Superior Court of the State of California
County of Orange

TENTATIVE RULINGS FOR DEPARTMENT C32
JUDGE LEE L. GABRIEL, Dept. C32

Date: June 17, 2025

APPEARANCES: Department C32 conducts non-evidentiary proceedings, such as law and motion, remotely, by Zoom videoconference. All counsel and self-represented parties appearing for such hearings must check-in online through the Court's civil video appearance website at https://www.occourts.org/media-relations/civil.html prior to the commencement of their hearing. Once the online check-in is completed, participants will be prompted to join the courtroom's Zoom hearing session. Check-in instructions and instructional video are available at https://www.occourts.org/mediarelations/aci.html. The Court's "Appearance Procedures and Information--Civil Unlimited and Complex" ("Appearance Procedures") and "Guidelines for Remote Appearances" ("Guidelines") are also available at https://www.occourts.org/mediarelations/aci.html.

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- Civil Court Reporter Pooling; and
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These are the Court's tentative rulings. They may become an order if the parties do not appear at the hearing. The Court also might make a different order at the hearing. (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 442, fn. 1.)

If the parties agree to submit on the Court's tentative rulings, please call the Court Clerk to inform the court that all parties submit on the Court's tentative ruling **(657-622-5232)**. The tentative ruling will then become the order of the Court upon a party or parties informing the Court that all parties submit to the Court's tentative ruling.

No filming, broadcasting, photography, or electronic recording is permitted of the video session pursuant to California Rules of Court, rule 1.150 and Orange County Superior Court rule 180.

#	Case Name	Tentative
1	**Montague vs. Richards** **2022-01290148**	**Motion to Appear Pro Hac Vice** The application of attorney Jason P. Gosselin to appear pro hac vice as counsel for Defendant Guaranty Income Life Insurance Company in this matter is hereby GRANTED pursuant to California Rules of Court, rule 9.40.
2	**Krausman vs. Cruisers Pizza Bar Grill LLC** **2023-01361048**	**Motion to Appear Pro Hac Vice** The application of attorney Rachel A. Remke to appear pro hac vice as counsel for Defendant Cosco Products in this matter is hereby CONTINUED to 07/22/2025, at 9:00 a.m. in Dept C32. Counsel is ordered to file a proof of payment to the State Bar of the application fee.
3	**Chairez vs. 7-Eleven Inc.** **2023-01359209**	**Motion to Compel Deposition (Oral or Written)** Plaintiff Anthony Chairez Motion to Compel the Deposition of Defendant 7-Eleven, Inc.'s Person Most Knowledgeable is CONTINUED to 09/16/2025, at 9:00 a.m. in Dept. C32.
4	**Toledo vs. High Noble Safe Company Inc** **2023-01367988**	**Motion to Compel Answers to Special Interrogatories** Plaintiff Jacob Toledo's Motion to Compel Further Responses to Special Interrogatories, Set Two, is MOOT in light of Defense counsel's declaration that amended responses were served on 6/4/24. Plaintiff's request for sanctions is GRANTED. Plaintiff served Special Interrogatories, Set Two ("SROG") on October 28, 2024, via email. (Porron Decl., ¶4, Ex. B.) The parties agreed to extend Defendant's deadline to respond to January 6, 2025. (Porron Decl., ¶5, Ex. F.) Defendant served verified responses via email on January 8, 2025. (Porron Decl., ¶5, Ex. C.) Service of untimely responses waived Defendant's objections. (See Code Civ. Proc., § 2030.290(a).) The parties met and conferred between February 18, 2025 and February 24, 2025. (Porron Decl., ¶¶6-7, Exs. D-E.) While Defendant agreed to stipulate to witness contact information on February 24, 2025, it failed to execute the proposed stipulation, propose any changes, or provide further responses regarding the identity of a comparator key witness. (Porron Decl., ¶7, Ex. E.) Defendant also failed to grant Plaintiff's requests to extend

		the motion deadline to allow the parties additional time to meet and confer. (Porron Decl., ¶8, Ex. E.) Plaintiff timely filed the instant motion on 2/25/25. (See Code Civ. Proc., §§ 2030.300(c), 2016.050, 1010.6(a)(3), 1013.) In lieu of filing an opposition, Defendant filed a declaration and an exhibit indicating Defendant served verified amended responses on 6/4/25. (Kohn Decl., ¶2, Ex. A.) In his reply, Plaintiff argues Defendant's failure to file an opposition constitutes a tacit admission that the motion is meritorious. (See *Herzberg v. County of Plumas* (2005) 133 Cal.App.4th 1, 20, see also *Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1410.) Plaintiff also argues Defendant's amended responses remain materially deficient and do not resolve the dispute because they continue to withhold key contact information for crucial fact witnesses. On this basis, Plaintiff contends the motion is not moot and the court should grant the motion. The court disagrees and finds the motion is MOOT. Missing from Plaintiff's reply and supporting declaration is any indication he met and conferred with Defendant about the amended responses. (See Code Civ. Proc., §§ 2030.300(b)(1), 2016.040.) The parties must meet and confer about the responses served on 6/4/25. Nevertheless, based on the facts recited above, Plaintiff is entitled to recover sanctions. Defendant is ORDERED to pay monetary sanctions to Plaintiff in the amount of $1,900.
5	**Jimenez vs. 321 East Orangewood LLC** **2024-01448482**	**Motion to Strike Portions of Complaint** Defendants 321 East Orangewood LLC, Mashcole Property Management, Inc., and Jackie Bellavia move to strike the allegations and prayer for punitive damages from the operative complaint. Code of Civil Procedure §436 states in part, "The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: Strike out any irrelevant, false, or improper matter inserted in any pleading."

		A plaintiff may recover exemplary damages in an action for the breach of an obligation not arising from contract if plaintiff proves by clear and convincing evidence that a defendant is "guilty of oppression, fraud, or malice." (Civ. Code § 3294, subd. (a).) Relevant here, malice is defined as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code § 3294, subd. (c)(1).) Oppression is defined as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code § 3294, subd. (c)(2).) Punitive damages cannot be pled in conclusory terms, instead the facts supporting a claim for punitive damages must be set out clearly, concisely, and with particularity. (Smith v. Superior Court (1992) 10 Cal.App.4th 1033, 1041-1042.) However, "it has long been recognized that '(t)he distinction between conclusions of law and ultimate facts is not at all clear and involves at most a matter of degree.'" (Perkins v. Superior Court (1981) 117 Cal.App.3d 1, 6.) "What is important is that the complaint as a whole contain sufficient facts to apprise the defendant of the basis upon which the plaintiff is seeking relief." (Id.) California courts have consistently held that punitive damages are permissible in actions for intentional infliction of emotional distress. (See Spinks v. Equity Residential Briarwood Apartments (2009) 171 Cal.App.4th 1004, 1055; Fletcher v. Western National Life Ins. Co. (1970) 10 Cal.App.3d 376.) Further, malice or oppression is a question of fact. (Spinks v. Equity Residential Briarwood Apartments, supra, 171 Cal.App.4th at 1053.) Here, the Complaint contains an unchallenged cause of action for intentional infliction of emotional distress (the fifth cause of action). Having conceded Plaintiff has alleged extreme and outrageous conduct, intended to cause emotional distress, Defendant necessarily concedes allegations asserting malice. Accordingly, the request to strike punitive damages is DENIED. Defendants to file an answer within 20 days. Defendants to give notice.

