**NOT FOR PUBLICATION**

FILED

MAY 14 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| ARTHUR LOPEZ,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>UNITED STATES OF AMERICA; et al.,<br><br>Defendants-Appellees. | No. 19-55162<br><br>D.C. No. 8:17-cv-01470-DOC-JDE<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Submitted May 6, 2020**

Before: BERZON, N.R. SMITH, and MILLER, Circuit Judges.

Arthur Lopez appeals pro se from the district court's summary judgment in his action alleging premises liability claims under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.* ("FTCA"). We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Marlys Bear Med. v. U.S. ex rel. Sec'y of Dep't of Interior*,

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

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241 F.3d 1208, 1213 (9th Cir. 2001). We affirm.

The district court properly granted summary judgment on Lopez's FTCA claims because Lopez failed to raise a genuine dispute of material fact as to whether the walkway outside the Ronald Reagan Federal Building and Courthouse was a dangerous condition. *See Conrad v. United States*, 447 F.3d 760, 767 (9th Cir. 2006) ("In assessing the United States' liability under the FTCA, we are required to apply the law of the state in which the alleged tort occurred."); *Taylor v Trimble*, 13 Cal. App. 5th 934, 944 (2017) (premise liability only arises under California law if there is a showing plaintiff's injuries were caused by a "dangerous condition" on the property).

The district court did not abuse its discretion in denying Lopez's motion for appointment of counsel because Lopez did not present "exceptional circumstances" warranting the appointment of counsel. *See Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009) (setting forth standard of review and "exceptional circumstances" standard for appointment of counsel).

To the extent that Lopez challenges the district court's order denying his reconsideration motion, we lack jurisdiction over that decision because Lopez did not file an amended notice of appeal. *See* Fed. R. App. 4(a)(4)(B)(ii).

We reject as meritless Lopez's contention that the district court's dismissal of his case deprived him of his constitutional rights.

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We do not consider facts or documents that were not raised before the district court. *See United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990).

All pending motions and requests are denied.

**AFFIRMED.**

Appendix A



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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

ARTHUR LOPEZ,
Plaintiff,
vs.
UNITED STATES OF AMERICA, et al.,
Defendants.

Case No.: 8:17-cv-01470 DOC (JDEx)

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT [69]

## I. Introduction

On December 10, 2018, Defendant Wilson 5 Service Company Inc. ("Wilson") filed a Motion for Summary Judgment and supporting Memorandum as to all claims asserted against it by Plaintiff Arthur Lopez ("Plaintiff"). Dkt. 69 ("Motion"). The Motion is supported by Declarations, Exhibits, a Statement of Undisputed Facts (Dkt. 75, "SUF"), and a Request for Judicial Notice (Dkt. 70, "Wilson RJN"). On December 26, 2018, Plaintiff filed an opposition to the Motion (Dkt. 82), a supporting memorandum (Dkt. 83, "Opp." or "Opposition"), and a Statement of Disputed Facts (Dkt. 80, "SDF"). On January 7, 2019, Wilson filed a

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response. Dkt. 89. On January 23, 2019, defendant United States of America ("United States") filed a joinder in the Motion. Dkt. 91 ("Joinder").

Having considered the arguments and evidence submitted in support of and in opposition to the Motion, the Court GRANTS the Motion as set forth below.

## II. Background

### A. Facts[1]

Wilson is a full-service facility operations company that provides services to commercial and governmental clients. Dkt. 69-2, Declaration of Edward K. Wilson, Sr. at ¶ 2. Wilson was organized in 1982 in accordance with the laws of Maine and is authorized to do business in the State of California. *Id* at ¶¶ 3-4. As a part of conducting its business, Wilson participated in the bidding process for a contract to render services for the United States government at the Ronald Reagan Federal Building and Courthouse located in Santa Ana, California ("the Courthouse"). *Id.* at ¶ 5. On or about September 3, 2012, Wilson was awarded a contract to render certain specified services at the Courthouse. *Id.* at ¶ 6.

On December 22, 2015, Plaintiff fell on a walkway outside the Courthouse on a day where it was "drizzling off and on." SUF at ¶¶ 10-11. Excluding its coloring—the physical composition of the surface, the slope, and the gradient of the walkway have not been materially modified or altered since that day. Dkt. 69-3 at ¶¶ 2-3.

