Dept. 1
Civil Law and Motion Tentative Rulings for Friday, January 10, 2025, at 8:30 a.m.

If you wish to appear for oral argument, you must so notify the Court at (209) 533-6633 and (209) 588-2316, and all other parties by 4:00 p.m. on the court day preceding the hearing, consistent with CRC 3.1308. The tentative ruling will become the ruling of the Court if notice for oral argument has not been provided.

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1. **CV65920** **Husley v. Johnson**
   Hearing on: Discovery Motions
   Moving Party: Both
   Tentative Ruling: See Below

This is a personal injury action arising out of a fatal incident late last year on SR-108 between a vehicle traveling westbound, and a pedestrian walking along the highway. The parties have struggled to cooperate with discovery, and are here yet again seeking judicial intervention. Before the Court this day are the following motions:

1. Filed 12/02/24: defendants' motion to quash third-party subpoenas to
   a. The DMV
   b. Plaintiff's former employers;
2. Filed 12/06/24: plaintiffs' motion to compel further responses to SRogs;
3. Filed 12/06/24: plaintiffs' motion to compel further responses to RPD.

In the coming week or two, additional motions are scheduled: defendants' motion to compel inspection of decedent's cell phone (filed 12/10/24); and defendants' motion to compel compliance with third-party subpoena (filed 12/23/24).

Given that trial is scheduled to commence in four weeks, some – if not most – of the outstanding discovery at issue could be rendered moot. To the extent these orders can bear fruit before the case goes to the jury, the parties are entitled to rulings.

The basic purpose of discovery is to take the "game" element out of trial preparation by enabling parties to obtain the evidence necessary to evaluate and resolve their dispute beforehand. *Emerson Electric Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1107; *Reales Investment, LLC v. Johnson* (2020) 55 Cal.App.5th 463, 473-474. Each party has a presumptive right to inquire about any matter which – based on reason, logic and common sense – might (1) be admissible, (2) lead to admissible evidence, or (3) reasonably assist that party in evaluating the case, preparing for trial and/or facilitating resolution. See CCP §2017.010; *Williams v. Superior Court* (2017) 3 Cal.5th 531, 557. There is a counterbalance to this broad right to discovery in the Constitutional right to privacy. See Cal. Const. Art. 1, §1; and *County of Los Angeles v. Los Angeles County Employee Relations Commission* (2013) 56 Cal.4th 905, 927; *Board of Registered Nursing v. Superior Court* (2021) 59 Cal.App.5th 1011, 1039. However, it is the party opposing disclosure which has the burden to establish the existence of these privacy rights. Thus, barring privileges or clear overbreadth, discovery should be self-executing and voluntarily complied with. However, there are a myriad of procedural requirements that often get in the way, and discovery directed at a third-party is rife with such impediments.

The mechanism for securing judicial intervention for a dispute involving a non-party deposition is a motion to compel or quash, both of which require a meet and confer declaration and a separate statement. See CCP §2025.480(b); CRC 3.1345(a)(3)-(4); *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 223-224. The declaration accompanying the moving papers does not reflect a meaningful meet and confer effort by defense counsel, ie a genuine effort to resolve the real issue. In addition, the separate statement filed by defendants is non-compliant. Pursuant to CRC 3.1345(c), the separate statement must provide all the information necessary to understand each discovery dispute, including the text/content of each response at issue and a cogent legal explanation for why a further response/production is needed. See *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 778-779. Nevertheless, the issue is fairly routine and easy to dispense with.

A subpoena for Courtney's DMV records going back to 2003 is patently overbroad if the issue is Michael's negligent entrustment of a vehicle to her in late 2023. In order to establish a claim for negligent entrustment, plaintiffs must show that Courtney was incompetent, inexperienced, incapacitated, reckless, or incapable of using due care at the time the entrustment took place. See *Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1157; *Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853, 863-864; *Lindstrom v. Hertz Corp.* (2000) 81 Cal.App.4th 644, 648; *White v. Inbound Aviation* (1999) 69 Cal.App.4th 910, 927-930. That would rarely be earlier than 24 months preceding the accident (for purposes of admissibility). If those records reveal a pattern of mishaps, the trier of fact may consider them to decide whether Michael was negligent in allowing Courtney to use his vehicle, but that would not make Michael liable for anything absent proximate cause – which even plaintiffs concede is far from a slam dunk. The balance of the subpoena does not unreasonably trample upon Courtney's "privacy" rights since it is apparently already known that she did not have a valid license at the time (which itself is not evidence of negligence). The motion to quash is granted in part, narrowing the date range to 12/01/2018 through 12/07/2023.