6	**Mendoza vs. Rivera** **2022-01295096**	**Motion to Strike Portions Of Cross- Complaint** Cross-Defendant Michael Mendoza's Motion to Strike Portions of the Amended Cross-Complaint is GRANTED. Cross-Defendant moves to strike portion of paragraph 2 of the prayer, on page 11 of the First Amended Cross-Complaint, which states: "For punitive damages against Cross-Defendant in an amount sufficient to punish and deter him and others from similar wrongful conduct." Code of Civil Procedure § 436 provides in pertinent part: "The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading." "Irrelevant matter" includes allegations not essential to the claim. (See Code Civ. Proc.§ 431.10(b).) Civil Code Section 3294, subdivision (a) provides for punitive damages: "In an action for breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice. . ." Section 3294(c) defines malice, oppression and fraud as follows: "(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." On November 26, 2024 the court rule on Cross-Defendant Motion to Strike Portion of the Cross-Complaint Granting the Motion to Strike punitive from the complaint, with leave to Amend. On December 20, 2024 Cross-Complainant file an Amended Cross-Complaint asserting causes of action for (1) Trespass, (2) Negligence, (3) Nuisance, and (4) Declaratory Relief.

		In the Amended Cross-Complaint, Cross-Complainant now alleges the same facts, namely that an Amber tree on Cross-defendants property has grown roots and branches extending into her property, causing damage to foundation, the sidewalk and an unreasonable amount of debris. She claims that Cross-defendant has willfully and knowingly allowed this to happen, characterizing his inaction as "willful and knowing disregard." (Amended Cross-Complaint, ¶14.) Cross-Complainant further asserts that Cross-Defendants prolonged failure to address the issue constitutes cruelty, as he knowingly allowed the damage to persist. (Amended Cross-Complaint, ¶17.) The Cross-Complaint further alleges that Cross-Defendant's inaction is malicious, as he was aware that the tree's continued growth would cause worsening damage yet deliberately chose to do nothing. (Amended Cross-Complaint, ¶28.) Additionally, she asserts that Cross-Defendant's knew of serious safety risks but consciously ignored them. (Amended Cross-Complaint, ¶29.) Cross-Complainant then concludes that Cross-Defendant's conduct demonstrates a willful and knowing disregard for her safety and property rights. (Amended Cross-Complaint, ¶ 31.) Cross-Complainant also contends since the filing of the Amended Cross-Complaint, she has been cited by the City of Anaheim for damage to the sidewalks allegedly caused by the Amber tree. Cross-Complainant claims she cannot fix the problem without first addressing the root cause of the problem – the Amber tree roots. As held previously, allowing a tree to grow in Cross-Defendant's front yard without properly maintaining does not constitutes malicious or oppressive conduct. Cross-Complainant's allegations are generally the same as the prior Cross-Complaint, but with the addition of buzz words such as "disregard for the rights and safety of others." But there are no facts to support the conclusion that Cross-Defendant allowed the tree to grow with the intent to cause harm to Cross-Complainant's property or anyone on Cross-Complainant's property. Although Cross-Complainant claims the tree caused significant cracking to sidewalk and foundation, and the overgrown limbs encroached on her property and created an unreasonable amount of debris, such actions do not indicate an intent to cause harm.

		As for the new facts regarding the citation by the City of Anaheim, a citation issued to Cross-Complainant is not evidence of malicious or oppressive conduct by Cross-Defendant. The fact the tree may have caused the sidewalk issues complained of by the City is not evidence Cross-Defendant acted with a conscious disregard for the safety of others. The citation was issued to Cross-Complainant, and not Cross-Defendant. There is no evidence or allegation Cross-Defendant is required under the citation to remediate any problems with the roots of his tree. Accordingly, the motion to strike is GRANTED without leave to amend.
7	**DUNNE vs. OC 405 PARTNERS JOINT VENTURE** **2021-01219445**	**Motion to Deem Facts Admitted** Defendants OC 405 Partners Joint Venture, Orange County Transportation Authority, and the City of Fountain Valley's Motion Deeming the Truth of Facts and Genuineness of Documents Requested in Defendants' Requests for Admission, set one, is GRANTED. The court orders the truth of any matters and genuineness of any documents specified in Defendants' requests for admission, set one, be deemed admitted. (Code Civ. Proc., § 2033.280, subd. (b).) Defendants OC 405 Partners Joint Venture, Orange County Transportation Authority, and the City of Fountain Valley electronically served their requests for admission, set one, on 11/21/24. (Smith Decl., ¶ 9.) Plaintiff is in pro per but has signed a stipulation to consent to electronic service. (ROA 405.) As of 2/11/25, Plaintiff has not served any responses to the discovery. Thus, Plaintiff failed to timely serve responses and did not request an extension in violation of Code of Civil Procedure, § 2033.250, subd. (a). Sanctions are DENIED. Plaintiff did not oppose the Motion. "The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed." (Cal. Rules of Court, rule 3.1348(a).) The Court declines to award sanctions here.

8	**Beverage Visions, LLC vs. Cua** **2024-01417494**	**Demurrer to Complaint** Defendant Beverage Visions LLC'S Demurrer to the Complaint in Intervention of Glenn Abadir (Abadir) is DENIED without prejudice. On 1/21/25, the court granted Abadir leave to file the Complaint in intervention, stating, "Intervenor shall file the Complaint in Intervention, attached to the Motion as Exhibit A, within five court days." Beverage Visions, LLC filed the present motion on 2/25/25. However, the court's electronic docket does not reflect filing of Abadir's Complaint as of this time. It appears the filing clerk rejected the filing of Abadir's Complaint in Intervention on 2/10/25 and 2/13/25 based on the erroneous statement that the motion to intervene had not been heard yet. Therefore, the motion is denied without prejudice as premature. Abadir should now be able to file his pleading. Abadir shall file the Complaint in Intervention within five court days.
9	**Rivera vs. FLW Service Corporation** **2024-01443480**	**Demurrer to Complaint** Defendant Wael Gendy's, named as Wael Guindi, Demurrer to the 5th-9th causes of action in the Complaint is SUSTAINED with 20 days leave to amend. "Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation." (Labor Code § 558.1(a).) The 5th cause of action for failure to pay minimum wage and 6th cause of action for failure to pay overtime are both subject to Labor Code Section 558.1 because they relate to wages and hours of work. The 7th cause of action for failure to provide an itemized statement under Section 226 and 9th causes of action for failure to indemnify under Section 2802 are subject to Section 558.1 because the Sections are enumerated in Section 558.1. The 8th cause of action for failure to pay wages under Sections 201 and 202 are subject to Section 558.1 because

