

Tentative Rulings

Law & Motion and Family Law Calendar for Sept. 22, 2014

Sept. 18, 2014, 4:00p.m.

Department Two

To request a hearing on any matter on this calendar, you must call the Court at 530/283-6305 by 12:00 noon, Sept. 19, 2014, notice of the intention to appear must also be given to all other parties. If the clerk is not notified of a party's intention to appear, there will be no hearing and the tentative ruling becomes the order of the court.

If you do appear and want the matter reported by a court reporter in unlimited civil, family law or probate, you must contract with and provide your own court reporter. The Court does not provide an official reporter for these calendars.

Probate – 9:00 a.m.

Case No. PR07-6398 – Conservatorship of White

Tentative Ruling: **Appearance required.**

Case No. PR14-00045 – Estate of Cowell

Tentative Ruling: **Granted.** The court finds that notice has been given as required by law. The Spousal Property Petition is granted. Petitioner is to prepare the Order.

Case No. PR14-00042 – Estate of Dennett

Tentative Ruling: **Appearance required.** The court notes the following: The notice of hearing does not indicate the date and place of mailing. The Petition does not indicate the place of death in 2.b. The Petition does not have attached the required Inventory and Appraisal, as required in 8. The Petition indicates that decedent had a will in 12.a., yet the Petition indicates decedent died intestate. The court will require petitioner to file an amended petition and notice.

Case No. PR14-00044 – Estate of Hendricks

Tentative Ruling: **Granted.** The court finds that notice has been given as required by law. The Petition to Determine Succession to Real Property is granted. Petitioner is to prepare the Order.

Case No. PR06-6328 – Guardianship of Michaud

Tentative Ruling: **Appearance required.** The court has not received the confidential guardianship status report.

Case No. PR12-00016 – Guardianship of Beltran

Tentative Ruling: **No appearance required.** The court has received the confidential guardianship status review report and finds that continued guardianship is in the best interests of the minors. The court schedules the annual review hearing for September 21, 2015, at 9:00a.m. The clerk of the court is reminded to send notice to the guardians one month prior to this date, informing the guardians of the duty to file a confidential status report prior to the review hearing.

Case No. PR14-00040 – Matter of Siri

Tentative Ruling: **Granted.** The court finds that notice has been given as required by law. The Petition to Determine Succession to Real Property is granted.

Civil – 9:30 a.m.

Case No. CV09-00065 – Adams vs. Dept. of Fish & Game

Tentative Ruling: Tentative Ruling: **Denied in full.** The alternative motions for summary judgment or adjudication by defendant, the California Department of Fish and Wildlife (“DFW”), are denied. The requests for judicial notice by both DFW and plaintiff, City of Portola (“Portola”), are granted.

In ruling on a defendant’s motion for summary judgment, the Court normally follows a three-step analysis to ascertain whether the evidence permits a finding favorable to the moving party with respect to an element of a cause of action or a defense. (*See, e.g., Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337, 1343 (“*Lane*”) (three-step analysis); *see, also, Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 757 (“*Cole*”) (dispositive question on motion).) However, where, as here, the motion challenges the legal sufficiency of the complaint, the Court treats it as a motion for judgment on the pleadings, and reviews the parties’ evidence only if the allegations are legally sufficient. (*Hansra v. Superior Court* (1922) 7 Cal.App.4th 630, 638-639.)

Issues One and Two

The motion as to Issues One and Two is made on the same grounds, *i.e.*, that the allegations of the FAC are legally insufficient, because Portola will be unable to establish liability under either *Government Code section 862* or *835*, the statutory bases for the third, fifth and sixth causes of action.¹

DFW argues that Portola cannot establish liability under *section 862(b)*, because the statute applies only when a public entity is using a pesticide in its proprietary capacity; DFW also asserts that Portola cannot establish liability under either *section 862* or *835*, because the allegations of the FAC are insufficient to establish proximate cause. In support, DFW proffers selected allegations of the FAC as undisputed facts (*see*, Defendant’s Separate Statement in

¹ Unless otherwise noted, all subsequent statutory references are to the *Government Code*.

