

**Tentative Rulings for June 23, 2010**  
**Departments 97A, 97B, 97C & 97D**

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There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

08 CECG 04414     *Burnett v. Hoffman* (Dept. 97D)

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The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

07CECG02071     *Kalmbach v. Sportsmobile* is continued to June 24, 2010 at 3:30 p.m. in Dept. 97D.

10CECG01129     *Maria M. Martinez v. America's Servicing Company – ASC, et al.* is continued to Tuesday, July 13, 2010 at 3:30 p.m. in Dept. 97C.

09CECG02494     *Leon Bueno v. SER-Jobs for Progress* is continued to June 30, 2010, at 3:30 p.m. in Dept. 97D

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(Tentative Rulings begin at the next page)

(5)

**Tentative Ruling**

Re: ***Avila et al. v. Surabian***  
Superior Court Case No. 09 CECG 04490

Hearing Date: June 23, 2010 (**Dept. 97D**)

Motion: By Defendant to strike the claim for punitive damages

**Tentative Ruling:**

To grant the motion without leave to amend but without prejudice to the filing of a motion at a later date seeking leave to amend the complaint to add a claim for punitive damages if discovery should produce such grounds. An Answer is to be filed within 10 days of service by the clerk of the minute order indicating the ruling on the motion.

**Explanation:**

On February 23, 2009 the Plaintiffs were involved in a motor vehicle collision with the Defendant south of Sumner Avenue in the City of Reedley. On December 10, 2009 Plaintiffs filed a judicial form complaint alleging a single cause of action for negligence. On December 17, 2009 Plaintiffs filed a judicial form First Amended Complaint. It added a claim for punitive damages based upon the allegation that the Defendant's driving license had been "suspended or revoked".

On April 20, 2010 Defendant filed a motion to strike the claim on the grounds that evidence of lack of a driver's license is not admissible to prove negligent operation of the vehicle citing *Wysock v. Borchers Bros.* (1951) 104 Cal.App.2nd 571, 582 and *Strandt v. Cannon* (1938) 29 Cal.App.2nd 509, 519-523 as well as Vehicle Code § 40832. This statute declares that evidence of the suspension or revocation of a driving privilege is inadmissible as evidence in any civil action. Opposition was filed citing to older cases that the Plaintiffs submit as authority for the premise that in some instances, the lack of driver's license is admissible to show the lack of ability to handle a vehicle competently. In addition, the Plaintiffs submit the traffic collision report attached as an exhibit to the Declaration of Rodriguez, Jr. In reply, the Defendant submits that if evidence is inadmissible for purposes of showing negligence, it is also admissible to show willful misconduct. Defendant also asserts that the traffic collision report is inadmissible in ruling on the motion to strike.

In tort cases, a plaintiff may seek punitive damages for “oppression, fraud or malice” by the defendant. [Civil Code § 3294(a)] The statute contains its own definitions:

- “Malice” means conduct *intended* by the defendant *to cause injury* to the plaintiff or *despicable conduct* that is carried on by the defendant with a *willful and conscious disregard* for the rights or safety of others. [Civil Code § 3294(c)(1)]
- “Oppression” means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. [Civil Code § 3294(c)(2)]
- “Fraud” means intentional misrepresentation, deceit or concealment of a material fact with the intention of depriving a person of property or legal rights or otherwise causing injury. [Civil Code § 3294(c)(3)]

In ruling on a motion to strike, the allegations in the complaint are considered in context and presumed to be true. See *Clauson v. Sup.Ct. (Pedus Services, Inc.)* (1998) 67 CA4th 1253, 1255. The theory supporting the claim for punitive damages appears to be malice in the form of a conscious disregard for the safety of other vehicles on the road. The facts supporting this theory are based upon the suspension or revocation of the Defendant's driving privilege. See ¶ EX-2 at page 5 of the First Amended Complaint. However, Vehicle Code § 40832 was enacted in 1959 and states:

No record of the suspension or revocation of the privilege to operate a motor vehicle by the department, nor any testimony of or concerning or produced at the hearing terminating in the suspension or revocation, shall be admissible as evidence in any court in any civil action.

Accordingly, the fact that the Defendant was driving when his license had been suspended or revoked cannot support the claim for punitive damages. *Id.* In addition, the traffic collision report cannot be considered in ruling on the motion. The grounds for a motion to strike must appear on the face of the challenged pleading or from a matter of which the court may take judicial notice. See CCP § 437(a) and *City and County of San Francisco v. Strahlendorf* (1992) 7 CA4th 1911, 1913. While the Court may take judicial notice (if properly requested) of the existence of the traffic collision report, it cannot take judicial notice of the truth of the facts therein. See *Stor-Media, Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9. Therefore, the motion to strike will be granted without leave to amend but without prejudice to a motion to add a claim for punitive damages if discovery reveals facts supporting this claim.

Pursuant to California Rules of Court, rule 3.1312, subd.(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary.













