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SUPERIOR COURT OF CALIFORNIA

COUNTY OF PLUMAS

UNLIMITED JURISDICTION

CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION,

Plaintiff,

v.

EUNICE E. HOWELL, INDIVIDUALLY AND DOING BUSINESS AS HOWELL'S FOREST HARVESTING, et al.,

Defendants.

AND CONSOLIDATED ACTIONS.

CASE NO. CV09-00205 (lead file)
(non-lead cases CV09-00231, CV09-00245, CV09-00306, CV10-00255, CV10-00264)

~~[PROPOSED]~~ ORDER REGARDING PLAINTIFFS' FAILURE TO ESTABLISH PRIMA FACIE CASE

Trial Date: July 29, 2013

On July 15, 2013, the parties filed trial briefs setting forth their respective legal contentions. Defendants' briefs included arguments regarding why all Plaintiffs would be unable to sustain their burden of proof at trial.

On July 22, 2013, the Court issued a "Notice to Counsel" indicating, among other things, that because this has been designated a complex case, it would conduct pre-trial hearings pursuant to *Cottle v. Superior Court* (1992) 3 Cal. App. 4th 1367. Under *Cottle*, in "a complex litigation case which has been assigned to a judge for all purposes, a court may order the exclusion of

evidence if the plaintiffs are unable to establish a prima facie claim prior to the start of trial." 3 Cal.App.4th at 1381. Similarly, the "burden is on the plaintiff to establish a prima facie showing of negligence against the defendant, and, if he fails to do so, that a nonsuit may be properly granted." *Mastrangelo v. West Side Union High School Dist. of Merced County* (1935) 2 Cal.2d 540, 546.

The court then convened on July 24, 2013, for a previously scheduled hearing and invited Defendants Sierra Pacific Industries, Eunice Howell, W.M. Beaty and Associates, and Landowner Defendants (collectively "Defendants") to request *Cottle* hearings as they believed appropriate. Proceedings continued on July 25-26.

Defendants requested that Plaintiffs make a prima facie showing to establish causation relative to whether a causal connection exists between the alleged failure to do a diligent inspection for fire under 14 C.C.R. section 938.8 and the spread of the Moonlight Fire, and whether conducting a diligent inspection under section 938.8 or otherwise would have made a difference in the spread of the Moonlight Fire. Sierra Pacific, Beaty, and the Landowner Defendants also requested a prima facie showing by Plaintiffs that, had they injected themselves into Howell's operations on September 3, 2007, in a manner inconsistent with Howell's role as an independent contractor, it would have made a difference in terms of the type of inspection that Howell completed. The parties then spent multiple days discussing these topics and various related issues, including the standard of care associated with Plaintiffs' claims and whether these issues would be wholly dispositive.

A. Plaintiffs' Legal Claims

Cal Fire's Causes of Action

Cal Fire stipulated on the record that it seeks to recover fire suppression and related costs only pursuant to Health and Safety Code sections 13009 and 13009.1. Section 13009(a) provides: "Any person . . . who negligently, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled or attended by him or her to escape onto any public or private property . . . is liable for the fire suppression costs incurred in fighting the fire and for the cost of providing rescue or emergency services . . . ." Section 13009.1(a) contains nearly identical language, except

that it authorizes the collection of investigative and related costs. Accordingly, in order to establish a prima facie claim under sections 13009 and 13009.1, Cal Fire must demonstrate that each Defendant either unlawfully or negligently set a fire, allowed a fire to be set, or allowed a fire kindled or attended by that Defendant to escape onto public or private property.

Cal Fire also seeks injunctive relief, but stipulated on the record that its claim for injunctive relief is derivative of its underlying cause of action under Health and Safety Code sections 13009 and 13009.1.

Private Plaintiffs' Causes of Action

Cal Engels, Grange, Guy, Brandt and Cozmez (collectively the "Landowner Plaintiffs") have plead different causes of action: general negligence (all Landowner Plaintiffs), trespass (Brandt, Cal Engels, Cosmez, Guy), nuisance (Brandt, Cal Engels, and Grange), negligent supervision (all Landowner Plaintiffs), negligent hiring (all Landowner Plaintiffs), negligent retention (Brandt, Cal Engels, Cosmez, Guy), Health and Safety Code sections 13007 and 13008 (Grange), unfair competition (Cal Engels), negligence per se (Brandt and Cal Engels), peculiar risk (all Landowner Plaintiffs), violation of Public Resources Code section 4422 (Grange), and violation of 14 C.F.R. section 938.8 (Grange).

