**PROPOSED TENTATIVE**

The operative pleading was filed on November 7, 2022, by plaintiff Sharon McWhorter against defendant Flynn Restaurant Group and GKT Central Towne Square, advancing two causes of action – negligence and premises liability. On May 30, 2021, while exiting the Applebee's restaurant in Lompoc, plaintiff tripped and fell while crossing the corner of a planter near the front door of the restaurant. The operative pleading explains broadly that plaintiff was on defendants' premises and "sustained injuries and damages . . . ." Plaintiff has substituted defendant Apple MidCal, LLC for Doe 1, and Allweather Landscape Maintenance, Inc. for Doe 2. GKT Central Towne has filed a cross complaint against Allweather Landscape, Inc., and Allweather Landscape Maintenance, Inc. for indemnity, contribution, and declaratory relief. Defendant Flynn Restaurant Group was dismissed on October 26, 2023. GKT Central Town Square, LLC, obtained entry of default against Allweather Landscape Maintenance, Inc. on October 9, 2024.

Defendant Apple MidCal, LLC (owner of the restaurant) has filed summary judgment, or in the alternative, summary adjudication, as to both causes of action. Defendant observes that the entirety of plaintiff's accident/fall was captured on video surveillance, and has submitted a copy of the footage with the court. The video surveillance shows that plaintiff stepped off the paved portion of the walkway into the landscaped area, which is where she tripped, falling forward onto the sidewalk. As a result, defendant contends it is not liable as a matter of law because 1) plaintiff cannot establish a breach of duty or causation, either because there was no notice of any dangerous condition, and/or because it was the landlord, not Apple MidCal LLC, that had a duty to maintain the sidewalk and walking area; and 2) any danger was "open and obvious" which defeats both causes of action. Defendant also contends that there are no disputed issues of material fact that any "design flaw" prevented plaintiff from seeing the "sidewalk/planter area configuration." Plaintiff has filed opposition, and defendant has filed a reply. The court has examined all briefing and separately reviewed the video surveillance footage submitted by defendant., which is approximately 35 minutes 57 seconds long.

The following facts are undisputed based on an examination of the parties' separate statements. On May 30, 2021, plaintiff entered Applebee's restaurant, accompanied by her friend Nyla Simmons. Plaintiff did not "pay attention" to the flowerbed or the landscaped area as she entered. After approximately 10 minutes inside the restaurant, plaintiff and Ms. Simmons exited from the same door they had entered; plaintiff exited first, with Ms. Simmons just behind her. Upon exiting, Ms. Simmons walked away from the planter area, staying on the paved cement, while plaintiff steps down into the corner of the planter. Plaintiff "was not paying attention to where Ms. Simmons was walking because her focus was on the parking lot." Plaintiff stepped off the sidewalk and into the corner of the planter area, lost her balance, and fell forward. No people were on the path, and at issue is the approximate 3-inch drop between the sidewalk/paved area and the planter. The video reveals that plaintiff crossed the far left-hand corner of the planter as one stands looking out from the restaurant.

The court will first examine defendant's request for judicial notice. It will address both parties' separately filed evidentiary objections, outline the relevant legal principles that frame the

issues to be decided, and then examine the merits of defendant's relevant legal challenges. The court will conclude with a summary of its conclusions.

**A) Defendant's Request for Judicial Notice Submitted with Its Reply**

Defendant with its reply asks the court to grant judicial notice of "ASTM Standard F 1637-95," entitled "Standard Practice for Safe Walking Surfaces." This document apparently is from the "American Society for Testing and Materials." It is settled that a court has discretion to consider new evidence submitted in a reply summary judgment/adjudication motion, so long as the opposing party has notice and an opportunity to respond. (*Los Angeles Unified School District v. Torres Construction Corp.* (2020) 57 Cal.App.5th 480, 499.) That being said, evidence which is used to fill gaps in the original evidence created by the opposition is particularly appropriate to consider in reply. (*Ibid*.) The court will grant the request for judicial notice as it determines there is little prejudice to plaintiff in doing so at this time.