Based on testing by Mark Blanchette, Ph.D., a biomechanics expert, the walkway was slip resistant under both wet and dry conditions. Dkt. 69-5 ("Blanchette Decl."), ¶¶ 1, 7. The walkway was not dangerously slippery under dry or wet conditions. *Id.* at ¶ 7. The slope of the area of the incident was within code requirements and did not present a risk to pedestrians. *Id.* at ¶ 8. The grout on the walkway did not present a hazard to pedestrians. *Id.* at ¶ 10.

[1] Unless indicated otherwise, to the extent Plaintiff contends that any of these facts are disputed, the Court finds any claimed dispute is not material to the disposition of the Motion. Further, to the extent the Court relies on evidence to which the parties have objected, the Court has considered and overruled those objections. As to any remaining objections, the Court finds it unnecessary to rule on them because the Court does not rely on the disputed evidence.



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**B. Procedural History**

Plaintiff filed this action on August 25, 2017. Dkt. 1, Complaint. Plaintiff brings four premises liability claims under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 ("FTCA"): (1) negligence, (2) gross negligence, (3) willful failure to warn of dangerous condition, and (4) dangerous condition on public federal property. Complaint at ¶¶ 10-13. On October 18, 2017, Wilson filed an Answer to the Complaint (Dkt. 24), and on December 1, 2017 the United States filed an Answer to the Complaint. (Dkt. 35).

By the Motion, Wilson moves for summary judgment as to each of the four claims asserted in the Complaint, asserting that undisputed material facts show that Plaintiff cannot meet its burden of proof as to one or more elements of each claim and, as a result, Wilson is entitled to judgment as a matter of law. Motion at 4. The United States joins in the Motion. Joinder at 2.

**III. Legal Standard**

Summary judgment is proper if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the facts and draw inferences in the manner most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1161 (9th Cir. 1992). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial, but it need not disprove the other party's case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986).

"In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire &*

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*Marine Ins. Co. v. Fritz Companies*, 210 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate the existence of a genuine issue of material fact with specific facts, not mere conclusory allegations. *Anderson*, 477 U.S. at 248-49. Summary judgment is appropriate if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

When the non-moving party bears the burden of proving the claim or defense at trial, the moving party can meet its burden for summary judgment by pointing out that the non-moving party has failed to present any genuine issue of material fact. *Musick v. Burke*, 913 F.2d 1390, 1394 (9th Cir. 1990). Although inferences drawn from the underlying facts are viewed in the light most favorable to the nonmoving party (*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)), a party cannot create a genuine issue of material fact simply by making assertions in its legal papers; rather, specific, admissible evidence must be identified demonstrating such a dispute. *S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co., Inc.*, 690 F.2d 1235, 1238 (9th Cir. 1980). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) (citation omitted).

## IV. Discussion

### A. Request for Judicial Notice

Wilson requests that the Court take judicial notice of nine documents, Exhibits 1, 2, 5, 6, 7, 8, 9, 10, and 11 of the Wilson Request for Judicial Notice ("Wilson RJN") (Dkt. 70), including:

- Exhibit 1, Complaint filed by Arthur Lopez on August 25, 2017, in the

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pending matter

- Exhibit 2, Proofs of Service filed on December 22, 2015 at 10:20am in the matter of *Arthur Lopez v. MUFG Union Bank, et. al.* United Stated District Court, Central District of California, Southern Division, Civil Case Number SACV-15-1354-JLS-KES
- Exhibit 5, Request for Domestic Violence Restraining Order filed October 20, 2016, by Arthur Lopez in the Superior Court of California, County of Orange, Case Number 160001283
- Exhibit 6, Income and Expense Declaration filed by Arthur Lopez on July 6, 2016 in the Superior Court of California, County of Orange, Case Number 16D001283
- Exhibit 7, Amended Complaint filed by Arthur Lopez on December 15, 2017, in the matter of *Arthur Lopez v. MUFG Union Bank, N.A. et. al.* United States District Court, Central District of California, Southern Division, Case Number SACV-17-01466-JLS-KES
- Exhibit 8, Complaint filed by Arthur Lopez on November 21, 2017 in the matter of *Arthur Lopez v. State of California, Edward Gerald Brown, Jr. et. al.* United States District Court, Central District of California
- Exhibit 9, Complaint filed by Arthur Lopez on December 23, 2016, in the matter of *Arthur Lopez v. Newport Beach Police Department, et. al.* United States District Court, Central District of California, Southern Division, Case Number SACV-16-02267-VBF-MRW
- Exhibit 10, Complaint filed by Arthur Lopez on February 17, 2017, in the matter of *Arthur Lopez v. Costa Mesa Police Department, et. al.* United States District Court, Central District of California, Southern Division, Case Number SACV-17-00297-VBF-MRM
- Exhibit 11, Complaint filed by Arthur Lopez on March 17, 2017, in the matter of *Arthur Lopez v. Newport Beach Police Department, et. al.* United

