1. KUMAR v. FLORES PC-20210349

Respondent Flores' Motion for Attorney Fees.

On July 8, 2021 petitioner filed a request for civil harassment restraining order against respondent Flores. Trial was held on the request on October 5, 2021. After finding that there was no clear and convincing evidence to support a restraining order the court denied the request for restraining order. On January 3, 2022 respondent Flores filed a motion for an award of attorney fees incurred to defend against the request in the amount of $7,260.

The proof of service declares that notice of the hearing and the moving papers were served on petitioner Kumar's counsel by mail on January 3, 2022. At the time this tentative ruling was prepared there was no opposition in the court's file

Recovery of Fees in Civil Harassment Action

"The prevailing party in any action brought under this section may be awarded court costs and attorney's fees, if any." (Code of Civil Procedure, § 527.6(s).)

In rejecting a plaintiff's argument that attorney fees may only be awarded to a prevailing defendant in a civil harassment action where the action was filed frivolously, or in bad faith, an appellate court held: "…[S]ection 527.6(i) states that the prevailing party "may" be awarded attorney fees. The normal rule of statutory construction is that when the Legislature provides that a court or other decisionmaking body "may" do an act, the statute is permissive, and grants discretion to the decisionmaker. (See, e.g., *Lewis v. Clarke* (2003) 108 Cal.App.4th 563, 569, 133 Cal.Rptr.2d 749; *Woodbury v. Brown–Dempsey* (2003) 108 Cal.App.4th 421, 433, 134 Cal.Rptr.2d 124.) Appellant has not convinced us, through statutory analysis or legislative history, that a different rule of construction should apply to Section 527.(i). Accordingly, we conclude that the decision whether to award attorney fees to a prevailing party—plaintiff or defendant—under section 527.6(i) is a matter committed to the discretion of the trial court."

(Krug v. Maschmeier (2009) 172 Cal.App.4th 796, 802.) The costs and attorney's fee provision is now found in Section 527.6(s).

Respondent Flores prevailed on the case and is entitled to consideration of whether to award him attorney fees incurred to defend against the action.

"It is well established that the determination of what constitutes reasonable attorney fees is committed to the discretion of the trial court, whose decision cannot be reversed in the absence of an abuse of discretion. (*La Mesa-Spring Valley School Dist. v. Otsuka*, 57 Cal.2d 309, 316, 19 Cal.Rptr. 479, 369 P.2d 7; *Horn v. Swoap*, 41 Cal.App.3d 375, 386, 116 Cal.Rptr. 113; *Excelsior etc. School Dist. v. Lautrup*, 269 Cal.App.2d 434, 447, 74 Cal.Rptr. 835.) The value of legal services performed in a case is a matter in which the trial court has its own expertise. (*Excelsior etc. School Dist. v. Lautrup*, supra at p. 448, 74 Cal.Rptr. 835.) The trial court may make its own determination of the value of the services contrary to, or without the necessity for, expert testimony. (*Barlin v. Barlin*, 156 Cal.App.2d 143, 149, 319 P.2d 87; *Mitchell v. Towne*, 31 Cal.App.2d 259, 266, 87 P.2d 908.) The trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case. (*La Mesa-Spring Valley School Dist. v. Otsuka*, supra; *Excelsior etc. School Dist. v. Lautrup*, supra, 269 Cal.App.2d at p. 447, 74 Cal.Rptr. 835.)" (Melnyk v. Robledo (1977) 64 Cal.App.3d 618, 623-624.)

"Correctly stated, the rule is that when the trial court is informed of the extent and nature of the services rendered, it may rely on its own experience and knowledge in determining their reasonable value. [Footnote omitted.] (See, e. g., *Lipka v. Lipka*, supra, 60 Cal.2d at p. 480, 35 Cal.Rptr. 71, 386 P.2d 671; *Elconin v. Yalen*, 208 Cal. 546, 549-550, 282 P. 791; *Kirk v.*

Culley, 202 Cal. 501, 508-509, 261 P. 994; *Spencer v. Collins*, 156 Cal. 298, 307, 104 P. 320; *Patten v. Pepper Hotel Co*., supra, 153 Cal. at p. 472, 96 P. 296; *Estate of Straus*, 144 Cal. 553, 557-558, 77 P. 1122; *Peyre v. Peyre*, supra, 79 Cal. at pp. 339-340, 21 P. 838; *Jones v. Jones*, supra, 135 Cal.App.2d at p. 64, 286 P.2d 908 (see fn. 3, Ante); see also, 1 Witkin, Cal. Procedure (2d ed. 1970) Attorneys, s 97, pp. 106-107.)" (In re Marriage of Cueva (1978) 86 Cal.App.3d 290, 300–301.)

"The use of the lodestar method for calculating attorney fees was established in California in Serrano III. As we recently noted, "[i]n so-called fee shifting cases, in which the responsibility to pay attorney fees is statutorily or otherwise transferred from the prevailing plaintiff or class to the defendant, the primary method for establishing the amount of 'reasonable' attorney fees is the lodestar method. The lodestar (or touchstone) is produced by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate. Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative 'multiplier' to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented." (*Lealao*, supra, 82 Cal.App.4th 19, 26, 97 Cal.Rptr.2d 797.) "The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132, 104 Cal.Rptr.2d 377, 17 P.3d 735.) Under certain circumstances, a lodestar calculation may be enhanced on the basis of a percentage-of-the-benefit analysis. (Lealao, supra, at pp. 49-50, 97 Cal.Rptr.2d 797.)" (Thayer v. Wells Fargo Bank, N.A. (2001) 92 Cal.App.4th 819, 833.)

Under the totality of the circumstances presented, it appears appropriate to award respondent Flores the reasonable amount of attorney fees incurred in defending against this action.

Respondent has filed the declarations of both of his counsels. The declarations of counsel do not set forth any facts to justify each attorney billing for the joint time each of them spent in consultations within themselves, joint conferences with respondent, joint preparation of both counsels for trial, and both counsels appearing for trial. The court finds that payment of hourly charges for two attorneys at every step of the case is unreasonable. Absent opposition, the court finds that the reasonable amount of attorney fees incurred in the defense of this action is $4,494.75. The court grants the motion and awards respondent Flores $4,494.75

TENTATIVE RULING # 1: RESPONDENT FLORES' MOTION FOR ATTORNEY FEES IS GRANTED. RESPONDENT FLORES IS AWARDED $4,494.75 IN ATTORNEY FEES PAYABLE BY PETITIONER KUMAR. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY

AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, FEBRUARY 25, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

2. DFK WHOLESALE v. HIGH HILL RANCH, LLC PCL-20190640

Plaintiff's Motion to Compel Discovery.

Plaintiff's counsel declares: on September 7, 2021 plaintiff served on defendant form interrogatories, set two, requests for production, set two, and requests for admission, set two; and despite a request for responses and production, defendant failed to provide any responses to the discovery propounded. Plaintiff moves to compel answers to the interrogatories and requests for admission and production of documents without objections. The motion does not request the court to deem admitted requests for admission. Plaintiff requests an award of monetary sanctions in the amount of $690.

The proof of service in the court's file declares that on January 12, 2022 notice of the hearing and copies of the moving papers were served by mail to defense counsel.

Defendant opposes the motion on the following grounds: defendant's verified responses to the subject discovery were served on plaintiff and all responsive documents in defendant's custody and control were produced on February 4, 2022, weeks after the motion was served on defendant; plaintiff has not objected to the form or substance of the responses, or requested supplemental responses; no order compelling responses is needed; and attorney fees should be denied, because the corporate defendant's attorney is also the CEO and CFO of the corporate plaintiff, therefore, counsel is effectively appearing in pro se as the corporation is the alter ego of plaintiff's counsel.

At the time this ruling was prepared, there was no reply in the court's file.

The party to whom interrogatories and requests for production have been served must serve responses upon the propounding party within 30 days after service or any other later date the propounding party stipulates to. (Code of Civil Procedure, §§ 2030.260, 2030.270,

2031.260, and 2031.270.) The failure to timely respond waives all objections to the interrogatories and requests and the propounding party may move to compel answers to interrogatories and production of documents. (Code of Civil Procedure, §§ 2030.290 and 2031.300.)

Where a party fails to timely respond to requests for admission, the court is mandated to deem such requests admitted, "…unless it finds that the party to whom the requests for admission have been directed has served, before the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with Section 2033.220. It is mandatory that the court impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) on the party or attorney, or both, whose failure to serve a timely response to requests for admission necessitated this motion." (Code of Civil Procedure, § 2033.280(c).)

Defense counsel declares: on February 4, 2022 defendant served verified responses to the discovery request that are the subject of this motion and served all responsive documents in defendant's custody and control; at the time the opposition was filed, plaintiff had not objected to the responses and has not requested supplemental responses; and while the parties met and conferred regarding withdrawal of the motion, they were unable to reach a stipulation prior to the filing of the opposition. (Declaration of Kevin James in Opposition to Motion, paragraphs 3 nd 4.)

Defendant's service of verified responses and production of documents has rendered the motion moot. If plaintiff has objections to the sufficiency of the responses and production, including the issue of whether objections to the discovery were raised after those objections were waived by the untimely responses, plaintiff's remedy is a motion for further responses and production.

