

Tentative Rulings for July 14, 2016  
Departments 402, 403, 501, 502, 503

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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).)

10CECG03284      *Woodmansee et al. v. DCL Investments et al.* (Dept. 501)

14CECG03077      *CCA Farms III v. McCormack et al.* (Dept. 502)

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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.

09CECG01032      *Gwartz et al. v. Weilert et al.* is continued to July 26, 2016 at 3:30 p.m. in Dept. 403.

15CECG00163      *Rose v. HealthComp, Inc.* is continued to Thursday, July 21, 2016 at 3:30 p.m. in Dept. 501.

15CECG00652      *Sylvia Garnica v. Olga Cruz* is continued to Tuesday, October 18, 2016 at 3:30 p.m. in Dept. 403.

16CECG00480      *John Talesfore v. Clovis Auto Cars* is continued to Tuesday, July 26, 2016 at 3:30 p.m. in Dept. 503.

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(Tentative Rulings begin at the next page)

# **Tentative Rulings for Department 402**

# **Tentative Rulings for Department 403**

# Tentative Rulings for Department 501

03

## Tentative Ruling

Re: **Marquez v. Caballero**  
Case No. 16 CE CG 00303

Hearing Date: July 14<sup>th</sup>, 2016 (Dept. 501)

Motion: Fresno County Self Insurance Group's Motion for Leave of Court to Intervene

### **Tentative Ruling:**

To grant the motion for leave to intervene in the action. (Code Civ. Proc. § 387; Labor Code § 3853.) Fresno County Self Insurance Group shall serve and file its complaint in intervention within 10 days of the date of service of this order.

### **Explanation:**

"Upon timely application, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding." (Code Civ. Proc. § 387, subd. (a).)

Also, "If any provision of law confers an unconditional right to intervene or if the person seeking intervention claims an interest relating to the property or transaction which is the subject of the action and that person is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by existing parties, the court shall, upon timely application, permit that person to intervene." (Code Civ. Proc. § 387, subd. (b).)

Under Labor Code section 3853, "If either the employee or the employer brings an action against such third person, he shall forthwith give to the other a copy of the complaint by personal service or certified mail... If the action is brought by either the employer or employee, the other may, at any time before trial on the facts, join as party plaintiff or shall consolidate his action, if brought independently." (Lab. Code, § 3853.)

Courts have read Labor Code section 3853 as giving an unconditional right to intervene to the injured employee or the employer. (*Jordan v. Superior Court* (1981) 116 Cal.App.3d 202, 207.) Moreover, the statute of limitations is tolled by the filing of the underlying action, so the intervenor has a right to file a complaint in intervention even after the statute would otherwise have expired by the time the complaint in intervention is filed. (*Home Ins. Co. v. Southern Cal. Rapid Transit Dist.* (1987) 196 Cal.App.3d 522, 525-526.)



(27)

**Tentative Ruling**

Re: **Granite State Insurance Company v. Halajian, et al.**  
Superior Court Case No. 14CECG03430

Hearing Date: **July 14, 2016 (Dept. 501)**

Motions: Plaintiff Granite State Insurance Company's motion to vacate, or to reconsider, the stay order dated May 23, 2016

**Tentative Ruling:**

To Deny.

**Explanation:**

"It is elementary that . . . the superior court cannot award workmen's compensation benefits, and the commission cannot award damages for injuries." (*Scott v. Industrial Acc. Commission* (1956) 46 Cal.2d 76, 83.) Nevertheless, despite the exclusivity of jurisdiction, the superior court and the Workers Compensation Board have concurrent jurisdiction to determine if an injured worker is covered by a particular insurance policy. (*Ibid*; *Taylor v. Superior Court, In and For Los Angeles County* (1956) 47 Cal.2d 148, 151 ["Therefore . . . the superior court should not try the case until the commission has made a final determination of the issue as to whether it or the court has jurisdiction to proceed . . ."].)

In *Jones v. Brown* (1970) 13 Cal.App.3d 513, a prior award established that the WCAB was the first tribunal to assume jurisdiction to determine jurisdiction. (*Jones, supra*, 13 Cal.App.3d at 521.) The workers comp board's determination that the injuries were sustained during the course of employment was a "final determination as to the matter of coverage . . ." (*Ibid*; see also *Sea World Corp. v. Superior Court* (1973) 34 Cal.App.3d 494, 503 [the superior court's ruling of defendant's summary judgment motion was a sufficient exercise of jurisdiction to prompt the WCAB to voluntarily stay their proceeding, "no doubt in recognition of the fact that the superior court's jurisdiction had been earlier invoked and partially exercised."].)

Here, the injured worker submitted his claim to the WCAB on September 13, 2013. (see RJN in support of motion, Ex. 1.) The WCAB judge issued orders on November 17, 2015 which included a statement that "it appear[s] that Granite State Insurance Co. is the proper insurance carrier . . ." (see RJN filed in support of opposition by Steve Dovali, Ex. D and E.) Accordingly, as early as November 17, 2015 it appears that the WCAB judge was exercising jurisdiction to determine coverage. This exercise of jurisdiction is confirmed with the issuance of the stay order on May 18, 2016 which was premised on the petition for mandatory arbitration under Labor Code § 5275(a) which addresses the existence of coverage.

Unlike the summary judgment rulings in *Jones* and *Sea World*, this court has yet to issue rulings which are dispositive of jurisdiction. Further, the request for default

judgment as to Halajian and Granite State's motion for summary judgment were filed after the workers comp judge's November 2015 orders which addressed coverage. In light of the filing of the WCAB application over a year before the filing of the superior court case, as well as the WCAB judge's orders in November 2015 and May, 2016, the WCAB was the first tribunal to take measures to determine the existence of coverage, i.e. whether the claim falls within the authority of the WCAB. (*Scott, supra*, 46 Cal.2d at 83; *Taylor, supra*, 47 Cal.2d at 151.) The motion to vacate the stay is denied.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (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:**       MWS       **on 7/12/16 .**  
                  (Judge's initials)      (Date)

(17)

## **Tentative Ruling**

Re: **Crop Production Services, Inc. v. EarthRenew, Inc.**  
Court Case No. 09 CECG 02733

Hearing Date: July 14, 2016 (Dept. 501)

Motions: CPS' Motion for Relief Based on EarthRenew's Alleged Discovery Violations

### **Tentative Ruling:**

To deny.

