TENTATIVE RULING

Note: The Court has been unable to open the video marked as Exhibit 4 in Plaintiff's opposition papers. If a party asks to argue the tentative and believes Exhibit 4 is material to the argument, counsel for that party shall be prepared to play the video at the oral argument.

Summary judgment, a drastic procedure which denies the adverse party the right to a trial on the merits, should be granted with caution. (*Mann* v. *Cracchiolo* (1985) 38 Cal.3d 18, 35.) Summary judgment should only be granted when the evidence in support of the moving party establishes that there is no triable issue of material fact. (Code Civ. Proc., § 437c, subd. (c).) The moving party bears the burden of furnishing supporting documents to establish the adverse party's claims lack merit under any legal theory. (*Lipson* v. *Superior Court* (1982) 31 Cal.3d 362, 374.) The court will strictly construe the moving party's affidavits, while liberally construing those of the adverse party. (*Stationers Corp.* v. *Dun & Bradstreet, Inc*. (1965) 62 Cal.2d 412, 417.) Any doubt concerning the propriety of granting the motion should be resolved in favor of the adverse party. (*Ibid*.) *Morin v. County of L.A.* (1989) 215 Cal.App.3d 184, 187 (parallel citations omitted).

Here, defendant, East Bay Municipal Utilities District (EBMUD) seeks summary judgment or summary adjudication as to each of plaintiff's three causes of action.

Count One and Two

Count One of the complaint alleges "negligence," Count Two alleges "willful failure to warn (Civil Code section 846), and Count Three alleges "dangerous condition of public property. Since EBMUD is a public entity, only the third count may lie. Government Code § 815. Defendant is entitled to summary adjudication as to Counts One and Two.

Count Three

As to Count Three, the relevant standard is set forth in Cal. Code of Civil Procedure 437c(p)(2):

(p) For purposes of motions for summary judgment and summary adjudication:

> (2) A defendant or cross-defendant has met that party's burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The plaintiff or cross-complainant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto.

Defendant's Defense Under Gov't Code § 831.7(b)(2)

EBMUD has shown that Government Code § 831.7(b)(2) provides a defense to plaintiff's third cause of action. "(a) Neither a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity… (b) 'Hazardous recreational activity…means: (2) [a]ny form of diving into water from other than a diving board or diving platform, or at any place or from any structure where diving is prohibited and reasonable warning has been given." As to that, there are no undisputed facts. Both sides agree that plaintiff dove head-first into Lake Camanche from something other than a diving board or diving platform and suffered a severe injury.

Plaintiff's Memorandum of Points and Authorities in Opposition to EBMUD's motion appears to concede that this defense applies – as it should. *Carr v. City of Newport Beach* (2023) 94 Cal.App.5th 1199, 1204-1205; *Rombalski v. City of Laguna Beach* (1989) 213 Cal.App.3d 842, 851; *Morin v. County of Los Angeles* (1989) 215 Cal. App. 3d 184, 195. Plaintiff's Opposition does not dispute the facial applicability of Section 831.7. Instead, it focuses on two exceptions to the defense. Gov't Code § 831.7(c)(1)(A) and (C).

Subdivision (A) provides an exception as follows:

> Failure of the public entity or employee to guard or warn of a known dangerous condition or of another hazardous recreational activity known to the public entity or employee that is not reasonably assumed by the participant as inherently a part of the hazardous recreational activity out of which the damage or injury arose.

Plaintiff's opposition argues that there was a failure to warn. But it does not address the last two lines of the exception: "that is not reasonably assumed by the participant as inherently part of the hazardous recreational activity…". This question was squarely addressed in *Valenzuela v. City of San Diego* (1991) 234 Cal.App.3d 258:

> This exception is inapplicable because it only destroys immunity where the causal factor was "not reasonably assumed . . . as inherently a part of the hazardous recreational activity out of which the damage or injury arose." The inherent risk of diving from a rock into shallow water is hitting one's head. … Since hitting one's head is reasonably assumed as an inherent risk of diving from a rock into shallow water, section 831.7, subdivision (c)(1) does not apply. *Valenzuela v. City of San Diego* (1991) 234 Cal.App.3d 258, 263.

Plaintiff also argues that EBMUD increased the risk to plaintiff by manipulating the water levels in the lake. But that argument fails here because of the "not reasonably assumed by the participant" clause discussed above. (As to the relevance of that argument to the "natural conditions" defense, see below.)

Subdivision (C) provides an exception as follows:

> Injury suffered to the extent proximately caused by the negligent failure of the public entity or public employee to properly construct or maintain in good repair any structure,

recreational equipment or machinery, or substantial work of improvement utilized in the hazardous recreational activity out of which the damage or injury arose.

But plaintiff offers no evidence at all to show that EBMUD failed to properly construct or maintain in good repair "any structure…or substantial work of improvement *utilized in the hazardous recreational activity…".*

Plaintiff does not contend that he dove from the rip-rap wall that was constructed by EBMUD's contractor. (The undisputed facts are a bit unclear as to how plaintiff was injured. Undisputed fact #21 says "he stood at the *shore* and dove headfirst into the water, attempting a shallow dive." Undisputed fact #25 says "Mr. Vaughn had jumped from the same *rock* as Mr. Hampton.") Plaintiff's memorandum in opposition to the motion asserts he entered the water *from* a rock. Plaintiff's Memorandum of Points and Authorities etc. 4:19-21. Regardless, it appears plaintiff did not utilize the rip-rap wall in his diving. But even if he did dive from the rip-rap wall, he produces no evidence that the wall was either improperly constructed or in poor repair.