Sanctions

Failure to respond to interrogatories, requests for production, and requests for admission is a sanctionable misuse of the discovery process. (Code of Civil Procedure, §§ 2023.010(d), 2023.030, 2030.290(c), 2031.300(c), and 2033.280(c).) The court may award sanctions under the Discovery Act in favor of the moving party even though no opposition to the motion to compel was filed, or the opposition was withdrawn, or the requested discovery was provided to the moving party after the motion was filed. (Rules of Court, Rule 3.1348(a).)

Plaintiff's counsel declares: he worked three hours to prepare the motion at an hourly rate of $200, which amounts to the plaintiff incurring $600 in attorney fees to file this motion; and that a filing fee of $90 was paid.

Defendant argues that the corporate plaintiff is the alter ego of plaintiff's attorney, therefore, the attorney can not recover sanctions in the form of attorney fees as he is appearing in pro se.

"Alter ego is an extreme remedy, sparingly used. (*Calvert, supra,* 875 F.Supp. at p. 678.)" (Sonora Diamond Corp. v. Superior Court (2000) 83 Cal.App.4th 523, 539.)

"(1) *In* General. To demonstrate the propriety of disregarding the corporate entity, it must be shown that the corporation is dominated or controlled by an individual or another corporation, but it is insufficient merely to show a "one-man" or "two-man" corporation, or ownership of a subsidiary by the parent. The general rule requires a further showing that failure to disregard the entity would sanction a fraud or promote injustice. These limitations are stated in *Minifie v. Rowley* (1921) 187 C. 481, 202 P. 673, as follows: "Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and *vice versa*, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has

ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice." (187 C. 487.) ¶ In *Norins Realty Co. v. Consolidated Abstract & Title Guaranty Co.* (1947) 80 C.A.2d 879, 182 P.2d 593, individual shareholders, residents of Los Angeles, were joined as defendants in an action on contract against the corporation, in order to obtain a trial in Los Angeles County instead of at the principal place of business of the corporation. *Held,* allegations that the corporation was dominated and controlled by the individuals, and that it was their alter ego, were insufficient to support a judgment against the individuals, and thus could not justify the desired venue. The court excluded other grounds for disregarding the entity by noting that the individuals (a) were not parties to the contracts, (b) had not guaranteed performance of the contracts, and (c) were not accused of fraud or other wrongdoing. Also, there was no allegation that the corporation was presently or prospectively insolvent. (80 C.A.2d 888.) (See *Wollersheim v. Church of Scientology Int.* (1999) 69 C.A.4th 1012, 1014, 81 C.R.2d 896 [preponderance of evidence is standard for finding alter ego]; *Leek v. Cooper* (2011) 194 C.A.4th 399, 415, 125 C.R.3d 56 [in age discrimination action against employer, plaintiff's pleading alleging only that defendant was sole owner of business was not sufficient to allege alter ego liability; unity of interest and ownership must be shown as well as unjust result if corporation is treated as sole actor].) ¶ (2) *Question of Fact*. A number of cases avoid formulas and tests, and treat the question as one of fact "particularly within the province of the trial court." (*Stark v. Coker* (1942) 20 C.2d 839, 846, 129 P.2d 390; see *Shafford v. Otto Sales Co.* (1957) 149 C.A.2d 428, 433, 208 P.2d 428; *Associated Vendors v. Oakland Meat Co.* (1962) 210 C.A.2d 825, 837, 26 C.R. 806; *Auer v. Frank* (1964) 227 C.A.2d 396, 407, 38 C.R. 684; Platt v. Billingsley (1965) 234 C.A.2d 577, 582, 44 C.R. 476; *Arnold v. Browne* (1972) 27 C.A.3d 386, 393, 103 C.R. 775; 12 Pacific L. J. 829, 846; for criticism of this view,

see 31 Cal. L. Rev. 426, 428 [disregarding corporate entity as regulatory process].)" (Emphasis added.) (9 Witkin, Summary of California Law (11th ed. 2021) Corporations, § 13.)

Defendant requests that the court take judicial notice that DFK Wholesale, Inc.'s Statement of Information filed with the Secretary of State on January 15, 2020 states that plaintiff's counsel is listed as CEO, CFO, Secretary, sole Director of the corporation, and agent for service of process.

The only alter ego evidence before the court is the request for judicial notice, which indicates that plaintiff DFK Wholesale, Inc. is a one person corporation. Such evidence is insufficient to pierce the corporate veil and treat corporate plaintiff DFK Wholesale, Inc. and counsel as one in the same. Counsel is not an attorney employed by a plaintiff, which is a corporate form of a law firm. The Statement of Information discloses that plaintiff's business is "DISTRIBUTION". (Emphasis in original.) (See Statement of Information, paragraph 16.) Absent sufficient evidence to pierce the corporate veil, counsel is an attorney representing a corporate defendant and not himself. The corporate plaintiff is entitled to recover as sanctions the reasonable attorney fees incurred to bring the motion.

The court awards plaintiff $690 in monetary sanctions payable by defendant within ten days.

TENTATIVE RULING # 2: THE PORTION OF PLAINTIFF'S MOTION TO COMPEL DISCOVERY SEEKING DISCOVERY RESPONSES IS DROPPED AS MOOT WITHOUT PREJUDICE TO PLAINTIFF FILING A MOTION TO COMPEL FURTHER RESPONSES TO THAT DISCOVERY. THE COURT GRANTS THE PORTION OF THE MOTION SEEKING AN AWARD OF MONETARY SANCTIONS. DEFENDANT IS ORDERED TO PAY PLAINTIFF $690 IN MONETARY SANCTIONS WITHIN TEN DAYS. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A

NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, FEBRUARY 25, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

3. ESTATE OF BRACCO PP-20190004

Review Hearing Re: Status of Administration.

Letters of Administration were issued on May 23, 2019. The Final Inventory and Appraisal was filed on September 16, 2019.

The personal representative's counsel previously explained that there is pending litigation concerning the estate's real property as well as another probate case, which has been dismissed. Counsel advised the court that until the litigation is complete, they are unable to proceed in the probate case.

At the hearing on October 29, 2021 the court was advised that title had been cleared and counsel was preparing the waiver of final account. The personal representative's counsel requested a continuance of the hearing and the court continued the hearing to January 7, 2022.

At the hearing on January 7, 2022 the court was advised that counsel expected to have all the documents necessary to resolve the matter, but does not have them as of yet. He anticipated he would have them in the next couple of weeks.

There was no Petition for Order of Final Distribution on Waiver of Account in the court's file at the time this ruling was prepared.

TENTATIVE RULING # 3: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, FEBRUARY 25, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

4. APONTE v. MARSHALL MEDICAL CENTER PC-20210413

Motion to be Relieved as Counsel of Record for Plaintiff.

TENTATIVE RULING # 4: THE MOTION IS GRANTED. WITHDRAWAL WILL BE EFFECTIVE AS OF THE DATE OF FILING PROOF OF SERVICE OF THE FORMAL, SIGNED ORDER UPON THE CLIENT. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, FEBRUARY 25, 2021

EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

5. TATE v FIESELER PC-20080086

Defendants/Cross-Complainants Fieseler's Motion to Enforce Judgment and Hold Plaintiffs/Cross-Defendants Tate in Contempt.

On March 3, 2010 the court entered judgment after court trial. Among the holdings of the judgment was that entry of judgment in favor of cross-complainants Fieseler and against cross-defendants Tate on the cross-complaint's claim for abatement of private nuisance and imposing a permanent injunction against cross-defendants Tate "from closing or locking the Parties' common gate to Highway 49 at any time that the Cross-Complainants Fieseler are at home."

The Tates appealed from the judgment. On January 24, 2012 the Third District Court of Appeal issued its decision on appeal affirming the judgment in full. On March 7, 2012 plaintiffs filed a petition for writ of review with the California Supreme Court. On April 11, 2012 the California Supreme Court denied the petition for writ of review. The remittitur was issued on April 19, 2012.

The Tates and the Fieselers later had OSCs re: contempt issued against each other for alleged conduct they contend violated the court's judgment. They contended each other's conduct was punishable by contempt proceedings. The matters were set for an evidentiary hearing to commence on January 30, 2015. At the conclusion of the hearing the court made the following findings: the judgment in place is applicable to the dispute regarding the gate from Highway 49 to the property; the roadway is partially blocked by ½ of the two part swinging gate being locked in a closed position; there is uncontroverted evidence that the Tates erected a gate with two sections; the Fieselers do not have a key to the locked section of the gate; and

the Tates claim they are in the right as they have opened one gate, as the gate is in two sections.

The court ruled as follows concerning the Fieseler OSC brought against the Tates: a reasonable and sensible reading of the injunction is that there can be no obstruction to the roadway; the gate is one gate with two sections and both sections are to be fixed open; to the extent that there is any post to which the gate attaches, it must be removed or must be level with the ground so as it does not impose any obstacle or hazard in the use of the road; the Tates are in civil contempt of the permanent injunction; the punishment for contempt can be jail time as well as the imposition of a fine; the court did not impose jail time, but did impose a joint fine of $1,000 against both Michael Tate and Linda Tate, which was stayed pending any further conduct that violates the injunction; and the court reserved the right to impose this fine together with other fines the court may impose as just and proper for any further contempt of the court's orders.

