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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE SPANOS CORPORATION,

Petitioner,

v.

THE SUPERIOR COURT OF
RIVERSIDE COUNTY,

Respondent;

JOSHUA ACKERMAN,

Real Party in Interest.

E055290

(Super.Ct.No. RIC541434)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. John L. Vineyard,
Commissioner. Petition granted.

Gordon & Rees, Kenneth S. Perri and Jan Buddingh, Jr., for Petitioner.

No appearance for Respondent.

Law Offices of Robin L. Haulman, Robin L. Haulman; Law Office of Steven C.
Geeting, Steven C. Geeting; and James S. Link for Real Party in Interest.

The underlying action arises from a single vehicle rollover accident. Real Party in Interest, Joshua Ackerman (Ackerman), the driver and sole occupant of the vehicle, sues for personal injuries on a theory that a dangerous condition was created during the construction of a development on neighboring property. The owner and developer of that property, Petitioner The Spanos Company (hereafter Spanos), moved for summary judgment on the ground that Ackerman could not establish causation. The trial court denied the motion, and Spanos filed this petition for writ relief.

FACTS

Ackerman was driving eastbound on McCall Boulevard (McCall) when his vehicle skidded and veered, eventually flipping over in a field on the north side of McCall and east of Antelope Drive (Antelope). McCall is an east-west roadway in this area with two lanes of traffic in each direction.

To the west of Antelope, the number 2 lane of McCall was very wide. To the east of Antelope, it narrowed to the width of a normal traffic lane as it passed by the property of Spanos. Spanos was in the process of constructing a multibuilding apartment complex south of McCall and east of Antelope. McCall was bordered at that location by an unimproved dirt area where utilities were eventually installed. A straw wattle ran along the edge of the road here, separating it from the dirt area.

Ackerman sues Spanos, as well as defendant Murrieta Development Company (hereafter Murrieta), on the ground that McCall was in a dangerous condition. He alleges that the construction extended into the roadway so that his vehicle was “pulled into the construction site which acted as a trap” causing him to loss control. He further

alleges that the narrowing of the highway was not visible at night and there were no warning signs.

Spanos moved for summary judgment on the ground that Ackerman had no evidence that anything it did or did not do caused the accident. It pointed out that there is no direct evidence what caused the accident. Ackerman has no memory of the accident or any events leading up to it. His last memory is entering his vehicle to return to Romoland after purchasing cigarettes at a gas station near the intersection of the 215 freeway and McCall. There were no witnesses to the accident.

The accident report indicates that Ackerman's vehicle started skidding in the number 2 lane (the southernmost lane) and veered toward the south edge. The vehicle then crossed back over the road and flipped over. The skid marks start over 100 feet past the intersection where the road narrowed. The police report indicates that there was a hay stack that appeared to have been hit in the roadway prior to the collision or as part of the collision. The majority of hay appeared to be in the number 2 lane, stretching out to the number one lane. There were stacks of hay on the southern dirt shoulder. The officer opined that this could be an associated factor in the collision. He concluded that the immediate cause of the accident was Ackerman overcorrecting and losing control of the vehicle.

Ackerman argued in response that Spanos and its subcontractor Murrieta created a trap by narrowing the number 2 lane and removing a section of pavement. There was no fog line or other visual demarcation of the edge of the roadway. He relies on the physical condition of the roadway, the accident report, as well as the

deposition of the investigative officer and the physical condition of the roadway, to argue there was evidence of negligence and causation.

In addition, Ackerman submitted the declaration of Michael Hale, an accident reconstruction expert, who concluded the accident was caused by a roadway condition not readily apparent to the approaching driver, specifically the narrowing of the lane with the lack of a warning, which caused Ackerman to hit the straw wattles. This resulted in him being pulled to the right, attempting to correct this condition, thus causing him to lose control. He also opines that the truck tires were inflated when they skidded in a northeasterly direction across the westbound lanes. Finally, he says that Ackerman was travelling “within the median speed of the traffic survey used to set the speed limit on McCall Blvd.”

