NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

HISHMEH ENTERPRISES, INC., et al., Cross-complainants, Cross-defendants and Appellants, v. CITY OF PORTERVILLE, et al., Cross-defendants, Cross-complainants and Respondents.	F074356, F074357, F077323 (Super. Ct. Nos. VCU259965 & VCU262368) **OPINION**

APPEAL from judgments of the Superior Court of Tulare County. Melinda Myrle Reed, Judge.

Ericksen Arbuthnot, Michael D. Ott, Gregory A. Mase and David J. Frankenberger for Cross-complainants, Cross-defendants and Appellants Hishmeh Enterprises, Inc. and Central Cities Pizza, Inc.

Suzanne M. Nicholson; Brumfield & Hagan and Larry F. Peake for Cross-defendant, Cross-complainant and Respondent City of Porterville.

Greines, Martin, Stein and Richland, Geoffrey B. Kehlmann, Robin Meadow; Laura Ann Meyerson and Carla Margolis Blanc for Cross-defendant, Cross-complainant and Respondent Southern California Edison.

-ooOoo-

Two young girls, Dalilah Micaela Gonzalez Pacheco and Litzy Blanco, were walking across the street one night in Porterville when they were hit by a pizza delivery driver and seriously injured. The streetlight above the intersection where they were crossing was not working at the time. The intersection was owned and maintained by the City of Porterville (City), and the streetlight was owned and maintained by Southern California Edison Company (Edison) pursuant to a street lighting agreement with City.

Pacheco and Blanco each filed suit against multiple defendants, including against appellants Central Cities Pizza, Inc. (Central)—the owner of the pizza restaurant that employed the driver—and Hishmeh Enterprises, Inc. (Hishmeh)—the successor owner of the restaurant. Appellants, who have been represented by the same counsel throughout this litigation, cross-complained against City and Edison for indemnity, contribution, and declaratory relief. Specifically, appellants cross-complained against Edison as to both Pacheco's action and Blanco's action, but cross-complained against City only as to Pacheco's action.

City and Edison each successfully moved for summary judgment against appellants on the ground they owed no duty to the plaintiffs to maintain the streetlight. Two judgments were entered, one in City's favor and one in Edison's favor, from which appellants appeal.

Appellants raise three issues on appeal regarding the judgment entered for City. First, they contend the trial court erred by granting the motions for summary judgment. Second, they contend the trial court erred in denying their petition for relief from the Tort Claims Act (Gov. Code, §§ 810, et seq.), which they filed in court after presenting City with an application to file a late claim *and* after the court had already granted City's motion for summary judgment. Third, appellants contend the trial court erred in denying them leave to file a cross-complaint against City as to Blanco's action. Appellants raise only one issue with respect to Edison's judgment, namely that the trial court erred in granting the motion for summary judgment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At around 7:30 p.m. on January 23, 2015, Pacheco and Blanco were crossing the street at the intersection of Date Avenue and Park Street in the City of Porterville when they were struck by a vehicle driven by Celestino Torres, Jr., a Domino's Pizza delivery driver. It was dark at the time of the accident, and the streetlight above the intersection was not functioning. Torres was an employee of appellant Central Cities Pizza, Inc. (Central) and Domino's Pizza. Appellant Hishmeh Enterprises, Inc. (Hishmeh) is the successor owner of the Domino's Pizza restaurant that employed Torres.

City owns, controls, and maintains the intersection where the accident occurred, and Edison owns, controls, and maintains the streetlight located above the intersection. Edison installed and operates streetlights for City pursuant to a street lighting agreement with City and Edison's tariff schedule LS-1. Under the tariff, Edison "owns and maintains the street lighting equipment and associated facilities," but City "shall specify the type of service, lamp size, and location of street lights."

Pacheco files suit

Pacheco and Blanco filed separate lawsuits that were eventually consolidated. On March 10, 2015, Pacheco filed suit against Domino's, its franchisee Hishmeh, and Torres. The complaint contained a claim for premises liability/dangerous condition of public property which alleged "[o]verhead lighting on northwest corner of intersection was not in working order at the time of the collision." The complaint was served on April 2, 2015.

Hishmeh's tort claim and cross-complaint

On April 14, 2015, Hishmeh[1] presented a tort claim to City seeking equitable indemnity and contribution from City for Pacheco's injuries. Paragraph 13 of the claim described the "Circumstances" of the incident as follows:

"Pedestrian DALILAH MICAELA GONZALEZ PACHECO, a minor, was struck by a motor vehicle operated by a Domino's Pizza delivery driver … at the intersection of Date Ave. and Park Street, in Porterville, CA. Overhead lighting on the northwest corner of the intersection was allegedly not operating at the time of the subject MVA versus pedestrian collision, according to Complaint filed in Tulare County Superior Court Case No. 259965."

Paragraph 18 of the claim asked for a description of "what act/action of City employees caused the injury/damage." Hishmeh provided the following in response:

"Overhead lighting on the northwest corner of the intersection was allegedly not operating at the time of the subject MVA versus pedestrian collision, according to Complaint in Tulare County Superior Court Case No. 259965."

On May 1, 2015, Hishmeh answered Pacheco's complaint, and on June 17, 2015, it cross-complained against City and the County of Tulare for indemnity, contribution, and declaratory relief. The cross-complaint alleged Hishmeh would be entitled to indemnity if it were found "in some manner responsible to plaintiffs or to anyone else as a result of the incidents and occurrences described in plaintiffs' complaint."