		Plaintiff alleges the violations were willful under Section 203 and Section 203 is enumerated in Section 558.1. "For purposes of this section, the term "other person acting on behalf of an employer" is limited to a natural person who is an owner, director, officer, or managing agent of the employer, and the term "managing agent" has the same meaning as in subdivision (b) of Section 3294 of the Civil Code." (§ 558.1(b).) In *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, the Supreme Court of California ruled the term "managing agent" under Section 3294 includes "only those corporate employees who exercise substantial independent authority and judgment in their corporate decision making so that their decisions ultimately determine corporate policy." (*Id*. at 566-567.) The *White* court determined the defendant was a managing against because she "exercised substantial discretionary authority over vital aspects of [the employer's] business that included managing numerous [8] stores on a daily basis and making significant decisions affecting both store and company policy." (*Id*. at 577.) Here, Plaintiff alleges Gendy is an agent of FLW and was Plaintiff's supervisor. (Compl., ¶ 7, 21.) Plaintiff makes no allegations regarding Gendy's decision making ability within FLW or that Gendy had substantial discretionary authority over vital aspects of FLW. Thus, the allegations are deficient as a matter of law. Therefore, Gendy's demurrer to the 5th-9th causes of action is sustained.
10	**Sheehan vs. Sheehan** **2024-01414691**	**Motion for Preference** Defendant Michael Sheehan's Motion for Trial Preference is GRANTED. Trial is set for 10/10/2025 (**Day 115)** at 9:00 a.m. in Department C32. "(a) A party to a civil action who is over 70 years of age may petition the court for a preference, which the court shall grant if the court makes both of the following findings: [¶] (1) The party has a substantial interest in the action as a whole. [¶] (2) The health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation." (§ 36(a).) "An affidavit submitted in support of a motion for preference under subdivision (a) of Section 36 may be signed by the attorney for the party seeking preference based upon information and belief as to the medical diagnosis and

		prognosis of any party. The affidavit is not admissible for any purpose other than a motion for preference under subdivision (a) of Section 36." (§ 36.5.) Defendant submits his own declaration stating he is 76 years old. (Sheehan Decl., ¶ 2.) This is sufficient evidence to establish his age. Defendant has sufficiently presented evidence of his medical condition. Section 36.5 allows the attorney declaration to be based on information and belief and does not require the attorney to state the source of the information and belief. Ferruzzo's declaration provides Defendant has prostate cancer and a delay will significantly risk prejudicing Defendant's ability to testify or assist in trial preparation. Thus, trial must be set within 120 days of this order. "Upon the granting of such a motion for preference, the court shall set the matter for trial not more than 120 days from that date and there shall be no continuance beyond 120 days from the granting of the motion for preference except for physical disability of a party or a party's attorney, or upon a showing of good cause stated in the record. Any continuance shall be for no more than 15 days and no more than one continuance for physical disability may be granted to any party." (Code Civ. Proc., § 36(f).)
11	**Brun vs. California On-Site Protection Services** **2023-01329275**	**Motion to Enforce Court Order** Plaintiff Richard Brun's Motion to Enforce Court Order is DENIED. On January 7, 2025, this Court issued a monetary sanctions order against Defendant in the amount of $2,650 and $500 to be paid within 20 days, in connection with two motions to compel against Defendant. (ROA 117.) As of the date of the filing of the motion, Defendant has failed to comply with the Court's order and has not paid the monetary sanctions. In Opposition, Defendant contends the failure to timely serve discovery responses was entirely due to the inaction of Defendant's prior counsel. After being notified of the Court Order, Defendant addressed the payment of sanctions with its prior counsel and the insurance carrier who retained such prior counsel in an effort to seek payment for the sanctions. Notwithstanding the fact that prior counsel and carrier did not respond to Defendant's outreach, the sanctions were paid to

		Plaintiff via two separate checks, the first being for $2,650.00 which Plaintiff's counsel confirmed receipt of on May 7, 2025, and the second being for the remaining $500.00 which was issued on May 9, 2025. Plaintiff confirms receipt of the checks, but still seeks sanctions against Defendant for its untimeliness. Based on the foregoing, the Court declines to impose additional sanctions on Defendant as the initial act leading to the sanctions appears to be attributed to its prior counsel. Accordingly, the motion is DENIED and no OSC will be issued.
12	**Doe 1 vs. Anderson** **2023-01325265**	**Motion to Enforce Settlement** Plaintiffs' Motion for an Order and Entry of Judgment Enforcing the Terms of the May 25, 2024 Settlement Agreement and for Interest, Attorney Fees, and Costs is MOOT. On 6/11/25, the parties filed a Stipulation and Proposed Judgment which addresses the issues raised in this motion. Therefore, the Court will sign the stipulated judgment.
14	**Giron Cordova vs. City of Anaheim** **2021-01227584**	**Motion for Summary Judgment and/or Adjudication** Defendant City of Anaheim's Motion for Summary Judgment is DENIED. Plaintiffs' objection no. 1 is SUSTAINED, the remaining objections are OVERRULED. The court declines to rule of Plaintiffs' "general objection" because it is unnumbered, fails to state the page and line number of the material objected to and fails to quote or set forth the objectionable statement or material in violation of California Rules of Court, rule 3.1354(b). Defendant's request for judicial notice is GRANTED. Plaintiffs' request for judicial notice is GRANTED. **Legal Standard**

		"[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) A "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact. . . ." (*Ibid*.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id*. at p. 851.) A defendant moving for summary judgment satisfies his or her initial burden by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) The scope of this burden is determined by the allegations of the plaintiff's complaint. (*FPI Development v. Nakashima* (1991) 231 Cal.App.3d 367, 381-382 [pleadings serve as the outer measure of materiality in a summary judgment motion]; *580 Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, 18-19 [defendant only required to defeat allegations reasonably contained in the complaint].) Once a defendant meets its prima facie showing, the burden shifts to the plaintiff to show by reference to specific facts the existence of a triable issue as to that affirmative defense or cause of action. (*Aguilar*, supra, 25 Cal.4th at p. 850.) To meet this burden, the plaintiff must present substantial and admissible evidence creating a triable issue. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.) Theoretical, imaginative, or speculative submissions are insufficient to stave off summary judgment. (*Doe v. Salesian Society* (2008) 159 Cal.App.4th 474, 481; *Bushling v. Fremont Med. Center* (2004) 117 Cal.App.4th 493, 510.) The court may "not engage in a credibility determination or a weighing of the evidence; instead, all doubts or evidentiary conflicts are to be resolved against the moving party." (*McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1119; Code Civ. Proc., § 437c subd. (e).) **Trivial Defect** "Liability may attach to a governmental entity if there is a dangerous condition on governmental property." (*Huckey v.*