**B) Evidentiary Objections**

Plaintiff has advanced three (3) evidentiary objections to defendant's proffer, while defendant has advanced ten (10) evidentiary objections to plaintiff's proffer. Each set will be examined separately.

*1) Plaintiff's Evidentiary Objections/Defendant's Responses*

The court overrules plaintiff's Objection No. 1, which involves a challenge to the video surveillance evidence offered by plaintiff. The video does not contain hearsay (and is itself not hearsay). Further, the court finds the video surveillance to be self-authenticating pursuant to Evidence Code section 1421, as it is what it purports to be.

The court overrules Objection No. 2, which is made to Exhibit I to Ms. Mazantez's declaration (defendant's own responses made to responses to plaintiff's requests for production). Plaintiff fails to identity any specific statement that is hearsay; further, as the objections are vague and conclusory, the objection is overruled. The court finds that defendant can rely on its own responses to requests for production, and thus have been properly submitted. Plaintiff's citation to the statutory provision for requests for admission is misplaced.

Objection No. 3 made to Exhibit P of Ms. Mazantez's declaration, which include co-defendant GKT Towne Square LLC's responses to plaintiff's special interrogatories, set one, is sustained. Code of Civil Procedure section 2030.410[1] makes it clear that while use of answers to interrogatories may be used by any party other than the responding party, they can only be used "against the responding party." Here, the responding party was GKT Central Town Square, but its responses are not being used against it; they are being used against plaintiff. Defendant does not address the plain meaning of the statutory language in its response.

[1] This provision provides in relevant part as follows: "At the trial or any other hearing in the action, so far as admissible under the rules of evidence, the propounding party or any party other than the responding party may use any answer or part of an answer to an interrogatory ***only against the responding party.*** . . ." (Emphasis added.)

*2) Defendant's Evidentiary Objections*

The court overrules defendant's evidentiary objections Nos. 1, 2, 3, 4, 6, 7, and 8, made to plaintiff's expert Brad Avrit's declaration. The statements that have been challenged do not lack personal knowledge (and thus lack foundation), are not speculative, are not impermissibly conclusory and incomplete, and do not involve impermissible legal conclusions, but opinions based on his expertise that would be admissible at trial.

The court overrules defendant's evidentiary objection No. 5 to the deposition testimony of Tamatha Sloan, Exhibit 5 to plaintiff's evidentiary proffer. Ms. Sloan, based on her 25 years of experience in leasing retail space, indicated that "it's apparent that people have walked through this area" (this area being the location where plaintiff tripped). She indicated during the deposition that "it's a clear pathway that people are using." Defendant did not object to the statement at the time it was made, and based on Ms. Sloan's experience, and her review photographs that were given to her just before the statement, she came to this conclusion. There is a sufficient basis in the record to support her statement, and it does not appear speculative.

The court overrules defendant's evidentiary objection No. 9 to Exhibit 3 of plaintiff's evidentiary proffer (the deposition testimony of Jasmine Preston-Govea, who was an employee at defendant's Lompoc restaurant), as well the deposition testimony of Mr. Todd Rapper, who was the manager of restaurant at which plaintiff fell. Both testified to their post-accident remedial efforts by filling in the area where plaintiff tripped because the manager, because Mr. Raper, "didn't want an incident like this to happen again." The court agrees that this information is inadmissible pursuant to Evidence Code section 1151 to show that defendant was negligent. However, it is admissible for ***other*** purposes, such as control, as discussed later in this order. (See, e.g., fn. 3, *infra*). For this reason, the court overrules the objection.

The court sustains defendant's evidentiary objection No. 10 to the declaration of Brad Avrit, to the extent Mr. Avrit declares that defendant had prior knowledge of the unsafe condition, as well as the ability to remedy it. He has no personal knowledge of this, and it seems beyond the permissible ken of an expert; it amounts to a legal conclusion in the guise of an expert opinion, is not beyond the common experience of trier of fact, and offers nothing of substance. (Evid. Code, § 802; *King v. State of California* (2015) 242 Cal.App.4th 265, 293.)

