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I

INTRODUCTION AND STATEMENT OF THE CASE

Appellant appeals from the Order of the Honorable [REDACTED], Judge Presiding, of the Orange County Superior Court, in which the motion of Respondent-Defendant SOUTHERN CALIFORNIA EDISON COMPANY (“Respondent”) for summary judgment pursuant to *Code of Civil Procedure* § 437c was granted as against Appellant-Plaintiff [REDACTED] (“Appellant”). Since the effect of the trial court’s granting of the motion was the dismissal of Appellant’s entire action, the order is directly appealable to this Honorable Court pursuant to *Code of Civil Procedure* § 437c(m)(1).

II

ISSUES PRESENTED IN THIS APPEAL

This case presents two specific issues on appeal:

- (1) Does the exclusive owner and beneficiary of the dominant tenement portion of an easement over real property have an affirmative duty to maintain such property in a safe condition and good repair?
- (2) Does the placing of the exclusive owner and beneficiary of the dominant tenement portion of an easement over real property on actual notice of the fact that its property is being maintained in an inherently dangerous condition give rise to liability for injuries to third parties if the injuries took place after the actual notice of the dangerous condition was given?

Appellant contends that the answers to these questions are both “yes” under applicable California law, and that as a result, the trial court’s granting of Respondent’s motion for summary judgment, which was predicated on the answers to both questions being “no,” was erroneous and should be reversed.

III

APPROPRIATE STANDARD OF REVIEW

The general standard is that when reviewing a judgment based on an order granting summary judgment, the appellate court undertakes an independent review of the evidence presented to the trial court to determine whether no triable issues of fact were presented. *Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1511, 1515. First, the reviewing court identifies the issues framed by the pleadings, because the motion must be based on the issues as so framed. (*Id.* at pp. 1513-1514.) Second, the court determines whether the moving party, if the plaintiff, has established all of the elements necessary to his or her cause or causes of action and negated every defense raised by defendant, (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 338) or, if, as in the action at bar, the moving party is the defendant, whether the moving party either has negated at least one element of each of the plaintiff’s causes of action, or has established every single element of a complete defense to plaintiff’s cause or causes of action. *Saldana v. Globe-Weis Systems Co.*, *supra*, 233 Cal.App.3d 1505, 1513-1514; *DeRosa v. Transamerica Title Ins. Co.* (1989) 213 Cal.App.3d 1390, 1397. Finally, if the moving party has established a prima facie basis for judgment in its favor, the court considers whether the opposing party has demonstrated that a triable issue of material fact

exists so as to preclude summary judgment. *Saldana v. Globe-Weis Systems Co., supra*, 233 Cal.App.3d 1505, 1513-1514. It is clear that in California, the independent review standard, rather than the abuse of discretion standard, applies. *Schrader v. Scott* (1992) 8 Cal.App.4th 1679.

IV

FACTUAL AND PROCEDURAL BACKGROUND

A. THE PARTIES.

The parties to this appeal are Appellant [REDACTED], who at all times relevant to the action at bar was and is the owner of a single family residence in Costa Mesa, California; and Respondent Southern California Electric Company, which is the ninth largest corporation doing business in California as well as the state's largest public utility.

B. THE EXISTENCE OF THE EASEMENT UPON APPELLANT'S PROPERTY UNDER WHICH RESPONDENT HELD THE DOMINANT TENEMENT AND APPELLANT HELD THE SERVIENT TENEMENT.

It is undisputed by the parties that Appellant owned a parcel of real property that was subject to an easement in favor of Respondent, and that Respondent utilized this easement to maintain an electric power pole and related electrical interconnection facilities on the dominant tenement portion of the easement. Appellant retained the servient tenement of the easement, which Respondent's employees were authorized to cross over from time to time for ingress and egress to and from the dominant tenement. Respondent specifically requested in connection with its motion for summary judgment that the trial court take judicial notice of the nature and existence of the easement. (See Clerk's Transcript ("C.T.") at pp. 000384-000385.)

C. THE INJURIES INFLICTED UPON THE APPELLANT.

While physically on Respondent's dominant tenement portion of the easement, Appellant was attacked by either a Brown Recluse Spider (*Loxosceles reclusa*), or some other member of the *Loxosceles* family which, according to an expert witness' Declaration submitted by Appellant in opposition to Respondent's motion for summary judgment, is comprised of many different sub-species. (See Clerk's Transcript ("C.T.") at p. 000547.) Appellant's expert further explained in his Declaration that "For purposes of this lawsuit, however, I do not believe it matters whether Plaintiff Barnett was in fact bitten by a Brown Recluse Spider, versus some other member of this family of spiders. *Loxosceles* spiders are known to cause necrotic tissue damage which is consistent with the injuries reported in Plaintiff Barnett's medical records." C.T. at p. 000547.

Appellant's injuries as a result of the spider bite were horrendous. He testified in both his deposition as well as in his Declaration submitted in opposition to the motion for summary judgment that he suffered from the injuries that were later described in his expert's Declaration, in which the expert noted: "Symptoms typically displayed by a human suffering a bite from any type of recluse spider can be extremely severe; often there is systemic reaction within 24-to-36 hours characterized by restlessness, fever, rash, chills, nausea, vomiting, hemolytic anemia, bloody urine, renal failure, shock, weakness, and joint pain. Where the bite occurs there is often tissue death and skin is sougged off. This usually begins with a circular red area on the skin, which sloughs off, leaving a slow-healing, open wound and exposed muscle tissue. The edges of the wound become thickened and raised, while the central area is filled by dense scar tissue. Lesions can range in diameter up to 10 inches. Healing can take several months or more. The victim is often left with a sunken scar that looks as if a hole had been scooped from the body."

C.T. at pp. 000547 to 000548. Appellant testified that he suffered from all of these symptoms; had to be hospitalized for an extended period; incurred over \$250,000 in medical expenses; and could not go back to work for approximately six to eight months. C.T. at pp. 000540 to 000541.

