CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 12
HEARING DATE: 10/13/17

GENERAL INSTRUCTIONS FOR CONTESTING TENTATIVE RULINGS IN DEPT. 12

NOTE PROCEDURE CAREFULLY

The tentative ruling will become the Court's ruling unless by 4:00 p.m. of the court day preceding the hearing, counsel or self-represented parties call the department rendering the decision to request argument and to specify the issues to be argued. Calling counsel or self-represented parties requesting argument must advise all other affected counsel and self-represented parties by no later than 4:00 p.m. of his or her decision to appear and of the issues to be argued. Failure to timely advise the Court and counsel or self-represented parties will preclude any party from arguing the matter. (*Local Rule* 3.43(2).)

Note: In order to minimize the risk of miscommunication, Dept. 12 prefers and encourages fax or email notification to the department of the request to argue and specification of issues to be argued – with a **STRONG PREFERENCE FOR EMAIL NOTIFICATION**. Dept. 12's Fax Number is: (925) 608-2693. Dept. 12's email address is: dept12@contracosta.courts.ca.gov. Warning: this email address is not be used for any communication with the department except as expressly and specifically authorized by the court. Any emails received in contravention of this order will be disregarded by the court and may subject the offending party to sanctions.

Submission of Orders After Hearing in Department 12 Cases

The prevailing party must prepare an order after hearing in accordance with CRC 3.1312. If the tentative ruling becomes the Court's ruling, a copy of the Court's tentative ruling **must be attached to the proposed order** when submitted to the Court for issuance of the order.

1. TIME: 9:00 CASE#: MSC13-00690
CASE NAME: THOMAS VS. BALBOA INSURANCE COMPANY
HEARING ON MOTION FOR JUDGMENT ON THE PLEADINGS
FILED BY BALBOA INSURANCE COMPANY
**** TENTATIVE RULING: ****

The parties' respective requests for judicial notice of the subject arbitration award and Court of Appeal decision are **granted**. Defendant's motion for judgment on the pleadings is **granted**, with one last — and strictly limited — opportunity to amend. Plaintiff may file her Fourth Amended Complaint on or before November 13, 2017.

A. Surviving Claim.

Plaintiff is seeking the refund of a portion of her pre-paid insurance premium, based on the 'totaling' of her covered vehicle. (TAC, ¶ 86, subds. (a) and (b).) This claim does not appear to have been a subject of the arbitration.

Plaintiff may allege one breach of contract cause of action based on this refund claim. Plaintiff shall allege the dollar amount of the refund claim, and explain how that dollar amount was calculated.

B. Eliminated Claims.

Plaintiff shall not include any other claims in the further amended complaint. The claims eliminated by this ruling include, but are not limited to, the following:

1. Uninsured Motorist Coverage. Plaintiff's breach of contract and bad faith claims for failure to pay the $100,000 policy limit under her uninsured motorist coverage lack merit as a matter of law. Defendant offered to settle for $15,000, and the now-final final arbitration award confirmed that plaintiff was entitled to only $12,000. That establishes conclusively that plaintiff's claim was worth only $12,000, and hence defendant's offer for more than that cannot be deemed to have been in bad faith. All claims based on uninsured motorist coverage shall be omitted from the further amended complaint.

2. Collision Coverage. Plaintiff alleges that "the Collision portion" of her claim "was completely settled on July 6, 2012." (TAC, ¶ 63.) She nevertheless seeks to recover for alleged emotional distress because of the time that it took to settle. Plaintiff cannot seek emotional distress damages for bad faith where there has been no economic loss. (See, *Continental Ins. Co. v. Superior Court* (1995) 37 Cal.App.4th 69, 85 ["a claim for emotional distress in a bad faith action cannot stand alone, but must be accompanied by some showing of economic loss"].) All claims based on collision coverage shall be omitted from the further amended complaint.

3. Punitive Damages. Judge Spanos previously granted defendant's motion to strike punitive damages, without leave to amend. (See, Minute Order, dated 2-28-14.) Further, all tort causes of action have now been eliminated. Accordingly, the further amended complaint shall not allege a claim for punitive damages.

4. The 4th C/A. The cause of action for a breach of the implied covenant is duplicative of plaintiff's causes of action for insurance bad faith. The further amended complaint shall not allege a cause of action for breach of the implied covenant.

5. The 5th C/A. The cause of action for violation of the Unfair Competition Law lacks merit, because plaintiff has no need for injunctive relief personally, and lacks standing to seek injunctive relief on behalf of the general public. Insofar as plaintiff seeks restitution, this cause of action is duplicative of her other claims. The further amended complaint shall not allege a cause of action under the UCL. (See Bus.& Prof. Code § 17200 et seq.)

6. The 6th C/A. The cause of action for declaratory relief is superfluous, because the subject issues were actively engaged in plaintiff's other causes of action. (Code of Civil Procedure § 1061.) The further amended complaint shall not allege a declaratory relief cause of action.

2. TIME: 9:00 CASE#: MSC14-00260
CASE NAME: BAYFRONT VS. JAMES
HEARING ON MOTION FOR ORDER OF ENTRY OF JUDGMENT
FILED BY BAYFRONT AT MARINA BAY HOMEOWNERS ASSOCIATION
**** TENTATIVE RULING: ****

The motion for judgment after default on settlement is **granted**. Judgment will be entered for plaintiff Bayfront at Marina Bay Homeowners Assn. against defendant Salbra James in the amount of $5,813.13, inclusive of fees and costs.

3. TIME: 9:00 CASE#: MSC14-01229
CASE NAME: B.A. RETRO INC. VS. D.L. FALK CONSTRUCTION
HEARING ON MOTION FOR ATTORNEYS FEES AND COSTS
FILED BY D.L. FALK CONSTRUCTION
**** TENTATIVE RULING: ****

At a previous hearing, the Court – having tentatively indicated that it had doubts about awarding attorney fees related solely to the cross-complaint against IBS – directed the attorneys to meet and confer with respect to the potential identification and segregation of those fees. The Court pointed out that even if complete agreement could not be achieved, the parties could consider compromising the difference. And at a minimum, they should at least identify which items (hopefully not extensive) in the bills were actually contested.

On Wednesday afternoon of this week, D.L. Falk filed an inch-thick "Second Supplemental Declaration", which (from a very quick glance) the Court understands as intended to address this allocation issue. The Court has not had time to review this belated filing at all, and it has received no corresponding filing from B.A. Retro.

This motion is accordingly continued to November 17 to allow time for the Court to review this dense, fact-specific, and belatedly presented material adequately. The parties are invited to continue to discuss the possibility that they might compromise the factual delta between them over what portions of the bills relate to IBS.

(The Court understands that at this point it has not ruled on the legal issue of whether IBS-related attorney fees are recoverable at all.)

4. TIME: 9:00 CASE#: MSC14-01229
CASE NAME: B.A. RETRO INC. VS. D.L. FALK CONSTRUCTION
HEARING ON MOTION TO TAX COSTS
FILED BY B.A. RETRO INC.
**** TENTATIVE RULING: ****

The hearing on this motion is continued to November 17, to be considered together with Line 3.

5. TIME: 9:00 CASE#: MSC15-00360
CASE NAME: BLACKMORE VS. GOLLADAY
HEARING ON MOTION FOR NEW TRIAL
FILED BY JAMES D. GOLLADAY
**** TENTATIVE RULING: ****

The motion for new trial is **denied** for lack of jurisdiction. The jurisdictional time has expired during which it must be heard and can be acted on. Under Code of Civil Procedure § 660, "the power of the court to rule on a motion for a new trial shall expire 60 days from and after the mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5…." In this case, the notice of entry of judgment was mailed on July 25, 2017. Sixty days from that date was September 23, 2017. After that date, the Court is without jurisdiction to rule on the motion for new trial, which is deemed denied by operation of law. The Court understands that the moving party may have been given this hearing date at the clerk's window; but that does not exempt this motion from the plain language of the statute. The moving party should have either filed the motion earlier, or presented an ex parte request to shorten time, or both.