Central is added as a party and cross-complains

On June 25, 2015, Pacheco named Central as a defendant to her complaint. Central answered the complaint, and on July 2, 2015, it filed a cross-complaint against City and the County of Tulare that was substantively identical to Hishmeh's cross-

[1] The tort claim was filed on behalf of Hishmeh and Domino's, but since Domino's was later dismissed as a defendant and is not a party to this appeal, no further reference is made to Domino's.

complaint against City and the County of Tulare. Central did not file a tort claim with City prior to filing its cross-complaint, even though the cross-complaint alleged Central had complied with applicable claim presentation requirements. Both Hishmeh and Central later dismissed the County of Tulare as a defendant.

Pacheco followed the cross-complainants' lead and amended her complaint to add City as a defendant. She later added Edison as a defendant as well.

Blanco files her complaint and Hishmeh and Central cross-complain

On September 3, 2015, Blanco filed her complaint naming Hishmeh, Central, Torres, and Edison as defendants. She did not name City as a defendant. Hishmeh and Central filed an answer on November 9, 2015, and the Pacheco and Blanco lawsuits were consolidated on December 21, 2015. On January 19, 2016, Hishmeh and Central cross-complained against Edison for indemnity, contribution, and declaratory relief.

Hishmeh and Central present a tort claim, but do not cross-complain against City

On January 7, 2016,[2] appellants presented a timely claim to City concerning Blanco's action. This claim was substantively identical to the claim Hishmeh presented to City in Pacheco's action; it only referenced the streetlight being nonoperational. Appellants presented an amended claim on March 7, which included the findings of their expert, Weston Pringle, a licensed civil engineer who inspected the intersection on October 18 and 19, 2015, and opined the intersection was dangerous because the crosswalk was improperly placed and the striping delineating it was not readily visible. City rejected the amended claim on March 16, on the basis it was untimely. Despite presenting City with a tort claim, appellants did not name City as a defendant in their cross-complaint as to the Blanco action.

---

[2] Unless otherwise stated, references to dates are to dates in 2016.

City moves for summary judgment in Pacheco action

On December 22, 2015, City moved for summary judgment as to Pacheco's complaint and the corresponding cross-complaints of Hishmeh and Central on the ground it owed no duty to plaintiffs to light its streets. Appellants opposed the motion, and submitted Pringle's declaration in support of their argument that City had a duty to light the intersection because there were peculiar conditions at the intersection besides the unlit streetlight that rendered the intersection dangerous.

The motion was heard and granted as to Hishmeh and Central on March 7.[3] The trial court relied on the holding in *Plattner v. City of Riverside* (1999) 69 Cal.App.1441 (*Plattner*) that cities do not have a duty to their streets. The trial court also recognized that the Hishmeh and Central cross-complaints were related to Pacheco's complaint for premises liability, which alleged the non-functioning overhead lighting as the only dangerous condition, and further observed that Hishmeh's tort claim to City referenced overhead lighting as the only dangerous condition. The court also sustained City's objection to Pringle's declaration on several grounds, including relevance. A formal order granting the motion for summary judgment issued on July 1.[4]

---

[3] The motion as to Pacheco's complaint was not granted until August 8 due to a service error, but since Pacheco did not oppose the motion, it was simply a matter of time before the motion would be granted as to Pacheco as well.

[4] The trial court's order granting summary judgment also noted that Pacheco's and Hishmeh's tort claims to City raised only the issue of the nonfunctioning streetlight at the intersection, and therefore appellants could not raise new theories of liability concerning the crosswalk's condition in opposition to City's motion for summary judgment. This ground for denying the motion for summary judgment represents a misunderstanding of the law on the court's part. However, the trial court granted the motion on other correct grounds, so there is no harm. As we will explain, *post*, the substance of the tort claims was irrelevant, because even if the tort claims properly contained facts to support the new theories appellants raised in their opposition, the fatal flaw for appellants was that neither Pacheco's complaint nor appellants' cross-complaints pled facts regarding the theories.

On January 7, while City's motion for summary judgment was pending, Hishmeh and Central presented a tort claim to City for indemnity and contribution as to Blanco's complaint. The language of the claim was substantively identical to the language of Hishmeh's claim to City in Pacheco's action. This claim did not reference the condition of the crosswalk—only the nonoperational streetlight.

Appellants present an amended claim to City in Blanco action

On March 8, the day after the court granted summary judgment in favor of City in Pacheco's action as to appellants, Hishmeh and Central presented an amended claim to City with respect to Blanco's action. The amended claim included the following description of acts by City that caused plaintiffs' injuries:

"Further review of the collision site on October 18 and 19, 2015 by civil engineer Weston Pringle revealed that the striping delineating the subject crosswalk was not readily visible. Additionally, the placement of this subject crosswalk at this uncontrolled intersection was improper. Based on his expertise and review of the unaltered intersection … [it] created a substantial and real risk of injury even when used with due care in a manner in which it was reasonably foreseeable that the road would be used. On information and belief, other conditions not yet discoverable by diligent efforts may constitute dangerous condition(s) on public property. [¶] Further failures to adhere to the standard specification … will come to light once additional investigations take place. It is also anticipated that other design defect(s) will come to light. The City of Porterville's general negligence in maintaining safe road conditions caused and/or contributed to LITZY BLANCO'S injuries."

On March 16, City returned this amended claim without action as untimely, or not presented within six months of the incident giving rise to the claim.

Appellants seek to file an amended tort claim in Pacheco action

On March 11, after summary judgment had been granted for City in the Pacheco action as to appellants, Hishmeh and Central submitted an application to late-file an

amended claim for indemnity with City with respect to the Pacheco action. According to a declaration of appellants' counsel, the purpose of the application was to add Central to the claim to City since Central did not file a claim before it filed its cross-complaint against City. Appellants' counsel's affidavit stated he had reasonably believed Hishmeh's original claim's allegations regarding the non-functioning streetlight "encompassed the factors identified by my retained consultant, Wes Pringle." City denied the application on April 6.

