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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

GIOCONDA MOLINARI,

Plaintiff and Appellant,

v.

PACIFIC GAS & ELECTRIC  
COMPANY,

Defendant and Respondent.

A131965

(San Francisco County  
Super. Ct. No. CGC08484755)

Plaintiff Gioconda Molinari injured her knee when she tripped over some construction cones on a sidewalk in San Francisco. She sued two defendants, Pacific Gas & Electric (PG&E) and NRG Energy Inc. (NRG Energy), for negligence. Both defendants moved for summary judgment, and both were successful, the trial court entering separate judgments for the defendants and dismissing plaintiff's case against them.

Plaintiff appeals only the judgment for PG&E and makes two arguments: (1) that PG&E has not met its burden of showing that plaintiff's action has no merit; and (2) that plaintiff has produced evidence showing a triable issue of material fact. We conclude that neither argument has merit, and we affirm.

**BACKGROUND**

Plaintiff worked in the Federal Building on 7th Street in San Francisco. Around 6:00 p.m. on June 20, 2007, plaintiff was walking to the BART station,

with her friend and coworker Peter Dunnaville. Walking on the sidewalk on 7th Street, near the intersection with Stevenson Street, plaintiff tripped over some construction cones and injured her knee.

In November 2008, representing herself, plaintiff filed a complaint for damages. This was followed in January 2009 by a first amended complaint, also filed by plaintiff herself, the complaint operative here. It named two defendants, PG&E and NRG Energy, and alleged one cause of action, for negligence. Not long thereafter, counsel substituted in to represent plaintiff, represented her throughout the proceedings below, and also represents her on appeal.<sup>1</sup>

NRG Energy and PG&E filed answers to the complaint in March 2009. PG&E also filed a cross-complaint for indemnity against NRG Energy and various Roes. Apparently one “A. Ruiz” was served as a Doe defendant, as in February 2010 it filed an answer to the PG&E cross-complaint.

No register of actions is in the record on appeal, and nothing before us states directly all that happened in the case in the next 18 months. However, based on what we infer, the parties engaged in extensive discovery, both written discovery and depositions. The former included numerous sets of interrogatories, both general and special; document productions; and requests for admissions. The latter included at several depositions, including those of plaintiff, Dunnaville , PG&E’s most knowledgeable person, and other people who were in the neighborhood on June 20, 2007.

On October 28, 2011, NRG Energy filed a motion for summary judgment. The next day PG&E filed its motion for summary judgment, the substance of which is discussed in detail below.<sup>2</sup> The motions were set for hearing on January 14, 2011, in Department 301, before the Honorable Peter Busch.

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<sup>1</sup> The substitution of counsel is not in the record. According to a representation below, the substitution was in May 2009.

<sup>2</sup> Apparently cross-defendant Ruiz filed a third motion against PG&E ‘s cross-complaint.

Following opposition and replies, the motions came on as scheduled. Prior to the hearing Judge Busch had issued tentative rulings granting the motions, which plaintiff contested. A hearing was held, following which Judge Busch granted both motions. Judgments were thereafter entered. Plaintiff filed a motion for new trial as against PG&E only, which Judge Busch denied on March 28. On May 3 plaintiff filed her appeal, appealing only from the judgment for PG&E.

## **DISCUSSION**

### **The Proceedings Below**

PG&E's motion for summary judgment was simple and straightforward, based on the ground that "PG&E owed no legal duty to plaintiff . . . to use, control or maintain the safety cones she complains were the cause of her injury on June 20, 2007. PG&E did not own or place the safety cones in or at the location where plaintiff fell and had no duty in relation to the plaintiff." In addition to a legal memorandum and separate statement, PG&E's motion was supported by two declarations, those of: (1) PG&E's counsel, which authenticated various discovery in the case, and (2) Nathan Ulrich, a PG&E employee, whose declaration we describe in some detail.

Ulrich worked for PG&E for seven years and was employed as a senior field engineer technician-Bay Area Region; at the time of the incident he was a field engineer technician on the "SOMA Grand" project. Ulrich testified that "PG&E construction crews were not working in the street or on the sidewalk area at or near the intersection of 7th Street and Stevenson Street on June 20, 2007, [and] . . . did not have any equipment, including safety cones, staged or grouped on the sidewalk at the corner . . . on that date."

And, Ulrich went on: "4. PG&E cannot and does not begin excavating on any project until the Underground Service Alert notification process is completed and the relevant permit is effective, except in cases of emergency repairs. To this end, PG&E does not deliver safety cones to a jobsite prior to a permit start date. When PG&E does use safety cones they are carried to a jobsite on PG&E work

trucks, and used in conjunction with work in progress at that time. Safety cones are generally not in use except when a crew is actually working. The cones are placed around a truck or an excavation site when crew members are present at an excavation site. When excavation work is completed for any particular day, the area is covered with a steel plate or other covering and asphalt is applied around the covering. Barricades may remain at the work site in conjunction with parking notifications or to protect a work area. Cones are not left at worksites but replaced on PG&E work trucks for future use.”