6. TIME: 9:00 CASE#: MSC16-01082
CASE NAME: TROMBADORE GONDEN LAW GROUP VS. SMITH
HEARING ON MOTION FOR ORDER THAT MATTERS BE DEEMED ADMITTED
FILED BY ROBERT WILLIAM SMITH
**** TENTATIVE RULING: ****

The motion to deem matters admitted is **granted**. The matters requested in the Plaintiff's First Set of Requests for Admissions (served June 29, 2017) are deemed admitted. Plaintiff's counsel must lodge a proposed order with a declaration confirming that no responses were served prior to the hearing. No sanctions are awarded.

In the event that defendant has served responses prior to the hearing, no matters will be deemed admitted, but sanctions are awarded to Plaintiff in the amount of $690.

7. TIME: 9:00 CASE#: MSC16-01302
CASE NAME: DENOVA HOMES INC. VS. QUALITY INTERIORS
HEARING ON MOTION TO DEEM FACTS ADMITTED
FILED BY DENOVA HOMES INC.
**** TENTATIVE RULING: ****

The motion to deem matters admitted is **granted**. The matters requested in the Plaintiff's First Set of Requests for Admissions (served June 30, 2017) are deemed admitted. Plaintiff's counsel must lodge a proposed order with a declaration confirming that no responses were served prior to the hearing. No sanctions are awarded.

In the event that defendant has served responses prior to the hearing, no matters will be deemed admitted, but sanctions are awarded to Plaintiff in the amount of $1,060.

The Court notes that because defendant is a corporation currently unrepresented by counsel, it is unable to appear in this action at present, including formal discovery proceedings. Defendant has been aware of this fact since its prior counsel withdrew in March of this year. Hence, defendant is unable to serve proper responses to these requests for admission unless and until it obtains counsel. Purported responses, even if served before the hearing date, will be disregarded if defendant is still unrepresented. If a non-attorney representative of defendant contests this tentative ruling in order to seek time in which to engage an attorney, the representative must appear at the hearing with (1) an explanation why no counsel has been hired since March, and (2) a credible plan to engage an attorney in the reasonably near future.

8. TIME: 9:00 CASE#: MSC16-01440
CASE NAME: REBECCA FRICK VS. ASCEND CAPITAL
HEARING ON MOTION TO QUASH DEPOSITION SUBPOENAS
FILED BY REBECCA FRICK
**** TENTATIVE RULING: ****

Vacated at 10/3/17 hearing.

9. TIME: 9:00 CASE#: MSC16-01480
CASE NAME: NI VS. SEENO ENTERPRISES
HEARING ON DEMURRER TO 2nd Amended COMPLAINT
FILED BY NORTHPOINT SECURITY SERVICES, INC.
**** TENTATIVE RULING: ****

Defendant Northpoint Security Services, Inc. demurs to the third and sixth causes of action in plaintiffs' Second Amended Complaint (SAC), asserted respectively for willful misconduct and negligent infliction of emotional distress. The demurrer to the third cause of action of is **sustained with leave to amend**. The demurrer to the sixth cause of action is **sustained without leave to amend** as to plaintiffs Liping Ni and Sharon Li. It is **overruled** as to plaintiff Jason Li. An amended pleading may be filed on or before November 13, 2017.

I. Background

On April 24, 2016, Huajin Li entered a Superfoot Reflexology store in a Pittsburg shopping mall with his son Jason Li. Defendant Seeno Enterprises LLC owns the mall, and it had hired Defendant Northpoint Security Services, Inc. to provide security services there. An unknown perpetrator thereafter entered the Superfoot store, brandished a weapon, and grabbed Jason while demanding that the cashier hand over the cash in the register. Huajin Li ran towards his son upon seeing that he was held hostage. The perpetrator shot Huajin Li, killing him.

Plaintiffs are Jason Li and Sharon Li, through their guardian ad litem Liping Ni, who also brings individual claims. Relevant to this demurrer, their SAC asserts causes of action for willful misconduct (third cause of action) and negligent infliction of emotional distress (sixth cause of action).

II. Demurrer to Third Cause of Action

Northpoint demurs to the cause of action for willful misconduct on two grounds. First, it argues that "willful misconduct" is not a separate tort, but an aggravated form of negligence. Thus, the willful misconduct claim duplicates the negligence cause of action. Second, Northpoint argues that even if the tort were separately recognized, the SAC does not state facts to satisfy the additional requirements for willful misconduct.

Initially, the Court concludes that a plaintiff may separately plead both a negligence claim and a claim for willful misconduct. True, "[w]illful misconduct is not a separate tort from negligence" but represents an aggravated form of that tort. (See *Doe v. United States Youth Soccer Assn.* (2017) 8 Cal.App.5th 1118, 1140, citing *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 526.) But willful misconduct has specific elements that ordinary negligence does not. A plaintiff must prove the elements of negligence (duty, breach of duty, causation, and damage) and show: (1) defendant's actual or constructive knowledge of the peril to be apprehended; (2) defendant's actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger; and (3) defendant's conscious failure to act to avoid the peril. (*Berkley*, 152 Cal.App.4th at 526; *Doe*, 8 Cal.App.5th at 1140.) A plaintiff may plead in the alternative that a defendant's acts, even if they do not rise to willful misconduct, nonetheless constitute ordinary negligence. This is similar to negligent infliction of emotional distress, which is "not an independent tort, but the tort of negligence," (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072) yet is nonetheless regularly pleaded as a separate cause of action given that is also has elements distinct from an ordinary negligence claim. (See CACI 1620, 1621 [jury instructions on NIED and bystander NIED as separate torts].) Both *Berkley* and *Doe* addressed their respective willful misconduct counts on the merits of their allegations, rather than simply dismissing the counts as superfluous. Pleading this theory as a separate cause of action is a convenient way of distinguishing between plaintiffs' plain negligence theory, and their "enhanced" theory of negligence with willful misconduct. A jury will have to be instructed on both theories. If (as Northpoint argues) they are really variants of the same cause of action, it does no particular harm to have them separately numbered.

As to whether Plaintiffs have properly pleaded these three additional requirements for willful misconduct, the Court concludes that they have not.

Doe is instructive. There, the plaintiff brought a civil action against the U.S. Youth Soccer Association (U.S. Youth) for its failure to protect her from sexual abuse by a coach. She raised separate claims for negligence and willful misconduct. "Plaintiff argued that US Youth engaged in willful misconduct when it chose not to require criminal background checks for the harm it knew was occurring. She claims US Youth was more concerned about its potential liability if it imposed this requirement on all state associations." (*Doe*, 8 Cal.App.5th at 1140.) But the Court of Appeal concluded that even though U.S. Youth "knew that children participating in its programs were at risk of sexual abuse, they did not have actual or constructive knowledge that injury to children like plaintiff was probable." (*Id.* at 1140-41.) Moreover, U.S. Youth "took some steps to avoid harm to plaintiff and others by requiring a voluntary disclosure form," meaning that "their conduct did not involve a positive intent to harm children in their soccer programs [nor did they] act with complete disregard of the consequences." (*Id.* at 1141.)

These claims bear striking similarity to most of Plaintiffs' allegations here. Plaintiffs allege that Northpoint knew that the mall was in a high-crime area; knew that these conditions likely would cause injury or death to invitees and tenants; could have employed better-trained and/or additional guards; and could have undertaken other precautionary measures for the safety of invitees and tenants. (See generally SAC ¶¶ 8, 14-16, 28-36.) But mere recognition that the mall was in a high-crime area is no different from U.S. Youth's general awareness that children in the program were at a risk for sexual abuse. Neither rises to the level of actual or constructive knowledge that the injury to the respective plaintiff was *probable*. And Plaintiffs concede, as they must, that Northpoint hired security for the mall, just as U.S. Youth took some steps to avoid harm through a voluntary disclosure form.

The only remaining allegation is the off-handed assertion that the on-duty guard "intentionally" failed to prevent the gunman from entering the mall and the Superfoot store. (SAC ¶¶ 13, 31, 33, 34.) Plaintiffs' theory of intention here is a bit obscure. They do not seem to suggest that the guard was in league with the perpetrator. Perhaps they mean simply that he or she consciously declined to do his or her duty out of cowardice, laziness, or something like that. But while Plaintiffs allege that the security guard was aware that the perpetrator had entered the mall, they do not allege that the guard was aware that the perpetrator was armed, or intended any crime. Absent any such knowledge, there would have been no more reason for the guard to have stopped the perpetrator than to stop any other potential shopper entering the mall. Lacking are any specific allegations that the guard intentionally allowed the incident to occur, consciously failed to prevent it, or did nothing despite knowing that the individual was armed or otherwise presented a threat, Plaintiffs have not alleged that the employee committed a tort with sufficient intent to meet the standards for willful misconduct.