According to plaintiffs, subpoenas were directed to Courtney's former employers in the hopes of finding some evidence that Courtney struggled with substance abuse and/or mental health issues over the years, and that she had such an experience on the night she crashed into decedent. Employment is financial, and "individuals have a privacy interest in their financial information." *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656; *In re Marriage of Tamir* (2021) 72 Cal.App.5th 1068, 1087. However, that right is not absolute; courts "indulge in a careful balancing of the right of civil litigants to discover relevant facts, on the one hand, with the right of [persons] to maintain reasonable privacy regarding their financial affairs, on the other." *Valley Bank* at 657. The factors a court must consider include "the purpose of the information sought, the effect that disclosure will have on the parties and

on the trial, the nature of the objections urged by the party resisting disclosure, and ability of the court to make an alternative order which may grant partial disclosure, disclosure in another form, or disclosure only in the event that the party seeking the information undertakes certain specified burdens which appear just under the circumstances." *Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 712; *Fortunato v. Superior Court* (2003) 114 Cal.App.4th 475, 480. There is no plausible relevance to the employment records sought absent evidence that Courtney's job involved driving – and no evidence of this was provided. In fact, plaintiffs proffer that Courtney worked as a server at these two eateries (see Opp Pg 12), which means she was not fired for her driving skills. If she was fired from these jobs, it would only amount to inadmissible character evidence. The motion to quash these subpoenas is granted.

Regarding Plaintiffs' SRog Nos. 43 (instant messaging accounts), 45 (social media accounts) and 46 (online personas), it seems to this Court that the issue – even if ultimately relevant to the question of distracted driving – is under present circumstances moot. Assuming defendant is ordered to provide a verified response within, say, 30 days, trial will already be underway. If a response to the discovery was itself the end game, disclosure during trial could occur. However, a response to the discovery is only step one. From there, plaintiffs will then want to send subpoenas to each of those third-party platforms and seek records. Plaintiffs effectively admit that step one is *not* the end game (see Reply Pg 3). Defendant will of course object, raising a more-serious privacy issue than what is presently at stake. The subpoena dispute would likely take months to resolve. With trial set to begin in a few weeks, and the discovery cut-off already past, this Court intends to find this request moot.

Finally, it reasonably appears to this Court that Plaintiffs no longer need a further response to RPD Nos 20 (cell call billing), 21 (cell text billing), or 22 (cell phone use) because substantially compliant responses were reportedly provided by the defense on 12/12/24. Defendant will need to re-verify a response clarifying that the information provided covered *any and all* cell phones she *actually used* on 12/07/23. The response appears to say that, but plaintiffs' counsel is unconvinced. As for the sanction issue, plaintiffs are correct that delinquent responses do not necessarily moot the sanction portion of a discovery motion. See CRC 3.1348. However, the quality of the meet and confer, coupled with the effort to accommodate a tight deadline, informs this Court that had discovery proceeded more efficiently early in the case, this particular motion (and probably most of the others) could have been avoided. The request for sanctions is denied because the opposition is substantially justified under the circumstances.

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2. CV66215 Johnson et al v. VOP Skyline Place
Hearing on: Motion to Compel Inspection
Moving Party: Plaintiffs
Tentative Ruling: Granted in part, Denied in Part

This is – at its core – a trip and fall case with tragic repercussions. Gordon Johnson was a resident at defendant's memory care facility here in Sonora, and reportedly fell during a stroll in the courtyard, striking his head. He died two days later. Before the Court this day is a motion by decedent's surviving spouse (successor-in-interest) and "step-son" (standing unclear) to compel the facility to permit an inspection of the facility. Largely at issue is the layout of the memory care wing, including the proximity of the nursing station. Although a schematic layout would undoubtedly suffice for the trier of fact, defendants have agreed to allow the on-site inspection with conditions plaintiffs do not like.