D. THE ORIGINAL COMPLAINT.

Appellant's original complaint against Respondent was filed on December 30, 2004. C.T. at p. 000009. It alleged that Respondent "...so negligently owned and maintained the Easement as to cause it to become a nuisance and to materially affect the health and safety of adjacent property owners and other third parties by allowing the Easement to become infested with vermin, rats, rodents, and poisonous bugs, insects and spiders constituting a dangerous condition on the Easement..." C.T. at p. 000012.

E. THE FIRST AMENDED COMPLAINT.

Appellant filed a First Amended Complaint on April 21, 2005. C.T. at p. 000013. Its substantive allegations were substantially similar to those averred in the original complaint. See C.T. at p. 000016. Respondent replied by way of a motion for judgment on the pleadings. C.T. at p. 000172.

F. THE SECOND AMENDED COMPLAINT.

Appellant's Second Amended Complaint was filed on March 27, 2006. It substantially elaborated on the two prior pleadings' operative allegations, by setting forth with particularity the averments that:

- From the time Appellant bought the subject property, he observed “...that the easement area behind his back fence was filled with brush and debris, and tended to attract rats, spiders, and other vermin.” C.T. at p. 000177.
- Appellant “...repeatedly complained to [Respondent] about the dangerous condition created by the fenced-off easement area. After one such complaint, [Respondent] undertook cutting back a palm tree on the easement, which became infested with rats. Afterward, [Respondent] hired workers to remove the entire tree from the property.” C.T. at p. 000177.
- “Despite [Appellant’s] repeated complaint to [Respondent] about rats, spiders, and other vermin entering his yard from the easement area, [Respondent] took no further steps to abate these problems.” C.T. at p. 000177.
- Appellant repeatedly attempted to use his own measures, including spraying poison and lacing the area with poisonous bait, to control the infestation problem, but these attempts were futile. C.T. at p. 000178. He then “...contacted SCE, and asked if it would be permissible for him to close the gap in the fencing between his backyard and the easement, or to take some other measure to abate the vermin problem, like filling in the easement area with concrete. [Respondent’s] agent refused [Appellant’s] request, told him that such remedial measures were impermissible, and insisted that the gap in the fence must remain, so that [Respondent’s] lineworkers could obtain access to the pole between the two fences.” C.T. at p. 000178.
- Appellant further averred that “...[Respondent] asserted exclusive control over the easement area by, inter alia, trimming, and later removing, the rat-infested palm tree on the easement, and by also refusing to allow [Appellant] to close the gap in the

fencing to contain the rats, spiders, and other vermin, or to pour concrete over the easement.” C.T. at p. 000178.

G. RESPONDENT’S DEMURRER TO THE SECOND AMENDED COMPLAINT.

Respondent demurred to the Second Amended Complaint on April 4, 2006, solely on the ground that Appellant had failed to state facts sufficient to constitute a cause of action against Respondent. C.T. at pp. 000182 to 000183. Respondent argued that it did not owe Appellant a duty of care to prevent the spider bite, and that even if it did owe such a duty, carrying it out would pose a tremendous burden because of the extensive nature of its electrical infrastructure throughout California. C.T. at pp. 000184 to 000196.

H. THE TRIAL COURT’S RULING ON RESPONDENT’S DEMURRER TO THE SECOND AMENDED COMPLAINT.

The trial court overruled Respondent’s demurrer to the Second Amended Complaint, finding that “...the *Cody F.* and the *Scally* cases are distinguishable based on the record before it.” C.T. at p. 000693. An extensive discussion was had between the trial court and counsel for Respondent (see C.T. at pp. 000693 to 000706), at the conclusion of which the court once again restated its conclusion that as re-pleaded, the Second Amended Complaint stated facts sufficient to constitute a cause of action against Respondent. C.T. at p. 000704.

I. RESPONDENT’S PETITION FOR A WRIT OF MANDATE OR PROHIBITION.

Respondent sought to compel the trial court to reverse its decision with respect to the demurrer to the Second Amended Complaint by filing a Writ Petition with this Honorable Court. The Petition was summarily denied on July 28, 2006. C.T. at p. 000332.

J. RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

Respondent filed its motion for summary judgment on August 7, 2006, in which it once again contended that "...[Respondent] did not owe [Appellant] a duty of care as a matter of law. Because [Appellant] cannot establish an essential element of his only cause of action for negligence, [Respondent] is entitled to judgment as a matter of law on [Appellant's Second Amended] Complaint." C.T. at pp. 000334 to 000335.

K. THE TRIAL COURT'S RULING ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

On October 18, 2006, the trial court granted Respondent's motion for summary judgment, indicating in its Minute Order that: "The court finds that defendant has established it held a non-exclusive easement for the maintenance of overhead electrical wires and the [Appellant's] injury was unconnected with the nature of the easement. The court finds [Appellant] has not been able to meet his burden of showing a triable material question of fact exists that defendant had the duty [Appellant] claims." C.T. at p. 000712. The trial court later executed a more specific Order Granting Defendant Southern California Edison Company's Motion for Summary Judgment which included, *inter alia*, additional rulings with respect to several evidentiary objections that Respondent had made in connection with the motion. C.T. at pp. 000719 to 000722.

V

LEGAL DISCUSSION

A. RESPONDENT’S RATIONALE FOR WHY IT SHOULD ESCAPE LIABILITY FOR APPELLANT’S INJURIES.

In its motion for summary judgment, Respondent contended that “First, Edison had no duty to prevent an injury that was unrelated to the scope of its easement. And second, if the Court finds that Edison’s non-exclusive easement can give rise to a duty of care generally, Edison did not owe a duty to Plaintiff specifically to prevent the alleged spider bite.” C.T. at p. 000340. Appellant contends that these assertions are inconsistent with California law, as well as that the factual circumstances placed before the trial court rendered the case authority upon which Respondent relied distinguishable in Appellant’s favor.