For these reasons, Northpoint's demurrer to the third cause of action is sustained with leave to amend.

III. Demurrer to Sixth Cause of Action

The sixth cause of action is for negligent infliction of emotional distress (NIED), specifically bystander emotional distress where physical injury is absent.

First, the Court rejects Northpoint's argument that NIED is not a separate tort from negligence and therefore cannot be pleaded separately. While NIED shares elements with ordinary negligence, like willful misconduct it has separate additional elements, particularly when a bystander raises it. (See *Thing v. La Chusa* (1989) 48 Cal.3d 644, 647 (listing specialized elements for bystander NIED liability); see also CACI 1621.) Plaintiffs may plead it as a separate cause of action.

This cause of action does not expressly specify that it is asserted only on behalf of Jason Li. Its allegations relate only to him, however, and Plaintiffs have confirmed that it is intended to be asserted only as to him. For clarity, therefore, the demurrer to this cause of action is sustained without leave to amend as to the other two Plaintiffs, Liping Ni and Sharon Li.

The Court overrules the demurrer to the sixth cause of action as brought by Jason Li. Although

Jason was himself one of the victims of this crime (in that he was held hostage at gunpoint), Plaintiffs confirm that Jason's claim sounds in bystander NIED liability because he was not directly injured by the gunshot. (SAC ¶ 56 (injuries to Jason result from "inability to protect against harm at Mall, resulting in death of Decedent"); see *Thing, supra*.) Accordingly, the issue of duty which Northpoint raises concerns only the duty to the general public under the bystander theory of liability, as opposed to the specific duty under direct NIED liability. (See *Thing*, 48 Cal.3d at 647.)

The parties dispute whether the pleading properly alleges that Jason Li perceived the shooting and was aware it caused injury, as is required for an NIED claim from a bystander in the absence of physical injury. (See *id.* (NIED requires plaintiff who is "present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim").) Northpoint contends that the SAC states that Jason was at the scene but not that he actually perceived the event. Plaintiffs argue that his perception of the event is reasonably inferred from the allegations that (1) the perpetrator actually grabbed Jason while holding a deadly weapon; (2) his father, the decedent Huajin Li, ran towards Jason; and (3) the perpetrator shot and killed Huajin Li. (SAC ¶ 10; see *Beason v. Griff* (1954) 127 Cal.App.2d 382, 386-87.)

The Court agrees with Plaintiffs. As alleged, the shooter was holding Jason and Jason's father was running towards him when he was shot. It is reasonable to infer from these allegations that Jason, present at the time of the shooting, was then aware that it caused injury to his father. A shooting is not analogous to scenarios where perception of the injury-producing condition is more attenuated. (See, e.g., *Wright v. City of Los Angeles* (1990) 219 Cal.App.3d 318, 349-50 (no NIED claim where plaintiff saw paramedic's examination, but did not contemporaneously understand that exam failed to detect signs of sickle-cell shock).) This is true even given Jason's age. Accordingly, the demurrer is <u>overruled</u> as to Plaintiff Jason Li.

In the interest of saving trees and thinning court files, the Court observes that it is not necessary for a demurring defendant to file a declaration attaching a copy of the pleading being demurred to.

10. TIME: 9:00 CASE#: MSC16-01480
CASE NAME: NI VS. SEENO ENTERPRISES
HEARING ON DEMURRER TO 2nd Amended COMPLAINT
FILED BY SEENO ENTERPRISES, LLC
**** TENTATIVE RULING: ****

At the outset, the Court observes that Seeno's counsel has filed a declaration attaching the Second Amended Complaint and reciting the asserted grounds for demurrer (both pointless acts), but has not provided evidence of compliance with the requirement to meet and confer before demurring. Given that Northpoint's counsel did meet and confer on substantially the same legal points, however, this noncompliance will be excused. (This time.)

Defendant Seeno Enterprises LLC demurs to the third and sixth causes of action in plaintiffs' Second Amended Complaint (SAC), asserted respectively for willful misconduct and negligent

infliction of emotional distress. The demurrer to the third cause of action of is **sustained with leave to amend**. The demurrer to the sixth cause of action is **sustained without leave to amend** as to plaintiffs Liping Ni and Sharon Li. It is **overruled** as to plaintiff Jason Li. Any amended pleading shall be filed on or before October 24, 2017.

I. Background

On April 24, 2016, Huajin Li entered a Superfoot Reflexology store in a Pittsburg shopping mall with his son Jason Li. Defendant Seeno Enterprises LLC owns the mall, and it had hired Defendant Northpoint Security Services, Inc. to provide security services there. An unknown perpetrator thereafter entered the Superfoot store, brandished a weapon, and grabbed Jason while demanding that the cashier hand over the cash in the register. Huajin Li ran towards his son upon seeing that he was held hostage. The perpetrator shot Huajin Li, killing him.

Plaintiffs are Jason Li and Sharon Li, through their guardian ad litem Liping Ni, who also brings individual claims. Relevant to this demurrer, their SAC asserts causes of action for willful misconduct (third cause of action) and negligent infliction of emotional distress (sixth cause of action).

II. Demurrer to Third Cause of Action

Northpoint demurs to the cause of action for willful misconduct, arguing that the SAC does not state facts to satisfy the additional requirements needed to elevate ordinary negligence to the level of willful misconduct. The Court concludes that it does not.

Doe is instructive. There, the plaintiff brought a civil action against the U.S. Youth Soccer Association (U.S. Youth) for its failure to protect her from sexual abuse by a coach. She raised separate claims for negligence and willful misconduct. "Plaintiff argued that US Youth engaged in willful misconduct when it chose not to require criminal background checks for the harm it knew was occurring. She claims US Youth was more concerned about its potential liability if it imposed this requirement on all state associations." (*Doe*, 8 Cal.App.5th at 1140.) But the Court of Appeal concluded that even though U.S. Youth "knew that children participating in its programs were at risk of sexual abuse, they did not have actual or constructive knowledge that injury to children like plaintiff was probable." (*Id.* at 1140-41.) Moreover, U.S. Youth "took some steps to avoid harm to plaintiff and others by requiring a voluntary disclosure form," meaning that "their conduct did not involve a positive intent to harm children in their soccer programs [nor did they] act with complete disregard of the consequences." (*Id.* at 1141.)

These claims bear striking similarity to most of Plaintiffs' allegations here. Plaintiffs allege that Northpoint knew that the mall was in a high-crime area; knew that these conditions likely would cause injury or death to invitees and tenants; could have employed better-trained and/or additional guards; and could have undertaken other precautionary measures for the safety of invitees and tenants. (See generally SAC ¶¶ 8, 14-16, 28-36.) But mere recognition that the mall was in a high-crime area is no different from U.S. Youth's general awareness that children in the program were at a risk for sexual abuse. Neither rises to the level of actual or constructive knowledge that the injury to the respective plaintiff was *probable*. And Plaintiffs concede, as they must, that Northpoint hired security for the mall, just as U.S. Youth took some

steps to avoid harm through a voluntary disclosure form.

The only remaining allegation is the off-handed assertion that the on-duty guard "intentionally" failed to prevent the gunman from entering the mall and the Superfoot store. (SAC ¶¶ 13, 31, 33, 34.) In Line 9, the Court holds that this allegation is insufficient even as against Northpoint. Further, this is Seeno's demurrer, and the "intentional" act alleged here is that of Northpoint's employee, not Seeno's.

For these reasons, Northpoint's demurrer to the third cause of action is sustained with leave to amend.

III. Demurrer to Sixth Cause of Action

The sixth cause of action is for negligent infliction of emotional distress (NIED), specifically bystander emotional distress where physical injury is absent.

This cause of action does not expressly specify that it is asserted only on behalf of Jason Li. Its allegations relate only to him, however, and Plaintiffs have confirmed that it is intended to be asserted only as to him. For clarity, therefore, the demurrer to this cause of action is sustained without leave to amend as to the other two Plaintiffs, Liping Ni and Sharon Li.