The court ruled as to the Tate OSC brought against the Fieselers: the Tate's OSC failed to state a cognizable claim of violation of the March 2010 judgment and restraining order; and the Tate's OSC was dismissed.

The Fieselers obtained issuance of a second OSC re: Contempt against the Tates asserting that the Tates and a "gang" of other family members installed a fence in the easement area that restricts and obstructs the use of the subject roadway. The court denied the motion to hold the Tates in contempt on August 7, 2015.

On November 4, 2021 defendants/cross-complainants Fieseler filed the instant motion to enforce judgment and hold plaintiffs/cross-defendants Tate in contempt. Cross-Complainants Fieseler contend that the cross-defendants Tate continue to lock the common gate while cross-complainants are at home in violation of the permanent injunction and the cross-defendants

Tate should be held in contempt of court, be further sanctioned by daily fines and costs against cross-defendants as long as they continue their wrongful conduct in violation of the injunction, that the court grant cross-complainants Fieseler immunity for cutting or removal of the locks, including forcing the gate open by reasonable means, when necessary; that the court specifically instruct the El Dorado County Sheriff' Department that the Sheriff is authorized to enforce the orders of the court, including peaceful cutting of locks and forcing open the gates; and the stay of the previously imposed sanction in the amount of $1,000 be lifted and cross-defendants Tate be ordered to pay that sanction

The Fieselers did not request an OSC Re: Contempt be issued and no OSC Re: Contempt was issued.

The proof of service declares that on October 21, 2021 notice of the hearing and the moving papers were served by mail to the Tates. The court notes that the notice of hearing filed on November 4, 2021 stated that the hearing would take place on December 3, 2021 and the clerk's office changed the date to December 17, 2021. This change in date occurred after the service of the notice on October 21, 2021 by mail and there is no proof of service of an amended notice of hearing specifying the hearing as taking place on December 17, 2021.

The Fieselers requested a continuance of the hearing by letter received by the court on December 13, 2021 stating they needed additional time to have a process server serve the Tates. The hearing was continued to February 25, 2022.

The proof of service filed on January 28, 2022 declares that on January 26, 2022 Linda Tate was personally served the December 17, 2021 minute order continuing the hearing, the notice of motion, the moving papers and exhibits, the judgment after court trial, the court's January 30, 2015 minute order, a substitution of attorney, and proposed order.

There is no proof of service in the court's file declaring that an OSC was personally served.

Contempt Proceedings

"A judgment not otherwise enforceable pursuant to this title may be enforced by personally serving a certified copy of the judgment on the person required to obey it and invoking the power of the court to punish for contempt." (Code of Civil Procedure, § 717.010.) Disobedience of any lawful judgment, order, or process of the court is contempt of the authority of the court. (Code of Civil Procedure, § 1209(a)(5).)

"(1) *Right to Hearing.* The party charged with contempt is entitled to a hearing at which, by affidavits or witnesses or both, that party may present defenses. (C.C.P. 1217; see *Hotaling v. Superior Court* (1923) 191 C. 501, 505, 217 P. 73 [competent evidence must be produced at hearing]; *Collins v. Superior Court* (1956) 145 C.A.2d 588, 594, 302 P.2d 805, 2 *Cal. Proc.* (5th), *Jurisdiction,* §308 [refusal to allow evidence of defenses is denial of due process]; C.J.E.R., Judges Benchbook: Civil Proceedings—After Trial §6.166; 73 Harv. L. Rev. 353 [procedures for trying contempts in federal courts]; on defenses, see infra, §349 et seq.; on disqualification and challenge of judge, see 2 *Cal. Proc.* (5th), *Courts,* §§97, 154.) ¶ (2) *Effect of Participation.* Even though the contempt proceeding is usually commenced by an affidavit filed in the main action, the contempt proceeding is separate and distinct. Hence, participation in a contempt proceeding is not a general appearance in the main action. (*Bank of America v. Carr* (1956) 138 C.A.2d 727, 733, 292 P.2d 587.) ¶ (3) *Affidavits as Complaint and Answer.* In a civil contempt proceeding, the affidavits on which the citation is issued constitute the complaint and the affidavits of the defendant constitute the answer or plea. The issues of fact are framed by the respective affidavits serving as pleadings, and the hearing must be had on these issues. (*Hotaling v. Superior Court*, supra; *Freeman v. Superior Court* (1955) 44 C.2d 533, 537, 282 P.2d 857; *In re Von Gerzabek* (1922) 58 C.A. 230, 232, 208 P. 318; *Groves v. Superior Court* (1944) 62 C.A.2d 559, 145 P.2d 355; for forms of counteraffidavits, see Cal.

Civil Practice, 4 Procedure, §30:87 et seq.) ¶ (4) *Quasi-Criminal Proceeding.* Because the proceeding is criminal in nature (see 3 *Cal. Proc.* (5th), *Actions,* §69), the party charged may not be compelled to give testimony against himself or herself. (See *Oliver v. Superior Court* (1961) 197 C.A.2d 237, 240, 17 C.R. 474, infra, §350; 2 *Cal. Evidence* (4th), *Witnesses,* §367.) And a verified answer to the affidavit is not a waiver of the right to refuse to testify; it is similar in effect to a plea of not guilty in a criminal case. (*In re Ferguson* (1954) 123 C.A.2d 799, 801, 268 P.2d 71.) The proceeding is governed by the criminal trial standard of proof beyond a reasonable doubt. But there is no requirement that the record show that the judge followed that standard; the presumption that an official duty has been performed applies. (*Ross v. Superior Court* (1977) 19 C.3d 899, 913, 141 C.R. 133, 569 P.2d 727.) ¶ (5) *No Right to Jury Trial.* There is no right to a jury trial in a civil contempt proceeding. (*United Farm Workers Organizing Committee, AFL-CIO v. Superior Court* (1968) 265 C.A.2d 212, 214, 71 C.R. 513; *Pacific Tel. & Tel. Co. v. Superior Court* (1968) 265 C.A.2d 370, 373, 72 C.R. 177.)…" (8 Witkin, California Procedure (5th ed. 2008) Enforcement of Judgment, § 348, pages 375-376.)

"It was formerly the rule that a sufficient affidavit was jurisdictional; if the affidavit was defective, it could not support an adjudication of indirect contempt, even though the facts proved and found would support it. (See *Warner v. Superior Court* (1954) 126 C.A.2d 821, 824, 273 P.2d 89.) Under C.C.P. 1211.5 (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment,* §345), a sufficient affidavit is no longer jurisdictional; it may be amended to correct any defect or to conform to proof; and a contempt adjudication can be set aside for insufficiency of the affidavit only under the constitutional test of reversible error, i.e., prejudice amounting to a miscarriage of justice. ¶ The change in the law effected by C.C.P. 1211.5 was clarified by *In re Cowan* (1991) 230 C.A.3d 1281, 281 C.R. 740, a case in which *no* affidavit was filed: ¶ (a) An affidavit is a mandatory requirement, and satisfies the due process requirement of notice of the nature

of the charge. Hence, the requirement is jurisdictional in the sense that the court cannot proceed in the complete absence of an affidavit. (230 C.A.3d 1286, 1288.) ¶ (b) However, if an affidavit is presented, the jurisdictional requirement is satisfied, even though the affidavit is seriously defective. It may be amended to correct the defect, and on review a contempt adjudication can be set aside only under the constitutional test of reversible error. (230 C.A.3d 1288, footnote 9.)" (7 Witkin, California Procedure (5th ed. 2008) Trial, § 176(2), pages 214-215.)

- Service of the Order to Show Cause (OSC)

"The order to show cause acts as a summons to appear in court on a certain day and, as its name suggests, to show cause why a certain thing should not be done. (*Morelli v. Superior Court* (1968) 262 Cal.App.2d 262, 269, 68 Cal.Rptr. 572.) Unless the citee has concealed himself from the court, he must be personally served with the affidavit and the order to show cause; otherwise, the court lacks jurisdiction to proceed. (§ 1015 [in civil actions in which a party is represented by an attorney, 'the service of papers, when required, must be upon the attorney instead of the party, except service of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt']; see also § 1016; *Arthur v. Superior Court*, supra, 62 Cal.2d at p. 408, 42 Cal.Rptr. 441, 398 P.2d 777; and see Weil & Brown, supra, § 9:716, p. 9(11)-47.) [Footnote omitted.]" (Emphasis added.) (Cedars-Sinai Imaging Medical Group v. Superior Court (2000) 83 Cal.App.4th 1281, 1286-1287.)

An OSC Re: Contempt has not been issued and not served. Therefore, the court can not hear this motion on its merits.