**C) Legal Background**

" 'The elements of a cause of action for premises liability are the same as those for negligence.' " (*Jones v. Awad* (2019) 39 Cal.App.5th 1200, 1207.) In both, plaintiff must prove duty, breach of duty, causation, and damages. (*Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 446; see *Nicoletti v. Kest* (2023) 97 Cal.App.5th 140, 145.) Additionally a landowner must " 'maintain land in [its] possession and control in a reasonably safe condition.' " (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1156, 1160; *Nicoletti, supra,* 97 Cal.App.5th at p. 145.) The duty arising from possession and control of property is adherence to the same standard of care that applies to negligence causes of action. (*Kenner v. Superior Court* (2016) 1 Cal.5th 1132, 1158.) It is settled, as relevant for our purposes, that one who invites

another to do business with him owes to the invitee the duty to exercise reasonable care to prevent his being injured "on the premises." The physical area encompassed by the term "the premises" does not, however, coincide with area to which the inviters' possesses a title or lease. (*Id.* at p. 1159 [we have never held that the physical or spatial boundaries of a property define the scope of a landowner's liability].) The duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of harm. (*Id*. at p. 1159.) That being said, " '. . . simple maintenance of an adjoining strip of land owned by another does not constitute control over that property. Although evidence of maintenance is considered 'relevant to the issue of control," a simple act of mowing on adjacent property, for example, or otherwise performing minimal, neighborly maintenance of property owned by another, will not, standing alone, constitute an exercise of control over the property. (*Contreras v. Anderson* (1997) 59 Cal.App.4th 188, 198-199; but see *Johnston v. De La Guerra Properties, Inc.*(1946) 28 Cal.2d 394, 401 [restaurant tenant exercised control over lighting of the approach to a side entrance to a building, inviting customers to use that entryway, but failed to warn a business invitee of a dangerous condition on this path]; *Pappas v. Carson* (1975) 50 Cal.App.3d 268-269 [tenant who installed and had control over electrical outlets]; *Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 831–832 [a tenant may be liable for an area outside the strict limits of his own tenancy if he assumes control over it].) In the end, it is error to grant summary judgment/adjudication when triable issues of material fact exist as to whether defendants controlled the property on which the alleged negligence occurred. (*Alcaraz, supra*, 14 Cal.4th at p. 1170, fn. 6; see CACI 1002 [instruction to jury on determining extent of control for property that is not actually owned or leased by defendants].)

There must be an unsafe or dangerous condition on the property before liability can be imposed. A "dangerous condition" is "one which a person of ordinary prudence should have foreseen would appreciably enhance the risk of harm." (*Constance B. v. State of California* (1986) 178 Cal.App.3d 200, 209.) Whether a particular condition is a dangerous condition is generally a question of fact unless reasonable minds could come to only one conclusion on the issue. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1133.)

Further, the defendant must have known or through exercise of reasonable care, should have known, about the dangerous condition, and failed to repair the condition, protect against the harm from the condition, or give adequate warning of the condition. (CACI 1003.) If an unsafe condition of the property is so obvious that a person could reasonably be expected to observe it, then the one who controls the property does not have to warn others about the dangerous condition. However, the person who controls the property still must use reasonable care to protect against the risk of harm that is foreseeable that the condition may cause injury to someone who because of necessity encounters the condition. (CACI 1004.) "Foreseeability of harm is typically absent when a dangerous condition is open and obvious. 'Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a

warning, and the landowner is under no further duty to remedy or warn of the condition.' In that situation, owners and possessors of land are entitled to assume others will 'perceive the obvious' and take action to avoid the dangerous condition." (*Jacobs, supra,* 14 Cal.App.5th at p. 447, internal citations omitted.) That being said, "[t]here may be a duty of care owed even where a dangerous condition is open and obvious, when 'it is foreseeable that the danger may cause injury despite the fact that it is obvious (e.g., when necessity requires persons to encounter it).' In other words, 'the obviousness of the condition and its dangerousness … will not negate a duty of care when it is foreseeable that, because of necessity or other circumstances, a person may choose to encounter the condition.' " (*Montes v. Young Men's Christian Assn. of Glendale, California* (2022) 81 Cal.App.5th 1134, 1140.)