Support of Motion, filed June 20, 2014 (“UMF”), UMF Nos. 1-11) and extracts from two of Portola’s responses to interrogatories. (UMF Nos. 12-16.)

Section 862

Section 862 provides, in part, that “[a] public entity is liable for injuries caused by its use of a pesticide to the same extent as a private person . . .” (*Id.*, *subd. (b.)*)

Interpretation of Statute

DFW argues that the phrase “to the same extent as a private person” was intended to limit liability to those circumstances where a public entity uses pesticides while acting in a proprietary, as compared with governmental, capacity; hence, because DFW was exercising its police power when it applied Rotenone to Lake Davis, Portola cannot establish liability under the *section 862*. (Defendants’ Memorandum of Points and Authorities in Support of Motion, filed June 20, 2014 (“DFW P&A”), pp. 3:15-5:28.)

This argument is based on dicta in *Farmers Insurance Exchange v. State of California* (1985) 175 Cal.App.3d 494 (“*Farmers*”), wherein the Sixth DCA “tend[ed] to agree with” this interpretation; however, the panel neither relied thereon for its ruling nor made any “independent finding” that the interpretation was correct. (*Id.*, at 504.) Further, nothing in the opinion suggests that the Sixth DCA considered *Cabell v. State* (1967) 67 Cal.2d 150, reversed on other grounds by *Baldwin v. State* (1972) 8 Cal.3d 424, wherein the Supreme Court applied the Tort Claims Act retroactively and rejected the pre-enactment “. . . attendant inequality[] between causes arising out of so-called ‘proprietary’ as distinguished from ‘governmental’ activities . . .” (*Id.*, at 152. (Citations omitted.))

The interpretation would also render nonsensical *section 820(a)*, where the Legislature used the same phrase to impose liability on public employees. (*See, Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1127 (Tort Claims Act does not generally provide for liability of public entity to “same extent as private person”).) Lastly, the proposed interpretation runs counter to the authorities which establish that the “doctrine of noncompensable loss” applies only under emergency conditions. (*See, Massingill v. Department of Food and Agriculture* (2002) 102 Cal.App.4th 498, 506-507 (loss may be compensable, if no “impending peril”).)

Accordingly, as a matter of law, a public entity may be held liable under *section 862* for injuries caused by its use of a pesticide while acting in either a governmental or proprietary capacity, and DFW’s challenge of the FAC on this grounds thus fails.

Proximate Cause

DFW argues that Portola cannot establish proximate cause under *section 862*, because the FAC fails to allege that Portola sustained injuries arising from DFW’s use of a pesticide. (DFW P&A, p. 10:6-12.) The allegations cited by DFW in support of its argument relate to conduct by DFW, other than the actual application of the pesticide, such as negative press and the closing of roads, which is alleged to have caused Portola’s injuries. (UMF Nos. 6, 9-11.) However, it is also alleged that the 2007 Poisoning involved the application of Rotenone and other chemical agents to Lake Davis (FAC, para. 54), and that, “. . . as a direct, and proximate result of the 2007 Poisoning . . .,” tourism dropped and the City suffered various economic losses. (*Id.*, paras. 83-84.) These paragraphs were incorporated by reference into the third, fifth and sixth causes of action, rendering them legally sufficient. (*Id.*, paras. 348, 380, 407.)

Hence, to sustain its burden on this issue, DFW must produce evidence tending to establish that the use of pesticide on Lake Davis was not a “substantial factor” in causing Portola’s economic losses. (See, *Johnson v. Prasad* (2014) 224 Cal.App.4th 74, 83 (“question to be resolved as to causation is whether ‘defendant’s act or omission was a substantial factor in bringing about the injury’”); see, also, *Cole, supra*, 205 Cal.App.4th at 769 (under *section 835*, question to be resolved is whether dangerous condition was “a substantial causative factor in bringing about” injuries).)

The only evidence produced by DFW consists of extracts from Portola’s response to DFW’s Special Interrogatory No. 37, a contention interrogatory directed at the standard of care, not proximate cause. (See, UMF Nos. 13-16.) Those extracts set forth evidence which supports the allegations recited in UMF Nos. 6 and 9-11, *i.e.*, an “advertising blitz” and signs telling people to stay away from Lake Davis (UMF Nos. 13, 14) and a failure to conduct a positive advertising campaign encouraging visitors to return to the lake, after the poisoning process was complete. (UMF Nos. 15, 16.)