Ulrich then turned to a document produced by plaintiff in discovery that she apparently relied on for some support of her claim, saying this about the document: “It is a list of excavation permits issued by the City of San Francisco between 2002 and 2007 for the location of Stevenson and 7th Streets and 1160 Mission Street associated with Stevenson Street. I have reviewed this list of permits. Those permits with numbers beginning with the letters ‘PGE’ are permits requested by or issued to PG&E. Those permits not beginning with the letters ‘PGE’ were not requested by or issued to PG&E. Of the permits relating to PG&E, none of the permits were in effect on June 20, 2007. No emergency work was performed at the subject locations on or about June 20, 2007.”

Ulrich then turned to a discussion of one particular permit: “6. One PG&E permit relates to work performed in July 200[7], Permit # PGE073013. That permit was for trenching work in the street area of Stevenson Street associated with the installation of new electric service to 1160 Mission Street. PG&E crews did not work on this job in or on the sidewalk in front of the Federal Building on 7th Street in June of 2007. Attached to this Declaration as Exhibit B is a true and correct copy of the Underground Service Alert, or ‘USA,’ ticket for PG&E work pursuant to July 200[7] Permit # PGE073013. USA tickets constitute the system by which owners of underground facilities in a given area are notified of a contractor’s intent to excavate, allowing that owner to properly mark and locate all underground facilities to avoid dig-ins. The USA ticket reflects when the USA

notice was received, and when work will start. The USA notice for the project associated with 1160 Mission Street shows that it was received by USA on June 28, 2007 and that the work was not scheduled to begin until July 9, 2007. I have reviewed job documents relating to labor charges performed under Permit # PGE073013 which indicated that actual work, including trenching, was done by a General Construction gas crew, and that the work did not begin until July 12, 2007.”

Ulrich’s declaration concluded with testimony about two other subjects: (1) a photograph produced by plaintiff, and (2) San Francisco Department of Public Works regulations. As to the former, Ulrich testified that he “reviewed the photograph produced by Plaintiff . . . , including one showing a safety cone atop a folded barricade attached hereto as Exhibit C. The safety cone in the picture does not appear to be the type of safety cone used by PG&E; it is yellow orange rather than the fluorescent red orange type used by PG&E. In addition, PG&E uses cones which are marked ‘PG&E.’ The cone in the picture does not contain this identifying marking. Furthermore, it is not the custom or practice of PG&E construction personnel to place safety cones on top of barricades which have been knocked to the ground; the purpose of these barricades is to hold notification signs informing the public that the posted area is going to be or is a no parking zone. PG&E personnel are instructed to return such barricades to an upright position so that motorists can read the notices on the barricades.”

As to the regulations, Ulrich testified that “[t]he Regulations for Excavating and Restoring Streets in San Francisco issued by the Department of Public Works requires public notification for work lasting 2 to 14 calendar days be posted by notices 72 hours prior to starting construction. San Francisco Traffic Code Section 33.1 requires the posting of notices every 20 feet for the restricted use of parking areas associated with construction work that is likely to interfere with parking. On-site placards must be erected 72 hours before the effective date of such parking prohibition. Attached as Exhibit D is a true and correct copy of the

No Parking notification associated with Permit # PGE073013. It confirms that the barricade depicted in Exhibit C was placed on July 10, 2007.”

Based on Ulrich’s declaration and in part on the discovery responses from plaintiff, PG&E’s memorandum of points and authorities argued as follows, with all arguments supported by references to PG&E’s separate statement of undisputed facts:

No PG&E construction crew was working in the street or on the sidewalk at or near the intersection of Seventh and Stevenson Streets on June 20, 2007;

Only one PG&E permit relates to work performed in the vicinity (PGE073013), and it was issued on or about July 9, 2007 and was for trenching work in the street area of Stevenson Street associated with the installation of new electric service to 1160 Mission Street;

Labor charges performed under Permit PGE 073013 indicated that actual work, including trenching, was done by a General Construction gas crew, beginning July 12, 2007.

PG&E does not—and cannot—begin excavating on any project until the Underground Service Alert notification process is completed and the relevant permit is effective, except in cases of emergency repairs.

PG&E does not deliver safety cones to a jobsite prior to a permit start date, and when it uses safety cones they are carried to a jobsite on PG&E work trucks, and used in conjunction with work in progress at that time.