Appellants file Petition for relief from Claims Act

On July 15, Hishmeh and Central filed a motion for relief from the Government Tort Claims Act. City opposed the motion on jurisdictional grounds and on the merits. The court denied the motion at an August 8 hearing on the main ground of appellants' lack of diligence in seeking relief and the prejudice to City that would result if relief were allowed so close to the trial date. The court noted trial was just over a month away and City would have insufficient time to complete discovery and challenge an amended complaint by demurrer or summary judgment.

Appellants seek to cross-complain against City in Blanco's action

Also on August 8, the court denied Hishmeh and Central's July 29 motion for leave to amend their cross-complaint in Blanco's action to name City as a defendant.[5] The trial court again referenced appellants' lack of diligence in bringing the motion, and the prejudice to City were relief to be granted.

Edison moves for summary judgment

Edison filed separate motions for summary judgment against Pacheco, Hishmeh, Central, and City and against Blanco and the same cross-complainants except for City

---

[5] Appellants captioned their motion as one for leave to amend their existing cross-complaint. However, since they were seeking to add a new party, their motion was really requesting leave to cross-claim against a new defendant, and such a motion is governed by Code of Civil Procedure section 428.50.

(which had dismissed its cause of action against Edison). The motion as to the Pacheco action was filed on April 27 and the motion as to the Blanco action was filed on May 23. Both motions were heard on August 8.

Edison argued in its motions that it owed no duty to the general public to maintain the streetlight. Appellants opposed the motion, arguing that policy considerations favored imposing a duty on Edison to maintain the streetlight. In response to the case law holding that policy considerations favor not imposing such a duty, appellants argued those cases were distinguishable. Appellants also submitted Pringle's declaration in opposition, as well as deposition testimony regarding the frequency and seriousness of accidents near the intersection. Appellants submitted this evidence to argue that there was a peculiar dangerous condition at the intersection that imposed a duty on Edison to maintain the streetlight. The trial court followed what it believed to be controlling case law and found Edison owed the plaintiffs no duty to maintain the streetlight.

Judgment was finally entered in favor of City against Hishmeh and Central on March 13, 2018. Separate judgments in favor of Edison were entered on September 2, 2016.

DISCUSSION

I. City's Motion for Summary Judgment

The trial court granted City's motion for summary judgment on appellants' cross-complaints in the Pacheco action. In granting summary judgment, the trial court noted the cross-complaints' three causes of action—for indemnity, contribution, and declaratory relief—all related to the second cause of action in Pacheco's complaint for premises liability. Pacheco's complaint only alleged a dangerous condition of "[o]verhead lighting on northwest corner of intersection [that] was not in working order at the time of the collision." The trial court also recognized the rule that the issues in a summary judgment proceeding are framed by the pleadings. From this, the trial court held that appellants' new contention and evidence—raised for the first time in opposition

to City's motion for summary judgment—regarding the crosswalk's dangerous condition was irrelevant as outside the scope of the pleadings and hence did not raise a triable issue of fact. We conclude the trial court correctly granted summary judgment for City.

A. Standard of Review

" 'On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]' [Citation.] A motion for summary judgment is properly granted 'if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " (*Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 813.) " ' "A defendant moving for summary judgment has the burden of producing evidence showing that one or more elements of the plaintiff's cause of action cannot be established, or that there is a complete defense to that cause of action. [Citation.] The burden then shifts to the plaintiff to produce specific facts showing a triable issue as to the cause of action or the defense. [Citations.] Despite the shifting burdens of production, the defendant, as the moving party, always bears the ultimate burden of persuasion as to whether summary judgment is warranted." ' " (*Multani v. Witkin & Neal* (2013) 215 Cal.App.4th 1428, 1443.) "Appellate courts (1) take the facts from the record that was before the superior court when it ruled on the motion; (2) consider all the evidence set forth in the moving and opposing papers, unless the superior court sustained objections to that evidence; and (3) resolve doubts concerning the evidence in favor of the party opposing the motion." (*Robinson v. City of Chowchilla* (2011) 202 Cal.App.4th 368, 374.)

The trial court's judgment can be affirmed on any ground supported by the record, not just those upon which the trial court relied. (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 802.)

B. Summary Judgment was properly granted

The pleadings play a key role in a summary judgment motion and " ' "set the boundaries of the issues to be resolved at summary judgment." ' " (*Nativi v. Deutsche Bank National Trust Co.* (2014) 223 Cal.App.4th 261, 289 (*Nativi*).) "[T]he scope of the issues properly to be addressed in [a] summary judgment motion" is generally "limited to the claims framed by the pleadings. [Citation.] A moving party seeking summary judgment or adjudication is not required to go beyond the allegations of the pleading, with respect to new theories that could have been pled, but for which no motion to amend or supplement the pleading was brought, prior to the hearing on the dispositive motion." (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 421.)

"Moving defendants have 'the burden on summary judgment of negating only those " 'theories of liability *as alleged in the complaint*' " and [are] not obliged to " ' " 'refute liability on some theoretical possibility not included in the pleadings,' " ' " simply because such a claim was raised in plaintiff's declaration in opposition to the motion for summary judgment. [Citation.]' [Citation.] Declarations in opposition to a motion for summary judgment are not a substitute for amending the pleadings to raise additional theories of liability. [Citation.] '[S]ummary judgment cannot be *denied* on a ground not raised by the pleadings.' " (*Nativi, supra,* 223 Cal.App.4th at p. 290; see *California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 637, fn. 3 ["[a] party may not oppose a summary judgment motion based on a claim, theory, or defense that is not alleged in the pleadings," and "[e]vidence offered on an unpleaded claim, theory, or defense is irrelevant because it is outside the scope of the pleadings"]; *Comunidad en Accion v. Los Angeles City Council* (2013) 219 Cal.App.4th 1116, 1125 [" ' "[a] party cannot successfully resist summary judgment on a theory not pleaded" ' "].)