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States District Court, Central District of California, Southern Division, Case Number SACV-17-00488-VBF-MRW

Wilson RJN Exs. 1-2, 5-11.

"Judicial notice" is a court's recognition of the existence of a fact without the necessity of formal proof. *See Castillo-Villagra v. I.N.S.*, 972 F.2d 1017, 1026 (9th Cir. 1992). Under Federal Rule of Evidence 201, a court may take judicial notice of court filings and other matters of public record. *Harris v. Cty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012) (noting that a court may take judicial notice of "undisputed matters of public record"); *see also Reyn's Pasta Bell a, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (taking judicial notice of pleadings, memoranda, and other court filings). In addition, judicial notice is appropriate for information obtained from government websites, *see Paralyzed Victims of Am. v. McPherson*, 2008 WL 4183981, at *5 (N.D. Cal. Sept. 8, 2008), as well as copies of "records and reports of administrative bodies." *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003). The Court does not, however, take judicial notice of reasonably disputed facts contained within the judicially noticed documents. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001).

Therefore, the Court takes judicial notice of the existence of the documents above. However, the Court does not take judicial notice of the facts within these exhibits subject to reasonable dispute. *See Lee*, 250 F.3d at 690.

**B. Only the United States Is a Proper Defendant Under the FTCA**

Wilson assets it is not a proper defendant under the FTCA. Motion at 3-4. The Court agrees.

The FTCA provides "a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment." *United States v. Orleans*, 425 U.S. 807, 813 (1976). However, the United States is the only proper defendant in an FTCA action. "The FTCA is the exclusive remedy for tortious

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conduct by the United States, and it only allows claims against the United States." *Federal Deposit Ins. Co. v. Craft*, 157 F.3d 697, 706 (9th Cir. 1998); *see also Kennedy v. United States Postal Serv.*, 145 F.3d 1077, 1078 (9th Cir. 1998) (per curiam).

Here, the Caption of the Complaint asserts that it is a complaint for "Federal Tort Claims Act 28 U.S.C. § 2671-2680." Complaint at 1. The sole asserted bases for jurisdiction are 28 U.S.C. § 1346(b) and 1402(b), relating to claims for money damages against the United States, 28 U.S.C. § 2401(b), relating to the statute of limitations for the FTCA, and the FTCA itself. *Id.* Plaintiff does not assert supplemental or diversity jurisdiction to support any claim against a defendant other than the United States.

Wilson is not a proper defendant in any of the four FTCA claims alleged in the Complaint. Therefore, the Motion is properly granted as to all of Plaintiff's FTCA claims asserted against Wilson.[2]

The United States joined in Wilson's Motion, but submitted no evidence or substantive argument. The FTCA, while authorizing jurisdiction over claims against the United States arising from the negligence of its employees and agencies, specifically excepts "contractors" from the definition of federal agencies. *See* 28 U.S.C. § 2671. Thus, the "government cannot be held liable for torts committed by its independent contractors . . . " *Edison v. United States*, 822 F.3d 510, 514 (9th Cir. 2016) (reversing dismissal of FTCA claims against the United States under the independent contractor exception). In determining whether a party is an independent contractor as a matter of fact, the Supreme Court has said that "the power of the Federal Government 'to control the detailed physical performance of

[2]Although the caption of the Complaint only purports to assert FTCA claims, the individual claims themselves, although entitled FTCA claims, also contain the titles of various potential common law claims under California law: (1) Negligence (2) Gross Negligence (3) Premises Liability – Failure to Warn; and (4) Dangerous Condition. Complaint at 10-13. As noted, Plaintiff does not request in the Complaint that the Court assert supplemental jurisdiction over such state law claims. However, because Plaintiff is proceeding *pro se*, the Court will interpret the Complaint liberally to also assert state law claims against Wilson, and the Court will therefore also consider the Motion's substantive challenges to the claims, set forth below.