Safety cones are generally not in use except when a crew is actually working; the cones are placed around a truck or an excavation site when crew members are present; and when the excavation work is completed for the day, the area is covered with a steel plate or other covering is applied around the work area.

Cones are not left at worksites but are replaced on PG&E work trucks for future use.

The safety cone in the picture produced by plaintiff is not the type of cone used by PG&E: it is yellow orange rather than the fluorescent red orange type used by PG&E.

PG&E uses cones marked “PG&E,” and the cone in the picture produced by plaintiff does not contain this identifying marking.

On December 30, 2010, plaintiff filed her opposition to the PG&E motion. It included a memorandum of points and authorities; plaintiff’s response to PG&E’s separate statement; plaintiff’s own separate statement of facts; and the declaration of plaintiff’s counsel, attaching six exhibits. Plaintiff also filed objections to evidence, objecting to two paragraphs of Ulrich’s declaration.<sup>3</sup>

Plaintiff’s memorandum took issue with PG&E’s assertion that it was “not working” in the area, an argument that read in its entirety as follows:

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<sup>3</sup> Plaintiff’s objections and claimed bases were as follows:

Material Objected to	Grounds for Objection
1. Page 1, ¶3: “PG&E construction crews were not working in the street or on the sidewalk area at or near the intersection of 7th Street and Stevenson Street on June 20, 2007. In addition, PG&E did not have any equipment, including safety cones, staged or grouped on the sidewalk at the corner of Stevenson and 7th on that date.”	Witness Lacks Personal Knowledge (Evid. Code 702(a).) Witness is improperly testifying as to a question which is within the sole province of the trier of fact; Witness lacks foundation to give this opinion and this opinion is based upon improper matter. (Evid. Code 801-802.)
2. Page 2, ¶4: at line 13 “Cones are not left at worksites but replaced on PG&E work trucks for future use.”	Misstates the evidence. (Evid. Code §§ 210, 350-351.) Witness Lacks Personal Knowledge (Evid. Code 702(a)). Witness lacks foundation to give this opinion and this opinion based [ <i>sic</i> ] upon improper matter. (Evid. Code 801-802.)

As will be seen, Judge Busch made no ruling on these, or any other objections, which could preserve the objections for appeal. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512.) However, plaintiff does not raise the issue here.

“[PG&E’s] ‘evidence’ is controverted by the testimony of multiple witnesses placing PG&E crews at the accident site on the day of the accident, and by the presence of PG&E equipment immediately adjacent to the accident scene:

“Peter Dunnaville, who witnessed the accident, observed that Ms. Molinari fell on a cone which was 3-4 feet away from the curb. There were other cones nearby and a PG&E barricade only 3 feet away. [Citation.] Zaccarie Joseph, the security guard monitoring the entrance to the Federal Building, observed PG&E workers in PG&E yellow safety hats at work in the area on the day of the accident. Several [were] working on the sidewalk location and appeared to be working in one or more open utility cover boxes. [Citation]

“There was a PG&E truck parked out front of the Federal Building on the 7th Street side within 15 feet of the accident site. [Citation.]

“A line of safety sawhorses with ‘PG&E’ handwritten at the bottom were in the street in front of the Federal Building; attached to the sawhorses were tow-away signs posting PG&E’s work hours and dates. The signs had been posted for four days before the accident and continued to be posted for a period of two weeks. [Citation.]

“The PG&E sawhorses were located less than five feet from where Ms. Molinari fell. [Citation.]

“Mr. Joseph also responded to the accident and observed, at that time, multiple construction cones on the sidewalk approximately four to five feet from Ms. Molinari, including a couple of cones laying on the ground. A PG&E sawhorse was in the street adjacent to the cones. [Citation.]

“According to the Federal Protective Services report generated as a consequence of the accident, ‘there did not appear to be any other hazard with the sidewalk except for the cones.’ A photograph was taken and attached to the report but has gone missing.”

Plaintiff also argued:

“Further, according to PG&E, City and County of San Francisco Department of Public Works requires notices posted 72 hours prior to starting construction on projects lasting 2 to 14 calendar days, including postings related to public parking restrictions. [Citation.] Thus, the postings observed by Mr. Joseph are further evidence of PG&E’s worksite activities at the time and place of the accident. All evidence supports plaintiff’s allegations that PG&E rush [*sic*] to finish a job and left the cones unattended and it is liable to Plaintiff for the resulting damages.”

PG&E filed its reply on January 10, 2011.

Judge Busch had issued tentative rulings granting the motions of PG&E and NRG Energy. Plaintiff contested the rulings, and the motions were heard on January 14, 2011. Following brief argument, Judge Busch held that the motions were granted, and requested formal orders.