**Tentative Ruling**

Re: ***Harrold v. California Retreaders, Inc.***  
Case No. 10 CE CG 01374

Hearing Date: June 23<sup>rd</sup>, 2010 (Dept. 97D)

Motion: Defendant California Retreaders, Inc.'s Demurrer to  
Complaint

**Tentative Ruling:**

To overrule the demurrer to the fourth cause of action for breach of oral contract not to terminate without good cause. (CCP § 430.10(e).) To sustain the demurrer to the eighth cause of action for intentional infliction of emotional distress, with leave to amend. (*Ibid.*) Plaintiff shall serve and file his first amended complaint within ten days of the date of service of this order. All new allegations shall be in **boldface**.

**Explanation:**

**Demurrer to Fourth Cause of Action:** Defendant argues that plaintiff has failed to allege the words used to form the purported oral contract, the terms and conditions of the contract, when and where the contract was entered into, and who from defendant CRI made the representations. However, it is not necessary to allege the precise words used to form an oral contract, since the words used are evidentiary in nature. (4 Witkin, Cal. Procedure (5<sup>th</sup> ed. 2008) Pleading, § 522, p. 653.) Instead, the oral contract should be pled according to its legal effect. (*Ibid.*)

Here, plaintiff alleges that he entered into an oral contract with defendant CRI not to terminate plaintiff except for good cause. (Complaint, ¶ 31.) In exchange, plaintiff agreed to perform good work for defendants. (*Ibid.*) While these allegations are somewhat vague, they are sufficient to state a claim for breach of an oral agreement not to terminate plaintiff except with good cause. Therefore, the court intends to overrule the demurrer to the fourth cause of action.

**Demurrer to Eighth Cause of Action:** “A cause of action for intentional infliction of emotional distress exists when there is ‘(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.’ [Citations.] A defendant's conduct is “outrageous” when it is so ‘extreme as to exceed all

bounds of that usually tolerated in a civilized community.’ [Citation.] And the defendant’s conduct must be ‘intended to inflict injury or engaged in with the realization that injury will result.’ [Citation.]” (*Hughes v. Pair* (2009) 46 Cal.4<sup>th</sup> 1035, 1050-1051.)

Moreover, “[l]iability for intentional infliction of emotional distress ‘does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.’ [Citations.]” (*Id.* at 1051.) Also, merely terminating an employee, even if done without good cause and for improper motives, is not sufficient to state a claim for intentional infliction of emotional distress. (*Buscemi v. McDonnell Douglas Corp.* (9<sup>th</sup> Cir. 1984) 736 F.2d 1248, 1352; *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 25.)

“To the extent plaintiff purports to allege any distinct cause of action, not dependent upon the violation of an express statute or violation of fundamental public policy, but rather directed at the intentional, malicious aspects of defendants’ conduct (‘to cause [plaintiff] as much grief as possible’), then plaintiff has alleged no more than the plaintiff in *Cole v. Fair Oaks Fire Protection Dist.*, *supra*, 43 Cal.3d 148, i.e., that the employer’s conduct caused him to suffer personal injury resulting in physical disability. *Cole* therefore controls. The kinds of conduct at issue (e.g., discipline or criticism) are a normal part of the employment relationship. Even if such conduct may be characterized as intentional, unfair or outrageous, it is nevertheless covered by the workers’ compensation exclusivity provisions.” (*Shoemaker, supra*, 52 Cal.3d at 25.)

However, certain types of conduct are outside the course of employment, and may form the basis of an intentional infliction claim if the conduct is sufficiently extreme and outrageous. (*Kovatch v. Cal. Casualty Management Co.* (1998) 65 Cal.App.4<sup>th</sup> 1256, 1277-1278: supervisor calling plaintiff a “faggot” and firing him was sufficiently extreme and outrageous to state a claim for intentional infliction; *Accardi v. Superior Court (City of Simi Valley)* (1993) 17 Cal.App.4<sup>th</sup> 341, 352-353: pattern of sexual harassment of plaintiff prior to her termination was sufficient to state claim for intentional infliction; *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 498: defendants using racial epithets in front of co-workers and firing plaintiff, who was African American, was sufficient to state a claim for intentional infliction.)

In the present case, plaintiff has not alleged any facts that would rise to the level of extreme and outrageous conduct that is so extreme as to exceed all bounds of that usually tolerated in a civilized community. (*Hughes v. Pair, supra*, 46 Cal.4<sup>th</sup> at 1050-1051.) Plaintiff alleges that defendants fired him immediately after Paul Neufeld, the owner of CRI, had to appear in Madera County Superior Court on an order to show cause to determine why CRI had not paid child support on behalf of plaintiff. (Complaint, ¶ 48.) Defendants also knew at the time of the firing that plaintiff suffered from cancer. (*Ibid.*) In addition, plaintiff

alleges that defendants engaged in a pattern of hiring younger workers to replace older employees like plaintiff. (Complaint, ¶ 10.)