**D) Merits**

With this legal background, the court will address each of defendant's arguments advanced in his memorandum of points and authorities and separate statement.

Defendant initially claims that it has no duty to maintain the sidewalks or landscaping just outside the area of the door (or more specifically, that area immediately adjacent to the cement walkway where plaintiff tripped) pursuant to the lease agreement defendant had with GKT Central Towne Square, LLC. The court is not persuaded. As noted above, it is not the legal ownership or terms of the lease that always defines the area of responsible, but whether defendant had control of the area in question. Control alone is enough. (*Alcaraz, supra,* 14 Cal.4th at p. 1162.) It seems clear to the court that the area in question (as part of the planter) may well have been part of the ingress and egress path customers used when entering or leaving the restaurant, for it is settled that such areas can be considered part of the area within the retainer's control. (*Alcaraz, supra,* 14 Cal.4t at p. 1158, citing *Schwartz v. Helms Bakery Limited* (1967) 67 Cal.2d 232, 239.)[2] As *Alcaraz* emphasized, such control involves some sort of "affirmative action" or "assertive controlling conduct" such that it is fair to hold the defendant responsible for the injuries. (*Contreras, supra,* 59 Cal.App.4th at pp. 200-201.)

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[2] In reply, defendant contends that it is pure speculation to conclude that it was reasonably foreseeable for a person in defendant's shoes to anticipate pedestrians would walk through the uncovered area at issue. The argument is not persuasive. One need look no further than Ms. Sloan's deposition testimony (detailed above in defendant's evidentiary objection), which suggests (based on her review of the pictures) that customers/pedestrians that people were using the area in question as a walkway, meaning defendant could anticipate people would use the area. And as expressly noted in *Chance v. Lawry* (1962) 58 Cal.2d 368, it is a general rule that a proprietor who knows of, or by the exercise of reasonable care could discover, an artificial condition upon the premises which he should foresee exposes his business visitors to an unreasonable risk, and who has no basis for believing that they will discover the condition or realize the risk involved, is under a duty to exercise ordinary care either to make the condition reasonably safe for their use or to give a warning adequate to enable them to avoid the harm. (*Id.* at p. 373.) Common sense, and perhaps human experience, also suggest that pedestrians would traverse the planter area at issue – and it is simply not speculative to foresee that occurring, notably as the court is required to assess the nonmoving' s party's evidence less rigorously that that of the moving party. (See, e.g., *Miller v. Campbell, Warburton, Fitzsimmons, Smith, Mendel & Pastore* (2008) 162 Cal.App.4th 1331, 1338 [all inferences and conflicts in the evidence must be viewed most favorably to the nonmoving party].)

Further, there are disputed issues of material fact concerning the degree of defendant's affirmative action or assertive control over the area in question. It is clear from the video surveillance and the photographs that the area where plaintiff tripped is very near the front entrance of the restaurant, making it arguably (as a practical matter) part of the ingress and egress to and from the restaurant. During the deposition of Mr. Kevin McCafferty, the person designated by defendant as the most knowledgeable to discuss the matter, Mr. McCafferty was asked the following question: "[I]f an Applebee's employee were to notice that the – there was a lack of mulch in the landscaping area that left it uneven with the pavement, would they be able to, under Applebee's policies, go out on their own and make sure that was filled?" Mr. McCafferty indicated they would and could, but "it's not part of their responsibility." "If they wanted to, that would be something that they would be able to do . . . ," and no permission was required. Further, Mr. McCafferty expressly testified that managers at the Lompoc restaurant were/are responsible for inspecting that area in order to determine whether the area was well maintained; and that managers "do general surveying of the building," "walk the restaurant, the exterior to make sure there's not – no obstacles for the guests walking in the building."