B. AS THE OWNER OF THE DOMINANT TENEMENT OF THE EASEMENT, RESPONDENT HAD THE DUTY TO MAINTAIN THE PREMISES ON WHICH ITS PORTION OF THE EASEMENT IS SITUATED IN A SAFE CONDITION AND GOOD REPAIR.

Since as far back as 1889, California law has been as was summarized by the California Supreme Court in *Durfee v. Garvey*, (1889) 78 Cal. 546:

“The general rule is, that any man may use his own land in his own way, provided he does not use it negligently, so as to injure his neighbor. And the rule is, also, that where one man has an easement over the land of another, the duty of keeping the easement in repair rests upon its owner, and when repairs are necessary, he may enter on the servient tenement to make them.

(*Goddard on Easements*, 285; *Gale and Whatley on Easements*, 215; *Prescott v. Williams*, 5 Met. 435; 39 Am. Dec. 688.)”

Five years later, the Court said, in *C.F. Bean v. Stoneman* (1894) 104 Cal. 49:

“The grantee, or owner of the easement, is bound to keep it in repair, and this applies as well to water ditches as to private ways. (*Quinlan v. Noble*, 75 Cal. 250; *Durfee v. Garvey*, 78 Cal. 546 (1889). In *Prescott v. Williams*, 5 Met. 429, 39 Am. Dec. 688, a case cited in *Durfee v. Garvey*, 78 Cal. 546, it was said: ‘The duty of making repairs, and the labor necessary for keeping the watercourse in a state fit for use, rests wholly upon him who claims an easement on his neighbor's land; and, as a general rule, easements impose no obligation upon those whose lands are thus placed in servitude to do anything.’ (See, also, *Goddard on Easements*, 285, 443.)”

The duty as recognized by the courts in *Durfee, supra*, and *C.F. Bean, supra*, was made statutory by the Legislature in 1939. *California Civil Code* § 845 was added by Stats. 1939 Ch. 755 § 1, later amended by Stats. 1985 Ch. 985 § 1, and finally amended into its present-day form by Stats. 1993 Ch. 196 § 1 (SB 370). As most recently amended, Section 845(a) provides as follows:

“ § 845. Maintenance of right of way; Sharing of costs by co-owners

(a) The owner of any easement in the nature of a private right-of-way, or of any land to which any such easement is attached, shall maintain it in repair.”

The more recent cases agree with the holdings in *Durfee, supra*, and *C.F. Bean, supra*, and, of course, also follow the statutory requirement. In, e.g., *Williams v. Foster* (1989) 216 Cal.App.3d 510, the court said simply:

“However, as recognized in the case law, ordinarily an easement or dominant tenement owner has the duty to maintain and repair the easement and the servient tenement owner is under no duty to do so.”

Earlier than *Williams, supra* but after the adoption of *Civil Code* § 845(a), in *Herzog v. Grosso* (1953) 41 Cal. 2d 219, the Supreme Court once again reiterated that: “Ordinarily, the owner of the servient tenement [here, Appellant] is under no duty to maintain or repair the easement.”

Likewise, in *McManus v. Sequoyah Land Associates* (1966) 240 Cal.App.2d 348, the court commented that:

“It is equally well settled that as between an easement owner and the owner of the land upon which the easement is situated (i.e., the servient tenement owner), the duty to keep the easement in repair rests on the former rather than the latter.”

Earlier courts had consistently applied the same rule. “It is the duty of owners of an easement to keep it in repair.” *Crease v. Jarrell* (1924) 65 Cal.App. 554. And: “The purchase of lands subject to an easement for a road puts on the purchaser no obligation to maintain service

of the road, such burden remaining on the easement owner.” *Conklin v. Goodson* (1954) 125 Cal.App.2d 823. In *Linton v. Miller & Lux, Inc.* (1927) 83 Cal.App. 481, the court had said that “...the rule in such [prior] cases was announced in the following language: ‘The grantee, or owner of the easement, is bound to keep it in repair, and this applies as well to water ditches as to private ways.’”

A well-reasoned and complete overview and survey of this area of the law was undertaken by the Ninth Circuit Court of Appeals in *Walsh v. United States of America* (1982) 672 F.2d 746. There, the court offered the following analysis:

“The *Restatement of Property* concerns itself with such problems. Section 485 of Restatement of the Law of Property, Vol. V, Servitudes, provides: In the case of an easement created by conveyance, the existence and the extent of any privilege and any duty of the owner of the easement to maintain, repair and improve the condition of the servient tenement for the purpose of increasing the effective uses of the easement or protecting the interests of the possessor of the servient tenement are determined by the conveyance. N3

* * * * *

3. The authors of the *Restatement* found the privilege and duty of the owner of the easement or the profit to repair and maintain to be recognized in the following cases: City of Bellevue v. Daly, 14 Idaho 545, 94 P. 1036 (1908); Dudgeon v. Bronson, 159 Ind. 562, 64 N.E. 910 (1902); Littlejohn v. Cox, 15 La. Ann. 67 (1860);

White v. Hotel Co., 68 N.H. 38, 34 A. 672 (1894); Dana v. Smith, 114 Me. 262, 95 A. 1034 (1915); Moore v. White, 159 Mich. 460, 124 N.W. 62 (1909); Edgett v. Douglass, 144 Pa. 95, 22 A. 868 (1891); Wayne Sewerage Co. v. Fronfield, 76 Pa.Super. 491 (1921); Thompson v. Uglow, 4 Or. 369 (1873); Kesterson v. California-Oregon Power Co., 114 Or. 22, 228 P. 1092 (1924); Murray v. Dickson, 57 Tex.Civ.App. 620, 123 S.W. 179 (1909).