The trial court denied summary judgment finding that Ackerman had established triable issues of fact whether Spanos and Murietta were engaged in construction work at the site, whether that construction work created a dangerous condition, whether there were sufficient warnings, and whether that condition and lack of warnings caused the accident.

DISCUSSION

Spanos asserts that it is entitled to summary judgment because Ackerman cannot establish causation. Specifically, he cannot show that it is more probable than not that its negligence was a cause of the accident.¹

As a preliminary matter, we determine that the trial court was correct in its conclusion that Spanos, as well as Murrieta, had shifted the burden of proof to Ackerman to raise a triable issue of fact by showing a lack of evidence as to causation. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573.) We reach this result despite the fact that Spanos's separate statement of facts referred to evidence showing only that Ackerman had no recollection of the accident, which is not the same as showing he could not establish causation. Although a party moving for summary judgment must include a separate statement that sets forth the material facts it contends are undisputed (Code Civ. Proc., § 437c, subd. (b)(1)), the trial court may, but is not required, to find the moving party's failure to comply with this requirement a sufficient ground for denial of the motion. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.) The moving papers themselves clearly

¹ We note that this formulation of the causation element is not accurate. Causation is the nexus between the defendant's negligent act or omission and the *injury* or *harm* suffered by the plaintiff. (Rest.3d Torts, Liability for Physical and Emotional Harm, § 26; see generally *Dixon v. Livermore* (2005) 127 Cal.App.4th 32, 42-43.) However, as we will discuss more extensively *post*, both parties have analyzed the issue in terms of causation of the accident and, indeed, Ackerman's theory is that Spanos's acts caused him to veer off the road, causing the accident. Moreover, the distinction between causation of the accident and causation of the harm does not lead to different results in this case.

identified the issue as Ackerman’s inability to establish causation and referred to evidence in addition to Ackerman’s lack of memory, including the accident report showing that the skid started before it veered toward the south edge of the roadway.² The issue was clearly set forth and the evidence called to the attention of the court and counsel, causing no due process violation. (Cf. *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 849.) In these circumstances, the trial court properly considered all of the evidence set forth in the moving papers. (*Varshock v. Department of Forestry & Fire Protection* (2011) 194 Cal.App.4th 635, 652-653.)

We now focus on the element of causation. A mere possibility of causation is not enough, and “when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to determine the issue in favor of the defendant as a matter of law.” (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 484 (*Leslie G.*)) In *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, the Supreme Court explained that if a defendant moves for summary judgment against a plaintiff who has the burden of proof by a preponderance of evidence, “he must present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not—otherwise, *he* would not be entitled to judgment *as a matter of law*, but would have to present *his* evidence to a trier of fact.” (*Id.* at p. 851.) Stated more directly, if the evidence at the

² Spanos also referred to the documents filed with Murrieta’s summary judgment motion, although the record does not indicate that the trial court ever ruled on its request for judicial notice.

summary judgment would not allow a reasonable jury to find for the plaintiff by a preponderance of evidence, the defense is entitled to summary judgment. Here, this means that Spanos is entitled to summary judgment if it shows Ackerman will never be able to prove causation by showing that it is more likely than not that his injury was due to the condition created by Spanos.

Aguilar cited *Leslie G.* on this point. In *Leslie G.*, the plaintiff was raped in the parking garage of her apartment building. She claimed that the landowner was negligent in failing to repair a broken security gate. The trial court granted summary judgment for defendant. The Court of Appeal affirmed, holding that the element of causation was lacking even assuming a duty was owed the tenant. “In this case, no one (other than the rapist, who has never been caught) knows how the rapist got into or out of the garage. Although the three access doors to the garage were found closed on the day after Leslie’s rape, no one knows whether they were closed or propped open on the night of the rape. No one knows whether the rapist followed another tenant in through the front door and then found his own way down to the garage. No one knows whether the rapist somehow obtained a key to the premises (he could have found a lost key or stolen one from another tenant). These unknowns are significant because, had the gate been operating properly, the rapist still could have entered the garage. Moreover, even if it had been working, he could have entered through the security gate itself by waiting outside for a car to enter, ducking beneath the closing gate, and hiding in the garage as he apparently did on the night of Leslie’s rape. (*Marshall v. Parkes* (1960) 181 Cal.App.2d 650, 655 [where the evidence is such that it is a matter of