### **Explanation:**

#### *1. Motion to Compel Production in Accordance with Statement of Compliance*

Code of Civil Procedure section 2031.320, subdivision (a) provides, in relevant part “[i]f a party filing a response to a demand for inspection, copying, testing, or sampling ... thereafter fails to permit the inspection, copying, testing, or sampling in accordance with that party's statement of compliance, the demanding party may move for an order compelling compliance.” There is no time limit for such a motion. (Code Civ. Proc., § 2031.320; *Standon Co. v. Superior Court* (1990) 225 Cal.App.3d 898, 903.)

It is difficult to discern exactly what Crop Production claims should be produced. Crop Production attaches its Requests for Production of Document, Set One and Requests for Production of Documents, Set Two, which contain 172 separate requests. Crop Production's argument appears to be that because it has obtained relevant documents beyond those produced by EarthRenew from its own files and third parties, EarthRenew's production must have been defective. EarthRenew claims it produced 24,841 pages of documents in accordance with these requests and that EarthRenew cannot be ordered to produce documents it has already produced or it does not have. (Klein Decl. ¶ 8; Opposition at 5:3.)

First, there are significant disputes as to whether all the documents that were not produced were subject to EarthRenew's statement of compliance. EarthRenew did not include emails related to irrelevant matters, like a golf course (Marroso Ex. 67) an advertisement (Marroso Ex. 61) and pleasantries, such as emails containing only “Thanks.” Because EarthRenew raised overbreadth and relevancy objections, EarthRenew had cause to withhold these emails.

Second, Crop Production makes the argument that EarthRenew should not have produced scanned paper copies of emails, claiming instead that they should have been produced electronically with metadata. Code of Civil Procedure section 2031.280, subdivision (d) provides that where a demand for production does not specify a form or forms for producing a type of electronically stored information (“ESI”), the

responding party shall produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably useable. Because the Crop Production's Requests for Production fail to specify any format for ESI at all, and indeed fail to define "COMMUNICATION" as including ESI, EarthRenew did not err in producing paper copies of emails.

Presumably, Crop Production already has verified responses authenticating the 24,841 pages of documents produced as all the documents that exist responsive to Crop Production's requests. At the time of trial, Crop Production may move to exclude any document that was not produced. Accordingly, the Court denies the current motion to compel compliance.

## 2. Request for Jury Instruction

Crop Production requests a jury instruction that EarthRenew's "failure to produce responsive and relevant documents is a fact from which the jury can draw an adverse inference that the missing documents were damaging to [EarthRenew's] case," citing *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1051 and *DaimlerChrysler Motors v. Bill David Racing, Inc.* (E.D. Mich. Dec. 22, 2005) 2005 WL 3502172 at \* 3.

In *Sprague*, the appellants argued that the trial court's instruction of the jury with BAJI 2.03 (now see CACI 204) which states that if the jury finds a party has willfully suppressed evidence, they may consider that fact in drawing inferences, was error. The appellate court disagreed.

However, the instruction of the jury is a matter inherently within the control of the trial judge. In civil trials, parties have the right to have the jury instructed on all theories of their case supported by the pleadings and evidence. (See Code Civ. Proc., §§ 607a, 608; *Menchaca v. Helms Bakeries, Inc.* (1968) 68 Cal.2d 535, 543.) Furthermore, the admissibility of evidence and questions as to the rules of evidence are issues of law for the trial judge. (Evid. Code, § 310, subd. (a).) Accordingly, this Court will defer the question of whether CACI 204, or a jury instruction like it, is appropriate, to the ultimate trial department.

## 3. Request for OSC re: Evidentiary and/or Issue Sanctions

Orders for issue and evidence sanctions do not issue in a vacuum. In virtually every case, issue and evidence sanctions may only issue after a party has violated a prior discovery order. Code of Civil Procedure section 2023.010 defines "misuses of the discovery process" as including "failing to respond or submit to an authorized method of discovery" and "disobeying a court order to provide discovery." (Code Civ. Proc. § 2030.010, subds. (d) & (g).) Section 2023.030 states, in relevant part:

*To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process:*

\* \* \*

(b) The court may impose an issue sanction ordering that designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process. The court may also impose an issue sanction by an order prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses.

(c) The court may impose an evidence sanction by an order prohibiting any party engaging in the misuse of the discovery process from introducing designated matters in evidence.

(Code Civ. Proc. § 2023.030, subd. (b),(c) (Emphasis added).)

Accordingly, issue and evidence sanctions must be authorized by a specific discovery statute; they are not available merely because they are an option listed in section 2023.030.

The only case cited by Crop Production for its request in its moving papers is *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, (*Slesinger*), a case that upheld the trial court's inherent authority to impose terminating sanctions for egregious discovery abuses. (*Id.* at pp. 762, 764, fn. 19.) A trial court has "limited, inherent discretionary power to dismiss claims with prejudice." (*Lyons v. Wickhorst* (1986) 42 Cal.3d 911, 915.) The court's inherent power to dismiss an action is recognized by statute. (See Code Civ. Proc., §§ 581(m), 583.150.) However, such power should be exercised in "extreme situations" for instance, when the conduct was clear and deliberate, where no lesser alternatives would remedy the situation, where the fault lies with the client and not the attorney, and when the court issues a directive that the client fails to obey. (*Del Junco v. Hufnagel* (2007) 150 Cal.App.4th 789, 799.)

Thus, in *Slesinger, supra*, 155 Cal.App.4th 736, where among other misconduct, the plaintiff illicitly obtained confidential information from the defendant by breaking into dumpster locations and taking copies of documents, the appellate court held "when the plaintiff has engaged in misconduct during the course of the litigation that is deliberate, that is egregious, and that renders any remedy short of dismissal inadequate to preserve the fairness of the trial, the trial court has the inherent power to dismiss the action." (*Id.* at p. 764.) Nevertheless, the court "emphasize[d] that dismissal is *always* a drastic remedy to be employed *only* in the rarest of circumstances. (*Ibid.* (emphasis in original).)

Crop Production is not be entitled to a remedy under *Slesinger, supra*, 155 Cal.App.4th 736. EarthRenew did not clearly deliberately fail to produce documents, as opposed to its counsel failing to produce documents, nor did EarthRenew disobey a court directive.