1. Negligence

To establish their prima facie negligence claim, Landowner Plaintiffs must demonstrate all of the following: duty, breach of the standard of care, causation, and damages. CACI 400. With respect to duty, a defendant "owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which made the conduct unreasonably dangerous." *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 399. In ordinary negligence cases, breach of the standard of care means either a failure to act as a reasonably careful person in the same situation (CACI 401), while in professional negligence cases, the breach of the standard of care means a failure to act as a reasonably prudent professional would have in similar circumstances CACI 600. Causation means that the harm would not have occurred but-for the negligence of Defendants. CACI 430.

2. Trespass and Nuisance

To establish their prima facie trespass claim, Brandt, Cal Engels, and Grange must show that Defendants intentionally, recklessly, or negligently entered, or caused something else to enter their land. See *Gallin v. Poulou* (1956) 140 Cal.App.2d 638, 645. Furthermore, "[w]here negligence and nuisance causes of action rely on the same facts about lack of due care, the nuisance claim is a negligence claim." *El Escorial Owners' Ass'n v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1349. Accordingly, Brandt, Cal Engels, and Grange must make a prima facie showing of negligence in order to recover under their nuisance theory.

3. Negligent Hiring, Supervision and Retention

All Landowner Plaintiffs assert a negligent hiring claim, which requires them to demonstrate that the hirer knew or should have known, because of past behavior or other factors, that an employee is unfit for the specific tasks to be performed and that hiring the person creates a "particular risk or hazard and that particular harm materializes." *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139. Specifically, Landowner Plaintiffs must make a prima facie showing that (1) the employer hired the employee, (2) the employee was unfit or incompetent to perform the work for which he was hired; (3) the employer knew or should have known that the employee was unfit or incompetent, and that this unfitness or incompetence created a particular risk to others; (4) the employee's unfitness or incompetence harmed the plaintiff; (5) the employer's hiring of the employee was negligent; and (6) the employer's negligence in hiring the employee was a substantial factor in causing the plaintiff harm. CACI 426.

Additionally, Landowner Plaintiffs assert a negligent supervision claim. It is well settled that California does not recognize a common law duty to supervise an independent contractor. *Asplund v. Selected Invs. in Fin. Equities, Inc.* (2001) 86 Cal.App.4th 26, 29, 38-39, 45. "The general supervisory right to control the work so as to insure its satisfactory completion in accordance with the terms of the contract does not make the hirer of the independent contractor liable for the latter's negligent acts in performing the details of the work." *McDonald* v. *Shell Oil. Co.* (1955) 44 Cal.2d 785, 788. Therefore, to establish their prima facie case, Landowner Plaintiffs must show that Defendants assumed a duty to supervise Howell. *Ibid.* Additionally,

Landowner Plaintiffs must establish all of the following: (1) the employer hired the employee, (2) the employee was unfit or incompetent to perform the work for which he was hired; (3) the employer knew or should have known that the employee was unfit or incompetent, and that this unfitness or incompetence created a particular risk to others; (4) the employee's unfitness or incompetence harmed the plaintiff; (5) the employer was negligent in supervising the employee; and (6) the employer's negligence in supervising the employee was a substantial factor in causing the plaintiff harm. CACI 426.

Similarly, to establish a prima facie negligent retention claim, Brandt, Cal Engels, Cosmez, and Guy must demonstrate the first four elements of a negligent supervision claim, and also the employer's retention of the employee was negligent and that the employer's negligence in retaining the employee was a substantial factor in causing the plaintiff harm. *Ibid.*

4. Statutory Claims

Grange has asserted claims under Health and Safety Code sections 13007 and 13008. Section 13007 provides: "[a]ny person who personally or through another willfully, negligently, or in violation of law, sets fire to, allows fire to be set to, or allows a fire kindled or attended by him to escape to, the property of another, whether privately or publicly owned, is liable to the owner of such property for any damages to the property caused by the fire." Section 13008 states: "[a]ny person who allows any fire burning upon his property to escape to the property of another, whether privately or publicly owned, without exercising due diligence to control such fire, is liable to the owner of such property for the damages to the property caused by the fire."

Cal Engels seeks an injunction for unfair competition under Business and Professions Code section 17200. During the hearing on July 25, 2013, Cal Engels stipulated on the record that its claim for injunctive relief is derivative of its underlying causes of action.

5. Negligence Theories vs. Causes of Action

Some Landowner Plaintiffs have pled claims that are not properly characterized as independent causes of action. For example, negligence per se, which is codified in Evidence Code section 699, is not an independent cause of action. See *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1285-86. Because of that, "an underlying claim of ordinary

negligence must be viable before the presumption of negligence of Evidence Code section 669 can be employed." *California Service Station and Auto. Repair Ass'n v. American Home Assur. Co.* (1998) 62 Cal. App. 4th 1166, 1178 (citations omitted). Accordingly, to invoke a negligence per se presumption, Brandt and Cal Engels first must establish a prima facie negligence case, and then demonstrate: (1) the defendant violated a statute, ordinance, or regulation of a public entity; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted. Evid. Code, § 669(a).