- Hearing

"(2) *Grounds for Contempt Order.* The court may exercise its contempt power when the person against whom the judgment or order is rendered has notice or knowledge of the

judgment and the ability to comply, but willfully refuses to do so. (*Board of Supervisors v. Superior Court* (1995) 33 C.A.4th 1724, 1736, 39 C.R.2d 906; on requirements of affidavit of contempt, see infra, §343.) Punishment for contempt must rest on a clear, intentional violation of a specific, narrowly drawn order. (*Wilson v. Superior Court* (1987) 194 C.A.3d 1259, 1273, 240 C.R. 131; *Board of Supervisors v. Superior Court*, supra, 33 C.A.4th 1737.)" (Emphasis added.) (8 Witkin, California Procedure (5th ed. 2008) Enforcement of Judgments, § 340(2), pages 365-366.)

The Fieselers request judicial notice of the March 3, 2010 judgment, the court's January 30, 2015 order holding the Tates in contempt, and the record of survey recorded in March 19, 2014.

The court notes that the underlying judgment entered on March 3, 2010 abated the nuisance claimed by the Fieselers and imposed a permanent injunction preventing the Tates from closing or locking the common gate to Highway 49 at any time that the Fieselers are at home.

The court further notes that in the final ruling and order issued in the OSC proceeding on January 30, 2015 the court expressly found that a reasonable and sensible reading of the permanent injunction was that there could not be an obstruction to the roadway.

Kristine Fieseler declares the following in support of the motion: the Tates continue to lock the gate and prevent the Fieselers from access to their property through the joint gate; the Tates continue to lock the gate when the Fieselers are present; Mr. Fieseler is always at home as he is handicapped; she runs a small horse ranch and has deliveries of food stuffs for the animals through the joint gate; she also has deliveries such as propane, Amazon, FedEx and U.S. mail delivered through the joint gate as it is their primary access to their property and it is their address; the dates of the new violations of the injunction are too numerous to list; and she

has attached a representative list of dates and photos of the gate being locked as Exhibit A to the declaration. (Declaration of Kristine Fieseler in Support of Motion, paragraphs 3, 5-7, and 9.)

The court notes that the permanent injunction only applies to leaving the gates open and unlocked when the Fieselers are at home and does not mandate the gates be opened and unlocked when the Fieselers are not home and they have deliveries scheduled or expected.

As stated earlier this ruling, the court can not hear this motion on its merits due to service defects.

Request for Immunity from Criminal Prosecution and Order Allowing Self-Help to Cut Locks and Force Open Gates

The Fieselers have not cited any legal authority for the court to grant them immunity from criminal liability for engaging in self-help by cutting locks on the gate and/or forcibly opening the gates.

In affirming a judgment entered after a nonjury trial awarding plaintiff Ferdinando Daluiso, damages for personal injuries sustained as a result of defendant's forcible entry onto certain land on which plaintiff resided when defendants were purportedly engaged in self-help conduct to remove a boundary fence they claimed was improperly placed as shown on a recent land survey, the California Supreme Court discussed the public policy against self-help to resolve civil disputes involving land as follows: "We intend by our holding today to give to a plaintiff in peaceable possession of land a right to recover In tort for damages for injuries to his person and goods against one forcibly entering the land. We reiterate that this holding gives full effect to the declared policy of this state against the use of self-help to recover possession of land and imposes liability on persons who engage in conduct which leads to a breach of the peace. 'It is a general principle that one who is or believes he is injured or deprived of what he

is lawfully entitled to must apply to the state for help. ¶ Self help is in conflict with the very idea of the social order. It subjects the weaker to risk of the arbitrary will or mistaken belief of the stronger. Hence the law in general forbids it.' (5 Pound, Jurisprudence (1959) s 142, pp. 351—352.) To the extent that they are inconsistent, we overrule *Canavan v. Gray*, Supra, 64 Cal. 5, 27 P. 788, and *Walker v. Chanslor*, Supra, 153 Cal. 118, 94 P. 606." (Daluiso v. Boone (1969) 71 Cal.2d 484, 500.) In Daluiso, supra, after a survey of the boundary between defendant's and plaintiff's land the plaintiff's son and defendant had several discussions about relocation of the West fence of the Melody Ranch property to conform to survey findings. Defendant claimed that he and plaintiff reached an agreement whereby Salvatore was to move the fence to a position east of where it was then located. Salvatore denied this. Apparently intending to relocate and realign the fence to conform to the survey, employees of defendant, at the latter's direction and under his personal supervision, proceeded to remove a section of the fence running along the west line of Melody Ranch. Defendant did not provide previous notice of this action to plaintiff or his son. Plaintiff arrived at the scene and asked defendant what was occurring. He was informed of defendant's intentions. The 85 year old plaintiff, who was ailing with a heart condition, asked defendant to order the work stopped. Defendant refused and a heated argument between plaintiff and defendant ensued and plaintiff became very excited and upset. Plaintiff repeatedly requested defendant during the argument to order his employees to stop and to settle the controversy about the location of the fence by legal means.

Issuing an order of immunity for engaging in self-help in the Fieseler's discretion related to the locks and gates would violate the public policy to have parties to a civil dispute resort to court when there is a dispute over land use and possession.

Instructions to the Sheriff's Department to Enforce a Civil Judgment

The Fieselers have not cited any legal authority for the court to grant a blanket order directing the Sheriff's Department to enforce a civil judgment.

Request for Fine for Potential Future Contempt by the Tates

Kristine Fieseler requests in paragraph 11 of her declaration that the Tates be fined an additional $1,000 for each time they violate the injunction as a contempt of court and imposition of that fine can be based solely upon observation of any Sheriff as submitted by official report to the Court.

Such an order would clearly violate the Tate's fundamental rights to due process by depriving them of the due process protections of the OSC quasi-criminal contempt proceedings.

It appears that an OSC was not issued and not personally served on Linda Tate. Therefore, the court has no authority to rule on the merits of the matter at this time.

TENTATIVE RULING # 5: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, FEBRUARY 25, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

6. MID-STATE ENTERPRISES v. THE CHI CO. PCU-20210089

Plaintiff's Motion to Fix Amount of Attorney Fees After Entry of Judgment.

On December 9, 2021 the parties executed a stipulation for a conditional judgment, which was entered as an order of the court on December 10, 2021. The parties agreed defendants would pay plaintiff $2,156.51 by a certain payment schedule; defendants would also pay $1,200 per month as month to month holdover tenants for unit K and $1,200 per month as month to month holdover tenants of unit L; if defendants failed to make any of the specified payments, the plaintiff may file without notice an ex parte declaration in support of a request for a writ of possession and cancellation of the agreement and seek entry of judgment in the amount of $2,165.51, less payments made; upon payment of $2,156.51, provided no monthly rent payment is outstanding, the plaintiff will dismiss the lawsuit; and the court retained jurisdiction to enforce the settlement. On December 30, 2021 plaintiff filed an ex parte application for entry of judgment and issuance of a writ of possession and declaration in support thereof. The court entered judgment on January 4, 2022 awarding plaintiff possession of the property and $2,156.51 in holdover damages. The court reserved judgment on the attorney fees and costs until a cost bill and motion for attorney fees are filed.

Plaintiff moves for an award of $5,422.50 in attorney fees and $593 in costs incurred in this action, including the fees incurred to prepare the instant motion.

The proof of service declares that notice of the hearing, the moving papers, and the memorandum of costs were served by mail to the address of record of defendants on January 3, 2022. There was no opposition in the court's file at the time this ruling was prepared.

The subject lease attached to the complaint for unlawful detainer provides in paragraph 13.2(a) related to remedies for the lessee's failure to perform any duties or obligations under

the lease: "…Lessor shall be entitled to recover from Lessee: * * * (iv) any other amount necessary to compensate Lessor for all the detriment proximately caused by the Lessee's failure to perform obligations under this Lease or which in the ordinary course of things would be likely to result therefrom, including but not limited to the cost of recovering possession of the Premises, …reasonable attorney's fees …" (Unlawful Detainer Complaint, Exhibit 1 – Standard Industrial/Commercial Multi-Tenant Lease – Gross.)

"In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. ¶ Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract. ¶ Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit. ¶ Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void." (Civil Code, § 1717(a).)

"The following items are allowable as costs under Section 1032: ¶ * * * (10) Attorney fees, when authorized by any of the following: (A) Contract. ¶ (B) Statute. ¶ (C) Law." (Code of Civil Procedure, § 1033.5(a)(10).)

"Contractual attorney fees are to be claimed "only" by noticed motion, not by the mere filing of a memorandum of costs." (Italics in original.) (Russell v. Trans Pacific Group (1993) 19 Cal.App.4th 1717, 1725.)

"It is well established that the determination of what constitutes reasonable attorney fees is committed to the discretion of the trial court, whose decision cannot be reversed in the absence of an abuse of discretion. (*La Mesa-Spring Valley School Dist. v. Otsuka*, 57 Cal.2d 309, 316, 19 Cal.Rptr. 479, 369 P.2d 7; *Horn v. Swoap*, 41 Cal.App.3d 375, 386, 116 Cal.Rptr. 113; *Excelsior etc. School Dist. v. Lautrup*, 269 Cal.App.2d 434, 447, 74 Cal.Rptr. 835.) The value of legal services performed in a case is a matter in which the trial court has its own expertise. (*Excelsior etc. School Dist. v. Lautrup*, supra at p. 448, 74 Cal.Rptr. 835.) The trial court may make its own determination of the value of the services contrary to, or without the necessity for, expert testimony. (*Barlin v. Barlin*, 156 Cal.App.2d 143, 149, 319 P.2d 87; *Mitchell v. Towne*, 31 Cal.App.2d 259, 266, 87 P.2d 908.) The trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case. (*La Mesa-Spring Valley School Dist. v. Otsuka*, supra; *Excelsior etc. School Dist. v. Lautrup*, supra, 269 Cal.App.2d at p. 447, 74 Cal.Rptr. 835.)" (Melnyk v. Robledo (1977) 64 Cal.App.3d 618, 623-624.)