conjecture whether a particular deduction is warranted from the facts which are known, there is no basis for a legally sufficient inference]; *Savarese v. State Farm etc. Ins. Co.* (1957) 150 Cal.App.2d 518, 520 [an inference may be based on another inference only when the first inference is a reasonably probable one and, even where it is, when the building of inference upon inference results in a progressive weakening of logical sequence and leads to an ultimate conclusion which is untenable on the basis of the facts proven, the ultimate inference is legally too remote and must be rejected].)” (*Leslie G.*, *supra*, 43 Cal.App.4th at pp. 484-485, fn. omitted; see also *Saelzler v. Advanced Group* 400 (2001) 25 Cal.4th 763.)

Ackerman relies on another third party assault case, *Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, where the appellate court found triable issues existed whether the defendant landlord’s negligence was a substantial factor in causing the plaintiff’s injuries. That case is distinguishable from *Leslie G.* and, thus, inapposite to our case, because there was evidence as to how the assault occurred: the assailant had been captured and it was known he was not a tenant in the apartment complex. In addition, it was known how he gained access into her apartment. Thus, there was evidence linking the landlord’s negligence in failing to provide adequate locks, security bars, and warnings with the assault.

Furthermore, Ackerman would have to show that it is more probable than not that the accident was caused by the condition of the road. His expert’s opinion is insufficient to raise a triable issue. According to his deposition testimony, the investigative officer apparently made no definitive finding that Ackerman’s vehicle

went off the southern edge of road before crossing to the other side of the road. Assuming the vehicle did go off the southern edge and strike the straw wattles, there is no evidence to explain his initial loss of control. What caused Ackerman to hit his brakes in the first place? He might have been surprised by the narrower road itself, but it also could be because his attention had been distracted for any number of reasons (e.g., trying to get a cigarette from the newly purchased pack, tuning the radio, etc.). Perhaps, Ackerman was trying to avoid an animal running across the road or perhaps he was speeding.³ He might have experienced some sort of mechanical problem with the truck.⁴ As we see, there are any number of possible explanations for Ackerman's loss of control, and proof of causation cannot be based on mere speculation, conjecture and inferences. Hale's declaration is sound only to the extent he provides an opinion as to what happened after petitioner came into contact with the edge of the roadway—not in explaining why he was headed into that direction to begin with. And, like *Leslie G.*, the expert's opinion for causation is speculative.

We must now address the issue of the distinction between causation of the accident and causation of the injury. Based on the foregoing analysis, it is clear that Ackerman will never be able to show that it is more probable than not that a condition

³ Also, he could have been going too fast; Hale's declaration merely says he was going within the median range of the traffic survey, but that does not necessarily establish that he was traveling at a safe speed.

⁴ The vehicle was disposed of several weeks before Ackerman commenced this action.

of the road caused him to lose control of the vehicle, i.e., Spanos's negligence caused the accident.

Hale's declaration does provide some evidence that once Ackerman's vehicle went over the edge of the paved road (if it did), it skidded across to the opposite side of the roadway due to overcorrection. This may have been a substantial factor in Ackerman's injuries, since the vehicle flipped over at that point. However, Ackerman still fails to show a nexus between Spanos's negligence and the injury or harm rather than the accident. His complaint is that those certain roadway conditions created by Spanos caused the accident in the first place. To illustrate our point, we look to a case involving a rollover accident, *Douppnik v. General Motors Corp.* (1990) 225 Cal.App.3d 849. In that case, the driver drove the car off the road while drunk and suffered serious injury when the car turned over, and the roof collapsed on him due to an allegedly defective roof post. The automobile manufacturer was held liable because its negligence in construction of the vehicle was a contributing factor to the driver's injuries, although, clearly, it did not cause of the accident. In *Douppnik*, the manufacturer was negligent because it had a duty to manufacture vehicles to provide for the safety of the occupants in a vehicle accident. Here, in contrast, the only negligence Ackerman identifies is the condition of the roadway and failure to warn that led to the accident. He talks about a trap pulling the vehicle off to the side of road. He also complains about the absence of a fog line and or adequate warnings so that drivers would unknowingly go off side of the road. As already discussed, there is no evidence that these conditions contributed to this happening. Once he hit the edge,

