

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA**

MINUTE ORDER

DATE: 08/19/2020

TIME: 08:20:00 AM

DEPT: 20

JUDICIAL OFFICER PRESIDING: Matthew P. Guasco

CLERK: Miriam Hernandez

REPORTER/ERM: Victoria Valine (CSR#3036)

CASE NO: **56-2018-00520146-CU-PO-VTA**

CASE TITLE: **Adilene Ayala as Sucessor vs Southern California**

CASE CATEGORY: Civil - Unlimited CASE TYPE: PI/PD/WD - Other

EVENT TYPE: Motion for Summary Judgment Defendants Gary L Faris and Esquire Property Management

MOVING PARTY: Gary L Faris, Esquire Property Management

CAUSAL DOCUMENT/DATE FILED: Motion for Summary Judgment or in the Alternative Summary Adjudication as to Plaintiffs Complaint; Memorandum of Points and Authorities; Declaration of Hillary Drennan Patton in Support thereof, 10/18/2019

APPEARANCES

Courtney A. Jakofsky, counsel, present for Guardian Ad Litem, Plaintiff(s) telephonically.

Michael J Chaloupka, counsel, present for Plaintiff(s) telephonically.

Hillary Patton, counsel, present for Defendant(s) telephonically.

Michael I Kim, counsel, present for Defendant(s) telephonically.

CHARLES J. SCHMITT, counsel, present for Defendant(s) telephonically.

Andy Mendoza, counsel, present for Defendant, Cross - Defendant(s) telephonically.

At 08:50 a.m., court convenes in this matter with all parties present as previously indicated.

Counsel have received and read the court's written tentative ruling.

Matter submitted to the Court with argument.

The Court finds/orders:

The Court's tentative is adopted as the Court's ruling.

Procedural Background

On July 16, 2020, the matter came before the Court for a hearing on this motion. The Court issued its tentative decision. At the hearing, counsel for plaintiffs requested a continuance to supplement the evidentiary showing in support of the opposition with the declaration of an expert witness which was previously unavailable. The Court granted that request over the objection of moving parties. The Court permitted limited augmentation of the evidentiary record and additional briefing commensurate with plaintiffs' request. The parties submitted that additional material. The Court modifies its tentative decision accordingly as reflected below.

Evidentiary Objections

The Court OVERRULES Faris's and Esquire's objections to the Declaration of Michael Chaloupka, Esq.

The Court SUSTAINS Faris's and Esquire's objections numbers 3-14 to the Declaration of Stephen J. Donnel. The declaration does not attach Mr. Donnel's c.v., thus omitting the requisite foundation of his qualifications to render expert opinions. Even if that omission is cured, however, Mr. Donnel's declaration is comprised of argument and legal conclusions in most respects, and it lacks foundation and is speculative in the other particulars which are material to this motion.

Undisputed Material Facts ("UMF"s) & Additional Material Factus ("AMF"s)

For the purposes of this motion only, the Court makes the following findings concerning the UMFs and AMFs:

Preliminarily, Faris and Esquire misunderstand the format requirements for a separate statement under rule 3.1350, subdivision (d). The separate statement has a core of 23 UMFs. Variations of these same 23 UMFs are repeated with different numbers for each of the seven issues as to which summary adjudication is sought. The net effect of this needless duplication and renumbering of the same core material facts is a total of 159 discrete UMFs, with variations of the first 23 UMFs having different numbers depending on the issue. The purpose of the separate statement is to facilitate the Court's task of determining the presence or absence of material triable issues, not to make that task unduly burdensome and time consuming. The Court exercises its discretion by not striking the UMFs exceeding the number 23 and by considering all submitted UMFs and AMFs.

The Court finds that UMFs 1-159 are established by the supporting evidence and materially undisputed.

The Court finds that AMFs 1-11 are established by the supporting evidence.

The Court finds that AMF number 12 is not established by the supporting evidence.

Legal Principles Governing Summary Judgment/Adjudication

Summary judgment procedure is well settled: "A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code of Civ. Proc., § 437c, subd. (a).) A party may also move for "summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty. . . ." (Code of Civ. Proc., § 437c, subd. (f)(1).) "The court must grant the motion if all the papers submitted show that there is no triable issue as to any material fact [citation omitted]-that is, there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately, the law [citations omitted]-and that the moving party is entitled to a judgment as a matter of law [citation omitted]." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 855-56, 107 Cal.Rptr.2d 841, 24 P.3d 493, internal quotation marks omitted ("*Aguilar*").) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Id.*, 25 Cal.4th at p. 855, 107 Cal.Rptr.2d 841, 24 P.3d 493.) The court must construe the evidentiary showing, and all reasonable inferences therefrom, in the light most favorable to the opposing party. (*Id.*, 25 Cal.4th at p. 857, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

The Court follows a three-part test in ruling on the motion:

(a) "First, . . . the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Id.*, 25 Cal.4th at p. 850, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

(b) "Second, . . . the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of

production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact."(*Ibid.*)

(c) "Third, . . . how the parties moving for and opposing, summary judgment may each carry their burden of persuasion and/or production depends on which would bear what burden of proof at trial." (*Id.*, 25 Cal.4th at p. 851, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

In determining whether a material triable issue exists, the Court must construe the evidence offered by the moving party in support of the motion strictly and the evidence offered in opposition to the motion liberally. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839, 89 Cal.Rptr.2d 540.) Moreover, the Court is not permitted to weigh or assess the credibility of, or resolve conflicts concerning, the evidence offered in support of or opposition to the motion; conflicts in the evidence must be resolved by the trier of fact, not the Court. (Code of Civ. Proc., §437c, subd. (e); *Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, 1397, fn. 4, 93 Cal.Rptr.2d 763; *AARTS Productions, Inc. v. Aetna Life Ins. Co.* (1986) 179 Cal.App.3d 1061, 1064, 225 Cal.Rptr. 203.)