* * * * *

The Restatement comment under the foregoing section makes it clear that the problem has two aspects -- who has the privilege of repairing and maintaining the easement, and who has the duty to do so. Both aspects are controllable by the terms of the conveyance, but in the absence of such terms the law grants to the owner of the easement the privilege of entering upon the easement to make reasonable repairs and the law also imposes upon the owner of the easement the duty for the benefit of the owner of the servient tenement to so maintain and repair the easement as to prevent unreasonable interference with the use of the servient tenement.

* * * * *

We find the Restatement principles to be fully supported by established precedent. Perhaps the leading case is Coulsen v. Aberdeen-Springfield Canal Co., 47 Idaho 619, 277 P. 542 (1929).

There plaintiff recovered for the loss of a bull which had fallen into a waste ditch created by the canal company's negligent maintenance of the canal. The canal company appealed the adverse judgment, and the Supreme Court of Idaho said: ‘The duty of maintaining the easement or right of way was upon appellant and not upon respondent. City of Bellevue v. Daly, supra; Durfee v. Garvey, supra (78 Cal. 546, 21 P. 302); Linton v. Miller & Lux, 83 Cal.App. 481, 257 P. 105. The failure of appellant to repair or guard amounts to actionable negligence. 9 R.C.L. 796; Vol. 2, Tiffany on Real Property, 1350; Big Goose & Beaver Co. v. Morrow (8 Wyo. 537, 59 P. 159), supra. This court in Settlers' Irr. Dist. v. A. R. Cruzen Inv. Co. (43 Idaho 736, 254 P. 1052), supra, held that the owner of the dominant tenement was answerable for such damages as might be sustained by the owner of the servient tenement resulting from the failure of the former to properly maintain the works connected with the easement, and in Stuart v. Noble Ditch Co., 9 Idaho, 765, 76 P. 255, and Burt v. Farmers' Co-op. Irr. Co., 30 Idaho, 752, 168 P. 1078, held that a canal company was liable for damages resulting from its negligent operation of its ditch or canal.’”

In the face of such common law case authority as well as the statutory provisions of *Civil Code* § 845(a), it is impossible for Respondent to credibly argue either that (i) as the holder of the dominant tenement of the easement at issue in this case, it had no duty to keep its portion of

the easement free of the kinds of nuisances described in detail in the Second Amended Complaint (rats, poisonous spiders, and a host of other vermin); or (ii) that it was somehow Appellant's obligation, as the owner of the servient tenement, to exterminate these pests and otherwise clean up Respondent's portion of the easement.

Just because as between Respondent and Appellant, it was not Appellant's obligation to police the condition of the dominant tenement, it would still have been possible – and remains possible today – that should some third party in the form of an invitee, licensee, or even a trespasser step onto any portion of Appellant's property and subsequently become injured from the active vermin infestation on the dominant tenement, Appellant could still face liability even though he had done absolutely nothing wrong. In *Austin v. Riverside Portland Cement Co.* (1955) 44 Cal.2d 225, 233 (1955), the Supreme Court held that the owner of land could be held liable for failing to warn its tenant of the danger posed by use of a crane near overhead electrical lines, even though the landowner neither owned nor maintained the electrical lines. The Court of Appeal reached the same conclusion on similar facts in *Krongos v. Pacific Gas & Electric Co.* (1992) 7 Cal.App.4th 387. And according to *Alcaraz v. Vece* (1997) 14 Cal.4th 1149:

“The same reasoning applies where a plaintiff is injured in a defendant's fenced backyard by a latent dangerous condition known to the defendant. Under such circumstances, the defendant could not escape liability merely by establishing that the fence was not located on the property line and that a neighbor, rather than the defendant, actually held title to the land containing the dangerous condition. As long as the defendant exercised control over the

land, the location of the property line would not affect the defendant's potential liability.”

It is unconscionable for Appellant to be forced to take this risk when Respondent, through its actions in preventing Appellant from enclosing the fence around the dominant tenement, is the party at fault and at whose pleasure the vermin residing there call the location “home.”

Respondent previously argued in its demurrer to the Second Amended Complaint that its refusal of Appellant’s request to close the gap in the fence separating the dominant tenement from the rest of Appellant’s land is an inherent right that it possesses due to its need to “...maintain, inspect, conduct repairs, etc. with respect to its facilities.” C.T. at p. 000193. Similar circumstances were the subject of comment in *Alcaraz, supra*, in which the Supreme Court held:

“The circumstance that defendants constructed a fence surrounding the narrow, city-owned strip of land that bordered their property also is highly relevant. It is obvious that the act of enclosing property with a fence constitutes an exercise of control over that property. Code of Civil Procedure section 323, which defines adverse possession under a written instrument or judgment, states that ‘land is deemed to have been possessed and occupied...Where it has been protected by a substantial enclosure.’ In *Lofstad v. Murasky*, 152 Cal. 64 (1907), this court defined ‘actual possession’ of real property as ‘an appropriation of the land by the claimant such as will convey to the community where it is situated

visible notice that the land is in his exclusive use and enjoyment; an appropriation manifested by either inclosing it, or cultivating it, or improving it or adapting it to such uses as it is capable of.’ Defendants' maintenance of the lawn and construction of the fence could support a finding that defendants took possession of the strip of land owned by the city and exercised control over it.”

The fence at issue in this case was in existence at the time Appellant purchased the property. C.T. at p. 000177. As the Second Amended Complaint specifically alleged, it had been, and apparently remains, Respondent’s position that it is entitled to control of the entire enclosure to the extent that it can prevent Appellant from closing the gap which exists and through which the infestation of vermin thrives. Respondent cannot reasonably argue that it has the right to enclose and control the entire dominant tenement, on the one hand, while simultaneously having the right to permit vermin and other dangerous pests to propagate and migrate onto Appellant’s adjoining land, on the other hand.

C. THE CASES CITED BY RESPONDENT IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ARE DISTINGUISHABLE FROM THE FACTS THAT WERE BEFORE THE TRIAL COURT.