"Correctly stated, the rule is that when the trial court is informed of the extent and nature of the services rendered, it may rely on its own experience and knowledge in determining their reasonable value. [Footnote omitted.] (See, e. g., *Lipka v. Lipka*, supra, 60 Cal.2d at p. 480, 35 Cal.Rptr. 71, 386 P.2d 671; *Elconin v. Yalen*, 208 Cal. 546, 549-550, 282 P. 791; *Kirk v. Culley*, 202 Cal. 501, 508-509, 261 P. 994; *Spencer v. Collins*, 156 Cal. 298, 307, 104 P. 320; *Patten v. Pepper Hotel Co*., supra, 153 Cal. at p. 472, 96 P. 296; *Estate of Straus*, 144 Cal. 553, 557-558, 77 P. 1122; *Peyre v. Peyre*, supra, 79 Cal. at pp. 339-340, 21 P. 838; *Jones v. Jones*, supra, 135 Cal.App.2d at p. 64, 286 P.2d 908 (see fn. 3, Ante); see also, 1 Witkin, Cal.

Procedure (2d ed. 1970) Attorneys, s 97, pp. 106-107.)" (In re Marriage of Cueva (1978) 86 Cal.App.3d 290, 300–301.)

"The use of the lodestar method for calculating attorney fees was established in California in Serrano III. As we recently noted, "[i]n so-called fee shifting cases, in which the responsibility to pay attorney fees is statutorily or otherwise transferred from the prevailing plaintiff or class to the defendant, the primary method for establishing the amount of 'reasonable' attorney fees is the lodestar method. The lodestar (or touchstone) is produced by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate. Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative 'multiplier' to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented." (*Lealao*, supra, 82 Cal.App.4th 19, 26, 97 Cal.Rptr.2d 797.) "The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132, 104 Cal.Rptr.2d 377, 17 P.3d 735.) Under certain circumstances, a lodestar calculation may be enhanced on the basis of a percentage-of-the-benefit analysis. (Lealao, supra, at pp. 49-50, 97 Cal.Rptr.2d 797.)" (Thayer v. Wells Fargo Bank, N.A. (2001) 92 Cal.App.4th 819, 833.)

The stipulation for conditional judgment expressly provided that in all other respects, the existing lease agreement between the parties shall remain in full force and effect. (Stipulation to Conditional Judgment Entered on December 10, 2021, page 1, lines 26-27; and page 2, lines 3-4.)

Plaintiff's counsel submitted a declaration in support of the claim for attorney fees and filed a verified memorandum of costs listing $593 in costs incurred for fling and motion fees and service of process.

Under the circumstances presented, plaintiff is the prevailing party in this action. As the prevailing party, plaintiff is entitled to an award of reasonable attorney fees pursuant to contract and costs of suit pursuant to statute. Having read and considered plaintiff's counsel's declaration in support of the motion and the memorandum of costs, the court finds that plaintiff incurred $5,422.50 in reasonable attorney fees and $593 in costs. The court awards plaintiff $5,422.50 in attorney fees and $593 in costs.

TENTATIVE RULING # 6: PLAINTIFF'S MOTION TO FIX AMOUNT OF ATTORNEY FEES AFTER ENTRY OF JUDGMENT IS GRANTED. THE COURT AWARDS PLAINTIFF $5,422.50 IN ATTORNEY FEES AND $593 IN COSTS. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT

WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, FEBRUARY 25, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

7. RUSSELL v. VANACORE PC-20200361

Defendants' Motion for Relief from Default.

On July 28, 2020 plaintiff filed a complaint against defendants Vanacore and Davis asserting causes of action for fraud, breach of fiduciary duty, conversion, breach of contract and constructive trust arising from alleged fraudulent activities and misrepresentations concerning alleged investment opportunities in new or existing businesses.

On September 22, 2020 defense counsel executed the Judicial Counsel Form POS-015 acknowledgement of receipt of the summons and complaint. The acknowledgement of receipt was filed on September 24, 2020.

Default was entered against both defendants on November 24, 2020.

Defendants' motion for relief from default as filed on January 12, 2022.

Defendants move to set aside the default as the parties stipulated to in the written joint stipulation, dated March 23, 2021. Defendants argue: due to mistake, inadvertence, and excusable neglect of the defense law firm, the stipulation and proposed answer were not filed with the court within 30 days of the stipulation as required by the terms of the stipulation; the associate and assistant handling the matter for the firm specifically told counsel at the time the stipulation was executed that it was timely filed with the court, however, this turned out to be erroneous; recently the associate and assistant accepted employment with another firm and up until the time of leaving counsel was informed that the stipulation and proposed answer were filed with the court; at the time the stipulation and answer were to be filed there were IT upgrades, email issues, and ECF filing issues that caused the filing not to occur earlier; and the parties have met and conferred on the matter and plaintiff's counsel stated that he no longer had authority to agree to file the stipulation at this time.

Plaintiff opposes the motion on the following grounds: the notice of motion limits the request for relief to the provisions of Code of Civil Procedure, § 473(b); the motion should be denied under section 473(b), because the court lacks jurisdiction to hear the motion as the motion was not filed within six months of entry of the defaults; and the motion should be denied as defendants have not established that there was a reasonable mistake of fact or law by defendants or their attorneys.

At the time this ruling was prepared there was no reply in the court's file.

"* * * Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties. However, this section shall not lengthen the time within which an action shall be brought to trial pursuant to Section 583.310." (Emphasis added.) (Code of Civil Procedure, § 473(b).)

Code of Civil Procedure, § 473(b) mandates that the court vacate a default and any resulting default judgment where the attorney of the moving party admits in a sworn declaration that it was counsel's mistake, inadvertence, surprise, or neglect that resulted in the default being entered. The court must grant relief even if the neglect was inexcusable, unless the court finds that the attorney's mistake, inadvertence, surprise or neglect did not in fact cause the default. (Metropolitan Service Corp. v. Casa de Palms, Ltd. (1995) 31 Cal.App.4th 1481, 1487.)

The purpose of the mandatory relief provision of section 473(b) is "to relieve an innocent client of the burden of the attorneys fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits. (Citation omitted.)" (Metropolitan Service Corp., supra at page 1487.)

"It is settled that the law favors a trial on the merits (*Elms v. Elms* (1946) 72 Cal.App.2d 508, 513, 164 P.2d 936; *Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523, 525, 190 P.2d 593; *Davis v. Thayer* (1980) 113 Cal.App.3d 892, 904, 170 Cal.Rptr. 328; *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233, 211 Cal.Rptr. 416, 695 P.2d 713; *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 243 Cal.Rptr. 902, 749 P.2d 339) and therefore liberally construes section 473. (*Elms v. Elms*, supra, 72 Cal.App.2d at p. 513, 164 P.2d 936.) Doubts in applying section 473 are resolved in favor of the party seeking relief from default (*Elston v. City of Turlock*, supra, 38 Cal.3d at p. 233, 211 Cal.Rptr. 416, 695 P.2d 713) and if that party has moved promptly for default relief only slight evidence will justify an order granting such relief." (Iott v. Franklin (1988) 206 Cal.App.3d 521, 526.)

The six month limitation in Section 473(b) for attorney mistake, inadvertence, surprise, or neglect dos not commence to run until the default judgment is entered. The court notes that a judgment has not been entered in this action. Therefore, the motion is timely.

If the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect, the motion must be denied. (Emphasis the court's.)

The defaults were entered on November 24, 2020.

Defendants argue that due to mistake, inadvertence, and excusable mistake of the defense law firm, the stipulation and proposed answer were not filed with the court within 30 days of the March 23, 2021 stipulation.

Defense counsel declares: on March 23, 2021 plaintiff and defendants entered into a stipulation agreeing to set aside the default; defendants request that the default be set aside due to mistake, inadvertence and excusable neglect as it was only recently learned that the stipulation was not filed within the timeframe contemplated by the parties; due to mistake, inadvertence, and excusable neglect, the stipulation, proposed order, and answer were not timely filed; the firm was in the process of undergoing significant IT upgrades at the time of the execution of the stipulation and proposed order and was experiencing IT issues with emails and ECF filings in several matters through no fault of the attorneys; the firm's associate and assistant handling the matter specifically told him at the time the stipulation was executed that it was timely filed with the court; this turned out to be inaccurate; recently that associate and assistant accept new positions with another firm and up until the time she left she informed him the stipulation, proposed order and answer was filed; the truth is that because of the IT upgrades, the ECF filing issue, and transition of her employment, the filing did not occur through mistake, inadvertence, and excusable neglect; and as soon as he learned about it in recent conversations with opposing counsel in preparation for the MSC he requested opposing counsel to allow the stipulation to be filed; and opposing counsel indicated he no longer had authority to agree to that proposition. (Declaration of Byron T. Ball in Support of Motion, paragraphs 10, 11, and 13-16.)