The Court overrules the demurrer to the sixth cause of action as brought by Jason Li. Although Jason was himself one of the victims of this crime (in that he was held hostage at gunpoint), Plaintiffs confirm that Jason's claim sounds in bystander NIED liability because he was not directly injured by the gunshot. (SAC ¶ 56 [injuries to Jason result from "inability to protect against harm at Mall, resulting in death of Decedent"]; see *Thing, supra*.) Accordingly, the issue of duty which Northpoint raises concerns only the duty to the general public under the bystander theory of liability, as opposed to the specific duty under direct NIED liability. (See *Thing*, 48 Cal.3d at 647.)

The parties dispute whether the pleading properly alleges that Jason Li perceived the shooting and was aware it caused injury, as is required for an NIED claim from a bystander in the absence of physical injury. (See *id.* [NIED requires plaintiff who is "present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim"].) Northpoint contends that the SAC states that Jason was at the scene but not that he actually perceived the event. Plaintiffs argue that his perception of the event is reasonably inferred from the allegations that: (1) the perpetrator actually grabbed Jason while holding a deadly weapon; (2) his father, the decedent Huajin Li, ran towards Jason; and (3) the perpetrator shot and killed Huajin Li. (SAC ¶ 10; see *Beason v. Griff* (1954) 127 Cal.App.2d 382, 386-87.)

The Court agrees with Plaintiffs. As alleged, the shooter was holding Jason and Jason's father was running towards him when he was shot. It is reasonable to infer from these allegations that Jason, present at the time of the shooting, was then aware that it caused injury to his father. A shooting is not analogous to scenarios where perception of the injury-producing condition is more attenuated. (See, e.g., *Wright v. City of Los Angeles* (1990) 219 Cal.App.3d 318, 349-50 (no NIED claim where plaintiff saw paramedic's examination, but did not contemporaneously

understand that exam failed to detect signs of sickle-cell shock).) This is true even given Jason's age. Accordingly, the demurrer is overruled as to Plaintiff Jason Li.

11. TIME: 9:00 CASE#: MSC16-01480
CASE NAME: NI VS. SEENO ENTERPRISES
HEARING ON MOTION TO STRIKE PORTIONS OF 2nd Amended COMPLAINT
FILED BY SEENO ENTERPRISES, LLC
**** TENTATIVE RULING: ****

Defendant Seeno moves to strike the Second Amended Complaint's prayer for punitive damages, along with certain specific allegations in support of that prayer. Punitive damages, however, could be available only on the basis of the third cause of action (willful misconduct). In Line 10 the Court sustains the demurrer to that cause of action with leave to amend. The motion to strike is therefore moot (at least temporarily).

Seeno also moves to strike a couple of particular passages – an allegation of a "heightened duty of care", and the word "intentional" – basically on the basis that Seeno doesn't think Plaintiffs will be able to prove the factual predicates for those allegations. Maybe, maybe not – but striking the allegations is not the way to go about disproving them. Seeno's motion demands more factual detail than is required at the pleading stage. The motion is **denied** as to these allegations.

12. TIME: 9:00 CASE#: MSC16-01480
CASE NAME: NI VS. SEENO ENTERPRISES
HEARING ON MOTION TO STRIKE PORTIONS OF 2nd Amended COMPLAINT
FILED BY NORTHPOINT SECURITY SERVICES, INC.
**** TENTATIVE RULING: ****

Defendant Northpoint moves to strike the Second Amended Complaint's prayer for punitive damages, along with certain specific allegations in support of that prayer. Punitive damages, however, could be available only on the basis of the third cause of action (willful misconduct). In Line 9, the Court sustains the demurrer to that cause of action with leave to amend. The motion to strike is therefore moot (at least temporarily).

13. TIME: 9:00 CASE#: MSC16-01770
CASE NAME: LORI SIPES VS. JAIRO PANTOJA
HEARING ON MINOR'S COMPROMISE
**** TENTATIVE RULING: ****

Hearing continued to 12/1/17 at 9:00 a.m. in Dept. 12 by stipulation per Ex Parte appearance on 10/5/17 in Dept. 9.

14. TIME: 9:00 CASE#: MSC16-01770
CASE NAME: LORI SIPES VS. JAIRO PANTOJA
HEARING ON MINOR'S COMPROMISE
**** TENTATIVE RULING: ****

Hearing continued to 12/1/17 at 9:00 a.m. in Dept. 12 by stipulation per Ex Parte appearance on 10/5/17 in Dept. 9.

15. TIME: 9:00 CASE#: MSC16-02109
CASE NAME: McNEAL VS. TRANSFIELD SERVICES
HEARING ON DEMURRER TO 2nd Amended COMPLAINT
FILED BY CHEVRON U.S.A., INC.
**** TENTATIVE RULING: ****

Defendant Chevron demurs to the SAC on the grounds that all of Plaintiff's claims are barred by the statute of limitations. The relevant statute of limitations is the two-year statute for personal injury and wrongful death, Code of Civil Procedure § 335.1.

The SAC alleges that Plaintiff was injured on November 11, 2014. Plaintiff first named Chevron as a Defendant on January 23, 2017 when Plaintiff filed his FAC. The FAC was filed more than two years after the accident. The operative Complaint on this demurrer is the Second Amended Complaint ("SAC"), filed June 8, 2017. Facially, then, Chevron was sued in this case beyond the expiration of the limitations period.

Plaintiff argues that Chevron has been validly substituted for a Doe defendant. Accordingly, he argues that he may take advantage of the "relation back" doctrine of Code of Civil Procedure § 474. Chevron counters with two arguments. (1) Plaintiff did not comply with the procedural requirements of § 474. Chevron was not added as a "Doe," but was simply named and served as an additional Defendant with the filing of the FAC and SAC; and (2) Plaintiff was never "genuinely ignorant" of Chevron's identity and therefore Plaintiff's FAC does not relate back to his original complaint.

1. Whether Plaintiff can cure the lack of substitution of Chevron as a Fictitious Defendant

Plaintiff did not file the usual form of amendment, expressly identifying Chevron as one of the Doe defendants named in plaintiff's original Complaint. Instead, he simply filed his FAC (and later his SAC) adding Chevron as a named defendant. The Court agrees with Chevron that that was procedurally incorrect. The defect is purely technical, however, and of no prejudice to Chevron. The Court accordingly chooses to allow plaintiff to cure this defect.

The Court in *Woo v. Superior Court* (1999) 75 Cal.App.4th 1679, 176, dealt with exactly this problem. The Court first discussed the general rule regarding amended complaints which add defendants and its exception under Code of Civil Procedure § 474.

> The general rule is, that an amended complaint that adds a new defendant does not relate back to the date of filing the original complaint and the statute of limitations is applied as of the date the amended complaint is filed, not the date of the original complaint. A recognized exception to the general rule is the substitution under Section 474 of a new defendant for a fictitious Doe defendant named in the original complaint as to whom a cause of action was stated in the original complaint. If the requirements of Section 474 are satisfied, the amended complaint substituting a new defendant for a fictitious Doe defendant filed after the statute of limitations has expired is deemed filed as of the date the original complaint was filed.

Id. at 176.

The *Woo* Court then addressed the procedural problem in its case. As in our case, the plaintiff had only amended her Complaint to add Woo as a named Defendant. She had not substituted him in as a Doe. On appeal, plaintiff argued that by simply filing the amended complaint she substituted Woo for a previously named fictitious Doe defendant pursuant to Section 474, and the effective date of the amended complaint therefore related back to the date of the filing of the original complaint. Id. at 175-76.

The Court disagreed. It explained:

> Among the requirements for application of the Section 474 relation-back doctrine is that the new defendant in an amended complaint be substituted for an existing fictitious Doe defendant named in the original complaint. Here, [plaintiff] made no apparent attempt to satisfy this procedural requirement. The amended complaint adds Woo as a defendant but does not identify him as a substitute for a previously named fictitious defendant. Furthermore, the summons served on Woo identifies him as being sued as an individual defendant, not as a defendant previously sued under a fictitious name.
>
> The court in *Ingram v. Superior Court* (1979) 98 Cal.App.3d 483, 491 stated:
>
> "[w]hile we recognize the Supreme Court's liberal attitude toward allowing amendments of pleadings to avoid the harsh result imposed by a statute of limitations, that attitude is not unfettered by reasonable requirements. Some discipline in pleading is still essential to the efficient processing of litigation.

