is similar to the acute exposure seen in the rescue workers at the world trade center, and hence may have led to his development of sarcoidosis.

In Ceres' reply it argues that the declaration does not establish a triable issue of fact on causation. The Court agrees.

> The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based upon competent expert testimony.

> Mere possibility alone is insufficient to establish a prima facie case. [Citations.] That there is a distinction between a reasonable medical 'probability' and a medical 'possibility' needs little discussion. There can be many possible 'causes,' indeed, an infinite number of circumstances which can produce an injury or disease. A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury.
>
> *Cooper v. Takeda Pharmaceuticals America, Inc.*, (2015) 239 Cal. App. 4th 555, 577

The plaintiff must offer an expert opinion that contains a reasoned explanation illuminating why the facts have convinced the expert, and therefore should convince the jury, that it is more probable than not the negligent act was a cause-in-fact of the plaintiff's injury. (*Cooper*, *supra* at p. 578) Nowhere in Dr. Ronaghi's expert opinion does he say that it is more probable than not that Plaintiff's sarcoidosis was caused by his exposure to hazardous materials. Rather, the declaration uses the equivocal language "may". This language only establishes a mere possibility not a probability.

As a result, because no triable issue of fact exists as to causation, Ceres' motion for summary judgment is granted. The Court declines to address the issues raised concerning duty.

BIC Motion

Preliminarily, points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument. (Jay v. Mahaffey, (2013) 218 Cal. App. 4th 1522, 1537) While BIC's discussion concerning inadequacies in the FAC may have some validity, upon review of the moving papers, BIC did not raise these arguments initially. Rather, instead of arguing in the moving papers that Plaintiff failed to adequately allege the retained control and concealed hazard exceptions in its FAC, BIC argued no triable issue of fact exists as to either exception. Thus, it would be unfair to consider the pleading arguments raised in the reply without providing Plaintiff an opportunity to respond. Because both parties have essentially proceeded to present evidence on the retained control and concealed hazard exceptions, the Court will not consider the pleading arguments in the reply and will only consider whether triable issues of fact exist as to these exceptions.

As both parties have acknowledged, the general rule is that a hirer of an independent contractor is not liable for injuries suffered by an employee, see *Privette v. Superior Court* (1993) 5 Cal.4th 689. However, as both parties also acknowledge, there are exceptions. Once the presumption arises, the burden shifts to the plaintiff to raise a triable issue of fact as to whether one of the exceptions to the *Privette* doctrine applies, and if it cannot, the defendant is entitled to summary judgment. (*Miller v. Roseville Lodge No. 1293*, (2022) 83 Cal. App. 5th 825, 834)

A landowner-hirer owes a duty to a contract worker if the hirer fails to disclose to the contractor a concealed premises hazard and a hirer owes a duty to a contract worker if the hirer retains control over any part of the work and actually exercises that control so as to affirmatively contribute to the worker's injury. (*Sandoval v. Qualcomm Incorporated*, (2021) 12 Cal. 5th 256, 271)

Retained Control/Affirmative Contribution Exception

The plaintiff in such cases must establish not only that the hirer retained control over the contracted work, but also that the hirer actually exercised that retained control in a manner that affirmatively contributed to the contract worker's injury. (*Sandoval, supra* at p.274.)The hirer may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect, the right to stop the work, the right to make suggestions or recommendations as to details of the work, the right to prescribe alterations or deviations in the work — without incurring a retained control duty. (*Id* at p. 275)

Here, at most, the evidence presented by Plaintiff amounts to nothing more than exercising broad general power of supervision so as to insure satisfactory performance with the contract. As a result, because Plaintiff has failed to present evidence amounting to retained control, the retained control exception does not apply.

Concealed Hazard Exception

As Defendant BIC correctly notes, this exception only applies to land owners/possessors. As Plaintiff correctly notes, a possessor of land is someone who owes some kind of duty of care to keep the premises safe. (*Kinsman v. Unocal Corp*., (2005) 37 Cal. 4th 659, 684, fn.1 citing Alcaraz v. Vece, (1997) 14 Cal. 4th 1149) Here, Plaintiff has presented evidence (AMF 27) that BIC was in charge of the burn sites. Thus, as at a minimum a triable issue of fact exists as to whether BIC was a possessor of land for purposes of the concealed hazard exception.