In its reply, Crop Production has chosen to focus exclusively on Murry Hasinoff's deletion of his work files from his personal computer which he used for work purposes, after his separation from EarthRenew, as the basis for arguing that EarthRenew deliberately destroyed documents relevant to this litigation and as such, must be subject to sanction.

*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, summarized the relevant authorities and concluded: "The general rule that we glean from these opinions is that if it is sufficiently egregious, misconduct committed in connection with the failure to produce evidence in discovery may justify the imposition of nonmonetary sanctions even absent a prior order compelling discovery, or its equivalent. Furthermore, a prior order may not be necessary where it is reasonably clear that obtaining such an order would be futile."

Crop Production's best argument is, in essence, that on August 20, 2009, EarthRenew was served with Crop Productions' first set of Inspection Requests, triggering a duty to preserve all responsive evidence. (Marroso Decl. Ex. 6.) EarthRenew Agreed to produce "non-privileged, responsive documents within its possession, custody or control." (Marroso Decl. Ex. 7.) EarthRenew told Hasinoff to affirmatively delete all EarthRenew documents off his personal computer, which was the only computer he had used during his tenure at EarthRenew, and on which he had generated and viewed many documents relating to Crop Production. (Reply Decl. of Marroso Ex. 1 at 28:23-29:20; 31:9-32:13; 34:9-15; 36:11-15.) This was done without inventorying or backup the documents first. (Reply Decl. of Marroso Ex. 1 at 36:21-25; 38:12-21.) Thus, it is unknown what documents have been lost. However, Hasinoff testified to his understanding, any document he generated was sent through the EarthRenew server, and a copy existed there. (Reply Decl. of Marroso Ex. 1 at 35:25-36:7.) Thus, the case is distinguishable from *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, in which a specific, known, items of discovery were not produced. The case is distinguishable from *Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, which involved wholesale pattern of willful discovery abuses including violation of court orders. Finally, the case is distinguishable from *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, because EarthRenew has not attempted to produce the "missing" documents at trial. Should it attempt to do so, they may be excluded at that time.

Crop Production's request, made in a footnote on reply, that all documents authored by Hasinoff be excluded as a sanction, should be denied as overbroad and a windfall to Crop Production. There is no evidence that the destruction of Hasinoff's files from his personal computer at the time it was done was anything other than a routine termination purge of confidential information from a former employee. Nor is there any information that Hasinoff had documents which were not sent through the EarthRenew servers and therefore remained available for production.

Accordingly, evidence and issue sanctions are denied at this time.



# Tentative Rulings for Department 502

03

## Tentative Ruling

Re: ***Estrada v. Fresno Soul Brothers***  
Case No. 15 CE CG 02458

Hearing Date: July 14<sup>th</sup>, 2016 (Dept. 502)

Motion: Defendants Bradly W. Walton and Cynde Ann Walton's  
Demurrer and Motion to Strike Portions of First Amended  
Complaint

### **Tentative Ruling:**

To sustain the demurrer to the third count of the first cause of action, for failure to state facts sufficient to constitute a cause of action. (Code Civ. Proc. § 430.10, subd. (e).)

To grant the motion to strike the Waltons' names from the exemplary damages attachment. (Code Civ. Proc. §§ 435, 436.) To grant the motion to strike the references to another invitee being killed during the incident, as irrelevant and improper. (*Ibid.*)

To grant leave to amend the complaint. Plaintiff shall serve and file her second amended complaint within 10 days of the date of service of this order. All new allegations shall be in **boldface**.

### **Explanation:**

**Demurrer:** Count three of the first cause of action attempts to state a claim for dangerous condition of public property against Bradly and Cynde Walton. However, under Government Code section 835, "Except as provided by statute, **a public entity is liable** for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury..." (Govt. Code § 835, subd. (a), emphasis added.)

Here, there are no facts in the FAC showing that defendants are public entities, and it appears that they are simply private individuals. Thus, defendants cannot be held liable for injuries caused by a dangerous condition on public property, even assuming that the property in question was actually public.

Indeed, plaintiff concedes in her notice of non-opposition that the dangerous condition of public property allegation does not state a valid claim, and she offers to delete it from her proposed second amended complaint. Therefore, the court intends to sustain the demurrer to the third count of the first cause of action in the FAC for failure to state facts sufficient to constitute a valid claim.

**Motion to Strike:** The court intends to grant the motion to strike the exemplary damages attachment to the FAC to the extent that it attempts to state a claim for punitive damages against the Walton defendants. The FAC fails to allege any facts showing that the Waltons acted with fraud, malice or oppression at the time of the incident where plaintiff was shot. (Civil Code § 3294.)

“‘Malice’ means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.” (Civil Code § 3294, subd. (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, subd. (c)(2).)

“‘Fraud’ means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.” (Civil Code § 3294, subd. (c)(3).)

“The cases interpreting section 3294 make it clear that in order to warrant the allowance of punitive damages the act complained of must not only be wilful in the sense of intentional, but it must also be accompanied by aggravating circumstances, amounting to malice. The malice required implies an act conceived in a spirit of mischief or with criminal indifference towards the obligations owed to others. *There must be an intent to vex, annoy or injure.* Mere spite or ill will is not sufficient; and mere negligence, even gross negligence is not sufficient to justify an award of punitive damages.” (*Ebaugh v. Rabkin* (1972) 22 Cal.App.3d 891, 894, internal citations omitted, emphasis in original.)

Also, conclusory allegations that a defendant was guilty of “malice, fraud or oppression” without specific supporting facts are insufficient to support a claim for punitive damages. (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.)

Here, plaintiff simply alleges that, “The organizers maliciously and fraudulently concealed the fact about the danger on the premises for the attendees and invitees such as the Plaintiff.” (FAC, EX-2.) However, plaintiff alleges no facts showing that the Waltons engaged in any fraudulent or malicious conduct, and it is not even clear what danger they are alleged to have concealed from plaintiff and the other invitees. The allegations are mere conclusions, which are insufficient to support the punitive damage claim. Therefore, the court intends to strike the allegations as improper and unsupported by facts. (Code Civ. Proc. §§ 435, 436.)