The evidence establishes that the claimed defense attorney mistake, inadvertence, and excusable mistake caused the stipulation and proposed answer to not be filed with the court within 30 days of the stipulation. The claimed attorney mistake, inadvertence, and excusable mistake did not cause entry of the default. The conduct claimed as the attorney mistake, inadvertence, and excusable mistake occurred months after the defaults were entered on November 24, 2020.

The court denies the motion as the court finds that entry of the default was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect.

TENTATIVE RULING # 7: DEFENDANTS' MOTION FOR RELIEF FROM DEFAULT IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, FEBRUARY 25, 2022 EITHER IN

PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

8. MATTER OF K.B. 22CV0030

OSC Re: Name Change.

At the time this ruling was prepared there was no proof of publication in the court's file, which is mandated by Code of Civil Procedure, § 1277(a).

TENTATIVE RULING # 8: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, FEBRUARY 25, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

9. FREEMAN v. OVERHOTLZER PC-20190099

Defendant Overholtzer's Motion for Summary Judgment.

On February 21, 2019 plaintiff filed an action against defendants asserting causes of action for general negligence and premise liability for personal injuries plaintiff allegedly sustained when using an allegedly defective grinder machine/sander.

Defendant Overholtzer moves for entry of summary judgment on the following grounds: the plaintiff can not establish the critical element of duty in the negligence cause of action, because defendant Overholtzer was not a tenant in possession, he did not rent, control, maintain, or own any of the equipment on the premises, and did not employ plaintiff; and the premises liability cause of action can not be proven against him, because he was not a tenant in possession of the property, he did not rent, control, maintain, or own any of the equipment on the premises, the willful failure to warn theory under Civil Code, § 846 does not apply as plaintiff was not invited onto the premises for recreational purposes, and there was no employee or agent relationship between defendant Overholtzer and defendant Sundance Motors or any other defendant.

The proof of service declares that on November 18, 2021 notice of the hearing and the moving papers were served by mail to plaintiff's address of record.

There was no opposition in the court's file at the time this ruling was prepared.

Summary Judgment Principles

"For purposes of motions for summary judgment and summary adjudication: ¶ * * * (2) A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of

action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (Code of Civil Procedure, § 437c(p)(2).)

"The purpose of summary judgment is to penetrate through pleadings to ascertain, by means of affidavits, the presence or absence of triable issues of material fact. (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107 [252 Cal.Rptr. 122, 762 P.2d 46].) The trial judge determines whether triable issues of fact exist by examining the affidavits and evidence, including any reasonable inferences which may be drawn from the facts. (*People v. Rath Packing Co.* (1974) 44 Cal.App.3d 56, 61-64 [118 Cal.Rptr. 438].) The evidence of the moving party is strictly construed and the evidence of the opposing party liberally construed. Doubts as to the propriety of granting the motion must be resolved in favor of the party resisting the motion. (*Stationers Corp. v. Dun & Bradstreet, Inc*. (1965) 62 Cal.2d 412, 417 [42 Cal.Rptr. 449, 398 P.2d 785].)" (Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.)

"In ruling on the motion, the court must "consider all of the evidence" and "all" of the "inferences" reasonably drawn therefrom (id., § 437c, subd. (c)), and must view such evidence (e.g., *Molko v. Holy Spirit Assn.*, supra, 46 Cal.3d at p. 1107, 252 Cal.Rptr. 122, 762 P.2d 46; *Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417, 42 Cal.Rptr. 449, 398 P.2d 785) and such inferences (see, e.g., *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1520, 80 Cal.Rptr.2d 94 [review on appeal]; *Ales-Peratis Foods Internat., Inc. v. American Can Co.* (1985) 164 Cal.App.3d 277, 280, 209 Cal.Rptr. 917, fn. * [same]), in

the light most favorable to the opposing party." (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843.)

"A moving party defendant is entitled to summary judgment if it establishes a complete defense to the plaintiff's causes of action, or shows that one or more elements of each cause of action cannot be established. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 849, 107 Cal.Rptr.2d 841, 24 P.3d 493.)" (Eriksson v. Nunnink (2011) 191 Cal.App.4th 826, 847.)

"A defendant has met its burden of showing a cause of action has no merit if it 'has shown that one or more elements of the cause of action ... cannot be established, or that there is a complete defense to that cause of action. Once the defendant ... has met that burden, the burden shifts to the plaintiff ... to show ... a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff ... may not rely upon the mere allegations or denials of its pleading to show ... a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists ....' (*Id.*, subd. (o)(2); *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 464 & fn. 4 [63 Cal.Rptr.2d 291, 936 P.2d 70].)" (Scheiding v. Dinwiddie Constr. Co. (1999) 69 Cal.App.4th 64, 69.)

"…[I]t is axiomatic that the party opposing summary judgment " 'must produce admissible evidence raising a triable issue of fact. [Citation.]' [Citation.]" (*Dollinger,supra,* 199 Cal.App.4th at pp. 1144–1145, 131 Cal.Rptr.3d 596.) This requirement is black letter law (Code Civ. Proc., § 437c, subd. (p)(2)) that applies whether the alleged cause of action is statutory or under the common law." (All Towing Services LLC v. City of Orange (2013) 220 Cal.App.4th 946, 960.)

"The pleadings determine the issues to be addressed by a summary judgment motion. (*Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 885, 164 Cal.Rptr. 510, 610 P.2d 407, revd. on other grounds *Metromedia, Inc. v. San Diego* (1981) 453 U.S. 490, 101 S.Ct.

2882, 69 L.Ed.2d 800.)" (Oakland Raiders v. National Football League (2005) 131 Cal.App.4th 621, 629.)

"The first step in analyzing a motion for summary judgment is to identify the issues framed by the pleadings. It is these allegations to which the motion must respond by showing there is no factual basis for relief or defense on any theory reasonably contemplated by the opponent's pleading. (Citations omitted.)" (6 Witkin, California Procedure (5th ed. 2008) Proceedings Without Trial, § 212, page 650.)

With the above-cited principles in mind, the court will rule on the motion for summary judgment.

Negligence Cause of Action

"The elements of a cause of action for negligence are: duty; breach of duty; legal cause; and damages. (*Paz v. State of California* (2000) 22 Cal.4th 550, 559, 93 Cal.Rptr.2d 703, 994 P.2d 975; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1188, 91 Cal.Rptr.2d 35, 989 P.2d 121, disapproved on another point in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, fn. 19, 107 Cal.Rptr.2d 841, 24 P.3d 493; *Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 614, 76 Cal.Rptr.2d 479, 957 P.2d 1313.)" (Friedman v. Merck & Co. (2003) 107 Cal.App.4th 454, 463.)

"Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself. The design, distribution, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and skill that is required by this section. The extent of liability in these cases is defined by the Title on Compensatory Relief." (Civil Code, § 1714(a).)

"The existence and scope of any such duty are legal questions for the court. (*Merrill v. Navegar, Inc., supra,* 26 Cal.4th at p. 477, 110 Cal.Rptr.2d 370, 28 P.3d 116.) "Duty, being a question of law, is particularly amenable to resolution by summary judgment." (*Parsons, supra,* 15 Cal.4th at p. 465, 63 Cal.Rptr.2d 291, 936 P.2d 70.)" (Taylor v. Elliott Turbomachinery Co., Inc. (2009) 171 Cal.App.4th 564, 593.)

"To determine if there is a duty in a particular case, we consider whether the defendant created an unreasonable risk of harm to others. (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 533, 107 Cal.Rptr.3d 481.) "[F]oreseeability of the risk is a primary consideration in establishing the element of duty." (*Weirum, supra,* at p. 46, 123 Cal.Rptr. 468, 539 P.2d 36.) A person is entitled to assume others will not act negligently, but only to the extent the intervening conduct could not be anticipated. (*Id.* at p. 47, 123 Cal.Rptr. 468, 539 P.2d 36.) " 'Courts ... have invoked the concept of duty to limit generally "the otherwise potentially infinite liability which would follow from every negligent act...." ' [Citation.]" (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 164, 11 Cal.Rptr.3d 564.)" (Jackson v. AEG Live, LLC (2015) 233 Cal.App.4th 1156, 1174.)

The general negligence cause of action of the complaint alleges: the date of the subject incident was February 24, 2017; defendants owned, controlled, managed, maintained, repaired, and serviced real property and the tools and equipment thereon, including the subject grinding machine/sander, which defendants owned, maintained, repaired, modified, and serviced; plaintiff was provided the subject grinding machine/sander to perform work while he was on the subject real property; the machine was defective in maintenance, repairs, modifications and servicing; defendants failed to warn plaintiff of the known dangers of the machine and failed to guard against those dangers; plaintiff was not properly instructed or trained in the use of the machine by defendants; defendants failed to provide adequate safety

equipment to use with operating the machine and/or did not require use of safety equipment; some of the defendants were the employers of plaintiff at the time of the subject incident; plaintiff was acting in the course and scope of that employment when injured; those employer defendants failed to carry workers compensation coverage at the time of the incident; certain defendants owned the machine at the time of the incident; and plaintiff was severely injured by the machine owned and supplied by defendant while the machine was being used by plaintiff at defendant's real property.