BIC's objections to evidence in support of AMF 27 are overruled. As to BIC's contention that the evidence does not support the purported fact, while the Court understands BIC's argument and that argument may very well be persuasive at trial, it is important to remember that on summary judgment we liberally construe all evidence presented by the non-moving party, see *King v. Andersen*, (1966) 242 Cal. App. 2d 606, 610. Further, we resolve all doubts concerning the evidence in favor of the non-moving party, see *Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 39.

Thus, while the evidence does not explicitly say that BIC was in control of the burn sites, it could be inferred from the relevant testimony that BIC was in control of the burn sites. While a contrary inference could be made from the evidence, as noted any doubts must be resolved in favor of the non-moving party at this stage.

The hirer as landowner [or possessor] may be independently liable to the contractor's employee, even if it does not retain control over the work, if: (1) it knows or reasonably should know of a concealed, preexisting hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor. (*Kinsman*, *supra* at p. 675)

(1) Defendant knows or reasonably should know of a concealed, preexisting hazardous condition on its premises;

Plaintiff has demonstrated a triable issue of fact exists, see AMF 22. BIC's objections to AMF 22 are overruled.

(2) The contractor does not know and could not reasonably ascertain the condition;

Plaintiff has demonstrated a triable issue of fact exists, see AMF 24 and 25. BIC's responds that there is no evidence, much less supporting evidence that there were "toxic contaminants" on site. This argument really goes to element #1 which presupposes the existence of a hazardous condition. To the extent BIC is arguing that Plaintiff has failed to meet its burden demonstrating the existence of a hazardous condition on site, circumstantial evidence is sufficient to establish a triable issue of fact and direct evidence is not required, see *Casey v. Perini Corp.,* (2012) 206 Cal. App. 4th 1222,1237. Here, the DROP and HASP recite numerous hazards encountered at previous burn sites which is circumstantial evidence establishing a triable issue of fact as to whether at least some of those hazards existed at the subject sites. In other words, the listed hazards at previous sites could permit an inference by the trier of fact that at least some of those hazards exist here.

As to the thrust of element #2, Plaintiff's declaration states that he was never told that he could be exposed to toxins on the job sites. This evidence is minimally sufficient to establish a triable issue of fact as to element #2 considering the referenced liberal construction rule. It could be inferred that because Plaintiff was never told he could be exposed to toxins, that the in fact did not know that he could be exposed to toxins. While the reply offers strong evidence and argument against Plaintiff's assertion, we do not weigh evidence on summary judgment.

(3) The landowner fails to warn the contractor.

Plaintiff has demonstrated a triable issue of fact exist, see AMF 24.

In sum, triable issues of fact exist as to whether the concealed hazard exception applies.

Causation

Judicial admissions may be made in a pleading, by stipulation during trial, or by response to request for admission. (*Myers v. Trendwest Resorts, Inc*., (2009) 178 Cal. App. 4th 735, 746) Not every document filed by a party constitutes a pleading from which a judicial admission may be extracted. Code of Civil Procedure section 420 explains that pleadings serve the function of setting forth "the formal allegations by the parties of their respective claims and defenses, for the judgment of the Court." (Code Civ. Proc., § 420.) "The pleadings allowed in civil actions are complaints, demurrers, answers, and cross-complaints." (Code Civ. Proc., § 422.10.) (*Id*)

Here, the workers compensation statement is not a pleading, therefore is cannot serve as the basis for judicial estoppel. In reviewing the case law on judicial admissions, the Court's research indicates it applies to pleadings and stipulations within the framework of the subject case being litigated. BIC has not cited any authority supporting the proposition that judicial admissions could extend to documents created for and during independent litigation.

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

3. <u>21CV02353 Kowalski, Jessee v. General Motors, LLC, a Delaware Limited Liability Company</u>

EVENT: General Motors LLC's Motion for Summary Judgment or in the Alternative, Summary Adjudication

This motion is continued to January 31, 2024 at 9:00am in consideration of *Rodriguez v. FCA USA* which is pending in the California Supreme Court, case no. S274625. Further, discovery is stayed in this case pending the continued hearing. The jury trial and trial readiness conference dates are vacated.

4. 22CV03048 Cortez, Alberto C. v. Cambridge Real Estate Services, Inc., et al.

EVENT: Status Conference

A status conference is hereby scheduled for January 17, 2024 at 9:00 AM. The parties shall file an updated report with the court as to status no later than December 29, 2023.

5. 23CV01567 In re: Lewis, Katherine E

EVENT: Name Change (adult)

The Court is in receipt of the proof of publication and will sign the decree provided.

6. 20CV02333 Sorenson, Angela v. Smith Bradley M et al.