Indeed, plaintiff concedes that the exemplary damage attachment is insufficient, and she has offered to amend the complaint to address the insufficiency. Therefore, the court intends to grant the motion to strike the Waltons’ names from punitive damages attachment of the FAC and grant plaintiff leave to amend the complaint.

Finally, the court intends to strike the references in the FAC to another invitee being killed during the incident. These allegations add nothing to plaintiff's claims, and are irrelevant and improper. Plaintiff concedes in her non-opposition that the allegations are irrelevant, and she has offered to amend the complaint to remove them. Therefore, the court intends to grant the motion to strike the references to another invitee being killed during the incident.

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:**     DSB     **on 7/11/16.**  
(Judge's initials)      (Date)

(6)

**Tentative Ruling**

Re: **Robertovna v. Central California Blood Center**  
Superior Court Case No.: 14CECG02787

Hearing Date: July 14, 2016 (**Dept. 502**)

Motion: By Defendant Central California Blood Center for summary judgment

**Tentative Ruling:**

To grant. The prevailing party is directed to submit directly to this Court, within 5 days of service of the minute order, a proposed judgment consistent with the summary judgment order.

All future hearing dates, including trial, are vacated.

**Explanation:**

Defendant Central California Blood Center ("Defendant") has met its burden to show that causes of action for: (1) negligent hiring/retention; (2) lack of informed consent; (3) negligence; (4) negligent failure to warn and educate; and (5) vicarious liability, are all barred by the one-year statute of limitations found in Code of Civil Procedure section 340.5.

The facts supporting the motion are: (1) The complaint was filed on September 22, 2014 (original complaint); (2) on September 22, 2012, Plaintiff went to Central California Blood Center, 4343 W. Herndon in Fresno to donate blood (Decl. of John Weber, ¶12, pp. 1:8-2:9, exhibit A, Plaintiff Angela Robertovna's responses to special interrogatories (set one), special interrogatory #9 and response thereto, p. 5:4-26); (3) after Plaintiff's blood was drawn and she was getting ready to leave the chair, she informed the phlebotomist she felt light-headed and was instructed to go to the kitchen and have something to eat or drink (Decl. of John Weber, ¶12, pp. 1:8-2:9m exhibit A, Plaintiff Angela Robertovna's responses to special interrogatories (set one), special interrogatory #9 and response thereto, p. 5:4-26); (4) Plaintiff was not assisted in reaching the kitchen; not instructed to remain in the kitchen; and not restricted to the kitchen and was not told she could not visit her children (Decl. of John Weber, ¶12, pp. 1:8-2:9, exhibit A, Plaintiff Angela Robertovna's responses to special interrogatories (set one), special interrogatory #9 and response thereto, p. 5:4-26); (5) after Plaintiff obtained some ice cream and juice she walked towards the room where her children were to observe them; she reached the designated room and sat down with the intent to have ice cream and juice; while she was eating her ice cream she began feeling nauseous, dizzy, and light-headed (Decl. of John Weber, ¶12, pp. 1:8-2:9, exhibit A, Plaintiff Angela Robertovna's responses to special interrogatories (set one), special interrogatory #9 and response thereto, p. 5:4-26); (6) Plaintiff started walking towards

the main area to seek assistance and find a place to lie down; after a few steps, she realized she could not walk and reached for the closet wall to gain control and stabilize herself but she was unable to; She fell, hitting her head first on the wall and then on the floor; she lost consciousness (Decl. of John Weber, ¶12, pp. 1:8-2:9, exhibit A, Plaintiff Angela Robertovna's responses to special interrogatories (set one), special interrogatory #9 and response thereto, p. 5:4-26); (7) Plaintiff suffered serious and permanent injuries as a result of the fall (Decl. of John Weber, ¶12, pp. 1:8-2:9, exhibit A, Plaintiff Angela Robertovna's responses to special interrogatories (set one), special interrogatory #9 and response thereto, p. 5:4-26); (8) Defendant is a blood bank, licensed by the California Department of Health pursuant to Health and Safety Code, Division 2, section 1600 et seq. (Request for judicial notice, exhibit A, license for the Production of Biologics, State of California Department of Health).

Defendant is a blood bank, and all the causes of action alleged stem from Defendant's rendering of services for which it is licensed. "Blood bank" is defined by Health and Safety Code section 1600.2:

"Blood bank" means any place where human whole blood, and human whole blood derivatives specified by regulation, are collected, prepared, tested, processed, or stored, or from which human whole blood or human whole blood derivatives specified by regulation are distributed.

California Code of Regulations, Title 17, section 1002, provides in relevant part:

The staff concerned with blood collection shall be instructed in the first aid procedures to be used in the event of a reaction, and suitable drugs and supplies shall be immediately available for use. Donors shall be kept under continuous observation throughout the entire procedure of blood collection and for at least 15 minutes thereafter. (Cal. Code Regs., Tit. 17, § 1002, subd. (b).)

Professional negligence encompasses actions in which the injury for which damages are sought is directly related to the professional services provided by the health care provider, or directly related to a matter that is an ordinary and usual part of medical professional services. Courts broadly construe professional negligence to mean negligence occurring during the rendering of services for which the health care provider is licensed. (*Arroyo v. Plosay* (2014) 225 Cal.App.4th 279, 297 [Patient's family members' claims against hospital for negligence in allegedly damaging patient's dead body while it was in the morgue was a professional negligence claim subject to the one-year statute of limitations], citing *Canister v. Emergency Ambulance Service, Inc.* (2008) 160 Cal.App.4th 388, 406 [Emergency medical technician's act of driving part of conduct for which he was licensed and thus automobile accident was professional negligence.]

Being light-headed after giving blood is integrally related to collecting blood from donors, that informing and warning a donor about the pros and cons of giving blood, being vicariously liable for a blood bank's employees' failures to warn or supervise a light-headed donor stems directly from Defendant's services in collecting



(5)

**Tentative Ruling**

Re: ***Jane Doe No. 1 .v Estate of Lance Clement et al.***  
Superior Court Case No. 14 CECG 03347 **Lead Case**

Hearing Date: July 12, 2016 (**Dept. 502**)

Motion: By Defendant Orange Center Elementary School  
District for summary adjudication

**Tentative Ruling:**

To grant the motion pursuant to the authority set forth in *Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59 on the grounds that the Plaintiffs have not produced any evidence creating a triable issue of material fact as to whether an individual supervisory employee or supervisory administrator of the District “knew or had reason to know” of the dangerous propensities of Lance Clement.