Here, a liberal reading of the cross-complaints and Pacheco's complaint reveals only one theory of liability, namely that City had a *general* duty to the general public to light the intersection. Pacheco's complaint exclusively identifies the tortious conduct as

the failure to maintain overhead lighting over the intersection; there are no factual allegations in either Pacheco's complaint or the cross-complaints referencing any dangerous condition of the crosswalk. The pleadings thus did not place the crosswalk's condition into issue, and evidence regarding the crosswalk—namely, Pringle's declaration—was thus irrelevant for summary judgment purposes. As such, appellants could not defeat summary judgment with Pringle's declaration regarding the alleged misplacement or unclear striping of the crosswalk, and the trial court was correct to sustain City's objection to Pringle's declaration on relevance grounds. Appellants never requested leave to amend their cross-complaints prior to the hearing to plead facts regarding the crosswalk's condition. Thus, the only theory of liability at issue on summary judgment, and thus the only theory City had to address, was that City owed a general duty to the public to light its intersection.

1. No general duty to light streets

" ' "In the absence of a statutory or charter provision to the contrary, it is generally held that a municipality is under no duty to light its streets even though it is given the power to do so, and hence, that its failure to light them is not actionable negligence, and will not render it liable in damages to a traveler who is injured solely by reason thereof. [] A duty to light, and the consequent liability for failure to do so, may, however, arise from some peculiar condition rendering lighting necessary in order to make the streets safe for travel." ' " (*Plattner, supra,* 69 Cal.App.4th at p. 1444, quoting *Antenor v. City of Los Angeles* (1985) 174 Cal.App.3d 477, 483 (*Antenor*).)

The issue in *Plattner* was whether a "city's failure to maintain a streetlight over a crosswalk creates a dangerous condition of public property." (*Plattner, supra,* 69 Cal.App.4th at p. 1443.) The plaintiff there conceded no other condition existed that rendered the crosswalk dangerous. (*Id.* at p. 1444.) In affirming summary judgment in favor of the city, the Court of Appeal held the subject crosswalk was "no more dangerous with the inoperative streetlight than it would have been if the city had not installed the

light at all." (*Id.* at p. 1446.) The court explained that "darkness is a naturally occurring condition that the city is under no duty to eliminate. Thus, the fortuity of locating the streetlight at a spot where it illuminates the crosswalk does not render the crosswalk dangerous without the light." (*Id.* at p. 1445.) Stated differently, a crosswalk that is not dangerous in the abstract does not constitute a peculiar condition rendering lighting necessary. (*Plattner,* at p. 1445; citing *Antenor, supra,* 174 Cal.App.3d at p. 483.)

This case is squarely within *Plattner's* purview because the pleadings only allege the streetlight was nonoperational; the pleadings did not allege some other condition that rendered the intersection dangerous in the abstract. Nevertheless, appellants claim the crosswalk's condition, as described in Pringle's declaration, rendered lighting necessary. However, as we have explained, the crosswalk's condition was not at issue. Appellants did not request leave to amend their cross-complaints prior to the motion hearing, and therefore evidence concerning the crosswalk could not properly be used to oppose the motion.

Adhering to *Plattner*, we conclude as a matter of law City owed no general duty to the general public to light the intersection, and the trial court correctly granted summary judgment for City.

2. Scope of Hishmeh's claim was irrelevant

Appellants additionally contend summary judgment must be reversed because they substantially complied with the Tort Claims Act, and their tort claim was sufficient to encompass the condition of the crosswalk. However, this contention is misplaced.

Appellants argue that, because Hishmeh's tort claim was worded broadly enough to encompass a theory of liability relating to the crosswalk's condition, they should be allowed to contest City's summary judgment motion with facts relating to that theory. This is a grave misunderstanding. As we have said, summary judgment proceedings are framed by the *pleadings*. (*Nativi, supra,* 223 Cal.App.4th at p. 289.) The contents of the tort claim are irrelevant for summary judgment purposes. Even if the tort claim were

worded broadly enough to encompass a theory of liability concerning the crosswalk, the dispositive point is that facts regarding that theory were not pled in the cross-complaints.

Because the contents of the tort claim are irrelevant here, we need not decide whether the claim was worded broadly enough to encompass the crosswalk's condition. The trial court's only concern, and indeed our only concern, is what was in the pleadings.

II. Appellants' Petition for Relief from Tort Claims Act

On March 11, four days after the trial court granted City's motion for summary judgment, appellants filed with City an application to late-file a claim on Central's behalf because Central never filed one. City denied the application on April 6. Over three months later, on July 15, appellants filed a petition for relief from the Tort Claims Act. The trial court denied the petition on the main ground there was an unreasonable delay in filing it. Appellants challenge the denial of the petition as an abuse of discretion. We find no such abuse.

Appellants' petition to the trial court was made pursuant to Government Code section 946.6, "which authorizes a court to overturn a governmental entity's denial of permission to file a late claim." (*Dunston v. State of California* (1984) 161 Cal.App.3d 79, 83 (*Dunston*).) To be entitled to relief, the petitioner must show the application to the public entity "was made within a reasonable time not to exceed" one year, and, as relevant to this case, "[t]he failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect unless the public entity establishes that it would be prejudiced in the defense of the claim …." (Gov. Code, § 946.6, subds. (b) & (c)(1).)