Similarly, peculiar risk does not constitute an independent cause of action, but rather is a tort doctrine that, under certain circumstances, imposes vicarious liability for the negligence of others. See CACI 3708. Additionally, while Grange asserts a cause of action for violation of Public Resources Code section 4422 and 14 C.F.R. section 938.8, neither of these statutes create a private right of action.

B. Expert Testimony Is Required To Establish The Standard Of Care And Its Breach On Plaintiffs' Negligence Claims Against Each Defendant.

On June 20, 2013, Cal Fire stated in an opposition to a motion in limine to exclude an expert that "what constitutes a diligent inspection after logging operations is not a matter of common understanding;" that "Forest practices are 'sufficiently beyond common experience' of jurors;" and that "an expert is needed to tell the jury how a reasonable Licensed Timber Operator would be expected to conduct a diligent inspection."

On July 15, 2013, Sierra Pacific filed a trial brief arguing in part that the professional standard of care requiring expert testimony applies to all Defendants.

On July 24, 2013, Cal Fire filed a brief regarding standard of care, arguing that expert testimony is not required on the standard of care for Plaintiffs' negligence claims.

The "general rule applicable in negligence cases arising out of the rendering of professional services" is that the "standard of care against which the acts of a [defendant] are to

be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of the layman." *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001 (citing *Landeros v. Flood* (1976) 17 Cal.3d 399, 410).

Another court aptly explained the rationale for the rule: because only "a person knowledgeable in the specialty can define the applicable duty of care and opine whether it was met . . . [w]ithout expert testimony that a reasonably prudent specialist . . . would, under the facts as the trial court found them, have acted differently than did respondent, there is no basis to attach legal fault to his conduct." *Wright v. Williams* (1975) 47 Cal.App.3d 802, 811.

California heavily regulates its timber harvesting industry. It restricts who may harvest timber through licensing, and it must review, approve and oversee a timber harvest plan before specific logging operations may begin. See e.g., Pub. Res. Code § 4581. In this action, Plaintiffs sued Defendants based on their alleged conduct arising out of the rendering of professional services associated with the Cooks Creek Timber Harvest Plan ("THP"). Plaintiffs sued Howell, the licensed timber operator which was operating under the THP on the day the Moonlight Fire ignited; W.M. Beaty & Associates, Inc., the registered professional forester under the THP; Sierra Pacific Industries, which purchased standing timber (i.e. stumpage) from the Landowner Defendants and hired Howell to harvest it under the THP; and Landowner Defendants, commercial timber harvesters and sellers who sold the timber associated with the THP.

For the reasons set forth in Defendants' briefs on file with the Court, as well as oral argument of counsel at the hearing attended by all parties, the Court finds that expert testimony is required to establish the standard of care for all of Plaintiffs' negligence claims. The court further finds that the conduct of Defendants required by the particular circumstances in this case does not fall within the common knowledge of a lay person and that the exception to the expert testimony requirement therefore does not apply. Thus, in order to establish a prima facie negligence case, Plaintiffs are required to proffer expert testimony on the applicable standard of care.

Expert testimony is also required to establish a breach of the standard of care in this case.

See e.g., *Stonegate Homeowners Ass'n v. Staben* (2006) 144 Cal.App.4th 740, 749 ("Standard of care and its breach in the construction defect context must usually be established through expert testimony . . ."); see *Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 467 ("Both the standard of care and defendants' breach must normally be established by expert testimony in a medical malpractice case."); see also *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 509 ("In a matter such as this, where the conduct required of a medical professional is not within the common knowledge of laymen, a plaintiff must present expert witness testimony to prove a breach of the standard of care").

Indeed, because "expert evidence is conclusive and cannot be disregarded" on the standard of care, and is the only evidence a jury may consider when evaluating a defendant's conduct arising from professional services not within common knowledge of a lay person, no jury could find Defendants breached that standard without such expert testimony. See *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001. Plaintiffs therefore are also required to proffer expert testimony that Defendants' conduct fell below that standard in order to establish a prima facie negligence case.

Defendants pointed to the absence of Plaintiffs' expert opinion testimony on the issues of standard of care and breach of the applicable standard. Plaintiffs identified on the record a number of witnesses who might have an expert opinion on the standard of care. Plaintiffs, however, did not identify any witnesses who had been disclosed as an expert witness under Code of Civil Procedure section 2034.260 and had formed an opinion on the applicable standard of care, or that any of the Defendants breached the applicable standard of care.