		City of Temecula (2019) 37 Cal.App.5th 1092, 1103–1104, citing Gov. Code §§ 830, 835.) The statute defines a "dangerous condition" to mean "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code, § 830 (a).) "The trivial defect doctrine originated to shield public entities from liability where conditions on public property create a risk 'of such a minor, trivial or insignificant nature in view of the surrounding circumstances ... no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used." (*Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092, 1104; Gov. Code, § 830.2.) When determining whether a given condition of public property is trivial as a matter of law, courts should consider both the physical description of the condition, and "whether there existed any circumstances surrounding the accident which might have rendered the defect more dangerous than its mere abstract [description] would indicate." (*Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 734.) Courts should also consider the physical characteristics of the condition (i.e. size, broken pieces, jagged edges), other conditions surrounding the defect (e.g., whether the defect was concealed, as well as whether some condition obstructed the pedestrian's view of the defect), time and place of the occurrence, the weather at the time of the accident, plaintiff's knowledge of the conditions in the area, whether the defect has caused other accidents, and whether circumstances might either have aggravated or mitigated the risk of injury. (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 567; *Fielder, supra,* 71 Cal.App.3d at p. 734.) "The trivial defect doctrine is not an affirmative defense. It is an aspect of a landowner's duty which a plaintiff must plead and prove. The doctrine permits a court to determine whether a defect is trivial as a matter of law, rather than submitting the question to a jury. Where reasonable minds can reach only one conclusion—that there was no substantial risk of injury—the issue is a question of law, properly resolved by way of summary judgment." (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 567 [cleaned up].)

		"The legal analysis involves several steps. First, the court reviews evidence regarding the type and size of the defect. If that preliminary analysis reveals a trivial defect, the court considers evidence of any additional factors such as the weather, lighting and visibility conditions at the time of the accident, the existence of debris or obstructions, and plaintiff's knowledge of the area. If these additional factors do not indicate the defect was sufficiently dangerous to a reasonably careful person, the court should deem the defect trivial as a matter of law and grant judgment for the landowner." (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 567–568.) Here, the City proffers the following material facts, to show that the alleged dangerous condition was a "trivial defect" as a matter of law: • The incident occurred on November 8, 2020, at around 5:00 p.m. on the sidewalk near 321 W. Katella Avenue in Anaheim, California. (UMF Nos. 1, 26, 51 and 76.) • While Plaintiffs were walking, lightweight debris from a date palm tree ("Subject Tree") fell and purportedly hit Plaintiff Cordova, after which he allegedly fell to the ground and was rendered unconscious. (UMF Nos. 1-2, 26-27, 51-52, and 76-77.) • The day of the incident was a sunny and visible day. (UMF Nos. 2, 27, 52, and 77.) • There had been high wind on the day of the incident. (UMF Nos. 2, 27, 52, and 77.) • The City had not received any pre-incident claims related to the palm trees near 321 W. Katella Avenue that Plaintiffs allege caused the subject incident. (UMF Nos. 15-19, 40-44, 65-69, and 90-94.) Plaintiffs dispute Defendant's description of the debris as "lightweight". Plaintiffs contend Defendant's Exhibit 8, the Anaheim Police Department Incident Report, describes "large chunk of palm tree fell from the top of the tree and struck Cordova, Cordova fell to the ground and remained motionless until paramedics arrived." (Hytrek Decl. ¶ 11, Ex. 8.) Plaintiff further contends that Adrian Bolanos, Branch Manager for BrightView, who provided a declaration in support of the motion, later testified on 12/27/24, that he estimates the debris weighed at least 8 pounds to 10, maybe 12 pounds. (Decl. Yoder ¶ 11, Plaintiff's Ex. 9.)

		Regarding the statement in the police report, the officer's characterization of the size of the debris has no bearing on the weight of the debris. Regarding Bolanos declaration, he states: > The tree which is the subject matter of this action is a date palm. I know this because of my review of photos of the subject tree, which I am informed and believe were taken by the Anaheim Police Department after the subject incident. The debris in the photos consist of date palm tree bark/husks. The debris is lightweight, close to that of cardboard. (Bolanos Decl., ¶ 5.) Plaintiffs objected to this paragraph (see Obj. No. 1) on the grounds that it lacks foundation, lacks personal knowledge, inadmissible speculation and conclusions. Plaintiffs argue Bolanos' contradicted this statement during his subsequent 12/27/24 deposition. Plaintiff cites the following testimony in support of his position: > Q. Do you have any estimate for how much that would weigh, that much of a pineapple? A. I want to say -- just because of the water, it can weigh more, but I want to say at least eight pounds to ten, maybe 12 pounds. (Decl. Yoder ¶ 11, Ex. 9 - 12/27/24 Deposition of Adrian Bolanos ("Bolanos 12/27/24 Depo."), p. 35:12-16) In its response to the objections, Defendant argues there is no inconsistent statement or contradiction, only misrepresentation by Plaintiffs' counsel. Defendant argues Bolanos' declaration concerns a Phoenix dactylifera, commonly known as a date palm, whereas his deposition testimony concerns a Washingtonian palm, commonly known as Mexican Fan Palm. Defendant contends Bolanos is a certified arborist for Brightview and was relying on his experience and expertise in his field similarly to Plaintiffs' expert, Lisa Smith. In its supplemental reply, Defendant reiterates Bolanos' testimony concerns a different species and argues Bolanos' testimony is his personal opinion which carries no foundation as Bolanos never saw or held the subject pineapple husk in person and only speculated the weight