"Our role on appeal is to review the action of the trial court for an abuse of discretion. 'The granting or denial of a petition for relief under [Government Code] section 946.6 rests within the discretion of the trial court and its determination will not be disturbed on appeal except for abuse of that discretion. [Citations.] It is true that an appellate court more carefully scans the denial than the allowance of such relief to the

end that wherever possible cases may be heard on their merits. [Citation.] Nevertheless, we cannot arbitrarily substitute our judgment for that of the trial court.' " (*Dunston, supra,* 161 Cal.App.3d at p. 83.)

"Remedial statutes such as Government Code section 946.6 should be liberally construed. [Citation.] However, this does not mean that relief in such cases should be granted casually. ' "Statutes of limitation and the like, prescribing definite periods of time within which action should be brought or certain steps taken are, of necessity, adamant rather than flexible in nature …." [Citation.]' [Citation.] 'A petitioner must show more than that he did not discover a fact until too late; he must establish that in the use of reasonable diligence he failed to discover it.' " (*Dunston, supra,* 161 Cal.App.3d at p. 83.)

Our review of the record demonstrates the trial court acted well within its discretion to deny appellants' petition for relief because City would have suffered prejudice had it been granted due to appellants' unreasonably long delay in filing it. The delay was unreasonable because City rejected the application on April 6, yet appellants did not file the court petition until over three months later on July 15 despite knowing trial was set for September 12. The only excuse appellants offer for the long delay is that they were waiting for the trial court to issue its written order on City's motion for summary judgment. This is not a good excuse. When the court granted the motion at the March 7 hearing, it directed City to prepare an order and circulate it to all parties for approval before submitting it to the court. It was practically certain the court was not going to reverse course, and therefore it is unreasonable for appellants to now say they were waiting to see if the court's order may have changed. Also contributing to the unreasonableness of the delay is that Pringle inspected the intersection in October 2015, which was well in advance of the March 2016 hearing, and appellants had plenty of time to request leave to amend their cross-complaints to incorporate his findings.

This delay prejudiced City because, had the petition been granted, City would have had just over a month to conduct discovery on new issues pertaining to the condition of the crosswalk and prepare for trial. City had no reason during appellants' three-month delay to prepare for trial on any issue, much less new issues, because City had already prevailed via summary judgment against appellants and also was going to prevail via summary judgment against Pacheco since she did not oppose the motion.

Appellants suggest prejudice to City could have been avoided by continuing the trial date. The tenor of appellants' briefing suggests that a trial continuance can be granted easily as a matter of routine. However, the Trial Court Delay Reduction Act directs judges to commence trials on the scheduled date and to adopt a "firm, consistent policy against continuances, to the maximum extent possible and reasonable." (Gov. Code, § 68607, subds. (f) & (g).) All parties and their attorneys must regard the date set for trial as certain. (Cal. Rules of Court, rule 3.1332(a).)[6] Consequently, trial continuances are generally disfavored. (Rule 3.1332(c); *Lazarus v. Titmus* (1998) 64 Cal.App.4th 1242, 1249.) In all cases, an affirmative showing of "good cause" for a continuance according to the standards set forth in rule 3.1332(c) must be made. Furthermore, the continuance request must be made "as soon as reasonably practical once the necessity for the continuance is discovered." (Rule 3.1332(b).) However, as we have already said, there was no good cause for granting a continuance, primarily because of the unreasonably long delay in filing the petition.[7]

---

[6] Subsequent references to rules are to the California Rules of Court.

[7] We comment briefly on the unusual nature of the appellants' petition for relief. Despite not having filed a tort claim, Central was able to fully litigate its claim as if it had done so. How would Central have been better off had it filed a claim? In other words, how was Central prejudiced by not having filed a tort claim? It clearly was not prejudiced. This appears to just be Central's attempt to gain a second chance to litigate its case. However, this issue is not dispositive and we need not wade into it.

III. Appellants' motion for leave to amend their cross-complaint as to the Blanco action

Appellants contend the trial court abused its discretion in denying their motion to add City as a defendant to their cross-complaint in the Blanco action. The trial court denied the motion on the ground of unreasonable delay in bringing the motion. We find no abuse of discretion.

City sets forth the proper standard of review. Code of Civil Procedure section 428.50 provides that a party may file a cross-compliant against any party other than the party who filed the complaint against him or her at any time before a date for trial is set. (Code Civ. Proc., § 428.50, subd. (b).) A party must obtain leave of court to file a cross-complaint after that time, and the court may grant leave "in the interest of justice." (Code Civ. Proc., § 428.50, subd. (c).) The court's denial of leave to file a cross-complaint is reviewed for abuse of discretion. (*Nels E. Nelson, Inc. v. Tarman* (1958) 163 Cal.App.2d 714, 730.) A trial court's discretionary ruling will not be disturbed unless there is a clear showing of abuse and "a miscarriage of justice." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331; *Denham v. Superior Court* (1970) 2 Cal.3d. 557, 566.)

Here, the trial court did not abuse its discretion in denying appellants' late-filed motion for leave to amend their cross-complaint in the Blanco action to add City as a defendant. The motion was filed on July 15—more than *four months* after City rejected appellants' amended claim— and trial was set for September 12. As the motion was heard on August 8, City would have had just over a month to prepare for trial in the Blanco action had appellants been allowed to cross-complain against it. City correctly points out that it had essentially been out of the case since March 7, the day its motion for summary judgment with respect to Pacheco's action was granted. Over those several months, City had no reason to prepare for trial or to anticipate it would be brought back into this consolidated case with respect to either plaintiff. The record reveals no good

excuse for the more than four-month long delay, which was made all the more inexcusable given the imminence of trial. Aside from the prejudice that would have inured to City for having to get back into the case and prepare for trial in a month, the inexplicable delay was itself sufficient to deny appellants' motion for leave to amend. The trial court did not abuse its discretion.