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the contractor' is a critical factor distinguishing federal agents and employees from independent contractors." *Orleans*, 425 U.S. at 814 (citing *Logue v. United States*, 412 U.S. 521, 528 (1973)); *see also Laurence v. Dep't of the Navy*, 59 F.3d 112, 113 (9th Cir. 1995). A component of this factor is whether the government supervises the actor's day-to-day operations. *Orleans*, 425 U.S. at 815. Courts look to the terms of the contract between the government and the contractor to determine whether the government controlled the detailed physical performance of the contractor or whether the government supervised the day-to-day operations of the contractor. *See Zion v. United States*, 913 F. Supp. 2d 379, 384 (W.D. Ky. 2012); *Johnson v. United States*, 2014 WL 12572914, at *4 (C.D. Cal. Mar. 14, 2014) (granting defendant government's motion for summary judgment and finding the Court had no jurisdiction over Plaintiff's negligence claim under the FTCA where the contract between the government and the contractor was a "comprehensive instrument providing that [the contractor] was responsible for the operations and maintenance services for all [government] facilities").

Here, neither Wilson nor the United States provided the Court with sufficient information to determine whether the power of the United States controlled the detailed physical performance of Wilson. Wilson provided testimony that it was awarded a contract to render certain services for the United States at the Courthouse but did not provide the Court with the contract or its key terms. Based on the current record, the Court cannot find, as a matter of law, that the independent contractor exception applies. Thus, the United States' joinder as to this portion of the Motion is denied.

**C. Substantive Failure of Proof: Duty of Care/Dangerous Condition**

Defendant argues it is entitled to judgment on Plaintiff's "four versions of premises liability asserted in the Complaint as [Plaintiff] cannot prove the essential elements of dangerous condition." Motion at 4. Further, as the substantive state law claims form the basis for the FTCA claims against the United States, to the extent

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those state law claims substantively fail as a matter of law, they cannot support an FTCA claim against the Untied States.

In order to establish liability on Plaintiff's negligence theory under California law, he must show: (1) a legal duty to use due care; (2) a breach of that duty; and (3) the breach as the proximate or legal cause of the resulting injury. *See, e.g., Jackson v. Ryder Truck Rental, Inc.*, 16 Cal. App. 4th 1830, 1837 (1993) (citing 6 Witkin, *Summary of Cal. Law: Torts* § 732 (9th ed. 1988)); *see also Conroy v. Regents of Univ. of California*, 45 Cal. 4th 1244, 1250 (2009) ("In order to establish liability on a negligence theory, a plaintiff must prove duty, breach, causation, and damages.") (internal citation omitted). The elements of premises liability on a negligence theory are the same. *Ortega v. Kmart Corp.*, 26 Cal. 4th 1200, 1205 (2001). Plaintiff has the burden of proving all of the elements of his negligence claim. *Id.* at 1205-06.

"The proper test to be applied to the liability of the possessor of land is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others." *Alcaraz v. Vece*, 14 Cal. 4th 1149, 1156 (1997). "This requires persons to maintain land in their possession and control in a reasonably safe condition." *Id.*

Wilson contends it did not owe any legal duty to Plaintiff with respect to the Courthouse walkway because the walkway was not a dangerous condition.

It is well-established under California law that the question whether a duty of care exists, the breach of which may constitute negligence, is a question of law. *Delgado v. Am. Multi-Cinema, Inc.*, 72 Cal. App. 4th 1403, 1406 (1999); *Kentucky Fried Chicken of California, Inc. v. Superior Court*, 14 Cal. 4th 814, 819 (1997). As the California Supreme Court explained:

> [I]n the case of a landowner's liability for injuries to persons on the property, the determination of whether a duty exists, "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

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> 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 the 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."