Plaintiffs identified Shane Cunningham, Jack Medici, John Forno, John Van Duyn, Eunice Howell, Kelly Crismon and J.W. Bush. However, Plaintiffs did not indicate that any witness was designated as either a retained or non-retained expert, and had also formed an opinion on either the standard of care or on whether Defendants breached that standard.

Plaintiffs contend that, regardless of whether the proffered witnesses were disclosed as experts, their percipient custom and practice testimony is evidence of the standard of care. However, "CACI No. 413 [the custom and practice jury instruction] applies only where the

standard of care is within common knowledge. The instruction is not appropriate where, as here, the standard of care must be established by expert testimony." *Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1548-1549 (citation omitted). Thus, contrary to Plaintiffs' arguments, the custom and practices of any one company or individual do not, by themselves, establish the standard applicable to the industry as a whole.

In addition to witnesses, Plaintiffs also identified Howell's internal policies or plans, which they allege Crismon violated on September 3, 2007, and which they contend constitute evidence of the standard of care. The authority cited by Plaintiffs does not support their contention that Howell's internal polices set the professional standard of care. *Dillenbeck v. City of Los Angeles* (1968) 69 Cal.2d 472 involved a wrongful death claim against the City of Los Angeles arising from a fatal car crash between a police officer and the decedent. Plaintiffs alleged that a police officer violated the applicable standard of care while speeding to respond to a bank robbery. The Supreme Court noted that one of its prior decisions already "set[] forth the standard of care governing the operation of emergency vehicles," and thus the present case did "not turn on the controlling standard of care." *Id.* at 476-77. The Supreme Court went on to hold that some of the LAPD's Daily Training Bulletins were admissible "to assist the jury in applying [that judicially established] standard." *Ibid.* The Court did not hold that a defendant's own policies established the standard of care; at most, such policies might be admissible as supplemental evidence to assist the jury in applying a standard already established by other means.

Here, however, Howell's own policies are inadequate to establish the standard of care. Defendants represented that their standard of care experts will testify at trial that Howell's fire inspection policies went far above and beyond the industry standard at that time. Under these circumstances:

> To permit the operator of an industry to establish a standard of care by the adoption of rules, **different from the ordinary standard of reasonable care which is required by law**, regardless of whether the complainant, who is protected by no special contract of employment, knows of these rules, or relies upon them, would create as many standards of conduct as there are various organizations with different operating rules. The public would then

> have no fixed standard of care upon which it could rely for protection.
>
> * * *
>
> The effect of [admitting private rules as evidence of negligence] is that, the more cautious and careful a man is in the adoption of rules in the management of his business in order to protect others, the worse [off] he is, and the higher the degree of care he is bound to exercise.

Smellie v. Southern Pac. Co. (1933) 128 Cal.App. 567, 580-81 (emphasis added). Because the only expert opinion testimony on the standard of care evidences that Howell's internal policies exceed the industry standard, Plaintiffs cannot rely on those internal policies to satisfy its burden to establish a prima facie negligence claim absent expert testimony.

C. There is No Causal Connection Between Any Alleged Violation of Section 938.8 and the Spread of the Moonlight Fire.

Plaintiffs argue that, to whatever extent they cannot establish the standard of care through expert testimony, they can use section 938.8[1] to establish a minimum standard of care, and a breach of that standard of care by defendants Crismon, Bush, and Howell. With respect to breach, Plaintiffs contend that Crismon, Bush and Howell violated section 938.8 through their actions on September 3, 2007. Specifically, Plaintiffs contend that the Moonlight Fire started at 12:15 p.m. on September 3, 2007, when Crismon's metal-tracked bulldozer drove over a rock, issuing a hot metal fragment which landed in forest litter. Plaintiffs also contend that the fire remained in an "incipient" stage, smoldering in a dry fuel bed for approximately 1.5 hours until it entered into the free-burning stage at approximately 1:45 p.m. Plaintiffs contend that Howell ceased operations at 1:00 p.m., just after Crismon yarded logs off the hillside and to a landing with his bulldozer. After greasing and fueling their cats, Crismon and Bush left the area in their vehicles after at approximately 1:30 p.m.