IV. Edison's Motions for Summary Judgment

Appellants contend the trial court erred in ruling Edison owed no duty to the general public to maintain the streetlight over the intersection, and erred in granting summary judgment for Edison accordingly. We find no error.

The question before us on appeal is one of law, namely, whether Edison owed a duty to plaintiffs to maintain the streetlight at the intersection. Appellants present on appeal three different theories on which a duty can be imposed on Edison to maintain the streetlight. First, they claim Edison owed a general duty to maintain its streetlights, and claim the trial court erred in recognizing an exception in these circumstances to the general rule of liability. Specifically, they contend a proper analysis of the factors from *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*) dictates against recognizing an exception to the general rule. Second, appellants claim the plaintiffs were third party beneficiaries of the street lighting agreement between Edison and City. Third, appellants contend there was a dangerous condition at the intersection that required Edison to maintain the streetlight in working condition. We conclude appellants' pleadings were insufficient to allege a duty under any of these theories, and therefore conclude, as a matter of law, Edison did not owe a duty to plaintiffs to maintain the streetlight. We consider each of these theories in turn.

A. Public utilities generally owe no duty to maintain streetlights

"The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion." (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397.)

" '[D]uty' is not an immutable fact of nature ' "but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitle to protection." ' " (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6.) There is a line of California cases establishing that a public utility generally owes no duty to the public to maintain streetlights. The most congruous case here is *White v. Southern Cal. Edison Co.* (1994) 25 Cal.App.4th 442 (*White*) because of its facts.

White involved the collision of a van and a moped that severely injured the moped driver. (*White, supra,* 25 Cal.App.4th at p. 445.) The moped driver sued Edison, alleging Edison "was employed as an independent contractor by a public entity to maintain and repair the streetlights at the intersection in which the collision occurred" and that those lights "were not functioning adequately and did not sufficiently illuminate the intersection." (*Id.* at p. 446.) Edison moved for summary judgment, arguing it "owed no contractual or common law duty as an electric utility to the motoring public to maintain the streetlight." (*Ibid.*) Edison also argued that since the public entity "owed no duty to plaintiff to light the streets, [Edison] also owed no duty to plaintiff to maintain the lights." (*Ibid.*) The trial court granted summary judgment for Edison, and the appellate court affirmed.

The *White* court began its discussion with the principle that "A public utility has a general duty to exercise reasonable care in the management of its personal and real property[, and] may be liable to those persons injured as a result of its breach of this duty." (*White,* 25 Cal.App.4th at p. 447; Civ. Code, § 1714.) But, as the *White* court continued:

> "An exception to the general duty rule applicable to a public utility exists, however, in the case of an interruption of service or a failure to provide service. In the absence of a contract between the utility and the consumer expressly providing for the furnishing of a service for a specific purpose, a public utility owes no duty to a person injured as a result of an interruption of service or a failure to provide

> service. [Citations.] The mere fact that the utility has contracted with the consumer to provide a service for general purposes, e.g., water or electricity, is not sufficient to create a duty. [Citations.] Nor does a duty arise where a public entity contracts with a public utility to furnish water to public hydrants for general fire purposes. [Citation.] The consumer is not a third party beneficiary of the contract between the public entity and the public utility. [Citation.] For example, a water company generally owes no duty to a person, whose property is destroyed by fire, to supply water for the extinguishment of the fire. [Citations.] In addition, a gas utility company owes no duty to homeowners whose house exploded as a result of the failure of the utility to turn off the gas to the neighborhood in the face of a rapidly approaching fire." (*White, supra,* 25 Cal.App.4th at pp. 448-449.)

The rationale for this exception to the general duty rule has been variously described. In *Niehaus Bros. Co. v. Contra Costa Water Co.* (1911) 159 Cal. 305 (*Niehaus*), the Supreme Court explained:

> "When we take into consideration the *status* of [utilities] in this state, the nature of the business in which they are engaged, the constitutional control which the state ... takes in fixing the rates which may be charged for [utility services], and the law imposed duties which the [utilities] must discharge to their customers, no liability such as plaintiff claims was ever contemplated where the only relation shown is such as proceeds from the fact that the [utility] has undertaken to furnish the inhabitants of a municipality with [a service] ... and is charging ordinance rates for the [service] supplied or to be supplied." (*Niehaus, supra,* 159 Cal. at p. 316.)

The Supreme Court continued:

> "While it is to be presumed that the rates established by a municipal ordinance are fair and reasonable, this presumption only applies as far as such rates fix the compensation to be paid the [utility] for furnishing [a service] to consumers as a commodity. They are not fixed as a consideration under which the [utility] obligates itself to furnish [the service] for [a specific purpose] with a corresponding liability for failure to do so." (*Niehaus, supra,* 159 Cal. at p. 317.)