This point is supported by defendant's actions taken *after* the accident. Immediately after Ms. McWhorter's fall, the manager of the Lompoc Applebee's restaurant manager Mr. Todd Raper instructed staff (including Jasmine Preston-Govea, Patrick Trayhill, and others) to fill in the area with mulch "so there wouldn't be another incident in the same spot." Ms. Preston-Govea's testified to this in her deposition.[3] There also is evidence that in 2021 defendant added mulch to the exact area where the accident occurred. (See Exhibit F of Brad Avrit's Dec.) A jury could determine, given the type and nature of the condition at issue, its close proximity to the front door of defendant's restaurant, and the general scope of managerial responsibility at Applebee restaurant to ensure the safety of its customers, including pre- and post-accident conduct, that defendants retained sufficient control over the area to establish a duty to remediate any potential danger. Nothing offered in defendant's reply undermines these conclusions.

The court denies summary judgment and adjudication on this ground.

Defendant claims next that it had no notice of any danger caused by the approximate 3-inch drop from the pavement into the planter because, in defendant's words, there were no prior accidents or incidents thereof. The court is also not persuaded. First, our courts have concluded that prior notice of an accident is not a perquisite to construction knowledge of that condition. "The plaintiff need not show actual knowledge where evidence suggests that the dangerous condition was present for a sufficient period of time to charge the owner with constructive

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[3] The court is sensitive to the use of this evidence in a post-accident context. It has long been settled in California that precautions taken and repairs made after the happening of an accident are inadmissible to show a negligent condition at the time of the accident, per Evidence Code section 1151. Nevertheless, evidence of subsequent remedial measures ***is*** admissible to demonstrate control over property when that issue is disputed, as it is here, without running afoul of Evidence Code section 1151. (*Alcaraz, supra,* 14 Cal.4th at pp. 1168-1169 [Evid. Code, § 1151 inapplicable when evidence not used to show negligence but to show defendants exercised control over property].)

knowledge of its existence." (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1206; see also *Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, 1134; see generally CACI 1011.)

Second, according to the declaration of plaintiff's expert, civil engineer Brad Avrit, who personally inspected the accident site, and based on his education, background, and training "in safety engineering and human ambulation," and his extensive experience in analyzing similar cases, "it is my opinion that the subject area presented a substantial fall hazard at the time of the incident. The subject landscaping area was located in foreseeable exterior pedestrian walkway as it is located in front and less than 8 feet away from the entrance/exit of the subject Applebee's. The area is open and accessible to people using the adjacent walkway and it is not blocked off to deter a passerby from walking on it. It is foreseeable that pedestrians would traverse the subject area while going to or from the adjacent parking lot and potentially step into the plantar area . . . ." Further, the "change in level presented by the subject planter was large enough to cause a trip of misstep event, but low enough that it would not be readily apparent."[4] A jury could determine based on the pictures presented and the uncontested 3-inch topographical change at issue that there was an unsafe condition to which defendant at least should have been aware. The court certainly cannot say otherwise as a matter of law.

The court denies summary judgment/adjudication on this ground.

Defendant also argues that the court should determine as a matter of law that the unsafe dangerous condition at issue was so obvious that the harm was foreseeable, obviating or precluding its liability, meaning there was no breach of any duty of care found to be a cause of the accident. (Motion, P. 12.) Defendant initially points to plaintiff's deposition testimony, in which she testified that that she was unaware she was stepping into a flower bed, because she was "focused on the parking lot and getting to the parking lot." According to defendant, plaintiff cannot establish a breach of duty of care or that any breach caused the harm suffered, as the evidence shows that the accident occurred as a result of plaintiff failing to take reasonable care in traversing the corner of the planter by not looking at her surroundings. Defendant then attempts to supplement this argument by asking the court to examine the video surveillance evidence submitted, claiming any contrary evidence should be ignored under the authority of *Swigart v. Bruno* (2017) 13 Cal.App.4th 529, 544, footnote 4.