In response to requests for admission, Cal Fire has acknowledged that Crismon's operation of a bulldozer on September 3, 2007, was not negligent. Cal Fire expert Bernie Paul

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[1] In 2007, section 938.8 read as follows: "The timber operator or his/her agent shall conduct a diligent aerial or ground inspection within the first 2 hours after cessation of felling, yarding, or loading operations each day during the dry period when fire is likely to spread. The person conducting the inspection shall have adequate communication available for prompt reporting of any fire that may be detected."

confirmed that running over a rock while driving a bulldozer is not negligent. Nevertheless, Cal Fire alleges that Crismon, Bush and Howell violated section 938.8 by failing to conduct a diligent inspection of any form. With respect to a diligent ground inspection, Plaintiffs allege that Bush and Crismon left the scene without conducting an inspection. Chief White testified that he believed Bush had returned to do a "fire watch" at approximately 2:15 p.m., but even with this timing, Plaintiffs further contend that Bush's return at roughly 2:15-2:30 p.m. was insufficient under the regulation because the fire was already out of control, and because he did not have the ability at the time to engage in communication as required under the regulation. Finally, Plaintiffs contend that an aerial patrol which spotted smoke from the Moonlight Fire just before it was called in by the Red Rock lookout tower at 2:24 p.m. was also insufficient to comply with section 938.8 because the patrol company was not acting as the agent of Howell.

Even if the Court were to accept each of these allegation as true, they are insufficient for purposes of creating a prima facie case against Crismon, Bush and Howell. In order to prevail on their claims against these Defendants for a violation of 938.8, Plaintiffs had the burden in this *Cottle* hearing to make a prima facie showing that Defendants' acts were a substantial factor in causing Plaintiffs' damages. See *Mitchell v. Gonzales*, 54 Cal. 3d. 1041 (1991); see also CACI 430. The court finds that Plaintiffs were unable to do so. The clear language of section 938.8 permits an aerial or ground inspection within two hours of cessation of operations. Here, however, the Red Rock lookout tower called in the Moonlight Fire at 2:24 p.m. Since Crismon, Bush and/or Howell could have complied with section 938.8 by returning to the scene at any time before 3:00 p.m., their alleged failure to do so was not relevant to the damages sought in this case. In other words, had these Defendants complied in full with 938.8, it would have made no difference whatsoever in Plaintiffs' damages, as the fire was spotted by others well before the expiration of time allowed to Defendants under section 938.8, and at which point it had already reached a stage where it could not be contained and suppressed. Thus, even if Plaintiffs' contentions are true, the actions of Crismon, Bush or Howell – indeed, the action of any Defendant with respect to section 938.8 – could not have been the proximate cause of Plaintiffs' damages.

D. There is No Evidence That an Inspection Would Have Discovered the Fire in an Incipient State.

Defendants also moved under *Cottle* requesting that Plaintiffs present evidence sufficient to support a finding by the jury that, even assuming an inspection for fire had been conducted under section 938.8, the fire would more likely than not have been detected, reported and suppressed. With respect to this aspect of Defendants' motion, Defendants and the Court have assumed for the sake of argument that Howell ignited the fire via a rock strike as alleged by Plaintiffs, and that Howell failed to conduct any inspection at all. Defendants provided notice in their motion of their contention that Plaintiffs had failed to develop any evidence on this essential factual predicate to liability.

In response, Plaintiffs advanced several arguments and factual contentions. However, upon close scrutiny, the Court concludes that Plaintiffs have failed to make a prima facie showing.

The Court's analysis of this issue requires consideration of the mode of ignition alleged by Plaintiffs. According to Joint Trial Exhibit No. 1, Cal Fire's Origin and Cause Report for the Moonlight Fire, Plaintiffs contend that the fire remained in an "incipient" stage for approximately 1.5 hours following ignition, before reaching the free burning stage. It is this mode of ignition and the allegation of a latent incipient stage which allows Plaintiffs to explain how the fire could have been ignited by Defendant Howell even though the undisputed evidence is that the fire was not reported until approximately one hour after Howell employees left the work area at 1:30 p.m., and over two hours after Howell left the specific area where the fire is alleged to have ignited.

Plaintiffs' presentation of evidence to establish that the fire more likely than not would have been detected upon such an inspection is insufficient. Plaintiffs first identified the Origin and Cause Report as evidence, pointing in particular to Chief Josh White's statement in the report that, "It is my opinion that had an inspection for fire occurred, as defined by California Code of Regulations, the fire could have been identified and contained by initial attack resources."[2]

[2] During the hearing, Plaintiffs first described this as evidence that the fire "would" have been discovered but conceded on the record that this initial characterization was incorrect.

Defendants objected to the admissibility of this statement on the ground that it lacks foundation, that Chief White is not qualified to offer the opinion, and that it is hearsay. For purposes of this motion only, the Court presumes the statement would come into evidence; however, the statement is speculative and lacks support, and is therefore insufficient. Plaintiffs have proffered no evidence regarding how Chief White would or could know the condition of the fire, or how one might be expected to detect it. In sum, it appears that this statement is in the nature of conjecture, rather than fact. Nevertheless, even assuming it is a fact for the benefit of Plaintiffs, the mere belief that some outcome "could" have happened is insufficient to establish that it more likely than not would have been the case. *Dixon v. City of Livermore* (2005) 127 Cal.App.4th 32; *Saelzler v. Advanced Group* 400 (2001) 25 Cal.4th 763 (granting summary judgment where the evidence showed merely a "speculative possibility" that additional security would have prevented the assault").