it is perhaps arguable that he lost further control of the vehicle, but how was Spanos negligent in this regard? Construction companies have a duty to warn of a narrow road or a trench so that motorists do not hit them, but as we see here, Ackerman cannot establish such lack of warning contributed to hitting the edge. Once he lost control and headed off the roadway, any condition along the side—a curb, a lip, or a straw wattle, could have caused a further loss of control but that would not render the condition a defect or the property owner or constructor negligent in having it there. If Ackerman had lost control and hit a parked piece of equipment, Spanos would not have been liable absent any evidence that they were negligent in parking the equipment at that location. (Cf. *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764 [where parking in an emergency parking only zone was found to be negligent and foreseeable that other drivers might collide with the parked truck].) So too here, there does not appear to be a nexus between the alleged negligence/dangerous condition and the injuries.

DISPOSITION

The petition is granted. Let a writ of mandate issue directing the Riverside County Superior Court to set aside its order denying Spanos’s motion for summary judgment and enter a new order granting that motion.

Spanos is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

Spanos is entitled to recover its costs of these writ proceedings.

The previously ordered stay is hereby lifted.

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HOLLENHORST
J.

I concur:

RAMIREZ
P. J.

KING, J., Dissenting.

The majority opinion fails on a number of grounds. Initially, it must be noted that it does not set forth our standard of review as it relates to motions for summary judgment. Second, it misapplies the law as it relates to petitioner, The Spanos Corporation's, initial burden of production and, most importantly, it ignores the facts that create a triable issue of fact on the issue of causation.

I. STANDARD OF REVIEW

Summary judgment is a “drastic remedy.” (*Mateel Environmental Justice Foundation v. Edmund A. Gray Co.* (2003) 115 Cal.App.4th 8, 17.)

On appeal following the grant of summary judgment, we review the record de novo. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) “We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.” (*Ibid.*) “The defendant must demonstrate that under *no hypothesis* is there a material factual issue requiring trial. [Citation.] If the defendant does not meet this burden, the motion must be denied.” (*Anderson v. Metalclad Insulation Corp.* (1999) 72 Cal.App.4th 284, 289-290, italics added.)

“Our review of the summary judgment motion requires that we apply the same three-step process required of the trial court. [Citation.] ‘First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond by establishing a complete defense or otherwise showing there is no factual basis for

relief on any theory reasonably contemplated by the opponent's pleading. [Citations.]

[¶] Secondly, we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in movant's favor.

[Citations.] . . . [¶] . . . [T]he third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue. [Citation.]' [Citation.]" (*Todd v. Dow* (1993) 19 Cal.App.4th 253, 258.)

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.* (2001) 25 Cal.4th 826, 849.) From commencement to conclusion, the moving party defendant bears the burden of persuasion that there is no triable issue of material fact and that the defendant is entitled to judgment as a matter of law. (*Id.* at p. 850.)

As to the issue of causation, we are concerned with whether the defendant's act or omission "is 'a substantial factor' in bringing about the plaintiff's injury." (*Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 288.) "A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.'" (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1025, quoting CACI No. 430.) The issue is "factual, and thus constitute questions for the jury." (*Ewing v. Cloverleaf Bowl* (1978) 20 Cal.3d 389, 399.) Ordinarily, this issue may not be resolved on summary judgment. (*Vasquez v.*

Residential Investments, Inc., supra, at p. 288, citing *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1687.) While a court may properly examine the causal nexus of the alleged injury at the demurrer stage (*Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180, 1190), a grant of summary judgment is improper unless from the undisputed facts ““only one reasonable conclusion could be drawn”” (*Pacific Sunwear of California, Inc. v. Olaes Enterprises, Inc.* (2008) 167 Cal.App.4th 466, 484).