Id. at 176-77. The Court continued:

> Were we to follow the admonition of the *Ingram* court, we would conclude that [plaintiff's] inept handling of her amended complaint to bring Woo into the litigation as a defendant after the statute of limitations had expired did not comply with the requirement of Section 474 and therefore the amended complaint did not relate back to the date of filing the original complaint.

Id. at 177. However, the court decided not to follow *Ingram*, but to allow plaintiff to cure the procedural defect. The Court explained:

> [T]he courts of this state have considered noncompliance with the party substitution requirements of Section 474 as a procedural defect that could be cured and have been lenient in permitting rectification of the defect. We conclude that [plaintiff] would be permitted to allege that Woo is a defendant substituted for a fictitious Doe defendant named in her original complaint and therefore do not hold that her noncompliance with the procedural requirements of Section 474 forecloses consideration of her Section 474 relation-back contention. However, in other cases, the courts may well require strict compliance and counsel are advised to follow the simple correct procedure for substituting a named defendant for a fictitious Doe defendant.

Id. at 177.

This court likewise allows Plaintiff to cure his procedural defect with the requirements of § 474. Courts have often held that § 474 should be liberally construed to allow cases to be decided on their merits. The purpose of § 474 is to enable a plaintiff to bring suit before it is barred by the statute of limitations and thus allow the case to be decided on its merits. Section 474 should be liberally construed to fulfill that purpose; fulfillment of that purpose has long been recognized as not subjecting the defendant to undue hardship. See *Austin v. Massachusetts Bonding & Insurance Co.* (1961) 56 Cal.2d 596, 602; *Smeltzley v. Nicholson Mfg. Co.* (1977) 18 Cal.3d 932, 939 n.1; *Parkview Villas Assn. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1216 ("An order based upon a curable procedural defect . . ., which effectively results in a judgment against a party, is an abuse of discretion").

2. Whether Plaintiff was "genuinely ignorant" of Chevron's identity at the time he filed his original Complaint.

Woo also discussed a substantive requirement for the application of the § 474 relation-back doctrine: a plaintiff must have been "genuinely ignorant" of the Doe defendant's identity at the time he filed his original Complaint. See *Woo*, 75 Cal.App.4th at 169.

Chevron points to the original Complaint in which Plaintiff alleged that he was injured as the result of an incident that occurred on November 14, 1014 at: *Chevron Refinery*. See Complaint, filed October 31, 2016, First Cause of Action – General Negligence. Chevron contends that the face of the original Judicial Form Complaint establishes that Plaintiff was aware of Chevron's identity.

The fact that Plaintiff knew where his accident took place is not enough to name Chevron as a defendant. Plaintiff must also have a reason to suspect that that person or entity had some connection to Plaintiff's injuries. In *Wallis v. Southern Pacific Transportation Co.* (1976) 61 Cal.App.3d 782, for example, the Court explained the test:

> The phrase "ignorant of the name of a defendant" has not been interpreted literally. A plaintiff is "ignorant of a name" if he knows the identity of the person

> but is ignorant of the facts giving him a cause of action against such a person. (citations omitted) Therefore, the fact that [plaintiff] and his attorney knew of respondent's existence at the time of the commencement of the action is not controlling. The question is whether he knew or reasonably should have known that he had a cause of action against respondent.

Id. at 786. See also *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 413 (statute of limitations "begins to run when the plaintiff actually knows or suspects, or reasonably should know or suspect, the injury was caused by wrongdoing").

There are facts alleged in the SAC that concern Chevron's connection to Plaintiff's injury. Chevron apparently leased the equipment to United Rentals and was equally responsible (with United Rentals) for maintaining and repairing the forklift. This Complaint is time-barred. However, Plaintiff may be able to employ the relation back doctrine of Code of Civil Procedure § 474. Accordingly, this court would allow Plaintiff to cure the procedural defect of the lack of a "Doe amendment" and would permit Plaintiff leave to plead around the statute of limitations bar, if he is able. See *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 384; *Lokton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1061.

The Court accordingly sustains Chevron's demurrer, but with leave to amend within two weeks.

The Court also notes that Plaintiff has filed a motion to amend the SAC, which is set for hearing on October 27, 2017. The proposed Third Amended Complaint does contain some allegations concerning why Plaintiff did not sue Chevron earlier, though the Court makes no present ruling on whether those allegations would suffice to plead around any limitations problem. The parties are directed to meet and confer in light of the court's tentative ruling above. The Court hopes to avoid a further round of pleadings and attacks on the pleadings by having the parties discuss the facts as to why Plaintiff could not have sued Chevron during the two-year statute of limitations. If Plaintiff believes he can plead a valid reason for delayed discovery with respect to Chevron's role in the alleged wrongdoing and application of Code of Civil Procedure § 474's relation-back doctrine, Plaintiff can modify the proposed Third Amended Complaint prior to the hearing and hopefully avoid further pleading challenges by Chevron. Additionally, before the October 27 hearing, Plaintiff is directed to cure the procedural defect, if Plaintiff wishes to rely on the relation-back doctrine of Code of Civil Procedure § 474.

16. TIME: 9:00 CASE#: MSC16-02109
CASE NAME: McNEAL VS. TRANSFIELD SERVICES
HEARING ON DEMURRER TO 2nd Amended COMPLAINT
FILED BY UNITED RENTALS
**** TENTATIVE RULING: ****

Defendant United Rentals (North America), Inc.'s demurrer is continued to October 27, 2017, as it may be mooted by Plaintiff's motion to leave to file a Third Amended Complaint ("TAC"). As Defendant has indicated that the parties did not meet and confer prior to filing the demurrer, the continuance provides a further opportunity for the parties to do so. Indeed, the Court directs that the Plaintiff and United Rentals meet and confer regarding the proposed TAC

and for Plaintiff to make the necessary modifications to the proposed pleading prior to the hearing, in the hopes of avoiding another round of pleadings and further challenges to those pleadings by United Rentals.

17. TIME: 9:00 CASE#: MSC16-02109
CASE NAME: McNEAL VS. TRANSFIELD SERVICES
HEARING ON MOTION TO STRIKE PORTIONS OF 2nd Amended COMPLAINT
FILED BY UNITED RENTALS
**** TENTATIVE RULING: ****

See Line 16.

18. TIME: 9:00 CASE#: MSC16-02179
CASE NAME: RUSSELL VS. SAL'S CIGARETTE & SMOKE SHOP
HEARING ON MOTION TO COMPEL ANSWERS TO FORM INTERROGS. (SET 1)
FILED BY FAITH RUSSELL
**** TENTATIVE RULING: ****

This motion to compel is **denied** because it was filed prematurely.

The present motion rests entirely on the premise that the due date for responses for the subject discovery was August 23, 2017. It is uncontested that that was the original due date. At some point (the date is unclear) Mr. Shalaby (defendants' attorney) contacted Mr. Johnson (plaintiff's attorney) to request an extension on the discovery responses because new counsel for defendants would be entering the case. Johnson responded that he would not grant any such extension to Shalaby, but that new counsel should contact him to request such an extension.

Johnson's declaration, filed in support of this motion, acknowledges that new counsel (Mr. Bates) did indeed enter the case (at least informally), and contacted Johnson on August 22 (the day before the due date) to request a 30-day extension. Johnson declined to grant a 30-day extension but offered a 14-day extension, which Bates accepted. That made the due date September 6.

The present motion, however, was filed on September 5. As of that date, the responses were not yet due. Needless to say, the motion and its supporting papers (including Johnson's declaration, dated August 31) say nothing about what, if anything, happened on or after the deadline.

Although Johnson's declaration acknowledges the extension he granted until September 6, the rest of the moving papers simply ignore that fact, as if it had not occurred. The motion asserts that the Court should order responses without objections because defendants missed the August 23 deadline. Plaintiff's brief says that "NO EXTENSION TO DISCOVERY WAS EVER GRANTED *TO MR. SHALABY'S OFFICE*" (italics added). True enough – but the extension ***was*** granted to defendants, through Bates, whom Johnson apparently accepts as having represented defendants at the time.