In its demurrer to the Second Amended Complaint, Respondent cited a total of ten cases in support of its position that Respondent owed no duty to Appellant. Appellant’s response to the demurrer pointed out why each of these cases were either completely irrelevant to the facts of the action at bar or, at the very least, highly distinguishable, and the trial court agreed. In its motion for summary judgment, Respondent cited, once again, all ten of these cases as supporting

its position -- a proposition that the trial court had already rejected and which did not impress the Court of Appeals when it considered the extraordinary Writ Petition, either.

After having recognized that “California law requires landowners to maintain land in their possession and control in a reasonably safe condition,” citing *Ann M. v. Pac. Plaza Shopping Ctr.* (1993) 6 Cal.4th 666 [C.T. at p. 000346], Respondent once again, as it did in its demurrer, relied principally upon *Cody F. v. Falletti* (2001) 92 Cal.App.4th 1232 as standing for the proposition that “An easement holder’s duty, however, is narrower in scope than a landowner’s duty.” [C.T. at p. 000346.] Respondent pointed out that the court in *Cody, supra*, indicated that an easement holder’s duty in managing its easement must be “tied to the reason that the easement was granted,” and that an easement holder cannot be “held responsible for an action that ha[s] no relationship to the scope of the easement granted.” [C.T. at pp. 000346 to 000347.] Summing up its argument, Respondent observed that, according to the holding in *Cody F., supra*, that court noted that it was “unaware of any case in which an easement holder was held responsible for an action that had no relationship to the scope of the easement granted.” [C.T. at p. 000348.]

As the trial court ruled specifically when it overruled Respondent’s demurrer earlier in these proceedings, *Cody F., supra*, has no application whatsoever to the question presented in the action at bar. [C.T. at p. 000693.] As distinguished from the instant action, wherein Respondent simply refused to maintain its easement at a time when it had repeatedly been warned that the conditions there posed a serious danger to, among others, Appellant as the adjacent landholder, *Cody F.* involved intervening circumstances that place it in an entirely different category than the within action. As the *Cody F.* court explained:

“This case arises from a dog attack resulting in tragic injuries to 11-year-old Cody F. The attack occurred on a private road within a subdivision and was witnessed by Cody's mother and sister. The respondents, property owners and association members in the Rancho Tehama Subdivision Association (RTA), owned access easements over the road. Respondents obtained favorable dispositions on the pleadings in the trial court and Cody, his mother and sister have appealed.

* * * * *

Appellants ask this court to expand the scope of an easement owner's liability to cover this fact situation, even though the owner did not create the hazard, did not own the dogs, had no interest in the land from which the dogs escaped and did not own the road where the attack took place. The suggested basis for this expanded liability is the respondents' right to use the roads within the subdivision and their status as association members of a planned unit development. In general, courts have imposed a duty to prevent the harm caused by a third party's animal when a defendant possesses the means to control the animal or the relevant property and can take steps to prevent the harm. Appellants' theory does not fit within the boundaries of the existing law because the element of control is absent from this case.”

The legal principle in *Cody F., supra* involved an injured plaintiff who happened to be attacked by dogs on the situs of an easement. That has nothing to do with Respondent's situation vis-à-vis Appellant in this action. *Cody F.* did not address the condition of the easement on which the attack occurred, or the statutory as well as common law duty of the holders of dominant tenements to adequately maintain their easements; neither of these questions was even tangentially relevant in *Cody F.*, whereas they are outcome-determinative in the action at bar.

After its misanalysis of *Cody F., supra*, Respondent next cited *Clark v. New Magma Irrigation & Drainage District* (2004) 92 P.3d 876. [C.T. at p. 000348.] Besides being an Arizona case that has no binding effect on this Court, *Clark* dealt not with a situation where the dominant tenement was inadequately maintained; it merely held that that "...we agree that an easement holder has a duty to act reasonably under the circumstances *in its use of the servient estate*, but conclude that the duty does not extend beyond the scope of that use." [Emphasis added] Respondent's use of the servient estate is not in issue here; all germane questions are directed toward its use of the dominant estate.

Respondent next cited the holding in *Colvin v. Southern California Edison Co.* (1987) 194 Cal.App.3d 1306. [C.T. at p. 000346.] The quotation offered is that an easement only carries with it a "duty to maintain and repair the structure or facility for which it was created." At best the quotation is mere dicta; *Colvin, supra* was a *Civil Code* § 846 case wherein the issue was whether Edison had immunity because the plaintiff, a child who grabbed an electrical wire that had been exposed following a storm, was a "recreational user" of the land on which he was injured. Just like *Cody F., supra* and *Clark, supra*, *Colvin* did not even consider the question of whether Edison, or anyone else, had properly maintained its dominant tenement under an easement arrangement.

Respondent's next citation was to *J.M. Ruth v. Pac, Gas & Elec. Co.* (1972) 23 Cal.App.3d 806. [C.T. at p. 000349.] In Respondent's version, the holding stands for the proposition that electric utilities have no independent duty "to keep [their] right of way clear of combustible material." In point of fact, the disagreement between the appellants and the appellees in *J.M. Ruth* involved the trial court's refusal to give the following jury instruction: "The duty of safe maintenance of electrical facilities includes keeping the right of way clear of combustible vegetation and materials which are likely to be ignited from operation of those facilities and cause fire to be transmitted outside the right of way." The Court of Appeals held that the trial court's giving of the following instruction, covering the same substantive area, was sufficient: "The duty of safe design, construction, operation and maintenance of electrical facilities and rights of way also includes preventing trees and other vegetation from growing close enough to electrical transmission lines to create a danger of their coming in contact with the line and causing a fire." Nothing in *J.M. Ruth, supra*, even remotely suggests that electric companies are somehow exempt from *Civil Code* § 425(a) or the extraordinarily large volume of common law authority that holds in no uncertain terms that: "It is the duty of owners of an easement to keep it in repair." *Crease, supra*.