Pursuant to CCP §2031.010, a party in a civil action may obtain discovery by entering upon and inspecting property in the possession, custody, or control of another party, and may measure, survey, photograph, test, or sample that property. Although site inspections are relatively innocuous requests that should be disposed of informally (see *Manzetti v. Superior Court* (1993) 21 Cal.App.4th 373, 378), the parties here have been unable to agree on the minutia. There are scant few requirements for a site inspection (see §2031.030), and a notable dearth of published authority on what conditions may be imposed thereon. Thus, trial courts generally default to the basic discovery rules, to wit:

1. The basic purpose of discovery is to take the "game" element out of trial preparation by enabling parties to obtain the evidence necessary to evaluate and resolve their dispute beforehand. *Emerson Electric Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1107; *Reales Investment, LLC v. Johnson* (2020) 55 Cal.App.5th 463, 473-474.
2. Each party has a presumptive right to inquire about any matter which – based on reason, logic and common sense – might (1) be admissible, (2) lead to admissible evidence, or (3) reasonably assist that party in evaluating the case, preparing for trial and/or facilitating resolution. CCp §2017.010; *Williams v. Superior Court* (2017) 3 Cal.5th 531, 557.
3. There is a counterbalance to the right to discovery in the Constitutional right to privacy, which is heightened for nonparties. See Cal. Const. Art. 1, §1; and *County of Los Angeles v. Los Angeles County Employee Relations Commission* (2013) 56 Cal.4th 905, 927; *Board of Registered Nursing v. Superior Court* (2021) 59 Cal.App.5th 1011, 1039.

With the aforementioned guidelines in mind, it seems to this Court that plaintiffs shall be entitled to conduct a site inspection at the facility here in Sonora, which may include the taking

of measurements and still photographs within the common areas, any area where decedent reportedly fell, and decedent's room. Defendants shall have staff temporarily remove personally identifying information of the current resident(s) within decedent's former room during the site inspection of the room itself. Plaintiffs shall not cause any disruption to the residents/guests, and shall not cause any residents/guests to be contacted or photographed, during the site inspection. The parties should endeavor to schedule the site inspection during a time when most of the residents in the memory care wing are resting in their respective rooms. Because this Court is not going to permit videotaping during the site inspection, the issue over the audio is moot.

3. **CV65497** **Kolberg v. Estate of James Walsh**
   Hearing on: Demurrer to "First Amended Complaint"
   Moving Party: Defendant
   Tentative Ruling: N/A

This is a family dispute regarding equitable ownership of certain real property located on Lynn Lane in Sonora, or a monetary equivalent thereto. The property was owned by John Walsh, who died on 05/17/21. His brother James commenced an *intestate* probate proceeding on John's behalf (see PR12140), despite John allegedly having a will leaving everything to his non-relative live-in caregiver (see PR12029). During that administration, James died, leaving his own intestate estate to be administered (see PR12267). Meanwhile, John's live-in caregiver (Christi) has filed this civil action claiming that John promised her that if she moved in and provided him with care/comfort in his waning years, that upon his passing he would gift her his home. Since James caused that property to be inventoried as part of John's *intestate* estate, the clear implication here is that the home would eventually go to family, not Christi.

Before the Court this day is an unopposed demurrer directed at a document Christi filed on 11/13/2024, entitled "Supplemental Response to Judge's Tentative Ruling." The Court, having received and reviewed said document, disagrees with defendant's contention that this ought to be treated as a First Amended Complaint. It is true that form should not be exalted over substance. Civil Code §3528. It is also true that so long as the document provides sufficient notice, the precise form it takes is not dispositive. See *Ameron Intern. Corp. v. Insurance Co. of State of Pennsylvania* (2010) 50 Cal.4th 1370, 1385; *In re DJ* (2010) 185 Cal.App.4th 278, 289; *In re A.N.* (2009) 171 Cal.App.4th 1058, 1064. However, in order to qualify as a complaint, the document must at a minimum contain "a statement of the facts constituting the cause of action, in ordinary and concise language" and "a demand for judgment for the relief to which the pleader claims to be entitled." CCP §425.10. Ideally, it should also call itself a complaint (CRC 2.111(6)) and have numbered causes of action (CRC 2.112). Her original pleading filed 08/11/2023 was entitled "Complaint for Damages" and included five separate

causes of action and a prayer for relief. Plaintiff clearly knows how to format an operative pleading. This new document, the "Supplemental Response to Judge's Tentative Ruling," reads more like a deficient (and untimely) request for reconsideration. On that basis, the request is denied. Plaintiff shall have 30 days from this date to file and serve a First Amended Complaint which shall:

- Contain a concise statement of ultimate facts
- Include facts rebutting the Probate Code §21380 presumption;
- Not exceed 12 pages in length;
- Included causes of action for negligence, quiet title, breach of oral contract, written contract, promissory estoppel, and equitable estoppel only.