This picture is further complicated by the fact that to date, Bates has not yet entered any formal appearance in this case. Shalaby has continued to represent defendants, including filing the opposition papers to this motion. Further, Shalaby has a motion to withdraw as counsel set for December 15, suggesting that Bates's representation may have fallen through after all. Defendants, however, were reasonable in assuming that an extension to September 6 was still operative whether Shalaby was out of the case or not. Johnson had no authority to condition his grant of an extension on replacement of defendants' attorney.

On the present record, there is nothing squarely stating whether defendants did in fact serve any responses by the September 6 due date. The Court assumes that they did not do so, however, as their opposition papers would surely have said so if they had. But by that date, plaintiff had already filed the present motion; arguably defendants did not know whether they should file responses with or without objections, thanks to plaintiff jumping the gun in filing a motion to compel.

At some point defendants are going to have to serve proper responses to the pending discovery. That, however, is complicated by the apparent uncertainty about who represents defendants, and who (if anyone) will represent them going forward. That uncertainty is not plaintiff's fault, and in a more orderly case, would not be plaintiff's problem. In light of plaintiff having filed this motion prematurely, the Court chooses to defer the issue of discovery response dates for the time being. An order concerning such dates will be addressed in connection with the motion to withdraw on December 15.

The Court also vacates the mediation completion deadline of October 31, 2017, and the Case Management Conference set for December 12, 2017. Further dates will be set in connection with the motion to withdraw.

Although the present ruling is adverse to plaintiff, the Court is not blind to the flagrant misconduct of **both sides** in this case. Shalaby's conduct in connection with this motion, both in his opposition papers and in his correspondence, has its share of infractions. The blunt fact is that the conduct of **both counsel** in this case has been childish, unprofessional, and unacceptable. Both attorneys are courting sanctions (possibly including striking of court filings) and reports to the Bar. Listen carefully: Clean up your acts, or the Court will take its own actions.

And on a far less serious note, the Court notes that the exhibits to Johnson's reply declaration are tabbed on the right, not the bottom as required. While incorrect tabs are better than no tabs, counsel should tab his papers properly in the future.

19. TIME: 9:00 CASE#: MSC17-00422
CASE NAME: JENNIFER K. TOY VS. EMMA CASTELLON
HEARING ON DEMURRER TO 1st Amended COMPLAINT
FILED BY EMMA CARMEN CASTELLONDEPENA
**** TENTATIVE RULING: ****

The Demurrer to the First Amended Complaint is continued by the Court to October 20, 2017, at 9:00 a.m., in Department 12, so that it can be heard together with the motion to strike.

20. TIME: 9:00 CASE#: MSC17-00652
CASE NAME: ROE VS. OAKLEY UNION
HEARING ON DEMURRER TO 1st Amended COMPLAINT
FILED BY OAKLEY UNION ELEMENTARY SCHOOL DISTRICT, et al.
**** TENTATIVE RULING: ****

There are two plaintiffs in this case. The lead plaintiff is a 13-year-old female student, identified in the Second Amended Complaint (SAC) as C.M. Roe. She sues through her mother, Marjorie Marchut, acting as her guardian ad litem. Marchut also asserts her own claims. For convenience, the Court will refer to these two as "Student" and "Mother". The defendants are the Oakley Union Elementary School District ("District"); Harvey Yurkovich, the principal of the school in question; Deb Perry, the vice-principal; and Ron Pence, formerly a teacher at the school. In a nutshell, the gravamen of the SAC is that another student, "J.G.", sexually abused Student on school grounds. Defendants are accused of failing to prevent this abuse, and inadequately investigating or redressing it.

Defendants demur to all causes of action asserted in the SAC. To summarize the Court's rulings:

- The demurrer to the First Cause of Action is **sustained without leave to amend** in its entirety.
- The demurrer to the Second Cause of Action is **sustained without leave to amend** as to Mother as a plaintiff. It is **overruled** as to Student's claim against all defendants.
- The demurrer to the Third Cause of Action is **sustained without leave to amend** as to Mother as a plaintiff, and as to the individual defendants. It is **overruled** as to Student's claim against the District.
- The demurrer to the Fourth Cause of Action is **sustained without leave to amend** in its entirety.
- The demurrer to the Fifth Cause of Action is **sustained without leave to amend** in its entirety.
- The demurrer to the Sixth Cause of Action is **sustained without leave to amend** as to the individual defendants. It is **sustained with leave to amend** as to the District and both plaintiffs.
- The demurrer to the Seventh Cause of Action is **sustained with leave to amend.**

Plaintiffs may file a Third Amended Complaint by November 13, 2017.

The parties' briefs on this demurrer are not as helpful as they might be. Both sides largely ignore potentially important distinctions between the potential liability of the District as a public entity, versus the potential liability of the individual defendants as public employees. Plaintiffs' brief further largely ignores any distinction between what claims might exist for Mother as opposed to Student, even though defendants' brief raises that issue. Plaintiffs' brief, indeed, consists largely of selective repetition of the SAC's allegations, and vague, unsupported legal conclusions – with a sprinkling of asserted facts and documents nowhere mentioned in the SAC. It contains literally no argument as to most of the causes of action asserted in the SAC.

Because the District is a public entity, it has no liability under any common-law theory. It may be sued only on the authority of specific statutory provisions, enumerated in the Tort Claims Act, Government Code § 814 et seq. The rules for pleading a claim against a public entity are well-established:

> [I]n California all government tort liability is dependent on the existence of an authorizing statute or "enactment" (Gov. Code, §§ 815, subd. (a), 815.6; *Tolan* v. *State of California* ex rel. *Dept. of Transportation, supra*, 100 Cal.App.3d 980, 983; *Morris* v. *State of California, supra*, 89 Cal.App.3d 962, 964; *Susman* v. *City of Los Angeles* (1969) 269 Cal.App.2d 803, 808), and to state a cause of action every fact essential to the existence of statutory liability must be pleaded with particularity, including the existence of a statutory duty. (*Susman* v. *City of Los Angeles, supra*, 269 Cal.App.2d 803, 809.) Duty cannot be alleged simply by stating "defendant had a duty under the law"; that is a conclusion of law, not an allegation of fact. The facts showing the existence of the claimed duty must be alleged. (*Id*.; see also *Rubinow* v. *County of San Bernardino* (1959) 169 Cal.App.2d 67, 71.) 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.

Searcy v. Hemet Unified School Dist. (1986) 177 Cal.App.3d 792, 802.

> Because the present case involves claims against a public entity and is controlled by the California Tort Claims Act, the following pleading rules apply: "However, because under the Tort Claims Act all governmental tort liability is based on statute, the general rule that statutory causes of action must be pleaded with particularity is applicable. Thus, 'to state a cause of action against a public entity, every fact material to the existence of its statutory liability must be pleaded with particularity.' [Citations.]" (*Lopez v. Southern Cal. Rapid Transit Dist*. (1985) 40 Cal. 3d 780, 795; see Cal. Government Tort Liability Practice 3d (Cont.Ed.Bar 1992) Claims and Actions, § 6.127, pp. 838-839.)

Hood v. Hacienda La Puente USD (1998) 65 Cal.App.4th 435, 439.

Mother's Claims

The SAC includes Mother as a plaintiff in all seven of its causes of action. The seventh cause of action is asserted by Mother alone; it will be addressed below. Conceivably Mother may be able to allege some form of contractual obligation, as in the sixth cause of action. In none of the first five causes of action, however, is there even the slightest attempt to allege or explain why Mother (as opposed to Student) could possibly be owed any of the duties asserted, or have any of the claims alleged. Some of these claims have problems of their own even as alleged by Student, as discussed below. All of them, however, have in common that the theories of duty and liability have to do with protection of students, not parents.

The demurrer is sustained as to the first through fifth causes of action, as to Mother as a plaintiff, without leave to amend. If Mother wishes to contest this tentative to seek leave to amend, she should come to the hearing prepared to discuss concretely what she proposes to assert.

First Cause of Action: Negligent Hiring

Student's first cause of action is pleaded against all four defendants, asserting negligent hiring.