The Court also observes that proof of causation on this front, namely that the fire more likely than not would have been detected had a ground inspection been conducted, is not within the common knowledge of a layperson, and thus expert opinion would be required. Plaintiffs did not identify during their presentation any expert opinion testimony on this front. Indeed, Defendants pointed out during the hearing that Plaintiffs' designated expert, Shane Cunningham, testified that inspections for fire under Forest Practice Rule 938.8 are not fool-proof. According to Defendants, Mr. Cunningham explained that one can conduct a diligent inspection for fire under 938.8 and miss a fire, but not be negligent. Plaintiffs did not controvert or rebut this aspect of Mr. Cunningham's testimony.

Plaintiffs also proffered the testimony of William Kleiner, whom they contend opined that the fire could possibly have been detected had a ground inspection been conducted. However, the Court notes that Plaintiffs did not represent to the Court that Mr. Kleiner testified that the fire would, more likely than not, have been detected under such circumstances.

In the alternative, Plaintiffs argued at length about various alternative factual scenarios in which the fire might have been prevented. For example, Plaintiffs have surmised that had Defendants not engaged in operations on September 3, 2007, the fire would not have occurred.

However, Plaintiffs have admitted that operations with bulldozers on September 3, 2007, even on a red flag day, were permissible. Plaintiffs then presumed alternate scenarios surmising that had a two-hour continuous "fire watch" been conducted, the fire would have been detected and suppressed. The Court notes that section 938.8 contains no reference to a continuous "fire watch" requirement and no expert opined that one existed. But even assuming *arguendo* such a requirement existed, Plaintiffs have proffered no evidence that if such a "fire watch" had been conducted, the fire would have been detected in time to be contained and suppressed.

Finally, Defendants contend that there is no evidence that an inspection from an air patrol, even if diligently executed, would have detected an incipient fire. Plaintiffs have argued that a "walking" inspection is required, and that an inspection via air or other vehicle would not have been adequate. The court notes that section 938.8 expressly allows an air inspection, and that Jim Wilson, Cal Fire's person most qualified on certain categories, testified that a diligent inspection may be made from a vehicle. Nevertheless, for purposes of the above analysis only, the Court presumes a walking inspection was required.

E. <u>There is No Evidence That Had Sierra Pacific, Beaty, or Landowner Defendants Injected Themselves Into Howell's Operations, It Would Have Changed the Outcome or Caused a Different Type of Inspection to Occur.</u>

Defendants Sierra Pacific, Beaty, and the Landowner Defendants also requested under *Cottle* a prima facie showing that, had they injected themselves into Howell's operations, it would have made a difference in terms of the type of inspection that was completed.

Howell was a Licensed Timber Operator at the time of the Moonlight Fire. That license was issued by Cal Fire and Cal Fire never cited Howell for any violations, either before or after the Moonlight Fire. Sierra Pacific hired Howell to conduct logging operations on the Cooks Creek Sale, and specifically hired Howell as an independent contractor. Cal Fire has admitted that it was notified that Howell would be the licensed timber operator for the Cook's Creek Timber Sale prior to commencement of any logging activities, and that it was not aware of any fires caused by Howell before the Greens Fire.

Based on Howell's independent contractor relationship, Sierra Pacific monitored the quality of the logs that Howell delivered to Sierra Pacific's mill, but did not assume control over

the manner in which Howell conducted its operations. Sierra Pacific, Beaty, and the Landowner Defendants dispute whether they had a duty to supervise Howell at all, given its licensure status and role as an independent contractor, but even if they did, there is no evidence that any different type of communication or supervision would have changed the outcome on September 3, 2007.[3]

F. Plaintiffs Have Not Made a Prima Facie Showing on Their Other Claims.

Plaintiffs' attempt to fall back on the "unlawful" prong of sections 13009 and 13009.1 is unavailing. Plaintiffs seek to rely on Public Resources Code section 4422, 14 C.C.R. section 938.8 and 36 C.F.R. 261.5, and they argue that violations of each of these authorities can establish their claims. Plaintiffs' position lacks merit.

Public Resources Code Section 4422

Public Resources Code section 4422 provides:

> A person shall not do any of the following:
>
> (a) Willfully or knowingly allow fire to burn uncontrolled on land which he owns or controls, or to escape to the lands of any person other than that of the owner.
>
> (b) Allow any fire kindled or attended by him to escape from his control or to spread to the land of any person other than from the land from which the fire originated.