*Wiener v. Southcoast Childcare Centers, Inc.*, 32 Cal. 4th 1138, 1145 (2004) (quoting *Rowland*, 69 Cal.2d at 112-13).

More specific to the facts of this case, California has recognized that "persons who maintain walkways, whether public or private, are not required to maintain them in an absolutely perfect condition." *Ursino v. Big Boy Restaurants,* 192 Cal. App. 3d 394, 398 (1987). Rather, under the trivial defect doctrine, "[t]he duty of care imposed on a property owner, even one with actual notice, does not require the repair of minor defects." *Id.* "[T]he trivial defect doctrine is 'not an affirmative defense but rather an aspect of duty [ ] plaintiff must plead and prove.'" *Kasparian v. AvalonBay Communities,* 156 Cal. App. 4th 11, 27 (2007). The trivial defect doctrine initially was developed to protect public entities from liability where conditions on public property create a risk "of such a minor, trivial or insignificant nature in view of the surrounding circumstances . . . no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used." *Id.* (quoting Cal. Govt. Code § 830.2); *see also Ursino,* 192 Cal. App. 3d at 398. The doctrine thus "permits a court to determine 'triviality' as a matter of law rather than always submitting the issue to a jury [and] provides a check valve for the elimination from the court system of unwarranted litigation which attempts to impose upon a property owner

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what amounts to absolute liability for injury to persons who come upon the property." *Ursino,* 192 Cal. App. 3d at 399.

Here, Wilson contends the walkway itself, the walkway's slope, and the walkway's grout did not present a dangerous condition at the time of Plaintiff's fall. Motion at 4-6. Notably, while the Court's ultimate determination under the trivial defect doctrine is legal in nature, the analysis it must engage in is fact-driven. *See e.g.*, *Kasparian*, 156 Cal. App. 4th at 27-29. In other words, before the Court can conclude that a condition is trivial, it must be able to thoroughly analyze the condition and the risk it presents. *See Brown v. Nagata*, 2009 WL 5218036, at *4 (N.D. Cal. Dec. 29, 2009).

**1. The Walkway**

Wilson submitted a declaration by Mark Blanchette, Ph.D., a biomechanics consultant, attesting that the walkway was slip resistant under both wet and dry conditions. Blanchette Decl., ¶¶ 1, 7. Mr. Blanchette conducted a coefficient of friction testing on July 24, 2018 at the Courthouse with an ASTM F2508-16 validated Mark IIIB tribometer to measure the slip resistance of the walkway, and he performed the testing in both dry and wet water conditions. *Id.* at ¶¶ 3, 5-6. For each condition, Mr. Blanchette conducted the test three times in the direction that Plaintiff was walking at the approximate location where he fell. *Id.* at ¶6. Based upon the results of his testing, Mr. Blanchette concluded the walkway was not dangerously slippery under dry or wet conditions. *Id.* at ¶ 7.

Plaintiff did not set forth any evidence to counter Mr. Blanchette's findings. Instead, Plaintiff challenges with the reliability and science behind Mr. Blanchette's tribometer by citing to a two-paragraph printout from an "Anti-Slip Floor Superstore" website. SDF pp 5-9 (CM/ECF pagination) & Ex. E; Opp. at 7. However, Plaintiff does not offer any contrary evidence to support a finding that the walkway itself constituted a dangerous condition. Instead, Plaintiff relies on conclusory statements unsupported by the factual record that the walkway was

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"dangerous." *See Contreras v. Wal-Mart Stores, Inc.*, 2015 WL 12656938, at *5 (C.D. Cal. May 8, 2015) ("'Conclusory allegations unsupported by factual data cannot defeat summary judgment.'") (quoting *Rivera v. Nat'l R.R. Passenger Corp.*, 331 F.3d 1074, 1078 (9th Cir. 2003); *see also Estate of Tucker v. Interscope Records*, 515 F.3d 1019, 1030 (9th Cir. 2008) (holding the party opposing summary judgment cannot "rest upon the mere allegations or denials of [its] pleading but must instead produce evidence that set[s] forth specific facts showing that there is a genuine issue for trial."). Thus, Plaintiff has not met his burden in establishing a dispute of fact as to whether the walkway itself constituted a dangerous condition. *See Contreras*, 2015 WL 12656938, at *5.