Thereafter, defendant is free to meet and confer with plaintiff if another demurrer is warranted. However, given the size of John's estate and the number of intestate heirs, it seems to this Court that some global resolution must be achievable.

4. CV64893 Kuffler v. North American Beverages, LLC, et al
Hearing on: Compel Party Deposition
Moving Party: Defendant
Tentative Ruling: Continued to 03/14/25

This is a personal injury action involving a collision between a vehicle and a pedestrian on State Route 49 in Jamestown. The accident occurred in October of 2020. Plaintiff hired a lawyer a few weeks later. According to plaintiff's mother and lawyer, plaintiff has not been seen or heard from since September of 2022, even though this lawsuit was filed after that. In fact, it appears that plaintiff's counsel has been litigating the case entirely without a client, even serving unverified discovery responses on his absent client's behalf. In February of 2023, the dispute was settled for $95,000 (again, without plaintiff's involvement). In May of 2023, plaintiff's counsel filed a probate petition seeking to have plaintiff's mother appointed as his conservator for the limited purpose of signing off on the settlement. That petition was granted on 12/15/23, with Letters being issued on 01/16/24. See PR12289. The conservator – plaintiff's mother – failed to file the first annual accounting, and was ordered to appear in Dept. 5 on 01/31/25. In the interim, defendant herein has filed a motion to compel plaintiff's appearance at a deposition, in the hopes of obtaining a certificate of non-appearance, followed by a successful order for terminating sanctions. Since this civil action has been settled, and there is only a delay in getting the final papers signed, it is premature to seek discovery orders. At the very least this Court needs confirmation from plaintiff's counsel that the settlement is off and the case is moving forward as is. Hearing continued to 03/14/25 at 8:30 a.m. in Dept 1.

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5. CV65610 Kumar v. Fidelity National Title Co
Hearing on: Motion for Summary Judgment
Moving Party: Defendant
Tentative Ruling: Granted

This case involves a disputed real estate transaction, and specifically the buyer's obligation to cover real estate commissions. Before the Court this day is defendant's *unopposed* motion for summary judgment, which comes on the heels of defendant's previous unopposed motion to deem RFAs admitted.

The salient facts are these:

In or about the summer of 2023, plaintiff apparently agreed to purchase APN 034-031-047, a reasonably modern 2,000 sq ft home on a 13-acre parcel near Flume Road, for $650,000. In conjunction therewith, plaintiff entered into a buyer's agent agreement in which she agreed to pay her agent a commission of 3%. As the escrow period came to a close, plaintiff reportedly learned for the first time that the 3% commission she agreed to pay her agent was *on top of* whatever amount she agreed to pay for the property. Thus, plaintiff actual financial outlay for this transaction was $669,500. According to plaintiff, she thought that the 3% commission would be included in the $650,000 sale price.

On 09/29/23, plaintiff filed two separate lawsuits. The first lawsuit she filed was against her own real estate agent for fraud and nondisclosure. See CV65605. That case was resolved by way of a bench trial on 11/22/24. Following the submission of evidence and testimony, this Court found that the contracts were clear and that defendant was entitled to judgment in her favor. That case is technically still active, as there is no judgment or dismissal yet entered.

The second lawsuit (CV65610) was against the title/escrow company involved in the transaction. The issue plaintiff had with Fidelity was that she reportedly asked to "cancel" the transaction after learning of the additional commission, but Fidelity said that only the agent could cancel it. Plaintiff was apparently concerned about also getting her $50,000 good faith deposit back, but of course misreading her own contract is hardly good cause for securing return of her good faith deposit. Nevertheless, she was always free to "cancel" the contract meaning not wire the balance of the funds over: any fallout from that decision would be individual to the party affected. Plaintiff decided to go forward with the deal, and promised to pay her agent the commission over time (even giving her a deed to the property).