> "An employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit. . . . The rule of direct employer liability under the Restatement Second of Agency section 213 is: 'A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others . . . .' As explained in comment (d): 'The principal may be negligent because he has reason to know that the . . . agent, because of his qualities, is likely to harm others in view of the work or instrumentalities entrusted to him. If the dangerous quality of the agent causes harm, the principal may be liable under the rule that one initiating conduct having an undue tendency to cause harm is liable therefor. . . . An agent . . . may be incompetent because of his reckless or vicious disposition, and if a principal, without exercising due care in selection, employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity. . . . One who employs another to act for him is not liable . . . merely because the one employed is incompetent, vicious, or careless. If liability results it is because, under the circumstances, the employer has not taken the care which a prudent man would take in selecting the person for the business in hand. . . . [P] Liability results . . . not because of the relation of the parties *but because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment*. . . .' (Rest.2d Agency, *supra*, § 213, com. d., italics added.)" (*Roman Catholic Bishop v. Superior Court* (1996) 42 Cal. App. 4th 1556, 1564-1565; and see *Evan F*. v. *Hughson United Methodist Church* (1992) 8 Cal. App. 4th 828, 842-843.)

Federico v. Superior Court (1997) 59 Cal.App.4th 1207, 1213-14.

This cause of action is indefinite on its face. It does not allege who, exactly, was negligently hired, or by whom. From plaintiffs' opposition brief, it appears that plaintiffs have in mind that Pence was the negligently hired employee – and yet the cause of action is asserted against Pence himself.

Lack of specificity aside, this cause of action suffers from a basic and inherent self-contradiction. The only employer involved in this case is the District. None of the individual defendants was an employer, and thus none could be liable for negligent hiring. But the District itself, as a public entity, could be liable for this tort only if there is a provision in the Tort Claims Act allowing such liability. Plaintiffs attempt to assert this claim on the basis of Government Code §§ 815.2, which subjects public entities to respondeat superior liability for the torts of their employees, if the employees would themselves be so liable. But here, the employees cannot be so liable – only the employer can. There is no statutory basis on which to sue the District for negligent hiring.

The demurrer to this cause of action is sustained without leave to amend.

Second Cause of Action – Negligence (and Mandatory Duty)

Student asserts this cause of action against all defendants. Taking it first as a garden-variety negligence claim, it adequately alleges a cause of action on behalf of Student. It is well established that public schools and their employees have a duty to control the behavior of their students for the protection of other students. See, for example, the extended discussion in *M.W. v. Panama Buena USD* (2003) 110 Cal.App.4th 508, 516-18. This cause of action (which incorporates all of the preceding allegations) alleges such negligence with a reasonable degree of specificity – bearing in mind that there is a limit on how much specificity can be expected when the alleged negligence consists of a failure to detect and prevent misconduct over a lengthy period of time.

On the other hand, the Court is unconvinced by plaintiffs' assertions that this cause of action arises directly against the District based on any statutory "mandatory duty", under Government Code § 815.6. Plaintiffs assert three alleged bases for such a duty, namely Cal. Const. Art. I, § 28; Education Code § 44807; and 5 CCR § 5552. But the constitutional provision is not self-executing, and does not create any "mandatory duty" within § 815.6. *Clausing v. San Francisco USD* (1990) 221 Cal.App.3d 1224, 1234-38; *Leger v. Stockton USD* (1988) 202 Cal.App.3d 1448. Section 44807 creates a duty only for teachers, not districts. *Hoff v. Vacaville USD* (1998) 19 Cal.4th 925,939. (It may also be doubted whether § 44807 speaks with the clarity and specificity necessary to bring it within § 815.6; but that need not be decided here.) There is no "mandatory duty" statute, equivalent to § 815.6, applicable to public employees – only the basic negligence duty of care discussed in *M.W.* And assuming (without deciding) that a regulation can be an "enactment" within § 815.6, 5 CCR § 5552 is limited to playgrounds and recesses – not alleged to be at issue here.

The demurrer to this cause of action is overruled as to Student and as to all defendants.

Third Cause of Action – Dangerous Condition of Public Property

Student alleges that the layout of the school's classrooms creates a dangerous situation, in that there are partitions that may conceal misconduct of the kind alleged here from teachers or other adults. In its reply brief, defendants effectively concede that this states a viable cause of action on the part of Student as against the District, under Government Code § 835. See, e.g., *Peterson v. San Francisco CCD* (1984) 36 Cal.3d 799 (dangerous physical condition creating risk of third-party crime); *Slapin v. Los Angeles International Airport* (1976) 65 Cal.App.3d 484 (same).

There is no statutory or substantive basis, however, for asserting a dangerous-condition claim against the individual defendants.

The demurrer to this cause of action is overruled as to Student and the District. It is sustained without leave to amend as to the individual defendants.

Fourth Cause of Action – Sexual Harassment

This cause of action alleges that defendants have created a "hostile environment" by failing to detect and prevent sexual harassment. Plaintiffs concede that this claim is demurrable, and propose to amend it. The concession is well taken. Plaintiffs make no effort to tie this claim to any particular statutory authorization. Neither "public policy" nor the constitutional right of privacy is the kind of law that could create any claim against the District under the Tort Claims Act. Nor do plaintiffs identify any theory on which the individual defendants could be liable on this as a distinct theory. Some aspects of the factual allegations underlying this cause of action may well turn out to be relevant to Student's general negligence claim, but there is no separate cause of action of this kind against these defendants.

The demurrer to this cause of action is sustained without leave to amend.

Fifth Cause of Action – Fiduciary Duty

As the above-quoted passage from *M.W.* discusses in detail, public school districts do have a "special relationship" with their students, arising out of mandatory school attendance. It is for that reason that (contrary to the general rule) a school district and its employees may have liability to protect students against the tortious conduct of other students.

Plaintiffs go too far, however, in seeking to translate that special relationship into a fiduciary duty. On the contrary, as *M.W.* lays out, the duty of districts and their employees is a straightforward negligence duty, subject to an ordinary duty of care. There is no fiduciary duty.

The demurrer to this cause of action is sustained without leave to amend.

Sixth Cause of Action – Contract

A claim for breach of contract is not subject to the Tort Claims Act. Government Code § 814.

Plaintiffs allege that defendants "did breach the verbal and written contractual agreement made with plaintiffs in that defendants failed to maintain and have supervision over the activities of

[Student], and did permit her to made subject to the physical violence, sexual abuse, and sexual harassment done by another student, and did not take steps to prevent them, nor to notify her parents or guardian as required." SAC ¶ 35. But this is the first and only mention in the SAC of any contract. The "verbal and written contractual agreement" is mentioned as though there were an antecedent allegation of a contract's existence and terms; but there is none. This is alleging a breach of contract, without alleging any contract. (Let alone any contract with the individual defendants.)

In their opposition, plaintiffs improperly attach a one-page document they seem to regard as the contract. The Court has doubts about whether that document could be an actionable contract. Because it is not alleged anywhere in the SAC, however, that need not be decided on this demurrer.

The caption of this cause of action also refers elliptically to "State Laws, Negligence for Failure to Notify Parents or Guardian". Nothing else in the cause of action, however, identifies any "state laws", nor any basis for negligence as to notification. That portion of the caption is disregarded as surplusage. To the extent that it were intended to add anything substantive to the asserted contract cause of action, it would be demurrable for improperly jumbling different theories and claims together.

The demurrer to this cause of action is sustained. No leave to amend is granted as to the individual defendants. Leave to amend is granted, as to both Student and Mother, as against the District only.

Seventh Cause of Action – Negligence (Mother Only)

Mother asserts her own individual cause of action for negligence, alleging that she has suffered emotional distress. No statutory basis is identified for this claim, as against either the District or the individual employees. The allegations of negligent conduct, moreover, are deficient. Defendants are accused first of misrepresenting that Student "would be protected under California law and that the sexually harassed, molested and sexually attacked" [sic]. SAC ¶ 39. But as a matter of law, neither a public entity nor its employees may be held liable for misrepresentation. Government Code §§ 818.8, 822.2. Mother also alleges that she was traumatized by an unprofessionally conducted interview (or interrogation) of Student. On its face, however, the manner of conducting such an interview is a matter of discretion, for which public employees are immune from liability. Government Code § 820.2. Necessarily, the District also cannot be liable for the employee's discretionary acts. See Government Code § 815.2(b). Further, defendants are not alleged to have intentionally inflicted any emotional distress on Mother, and she does not come close to meeting the requirements for stating a claim for negligent infliction of emotional distress. See generally, e.g., *Thing v. La Chusa* (1989) 48 Cal.3d 644, 647.