II. ANALYSIS

A. *Spanos Did Not Meet Its Initial Burden of Production in Demonstrating That Its Alleged Negligence Was Not a Substantial Factor in Bringing About Real Party in Interest, Joshua Ackerman’s, Injury*

““The purpose of a summary judgment proceeding is to permit a party to show that material factual claims *arising from the pleadings* need not be tried because they are not in dispute.’ [Citation.] Materiality depends on the issues in the case, and what matters are at issue is determined by the pleadings, the rules of pleadings, and the substantive law. [Citation.] ‘*The complaint measures the materiality of the facts tendered in a defendant’s challenge to the plaintiff’s cause of action.*’ [Citation.]” (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 172, italics added.)

Here, Ackerman alleged one cause of action against Spanos. In it, Ackerman alleged, among other things, that Spanos negligently created and maintained a dangerous condition of roadway at the location of the accident. As to the issue of causation, Ackerman contended that the “right wheels of his vehicle were pulled into

the construction site which acted as a trap, causing [him] to lose control of his vehicle which caused his vehicle to roll over causing the severe injuries”

Thus, to be entitled to summary judgment on the ground that the element of causation cannot be established, Spanos had to negate the above “material factual allegation.” (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 849.) As explained in *Teselle*, this is accomplished through the undisputed statement of material facts: “The purpose [of summary judgment] is carried out in [Code of Civil Procedure] section 437c, subdivision (b)(1) by requiring the moving party to include in the moving papers ‘a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed . . . [together with] a reference to the supporting evidence.’ ‘The complaint measures the materiality of the facts tendered in a defendant’s challenge to the plaintiff’s cause of action’ [citation], *hence the moving party’s separate statement must address the material facts set forth in the complaint.*” (*Teselle v. McLoughlin*, *supra*, 173 Cal.App.4th at p. 168, italics added.)

The separate statement is not merely a statutory requirement; its purpose is “to afford due process to opposing parties” (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 335.) “Where a remedy as drastic as summary judgment is involved, due process requires a party be fully advised of the issues to be addressed and be given adequate notice of what facts it must rebut in order to prevail.” (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.)

Thus, under the present facts, it was incumbent on Spanos to set forth in its separate statement of undisputed facts clear statements showing that the element of causation cannot be established. This can be done by conclusively negating the element or by demonstrating that Ackerman cannot establish the element. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pp. 853, 855.) In looking at Spanos’s statement of undisputed facts, Spanos made no effort to conclusively negate the element of causation. What it attempted to do is show that Ackerman could not prove causation.

In its separate statement of undisputed facts, Spanos averred the following:

“6. [Ackerman] has no memory of the accident nor of the events leading up to the accident”; [¶] . . . [¶]

“9. [Ackerman] has no memory of any condition in the roadway relative to approaching the intersection of McCall Boulevard and Antelope Drive”;

“10. [Ackerman] has no recollection of any height differential between the south edge of the roadway at McCall Boulevard and the dirt area of the unimproved right-of-way on the Spanos property to his right”;

“11. [Ackerman] has no recollection of his vehicle veering to the right”;

“12. [Ackerman] does not recall striking anything on the dirt area to the right of McCall Boulevard”; and

“13. [Ackerman] does not know if he did anything to cause his vehicle to veer from the right side of McCall Boulevard off to the left side of McCall Boulevard.”

Spanos argues that these undisputed facts demonstrate that Ackerman cannot establish a causal connection between its conduct and the “accident.”¹ The undisputed facts and Spanos’s argument miss the mark on two accounts. First, Spanos’s separate statement is focused on the cause of the accident, not the cause of the injury. However, the issue regarding causation is whether Spanos’s conduct was a cause of the *injury*, not the *accident*.