The *White* court acknowledged no California case had been presented with the precise issue before it: Does an electric utility company owe a duty to motorists injured in motor vehicle collisions caused in part by an inoperative streetlight which the utility has contracted to maintain? To answer this question, the court performed an analysis of the *Rowland*[8] factors:

> "The issue of duty is a policy consideration. We must take into consideration not only the foreseeability of harm to a plaintiff but also the burdens to be imposed against a defendant. In determining whether a public utility should be liable to motorists for inoperable streetlights, we must consider the cost of imposing this liability on public utilities, the current public utility rate structures, the large numbers of streetlights, the likelihood that streetlights will become periodically inoperable, the fact that motor vehicles operate at night with headlights, the slight chance that a single inoperative streetlight will be the cause of a motor vehicle collision, and the availability of automobile insurance to pay for damages.
>
> "We are of the opinion that a public utility generally owes no duty to the motoring public for inoperable streetlights. There is no contractual relation between the utility and the injured party, and the injured party is not a third party beneficiary of the utility's contract with the public entity. The public utility owes no general duty to the public to provide streetlights. The burden on the public utility in terms of costs and disruption of existing rate schedules far exceeds the slight benefit to the motoring public from the imposition of liability. As noted, vehicles at night are driven with headlights, it is unlikely that a single inoperable streetlight will be a substantial factor in

---

8 "In determining the existence of duty, '… the major [considerations] 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.' " (*White, supra,* 25 Cal.App.4th 447, quoting *Rowland, supra,* 69 Cal.2d at p. 113.)

> causing a collision, and automobile insurance is available to cover damages." (*White, supra,* 25 Cal.App.4th at pp. 450-451.)

From this analysis of the public policy considerations, the *White* court constructed the following rule:

> "[L]iability may not be imposed [for failure to maintain a streetlight] where (1) the installation of the streetlight is not necessary to obviate a dangerous condition, i.e., there is a duty to install the streetlight and a concomitant duty to maintain it; (2) the failure to maintain an installed streetlight does not create a risk greater than the risk created by the total absence of a streetlight; and (3) the injured party has not in some manner relied on the operation of the streetlight foregoing other protective actions, e.g., a pedestrian chooses a particular route home in reliance on the available streetlighting when the pedestrian would have chosen a different route or a different means of transportation in the absence of lighting. (Cf. Rest.2d Torts, § 324A.)" (*White, supra,* 25 Cal.App.4th at p. 451.)

The *White* court remarked that this rule was consistent with the rule from *Antenor, supra,* 174 Cal.App.3d 477 that public entities generally owed no duty to light the streets. (*White, supra,* 25 Cal.App.4th at p. 451.) The court was aware of the longstanding law that a public entity " 'cannot be charged with a greater liability than the city itself,' " and it did not think utility's ownership of the streetlight should "alter the general rule." (*Id.* at p. 452, quoting *Ukiah v. Ukiah Water and Imp. Co.* (1904) 142 Cal. 173, 178.)

Appellants contend *White* was wrongly decided, and in any event is factually distinguishable. We disagree. Appellants contend the *White* court did not properly analyze the *Rowland* factors, and did not even consider all of the factors. Appellants therefore urge us to not follow *White* and conduct our own analysis of the *Rowland* factors to conclude that Edison did owe a duty to the plaintiffs to maintain the streetlight in working order. We decline the invitation to ignore *White's* duty analysis and begin the *Rowland* analysis afresh here. We believe the Court of Appeal there conducted a

properly reasoned *Rowland* analysis, which we endorse. We particularly agree with the *White* court's conclusion that public policy considerations strongly counsel against departing from the longstanding rule that a public utility cannot be charged with a greater liability than the public entity. It also makes no difference to us that it was Edison and not City who owned the streetlight.

The facts of *White* are also not distinguishable. As we have noted, the *White* court's *Rowland* analysis took into account that vehicles have headlights that can illuminate dark streets, and therefore the odds of an unlit streetlight being the proximate cause of an accident are relatively low. Appellants point to the following factual distinction: *White* involved a vehicle-vehicle collision, whereas this case involved a vehicle-pedestrian collision. Since the pedestrian plaintiffs in this case could not have headlights, appellants argue this case is outside the purview of *White*. This distinction is unimportant, though, because what matters is that at least one vehicle was involved that could have had headlights.

Having established the facts of this case are within *White's* purview, we now apply the *White* rule regarding when liability may *not* be imposed on a public entity for failing to maintain a streetlight. It is clear appellants have not pled sufficient facts to create a triable issue of fact on any of the three disjunctive elements of the rule. First, appellants have not pled facts identifying the dangerous condition that needed obviating. None of Pacheco's, Blanco's, or appellants' pleadings allege facts regarding the crosswalk's condition—or any other aspect of the intersection—and therefore the new evidence appellants presented in opposition to Edison's motion for summary judgment was irrelevant.[9] Second, appellants have not alleged the unlit streetlight created a risk greater

[9] Edison also correctly argues that, even if there were facts alleging a streetlight was necessary to obviate a dangerous condition, it was not alleged Edison had actual or constructive knowledge of the dangerous condition, which would be required to impose a duty on Edison. (See *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1206.)

than the risk created by the total absence of a streetlight. And third, appellants have not alleged the plaintiffs in some manner relied on the operation of the streetlight, thereby foregoing other protective actions.

B. Third party beneficiary theory

Appellants' first alternative basis for imposing a duty on Edison to maintain the streetlight is that the plaintiffs were third party beneficiaries of the street lighting agreement between City and Edison. Appellants contend the agreement was entered into to provide streetlights for the benefit of motorists and pedestrians, whereas Edison maintains it installed the streetlights under the agreement for the benefit of City only. Appellants argue that, even though the plaintiffs and Edison were not in privity of contract, a weighing of applicable public policy factors compels a finding that Edison nevertheless owed a duty to plaintiffs. We disagree.

1. Separate statements of undisputed material facts

In its separate statements of undisputed material facts submitted in support of its motions for summary judgment, Edison asserted (1) that streetlights owned and maintained by Edison pursuant to the street lighting agreement are not used directly and indirectly by Edison to transmit or distribute electricity; (2) that the streetlights are installed entirely for the benefit of City and do not serve to facilitate electrical service to other Edison customers; and that Edison places all streetlights at the specific direction of its street lighting customers. To evidence these facts, Edison submitted a declaration from Robert Binns and the tariff rate schedule.