None of these facts, however, shows the type of extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress. As discussed above, management decisions such as hiring and firing personnel are not normally sufficient to state a claim for intentional infliction, even if the employer had an improper or discriminatory motive at the time of the termination. (*Shoemaker v. Myers, supra*, 52 Cal.3d at 25; *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4<sup>th</sup> 55, 80.) “Managing personnel is not outrageous conduct beyond the bounds of human decency, but rather conduct essential to the welfare and prosperity of society. A simple pleading of personnel management activity is insufficient to support a claim of intentional infliction of emotional distress, even if improper motivation is alleged. If personnel management decisions are improperly motivated, the remedy is a suit against the employer for discrimination.” (*Janken, supra*, at 80.)

In the present case, plaintiff has alleged that he was wrongfully terminated and that his employer had improper motives for the termination, i.e. age discrimination, a desire not to pay child support on behalf of plaintiff, and not wanting to deal with plaintiff’s medical condition. Yet such improper motives are not, in themselves, extreme and outrageous conduct that harmed plaintiff. It was the wrongful termination that harmed plaintiff, not the defendant’s improper motives. Unless plaintiff can allege some other type of conduct by defendant or its agents or employees that was itself extreme or outrageous, plaintiff cannot state a valid claim for intentional infliction of emotional distress. Therefore, the court intends to sustain the demurrer to the eighth cause of action with leave to amend.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

Issued By: \_\_\_\_\_DRF\_\_\_\_\_ on \_\_\_\_\_6-22-2010\_\_\_\_\_.  
(Judge’s Initials) (Date)



**Tentative Ruling**

Re: ***Piseno v. Millerd***  
Case No. 09 CE CG 02946

Hearing Date: June 23<sup>rd</sup>, 2010 (Dept. 97A)

Motion: Petitions to Compromise Minors' Claims of Deanna Piseno  
and Katrina Piseno

**Tentative Ruling:**

To deny the petitions to compromise the minors' claims, without prejudice. (CCP § 372 et seq.; Probate Code § 3500 et seq.; CRC 7.955.)

**Explanation:**

First of all, plaintiff's counsel has not presented sufficient evidence to justify his request for attorney's fees. Under Rule of Court 7.955, "In all cases under Code of Civil Procedure section 372 or Probate Code sections 3600-3601, unless the court has approved the fee agreement in advance, the court must use a reasonable fee standard when approving and allowing the amount of attorney's fees payable from money or property paid or to be paid for the benefit of a minor or a person with a disability."

Under Rule 7.955(b), the court may consider the following nonexclusive factors in determining whether the attorney's fees are reasonable:

- (1) The fact that a minor or person with a disability is involved and the circumstances of that minor or person with a disability.
- (2) The amount of the fee in proportion to the value of the services performed.
- (3) The novelty and difficulty of the questions involved and the skill required to perform the legal services properly.
- (4) The amount involved and the results obtained.
- (5) The time limitations or constraints imposed by the representative of the minor or person with a disability or by the circumstances.
- (6) The nature and length of the professional relationship between the attorney and the representative of the minor or person with a disability.

(7) The experience, reputation, and ability of the attorney or attorneys performing the legal services.

(8) The time and labor required.

(9) The informed consent of the representative of the minor or person with a disability to the fee.

(10) The relative sophistication of the attorney and the representative of the minor or person with a disability.

(11) The likelihood, if apparent to the representative of the minor or person with a disability when the representation agreement was made, that the attorney's acceptance of the particular employment would preclude other employment.

(12) Whether the fee is fixed, hourly, or contingent.

(13) If the fee is contingent:

(A) The risk of loss borne by the attorney;

(B) The amount of costs advanced by the attorney; and

(C) The delay in payment of fees and reimbursement of costs paid by the attorney.

(14) Statutory requirements for representation agreements applicable to particular cases or claims.

Finally, under Rule 7.955(c), "A petition requesting court approval and allowance of an attorney's fee under (a) must include a declaration from the attorney that addresses the factors listed in (b) that are applicable to the matter before the court."

Here, the petitioner's attorney's declaration simply states that there is a contingency fee agreement for 25% of the minor's recovery and reimbursement of costs incurred in the handling of the case. (Attachment 14a, Alger decl.) However, the declaration does not address any of the other factors under Rule 7.955, or even state how much time the attorney spent on the case and what his hourly rate is. Therefore, the request for fees is not supported by sufficient evidence, and the court cannot approve the fee request.

Also, petitioner has not submitted a copy of a letter or report from a doctor stating what the minors' current conditions are, and whether they have fully recovered.

Therefore, the court intends to deny the petitions without prejudice.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

**Issued By:** \_\_\_\_\_ **AMC** \_\_\_\_\_ **on** \_\_\_\_\_ **June 21, 2010** \_\_\_\_\_.  
(Judge's Initials) (Date)