Fidelity now moves for summary adjudication. The operative pleading includes two causes of action: negligence and fraud. While neither the Notice, nor the Separate Statement, reference discreet causes of action, the ultimate facts pled for each claim are identical – and as such will be treated the same where the overlap is obvious.

An escrow holder is a limited agent and fiduciary to all parties to the escrow. At the inception of an escrow (upon delivery of documents and moneys), the escrow holder is a dual agent for both buyer and seller in accordance with the escrow instructions. Thereafter, the escrow holder becomes the agent of the buyer with regard to transfer/recordation of the deed (as instructed), the agent of the seller with regard to payment of the money (as instructed), and the agent of the lender with regard to final settlement (as instructed). The scope of these dual/discrete agencies, and the fiduciary obligations associated therewith, are always capped by (1) the express provisions of the escrow instructions and (2) any material information the escrow agent acquires in secret that would reasonably affect either parties' decision regarding the pending transaction. However, an escrow holder has no general duty to police the affairs of its depositors, and absent clear evidence of fraud, an escrow holder incurs no liability for the failure to do something not within the terms of the escrow or for a loss incurred while correctly following the escrow instructions. Absent fraud, escrow agents are generally liable to buyers and sellers only when they fail to exercise "ordinary skill and diligence" in the manner in which they attempted to comport with the escrow instructions. See *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711; *Tribeca Cos., LLC. v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1109-1110; *Rideau v. Stewart Title of Calif., Inc.* (2015) 235 Cal.App.4th 1286, 1294; *Virtanen v. O'Connell* (2006) 140 Cal.App.4th 688, 703; *Paul v. Schoellkopf* (2005) 128 Cal.App.4th 147, 154; *Kangarlou v. Progressive Title Co., Inc.* (2005) 128 Cal.App.4th 1174, 1178-1179; *California Nat'l Bank v. Havis* (2004) 120 Cal.App.4th 1122, 1138; *Marriage of Cloney* (2001) 91 Cal.App.4th 429, 440; *Vournas v. Fidelity Nat'l Title Ins. Co.* (1999) 73 Cal.App.4th 668, 674; *Triple A Mgmt. Co., Inc. v. Frisone* (1999) 69 Cal.App.4th 520, 534-535; *Siegel v. Fidelity Nat'l Title Ins.* Co. (1996) 46 Cal.App.4th 1181, 1194.

Althhugh plaintiff has failed to file any opposition to the pending motion, the evidence submitted by defendant, alongside the evidence this Court can take judicial notice of from the related action, leads inexorably to the singular conclusion that Fidelity had no contractual obligation to review the buyer's agent agreement with plaintiff, no legal duty to discuss it with plaintiff, and no reason to believe that plaintiff "misunderstood" the agreement – particularly if the closing settlement statement accurately indicated that the buyer's commission was outside the sales proceeds. This is similar to the question of fraudulent concealment, to wit: a duty to disclose only arises when the defendant is in a fiduciary relationship with the plaintiff, when the defendant has exclusive knowledge of material facts not known to the plaintiff, when the

defendant *actively* conceals a material fact from the plaintiff, or when the defendant makes partial (ie, incomplete) representations while suppressing material portions. *Bank of America v. Superior Court* (2011) 198 Cal.App.4th 862, 870-871; *Perias v. GMAC Mortgage, Inc.* (2010) 187 Cal.App.4th 429, 434; *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336. None of that is shown by the facts here.

Finally, there is the passing reference to Fidelity representation that plaintiff was "not allowed" to cancel the transaction. This Court cannot tell just what that claim entails, and Fidelity does not address it. However, cancellation of the escrow does not itself terminate the underlying purchase agreement or exonerate the parties from liability under the escrow instructions or purchase agreement unless such cancellation is specifically stated in writing by the parties. See Civil Code §1057.3(e); *Conservatorship & Estate of Buchenau* (2011) 196 Cal.App.4th 1031, 1039-1040; *Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1341-1343. If the purchase transaction is not completed by the closing date or the escrow is cancelled, buyer and seller are obligated to "ensure that all funds deposited into an escrow account are returned to the person who deposited the funds or who otherwise is entitled to the funds under the contract. Civil Code §1057.3(a); see also *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 233-234 [absent contrary escrow instructions, title to deposit vests in seller when seller accepts underlying contract]. As it appears that plaintiff deposited a sizable ($50,000) deposit into escrow, and decided to cancel it without legal cause, there is a high likelihood that plaintiff would have been looking at protected litigation with both the seller and her own real estate agent. Even if the advice given by Fidelity (that plaintiff needed her agent's permission to cancel the transaction) was technically incorrect, there are no facts from which to find that said representation caused plaintiff compensable harm.

