Proposed Tentative

On September 10, 2024, plaintiff minor Natalie Hernandez, through her guardian ad litem Maribel Aguilera (plaintiff), filed a complaint on standard Judicial Council forms against defendant County of Santa Barbara (defendant), advancing causes of action for general negligence and premises liability. On September 29, 2023, at approximately 3:15 p.m., plaintiff, who was 6 years old at the time, was walking on a sidewalk on Harp Road, near 119 E. Clark Ave., Orcutt, at a "normal pace" when she "tripped on a section of sidewalk which was lifted to an unsafe level in height and fell. Plaintiff hit her chin so hard on the pavement that she suffered a laceration." "Plaintiff has sustained injuries, special damages and general damages . . . ." A CMC is scheduled for January 21, 2025.

Defendant has filed a demurrer to the first cause of action for general negligence. Defendant argues that plaintiff, under the Government Claims Act,[1] cannot state a general negligence cause of action under common law principles against a state agency, for public entity liability must be based on a specific statute. Defendant also challenges the "Doe" designations as to both causes of actions. According to defendant: "Plaintiff's [c]omplaint alleges causes of action against Does 1-10. Neither the first cause of action for general negligence nor the second cause of action for premises liability asserts any allegation against a "Doe" defendant . . . . The lack of factual allegation in the [c]omplaint fails to state facts sufficient to establish a cause of action against these alleged [D]oe defendants, or any County employee. No act or omission of an individual has been specified, and thus, no facts have been alleged to establish a cause of action against the Doe defendant or a County employee. Merely checking a box on the form does not save the [c]omplaint from this defect. Thus, the Doe defendants named should be dismissed from the [c]omplaint."

Plaintiff filed a separate opposition to the demurrer and motion to strike on November 18, 2024. Defendant filed a reply and a 63-page request for judicial notice.

The court will first address defendant's request for judicial notice; it will then address the merits of defendant's demurrer, and then the merits of its motion to strike. It will finish with a summary of the conclusions reached.

A) Request for Judicial Notice with Reply

[1] County references the "Government Tort Claims Act" in its motion work. The claim filing requirements of this statute, usually referred to as the Government Tort Claims Act or the Tort Claims Act "are not limited to tort claims, but extend also to claims for money or damages based on contract [citation], and 'Government Claims Act' is therefore a more appropriate label than Tort Claims Act." (*Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139, 1147, fn. 1.)

Defendant asks the court to take judicial notice of the government claim letter and exhibits plaintiff filed with the defendant on March 27, 2024, which in turn contains Exhibits A to U.

The issue is not whether the document is subject to judicial notice. ***It is.*** The issue is whether it is fair to ask the court to take judicial notice of documents at the time the reply is filed. ***It is not.*** It is unfair for the moving party to provide these materials after plaintiff's opposition has been filed. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [" 'Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant,' " citing *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11].) No good reason can be seen to excuse the delay. (*Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1022; see *Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 744 [denying request for judicial notice in reply brief].) The court denies defendant's belated request for judicial notice submitted with the reply.

B) Demurrer

Before addressing the merits, it is important to recognize what is ***not*** being challenged, for this helps frame the issues that have been raised and provides guidance to the court for ultimate resolution. Defendant does not challenge the sufficiency of the factual allegations offered to support the second cause of action for premises liability based on an unsafe or defective sidewalk, pursuant to Government Code[2] section 835, subdivision (b).[3] (See, e.g., *People ex. Rel. Dept. of Transportation v. Superior Court* (1992) 5 Cal.App.4th 1480, 1484-1485 [a cause of action for dangerous condition of public property must allege a dangerous condition of public property, a proximate causal connection between the condition and the injury sustained, a reasonably foreseeable risk that the kind of injury that occurred would result from the dangerous condition, and that the entity either created the condition or had actual notice or constructive notice of its existence, and there was sufficient time before the injury for it to have taken remedial action].) Defendant does not contend that plaintiff's allegations contained on the

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[2] All further statutory references are to the Government Code unless otherwise indicated.

[3] This provision provides in relevant part that except as provided by statute, "a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and . . . (b) The public entity had actual or constructive notice that created a reasonably foreseeable risk of injury, and "[t]he public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." Plaintiff does not allege that the condition was created by the employee of defendant public entity, as contemplated under Government Code section 835, subdivision (a) (for the box on the Judicial Council form is not checked), but that it was instead created by a third party. (See, e.g., *Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 836 [§ 835, subds. (a)and (b) address two different types of cases, based on who created the dangerous condition; all suits brought on account of dangerous conditions created by the entity will be brought under subd. (a), while a dangerous condition not created by the entity, or its employees is brought under subd. (b)].)

Judicial Council form as to this cause of action are inadequate or require amendment. (*Id*. at p. 1486).