The court again is not persuaded. In *Chance v. Lawry, supra,* 58 Cal.2d 368, plaintiffs were one of a party of 8 who dined at defendant's restaurant; after dining, as plaintiff was about to depart from the foyer, she stood with her back to a planter box. In order to avoid crowding, plaintiff stepped back, lost her balance, and fell into the open box. She sued for premises liability/negligence, and the jury returned a verdict in plaintiff's favor. On appeal, defendant's main contention was that it was not liable because "the danger of the open planter box was so obvious that it could reasonably anticipate and apprehend the dangers. . . ." The high court

[4] As the court is not relying on Mr. Avrit's claim that there was a building code violation as part of this assessment, the court will not address defendant's claim in reply that plaintiff has failed to establish a code violation.

rejected the claim. "[I]n our opinion this was a fact question for the jury. Under the evidence the jury could reasonably conclude that [defendant's] could not have reasonably expected that its patrons would necessarily see the planter box and apprehend the danger." Defendant "must be held to know that the members of a dinner party working their way through a crowded restaurant foyer cannot be expected to be as observant as a pedestrian in the open street. [Citation.] Whether the danger created by the open planter box was sufficiently obvious to relieve Lawry's of its duty to warn Mrs. Chance of its existence was peculiarly a question of fact to be determined by the jury." (*Id.* at p. 375.)

Our high court also addressed defendant Lawry's claim that the danger was so obvious that plaintiff's contributory negligence extinguished its liability as a matter of law, because plaintiff testified that "if [she]y had looked [she] would have seen the plantar box." "Defendants rely on the familiar proposition that person is under a duty to look where he is going and to see that which is in plain sight in front of him." (*Chance, supra*, 58 Cal.2d at p. 375.) The *Chance* court disagreed. " ' There are many cases involving accidents in mercantile establishments were the question of plaintiff's contributory negligence has been held to be a question for the jury even though the plaintiff failed to observe what may have been an obvious danger. [Citations.] It cannot be said as a matter of law that [plaintiff] was contributorily negligence for not seeing the planter box or in not looking back before she stepped backward. . . . Whether she made a reasonable use of her faculties and acted as a reasonable person, under the circumstances, was a factual question for the jury's determination." (*Chance, supra*, at pp. 375-376.)

The same reasoning utilized by our high court in *Chance* applies here (albeit this court is apply notions of contributory negligence with more modern concepts of comparative fault). While defendant argues the elevation between the walkway and the landscaped area was "obvious" to customers entering and leaving their restaurant, our high court has expressly observed that generally no business customer is obliged to make a critical examination of the surroundings he is about to enter (or leave); "on the contrary [the customer] has a right to assume that those in charge have exercised due care in the manner of inspection, and have taken proper precautions for the safety of the patrons, and will use reasonable care in guarding against injury." (*Chance, supra*, at pp. 373-374.) A customer leaving a restaurant may focus attention on others they are leaving with, and by inclination and custom take a path that crosses over a landscaped area (particularly as it is corner between two slabs). The reasonable anticipation of such behavior arguably increases the necessity for a proprietor to exercise care.

The 3-inch deviation exists just outside the front door of the restaurant, and the pictures submitted by defendant reveal shadows covering the site, meaning pedestrians who come from the restaurant into the light may not be able to see all with clarity. "Under *Rowland* . . . , we are impelled to conclude that the obvious nature of the risk, danger or defect . . . can no longer be said *per se* to abridge the invitation given by the possessor of land, or to derogate his duty of care, so as to make his liability solely a matter of law. . . . By that decision, this matter of law for the court is transmuted to a question of fact for the jury; namely, whether a possessor of land

even in respect to the obvious risk has acted reasonably in respect to the probability of injury to an invitee; and whether or not the invitee used the property reasonably in full knowledge of any obvious risk entering into a subsequent injurious incident." (*Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 33.) Further, as was the case in *Chance,* whether plaintiff acted reasonably or not under the circumstances should be for the trier of fact to decide, not this court. As was true in *Chance*, the court here cannot determine as a matter of law that plaintiff was exclusively at fault, at least based on the record before it. Other cases bolster this conclusion. (See, e.g., *Neel v. Mannings, Inc.* (1942) 19 Cal .2d 647, 656 [plaintiff was traversing the steps of a restaurant, struck her head on a board projecting from the ceiling; while the board was in plain view, plaintiff was distracted by people coming down the stairs; the issue of whether the danger was sufficiently obvious was for the jury to decide].).