Second, the fact that Ackerman has no recollection of the accident does not mean that he cannot prove that Spanos’s conduct was a cause of his injury. Nothing in Spanos’s separate statement of undisputed facts establishes that Ackerman cannot prove that Spanos’s conduct was a contributing cause of his injury. Even if Ackerman admitted each of Spanos’s undisputed material facts, it would not mean that he could not prove causation.

In that Spanos failed to address the issue of causation as alleged in the complaint, the burden of production never shifted to Ackerman and, therefore, the motion was properly denied. (See *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1534 [“if the showing by the defendant does not support judgment

¹ At page 10 of the petition Spanos states: “[Spanos]’s motion was based upon the simple premise that [Ackerman] cannot prove a causal connection between any conduct attributable to [Spanos] and [Ackerman]’s *accident*.” (Italics added.) At page 13, it states: “Because the motion at issue was based solely upon [Ackerman]’s inability to prove a causal connection between any allegedly negligent conduct attributable to [Spanos] and [Ackerman]’s *accident*” (Italics added.) At page 14 of the petition, in referencing Ackerman’s reconstruction expert’s declaration, Spanos states: “That declaration, however, did not offer any evidence as to whether any possible cause of the *accident* was a more probable than not cause.” (Italics added.)

in his favor, the burden does not shift to the plaintiff and the motion must be denied without regard to the plaintiff's showing."].)

In its opinion, the majority, in concluding that Spanos met its initial burden of production, indicates: "[W]e reach this result [that Spanos met its initial burden of production] despite the fact that Spanos's separate statement of facts referred to evidence showing only that Ackerman had no recollection of the accident, which is not the same as showing he could not establish causation." (Maj. opn., *ante*, at p. 5.)

In so concluding, the majority violates every precept relative to a court's review of summary judgment motions. Contrary to the majority's view that close counts, the law clearly provides that all documents are to be strictly construed against the moving party, and summary judgment should not be granted unless, under no hypothesis, is there a triable issue of material fact.²

In support of its position that Spanos's separate statement of material facts was close enough to afford due process to Ackerman, the majority relies on this court's decision in *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826 [Fourth Dist., Div. Two]. In so doing, the majority totally misrepresents the import of *Eriksson's* due process analysis. In *Eriksson*, the decedent died while involved in a horse-jumping event. The horse that decedent was riding failed to complete a jump; the decedent fell off the horse and the horse fell on top of her. (*Id.* at p. 836.) Her parents sued the trainer of

² While close may count in horseshoes, to be entitled to summary judgment it must be a ringer.

the horse. At the hearing on her motion for summary judgment, the defendant argued that the decedent impliedly assumed the risk of injury and, as the trainer of the horse, she did not owe the plaintiffs' decedent a duty. At issue was whether the defendant increased the risk of injury to the plaintiffs' decedent by allowing her to ride a horse that was unfit. (*Id.* at pp. 845-846.) In discussing the separate statement of undisputed facts and its due process ramifications, the court stated: "In regard to the unfitness of the horse, the undisputed fact that comes closest to addressing the issue is undisputed fact No. 13, which states: 'At no time before [the decedent] began her cross-country course run did anyone, including [the decedent], ever complain that her horse was not behaving characteristically or in a manner that would suggest that [the horse] would present a danger to [the decedent] were she to ride that horse in the eventing competition, and she received a very good score of 50 in the dressage portion of the competition, on the previous day' [¶] The import of this 'undisputed fact' is that no one *complained* to [the defendant] that the horse was unfit for the competition. It does not say that the horse was fit for the event or that she did not allow [the decedent] to ride an unfit horse in the event. . . . Under our facts, to establish that she did not breach her duty of care, she must establish that she did not know or should not have reasonably known that the horse was unfit. The distinction between 'no one complained to her' and 'I did not know nor should I have reasonably known' is significant. The [plaintiffs] could very well admit that no one complained to [the defendant] about the fitness of the horse, yet [the defendant], based on her own

expertise, could still have known or had reason to know that the horse was unfit.

Thus, the ‘undisputed fact,’ as phrased, does not put the issue to rest.” (*Id.* at pp. 849-850.)