On February 2, 2011, Judge Busch signed an order granting PG&E’s motion, which stated in pertinent part as follows:

“The presence of a PG&E truck in the vicinity of the accident site on the day of the accident and the presence of a traffic barricade in the street is insufficient to raise a triable issue of material fact as to PG&E’s responsibility for the safety cones on the sidewalk which Plaintiff states caused her to fall.

“The evidence presented by Plaintiff in opposition to Defendant PG&E’s Motion does not dispute the affirmative evidence presented by Defendant PG&E regarding its procedures with respect to its use of safety cones, including the fact [that] PG&E stamps its cones with its logo. No witness has identified the safety cones as marked with the PG&E logo.

“The evidence submitted by Plaintiff was deposition testimony that a PG&E truck was parked on 7th Street in the morning of June 20, 2007 in front of the Federal Building and that a barricade marked PG&E was present in the street approximately five feet from the location of the safety cones on the sidewalk. There is no evidence that PG&E employees were working on the sidewalk at the

time of the accident or that PG&E workers placed the safety cones at the location where plaintiff encountered them. There is no evidence establishing a nexus between the safety cones present on the sidewalk at the time of Plaintiff's accident and the PG&E work truck or barricade. The evidence submitted by Plaintiff in her opposition requires the trier of fact to speculate as to whether the safety cones were in fact placed on the sidewalk by PG&E employees as opposed to other entities who may have been working in the area on the day of the accident. Evidence that gives rise to no more than speculation or surmise is insufficient to establish a triable issue of fact.

“IT IS THEREFORE ORDERED that the motion for summary judgment is granted and that judgment in favor of Defendant PACIFIC GAS & ELECTRIC COMPANY and against Plaintiff GIOCONDA MOLINARI shall be entered accordingly.”

Nothing was said in the order—or, for that matter, in the tentative ruling or at the hearing—about any parties' objections to the evidence.<sup>4</sup>

On March 4, 2011 plaintiff moved for a new trial against PG&E on the grounds that the “findings are against the law and/or there is insufficient evidence to support the court's ruling.” Plaintiff's primary argument was that she “established a nexus between the safety cones and PG&E.” In her motion, plaintiff also objected to a different portion of Ulrich's declaration, his testimony that “PG&E uses cones which are marked ‘PG&E,’ ” objecting that the testimony lacked foundation.

The motion for new trial was heard on March 28, 2011. Referring to plaintiff's belated objection, Judge Busch said, “I don't think that Mr. Ulrich's testimony is inadmissible. What conclusions to draw from it is a whole other issue, but I also don't think it was essential to the Court's ruling, nor do I think

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<sup>4</sup> PG&E's reply had objected to seven photographs attached to the declaration of plaintiff's counsel, on the ground that the photographs misstated the evidence and lacked foundation.

that a motion for new trial is an appropriate way to get a ruling on an evidentiary issue in any event.” Judge Busch went on to deny the motion, following which a formal order was entered.

Judgment for PG&E was entered on April 6, and on May 12 plaintiff filed her notice of appeal.

### **Summary Judgment and the Standard of Review**

We set forth the applicable law in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 253-254:

“Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) As applicable here, moving defendants can meet their burden by demonstrating that ‘a cause of action has no merit,’ which they can do by showing that ‘[o]ne or more elements of the cause of action cannot be separately established . . . .’ (§ 437c, subd. (o)(1); see also *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 486-487.) Once defendants meet this burden, the burden shifts to plaintiff to show the existence of a triable issue of material fact. (§ 437c, subd. (p)(2).)

“On appeal ‘[w]e review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. [Citations.]’ (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) Put another way, we exercise our independent judgment, and decide whether undisputed facts have been established that negate plaintiff’s claims. (*Romano v. Rockwell Internat., Inc., supra*, 14 Cal.4th at p. 487.) As we put it in *Fisherman’s Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 320: ‘[W]e exercise an independent review to determine if the defendant moving for summary judgment met its burden of establishing a complete defense or of negating each of the plaintiff’s theories and establishing that the action was without merit.’ (Accord, *Certain*

*Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972.)”

And, we went on: “But other principles guide us as well, including that ‘[w]e accept as true the facts . . . in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them.’ (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 67.) And we must ‘“view the evidence in the light most favorable to plaintiff[] as the losing part[y]” and “liberally construe plaintiff[’s] evidentiary submissions and strictly scrutinize defendant[’s] own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff[’s] favor.” ’ (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96-97.)”

We note one final principle, one not mentioned in *Nazir*, but one particularly applicable here. It is this: if opposition to a motion for summary judgment is based entirely on inferences, such inferences must be “ ‘reasonably deducible from the evidence and not such as are derived from speculation, conjecture, imagination or guesswork.’ ” (*Waschek v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 647; *Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 894.)