Defendant Overholtzer declares in support of the motion: on February 24, 2017 he owned the subject real property where the incident occurred; he previously turned over all duties and obligations to the lessee, James Curry; on February 24, 2017 James Curry was leasing the subject property from him; he did not own, hire, provide, nor employ the grinding machine/sander that plaintiff was apparently using during the time of the alleged incident; he had nothing to do with this grinder; it was not his grinder; he did not hire plaintiff and was not his employer before, on, or about February 24, 2017; he did not invite plaintiff onto the property for recreational purposes and did not have plaintiff pay him to use the property for recreational purposes; he did not invite plaintiff to do anything on the day he was apparently injured; he did not injure plaintiff directly or indirectly in any way; he was not present when plaintiff was injured; and he did not do anything that caused plaintiff to be injured. (Declaration of Willard Overholtzer in Support of MSJ, paragraphs 2-7.)

Inasmuch as plaintiff has not objected to any evidence submitted in support of the motion and has not filed any opposition or separate statement in opposition, the court may enter summary adjudication in favor of defendant Overholtzer as requested, provided the evidence submitted meets plaintiff's initial burden to establish a prima facie case of entitlement to summary adjudication of the negligence cause of action.

Strictly construing the moving party's evidence, resolving doubts as to the propriety of granting the motion in favor of the party resisting the motion, and considering all of the evidence and all of the inferences reasonably drawn therefrom in the light most favorable to the opposing party (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843; and Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.), the court finds the above-cited evidence is sufficient to meet defendant's initial burden of proof.

Defendant having met his initial burden of proof, the burden shifted to the plaintiff to show with admissible evidence that a triable issue of one or more material facts exists as to the negligence cause of action. Plaintiff not having opposed the motion, plaintiff failed to submit any evidence that raises a triable issue of material fact and, therefore, failed to meet plaintiff's burden to avoid entry of summary adjudication on this cause of action.

The court grants summary adjudication of the general negligence cause of action in favor of defendant.

Premises Liability Cause of Action

"While an owner is not an insurer of safety to those on its premises, an owner owes them "a duty to exercise reasonable care in keeping the premises reasonably safe." (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205, 114 Cal.Rptr.2d 470, 36 P.3d 11.)" (Howe v. Seven Forty Two Co., Inc. (2010) 189 Cal.App.4th 1155, 1161.)

"A defendant cannot be held liable for the defective or dangerous condition of property which it did not own, possess, or control. Where the absence of ownership, possession, or control has been unequivocally established, summary judgment is proper. (*Whitney's at the Beach v. Superior Court* (1970) 3 Cal.App.3d 258, 269, 83 Cal.Rptr. 237; *Bill v. Superior Court* (1982) 137 Cal.App.3d 1002, 1014–1015, 187 Cal.Rptr. 625; *Petersen v. City of Vallejo* (1968) 259 Cal.App.2d 757, 773–777, 66 Cal.Rptr. 776; see also *Gillespie v. City of Los Angeles*

(1950) 36 Cal.2d 553, 555–557, 225 P.2d 522.)" (Isaacs v. Huntington Memorial Hospital (1985) 38 Cal.3d 112, 134; overruled on other grounds in Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal.4th 666.)

"The elements of a cause of action for premises liability are the same as those for negligence: duty, breach, causation, and damages. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205, 114 Cal.Rptr.2d 470, 36 P.3d 11; see Civ.Code, 1714, subd. (a).)" (Castellon v. U.S. Bancorp (2013) 220 Cal.App.4th 994, 998.)

"A landowner " ' "has an *affirmative duty* to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must *inspect* them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable." ' [Citation.]" (*Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, 1134, 32 Cal.Rptr.2d 755.)" (Salinas v. Martin (2008) 166 Cal.App.4th 404, 412.)

"Historically, the public policy of this state generally has precluded a landlord's liability for injuries to his tenant or his tenant's invitees from a dangerous condition on the premises which comes into existence after the tenant has taken possession. This is true even though by the exercise of reasonable diligence the landlord might have discovered the condition. (*Schwartz v. McGraw-Edison Co.*, 14 Cal.App.3d 767, 92 Cal.Rptr. 776; 30 Cal.Jur.2d Landlord and Tenant, s 159, pp. 307--309; Rest., Tort, s 355 et seq.; 4 Witkin, Summary of Cal.Law, 8th ed., Torts, s 615, pp. 2895--2896.) ¶ The rationale for this rule has been that property law regards a lease as equivalent to a sale of the land for the term of the lease. (See comment (a) to Rest., Torts, s 355.) As stated by Prosser: 'In the absence of agreement to the contrary, the lessor surrenders both possession and control of the land to the lessee, retaining only a reversionary interest; and he has no right even to enter without the permission of the lessee. Consequently, it is the general rule that he is under no obligation to anyone to look after the premises or keep

them in repair, and is not responsible, either to persons injured on the land or to those outside of it, for conditions which develop or are created by the tenant after possession has been transferred. Neither is he responsible, in general, for the activities which the tenant carries on upon the land after such transfer, even when they create a nuisance.' (Prosser, Law of Torts, p. 400 (4th ed.).) ¶ To this general rule of nonliability, the law has developed a number of exceptions, such as where the landlord covenants or volunteers to repair a defective condition on the premises (*Scholey v. Steele*, 59 Cal.App.2d 402, 405, 138 P.2d 733; *Minolletti v. Sabini*, 27 Cal.App.3d 321, 324, 103 Cal.Rptr. 528), where the landlord has actual knowledge of defects which are unknown and not apparent to the tenant and he fails to disclose them to the tenant (*Shotwell v. Bloom*, 60 Cal.App.2d 303, 309--310, 140 P.2d 728), where there is a nuisance existing on the property at the time the lease is made or renewed (*Burroughs v. Ben's Auto Park, Inc.*, 27 Cal.2d 449, 453--454, 164 P.2d 897), when a safety law has been violated (*Grant v. Hipscher*, 257 Cal.App.2d 375, 382--383, 64 Cal.Rptr. 892), or where the injury occurs on a part of the premises over which the landlord retains control, such as common hallways, stairs, elevators or roof (*Johnston v. De La Guerra Properties, Inc.*, 28 Cal.2d 394, 400, 170 P.2d 5). ¶ A common element in these exceptions is that either at or after the time possession is given to the tenant the landlord retains or acquires a recognizable degree of control over the dangerous condition with a concomitant right and power to obviate the condition and prevent the injury. In these situations, the law imposes on the landlord a duty to use ordinary care to eliminate the condition with resulting liability for injuries caused by his failure so to act. (Cf. *Brennan v. Cockrell Investments, Inc.*, 35 Cal.App.3d 796, 111 Cal.Rptr. 122.)" (Emphasis added.) (Uccello v. Laudenslayer (1975) 44 Cal.App.3d 504, 510-511.) "Simply put, a landlord should not be held liable for injuries from conditions over which he has no control." (Uccello v. Laudenslayer (1975) 44 Cal.App.3d 504, 512.)

““Because a landlord has relinquished possessory interest in the land, his or her duty of care to third parties injured on the land is attenuated as compared with the tenant who enjoys possession and control. Thus, before liability may be thrust on a landlord for a third party's injury due to a dangerous condition on the land, the plaintiff must show that the landlord had actual knowledge of the dangerous condition in question, plus the right and ability to cure the condition.” ¶ Limiting a landlord's obligations releases it from needing to engage in potentially intrusive oversight of the property, thus permitting the tenant to enjoy its tenancy unmolested.” (Stone v. Center Trust Retail Properties, Inc. (2008) 163 Cal.App.4th 608, 612.)

The premises liability cause of action of the complaint alleges: the date of the subject incident was February 24, 2017; defendants owned, controlled, managed, maintained, repaired, and serviced real property and the tools and equipment thereon, including the subject grinding machine/sander, which defendants owned, maintained, repaired, modified, and serviced; plaintiff was provided the subject grinding machine/sander to perform work while he was on the subject real property; the machine was defective in maintenance, repairs, modifications and servicing; defendants failed to warn plaintiff of the known dangers of the machine and failed to guard against those dangers; plaintiff was not properly instructed or trained in the use of the machine by defendants; defendants failed to provide adequate safety equipment to use with operating the machine and/or did not require use of safety equipment; some of the defendants were the employers of plaintiff at the time of the subject incident; plaintiff was acting in the course and scope of that employment when injured; those employer defendants failed to carry workers compensation coverage at the time of the incident; defendants are liable for plaintiff’s injuries under an exception to the nonliability provisions of Civil Code, § 846, because the defendant owners willfully or maliciously failed to warn against a dangerous condition, use, structure, or activity; certain defendants owned the machine at the

time of the incident; defendants Overholtzer and Sundance Motors were the agents and employees of each other and acted within the scope of that agency; and plaintiff was severely injured by the machine owned and supplied by defendant while the machine was being used by plaintiff at defendant's real property.