		from pictures and photos. Defendant contends the following testimony represents Bolanos' full testimony: Q: Do you have any estimate for how much that would weigh, that much of a pineapple? A: I want to say – just because of the water, it can weigh more, but I want to say at least eight pounds to ten, maybe 12 pounds. Q: Is that including the water or – A: That's including the water. Q: Including? Have you ever seen that – a chunk of pineapple fall off before? A: Yes, once. The one that I mention it to you, the Washingtonian palm. (Supplemental Declaration of Christopher C. Surh ("Supp Surh Dec") ¶ 4, Ex. 12, Bolanos 12/27/24 Depo, p. 35:12-22.) Defendant's contention regarding Bolanos' deposition lacks merit. The court finds Bolanos' full testimony actually consists of three pages of testimony. (See Decl. Yoder ¶ 11, Ex. 9 - Bolanos 12/27/24 Depo., pp. 32:12-35:22.) A review of these three pages of testimony shows Bolanos' estimate about the weight concerned the debris that fell from the Subject Tree and not about a Washingtonian palm. Bolanos only mentioned the Washingtonian palm to show that the indications of water accumulation in both types of palms is the same. (See, e.g., Bolanos 12/27/24 Depo., pp. 33:12-34:11) He apparently testified earlier in the deposition about water accumulation in Washingtonian palms. (*Ibid*.) Defendant takes contradictory positions in its supplemental filings by arguing on the one hand in its response to the objections that Bolanos, as a certified arborist for Brightview, was relying on his experience and expertise in his field and then on the other hand argue in its supplemental reply that his testimony is his personal opinion which carries no foundation because he never saw or held the subject pineapple husk in person. Defendant's argument in its response to the objections is correct. Bolanos is a certified arborist who testified based on his experience and expertise. Further, his testimony lays a sufficient foundation to give an estimate as to the weight of the debris depicted in the photo being reviewed during the that portion of his deposition.

		Therefore, Bolanos' deposition testimony estimating the weight of the debris as 8 to 12 pounds contradicts his statement in his declaration that "[t]he debris is lightweight, like cardboard." Since this initial analysis does not reveal a trivial defect, the court need not consider evidence of any additional factors. (See *Stathoulis, supra,* 164 Cal.App.4th at pp. 567–568.) **Government Code section 835 - Dangerous Condition** "Liability against a public entity must be based in statute. (See *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 932.) To hold a public entity liable for injury caused by a dangerous condition of (public) property, a plaintiff must prove: (1) that the property was a dangerous condition at the time of the injury, (2) that the injury was proximately caused by the dangerous condition, (3) that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and (4) that either a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition or the public entity had actual or constructive notice of the dangerous condition and sufficient time prior to the injury to have taken measures to protect against the dangerous condition. (Cal. Gov. Code, § 835.) "The existence of a dangerous condition is ordinarily a question of fact but 'can be decided as a matter of law if reasonable minds can come to only one conclusion.'" (*Cerna v. City of Oakland* (2008) 161 Cal. App. 4th 1340, 1347.) *Maintenance of the Subject Tree* Defendant argues Plaintiffs have no evidence that a City employee negligently or wrongfully created the purported dangerous condition under Government Code section 835 subdivision (a), first, because contractors, not City employees, performed the routine maintenance and inspections of the subject tree, which were reasonable and within the standard of care. Defendant proffers the following material facts: • The contractor handling maintenance and tree trimming/pruning of the subject location at or near the time of the incident was BrightView, who utilizes only

		tree care workers with more than five years experience to perform maintenance. (UMF Nos. 8, 33, 58, and 83.) • The International Society of Arboriculture ("ISA") industry standard is to perform date palm maintenance on an approximate annual or bi-annual cycle. (UMF Nos. 7, 32, 57, and 82.) • In the last five years prior to the incident, the Subject Date Palm was pruned/trimmed and inspected during maintenance on or about July 15, 2015; November 10, 2015; May 4, 2016; February 13, 2017; June 22, 2017; April 4, 2018; April 1, 2019; April 30, 2020; and September 1, 2020, which amounts to an approximate annual cycle and twice in the year of the subject incident. (UMF Nos. 6, 31, 56, and 81.) • At the subject location, the trees in the subject area were inspected, maintained and trimmed by experienced tree trimmers as recently as September 1, 2020. (UMF Nos. 6, 8, 31, 33, 56, 58, 81, and 83.) • The kind of inspection and maintenance performed by City's contractors is within the standard of care. (UMF Nos. 4, 29, 54, and 79.) • It is the general practice of BrightView to report any issues or potential dangers to the City, which are then logged into the Arbor Access System. (UMF Nos. 10-11, 35-36, 60-61, and 85-86.) • There were no issues regarding the subject location in the Arbor Access system. (UMF Nos. 13, 38, 63, and 88.) Plaintiffs do not dispute that BrightView was at the location on the dates asserted by Defendant. Plaintiffs instead argue BrightView failed to adequately inspect and/or report the condition of the tree, or that they simply followed the delivery order and pruned at 9&3. (Plaintiff's Response and Evidence ("PRE") Nos. 4, 5, 6; Plaintiff's Additional Material Facts ("PAMF") Nos. 1-34.) Thus, according to Plaintiffs, BrightView did not adhere to the scope of work set out by the city in their Request for bid which requires ["The removal of all dead fronds and other dead plant parts from the trunk. All loose frond sheaths shall be removed along the entire length of the palm trunk."], and similarly the City would have been on notice of this because they are supposed to conduct windshield surveys (i.e., face to face inspections) of the jobs and inspect the work before and after- no evidence this happened has been provided, but invariably the city failed to inspect the tree in September of 2020 because it would have been in the same

		conditions on the day of the incident based on the Date Palm slow growth rate. (PAMF Nos. 1-34.) Plaintiffs also provided a declaration from Lisa Smith, a Board-Certified Master Arborist, who states: Normal weather conditions can easily impact trees. Annual Santa Ana winds are normal and predictable in Anaheim and throughout Orange County. Assessing and maintaining trees and palms for typical wind loads and impacts is a common risk mitigation practice. The wind events during this incident week were typical, and winds ranged from 24 - 45 mph gusts in the Anaheim region, per WeatherSpark. (Smith Decl., ¶13.) She observed the volume of husk debris, as portrayed in the photos provided. I agree with Mr. Bolanos' testimony regarding the weight of debris could be approximately twelve pounds. (Smith Decl., ¶ 14.) Consequences of this palm husk failure is based on the weight and distance of fall, and the larger the debris, and the greater the distance, the greater the impact and consequences to an individual. (Smith Decl., ¶ 16.) Maintaining the palm fronds is only one portion of their complete care in an urban setting. The removed fronds, and resulting husk are also an area for failure, as the contract notes in their language, via "below the crown…report any damage, decay or deterioration" (Smith Decl., ¶ 17.) Based on my review of historical imagery, such as Google Street View, it is clear that the palm trees in question had been exhibiting signs of deterioration for an extended period. The husks and fronds were visibly degrading, deteriorating and loose, indicating a lack of proper maintenance over time. (Smith Decl., ¶ 18.) In my expert opinion, the failure to inspect the palm tree trunk and upper zone just below the crown and observe the obvious deterioration and address the obvious deterioration of the palm trees in September of 2020 was a direct contributing factor to the incident. A basic visual inspection, commonly referred to as a "windshield inspection," would have been sufficient to