Applying those principles here, we conclude that summary judgment was properly granted for PG&E.

### **Summary Judgment Was Properly Granted**

As noted, plaintiff makes two arguments on appeal: (1) that PG&E has not met its initial burden of showing that plaintiff’s cause of action has no merit; and (2) that plaintiff has produced evidence showing a triable issue of fact as to PG&E’s liability.

The first argument, plaintiff contends, is demonstrated because PG&E cannot “affirmatively establish” that (1) a PG&E worksite did not exist in the area where plaintiff fell; and (2) the “subject cones did not belong to PG&E.” We disagree.

To begin with, we do not understand how an argument couched in terms that PG&E “did not meet its burden” is supported by an argument that PG&E did not “affirmatively establish” something, or, as plaintiff later puts it, did not “conclusively demonstrate” something. Certainly PG&E met the initial burden imposed on it.

Plaintiff’s sole cause of action was for negligence. “Negligence is the failure to use reasonable care to prevent harm to . . . others. [¶] A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.” (CACI 401.)

“Actionable negligence involves a legal duty to use due care, a breach of such legal duty, and the breach as the . . . legal cause of the resulting injury.” (*United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 594; *Ortega v. KMart* (2001) 26 Cal.4th 1200, 1205.) To establish the element of actual causation, it must be shown that the defendant’s act or omission was a substantial factor in bringing about the injury. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 778.)

As applied here, therefore, plaintiff had to show negligence on the part of PG&E in connection with the cones, including necessarily that PG&E was responsible for them. PG&E’s attempt to defeat that claim included its showing that it was not working in the vicinity on June 20, 2007 and, moreover, that the cone described by plaintiff was not a PG&E cone.

Since plaintiff had to show that PG&E was responsible for the cones, it meant she had the burden of proof on the issue. So, as the Supreme Court articulated it, this required PG&E as the moving defendant to present evidence that “would require a reasonable trier of fact *not* to find any underlying material fact more likely than not.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851.) The meaning of the “more likely than not” in the quotation is that a

moving defendant must present evidence that, if uncontradicted, “would constitute a preponderance of evidence that an essential element of the plaintiff’s case cannot be established . . . .” (*Kids’ Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 879.)

This, of course, PG&E did, with Ulrich’s declaration testimony. Once PG&E met this burden, the burden shifted to plaintiff to prove the existence of a triable issue of fact regarding that element of her cause of action; if she did not, PG&E would be entitled to judgment as a matter of law. (*Saelzler v. Advanced Group 400, supra*, 25 Cal.4th at pp. 780-781; *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468-469.)

As demonstrated above, PG&E’s evidence showed that it was not working in the area, that it had no work crew in the area on the day plaintiff was injured. It also showed that cones it used were marked with the PG&E logo, and were of a different color than the cones testified to by plaintiff. In short, PG&E met its burden.

Arguing to the contrary, plaintiff’s reply brief asserts, however quizzically, as follows:

“Here, PG&E relies on conjecture and disputed testimony that do not conclusively demonstrate that Plaintiff cannot establish the element of causation. PG&E’s argument is almost entirely based on the unsupported Ulrich Declaration to suggest that *all* PG&E cones bear its logo and that PG&E crews always collect their cones at the end of the day. [Citation.] Even setting aside the admissibility of Mr. Ulrich’s testimony, *supra*, Plaintiff has contradicted this testimony by noting that she does not remember if the cones were marked. [Citation.] This is significant because Defendant cannot place anyone at the scene that has testified that the cones bore the PG&E logos. In addition, Plaintiff left her workplace at approximately 6:00 p.m. on the day she was injured, which contradicts the notion that PG&E removes their cones every day, assuming the subject cones belonged to PG&E.”

“Finally, Defendant says that no PG&E crews were working in the vicinity of the incident area on the day Plaintiff was injured yet does not produce any supporting evidence. Yet Plaintiff has offered eyewitness testimony from Mr. Joseph that directly contradicts this assertion. Mr. Joseph states that he saw PG&E workers in yellow safety hats at work on the sidewalk location on the day of the accident. [Citation.] In addition, on the same day he also saw a blue PG&E truck parked out in front of the Federal Building.”

We do not see how this shows that PG&E did not meet its initial burden. And, indeed, we conclude it did. We thus turn to plaintiff’s second argument, that she showed a triable issue of material fact. And conclude she did not.