That being said, it also seems evident that the first cause of action for "general negligence" is not predicated on or otherwise intended to mirror the premises liability cause of action per section 835, subdivision (b), discussed above, but seems predicated (at least as pleaded) on a common law negligence theory.[4] Further, it is settled that in California, there is no common law government liability for damages arising out of torts, even if those damages are precipitated by the negligence of a public employee. This rule is codified in section 815, subdivision (a), which provides in pertinent part: "Except as otherwise provided by statute: [¶][a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." Stated slightly differently, under the Government Claims Act, a public entity may be held liable only if a statute declares that it may. (*Odello Bros. v. County of Monterey* (1998) 63 Cal.App.4th 778, 792; *Datil v. City of Los Angeles* (1968) 263 Cal.App.2d 655, 660; see *McCarty v. State of California Dept. of Tranp*. (2008) 164 Cal.App.4th 955, 977 ["[A] public entity cannot be held liable for common law negligence"].) As our high court has observed, a public entity can only be held liable if there is a statutory basis for liability, such as section 835, a component of the Government Claims Act; a public entity cannot be sued for common law negligence independent of Government Claims Act, such as Civil Code section 1714, which creates the general duty of care. (*Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 897; *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1183 [tort liability of public entities cannot be based on Civil Code section 1714, but on a specific statute such as section 835].)

Plaintiff in opposition claims that the first cause of action for negligence is "proper" because it is predicated on section 815.2. This provision reads in full as follows: "(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative. [¶] (b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." Plaintiff then cites to *Torsiello v. Oakland Unified School District* (1987) 197 Cal.App.3d 41, *Roe v. Hesperia Unified School District* (2022) 85 Cal.App.5th 13, and *Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340.

The operative pleading does not reference or even mention section 815.2. Further, there is nothing in the first cause of action that remotely suggests defendant public entity's vicarious

[4] One need only compare the two causes of action as pleaded to see why this is so. In the first cause of action, plaintiff simply alleges the dangerous condition, relying so it appears on the general duty of care pursuant to Civil Code section 1714, which codifies common law principles of negligence. (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1183.) By contrast, the second cause of action for premises liability is expressly tied to the elements of Government Code section 835.

liability is based on the tortious acts and/or omissions of its employees committed within the scope of the employment under the circumstances in which the employee would be personally liable for the injuries. Of course, the existence and extent of an entity's vicarious liability under section 815.2, subdivision (a) will be determined by the scope of the duty legally attributed the employees. This has not been done with the factual specificity required to establish statutory liability, and not one of the three cases cited by plaintiff involved a public entity vicarious liability for a dangerous condition of property based on an employee's breach of duty as contemplated by section 815.2 (*Torsiello, supra*, 197 Cal.App.3d at p 44-45 [basis of liability predicated on theory that teacher employed by school district failed to supervise student]; *Roe, supra*, 85 Cal.App.5th at p. 21 [failure to supervise janitor who sexually abused children]; *Cerna, supra*, 161 Cal.App.4th at p. 1347 [public entity's liability based on dangerous condition per Government Code, § 835 only, without mention of vicarious liability under § 815.2].)

Further, *and more dispositively*, plaintiff cannot *as a matter of law* establish vicarious liability of a public entity for a dangerous condition (such as sidewalk, as is the case here) based on negligence under section 815.2, as he claims, per *Longfellow v. County of San Luis Obispo County* (1983) 144 Cal.3d 379. There, plaintiff fell while walking on a sidewalk within the city limits of the City of Atascadero. The plaintiff brought six causes of action, including 1) premises liability under section 835; 2) negligence pursuant to section 815.2, which "imposes vicarious liability upon public entities for tortious acts or omission of the employees," unless the employees are immune; 3) nuisance; 4) pursuant to section 815.6, which imposes liability on a public entity for injury if it fails to discharge a mandatory duty imposed by an enactment that is designed to protect against of a particular kind of injury; 5) breach of contract; and 6) "all of the above." (*Id.* at p. 383.) The trial court sustained defendant's demurrer as to all six causes of action without leave to amend.

As relevant for our purposes, the *Longfellow* court (in an opinion written by our own appellate court) affirmed the trial court's decision to sustain the demurrer without leave to amend as to the second cause of action for negligence per section 815. 2, the very provision plaintiff relies upon in opposition, as follows: "With respect to the plaintiff's cause of action pursuant to section 815.2 of the Government Code, the law was settled in *Van Kempen v. Hayward Area Park, etc., District* (1972) 23 Cal.App.3d 822 [], ***that public entity liability for property defects is not governed by the general rule of vicarious liability provided in section 815.2, but rather by provisions in sections 830 to 835.4 of the Government Code***. A public employee is not liable for injuries caused by a condition of public property where such conditions exist because of any act or omission of such employee within the scope of his employment. ([] § 840[5].) This is specifically what the plaintiffs allege in this cause of action. That is, a dangerous condition of public property existed which should have been repaired by an employee of the County working

[5] This provision provides that except as provided in this article, "a public employee *is not liable for injury caused by a condition of public property* where such condition exists because of any act or omission of such employee within the scope of his employment." (Italics added.)

within the scope of his employment and that, therefore, the County may be vicariously liable for the employee's failure to act. However, since the employee is immune, the public entity cannot be held liable for the acts of the employee and plaintiff have no such cause of action." (*Id.* at p. 383, emphasis added.)