EVENT: Plaintiff's Motion to Compel Further Responses to Request for Production of Documents Set #2 and For Monetary Sanctions

The parties are ordered to meet and confer regarding a protective order. If the parties cannot stipulate to a protective order within 2 weeks, each party shall submit a protective order to the Court and the Court will select one.

Preliminarily, all attorney-client privilege objections are overruled. Considering the parameters of the subject requests, none of them implicate the attorney client privilege.

As to the specific requests, the Court rules as follows:

> Request No. 21 – The motion is granted. The interests of justice outweigh any confidential interests. [Alternative: The motion is continued as to this request. The Court will conduct an in camera hearing of the subject documents to determine whether any need to protect confidentiality outweighs the interests of justice. Defendant shall lodge a copy of the subject documents with the Court within one week. A hearing is hereby set for September 6, 2023 at 9:00am for the Court to issue a ruling on this request.]

Request No. 22 – The motion is granted. The Court notes that the request as phrased necessarily precludes work product because it would have necessarily been waived if it was produced to the District Attorney.

Request No. 23 – The motion is granted in part. To the extent there exists witness statements that were not produced to the District Attorney or any unnecessary third party (thus expressly waiving the work product privilege) a privilege log is required. The Court also notes that any evidence withheld in discovery will not be admissible at trial.

Request No. 24- The motion is granted. The response is not code complaint as it fails to explain whether the item has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party.

Request No. 25 – The motion is granted for the same reasons discussed in no. 24

Request No. 27 – The motion is denied.

Request No. 28 – The motion is Denied.

Sanctions are denied.

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

7. 23CV01788 *Confidential*

EVENT: Confidential Name Change (CCP 1277(b))

The petition is granted. The court will sign the decree provided.

8. 23CV01022 Cockburn, Ivan Edward v. Cockburn, Benedict Peter

EVENT: Defendants Benedict Peter Cockburn and Elizabeth Jane Wood's Demurrer to the Complaint

It appears the moving papers do not attach the documents that are the subject of Defendant's Request for Judicial Notice. The demurrer is continued to September 6, 2023 at 9:00 AM for defendant to file an amended Request for Judicial Notice that attaches the relevant documents and that complies with California Rules of Court Rule 3.113(l).

9. 23CV01381 Kravica, James v. Novak, Larissa

EVENT: Defendant's Demurrer to the Complaint (Continued from August 2, 2023)

Defendant's Demurrer to Complaint is OVERRULED.

> Weil & Brown Civil Procedure Before Trial (Rutter Group) [7:44] No Matter How Unlikely: The sole issue raised by a general demurrer is whether the facts pleaded state a valid cause of action – not whether they are true. Thus now matter how unlikely or improbable, plaintiff's allegations must be accepted as true for the purpose of ruling on demurrer. [*Del E. Webb Corp. v. Structural Materials Co*. (1981) 123 CA3d 593, 604

On demurrer the Court has no authority to consider evidence extrinsic to the complaint or weigh competing evidence. Consequently, the Court has no authority at this time to consider Defendant's argument that the purported purchase agreement is fraudulent.

The Court will prepare the order.

10. 21CV01932 Gonzalez, Veronica v. Sierra Health and Wellness Centers, LLC

EVENT: Plaintiff's Motion for an Order: 1) Granting Final Approval of Class Action Settlement; 2) Awarding Attorneys' Fees and Costs to Class Counsel; 3) Awarding Enhancement to the Representative Plaintiff; and 4) Awarding Reimbursement of Settlement Administration Costs

Plaintiff's Motion for an Order: 1) Granting Final Approval of Class Action Settlement; 2) Awarding Attorneys' Fees and Costs to Class Counsel; 3) Awarding Enhancement to the Representative Plaintiff; and 4) Awarding Reimbursement of Settlement Administration Costs is GRANTED. The Court will sign the Proposed Order.

11. 149849 Newport Capital Recovery Group II v. Heydenreich, Janet

EVENT: Opposition to Claim of Exemption

The opposition to claim of exemption is continued to September 13, 2013 at 9:00am for the filing of the claim of exemption. The Court is informed that the Sheriff mailed the claim of exemption to the Court back in late July, however, the Court has yet to receive it. If the

Court does not receive the claim of exemption by the next hearing, the Court sees no alternative other than debtor submitting a new claim of exemption.

12. 23CV00821 In re: Ramos, Ivan Gustavo

EVENT: Change of Name (Adult) (Continued from 8/2/23)

The Court is in receipt of the proof of publication and will sign the decree provided.