It is unclear how this evidence establishes that the actual use of Rotenone in Lake Davis was not, as a matter of law, a “substantial factor” in causing a decrease in tourism which caused Portola’s losses. While the advertising campaign leading up to the use of the pesticide contributed to Portola’s injuries, a fact-finder could also find that the actual poisoning, carried out as advertised, would deter persons from going to Lake Davis. DFW has thus failed to sustain its initial burden. (See, *Lane, supra*, 183 Cal.App.4th at 1347 (to prevail, defendant must present evidence “sufficient to demonstrate as a matter of law” that plaintiff cannot establish element of cause of action).)²

Because DFW has failed to sustain its burden that Portola cannot establish liability under *section 862*, the issue of whether Portola can establish liability under *section 835* is moot, and the motion for summary adjudication of Issues One and Two is denied.

Issue Three

DFW seeks summary adjudication of the first and second causes of action, for public and private nuisance, on the grounds that (1) Portola has abandoned its nuisance claims; and (2) the only damages sought by Portola are for “stigma,” not actual physical loss.

Abandonment of Nuisance Causes

The FAC on file with this Court alleges that the poisoning of Lake Davis constituted a nuisance which unreasonably interfered with Portola’s use and enjoyment of its property. (See, FAC, paras. 300-309, 338-346.) There is nothing on the face of the FAC, nor a filed amendment to the

² DFW cites authority wherein a defendant was required to establish a direct physical connection between the dangerous condition and the injuries sustained under *section 835*; however, there appears to be no authority suggesting that this “. . .extremely restrictive rule for determining when the conduct of a third party will operate as a superseding cause excusing a public entity from liability for a dangerous condition. . .” (*Cole, supra*, 205 Cal.App.4th at 774), should be extended beyond *section 835* and applied under *section 862*. Indeed, *Cole* declined to follow the rule for purposes of *section 835*, limiting it to cases where the plaintiff’s injuries were caused by a “deliberate act of violence.” (*Ibid.*)

FAC, striking any of these allegations. DFW, however, contends that allegations of an essential element of a nuisance cause of action are no longer operative, by reason of an order by the discovery referee, which provides:

13. The parties are ordered to comply with the following, as agreed to by the parties:
 - a. Plaintiff City of Portola is not claiming damages to any physical property that it owns.
 - ...
 - c. Plaintiff City of Portola will withdraw its allegations contained in paragraphs 302 and 341 of the fourth amended complaint. (*See*, UMF No. 22; *see, also*, Order of the Discovery Referee, Exhibit 2 to Defendant's Request for Judicial Notice, filed June 20, 2014 ("Order").)

Portola disputes that it has either abandoned its nuisance causes or withdrawn the allegations of paragraphs 302 and 341. (*See*, Plaintiff's Separate Statement in Opposition to Motion, filed August 25, 2014, UMF No. 22.) It also appears that, since the Order was signed by Justice Simms in February 2014, evidence of a water contract, granting to Portola a usufructuary interest in the waters of Lake Davis, has been "newly discovered." (*See, ibid; see, also*, Plaintiff's Memorandum of Points and Authorities in Opposition to Motion, filed August 25, 2014, pp.13:21-14:2, fn. 3.)

The Court notes that a discovery referee's order is advisory, and not, in and of itself, binding. (*See, Rockwell International Corporation v. Superior Court* (1994) 26 Cal.App.4th 1255, 1269 (trial court must independently consider referee's findings).) Additionally, a trial court may ". . . modify or disregard the referee's recommendations, . . . at any time, either on the motion of any party for good cause shown or on the court's own motion." (*Code of Civil Procedure section 643(c).*)

In light of Portola's newly discovered evidence of the water contract, the Court hereby modifies the Order, striking therefrom subparagraph 13.c., rendering the FAC, with "revived" paragraphs 302 and 341, sufficient to state a cause of action for nuisance.³

Stigma Damages

In support of its contention that Portola seeks only "stigma damages," DFW relies on UMF No. 23, which recites that Portola is not claiming damages to any physical property that it owns. (DFW P&A, p.13:9-17.) Paragraph 13.c. of the Order, cited in support of UMF No. 23, has been stricken; however, DFW also references in its brief, but not its separate statement, paragraph 13.a. thereof, which states that Portola is not claiming any injury to "physical property."