The court refrains from ruling on any of the 136 objections raised in the reply papers as the evidence objected to was not material to the disposition of the motion. Code of Civil Procedure section 437c(q).

**Explanation:**

**Defects in the Defendant's Separate Statement**

The Separate Statement fails to identify the causes of action to which the affirmative defenses apply. Instead, Defendant asserts the defense of immunity pursuant to various provisions of the Government Code as to “as to all claims which are predicated on the direct negligence on the part of the District...”; “as to all decisions which the Board of Trustees made...”; “any alleged deficiencies in its Board Policies and Administrative Regulations...”; and “any alleged deficiencies in the manner in which any District Board Policies and Administrative Regulations were implemented...” See Grounds Nos. 1-4.

But, CCP § 437c(f)(1) states:

A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, **if that party contends that the cause of action has no merit** or that there is no affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both, or that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or

plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.

As a matter of law, a cause of action has no merit if:

- *any element* of the cause of action (whether or not separately pleaded) *cannot be established*; or
- there is a *complete defense to the cause of action*. [CCP § 437c(o)]

Accordingly, any motion for summary adjudication brought on the grounds of an affirmative defense must completely dispose of the cause of action to which it is directed. See *Hood v. Sup.Ct. (United Chambers Administrators, Inc.)* (1995) 33 Cal.App.4th 319, 321; *McCaskey v. California State Auto. Ass'n* (2010) 189 Cal.App.4th 947, 975—"If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered"]. Ultimately, summary adjudication of grounds Nos. 1-4 must be denied.

### **Eighth Cause of Action—Negligent Hiring, Supervision and Retention**

Ordinarily, "[l]iability for negligent supervision and/or retention of an employee is one of **direct** liability for negligence, not vicarious liability." [*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815, distinguished in *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 875.] In the latter case, the California Supreme Court determined that "a public school district may be **vicariously liable** under [Government Code] section 815.2 for the negligence of administrators or supervisors in hiring, supervising and retaining a school employee who sexually harasses and abuses a student." *Id.* at 879.

The Decision in *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861.

The case involved the abuse of a male high school student by the head guidance counselor, Roselyn Hubbell. The complaint alleged inter alia that the District "knew or should have known and/or were put on notice" of Hubbell's past sexual abuse of minors and her "propensity and disposition" to engage in such abuse. *Id.* at 866. The complaint also alleged inter alia that the "personnel and/or school records of Defendants reflect numerous incidents of inappropriate sexual contact and conduct with minors.....including incidents involving Hubbell....." *Id.* at 866-867.

The High Court laid out the statutory framework as follows:

Section 815 establishes that public entity tort liability is exclusively statutory: "Except as otherwise provided by statute: [¶] (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." Section 815.2, in turn, provides the statutory basis for liability relied on here: "(a) A public entity is liable for injury proximately caused by an act or omission of an

employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative. [¶] (b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." Finally, section 820 delineates the liability of public employees themselves: "(a) Except as otherwise provided by statute (including Section 820.2), a public employee is liable for injury caused by his act or omission to the same extent as a private person. [¶] (b) The liability of a public employee established by this part (commencing with Section 814) is subject to any defenses that would be available to the public employee if he were a private person." In other words, "the general rule is that an employee of a public entity is liable for his torts to the same extent as a private person (§ 820, subd. (a)) and the public entity is vicariously liable for any injury which its employee causes (§ 815.2, subd. (a)) to the same extent as a private employer (§ 815, subd. (b))." (*Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 463, 183 Cal.Rptr. 51, 645 P.2d 102.)

Id. at 868.

With regard to its theory of liability, the Supreme Court stated:

The District acknowledges that a special relationship making an employee potentially liable for a student's injury at the hands of a third party "might exist where the individual employee is in direct charge of and supervising the student," but insists that a "**principal, school superintendent, or other administrator who oversees the overall functioning**" of the school cannot be liable on this theory: "They have no special relationship with any particular student. Their relationship is with the entity." **We disagree. Responsibility for the safety of public school students is not borne solely by instructional personnel. School principals and other supervisory employees, to the extent their duties include overseeing the educational environment and the performance of teachers and counselors,** also have the responsibility of taking reasonable measures to guard pupils against harassment and abuse from foreseeable sources, including any teachers or counselors they know or have reason to know are prone to such abuse. (See Cal.Code Regs., tit. 5, § 5551 ["The principal is responsible for the supervision and administration of his school."]; *McGrath v. Burkhard* (1955) 131 Cal.App.2d 367, 372, 280 P.2d 864 ["[T]he principal has the necessary power which is inherent in his office to properly administer and supervise his school."].)

Id. at 870-871.

Notably, throughout the opinion, the High Court referred to the underlying liability as one of an **individual**. It stated:

Unlike the theory rejected in *Munoz*, plaintiff's theory of the District's liability does not depend on blurring the line between direct and vicarious liability or on an assumption that a public entity's negligence liability is inherently vicarious. Plaintiff alleges the District's **administrators** and **employees** knew or should have known of Hubbell's dangerous propensities, but nevertheless hired, retained and failed to properly supervise her. These allegations, if proven, could make the District liable under a vicarious liability theory encompassed by section 815.2. [boldface added]

Id. at 875.

Nor does our holding that public school **administrators** and **supervisors** may be held legally responsible for their negligence in hiring and retaining as well as supervising school staff subject the great majority of public school personnel, much less other employees, to potential liability for acts committed by their fellow workers. The scope and effect of our holding on **individual liability** is limited by requirements of causation and duty, elements of liability that must be established in every tort action. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673, 25 Cal.Rptr.2d 137, 863 P.2d 207.) [boldface added]

Id. at 876.

But where an **individual defendant** did not have final authority over the hiring or firing of the malefactor employee, but was merely in a position to propose or recommend such action, *proving* causation may present a significant obstacle. Plaintiff here, and those similarly alleging **individual negligence** in hiring and firing, must demonstrate that the **individual employee's** proposal or recommendation, or failure to take such action, was a substantial factor (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052, 1 Cal.Rptr.2d 913, 819 P.2d 872) in causing the malefactor to be hired or retained. [boldface added]

Id.