Nor is the court persuaded that the video surveillance evidence supports defendant's claim that summary judgment/adjudication is appropriate. Plaintiff's reliance on *Swigart* is in fact misplaced. In *Swigart,* plaintiff and defendant participated in an organized endurance horseback riding event, with 47 other riders. Approximately less than two hours into the event, plaintiff and defendant were walking single file on the trail, with Swigart in the lead. Swigart had dismounted, as required at the checkpoint. Swigart sued Bruno, alleging causes of action for negligence, reckless or intentional misconduct, and having an animal with a dangerous propensity. (*Id.* at p. 532.) Although the evidence was in dispute as to exactly what happened, there was no dispute that defendant's horse struck Swigart while she was standing on the ground, injuring her. The trial court granted summary judgment to defendant. The appellate court affirmed, concluding that plaintiff's lawsuit was precluded under the doctrine of primary assumption of risk, and the fact plaintiff could not establish a disputed issue of material fact as to defendant's liability claim. (*Id.* at p. 544.) The appellate court noted that in making this decision it independently reviewed the record, including a 40-minute of video surveillance, which captured the injury to plaintiff. (*Id*. at p. 540, fn. 4.) Further, it noted as relevant for our purposes that to "the extent [plaintiff's] witnesses' testimony was inconsistent with the video, we do not consider such inconsistency a disputed fact and have relied on the evidence in the video." (*Ibid.*)

Specifically, the appellate court noted that based on its own review of video footage, "given the amount of tailgating by many of the riders . . . , *particularly* as the group approached the second card stop at the eight-mile checkpoint immediately before Swigart's injury – testimony that such behavior is not part of the sport of endurance riding simply is not credible. [Fn. Omitted.]" It noted that the video revealed conclusively that plaintiff "was injured by [defendant's] horse, which bolted out of control as a group of seven horses in a single-file line came to a stop in a narrow area. In the process of slowing down, [defendant's] horse bumped the rear of Seven's hors. Steven's horse kicked [defendant's] horse, [defendant] was thrown from the horse, and [defendant's] horse took off, sideswiping two horses ahead and striking Swigart, who was standing on the ground at a Ride checkpoint. Because this type of equine conduct is among the risks inherent in endurance riding, the assumption of the risk doctrine applies to

Swigart's claims based on [defendant's] alleged negligence. . . ." (*Id*. at p. 541, italics in original).)

The video surveillance footage here is not nearly as dispositive in the context of the present case as was the video footage in Swigart. Defendant contends that a party's evidence that is inconsistent with the video surveillance should be ignored, relying on *Swigart*. But the critical issue in *Swigart* was much different than the one at issue here. There, plaintiff had to overcome the clear hurdle imposed by the primary assumption of risk doctrine, which bars lawsuits based on injuries suffered by plaintiff that are attendant to or simply part of the inherent risk of a sport or active, such as endurance horse riding or racing. To do so, plaintiff Swigart had to show at trial not just negligence, but that defendant tried to intentionally injure plaintiff (or another rider); or otherwise engaged in activity or conduct that was so reckless as to be totally outside the range of the ordinary activity involved in the sport. (*Swigart, supra*, at p. 538.) The video evidence provided to the *Swigart* court was well suited for that determination, for it showed there was no intent to injure by defendant or that defendant's conduct was so reckless to be outside the range of ordinary activity inherent in the sport. Plaintiff could not counter the video evidence with testimony given the undisputed footage that captured exactly what had occurred.