**Plaintiff Has Not Shown A Triable Issue of Material Fact**

Plaintiff summarizes her second argument as supported by six facts, an argument that reads in its entirety as follows: plaintiff is the “party opposing summary judgment and the reasonable inferences drawn [from her evidence] must be accepted as true. (*Sutherland v. Barclays American/Mortgage Corp.* (1997) 53 Cal.App.4th 299, 309; *Kelsey v. Waste Management of Alameda County* (1999) 76 Cal.App.4th 590, 594.) Plaintiff has presented the following *undisputed* facts before the Court:

“The six or seven clustered cones were within feet of a PG&E-labeled barricade. (App. 625-627)

“The PG&E-labeled barricade was located less than five feet from where Plaintiff fell. (App. at 626.)

“The cones were similar in size and appearance, according to Plaintiff’s recollection. (App. at 544.) Other than the existence of any PG&E-labeling or fluorescent orange versus orange coloring, Defendant does not dispute this.

“Zaccarie Joseph, the security guard monitoring the entrance to the Federal Building, testified that he saw PG&E workers in yellow safety hats at work on the sidewalk location on the day of the accident. (App. at 625.)

“Mr. Joseph also testified that a blue PG&E truck was out front of the Federal Building where Plaintiff works and within 15 feet of the accident site. (App. at 625.)

“The Federal Protective Services report, generated as a consequence of the accident, states ‘there did not appear to be any other hazard with the sidewalk except for the cones.’ ” (App. 627.)

While plaintiff need not show that the facts are, as she describes them, “undisputed”—which they certainly are not—the critical question is whether the facts demonstrate a triable issue of material fact. They do not.

The first three claimed facts, dealing with a PG&E barricade (on the street, not the sidewalk) and the location of cones and their color, do not avail plaintiff. As Judge Busch aptly put it: “There is no evidence that PG&E employees were working on the sidewalk at the time of the accident or that PG&E workers placed the safety cones at the location where plaintiff encountered them. There is no evidence establishing a nexus between the safety cones present on the sidewalk at the time of Plaintiff’s accident and the PG&E work truck or barricade. The evidence submitted by Plaintiff in her opposition requires the trier of fact to speculate as to whether the safety cones were in fact placed on the sidewalk by PG&E employees as opposed to other entities who may have been working in the area on the day of the accident. Evidence that gives rise to no more than speculation or surmise is insufficient to establish a triable issue of fact.”

The sixth fact, dealing with “no other hazard,” is of no consequence, especially as there is no dispute that plaintiff tripped over cones.

That leaves the two other facts claimed to be supported by Joseph’s testimony: that he saw PG&E workers in yellow safety hats at work on the sidewalk location on the day of the accident, and that a blue PG&E truck was in front of the Federal Building and within 15 feet of the accident site.

As noted, plaintiff claims that these facts are supported by the deposition testimony of Joseph, the security guard at the Federal Building, reliance on which

could be affected by significant missteps concerning the Joseph deposition, and we begin with a description of those missteps.

Plaintiff's opposition to PG&E's motion included her own separate statement of disputed material facts, which set forth ten facts. Five of those facts, two through six, were claimed to be based in whole or in part on Joseph's deposition testimony, described by plaintiff as follows:

"2. Zaccarie Joseph, the security guard monitoring the entrance to the Federal Building, observed PG&E workers in PG&E yellow safety hats at work in the area on the day of the accident. Several were working on the sidewalk location and appeared to be working in one or more open utility cover boxes. [Joseph Depo., 19:11–23; 43:15–44:11 (Ex. 3)].

"3. A blue PG&E truck was parked out front of the Federal Building on the 7th Street side within 15 feet of the accident site. [Joseph Depo., 19:24–20:9 (ex. 3)].

"4. A line of safety sawhorse barricades with 'PG&E' marked at the bottom were in the street in front of the Federal Building with tow-away signs posting PG&E's work hours and dates. The signs had been posted for four days before the accident and continued to be posted for a period of two weeks. [Joseph Depo., 19:5-10 (Ex. 3)].

"5. The PG&E sawhorses were located less than five feet from where Ms. Molinari fell. [Joseph Depo., 18:21-19:10 (Ex. 3)].

"6. Mr. Joseph responded to the accident and observed, at that time, multiple construction cones on the sidewalk approximately four to five feet from Ms. Molinari, including a couple of cones laying on the ground. Mr. Joseph also saw that a PG&E barricade was in the street adjacent to the cones. [Joseph Depo., 21:1–5; 38:1–8 (Ex 3)]. . . ."