Motion for summary judgment is granted. Defendant to prepare and submit proposed judgment thereon.

6. CV64272 **Venturi v. California Department of Transportation *et al***
Hearing on: MSJ
Moving Party: Sierra Mountain Construction
Tentative Ruling: Continued to 02/07/2025

This is a personal injury action involving a catastrophic vehicular accident along the south-side shoulder of Highway 108 in a construction zone. There were two persons seriously injured in that accident: the driver (who subsequently died), and a construction worker standing off the shoulder in the "staging area" (Robert Venturi, hereinafter "plaintiff"). Before the Court this day is a motion by co-defendant Sierra Mountain Construction, Inc. (hereinafter "Sierra") to summary adjudicate in its favor all of the claims asserted against it by co-defendant California

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Department of Transportation (hereinafter "Caltrans") in the latter's operative cross-complaint (filed 10/11/2024). At issue is whether Sierra should shoulder any direct blame for allowing workers on the shoulders with inadequate safety precautions, or whether Sierra is contractually bound to provide Caltrans some level of financial protection irrespective of fault. (This Court has just recently denied Caltrans' motion for summary judgment against plaintiff involving the question of protective k-rails along the shoulder.)

The salient facts may be re- summarized as follows:

- In the Spring of 2020, Caltrans put the Peaceful Oak Project out to bid. This public works project involved constructing entrance/exit ramps for S.R. 108 in the vicinity of Peaceful/Standard and Mono Way;
- After the project was put out to bid, prospective contactors inquired of the need for k-rails along that portion of S.R. 108 where blasting was expected and/or where construction work was in close proximity to the lanes of traffic. Caltrans essentially advised that bidders should bid according to the existing plans, and not to inflate the bid with the expected cost for k-rails (see §12-3.20(D));
- In the Summer of 2020, the Peaceful Oak Project was awarded to Sierra. The contract between Caltrans and Sierra provided in pertinent part as follows:
    - Sierra was deemed to be the "controlling employer," and thus responsible for correcting hazardous conditions (§7-1.02K(6)(a);
    - Sierra was expected to "erect and maintain fences, temporary railing, barricades, lights, signs and other devices and take any other necessary protective measures to prevent damage or injury to the public" (§7-1.04);
    - For "temporary railing" weighing 110 lbs or more, those "must be on the Authorized Materials List" (§12-3.01B);
    - Sierra was required to secure consent from Caltrans in order to place k-rail because k-rail "is not cheap" and has the potential to impact "the traveling public" (Marsh Depo 28:5-22).
- In the Winter of 2020, Sierra began work on the Peaceful Oak Project. Plaintiff was one of many laborers hired by Sierra for that work;
- Just prior to 5:30 a.m. on 06/23/21, Ms. Anderson (age 80) called law enforcement to report that someone was trying to kill her, and that she could not breathe. Soon thereafter, she climbed into her 2010 Mercedes SLK350 and, on her expired driver's license, left her home in Groveland;
- Shortly before 6:30 a.m., Ms. Anderson was heading eastbound on S.R. 108, just past Hess Avenue, when her right tire deflated. As she continued eastbound on S.R. 108, her speed increased to approximately 80 mph. As she entered the Peaceful Oak construction zone, she lost control. She first swerved into oncoming traffic, then back

across the eastbound lane onto the south shoulder, striking a Ford F250, a Chevy 2500, and a Volvo dump truck – all registered to Benton Machinery;
- Plaintiff was standing between the Chevy and the Volvo, and took a significant brunt of the impact force from Ms. Anderson's vehicle;
- Ms. Anderson's vehicle then careened back across S.R. 108, coming to rest on the north side of the highway;
- Ms. Anderson was transported to U.C. Davis, and died three days later from "respiratory failure" secondary to her injuries. Ms. Anderson had an estate valued at $230,000. There were no creditor claims filed against her, and no personal injury claims made on her behalf or by her heirs. See PR12013.