Like the defendant in *Eriksson*, who did not address the issue of duty as framed by the complaint, Spanos’s statement of undisputed facts does not address the issue of causation as alleged in the complaint, and therefore fails to put the issue to rest. Far from providing support for the majority’s view, *Eriksson* compels the conclusion that Spanos was not entitled to summary judgment. In that close does not count for purposes of due process, the motion was properly denied.

B. A Triable Issue of Fact is Present as it Relates to Spanos’s Alleged Negligence Being a “Substantial Factor” in Bringing About Ackerman’s Injury

Aside from whether Spanos met its initial burden of production, the evidence submitted by Ackerman clearly created a triable issue of fact.

As earlier stated, when dealing with causation, the inquiry focuses on the cause of the injury, not the accident. To be such a cause, the conduct or condition must be a substantial factor in bringing about the injury. There may be multiple causes of an injury.

In overview of the present facts, I believe the evidence shows three contributing causes to Ackerman’s injuries: (1) Ackerman initially losing control of his vehicle and veering to the right; (2) the right side of Ackerman’s vehicle going off the paved portion of the roadway and encountering the straw wattles, resulting in Ackerman’s

overcorrection to the left; and (3) Ackerman's apparent failure to wear an operable seat belt. For purposes of the present motion, we are concerned with whether a triable issue of fact exists as to the second contributing cause—that of encountering the straw wattles. In that the majority has omitted and not discussed any of the evidence submitted as to this contributing cause, I will recite the facts that I believe create a triable issue of fact as to causation.

The construction was part of The Storm Water Pollution Prevention Plan for the Antelope Ridge development. The specific installations were implemented towards the end of 2008, prior to the rainy season. As part of the plan, a silt fence was put up and straw wattles were placed along the side of the street. A straw wattle is straw pressed into a roll and wrapped with nylon netting. The rolls are about six inches in diameter and approximately 250 feet in length. Wooden stakes were placed into the wattles to secure them to the ground. As part of the plan, sandbags were also placed on the side of the road perpendicular to the road. Prior to placing the straw wattles along the south side of the pavement, and for a distance of 450-600 linear feet, a couple of inches of pavement were shaved off the edge of the road. The pavement had a thickness of four to six inches and was vertically cut.

The investigating police officer testified in his deposition that upon his arrival at the scene, he noticed hay in the No. 2 lane, which appeared to be part of the accident. It was littered across both lanes of McCall Boulevard. He also noticed stacks of hay on the southern dirt shoulder of McCall Boulevard that appeared to be

used for construction purposes. He further testified that when he got to the scene it appeared the hay had been hit by a vehicle, because it was kind of strewn about the road. He noticed a straw wattle was disrupted right near the right skid line. About five to eight feet of the straw wattle was disturbed. The broken haystack area appeared to have fresh black rubber tire marks. According to the officer, the striation skids leading from the side of the road could have been caused by somebody overcorrecting and jerking the steering wheel hard to the left. He opined that the hay could have been an associated factor in the collision due to the fact that the vehicle could have collided into the haystack, causing the driver to lose control of the vehicle. Because of the hay, the vehicle could have lost traction, causing the driver to overcorrect and lose control of the vehicle.

An employee of one of the contractors testified that when he showed up to work on the morning following the accident, it was pretty obvious there had been an accident; somewhere between 50 and 75 feet of the straw wattles had been damaged.

Ackerman's design engineer stated in a declaration that the straw wattles and sandbags presented a change in the coefficient of friction from the pavement to the shoulder.

Michael Hale, Ackerman's reconstruction expert, submitted a declaration. In it, he indicated the vehicle was eastbound and began skidding in the vicinity of the straw wattles, which were located along the southern roadway edge. The physical evidence quite clearly shows that the right wheels left the roadway where the straw wattles had

been laid out. The vehicle was in contact with either the straw wattles or the dirt shoulder, or both. As stated: “Mr. Ackerman . . . hit the straw wattles as per the investigating officer’s report of the accident. This resulted in Mr. Ackerman being pulled to the right (off the road) because of the difference in coefficients of friction between the paved roadway, the straw wattles, and the dirt shoulder, and his attempt to correct this sudden condition, thus causing a loss of control of the vehicle and resulting in multiple roll-overs which caused damage and injuries.” He further indicated that upon inspection of Ackerman’s tires, there was some abrading of the outer edge of both right tires. This burn was from skids that dug into the pavement when the vehicle traveled back onto the roadway surface. The vehicle’s movement to the north side of the roadway was a result of the centrifugal skid caused by the overcorrection from contact with the straw wattles.