As indicated, plaintiff's reliance on Joseph referred to six pages of his deposition: pages 18, 19, 20, 21, 38, and 43. However, only one page of the deposition was in fact put before the court—page 20. PG&E's reply referred to

this, observing as follows: “In response to PG&E’s undisputed facts . . . , Plaintiff submits 4 lines of testimony from . . . Joseph . . . . [¶] Mr. Joseph testifies that he saw a PG&E truck approximately 15 feet from the area where Plaintiff fell and a PG&E ‘sawhorse’ less than 5 feet from the accident site. However, the deposition testimony submitted to the court does not establish when Mr. Joseph observed the truck or the sawhorse, or that he observed either on the date of the accident. Further, the mere presence of [a] PG&E truck 15 feet from where Plaintiff fell does not substantiate that PG&E was working in that area or that any cones were being used. PG&E trucks can be found throughout the city every day for a variety of reasons.”

Despite plaintiff’s misstep, at the hearing Judge Busch observed at one point that there was “evidence of the presence of a PG&E truck on the street and of a barricade, but that’s very different [from evidence of PG&E]” doing work on the sidewalk.” This was followed at the next page by counsel for PG&E referring to what was in fact submitted from the Joseph deposition. The colloquy was as follows:

“MS. RISO-GREEN: There is no evidence of a work site that’s been submitted by PG&E. The testimony that was submitted regarding the PG&E truck was submitted by Mr. Joseph, and there’s one page of testimony, and it’s attached as Exhibit 3 to Mr. Coz’s (phonetic) declaration. And it’s essentially four lines, and it says, ‘I saw a PG&E truck 15 feet away and one barricade.’

“There’s no date or time identified in the testimony that’s submitted as to when he even saw the PG&E truck. [¶] . . . [¶]

“THE COURT: I don’t know how strongly you want to stand on that. The evidence is that it was that day, and if that mattered plaintiff could ask for and would be given leave to add the missing page that shows that. But we know that from what’s before the Court from the other motions.

“MS. RISO-GREEN: Right. And there’s no time that’s associated with it.”

As noted, plaintiff later moved for a new trial, and her motion referred at length to Joseph's testimony, arguing that his testimony, like that of Dunnville, "raises the . . . inference" that "it was likely that PG&E was responsible for the cones on the day of the accident." In claimed support, plaintiff quoted from portions of Joseph's deposition, including the following:

"Q: And how do you know that PG&E was there?"

"A: Because of the sawhorse, the safety sawhorses that were in the street had the two-away [*sic*] signs posted on the sawhorse and the times and dates when you could not park there, and at the bottom is 'PG&E.' And it was actually handwritten, so . . .

"Q: Do you recall the dates that were on there?"

"A: No.

"Q: Do you know if June 20th was one of the dates?"

"A: I would say yes because the sawhorses and stuff were there for about a two-week period.

"Q: How long before June 20th were they there?"

"A: About four days.

"Q: Did you see PG&E workers in that area—

"A: Yes.

"Q: How did you know they were PG&E workers?"

"A: They were making so much noise all day long drilling on the sidewalk and cracking cement. You knew they were there. (Joseph Depo., 18:21–19:18)

[¶] . . . [¶]

"Q: My question to you is given that there was this massive amount of construction over months of time, is it possible that as you sit here today and you think back two and a half years the barricades that you saw that said 'PG&E' that were located in the street were barricades that you may have seen a week or two after this incident?"

"A: No.

“Q: Okay. So you’re sure that you saw barricades on the day of the accident?

“A: Yes, ma’am.

“Q: All right. And did you see them when you came to work that morning?

“A: Yes, ma’am.

“Q: All right. And where exactly were these barricades?

“A: About two to three feet off the sidewalk in the street from the corner of Stevenson and 7th down to Mission and 7th.

“Q: Okay. And did you see any work in progress in that same zone?

“A: Yes.

“Q: All right. And what work did you see?

“A: Just a bunch of PG&E and electricians doing their thing.

“Q: And you say they are PG&E because you saw yellow hardhats?

“A: Yellow safety hats and also the blue-and-white trucks. (Joseph depo, 39:17–40:20, Collins Decl., Ex. 3.) [¶] . . . [¶]

“Q: Does that photograph show you the area where those workers were located?

“A: Yes.

“Q: And can you give me an approximation—could you describe to me where they were located?

“A: This whole entire area. You had your sawhorses out here in the street, you had your safety cones here, her [*sic*], there was one over here. All this was open. (Joseph depo, 65:11–24) [¶] . . . [¶]

“Q: My last question. Do you know why those cones were on the sidewalk?

“A: Like I said, they were doing construction all over the place, and as I was walking towards work, there was a PG&E—I guess it’s a supervisor’s truck. Didn’t have any equipment on it. Just a white truck with a logo on it—sitting right

there. So it was blocking this, so I had to go around him to get to the office door.’ (Joseph depo, 72:5–15, Collins Decl., Ex. 3. . . .)”