Turning to the duty element, we have explained that the potential legal responsibility of District **administrators** and **supervisors** for negligently hiring or retaining Hubbell arises from the special relationship they had with plaintiff, a student under their supervision, which relationship entailed the duty to take reasonable measures to protect plaintiff from injuries at the hands of others in the school environment. Absent such a special relationship, there can be no **individual liability** to third parties for negligent hiring, retention or supervision of a fellow employee, **and hence no vicarious liability** under section 815.2 (or, for private organizations, under common law respondeat superior principles). [boldface added]

Id. at 877.

In this factual context, foreseeability and its related *Rowland* factors (see *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 774, 122 Cal.Rptr.3d 313, 248 P.3d 1170) depend largely on the same factual question we have discussed in relation to causation: whether **the individual** whose negligence allegedly led to the malefactor employee's hiring or retention was, under the circumstances, likely to be highly influential to the actual decision maker. [boldface added]

Id. at 877-878.

Unless the **individual** alleged to be negligent in a hiring or retention decision knew or should have known of the dangerous propensities of the employee who injured the plaintiff, there is little or no moral blame attached to the person's action or inaction. [boldface added]

Id. at 878.

### **Merits**

In the instant case, Plaintiffs seek to hold District liable through the action and/or inaction of its Board of Trustees as a collective group. Throughout the eighth cause of action of the Third Amended Complaint, the Plaintiffs refer to the responsibilities of the "employees, agents and Board Trustees", the failure of the "employees, agents and Board Trustees" to supervise Clement and that the "employees, agents and Board Trustees" knew or should have known of that Clement was molesting female pupils. See ¶¶ 128, 129, 131-136, 140-142, and 148-154. It is true that for pleading purposes only, the Plaintiffs did not have to name the individual or individuals. See *C.A. v. William S. Hart Union High School District*, supra at 872. But, as stated throughout this decision, only the liability of an individual in a supervisory capacity triggers the vicarious liability of the District.

Yet, Plaintiffs' own Separate Statement of Disputed Facts fails to identify any **individual** who knew or should have known of Clement's dangerous propensities and whose conduct was a substantial factor in the harm that occurred. See Facts 1-89 of the Plaintiffs Separate Statement of Additional Disputed Material Facts filed pursuant to CCP § 437c(b)(3). Instead, the Plaintiffs Separate Statement and its opposition relies heavily upon Clement's conduct and the suspicions of the teachers and staff at the School. But, liability does not attach on these grounds. The elements set forth in the decision have to be established by evidence.

At the same time, we emphasize that a district's liability must be based on evidence of negligent hiring, supervision or retention, not on assumptions or speculation. **That an individual school employee has committed sexual misconduct with a student or students does not of itself establish, or raise any presumption, that the employing district should bear liability for the resulting injuries.**

*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 878-79.



## **Tentative Rulings for Department 503**

(30)

Re: ***Estate of Ann Hart v. Willow Creek Healthcare Center, LLC.***  
Superior Court No. 15CECG02999

Hearing Date: Thursday, July 14, 2016 (**Dept. 503**)

Motion: (1) Defendant Saint Agnes' Demurrer to Plaintiffs' First Amended Complaint

(2) Defendant Saint Agnes' Motion to Strike Plaintiffs' First Amended Complaint

### **Tentative Ruling:**

To Overrule Defendant Saint Agnes' demurrer to all portions of Plaintiffs' First Amended Complaint based on statutory immunity;

To Sustain Defendant's demurrer to cause of action two (EADACPA);

To Overrule Defendant's demurrer to cause of action three (Battery);

To Sustain Defendant's demurrer to cause of action four (NIED);

To Grant Defendant Saint Agnes' motion to strike Plaintiffs' complaint on page 9, which states, "Defendants' duties under the EADCPA were breached in a manner that was reckless, malicious, oppressive, tainted by fraud, and generally reprehensible."

To Order Defendant's motion to strike Plaintiffs' prayer for punitive damages off calendar.

To Order Defendant's motion to strike Plaintiffs' request for attorney's fees off calendar.

Plaintiff is granted 10 days leave to amend. (Cal. Rules of Court, rule 3.1320(g).) The time in which an amended pleading may be filed will run from service by the clerk of the minute order. (Code Civ. Proc., § 472b.)

### **Explanation:**

#### **DEMURRER**

##### Statutory Immunities

(1) Probate Code section 4303:

Demurrer is overruled on the basis of Probate Code section 4303 immunity (see Tentative Ruling, adopted 3/7/16). Further, Probate Code section 4303 is applicable to

a "third person," whereas Probate Code section 4740 is specifically applicable to Defendant, a "health care provider or institution."

(2) Probate Code section 4740:

Probate Code section 4740 reads:

"A health care provider or institution acting in good faith and in accordance with generally accepted health care standards is not subject to criminal or civil liability or professional discipline for any of the following conduct:

(1) Complying with a health care decision of a person that the provider or institution believes in good faith has the authority to make the decision, including a decision to withhold or withdraw health care."

Here, Defendant asserts that its' good faith reliance on the power of attorney presented to them by Defendant Beshears shields them from liability for all portions of Plaintiffs' FAC arising prior to December 30, 2014. The problem here is that Beshears presented a durable power of attorney for asset management. It states, "THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU" (FAC, Ex.A p2). The nature of the document is also obvious from a cursory read. Since making care decisions based on an assets management power of attorney is not a generally accepted health care standard, Defendant's assertions of good faith are not convincing. *If Beshears had presented Defendant with a general power of attorney, it would have authorized the broadest possible authority, validating Defendant's assertions of "good faith," but that is simply not our case.*

Defendant also argues that it is immune from liability with respect to decisions made after December 30, 2014 because it relied, in "good faith," on decedent's advanced health care directive. However, Plaintiff asserts that Defendant improperly witnessed the directive, with knowledge that the decedent was severely cognitively impaired on both on December 15 and 30, 2014 (FAC, ¶ 24-25). These allegations bring about questions of fact, which are improperly decided on demurrer.