It is undeniable that these facts create a triable issue of fact as to the causal relationship between the straw wattles and Ackerman’s overcorrection of his vehicle, causing the vehicle to cross to the other side of the road and roll, apparently ejecting him from the passenger compartment.

The majority states in its opinion: “[T]he only negligence Ackerman identifies is the condition of the roadway and failure to warn that led to the accident. He talks about a trap pulling the vehicle off to the side of [the] road. He also complains about the absence of a fog line and or adequate warnings so that drivers would unknowingly go off [the] side of the road. As already discussed, there is no evidence that these

conditions contributed to this happening. Once he hit the edge, it is perhaps arguable that he lost further control of the vehicle, but how was Spanos negligent in this regard?” (Maj. opn., *ante*, at pp. 10-11.)

While in one vein the majority has indicated that the issue is the cause of the injury, not the cause of the accident, it attempts by way of the above to subtly revert the discussion back to the cause of the accident by saying “there is no evidence that these conditions contributed to this happening.” The majority then concedes that once Ackerman hit the edge of the road he lost further control of the vehicle. By saying this, the majority is admitting that Ackerman’s overcorrection of his vehicle caused by running off the roadway could well be a contributing cause to his injury in that his vehicle then crossed the road and rolled. And lastly, the majority posits the question, “but how was Spanos negligent in this regard?” The present summary judgment motion is based on a lack of *causation* not a lack of *negligence*. Whether or not Ackerman was negligent is simply not an issue.

To support its conclusion that there is no triable issue of material fact as to causation, the majority relies almost exclusively on *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472. There, the plaintiff was raped in the garage of the apartment within which she lived. She alleged that the defendant was negligent in failing to repair a security gate. Whether or not the security gate in question was operating properly on the day of the incident was an issue in dispute. There existed three other secure entrances into the complex, which were at times propped open by

tenants. The plaintiff's security expert testified in his deposition that he did not know how the rapist gained entry into the garage or whether he was allowed in by a tenant. In its motion for summary judgment, the defendant contended that there was an absence of evidence to support the issue of causation. It relied on the testimony of the investigating officer and the plaintiff's expert, neither of whom knew how the rapist entered or left the garage. In finding that no triable issue of fact existed as to causation, the court indicated that it was totally speculative as to how the rapist entered the complex.

In quoting *Leslie G.*, the majority states in its opinion: "A mere possibility of causation is not enough, and 'when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to determine the issue in favor of the defendant as a matter of law.' [Citation.]" (Maj. opn., *ante*, at p. 6.) Here, causation is not the least bit speculative or conjectural. As earlier set forth, there would appear to be three contributing causes to Ackerman's injuries: (1) Ackerman initially losing control of his vehicle and veering to the right; (2) the right side of Ackerman's vehicle going off the paved portion of the roadway and encountering the straw wattles, resulting in Ackerman's overcorrection to the left; and (3) Ackerman's apparent failure to wear an operable seat belt. Based on the facts before us, the causal relationship between Spanos's conduct and the first contributing cause listed above could arguably be deemed speculative. There is no apparent reason why Ackerman initially lost control of his vehicle. Attributing it to Spanos's conduct

would appear to be conjectural. However, as earlier discussed there is nothing speculative or conjectural as to the contribution played by Ackerman's vehicle encountering the straw wattle. There is ample evidence for purposes of defeating a summary judgment motion. To suggest otherwise, simply ignores the facts.

Simply put, by misapplying the law and not addressing the facts, the majority reaches the result it wishes.

KING
J.