Respondent's motion for summary judgment next went on to cite *Atchison, Topeka & Santa Fe Ry. Co. v. Abar* (1969) 275 Cal.App. 456, as standing for the proposition that the owner of a "servient tenement may make any use of the land that does not interfere unreasonably with the easement." [C.T. at p. 000350.] Appellant certainly has no quarrel with this concept. The Second Amended Complaint pleaded that "SCE breached its duty of care by carelessly maintaining the easement property so as to allow it to become a nuisance and a health and safety hazard to the adjoining properties by allowing the easement property to become infested with

rats, poisonous spiders, and other vermin, and by refusing to allow [Plaintiff] to take actions to prevent an overflow of these vermin from the easement area into his back yard.” [C.T. at pp. 000178 to 000179.] It also pleads in the immediately following paragraph that Respondent had available to it a number of solutions to the problem, all of which would have been cost-effective and none of which would have interfered with its use of the dominant tenement. [C.T. at p. 000179.] Respondent’s citation of *Atchison, Topeka, etc., supra*, merely again underlines that Respondent does not understand the fundamental gravamen of Appellant’s claim: Namely, Respondent’s failure to properly maintain the dominant tenement portion of the easement.

Respondent’s final argument in its motion for summary judgment was that to impose liability in this case would “impose a tremendous burden” not only on Respondent, but also on other frequent users of easement rights. Appellant considers the bite he received from the extremely toxic spider to have inflicted on him “a tremendous burden” as well. In any case, Respondent cites *Rowland v. Christian* (1968) 69 Cal.2d 108, and thereafter constructs a doomsday scenario for all Californians if Appellant is allowed to recover under the unique facts of the instant action.

Some things about *Rowland, supra*, are worthy of separate note:

- At no point anywhere in the Court’s opinion is the word “easement” used. *Rowland* is not a case that has anything to do with easements.
- *Rowland* had nothing to do with the rights or duties of the holders of any kinds of interests in land, easements included. The plaintiff in *Rowland* cut his hand on an allegedly defective sink faucet handle and claimed to be damaged thereby.
- *Rowland* specifically reaffirmed the statutory and common law principle that “Persons are required to use ordinary care to prevent others being injured as the

result of their conduct.” No exception was made for defendants like Respondent who because of their gigantic size probably run into more problems with dominant tenements in easement situations than the average citizen.

Rowland, supra did refer to the possibility of making exceptions to the general rule that persons are required to use ordinary care to protect others from injury resulting from their conduct. In the words of the court:

“A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.”

Respondent focused on the eighth *Rowland* factor only and essentially argued that to find liability in the action at bar, the immediate result would be the necessity of employing thousands of new workers to inspect and maintain every single utility easement of any type whatsoever and make sure that the surrounding grounds are as sparkling and presentable as Disneyland.® That is hardly the case. The instant action is very fact specific; it involves:

- A hazardous easement condition about which Respondent had received numerous complaints from Appellant, and accordingly had full knowledge that it was

continuing to run a calculated risk by following an “open border policy” between Plaintiff’s property and the dominant tenement boundary, allowing rats, poisonous spiders, and other vermin to infest and migrate at will.

- A scenario where Respondent acknowledged its responsibility to police its area of the easement by first trimming, and then later cutting down entirely, a rat-infested palm tree located on the dominant tenement, but then refusing to “go all the way” to follow through on its half measures. The analogy here is to the good Samaritan who stops, renders preliminary aid, then says, never mind, and leaves the scene of the accident.
- A situation in which Appellant offered to remedy the problem by enclosing the dominant tenement, a request that was refused by Respondent.
- The easy availability to Respondent, as set forth in the Second Amended Complaint [C.T. at p. 000179], of other approaches that would have solved the entire problem at minimal expense – approaches that were rejected out of hand by Respondent.

These factors are what give rise to liability in this case, when combined with Respondent’s general breach of its duty to maintain the dominant tenement in good condition. To the extent Respondent is arguing that to impose liability would be just too burdensome to it because of the scope of its operations is the same thing as saying that under the law, the next time a factually similar situation arises, Respondent should once again be permitted to turn a blind eye and wait to see who gets killed or injured due to its carelessness and disregard, then claim exemption from liability. Taken on the whole, it is clear from a reading of the opinion in

Rowland, supra, that this is not the sort of result the Supreme Court had in mind when it issued that holding.

One other aspect that must be borne in mind when analyzing the imposition of liability and the suggestion in *Rowland, supra* that there may be some circumstances in which such imposition should be precluded for the sake of “...consequences to the community of imposing a duty to exercise care...” is that this phrase, as used in *Rowland* and all of its progeny, speaks retrospectively; in other words, it analyzes what should happen *after* a particular previously unexpected calamity has befallen an injured plaintiff. That is not what is involved in the action at bar. There is a big difference between a landowner such as Appellant calling up a party in the position of Respondent and making a generalized complaint about events that **might** happen in the future, versus a party in the position of Appellant calling up a party in the position of Respondent and placing the latter party on specific notice of the existence of actual, manifest, inherently dangerous conditions then already in existence on the property over which the Respondent has sought to assert control.

Under Respondent’s theory, it would not be obligated to do anything in the first example, because under its interpretation of *Rowland, supra*, as well as the other authorities cited in its motion for summary judgment, it would have no duty to even listen to the concern being expressed by the homeowner about the possibility of some remote future event. But in the second example, no one could seriously argue that Respondent could meet the duty of care about which *Rowland, supra* speaks by merely doing nothing and telling the homeowner, “Good luck.” The facts in the action at bar are very akin to the second of these two hypothetical examples. Plaintiff did not call Respondent with a generalized complaint about the conditions on the dominant tenement of the easement. The Second Amended Complaint specifically pleads that

Plaintiff contacted Respondent numerous times and complained specifically about the active presence of rats, poisonous spiders, and a whole host of other vermin; that Respondent did respond by first trimming and then cutting down altogether a palm tree located on the dominant tenement; and that Respondent was repeatedly informed that despite the removal of the palm tree, the easement area was still infested with the types of critters that inherently pose dangers to humans. [C.T. at pp. 000177 to 000179.] In the face of this notification Respondent not only did nothing to affirmatively solve the problem; it also took pains to warn Plaintiff against attempting to use any form of self-help that would have potentially abated the hazardous nuisance. [C.T. at pp. 000178 to 000179; and at pp. 000441 to 000442.]