*Demurrer is overruled on the basis of Probate Code sections 4303 and 4707 immunities (before and after December 30, 2014).*

#### Elder Abuse and Dependant Adult Civil Protection Act (EADACPA)

In the FAC, Plaintiffs add assertions regarding the identity of culpable actors; financial motivations, and decedent's medical condition, but still fail to assert any *facts* to support these assertions. First, Plaintiffs do not allege that any specific employee of Defendant committed any wrongful acts or had knowledge of the alleged wrongful conduct. Plaintiffs' allegation that "St. Agnes officials" were involved in care decisions is vague and therefore insufficient (FAC, p12). Next, Plaintiffs do not specify the nature of the decedent's medical condition or the danger of not providing continued care. Plaintiffs' allegation that the decedent was "severely cognitively impaired" and "not in a condition to be discharged" is also too vague to meet the stringent pleading requirements (FAC, p12). Last, Plaintiffs do not assert any facts to support allegations

that Defendant acted with improper financial motives. Plaintiffs' assertions that "[decedent's] meager resources were going to cause St. Agnes to lose money treating her if extensive care was provided," is nothing more than sheer speculation (FAC, p12).

*Demurrer is sustained. New pleadings must remove this cause of action or add additional facts to satisfy the elements.*

### Battery

A surgical operation or other medical treatment performed without consent is a battery. (*Estrada v. Orwitz* (1946) 75 Cal.App.2d 54, 57; *Berkey v. Anderson* (1969) 1 Cal.App.3d 790, 803.) Further, an action for a battery can lie even though the surgery or medical treatment is skillfully performed (*Rainer v. Buena Community Meml. Hosp.* (1971) 18 Cal.App.3d 240, citing *Berkey, supra*; *Pedesky v. Bleiberg* (1967) 251 Cal.App.2d 119, 123; *Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 38.)

Here, Defendant argues that Plaintiffs' cause of action for battery should fail because: (1) informed consent is duplicative of negligence; (2) no specific facts are asserted to support the claim; (3) Defendant did not intend to harm or offend decedent; and (4) Defendant had no duty to inform decedent (Memo, filed 6/10/16 p8-10). First, Defendant confuses informed consent with consent. While it may be true that *informed* consent is duplicative of negligence, Plaintiffs are asserting a lack of consent, not a lack of informed consent. Second, Plaintiffs adequately plead a touching. Plaintiffs assert, "St. Agnes battered the decedent by (1) making care decisions... and (2) permitting the decedent to be discharged" (FAC, p10). Although not specific in nature, "[E]ach evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." (*C.A. v. William S. Hart Union High School Dist, supra*, 53 Cal.4th 861, 872.) Also, complaints which show some right to relief are generally sufficient to withstand a general demurrer, even if the facts are not clearly stated. (*Gressly v. Williams, supra*, 193 Cal.App.2d at p. 639.) These facts appraise defendant of the nature of Plaintiffs' claim and warrant legal relief; details about how defendant exactly touched the decedent can be revealed using discovery procedures and do not justify demurrer. Third, it is irrelevant whether Defendant intended to harm decedent or not. All that is required to assert a claim for battery based on lack of consent is a touching. (see *Rainer, supra*; *Berkey, supra*; *Pedesky, supra*; and *Kritzer, supra*.) Lastly, Defendant has a duty to obtain consent because it, as a hospital, provides medical treatment. Defendant cites *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 133 to assert that only a Physician has a duty to obtain consent. However, *Moore* deals with informed consent, so it is not applicable.

*Demurrer is overruled.*

### Negligent Infliction of Emotional Distress

Demurrer is sustained on the basis of Negligent Infliction of Emotional Distress (see Tentative Ruling, adopted 3/7/16).

*Demurrer is sustained again. New pleadings must remove this cause of action or add additional facts to satisfy the elements.*

## **MOTION TO STRIKE**

### Fact Pleading

Complaints must plead the facts (Code Civ. Pro. § 425.10). Such facts cannot be stated in a conclusory fashion (*Ankeny v. Lockheed Missiles and Space Co.* (1979) 88 Cal.App.3d 531, 537; *Fox v. Monahan* (1908) 8 Cal.App. 707; *Buttner v. Kasser* (1912) 19 Cal.App. 755, 758; *Fisher v. Fisher* (1913) 23 Cal.App. 310, 313; *Moran v. Bonyng* (1910) 157 Cal. 295.) In *Blegen v. Super. Ct, supra*, 125 Cal. App.3d at p. 959, the Court ruled that, "the terms 'wilful,' 'fraudulent,' 'malicious' and 'oppressive' are the statutory description of the type of conduct which can sustain a cause of action for punitive damages. (Civ. Code, § 3294.) Pleading in the language of the statute is acceptable provided that sufficient facts are pleaded to support the allegations (citing *Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6-7.) The terms themselves are conclusory, however." Where a prayer for punitive damages is based on unsupported conclusions, any such conclusions are properly stricken. (*Smithson v. Sparber* (1932) 123 Cal.App.225, 232; *Faulkner v. California Toll Bridge Authority* (1952) 40 Cal.2d 317, 329.)

Here, Defendant requests that the following language be stricken from Plaintiffs' FAC: "Defendant's duties under the EADACPA were breached in a manner that was reckless, malicious, oppressive, tainted by fraud, and generally reprehensible" (FAC, p12). Because Plaintiff failed to plead facts sufficient to maintain his cause of action under EADACPA, this conclusory language is ripe for Defendant' motion to strike.

*Motion to strike is granted. New pleadings must remove this conclusory language.*

### Punitive Damages

Defendant moves to strike Plaintiffs' request for punitive damages. However, in granting the demurrer to Plaintiffs' second cause of action (EADACPA), the issue of Plaintiffs' entitlement to punitive damages is eliminated.

*Motion to strike is ordered off calendar.*

### Attorney's Fees

Defendant moves to strike Plaintiffs' request for attorney fees. However, in granting the demurrer to Plaintiffs' second cause of action (EADACPA), the issue of Plaintiffs' entitlement to attorney's fees is eliminated.

*Motion to strike is ordered off calendar.*

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (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: A.M. Simpson on 7/13/16 .  
(Judge's initials) (Date)

(6)

**Tentative Ruling**

Re: **Seabright Insurance Company v. Ayala**  
Superior Court Case No.: 12CECG03480

Hearing Date: July 14, 2016 (**Dept. 503**)

Motion: By Defendant Gregorio Jacobo for order determining that settlement is in good faith

**Tentative Ruling:**

To deny.

The Court sustains evidentiary objections, as outlined below.