**2. The Walkway's Slope**

Second, Mr. Blanchette attests that the slope of the walkway in the area of the incident was within code requirements and did not present a risk to pedestrians. Blanchette Decl. at ¶ 8. He examined and measured the walkway to be at a grade of 4.8%, and he stated that walkways with slopes of less than 5% grade are not considered ramps and do not require handrails. *Id.*

Plaintiff did not produce any evidence to counter Mr. Blanchette's findings. Instead, Plaintiff asserts he was not present for Mr. Blanchette's examination, and Plaintiff claims the 4.8% grade "exceeds the Americans with Disabilities Act slope limits." SDF at 7. Plaintiff cites to what appears to be two sections of the Americans with Disabilities Act Accessibility Guidelines ("ADAAG"). SDF, Ex. F at 4. However, whether Plaintiff was present or not during Mr. Blanchette's examination does not create a genuine issue of material fact as to whether a dangerous condition existed. Further, Plaintiff's citation to the ADAAG is a conclusory allegation unsupported by factual data. Plaintiff relies on general statements unsupported by the factual record that the slope of the walkway was "dangerous."

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### 3. The Walkway's Grout

Third, Mr. Blanchette attests he examined the grout on the walkway and found it did not present a hazard to pedestrians. Blanchette Decl. at ¶ 10. In opposition, Plaintiff argues the grout is defective, causing water to puddle and mold to build, and Plaintiff cites to nine pictures he took on December 27, 2015. Opp. at A-G. However, the pictures do not, alone, show that the grout was defective. Plaintiff submits no evidence to show that the grout was defective, instead relies on general unsupported assertions that the grout of the walkway was "dangerous."

Accordingly, the Court finds that Wilson has demonstrated that the walkway presented nothing more than a minor or trivial risk. Plaintiff has not presented any contrary evidence to show that the walkway itself, the walkway's slope, or the walkway's grout was a "dangerous condition." The absence of the existence of a dangerous condition is fatal to each of Plaintiff's underlying state law tort claims. *See, e.g., Fredette v. City of Long Beach*, 187 Cal. App. 3d 122, 131-32 (1986) (finding Plaintiff must show that an actual dangerous physical defect exists to establish failure to warn premises liability); Cal. Gov't Code § 830(a) (a dangerous condition of public property is defined as "a condition of property that creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury" when such property is used with due care in a foreseeable manner). As a result, Wilson is entitled to judgment as a matter of law. *See Rodgers v. Stater Bros. Markets*, 2018 WL 2018106, at *7 (S.D. Cal. May 1, 2018) (granting defendant's motion for summary judgment in a premises liability, slip and fall case under California law); *Contreras*, 2015 WL 12656938, at *4-6.

As to Wilson, the Motion is granted.[3]

[3] Because of the Court's finding that Wilson is entitled to judgment as a matter of law as to the issue of duty of care/absence of a dangerous condition, the Court finds it unnecessary to consider Wilson's alternative argument that Plaintiff did not suffer any physical or financial injury as a result of his fall.



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**D. Joinder by the United States**

As noted, as the state law negligence and related claims form the basis for the purported FTCA claims against the United States, as those claims fail, the FTCA claim also fails. The United States is also entitled to judgment as a matter of law and its Joinder is granted.

Further, as noted above, the United States is the only proper defendant in a FTCA claim. *See Craft*, 157 F.3d at 706. This Court has already found that defendant the General Services Administration ("GSA") was improperly named as a defendant. *See* Dkt. 59. As no claim can be stated against the GSA, it also is entitled to judgment as a matter of law.

**V. Disposition**

For the reasons explained above, the Court finds Wilson, the United States, and the GSA are entitled to judgment as a matter of law. As such, the Court GRANTS Wilson's motion for summary judgment and the United States' Joinder. This Order disposes of all claims. Accordingly, the Court ORDERS the Clerk of Court to enter judgment in favor of defendants and to terminate the case.

DATED: February 5, 2019

David O. Carter

DAVID O. CARTER
United States District Judge

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