			identify the hazardous condition of the palm trees. The location of the incident is no stranger to wind events. This type of inspection is necessary to prevent this type of foreseeable outcome with this species of date palm. I reviewed all documents produced by the city and BrightView, and did not see any evidence of any Level 1, or "windshield inspections" were performed. (Smith Decl., ¶ 19.) The anatomical structure of the palm tree involved in the incident suggests that water accumulation and wind forces may likely played a role in the failure of the large husk. The weight and instability of the decaying husk, combined with the lack of proper maintenance, created a foreseeable risk of the husk becoming dislodged and falling. Husks are impacted by annual rainfall, and natural aging and deterioration over time, the lower, older husks are subject to detachment as they lose their ability to maintain attachment to the trunk. This is a readily known characteristic of date palms, and thus the required specifications in the contract. The combination of aging, weather, annual rainfall collecting in the husks, and wind events allow the detachment of these deteriorated husks each year. Inspecting, monitoring and maintaining these palms are critical to reducing the known hazards and risk associated with this issue. (Smith Decl., ¶ 20.) Based on the slow growth of these Date Palms, the conditions on the date of the incident of the subject date palm, would have been substantially similar to when BrightView was there in September of 2020. The deterioration of the Palm Husks in the area of the pineapple would have indicated to any trained arborist that they needed to be removed or that there was a substantial likelihood they could fall. (Smith Decl., ¶ 21.) In conclusion, the contractor's failure to adhere to the scope of work and industry standards for palm tree maintenance, including the required inspection and reporting of any damage, decay, or deterioration, and removal of deteriorating husks, was a significant factor in the incident. Given the pictures taken by Police of the tree on the date of the incident, identifiable decay in the husks near the crown, and the slow growth of this

		type of date palm, the hazardous condition of the palm tree was readily observable in September of 2020 and should have been addressed to mitigate the risk of such an incident occurring. (Smith Decl., ¶ 22.) The City argues Plaintiffs have failed to establish the fallen pineapple husk from the subject date palm were dead plant parts. The City contends there is no evidence showing that the fallen pineapple husks were dead plant parts which required removal under the Service Agreement. Plaintiffs did not retain any portion of the subject tree including the fallen husk. There is no deposition testimony supporting that the pineapple husks were dead and required removal. Plaintiffs only rely on their expert's opinion in supporting that the pineapple husk were dead or decaying which lacks foundation and calls for speculation, as Plaintiff's expert was not present during the subject incident, and never saw or held the subject pineapple husks in person. As such, according to the City, the above maintenance and inspection standard Plaintiffs are improperly imposing to assert negligence does not apply to the subject pineapple husks because the husks were not dead and did not require removal under the Service Agreement. The City also argues the evidence supports a finding that the subject tree was properly inspected, including but not limited to, Bolanos' testimony that it's the normal thing BrightView does every time it trims date palms to remove dead palm fronds or broken palm fronds or the fruit. (Supp Surh Decl., ¶6, Ex. 13 - Bolanos Depo. pp. 40:13-41:1; Supp Surh Decl., ¶7, Ex. 14 - Bolanos PMK Depo. p. 30:14-23; Supp Surh Decl. ¶ 8, Ex. 15 - Rasmussen Dep. pp. 40:6-41:3.) To the extent the City argues the Smith declaration lacks foundation and calls for speculation, the City did not file objections to the declaration. The court finds Smith's declaration is sufficient to raise a triable issues of material fact as to whether the inspection and maintenance of the subject tree was adequate and whether a dangerous condition existed. *Natural Occurrence – Wind Event* Defendant argues the debris fell from the subject tree because of the wind, over which it has no control.

		Plaintiffs argue in their original opposition that the "Act of God" defense fails because there still exists triable issues of material fact concerning whether Defendant's failure to properly inspect and maintain the palm constitutes a proximate cause of the palm's failure on the evening of the incident. Defendant argues in its original reply the incident was a natural condition to which it is immune under Government Code section 831.2. In their supplemental opposition, Plaintiffs argue the wind on the date of the incident was not anomalous and is part of the reason why the husk removal is in defendant's own contract bid language. Plaintiffs also argue Defendant is not entitled to immunity under section 831.2 because the location of the incident is not unimproved land and applying the immunity based on wind would be contrary to the purpose of the statute and case law. "Section 831.2 was enacted to ensure that public entities will not prohibit public access to recreational areas because of the burden and expense of defending against personal injury suits and of placing such land in a safe condition." (*City of Chico v. Superior Court* (2021) 68 Cal.App.5th 352, 361.) The natural condition immunity statute presents two fact questions: whether a condition is "natural" and whether the property is "unimproved" public property. (*County of San Mateo v. Superior Court* (2017) 13 Cal.App.5th 724, 731.) "The Government Claims Act in general, and *section 831.2* in particular, fail to either define or establish a precise standard for determining when, as the result of developmental activity, public property in its natural state ceases to be unimproved. Courts, however, have required at least some form of artificial physical change in the condition of the property at the location of the injury." (*Alana M. v. State of California* (2016) 245 Cal.App.4th 1482, 1489 [cleaned up].) Here, even assuming the wind on the day of the incident a natural condition contemplated by Government Code section 831.2, Defendant has failed to establish the incident occurred on "unimproved" public property. As Plaintiffs point out, the location of the incident at 321 W. Katella Avenue at the heart of the Resort District in Anaheim California, in front of the Bubba Gump Shrimp Co. Defendants' supplemental reply is

		silent as to this aspect of the natural condition immunity under section 831.2. Therefore, the City has failed to meet it initial burden as to the application of the natural condition immunity. **Notice** "The plaintiff bears the burden of establishing ... the entity had notice of the dangerous condition for a long enough time to protect against the danger." (*Metcalf v. City of San Joaquin* (2008) 42 Cal.4th 1121, 1126.) Plaintiff must show either actual or constructive notice as defined by Government Code section 835.2, which provides in relevant part: (a) A public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of Section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character. (b) A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. "To establish actual notice, '[t]here must be some evidence that the employees had knowledge of the particular dangerous condition in question'; 'it is not enough to show that the [public entity's] employees had a general knowledge' that the condition can sometimes occur." (*Martinez v. City of Beverly Hills* (2021) 71 Cal.App.5th 508, 519 [citation omitted].) A plaintiff can prove actual notice of a dangerous condition if others had been injured in the same location and in the same manner. The opposite is also true, the absence of prior injuries at the location is compelling evidence that the condition did not present a substantial risk of injury when used with due care. (*Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 241, 243; *McKray v. State of California* (1977) 74 Cal.App.3d 59, 62 [no dangerous condition where no accidents occurred during prior five-and-a-half-year period]; *Callahan v. City and County of San Francisco* (1971) 15 Cal.App.3d 374, 379 [given "paucity of accidents" in 4.5 years, "the only conclusion

reasonable men could draw is… [it] did not constitute a dangerous condition for [those] exercising due care"].)