Plaintiff sustained fairly serious injuries in the accident, and filed suit against Caltrans. The operative pleading (filed 03/01/22), includes a single cause of action for premises liability. Within that cause of action there are three separate counts: negligence, failure to warn, and dangerous condition of public property.

On 09/28/2023, in response to plaintiff's complaint, Caltrans filed a cross-complaint naming Sierra (plaintiff's employer). Within that operative Judicial Council form pleading, Caltrans indicated a first cross-claim for "indemnification," a second cross-claim for apportionment of fault, a third cross-claim for declaratory relief, and a fourth cross-claim for contribution. Attached to the operative pleading, and expressly incorporated therein by reference (see Para 2), was the 38-page written contract between Caltrans and Sierra.

On 11/27/2023, Sierra filed an answer to that cross-complaint. Therein, Sierra asserted a general denial and forty-eight (48) affirmative defenses – including several which actually *help* Caltrans. Sierra also that day filed a cross-complaint against Ms. Anderson's estate (later amended to name her son as administrator). That cross-complaint does not appear to have been either served or dismissed, and it is now too late since her estate has long ago been discharged (see PR12013).

On 06/04/2024, Sierra filed the pending motion for summary adjudication/judgment. With regard to the first (and arguably main) cross-claim for indemnity, Sierra alleged that the claim had "no merit because Caltrans cannot establish that plaintiff's injuries resulted from Sierra's performance of its contractual obligations." Sierra further alleged that the cross-complaint "does not allege Sierra's duty to indemnity is based on any contractual agreement between Caltrans and Sierra. The cross-complaint alleges that the claim for indemnity is based on equity." The motion was set to be heard 08/23/2024.

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On 07/30/2024, Caltrans filed an ex parte application seeking leave to file an amended cross-complaint for the sole purpose of making plain its intention that the first cause of action for "indemnification" be viewed as one for "contractual indemnity" and not "equitable indemnity." Sierra strongly opposed the motion, contending that the scope of the operative pleading was plain, that counsel for Caltrans was derelict in his duties to review the pleadings, and that the last-minute "hail Mary" was unfair. After allowing full briefing on the request for leave to file an amended pleading, this Court ruled in pertinent part as follows:

> "Notwithstanding one sentence to the contrary (at 12:26-27), Sierra's MSJ/MSA read as if it was already treating [Caltrans]'s first cause of action as one for *contractual* indemnity. See MPA 9:20-10:3, 11:11-12:23, 13:16-14:19. Sierra repeatedly turned to, and distanced itself from, the contractual indemnity clause. In addition, Sierra did not cite any of the caselaw barring equitable indemnity when a contractual provision exists – which would seem an obvious argument for Sierra to make if it *actually* believed the cross-complaint was limited to equitable principles … there is no surprise or prejudice to Sierra in clarifying that the first cause of action in the cross-complaint is for contractual indemnity because Sierra already argued in its MSJ papers that the contractual indemnity clause was not triggered by the facts in the case at bar. As noted, Sierra treated its motion as one attacking a claim for contractual indemnity. This Court was fully prepared to treat the operative pleading as including, and then addressing, *contractual* indemnity as part of Sierra's MSJ/MSA … There is no suggestion that [Caltrans] has acted in bad faith. See *Silver Organizations Ltd. v. Frank* (1990) 217 Cal.App.3d 94, 98; *Sidney v. Superior Court* (1988) 198 Cal.App.3d 710, 718.

Using its limited leave. Caltrans filed on 10/11/2024 a First Amended Cross-Complaint. Rather than simply clarify that the first cross-claim was for "contractual indemnity" (as was expected), Caltrans kept the original "indemnity" cross-claim and added a <u>fifth</u> cross-claim for "contractual indemnity." Since it would be imprudent to have two causes of action based upon the same written indemnity provision, this Court must conclude that the first cross-claim for "indemnity" is now limited to "equitable indemnity" – as Sierra previously argued.

With the slight adjustment to the cross-complaint, the volume of materials necessary to review has ballooned. Moreover, it now appears that Caltrans may be trying to inferentially add a *sixth* cross-claim (breach of agreement to name as additional insured). This Court requires additional time to pour through the materials and will have a complete tentative ruling available for the parties prior to the next hearing date.