Respondent's next-to-last citation offered in support of its motion for summary judgment was to *Brunelle v. Signore* (1989) 215 Cal.App.3d 122, about which Respondent claims: "At least one California court has addressed the issue of whether the owner of a private residence has a duty to protect or prevent harmful insect bites, and declined to impose such a duty." True, but totally irrelevant to the action at bar. *Brunelle, supra* involved a guest at a private residence in Cathedral City (near Palm Springs), California, who was bitten by the same type of spider that inflicted Appellant's injuries in the within action. Defendant sought summary judgment on the grounds that (1) he acted as a reasonably prudent person would under the same or similar circumstances; and (2) an owner of premises is not liable for injuries suffered as a result of a dangerous condition of which he has no knowledge. In support of these arguments, defendant submitted a statement of undisputed material facts, stating: (1) "plaintiff was bitten by a Brown Recluse Spider"; (2) "plaintiff had not at any time seen a Brown Recluse Spider on defendant's property"; (3) "plaintiff did not see any spiders" in defendant's house the night he was bitten; (4) "defendant has never seen anything around his house that looked like a Brown Recluse Spider";

(5) "defendant was unaware that Brown Recluse Spiders were in the California area"; (6) "defendant had not seen a Black Widow Spider in his house before plaintiff was bitten by a spider"; (7) "defendant removed the spiders he found inside his house"; (8) "defendant sprayed the entire inside and outside of his property to get rid of the bugs"; and (9) "defendant did not see any insects in his home during the 4 months" before plaintiff was bitten by a Brown Recluse Spider.

Brunelle, supra, just like many of the cases cited by Respondent in its motion for summary judgment, has nothing to do with the duties and liabilities of the holders of dominant tenements under easement arrangements. *That* is the real issue posed by Respondent's motion, and the statutory and case law are both clear that Respondent had an affirmative duty of care toward Appellant to not knowingly allow a dangerous condition on the dominant tenement to continue to exist unabated.

In its motion for summary judgment, Respondent also cited eight additional cases that were not cited in support of its demurrer to the Second Amended Complaint. These eight cases are also distinguishable and do not change the well-settled California law described above.

The "new cases" Respondent invited the trial court to consider in connection with ruling on its motion for summary judgment were as follows:

- *Aguilar v. Atlantic Richfield* (2001), 25 Cal.4th 826. Respondent cites this holding as standing for the proposition that a defendant need not "conclusively negate an element of the plaintiff's cause of action," and that the defendant need only show that "...the plaintiff cannot establish at least one element of the cause of action..." A better way of putting it would be as the Court said in *Twain Harte*

Associates, Inc., supra, and *Chevron, U.S.A., Inc. v. Superior Court of Kern County, supra*: “A defendant who moves for summary judgment must either *prove* an affirmative defense which would bar every cause of action pled in the complaint, or *disprove* at least one essential element of each cause of action in the complaint.” In any event, *Aguilar, supra* certainly does nothing to support Respondent’s central thesis that it owed no duty of care to Appellant.

- *Butcher v. Gay* (1994) 29 Cal.App.4th 388. This case involved an invitee house guest who suffered a tick bite, not two easement owners whose responsibilities toward one another were predicated on the duties of the owner of the dominant tenement versus those of the owner of the servient tenement. Moreover, as even Respondent helpfully noted in its motion for summary judgment, the *Butcher* holding specifically concluded: “Where one has not fostered an environment designed to cultivate such predators they are simply part of the inherent risks of living.” [Emphasis added] [C.T. at p. 000354.] This is precisely what Appellant is arguing in this lawsuit: That Respondent “fostered” the environment in which the spider that bit him established its habitat; was told that the dangerous condition existed; exercised dominion and control over the portion of the easement where the spider bite took place;

and prevented Appellant from doing anything to ameliorate the inherent danger Respondent had thereby created.

- *Donnell v. California Western School of Law* (1988) 200 Cal.App.3d 715. This action involved a law student who was attacked, stabbed, and injured in the middle of the night. The holding of no liability was expressly predicated on the court having found that “Cal Western has established the absence of ownership, possession or control of the property where Donnell was injured.” In other words, the defendant had no interest of any kind in the property on which the attack took place. This fact obviously distinguishes the holding from the facts involved in the action at bar, since the whole dispute in this litigation revolves around the respective duties and rights of dominant tenement, servient tenement, and easement holders.
- *Friedman v. Merck & Co.* (2003) 107 Cal.App.4th 454. Respondent cites this holding as standing for the proposition that “A court determines whether a duty is imposed by law as a matter of policy.” Appellant has no quarrel with this interpretation.
- *Hamilton v. Gage Bowl, Inc.* (1992) 6 Cal.App.4th 1706. Respondent cites this holding for the idea that “In a premises liability case, ‘a defendant cannot be held liable for a defective or dangerous condition of property which defendant does not own, possess, or control.’” [C.T. at p. 000345.] The Court should

simply consider the facts involved in *Hamilton* to see how desperate Respondent's argument has become. In *Hamilton*, the plaintiff was walking through a parking lot owned by defendant Gage Bowl. From a building adjacent to the parking lot but not owned or connected in any way with Gage Bowl, a sign fell off and struck the plaintiff. The parties who owned the building from which the sign had fallen settled without going to trial. Was Gage Bowl liable? Of course not, because it had nothing to do with the entire event. That state of affairs contrasts sharply with those involved in the action at bar, in which Respondent held an easement; allowed the easement to fall into disrepair; was put on notice that its portion of the easement was harboring dangerous vermin and other pests; exercised dominion and control over this same dominant tenement; and prevented Appellant from doing anything to rectify the problem. The decision in *Hamilton* is as irrelevant to the present fact situation as it could possibly be.