Ruling on Motion

For the following reasons, the Court GRANTS the motion of Faris and Esquire for summary judgment:

(1) The Court finds that Faris and Esquire have met their initial burdens of production and persuasion concerning application of the *Privette* doctrine as a complete defense to the Complaint. (*Privette v. Superior Court (Contreras)* (1993) 5 Cal.4th 689, 21 Cal.Rptr.2d 72, 854 P.2d 721 ("*Privette*").) Under the *Privette* doctrine, worker's compensation is the exclusive remedy for an employee of an independent contractor who is injured on the worksite. The injured employee may not sue the independent contractor in tort. Additionally, the hirer of the independent contractor may not be sued in tort by the injured employee. The exclusivity of the worker's compensation remedy inures to the benefit of the independent contractor and its hirer. (*Privette, supra*, 5 Cal.4th at 697-698, 702, 21 Cal.Rptr.2d 72, 854 P.2d 721.)

(2) It is materially undisputed that, at the time of the accident, the decedent was an employee of an independent contractor – Master Tree Services, Inc. ("Master") – which had been hired by Esquire as property manager on behalf of Faris. Thus, the *Privette* doctrine is triggered. That doctrine acts as a defense to plaintiffs' Complaint against Faris and Esquire because of the worker's compensation exclusive remedy.

(3) Moreover, the hirers – Esquire and Faris – implicitly delegated to the independent contractor – Master – their statutory duty to comply with all applicable governmental regulatory safety rules pertaining to the work site on Faris's real property. (*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 600-03, 129 Cal.Rptr.3d 601, 258 P.3d 737.)

(4) The burden, therefore, shifts to plaintiffs to raise a triable issue of fact regarding any exception to the *Privette* doctrine. (*Horne v. Ahern Rentals, Inc.* (2020) 50 Cal.App.5th 192, --- Cal.Rptr.3d ---, 2020 WL 3071567, p. 5.)

(5) In order to establish a triable dispute as to the *Privette* defense, plaintiffs must produce relevant evidence that Faris and Esquire retained control of the property in such a manner as to have affirmatively contributed to the fatal accident. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 214-15, 115 Cal.Rptr.2d 853, 38 P.3d 1081 ("*Hooker*"); *Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 717-18, 208 Cal.Rptr.3d 699 ("*Khosh*").) In this context, "affirmative contribution" means "active participation" which ". . . may take the form of directing the contractor about the manner or performance of the work, directing that the work be done by a particular mode, or actively participating in how the job is done." (*Khosh, supra*, 4 Cal.App.5th at p. 718, 208 Cal.Rptr.3d 699.)

(6) It is materially undisputed that neither Faris nor Esquire affirmatively contributed in any manner to

the accident which resulted in decedent's death. Instead, plaintiffs attempt to meet their burden in opposing summary judgment by arguing that Faris and Esquire knew about but did not disclose the concealed, hazardous condition of the power line. (See *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 674-75, 36 Cal.Rptr.3d 495, 123 P.3d 931.) It is, however, materially undisputed that the existence of the active power line in relation to the trees being pruned by the contractor, Master, was an open and obvious, not concealed, hazard. Even if it was admissible, Mr. Donnell's opinions do not change this result or create a material triable dispute excepting Faris and Esquire from the *Privette* doctrine. If anything, Donnell's declaration reaffirms that the hazard at issue here – the power line in close proximity to the palm trees – was open and conspicuous, not concealed. Plaintiffs have failed to meet their burden of producing evidence creating a triable dispute about application of the concealed hazard doctrine as an exception to the *Privette* defense.

(7) Thus, Faris and Esquire, have demonstrated there is no material triable dispute that the *Privette* doctrine is an absolute defense to this action. Faris and Esquire are entitled to judgment in their favor on the Complaint as a matter of law.

(8) In light of the Court's ruling granting summary judgment, the motion for summary adjudication of causes of actions and issues is rendered moot.

For the above reasons, the Court GRANTS the motion and enters JUDGMENT in favor of Faris and Esquire, and each of them, and against plaintiffs on the Complaint. Plaintiffs shall take nothing by their Complaint against Faris and Esquire. Costs are awarded in favor of Faris and Esquire, and each of them, and against plaintiffs, and each of them, in amounts to be determined pursuant to a timely filed cost memorandum in conformity with the Code of Civil Procedure and the California Rules of Court.

Counsel for Faris and Esquire shall serve and file a notice of ruling and proposed order and judgment consistent with the above and in conformity with the Code of Civil Procedure and the Rules of Court.