The Court is dubious that Mother can salvage this claim by amendment. As this is the first demurrer in the case, however, it is willing to let her try. The demurrer is sustained with leave to amend.

Other Matters

The Court notes that although Student is identified in the SAC (and its predecessors) only by a pseudonym, some of the attachments filed with plaintiffs' papers contain full identifying information on her. The parties should consider whether to seek an appropriate sealing order.

The Court also notes that the SAC, and others of the plaintiffs' filings, do not comply with CRC 3.1110(f) and Local Rule 3.42 concerning tabbing of exhibits. Counsel is directed to review these rules and comply with them as to any future filings. Failure to do so may result in rejection or disregard of nonconforming papers. Moreover, the identification of attached exhibits in the text of the SAC does not conform to the exhibits themselves.

21. TIME: 9:00 CASE#: MSC17-01102
CASE NAME: MEHENNI VS. ARBOR BUILDING GROUP
HEARING ON DEMURRER TO COMPLAINT
FILED BY ARBOR BUILDING GROUP INC., et al.
**** TENTATIVE RULING: ****

By stipulation, this demurrer was continued to this date because the parties were in the process of finalizing a settlement. Nothing has been filed or reported to the Court since the time of that stipulation – neither any settlement, nor any papers opposing the demurrer, nor any stipulation for a further continuance. The Court surmises that the attorneys may have forgotten that the demurrer was still on calendar for October 13.

On the courtroom clerk's telephonic inquiry, defendant's counsel reports that the case is still near settlement. The demurrer is therefore taken off calendar, without prejudice. If the settlement falls through, defendant may refile the demurrer in ordinary course.

The case is set for a "tickler" (not a court appearance) for December 1, to confirm that either the case has been dismissed or a demurrer or answer has been filed.

22. TIME: 9:00 CASE#: MSL15-02780
CASE NAME: KELSTIN GROUP VS. PALACIOS
HEARING ON MOTION TO DEEM MATTERS ADMITTED
FILED BY KELSTIN GROUP, INC.
**** TENTATIVE RULING: ****

The motion to deem matters admitted is **granted**. The matters requested in the Plaintiff's First Set of Requests for Admissions (served June 22, 2017) are deemed admitted. Plaintiff's counsel must lodge a proposed order with a declaration confirming that no responses were served prior to the hearing. No sanctions are awarded.

In the event that defendant has served responses prior to the hearing, no matters will be deemed admitted, but sanctions are awarded to Plaintiff in the amount of $260.

23. TIME: 9:00 CASE#: MSL15-02780
CASE NAME: KELSTIN GROUP VS. PALACIOS
HEARING ON MOTION TO COMPEL DISCOVERY RESPONSES
FILED BY KELSTIN GROUP, INC.
**** TENTATIVE RULING: ****

The motion to compel responses to form interrogatories is **granted in part, and conditionally granted in part**. If (but only if) defendant serves responses to the First Set of Requests for Admissions (see Line 22), defendant is ordered to serve full responses, without objections, to plaintiff's First Set of Form Interrogatories, served June 22, 2017. Such responses must be served by November 13, 2017.

The Court notes that in the event that matters are deemed admitted pursuant to Line 22, the discovery sought here will be essentially superfluous. In that event, this motion is deemed moot as to compelling responses, but not as to sanctions.

Plaintiff is awarded sanctions of $260, whether or not defendant serves responses to the RFAs.

24. TIME: 9:00 CASE#: MSL15-02780
CASE NAME: KELSTIN GROUP VS. PALACIOS
HEARING ON MOTION TO COMPEL DISCOVERY RESPONSES
FILED BY KELSTIN GROUP, INC.
**** TENTATIVE RULING: ****

The motion to compel responses to document requests is **granted in part, and conditionally granted in part**. If (but only if) defendant serves responses to the First Set of Requests for Admissions (see Line 22), defendant is ordered to serve full responses, without objections, to plaintiff's First Demand for Production and Inspection of Documents, served June 22, 2017. Such responses must be served by November 13, 2017.

The Court notes that in the event that matters are deemed admitted pursuant to Line 22, the discovery sought here will be essentially superfluous. In that event, this motion is deemed moot as to compelling responses, but not as to sanctions.

Plaintiff is awarded sanctions of $260, whether or not defendant serves responses to the RFAs. The awards of sanctions on these three motions are cumulative.

25. TIME: 9:00 CASE#: MSN17-1602
CASE NAME: EAST BAY PARKS VS. CLAYTON ESTATES
HEARING ON PETITION TO CONFIRM ARBITRATION AWARD
FILED BY EAST BAY REGIONAL PARK DISTRICT
**** TENTATIVE RULING: ****

The parties have stipulated to confirmation of the arbitration award, and the Court has signed the stipulated order and judgment.

26. TIME: 10:00 CASE#: MSC13-00422
CASE NAME: CHAVEZ VS. CHOWDHURY
JURY TRIAL - LONG CAUSE / 5 DAY(S)
**** TENTATIVE RULING: ****

Parties to appear.

27. TIME: 10:00 CASE#: MSC17-01280
CASE NAME: LEE VS. LEE
SPECIAL SET HEARING ON: OSC RE PRELIMINARY INJUNCTION
SET BY CHARLES LEE
**** TENTATIVE RULING: ****

The (unfiled) motion for preliminary injunction is **denied without prejudice.**

At an ex parte hearing on July 25, 2017, the Court entered a Temporary Restraining Order and Order to Show Cause. That TRO/OSC is in the Court's file. What the file does *not* contain, however, are plaintiff's moving papers seeking a TRO and a preliminary injunction. The Court does not recall whether plaintiff presented any separate declarations at the ex parte hearing, or simply relied on the Verified Complaint. In either case, however, there has to have been an ex parte motion requesting that the Court issue a TRO and an OSC re preliminary injunction (along with other supporting papers, such as proof of notice to defendants). The Court has none, either in its file or in the computerized docket. On telephone inquiry by the courtroom clerk, plaintiff's counsel confirmed that he did not file those papers after presenting them to the Judge ex parte. Apparently, upon securing a TRO/OSC from the Court ex parte, plaintiff properly proceeded to file the TRO/OSC itself with the Court, but improperly failed to file the supporting papers on which the TRO/OSC had been granted.

The Court does not agree with the view in defendants' opposition brief that preliminary injunctive relief must be expressly sought in a pleading. Defendants note that the original Verified Complaint in this case expressly requested injunctive relief, including preliminary injunction. Thereafter, however, plaintiff filed a First Amended Verified Complaint which omitted any reference to injunctive relief (though it continued to pray for specific performance of Hazel Lee's alleged contractual obligation to convey the coop property). Defendants point to no legal authority to the effect that a preliminary injunction cannot be granted unless the current operative pleading requests it. Code of Civil Procedure § 527(a) provides that a preliminary

injunction may be based on *either* a verified complaint, *or* on affidavits (for which declarations are commonly substituted).

The problem here is not the absence of a verified complaint and/or declarations, nor (in itself) the failure of the First Amended Verified Complaint to ask for injunctive relief. The problem is the absence of ***any*** current document by which plaintiffs request that a preliminary injunction be issued. In ordinary course that should have been presented as a motion for such relief – and indeed the Court assumes that it was so presented, as the Court does not think it would have issued the OSC/TRO without a proper motion. But if there was any such motion presented ex parte, it was required to then be filed with the Clerk's office after presentation, along with the signed TRO/OSC itself. It was not. Nor does the original Verified Complaint serve as a substitute for any such motion – both because it is an insufficient request in itself for immediate court action, and because it has been superseded by an amended pleading that does not request injunctive relief.

Accordingly, there is no motion for a preliminary injunction currently pending before the Court. The OSC issued on July 25 was rendered retroactively improvident by the failure of plaintiff to file any motion on which the Court could act.

28. TIME: 9:01 CASE#: MSC13-00419
CASE NAME: COOK VS. GRAY
HEARING ON MOTION TO DETERMINE GOOD FAITH SETTLEMENT
FILED BY AMELIA KAY BOLLINGER
**** TENTATIVE RULING: ****

Defendant Bollinger's unopposed motion to determine good faith settlement is **granted.**