Cal Fire concedes that section 4422(a) has no application here, but it argues that Defendants violated section 4422(b) and that that violation establishes a violation of sections 13009 and 13009.1. Cal Fire argues that if Howell started the fire, Defendants are strictly liable under section 4422(b).

It is well established in California, however, that "[l]iability for the escape of fire is based on negligence." 6 B.E. Witkin, Summ. of Cal. Law (Torts) § 1427, p. 850 (10th ed. 2005). Indeed, "it is beyond the power of the Legislature to impose a liability for an accidental and unavoidable fire, which accidentally and unavoidably escapes, if there be no negligence in causing the fire or in allowing it to escape." *Paiva v. California Door Co.* (1925) 75 Cal. App. 323, 333. Cal Fire's argument is inconsistent with this principle.

[3] Cal Fire also admitted that Sierra Pacific was not negligent in hiring Howell as the licensed timber operator; it follows that no Plaintiff can make a prima facie showing of a negligent hiring claim.

Indeed, Cal Fire's argument would render a key provision of sections 13009 and 13009.1 nugatory. These statutes impose liability for certain actions done "negligently" *or* "in violation of law." Health & Saf. Code §§ 13009, 13009.1. If, as Cal Fire argues, section 4422 imposed strict liability for starting a fire that spreads, then the "negligently" prong of sections 13009 and 13009.1 would have no effect. *Every* fire that spread would do so "in violation of law," and thus establishing negligence would never be required. Section 4422 should not be interpreted to obviate key provisions of other fire-related statutes.

Cal Fire's argument fails for the additional reason that section 4422(b), to the extent it is intelligible, does not apply under the undisputed facts of this case. The first clause of the statute, which prohibits "[a]llow[ing] any fire kindled or attended by him to escape from his control," does not apply because it is undisputed that Defendants never had control of the Moonlight Fire. On the contrary, the parties agree that the fire was beyond control by the time any Defendant (or the employee or agent of any Defendant) knew it was burning. For similar reasons, it is undisputed that no Defendant "allowed" the fire to escape because no Defendant knew the fire was burning when it might have been controlled. See *County of Ventura v. Southern California Edison Co.*, (1948) 85 Cal.App.2d 529, 532 (holding that "[a]llow[ing] fire to be set" means "negligent acquiescence in, or failure to prevent *known* conditions, circumstances, or conduct which might reasonably be expected to result in the starting of a fire") (emphasis added).

Nor can Cal Fire establish a violation of section 4422(b)'s second clause, which prohibits "[a]llow[ing] any fire . . . to spread to the land of any person other than from the land from which the fire originated." At best, this statutory language is puzzling. Perhaps it prohibits allowing fire to spread from land other than the land where it originated. If so, then it has no application to the facts here, because there is no allegation that any Defendant was in a position to allow (or to disallow) the fire to continue spreading after it had spread to the land of others. On the contrary, it is undisputed that the fire could not be controlled at that point.

To the extent the language is incomprehensible, of course, it is void. See *Connally v. Gen. Const. Co.* (1926) 269 U.S. 385, 391 ("[A] statute which either forbids or requires the doing of an

act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law").

For the foregoing reasons, Cal Fire cannot rely on section 4422.

14 C.C.R. Section 938.8

For the reasons addressed elsewhere, even assuming Cal Fire could establish a violation of section 938.8, it cannot establish that the violation caused the fire to spread. Accordingly, a violation of section 938.8 cannot serve as the predicate to liability under sections 13009 or 13009.1.

36 C.F.R. Section 261.5

Cal Fire did not allege a violation of section 261.5 in its complaint, its first amended complaint or its (operative) second amended complaint. Indeed, it did not mention this federal regulation until its trial brief, where it argues that it can establish its claims under sections 13009 and 13009.1 by establishing a violation of section 261.5. Even if Cal Fire could possibly establish a violation of section 261.5 (which, as discussed below, it cannot), its failure to raise the issue until its trial brief would preclude it from relying on such a violation to establish its claims. See *Estate of Murphy* (1978) 82 Cal. App.3d 304, 311 (proper for court to deny leave to amend complaint when "the proposed amendment opened up an entirely new field of inquiry without any satisfactory explanation as to why this major change in point of attack had not been made long before trial").

In any event, Cal Fire cannot establish that any Defendant violated section 261.5 because the version of the regulation in effect in 2007 applied only to conduct occurring on federal land. *United States v. Mendez Concrete*, 2009 WL 733881 (C.D. Cal. March 16, 2009).

G. Burden Shifting Mechanisms

Haft v. Lone Palm Hotel

Plaintiffs argue that the standard of care regarding causation should shift to Defendants under *Haft v. Lone Palm Hotel* (1970) 3 Cal.3d 756, where, as a matter of public policy, the Court shifted the burden of proof regarding causation to the defendant, a motel that failed to provide a statutorily required lifeguard at its pool, which failure resulted in a complete absence of evidence

regarding why and how two motel guests drowned. According to Plaintiffs, Defendants' alleged failure to comply with section 938.8 is akin to the motel's failure to post a lifeguard, and thus the burden of proof regarding causation should shift to Defendants.