Longfellow has obvious import here; because public employees are not liable for dangerous conditions on public property, public employers (such as defendant) cannot be held vicariously liable for negligence under section 815.2 for their employees' actions with respect to such conditions. Not only has plaintiff failed to state a *factual* basis for liability under section 815.2, but plaintiff is also precluded from articulating such a theory pursuant to section 815.2 *as a matter of law*, for public employees are immune.

For these reasons, the court sustains the demurrer without leave to amend as to the first cause of action for negligence.

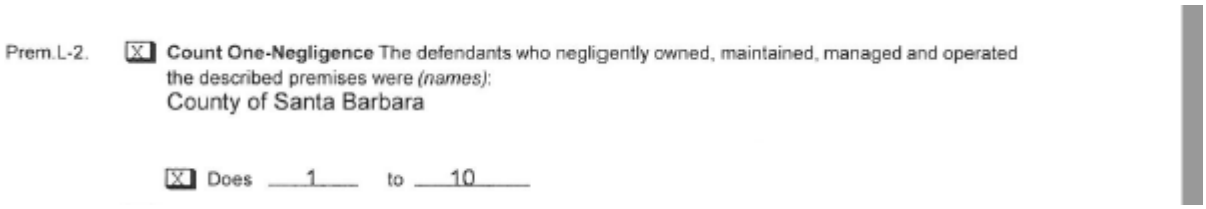
The court overrules defendant's demurrer to the effect that there is an insufficient factual predicate to support the "Doe" defendants (at least at this stage) associated with the second cause of action for premises liability. Unquestionably, because public entity liability is statutory in nature, facts material to the existence of such liability must be pleaded with particularly. (*C.A. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872, citing *Lopez v. Southern California Rapid Transit District* (1985) 40 Cal.3d 780, 795.) But defendant fails to explain why the sufficient particularity offered to support the cause of action against the public entity itself (and *not challenged by defendant*) somehow becomes insufficient when applied to the putative Doe defendants. In addition to the above allegations associated with the premises liability cause of action per section 835, subdivision (b), plaintiff alleges in the premises liability cause of action that the defendants (which are the Doe defendants 1 to 10) "were the agents and employees of the other defendant and acted within the scope of the agency" (being, presumably, employees of defendant). Of course, it is not enough simply to name "Doe" defendants; rather the complaint must allege they were responsible for the acts complained of, which has occurred here. Compliance is relatively simple – generally accomplished usually by alleging that the wrongful acts were committed by "defendants and each of them" or something similar. (*Winding Creek v. McGlashan* (1996) 44 Cal.App.4th 933, 941.) That is what has occurred here.[6]

[6] Defendant fails to cite to one case in which the court has found the allegations against a named defendant proper, but those same allegations are inadequate or deficient when applied to a Doe defendant. That perhaps is not surprising, for defendant's arguments would seemingly undermine the viability of the "Doe defendant" procedure itself. It is hard to allege a specific act or omission without knowing the individual employee's identity. It seems sufficient to allege – as was done here – that defendant and those who were its agents and who acted within its scope alleged committed premises liability under section 835, subdivision (b). As defendant goes so go the Doe defendant employees (at least for pleading purposes).

The court sustains the demurrer to the first cause of action without leave to amend; the court overrules defendant's demurrer to the Doe defendant allegations associated with the second cause of action for premises liability.

C) <u>Motion to Strike</u>

Defendant asks the court to strike the allegations contained on page 5 of the operative pleading, under the heading "Prem.L-2," which reads as follows:


Prem.L-2. ☒ **Count One-Negligence** The defendants who negligently owned, maintained, managed and operated the described premises were *(names)*:
County of Santa Barbara

☒ Does 1 to 10

Defendant's arguments in support of the motion to strike are the same arguments advanced in support of its demurrer to the first cause of action – this language, like the first cause of action itself, relies on a negligence theory that cannot be advanced as to a public entity. As the first cause of action is ineffectual, any reference to it in the second cause of action is also ineffectual. The court agrees that this allegation should be stricken for the same reasons it sustained the demurrer without leave to amend as to the first cause of action.

Nothing in plaintiff's opposition casts doubt on this conclusion. Plaintiff simply incorporates the arguments it advanced in opposition to demurrer. As those arguments were unavailing in that context, they are unavailing here.

The court grants defendant's motion to strike the above language from the operative pleading without leave to amend.

D) <u>Summary</u>

- The court denies defendant's judicial notice request filed with the reply.
- The court sustains defendant's demurrer to the first cause of action for negligence *without* leave to amend; it overrules defendant's demurrer to the second cause of action based on premises liability as to the "Doe defendant" allegations.
- The court grants defendant's motion to strike the language associated with "Prem. L-2" from the complaint, without leave to amend.
- The court directs plaintiff to file an amended pleading with the above removed. Defendant is directed to file an answer within 30 days after the amended pleading has been filed.