In opposition, appellants disputed the assertion that the street lighting agreement provided that the streetlights were installed entirely for City's benefit, and raised a triable issue as to what control Edison exercised in the placement of the streetlight above the intersection where the accident occurred.

2. Analysis

Appellants' argument on this third party beneficiary theory is based on *Lichtman v. Siemens Industry Inc.* (2017) 16 Cal.App.5th 914. In that case, a city installed a backup battery system in its traffic signals and contracted with the defendant, a private company, to maintain the system. (*Id.* at pp. 918–919.) Defendant reinstalled a backup battery unit in a particular traffic signal but did not insert any batteries. (*Id.* at p. 919.) One night, during a power outage, plaintiff drove through the intersection with that traffic signal not operating and got into an accident. (*Ibid.*) The trial court granted the defendant's motion for summary judgment, finding that it owed no duty of care to the public to maintain the backup battery system. (*Ibid.*)

The Court of Appeal reversed, finding the injured parties were third party beneficiaries under the contract. (*Lichtman, supra,* 16 Cal.App.5th at p. 920.) As the court explained: "A duty running from a defendant to a plaintiff may arise from contract, even though the plaintiff and the defendant are not in privity." (*Id.* at p. 921, citing *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*).) The court continued: "*Biakanja* guides us in cases involving contracts between a defendant and a person other than the plaintiff. As already mentioned, the absence of privity presents no hurdle. Rather, we examine the *Biakanja* factors to determine whether defendant established as a matter of law that it owed no duty to plaintiffs." (*Lichtman, supra,* 16 Cal.App.5th at p. 924.)

The *Biakanja* factors are similar to the *Rowland* factors:

> "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy

> of preventing future harm." (*Biakanja, supra,* 49 Cal.2d at p. 650.)

On the first factor, the *Lichtman* court reasoned that the backup battery units "help drivers and pedestrians safely traverse traffic intersections during power outages. The contract between defendant and the City was clearly intended to, and does, affect plaintiffs. This factor fails to support the conclusion that defendant owed no duty as a matter of law." (*Lichtman, supra,* 16 Cal.App.5th at p. 924.)

Appellants contend the *Lichtman* court's reasoning on this first factor applies here with equal force. They argue that streetlights help drivers and pedestrians traverse intersections just as battery backup systems do, and thus the street lighting agreement here "was clearly intended to, and does, affect plaintiffs." With respect to the five remaining *Biakanja* factors, which are substantively identical to *Rowland* factors, all support the conclusion that Edison owed a duty of care to plaintiffs.

We disagree an analysis of the *Biakanja* factors weighs in favor of imposing a duty on Edison on a third party beneficiary theory. As Edison points out, *Lichtman* involved a private entity defendant—not a public utility—and involved a traffic light—not a streetlight. (*Lichtman, supra,* 16 Cal.App.4th at p. 918.) These differences are crucial. As the court said in *Plattner,* "First, unlike an inoperative traffic light or obscured stop sign which may only be visible to traffic approaching from one direction, it is obvious to all when a streetlight is out." (*Plattner, supra,* 69 Cal.App.4th at p. 1446.) "Moreover, unlike traffic lights and stop signs which are the only means by which traffic is controlled, streetlights are not the only or even the primary means by which streets are illuminated for vehicular traffic. Vehicle headlamps are designed and used for that purpose." (*Ibid.*)

That Edison is a public utility, not a private entity, guides us to incorporate the *White* court's analysis of the *Rowland* factors here. Again, five of the *Biakanja* factors are identical to *Rowland* factors analyzed in *White*. To the extent the street lighting

agreement may have been intended to benefit the plaintiffs, a careful analysis of public policy factors advises against imposing a duty on Edison on a third party beneficiary theory. We therefore decline to find a duty on this ground.

C. Negligent undertaking theory

Finally, appellants contend a duty can be imposed on Edison on a negligent undertaking theory. "[T]he negligent undertaking doctrine (also referred to as the Good Samaritan doctrine), which is contained in section 324A of the Restatement Second of Torts," [(section 324A)] states, " 'One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to [perform] his undertaking if [¶] (a) his failure to exercise reasonable care increases the risk of such harm, or [¶] (b) he has undertaken to perform a duty owed by the other to the third person, or [¶] (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.' " (*Dekens v. Underwriters Laboratories, Inc.* (2003) 107 Cal.App.4th 1177, 1181–1182, fn. omitted.)

Since appellants have not pled facts to create a triable issue under any of the three disjunctive elements, Edison was entitled to summary judgment as a matter of law. We borrow from our analysis of the test created by the *White* court, which was derived from section 324A. First, appellants pled no facts alleging the unlit streetlight rendered the intersection more dangerous than the total absence of a streetlight. Such an allegation, however, would be absurd. Second, appellants pled no facts alleging City owed a duty to plaintiffs to light the streets. And third, appellants pled no facts alleging plaintiffs chose to cross the street at that particular intersection in reliance on the streetlight. Such an allegation would also be absurd in that the plaintiffs surely recognized the streetlight was out before they stepped into the street. At least one of elements (a), (b), or (c) from section 324A must be satisfied to impose a duty. As no party pled any facts to

conceivably satisfy any of the three elements, a duty could not be imposed under section 324A, as a matter of law.

DISPOSITION

The judgments are affirmed.[10] Respondents are awarded their costs on appeal.

SNAUFFER, J.

WE CONCUR:

DETJEN, Acting P.J.

DE SANTOS, J.

[10] Edison's September 27, 2018 request for judicial notice is denied as unnecessary to our deciding this appeal.