³ The Court does so, in part, because leave to amend is to be liberally granted in order for cases to be disposed of on their merits. (*See, Board of Trustees of the Leland Stanford Junior University v. Superior Court* (2007) 149 Cal.App.4th 1154, 1173 (California has liberal policy of allowing amendments).) Additionally, the trial date of October 14, 2014 has been continued, and an order "reviving" Portola's existing allegations in the FAC regarding injuries sustained to its property interests, if required at all, causes neither delay nor inconvenience.

It is unclear what impact paragraph 13.a. has on the revived allegations of the FAC; however, in support of its opposition, Portola has produced evidence from which one may infer that it had a usufructuary interest in the waters of Lake Davis, which interest was injured by DFW's application of Rotenone. (Declaration of James Murphy in Support of Plaintiffs' Opposition, filed herein August 25, 2014, paras. 6-9, Exhibit 1 (water contract granting Portola the right to use water from Lake Davis), para. 10 (Portola unable to use water with detectable levels of Rotenone); Declaration of David A. Diepenbrock in Support of Opposition, filed herein August 25, 2014, Exhibit 3, Portola's Responses to Request for Admission No. 49 and Form Interrogatory 17.1 (developer of private subdivision could not use municipal water supply due to poisoning, contributing to default under its note to Portola).)

This interest constitutes a "property right," albeit not strictly "physical," the interference with which constitutes an injury for which damages are recoverable under a nuisance cause of action. (*See, Witkin, 12 Summary of California Law* (10th Ed. 2005), Real Property, section 917 (usufructuary, rather than ownership, interest in water); *see, also, Selma Pressure Treating v. Osmose Wood Preserving Company of America, Inc.* (1990) 221 Cal.App.3d 1601, 1618, reversed on other grounds by *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, (water rights constitute cognizable property interest as to which damages are recoverable for injuries caused by public nuisance).) This evidence thus creates a triable issue as to whether Portola seeks only stigma damages.

DFW urges the Court not to accept Mr. Murphy's declaration at face value, since he was a signatory to a mitigation agreement between DFW and Portola. (*See, Declaration of Raymond Rouse in Support of Defendants' Reply*, filed herein September 4, 2014, para. 3, Exhibit 2 (mitigation agreement); Defendant's Reply in Support of Motion, filed September 3, 2014, p. 11:4-15.) The Court, however, may not weigh the evidence; instead, its role is to determine whether a triable issue of material fact exists. (*See, Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 880 (trial court may not weigh conflicting evidence).

Accordingly, DFW's motion for summary adjudication of Issue Three is denied.

Evidentiary Rulings:

DFW Objections:

To Bole Declaration

Overruled: Objection Nos. 1-7

To Murphy Declaration

Overruled: Objection Nos. 1-6

To Oels Declaration

Overruled: Objection No. 1

To Tibbedeaux Declaration

Overruled: Objections 1-2

Case No. CV13-00156 – Leschinsky vs. Johnson

Tentative Ruling: **Granted.** Plaintiff's motion for an order allowing amendment of the complaint is granted, pursuant to CCP 473(a)(1). Plaintiff is granted leave to file her amended complaint within 10 days. As a result of the court's ruling, this matter is scheduled for a case management conference today at 2:00p.m., and counsel may appear by CourtCall.

Case No. CV14-00150 – McBride vs. B of A

Tentative Ruling: **No appearance required.** The court has received a notice of settlement of entire case. The court will confirm the case management conference scheduled for February 9, 2015, at 1:30p.m. If a request for dismissal is filed prior to that date, the conference will be vacated.