We have several observations. First, the motion for new trial cited to six pages of Joseph’s deposition: pages 18, 19, 39, 40, 65, and 72. However, only two of these, pages 18 and 19, were cited—though, as noted, not submitted to the court—in plaintiff’s separate statement in opposition to the motion. Nevertheless, Judge Busch seemingly considered them. So will we. We will not, however, consider the other four pages.<sup>5</sup>

Turning to pages 18, 19, and 20 of Joseph’s deposition, therefore, the fundamental thrust of those pages deals with barricades in the street— not cones on the sidewalk. Beyond that, Joseph nowhere states that the PG&E crew he saw had set out safety cones in the area in which it supposedly was working, an omission that is significant because both plaintiff and her companion Dunnville admitted that there was no indication that any construction work had been performed in or near the area where the cluster of cones was located.

In sum and in short, even with Joseph’s testimony, plaintiff’s causation case would require a trier of fact to speculate that a PG&E crew “might have” been working in the area where she fell on the day of the accident; that a PG&E crew “might have” set out six (or more) safety cones; that the crew “might have” failed to collect the cones when it finished its work for the day; that the cones ended up in a cluster on the sidewalk in plaintiff’s path of travel; and that both she and Dunnville failed to notice that any safety cone was marked with the PG&E logo. This, we conclude, is not enough.

PG&E discusses at some length a number of cases—six to be exact—that it represents “well illustrate that a plaintiff’s speculation as to causation cannot

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<sup>5</sup> Not only were these four pages not originally referred to in the separate statement, nor submitted to the court at the time of the summary judgment motion, they were not submitted with the new trial motion either. The only pages attached to plaintiff’s counsel’s declaration as Exhibit 3 were pages 18 and 19.

defeat a summary judgment motion.” These cases are *Padilla v. Rodas* (2008) 160 Cal.App.4th 742; *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472; *Saelzler v. Advanced Group 400, supra*, 25 Cal.4th 763; *McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098; *Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96; and *Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769. These cases, PG&E asserts, are “on point with this one, and they firmly support affirmance of the summary judgment in PG&E’s favor.”

Not one of the cases is even mentioned, let alone discussed, by plaintiff. Whether “on point” or not, the cases demonstrate, in varying language, that a plaintiff cannot defeat summary judgment with mere conjecture.

*Padilla v. Rodas, supra*, 160 Cal.App.4th 742, is illustrative. Plaintiff parent brought an action for the wrongful death of her two-year-old child who drowned in a backyard swimming pool. It was a premises liability action against the landowner, based in part on the theory that a gate at one of the entrances to the pool did not have a self-latching closing mechanism. (*Id.* at p. 745.) The trial court granted summary judgment for the landowner, and the Court of Appeal affirmed: “With the evidence viewed most favorably to Padilla, she is unable to show that it was more probable than not that a self-latching gate would have prevented Eddie’s drowning. The probabilities are evenly balanced as to whether Eddie gained entrance to the pool through the side yard gate, the ‘door’ on the other side of the house, or the sliding glass doors of the house. Accordingly, Padilla cannot establish that Defendants’ failure to provide a self-latching gate was a substantial factor in causing Eddie’s drowning.” (*Id.* at pp. 752-753.)

In *McGonnell v. Kaiser Gypsum Co., supra*, 98 Cal.App.4th 1098, Division Four of this court affirmed a summary judgment in an asbestos case, where plaintiff’s evidence showed that it was within the realm of possibility that McGonnell encountered a wall with Kaiser joint compound during his 24 years of employment at California Pacific. (*Id.* at p. 1105.) This was insufficient: “Does this possibility create a triable issue of fact? We think not. It is not enough to

produce just some evidence. The evidence must be of sufficient quality to allow the trier of fact to find the underlying fact in favor of the party opposing the motion for summary judgment. [Citation.] All that exists in this case is speculation that at some time McGonnell might have cut into a wall that might have contained Kaiser joint compound that might have contained asbestos. The evidence creates only ‘a dwindling stream of probabilities that narrow into conjecture.’ ” (*Ibid.*)

*Andrews v. Foster Wheeler LLC, supra*, 138 Cal.App.4th 96, a case from our court, is similar. We concluded that “plaintiff’s ‘evidence’ that Andrews was exposed to respirable asbestos fibers from [defendant’s] products, even under our most lenient review, creates only a dwindling stream of probabilities that narrow into conjecture.’ ” (*Id.* at p. 112.)

This, we conclude, describes plaintiff’s evidence here. It does not create a triable issue of material fact.

#### **DISPOSITION**

The judgment in favor of PG&E is affirmed.

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Richman, J.

We concur:

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Kline, P.J.

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Lambden, J.