Inasmuch as plaintiff has not objected to any evidence submitted in support of the motion and has not filed any opposition or separate statement in opposition, the court may enter a summary adjudication in favor of defendant Overholtzer as requested, provided the evidence submitted meets plaintiff's initial burden to establish a prima facie case of entitlement to summary adjudication of the negligence cause of action.

Strictly construing the moving party's evidence, resolving doubts as to the propriety of granting the motion in favor of the party resisting the motion, and considering all of the evidence and all of the inferences reasonably drawn therefrom in the light most favorable to the opposing party (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843; and Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.), the court finds the evidence previously cited in this ruling is sufficient to meet defendant's initial burden of proof.

Defendant having met his initial burden of proof, the burden shifted to the plaintiff to show with admissible evidence that a triable issue of one or more material facts exists as to the general premises liability cause of action. Plaintiff not having opposed the motion, plaintiff failed to submit any evidence that raises a triable issue of material fact and, therefore, failed to meet plaintiff's burden to avoid entry of summary adjudication on the general premises liability cause of action.

The court grants summary adjudication of the general premises liability cause of action in favor of defendant.

- Civil Code, § 846 Theory of Premises Liability

"(a) An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on those premises to persons entering for a recreational purpose, except as provided in this section. ¶ (b) A "recreational purpose," as used in this section, includes activities such as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, private noncommercial aviation activities, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites. ¶ (c) An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby do any of the following: ¶ (1) Extend any assurance that the premises are safe for that purpose. ¶ (2) Constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed. ¶ (3) Assume responsibility for or incur liability for any injury to person or property caused by any act of the person to whom permission has been granted except as provided in this section. ¶ (d) This section does not limit the liability which otherwise exists for any of the following: ¶ (1) Willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity. ¶ (2) Injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose. ¶ (3) Any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner. ¶ (e) This

section does not create a duty of care or ground of liability for injury to person or property." (Civil Code, § 846.)

Strictly construing the moving party's evidence, resolving doubts as to the propriety of granting the motion in favor of the party resisting the motion, and considering all of the evidence and all of the inferences reasonably drawn therefrom in the light most favorable to the opposing party (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843; and Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.), the court finds the evidence previously cited in this ruling is sufficient to meet defendant's initial burden to prove with the evidence submitted that the incident did not involve use of defendant Overholzer's real property for recreational purposes and that plaintiff did not pay him for recreational use of the premises. The evidence present established that defendant Overholtzer can not be held liable under Civil Code, § 846 for willful or malicious failure to warn against a dangerous condition, use, structure, or activity or is liable for charging plaintiff for recreational use of the property.

Defendant having met his initial burden of proof, the burden shifted to the plaintiff to show with admissible evidence that a triable issue of one or more material facts exists as to the Civil Code, § 846 theory of premises liability cause of action. Plaintiff not having opposed the motion, plaintiff failed to submit any evidence that raises a triable issue of material and, therefore, failed to meet plaintiff's burden to avoid entry of summary adjudication on the Civil Code, § 846 theory of premises liability cause of action.

The court grants summary adjudication of the Civil Code, § 846 theory of premises liability cause of action in favor of defendant.

- Agent and Employee Liability Theory

The Third District Court of Appeal has held: "We observe two doctrines may by implicated in assessing liability against an employer. One doctrine is respondeat superior, pursuant to which

the employer is indirectly or vicariously liable for torts committed by its employees within the scope of their employment. (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 208, 285 Cal.Rptr. 99, 814 P.2d 1341 (*Mary M.*).) The other doctrine is an agency theory pursuant to which an employer may be directly liable for acts of its agents. "Vicarious liability based on the tort doctrine of respondeat superior and direct liability based on the theory of actual or ostensible agency are different liability theories which cases do not always distinguish between. [Citation.]" (*Inter Mountain Mortgage, Inc. v. Sulimen* (2000) 78 Cal.App.4th 1434, 1440, fn. 4, 93 Cal.Rptr.2d 790.)" (Myers v. Trendwest Resorts, Inc. (2007) 148 Cal.App.4th 1403, 1427.) "A principal is bound by the authorized acts of agents and those which he has allowed third persons to believe he has authorized (*Smeade v. Rosen*, 121 Cal.App. 79, 8 P.2d 507)." (Northern Cal. Dist. Council of Hod Carriers v. Pennsylvania Pipeline, Inc. (1980) 103 Cal.App.3d 163, 172.)

The Third District stated: "Under the respondeat superior doctrine, an employer may be vicariously liable for torts committed by an employee. (*Perez v. Van Groningen & Sons, Inc., supra,* 41 Cal.3d at p. 967, 227 Cal.Rptr. 106, 719 P.2d 676.) The rule is based on the policy that losses caused by the torts of employees, which as a practical matter are certain to occur in the conduct of the employer's enterprise, should be placed on the enterprise as a cost of doing business. (*Ibid.*) The basic test for vicarious liability is whether the employee's tort was committed within the scope of employment. (*Ibid.*) ¶ The determination of scope of employment can be a difficult task. (*O'Connor v. McDonald's Restaurants, supra,* 220 Cal.App.3d at pp. 29–30, 269 Cal.Rptr. 101.)" (Kephart v. Genuity, Inc. (2006) 136 Cal.App.4th 280, 291.)

Strictly construing the moving party's evidence, resolving doubts as to the propriety of granting the motion in favor of the party resisting the motion, and considering all of the evidence and all of the inferences reasonably drawn therefrom in the light most favorable to

the opposing party (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843; and Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.), the court finds the previously cited evidence meets defendant Overholtzer's initial burden to prove with the evidence submitted that he was not an agent or employee of defendant Sundance Motors and defendant Sundance Motors was not the agent or employee of defendant Overholtzer and, therefore, he is not liable for plaintiff's injuries under a premises liability cause of action based upon the theory that defendant Overholtzer is liable for the conduct of Sundance Motors on the subject premises as Sundance Motors was the agent or employee of defendant Overholtzer.

Defendant having met his initial burden of proof, the burden shifted to the plaintiff to show with admissible evidence that a triable issue of one or more material facts exists as to the employee/agency theory of premises liability cause of action. Plaintiff not having opposed the motion, plaintiff failed to submit any evidence that raises a triable issue of material and, therefore, failed to meet plaintiff's burden to avoid entry of summary adjudication on the employee/agency theory of premises liability cause of action.

The court grants summary adjudication of the employee/agency theory of premises liability cause of action in favor of defendant.

In short, defendant Overholtzer's motion for summary judgment is granted.

TENTATIVE RULING # 9: DEFENDANT OVERHOLTZER'S MOTION FOR SUMMARY JUDGMENT IS GRANTED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON.

PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, FEBRUARY 25, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

10. CAIN V. MENDONSA, PC20190308

Motion to Preclude Defendant from Traveling to Plaintiff's Office.

Defendant filed an ex parte motion on February 7, 2022. The OSC granted shortened time for a hearing to February 25, 2022, at 8:30 a.m., prior to defendant's scheduled deposition on March 3, 2022. Defendant argues that she should be permitted to remain at home and be deposed via Zoom in order to protect her from potential exposure to COVID-19. Defendant is 76 years old. The elderly, 65 years or older, account for about 81% of deaths due to COVID for the U.S. population. Plaintiff opposes defendant's request because defendant resides less than 75 miles from the deposition location and plaintiff does not oppose defendant wearing a mask.

Neither party cited any law in the motion or the opposition. Defendant provided case law in the reply; however, this raises due process concerns because plaintiff is prevented from responding in writing to defendant's reply.

"Unless the court orders otherwise under Section 2025.260, the deposition of a natural person, whether or not a party to the action, shall be taken at a place that is, at the option of the party giving notice of the deposition, either within 75 miles of the deponent's residence, or within the county where the action is pending and within 150 miles of the deponent's residence." (CCP § 2025.250(a).)

"In exercising its discretion to grant or deny this motion, the court shall take into consideration any factor tending to show whether the interests of justice will be served by requiring the deponent's attendance at that more distant place, including, but not limited to, the following…. (3) The convenience of the deponent." (CCP § 2025.260(b)(3).)

"Before, during, or after a deposition, any party, any deponent, or any other affected natural person or organization may promptly move for a protective order… The court, for good

cause shown, may make any order that justice requires to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. This protective order may include, but is not limited to, one or more of the following directions…." (CCP § 2025.420(a), (b).)

The location from defendant's residence is 56 miles from Cameron Park to Grass Valley. Defendant must travel about an hour and a half, and her concern is to not acquire COVID. Plaintiff does not oppose defendant wearing a mask.

The court directs defendant to appear at the noticed location because it is only 56 miles from her residence. (CCP § 2025.250(a).) The court finds there is good cause for heightened protection for defendant due to her high-risk category of acquiring COVID. (CCP § 2025.420(a), (b).) The court directs that all persons at the deposition be always masked and stay a minimum of 6 feet away from defendant during the deposition (i.e., court reporter, attorneys, videographer, etc.).

TENTATIVE RULING # 10: DEFENDANT SHALL GO TO THE LOCATION. ALL PERSONS WILL BE MASKED AND STAY A MINIMUM OF 6 FEET AWAY FROM DEFENDANT. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY

AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, FEBRUARY 25, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.