Case No. CV12 -00214 – Rose vs. Guereque

Tentative Ruling: **Appearance required, if proof of service is filed prior to the examination.**

Family Law – 10:30 a.m.

Case No. FL12-00012 – Artaz vs. Gilbert

Tentative Ruling: **Appearance required.** The court will set the matter for hearing.

Case No. FL14-00066 – Mar. of Aswad

Tentative Ruling: **Appearance required.** The court has received an unsigned custody and visitation agreement, and will discuss the matter with the parties.

Case No. FL08-28213 – Mar. of Baker

Tentative Ruling: **Appearance required.** The court will discuss the status of the case with the parties.

Case No. FL14-00187 – Campbell vs. Fairbanks

Tentative Ruling: **Appearance required.** The court will order the parties to mediation.

Case No. FL14-00171 – Mar. of Castillo

Tentative Ruling: **Appearance required.** The court will order the parties to mediation.

Case No. FL14-00110 – Mar. of Dunnington

Tentative Ruling: **Appearance required.** The court will review the previous custody and visitation orders with the parties.

Case No. FL14-00172 – Hernandez vs. Livermore

Tentative Ruling: **Appearance required.** The court will order the parties to mediation.

Case No. PR14-00178 – McCray vs. Valadez

Tentative Ruling: **Appearance required.** The court will order the parties to mediation.

Case No. FL14-00136 – Mar. of Wolf

Tentative Ruling: **Appearance required.** The court will discuss the status of the case with the parties.

CASE MANAGEMENT CONFERENCE TENTATIVE RULINGS

Case No. CV14-00041 – American Valley Pet vs. Labbe

Tentative Ruling: **Appearance required.** The parties should be prepared to discuss ADR options and set a trial date.

Case No. LC08-27794 – Ford Motor Credit vs. Goodson

Tentative Ruling: **Appearance required.**

Case No. CV14-00039 – People vs. Huerta

Tentative Ruling: **Appearance required.** OSC on failure to appear or prosecute. If there is no appearance, this matter will be dismissed.

Case No. CV13-00169 – Robinson vs. Genesis Systems

Tentative Ruling: **Appearance required.** The court will discuss the status of the case.

Case No. PR13-00049 – Snyder Family Third Party Special Needs Trust

Tentative Ruling: **Appearance required.** The court will discuss the status of the case with the parties.

Case No. LC14-00020 – Unifund CCR vs. Conley-Moser

Tentative Ruling: **No appearance required.** The court notes this is a collections case. This matter is continued to January 26, 2015 at 1:30p.m., pursuant to Rule 3.740(f). If the plaintiff has not obtained a default judgment by said date, this matter will be set for an order to show cause and sanctions may be imposed.

Case No. LC14-00022 – Unifund vs. Retallack

Tentative Ruling: **Appearance required.** The court notes there is no proof of service in the file on the defendant. The court will discuss with the plaintiff why there is no request for publication.

Case No. CV09-000656 – Adams vs. Dept. of Fish and Game

Tentative Ruling: **Appearance required.** The parties should be prepared to set a trial date.

Case No. PR09-00041 – Estate of Casteel

Tentative Ruling: **Appearance required.**

Case No. PR13-00028 – Estate of McGushin

Tentative Ruling: **Appearance required.** OSC on counsel's failure to appear. The court will set the matter for trial.

Case No. CV13-00158 – Gomez vs. Walter

Tentative Ruling: **Appearance required.** The court will discuss the status of the case with the parties.

Case No. FL10-00013 – Mar. of Mattingly

Tentative Ruling: **No appearance required.** The court has signed a stipulation, and therefore, this case management conference is continued to November 24, 2014, at 2:00p.m.

Case No. CV12-00230 – Miles vs. State of California

Tentative Ruling: **No appearance required.** At the request of the plaintiff, this case management conference is continued to November 24, 2014, at 2:00p.m. If a request for dismissal is filed prior to that date, the conference will be vacated.

Case No. V13-00149 – Seneca Gold, LLC vs. Preim

Tentative Ruling: **Appearance required.** The court will discuss the status of the case with the parties.

Case No. LC13-00204 – Williams vs. Brawley

Tentative Ruling: **Appearance required.**