Even assuming Plaintiffs can establish a violation of section 938.8, its argument is unpersuasive. In *Haft*, the defendant violated its statutory obligation to post a lifeguard at the pool, resulting in "a total lack of direct evidence as to the precise manner in which the drownings occurred." 3 Cal.3d at 771. The combination of the complete "evidentiary void" resulting from defendant's violation of statute, the purpose of which was not only to prevent accidents but to "witness[] those accidents that do occur," the clear culpability of the defendant, and the "significant probability of a successful rescue" if a lifeguard had been present together led the Court to shift the burden of proof regarding causation to defendant as a matter of public policy. *Id.* at 773-74 ("Without such a shift in the burden of proof in the instant case, the promise of substantial protection held out by our statutory lifeguard requirement will be effectively nullified in a substantial number of cases.").

Haft itself, as well as subsequent decisions, makes clear that shifting the burden of proof regarding causation is the rare exception rather than the rule, and that it may happen only when a number of factors align. First, the plaintiff must establish a *prima facie* case of causation – that there is "a substantial probability that a defendant's negligence was a cause of an accident . . . ." *Thomas v. Lusk* (1994) 27 Cal.App.4th 1709, 1717 (quoting *Haft*, 3 Cal.3d at 774 n.19). This is a "condition precedent to a shift in the burden of proof." *Lusk*, 27 Cal.App.4th at 1719. For reasons discussed elsewhere, Plaintiffs cannot satisfy this threshold requirement here.

Public Resources Code Section 4435

Plaintiffs contend they can establish negligence under Public Resources Code section 4435, which provides:

> If the fire originates from the operation or use of any engine, machine, barbeque, incinerator, railroad rolling stock, chimney, or any other device which may kindle a fire, the occurrence of the fire is prima facie evidence of negligence in the maintenance, operation, or use of such engine, machine, barbeque, incinerator, railroad rolling stock, chimney, or other device. If such fire escapes from the place where it originated, and it can be determined which

> person's negligence caused such fire, such person is guilty of a misdemeanor.

Plaintiffs argue that the Howell bulldozer started the fire, that a bulldozer is a "device which may kindle a fire," and therefore that they can show prima facie evidence of negligence simply by proving the bulldozer started the fire.

Defendants persuasively argue, however, that even assuming the truth of Plaintiffs' factual allegations, section 4435 has no application on these facts. It is undisputed that bulldozers routinely and inevitably strike rocks when performing timber operations – indeed, they are designed to drive over and move rocks – and Cal Fire has conclusively admitted that doing so is not negligent. Plaintiffs do not contend that Howell somehow used or maintained the bulldozer in such a way as to unreasonably increase any risk that a rock strike would start a fire. Nor do Plaintiffs have any evidence that the fire started as a result of something other than a rock strike. Indeed, Cal Fire's investigator excluded any possible cause but rock strike in the Origin and Cause Report, and this was conclusively established through binding discovery responses. No Plaintiff has pointed to any expert testimony that Howell started the fire in some way other than by a rock strike. The undisputed evidence therefore rebuts as a matter of law any prima facie evidence section 4435 might generate for Plaintiffs, if the statute can even be said to apply under these particular circumstances.

H. The Parties' Factual Disputes

In requesting these hearings, Defendants necessarily made numerous factual representations for the record. Plaintiffs responded over the course of two days and made several factual representations of their own. Plaintiffs and Defendants alike expressed concerns about, and disagreements with, representations made by the other side and wanted to ensure their objections were preserved. However, Defendants repeatedly clarified that for purposes of these motions only, unless stated otherwise, their arguments presumed all doubts about any evidentiary disputes in Plaintiffs' favor. For example, Defendants' motions assumed, *arguendo*, that Howell ignited the fire via a rock strike as alleged, and that Howell conducted no inspection at all. With these assumptions, virtually all of the evidence proffered by Plaintiffs concerning items such as

whether the air patrol was Howell's agent, what Howell's employees intended to do upon returning to the site, the timing of when Howell's employees returned to the area, whether they had means of communication, are beside the point.

ORDER

In light of the foregoing and based on the record evidence presented, the Court holds that Cal Fire and the private Plaintiffs have not made a prima facie showing that they can prevail on any of their claims. Defendants are directed to prepare a formal order of dismissal.

IT IS SO ORDERED.

Dated: July 26, 2013

Honorable Leslie C. Nichols
Judge of the Superior Court