With respect to constructive notice, the second element – the defect be so obvious that it should have been discovered by the public entity – "is critical because it is the public entity's failure to discover and repair an obvious defect that makes it appropriate to impute knowledge of that defect to the entity, which is what renders that entity negligent for failing to correct a defect despite that imputed knowledge. Because it is the failure to discover and repair an obvious defect that renders the public entity negligent (and hence potentially liable for injuries caused by that defect), it becomes relevant whether (1) the entity had a reasonably adequate inspection system in place to inform it whether the property was safe for the use or uses for which it used or intended others to use the public property and for uses that the public entity knew others were making of the public property and (2) the entity operated such an inspection system with due care and still did not discover the defect. Although constructive notice of a defect may be imputed to a public entity that fails to have a reasonably adequate inspection system, constructive notice will not be imputed if the defect is not sufficiently obvious." (*Martinez*, supra, 71 Cal.App.5th at 519–520. [cleaned up].)

Here, it is undisputed that BrightView was at the scene in September 2020, a month prior to the incident. As discussed above, Defendant failed to establish the debris that fell was a trivial defect, and Plaintiffs' expert declaration sufficiently establishes triable issues of fact exist as to whether the inspection and maintenance of the subject tree was adequate and whether a dangerous condition existed. (See Smith Decl., ¶¶ 13-22.) Further, Plaintiffs' expert opines that the conditions on the date of the incident of the subject date palm, would have been substantially similar to when BrightView was there in September of 2020. (Smith Decl., ¶ 21.) Accordingly, Plaintiffs have established a triable issue of material fact as to Defendant's constructive notice of the existence of a dangerous condition.

Government Code section 835.4(b)

Government Code section 835.4 subdivision (b) provides:

> A public entity is not liable under subdivision (b) of Section 835 for injury caused by a dangerous condition

		of its property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury. The application of section 835.4(b) is not a proper subject of a motion for summary judgment. (See Biron v. City of Redding (2014) 225 Cal.App.4th 1264, 1281 ["Reasonableness is a question of fact for the trier of fact, and is determined by weighing the probability and gravity of potential injury against the practicability and cost of the action."].) In any event, for the reasons stated above, a triable issue of material fact exists as to the reasonableness of the City's inspection and maintenance of the subject tree. Based on the foregoing, the Motion for Summary Judgment is DENIED.
15	**Shepherd vs. Shifflett** **2022-01262793**	**Motion for Summary Judgment and/or Adjudication** Defendant DISC Surgery Center at Newport Beach, LLC's Motion for Summary Judgment is DENIED. Plaintiff's "Objections to Separate Statement" (ROA 162) is overruled. Plaintiff must object to specific evidence, not facts. (Cal. Rules of Court, Rule 3.1354.) The Court declines to consider the new exhibits M, N, O, and P submitted by Defendant in reply. The Court similarly declines to consider the surreply filed by Plaintiff. Moreover, even if the Court considered this evidence, it lacks foundation and is not material to the Court's decision. Plaintiff's request for judicial notice is denied. Plaintiff requests judicial notice of various website contents and screen captures, which are not the proper subject of judicial notice.

		(Evid. Code §§ 452, 453.) To the extent these exhibits are properly authenticated, the Court will review them as evidence without taking judicial notice thereof. <u>Summary of Motion:</u> Moving Defendant is a surgical center where Plaintiff was allegedly provided substandard treatment by Defendant Dr. Shifflett. Defendant submits the declaration of its expert Nitin Bhatia, M.D., who generally declares the nursing and non-physician staff of Defendant complied with the applicable standard of care. Defendant's staff was not directly involved in the actual placement, implantation, replacement, or positioning of the artificial discs, and was not responsible for obtaining informed consent or deciding what type of disc to use. (¶¶ 11-13.) Therefore, Dr. Bhatia concludes that Defendant's staff did not cause or contribute to Plaintiff's alleged injuries. Defendant also asserts that, as a surgery center, it was not liable for Dr. Shifflett's alleged negligence based on a theory of vicarious liability or ostensible agency. <u>Legal Standard Re: Ostensible Agency:</u> Civil Code section 2315 states, "An agent has such authority as the principal, actually or ostensibly, confers upon him." Section 2317 states, "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." Section 2334 states, "A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof." "Proof of an agency relationship may be established by evidence of the acts of the parties and their oral and written communications. Proof of authority, either actual or ostensible, likewise may be established by circumstantial evidence." (*van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 573 [cleaned up].) *Franklin v. Santa Barbara Cottage Hospital* (2022) 82 Cal.App.5th 395, 405 (cleaned up) holds:

		"An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (Civ. Code, § 2300.) Ostensible agency may be implied from the facts of a particular case, and if a principal by his acts has led others to believe that he has conferred authority upon an agent, he cannot be heard to assert, as against third parties who have relied thereon in good faith, that he did not intend to confer such power. The doctrine establishing the principles of liability for the acts of an ostensible agent rests on the doctrine of estoppel. The essential elements are representations by the principal, justifiable reliance thereon by a third party, and change of position or injury resulting from such reliance [¶] 'Although a hospital may not control, direct or supervise physicians on its staff, a hospital may be liable for their negligence on an ostensible agency theory, unless (1) the hospital gave the patient actual notice that the treating physicians are not hospital employees, and (2) there is no reason to believe the patient was unable to understand or act on the information, or (3) the patient was treated by his or her personal physician and knew or should have known the true relationship between the hospital and physician.' (*Wicks v. Antelope Valley Healthcare District* (2020) 49 Cal.App.5th 866, 884 [263 Cal.Rptr.3d 397], italics added; see also *Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1038 [208 Cal.Rptr.3d 363] (*Markow*), italics added [" 'unless the patient had some reason to know of the true relationship between the hospital and the physician—i.e., because the hospital gave the patient actual notice or because the patient was treated by his or her personal physician—ostensible agency is readily inferred' " (italics added)]." "Although the existence of an agency relationship is usually a question of fact, it becomes a question of law when the facts can be viewed in only one way. In the physician-hospital-patient context, ostensible agency is a factual issue unless the evidence conclusively indicates that the patient should have known that the treating physician was not the hospital's agent, such as when the patient is treated by his or her personal physician' or received actual notice of the absence of any agency relationship." (*Magallanes v. Doctors Medical Center of Modesto* (2022) 80 Cal.App.5th 914, 923 [cleaned up].) <u>Application:</u>