At most, plaintiff asserts that "one of the boulders that was installed at the lake for that purpose [erosion control] was set sufficiently away from the others such as to create a dangerous condition that Mr. Hampton…could not have reasonably assumed to be an inherent part of swimming near the shoreline." Opposition Memorandum, p. 8, lines 16-19. That does not meet the exception that the rock have been "utilized in the hazardous recreational activity. And, as noted above, *Valenzuela* says that hitting one's head while diving is an inherent risk; the argument that Mr. Hampton "could not have reasonably assumed" that to be a risk is contrary to *Valenzuela.*

As noted, that there are no disputed issues of fact material to the determination under §831.7(b)(2). Defendant has established a defense under § 831.7(b)(2). That entitles it to judgment on Count Three.

Defendant's Two Other Defenses

Defendant asserts two other defenses: (i) Government Code § 831.2 and (ii) primary assumption of the risk. Plaintiff asserts he has raised disputes of fact as to what (if any) rock he struck and whether it was placed in the lake by EBMUD's contractor. Those issues may be relevant to defendant's additional defenses. The Court need not reach those issues since it has determined defendant is entitled to judgment under §831.7(b)(2). However, if defendant wishes to argue these other two defenses, the Court invites the parties to address whether there are disputed issues of material fact.

Should the parties choose to argue defendant's contention that it has established a defense under Government Code § 831.2, it is important to consider the language of the statute:

> Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach.

Plaintiff argues that the lake was not in a "natural condition" because EBMUD controlled ("manipulated") the water levels and because it "placed" a submerged boulder in the lake. There is ample case law that establishes that raising and lowering water levels does not make the conditions "unnatural."

> Immunity under section 831.2 has been upheld despite human regulation of the artificial lake's water level. *Morin v. County of L.A.* (1989) 215 Cal.App.3d 184, 188-189, citing *Eben* v. *State of California* (1982) 130 Cal.App.3d 416, 424-425.

> Furthermore, plaintiff's contention that because the water level of the lake was "man controlled," the accident site was not in a natural state is answered in *County of Sacramento* v. *Superior Court* (1979) 89 Cal.App.3d 215, 218-219 wherein a snag in the American River flowing near a county park was held to be a natural condition of unimproved property, notwithstanding control of water level and flow at Folsom Dam, 15 miles upstream lake is a "natural" condition within the immunity statute. (50 Cal.App.3d at p. 590.). *Eben v. State of California* (1982)130 Cal.App.3d 416, 424.

Plaintiff argues the "placement" of a rip-rap boulder, some unspecified distance from the main rip-rap wall, vitiates the "natural condition" defense. The parties are invited to argue this if defendant wishes to argue this additional defense.

Similarly, plaintiff argues that same alleged fact defeats the primary assumption of the risk defense, on the ground that it increased the risk in question. The parties are invited to address that too should defendant wishes to argue this additional defense.

If these issues are argued, the Court request that the parties address what, in the Statement of Undisputed Facts or the subsequent filings with regard to that Statement, link the "giant rock in the area" referred to by Mr. Hampton (Plaintiff's Separate Statement in Opposition to Defendant EBMUD's Separate Statement of Undisputed Material Facts etc; Plaintiff's additional fact #13), with the rip-rap boulder that was the subject of Mr. Guerrero's testimony (*Id*. fact #2). Mr. Hampton's testimony as well as that of Mr. Vaughn seems to say the swimmers were jumping or diving from a "rock," [See Vaughn deposition, p. 30-35, Exhibit 5 to Declaration of John C. Adams in EBMUD Index of Exhibits etc.] not from the rip-rap wall. If that is so, then how does Mr. Hampton's testimony that he hit a rock establish that it was the isolated piece of rip-rap?)

<u>Defendant's Motion Against Urban Park Concessionaires</u>

EBMUD also moved for summary judgment against Urban Park Concessionaires ("UPC") with regard to the latter's cross-complaint. UPC filed no opposition. Therefore the

motion is granted and EBMUD is entitled to summary judgment as to UPC's cross-complaint.

For these reasons, EBMUD's motion for summary judgment as to Plaintiff's case (including all three causes of action) and as to UPC's cross-complaint is granted.

The Evidentiary Objections

As to the evidentiary objections. Plaintiff filed eight evidentiary objections. With regard to objections 1-7, which relate to plaintiff's use of drugs and alcohol and his limited food consumption, the Court finds those alleged facts to be irrelevant to its determination as should be clear from the reasoning stated above. As to objection 8, the Court finds that alleged fact to be irrelevant to the determination as to Counts one and two, and to its determination under § 831.7(b)(2) as stated above. (Whether the parties argue the other two defenses asserted by defendant, and whether any of those facts is material is reserved for oral argument, if any.)

Defendant filed two evidentiary objections. As to both, it appears that the witness lacks foundation. There is no evidence of how he knows those things. As noted above, on summary judgment, "the court will strictly construe the moving party's affidavits, while liberally construing those of the adverse party." (*Stationers Corp.* v. *Dun & Bradstreet, Inc*. (1965) 62 Cal.2d 412, 417.) Given the Court's reasoning above with regard to § 831.7(b)(2), this evidence is not relevant to the decisive question. However, should defendant choose to argue the other asserted defenses (or if either party thinks this is somehow relevant to the issue under § 831.7(b)(2), then the Court will hear argument on these objections.