- *Krongos v. Pacific Gas & Electric Co.* (1992) 7 Cal.App.3rd 387. Respondent's quotation from this holding is that duty "...is merely a conclusory expression used when the sum total of policy considerations lead a court to say that the particular plaintiff is entitled to protection." Appellant also has no quarrel with this statement of the law.

- ***Nicholson v. Smith*** (Tex. App. 1999) 986 S.W.2d 54. This Texas case, in the words of Respondent’s motion for summary judgment [C.T. at p. 000355], indicates that “...the majority of cases...have refused to find that the landowner owed the invitee a duty with regard to the acts of wild animals on its premises.” To this it may simply be said that, as made clear by Appellant in its opposition Points and Authorities, “...the majority of cases...” involve invitees, and have nothing whatsoever to do with determining the rights or duties of dominant tenement holders versus servient tenement holders within an easement context. Those cases which ***have*** addressed the issue leave no question but that the holder of the dominant tenement has every bit as much responsibility for policing his or her portion of the easement as does the holder of the servient tenement. And trumping all else is the fact that Respondent’s duty in this action is specifically prescribed by statute, in the form of ***California Civil Code*** § 845(a), which provides that “The owner of any easement in the nature of a private right-of-way, or of any land to which any such easement is attached, shall maintain it in repair.”
- ***White v. Southern California Edison Co.*** (1994) 25 Cal.App.4th 442. Respondent cites this case as bolstering its contention that as a public utility, “...Edison did not owe a duty of care to the motoring public for inoperable streetlights.” [C.T. at p. 000358.]

The more germane part of the holding, conveniently left out of its Points and Authorities by Respondent, was expressed by the court in the following terms: “A public utility has a general duty to exercise reasonable care in the management of its personal and real property. (Civ.Code, § 1714; *Langley v. Pacific Gas & Elec. Co.* (1953) 41 Cal.2d 655, 660-661, 262 P.2d 846.) A public utility may be liable to those persons injured as a result of its breach of this duty. (*Ibid.*)” The holding in *White, supra*, in other words, expressly confirms Appellant’s view of the law and disaffirms Respondent’s claim, which is seemingly that it could never have a duty of care toward *anyone*.

D. THE FACT THAT APPELLANT SPECIFICALLY PLACED RESPONDENT ON ACTUAL NOTICE OF THE EXISTENCE OF AN INHERENTLY DANGEROUS CONDITION ON THE DOMINANT TENEMENT INDEPENDENTLY GIVES RISE TO LIABILITY ON THE PART OF RESPONDENT FOR THE INJURIES SUBSEQUENTLY SUFFERED BY APPELLANT.

Respondent urged the trial court to rely heavily on the holding in *Cody F., supra* -- something the trial court refused to do when it ruled on Respondent’s demurrer to the Second Amended Complaint but reversed course and agreed to do when it granted Respondent’s motion for summary judgment. The reasons why *Cody F., supra* is distinguishable from the facts of the action at bar have already been articulated hereinabove. But more importantly, in the words of a Pennsylvania court, “We recognize that the degree of control imparted by an easement varies with the terms of the easement and the manner in which the easement is exercised.” *Leichter v. Eastern Realty Co.*, (1986) 516 A.2d 1247, 358 Pa.Super. 189.

Appellant is not claiming that he was ambling along on open ground, where 2,000 feet above, Respondent had some electrical transmission lines strung. In that situation, liability would most likely never attach. But in the action at bar both Appellant and Respondent were very active players, with Appellant continually demanding that Respondent do something about cleaning up its side of the dangerous dominant tenement while Respondent consistently did nothing other than trim and remove a palm tree.

Respondent claims to never have heard of a case in which an electric utility company such as itself has ever been held liable for injuries to persons sustained on the utility's easements. As noted in *Leichter v. Eastern Realty Co.*, *supra*, easements can be put to many different uses. The most recent known case on point, and that tracks closely with the facts of the action at bar, is *Stanton v. Lackawanna Energy, Ltd.*, 886 A.2d 667 (Pa. 2005).

In *Stanton, supra*, the court pointed out that based upon commonly accepted meanings of the relevant terms, the defendant utility with the benefit of the easement was an "occupant" of the property in question, since it regularly maintained the electrical facilities on the property and used a dirt road along its utility line, on the land contained within its easement. "These activities demonstrate that PP&L has possessory rights in and daily control over its easement."

Just like in *Stanton, supra*, here Respondent insisted on its right to continuing access to its electric facilities situated on the dominant tenement, and even nixed Appellant's attempts to remedy what was Respondent's problem in the first place.

Stanton, supra, is not the only non-California jurisdiction that has held a public utility responsible for injuries resulting from its use of an easement. *See, e.g., Robinson v. Illinois Power Co.*, 338 Ill.App.3d 1088, 273 Ill.Dec. 618, 789 N.E.2d 792 (2003), in which the court held that a power company need not have ownership rights in property to be considered an

occupant, but instead could be considered such by placing and maintaining power poles and lines on the property.

Respondent would like to pretend that its role here is nothing more than innocent bystander. In point of fact it acted on numerous occasions, and in several ways, to exercise dominion and control over the dominant tenement portion of its easement rights. It has that right under the terms of its easement -- but with that right comes the responsibility to maintain the easement, and it is that responsibility what Respondent is attempting to shirk in these proceedings.

VI
CONCLUSION

Appellant respectfully submits that the trial court erred when it granted Respondent's motion for summary judgment, and that its decision should be reversed by this Honorable Court and remanded for further proceedings at the trial level.

Dated: [REDACTED], 2007

Respectfully submitted,



[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

Attorneys for Appellant-Plaintiff [REDACTED]

[REDACTED]