The issue at play here is different. The video unquestionably captures plaintiff's fall, as well as plaintiff's acts pre- and post-fall. But it simply does not resolve as a matter of law the critical issue defendant's asks – whether plaintiff is *wholly* responsible for the accident based on her inattentiveness and based on plaintiff's alleged "failure to take care in traversing property outside of Applebee's by not looking at her surroundings while walking"; or whether Applebee is at least partially responsible, if at all, under comparative fault principles.[5] The video footage fails to account for the legal standards enunciated by our high court in *Chance v. Lowry*, *supra,* 58 Cal.2d 368. For example, *Chance* made it clear that a business invitee (such as plaintiff) is not obliged to make a critical examination of the surroundings he is about to enter or leave, but on the contrary has the right to assume that those in charge have exercised due care in the matter of inspection, and have taken proper precautions for the safety of patrons, and will use reasonable care in guarding against injury, which makes this inquiry particularly fact specific. (*Id.* at pp. 373-374.) *Chance* also made it clear that a business proprietor who knows of, or by the exercise of reasonable care could discover, an artificial condition upon premises it control and which it could foresee exposing business visitors to an unreasonable risk, is under a duty to exercise ordinary care either to make the condition reasonably safe or for their use or give a warning adequate to enable to avoid the harm. (*Id*. at p. 372.) The video evidence does not point unerringly to one conclusion or the other in this regard (requiring a more nuanced determination

[5] The court would agree that if primary assumption of the risk doctrine were at play here, the video would be dispositive. But that doctrine is not relevant here. (*Wolf v. Weber* (2020) 52 Cal.App.5th 406, 411.) As only ordinary notions of negligence culpability are at issue here, the video evidence is less encompassing and thus far less dispositive in resolving critical issues raised by defendant.

necessitated by the primary assumption of risk doctrine). Whether a defendant in the present situation acts as a reasonable person in the management of property depends on several factors (see, e.g., *Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 371), all of which are left unanswered in the video footage. No doubt the video footage is relevant; at this point, it seems to ***reinforce*** the conclusion that the trier of fact, not this court, should make the appropriate determinations about liability under comparative fault principles, taking into account the totality of circumstances. Unlike in *Swigart*, there is enough to go forward to trial.

For these reasons, the court also denies defendant's summary judgment/adjudication motion on this ground.

As there is a sufficient basis for both causes of action to move forward based on the factors and analysis identified and articulated above, there is no need for the court to address the nature of defendant's last challenge raised on pages 12 and13 of its motion – that defendant is not responsible for a "design flaw" in the sidewalk/planter area configuration which makes it liable. This issue according to the defendant's Issue No. 12 in its Separate Statement is that a "design flaw" in the "sidewalk/planter area configuration which prevented plaintiff from seeing the planter area before stepping in it and that 'there was a large deviation in the pathway designated for pedestrians." While at trial this issue may be developed more robustly, the nature of the evidence creates disputed issues of material fact irrespective of this allegation, rendering it unnecessary to address at this time.

**In Summary**:

The court grants defendant's request for judicial notice. The court sustains plaintiff's evidentiary objection No. 3, and overrules all other evidentiary objections raised by plaintiff. The court sustains defendant's evidentiary objection No. 10, and overrules all other evidentiary objections raised by defendant.

The court denies defendant's summary judgment/summary adjudication motion as to both causes of action, determining that there are disputed issues of material fact as to duty, breach, causation and harm. Nothing in the video surveillance footage actually allows the court to make a determination as a matter of law. This case is not similarly situated to *Swigart v. Bruno* (2017) 13 Cal.App.5th 529, relied upon by defendant. The trier of fact should make the critical determinations at issue through a comparative fault prism. Summary judgment/adjudication can be resolved without any need to assess the impact of any alleged "design flaw" in or with the sidewalk/planter configuration; accordingly; the court does not need to address the issue at this time. The parties are directed to appear at the hearing by Zoom or in person, as a CMC is also scheduled for today. Plaintiff is directed to provide a proposed order for signature.