		Here, moving Defendant is not a hospital, but the surgery center which Dr. Shifflett used to perform surgery on Plaintiff. However, the Court will apply the analogous legal standard set out above regarding an independent physician's ostensible agency relationship with a hospital. In the motion, Defendant cites Plaintiff's deposition testimony in which she stated the surgeries were performed at the surgery center in Newport Beach, not the office where she usually saw Dr. Shifflett in Marina Del Rey. (Plaintiff Depo., p. 106.) However, the mere fact that the consultation and surgery occurred in different locations is not dispositive. In opposition, Plaintiff does not assert that moving Defendant's staff was negligent. However, she contends there is sufficient evidence of ostensible agency to hold moving Defendant liable for the alleged negligence of Dr. Shifflett. Plaintiff declares that she believed that Dr. Shifflett's office (non-party DISC Sports and Spine Center) was "part of a medical practice" including the moving Defendant, DISC Surgery Center at Newport Beach. Based on her knowledge of Dr. Shifflett and his practice at the time, Plaintiff declares, "I believed Dr. Shifflett to be acting on behalf of the DISC surgery centers, including DISC Newport Beach, as part of his practice and understood him to be a doctor at DISC – meaning a doctor and employee of both the clinics and the surgery centers, including DISC Surgery Center at Newport Beach, LLC. I selected Dr. Shifflett as my surgeon knowing that his practice had its own surgical centers where I would receive treatment." (¶ 4.) Plaintiff cites Dr. Shifflett's responses to Requests for Admissions, in which he states he was an equity owner of, and acting as an agent for "DISC," which is defined as "Disc Surgery Center Newport Beach," in relation to his decision to perform surgery on Plaintiff. (Plaintiff's Ex. DD.) Plaintiff's opposition cites various statements on Defendant's website, but Plaintiff fails to authenticate these web pages, and Plaintiff does not declare that she reviewed Defendant's website at the time. In summary, Plaintiff had a preexisting relationship with Dr. Shifflett, who she saw at his office which had a similar name (incorporating "DISC") to the surgery center as part of an

		apparently coordinated patient care and marketing strategy. Plaintiff reasonably believed Dr. Shifflett's practice was part of the "DISC" facilities. Dr. Shifflett admits he is an equity owner and acted as an agent of the surgery center. Defendant relies on *Magallanes v. Doctors Medical Center of Modesto* (2022) 80 Cal.App.5th 914, 917–918, where the court found no ostensible agency. However, there the patient signed a consent form which stated, "Physicians are not employees or agents of the hospital." Here, Defendant does not contend that Plaintiff signed a similar acknowledgement. In reply, Defendant submits photographs of notices which its counsel declares are "posted" in the entry area of the surgery center stating physicians are not employees. However, even if the court were to consider the new evidence in reply, Defendant fails to adequately authenticate the exhibits with evidence that they were present at the time of Plaintiff's surgery. There is no evidence Defendant specifically advised Plaintiff that Dr. Shifflett was not its employee or agent prior to the surgeries performed in its facility. Plaintiff has demonstrated a triable issue of fact as to whether Dr. Shifflett was an agent of moving Defendant, based on evidence including the similar name and branding of Defendants' facilities and her communications with Defendants. Defendant has not shown that Plaintiff was expressly put on notice that Dr. Shifflett was not its agent. Therefore, the motion is denied.
16	**Doe #1 T.M. vs. The General Council of the Assembilies of God** **2022-01299838**	**Motion for Summary Judgment and/or Adjudication** Defendant The General Council of the Assemblies of God's motion for summary judgment or, in the alternative, summary adjudication, as to all claims set forth in plaintiff John Doe 1 T.M.'s Complaint is CONTINUED to 09/02/2025 at 9:00 am in Dept. C32. Plaintiff requests that the hearing on the Motion be continued so that Plaintiff can obtain additional evidence. Code of Civil Procedure section 437c, subdivision (h) provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the

		motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due." "A declaration in support of a request for continuance under section 437c, subdivision (h) must show: '(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]' " (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.) " 'The purpose of the affidavit required by Code of Civil Procedure section 437c, subdivision (h) is to inform the court of outstanding discovery which is necessary to resist the summary judgment motion. [Citations.]' " (*Bahl v. Bank of Am*. (2001) 89 Cal.App.4th 389, 397.) However, "the affiant is not required to show that essential evidence does exist, but only that it may exist." (*Frazee v. Seely* (2002) 95 Cal.App.4th 627, 634.) "The decision whether to grant such a continuance is within the discretion of the trial court. [Citation] But as this court recently noted, the interests at stake are too high to sanction the denial of a continuance without good reason." (*Id.* at pp. 633–34.) Plaintiff has submitted the declaration of his attorney, James West, in support of his request for continuance. Plaintiff states that facts exist but have not yet been obtained in this action that would lead to a denial of Defendant's Motion. Specifically, Plaintiff seeks to depose Defendant's Person Most Knowledgeable on various issues relating to Defendant's involvement in the Royal Ranger's program, notice and knowledge of abuse, policies and procedures relating to sexual misconduct, identifying volunteers and other witnesses, training relating to prevention of sexual abuse, evaluation of safety for children, and information on the perpetrators at issue. (West Decl., ¶ 9.) Plaintiff has served a deposition notice for Defendant's PMK to obtain this information, but the deposition has not yet been completed. (West Decl., ¶ 10.) The Notice of Deposition for Defendant's PMK was served on May 23, 2025, and notices the PMK's deposition for June 23, 2025. (West Decl., ¶ 12, Ex. F.) Plaintiff estimates that the deposition can be completed, along with the production of documents identified in the notice of deposition, within the next forty-five (45) days.

		Based on the foregoing, Plaintiff has sufficiently shown that the facts to be obtained are essential to opposing the motion and that there is reason to believe such facts may exist. Accordingly, the hearing on the Motion is CONTINUED to allow Plaintiff to conduct the additional discovery. Plaintiff to give notice.
17	**Beehive.com. LLC vs. Gleisinger** **2023-01348798**	**Motion for Reconsideration** Defendant Joseph Allan Gleisinger's Motion for Reconsideration of the Court's 2/20/25 order is DENIED. The 2/20/25 order denied Plaintiff's ex parte application for an order shortening time to hear a motion for order appointing a discovery referee. On 4/22/25, the Court granted Plaintiff's request to appoint a discovery referee after hearing the motion. Movant contends it was error to deny the ex parte application without prejudice, thereby allowing Plaintiff to further pursue its request for a discovery referee. Movant has not demonstrated the decision was erroneous or shown the existence of "new or different facts, circumstances, or law" requiring reconsideration of the court's order. (Code Civ. Proc. § 1008(a).) Therefore, the motion is denied.