**Explanation:**

*Evidentiary objections*

The Court sustains evidentiary objections a. on grounds of hearsay and relevance; objection b. on relevance; objection c. on relevance; objection d. on relevance; objection e. on insufficient foundation, and no personal knowledge; objection f. on grounds of hearsay, insufficient foundation, and no personal knowledge; objection g. on grounds of hearsay, insufficient foundation, and no personal knowledge; objection h. on grounds of insufficient foundation and no personal knowledge; and objection i. on insufficient foundation and no personal knowledge.

A court does not look to the plaintiff's claim for damages, but tries to determine a "rough approximation" of what the plaintiff would actually recover if the case would go to trial, and discount it for factors based on the fact that the defendant is settling. (*Horton v. Superior Court* (1987) 194 Cal.App.3d 727, 735-36.) Consequently, what the complaint alleges is not relevant to establish a rough approximation of Plaintiff Seabright Insurance Company's total recovery and Defendant Gregorio Jacobo's proportionate liability.

Statements made on information and belief are hearsay. (*Jeffers v. Screen Extras Guild* (1955) 134 Cal.App.2d 622, 623.) The state of mind of attorney William Haesy is not itself an issue in this action, so that exception to the hearsay rule would not apply. (Evid. Code, § 1250, subd. (a)(1).)

No foundation has been lain concerning the methodology alleged used by Plaintiff Seabright Insurance Company to arrive at the figures used in determining the rough approximation of Plaintiff's total recovery and Mr. Jacobo's proportionate liability. This would not be within Mr. Haesy's personal knowledge. The calculations that rely on those figures are thus also objectionable.



(6)

**Tentative Ruling**

Re: **Lopez v. Martinez**  
Superior Court Case No.: 15CECG01660

Hearing Date: July 14, 2016 (**Dept. 503**)

Motion: By Defendants Brennen Daniel Martinez and David John Martinez to compel Plaintiff Amanda Lopez's attendance at deposition and for monetary sanctions

**Tentative Ruling:**

To deny.

**Explanation:**

Moving parties did not comply with The Superior Court of Fresno County, Local Rules, rule 2.1.17, before filing this motion.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (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: A.M. Simpson on 7/13/16 .  
(Judge's initials) (Date)

(23)

**Tentative Ruling**

Re: **Robin Bebout v. McDonald's Restaurants of California, Inc.**  
Superior Court Case No. 16CECG00509

Hearing Date: Thursday, July 14, 2016 (**Dept. 503**)

Motions:

- (1) Defendant McDonald's Restaurants of California, Inc.'s Demurrer to Plaintiff Robin Bebout's First Amended Complaint
- (2) Defendant McDonald's Restaurants of California, Inc.'s Motion to Strike Claim for Punitive Damages
- (3) Defendant McDonald's Corporation's Demurrer to Plaintiff Robin Bebout's First Amended Complaint
- (4) Defendant McDonald's Corporation's Motion to Strike Claim for Punitive Damages
- (5) Defendant McDonald's USA, LLC's Demurrer to Plaintiff Robin Bebout's First Amended Complaint
- (6) Defendant McDonald's USA, LLC's Motion to Strike Claim for Punitive Damages

**Tentative Ruling:**

To strike *sua sponte* Plaintiff Robin Bebout's second amended complaint. (Code Civ. Proc., § 436, subd. (b).)

To take off calendar Defendant McDonald's Restaurants of California, Inc.'s demurrer to Plaintiff Robin Bebout's first amended complaint, Defendant McDonald Corporation's demurrer to Plaintiff Robin Bebout's first amended complaint, and Defendant McDonald USA, LLC's demurrer to Plaintiff Robin Bebout's first amended complaint. (Code Civ. Proc., § 430.41, subd. (a).)

The Court orders Plaintiff and Defendants' counsel to meet and confer in person or by telephone as required by Code of Civil Procedure section 430.41, subdivision (a). If the parties do not reach an agreement resolving the objections raised in the instant demurrer, Defendants may obtain new hearing dates for the instant demurrers. If new hearing dates are obtained, Defendants must each file a new meet and confer declaration as required by Code of Civil Procedure section 430.41, subdivision (a)(3), at least 16 court days, plus any additional time as required for service of the declaration, before the new hearing date. If, after meeting and conferring, Plaintiff agrees to amend her complaint, Plaintiff and Defendants may file a stipulation and order for leave to file an amended complaint, which will be granted by the Court without need for a hearing. (Cal. Rules of Court, rule 3.1207(4); Superior Court of California, County of

Fresno Local Rules, Rule 2.7.2.) To avoid confusion with the stricken second amended complaint, the stipulation and order should seek leave to file a third amended complaint.

To take off calendar Defendant McDonald's Restaurants of California, Inc.'s motion to strike claim for punitive damages, Defendant McDonald Corporation's motion to strike claim for punitive damages, and Defendant McDonald USA, LLC's motion to strike claim for punitive damages. (Cal. Rules of Court, rule 3.1322(b).)

If Defendants obtain new hearing dates for their demurrers, Defendants must obtain the same hearing dates for their motions to strike. If Defendants decide not to obtain new hearing dates for their demurrers, but still want to have the instant motions to strike heard by the Court, Defendants may obtain new hearing dates for their motions to strike.

**Explanation:**

The Court's Sua Sponte Motion to Strike Plaintiff's Second Amended Complaint

On May 13, 2016, Defendants McDonald's Restaurants of California, Inc., McDonald's Corporation, and McDonalds USA, LLC each filed a demurrer to Plaintiff Robin Bebout's ("Plaintiff") first amended complaint. In response, Plaintiff filed a second amended complaint on June 16, 2016. Since Plaintiff had filed her first amended complaint without leave of court pursuant to Code of Civil Procedure section 472, Plaintiff was required to obtain leave of court before filing her second amended complaint. However, Plaintiff chose to file her second amended complaint without first obtaining the Court's permission to do so.

Therefore, the Court strikes *sua sponte* Plaintiff's second amended complaint since it was "not ... filed in conformity with the laws of this state[.]" (Code Civ. Proc., § 436, subd. (b).)

Defendants' Three Demurrers to Plaintiff's First Amended Complaint

On May 13, 2016, Defendants McDonald's Restaurants of California, Inc., McDonald's Corporation, and McDonalds USA, LLC ("Defendants") each filed a demurrer to the third cause of action for intentional tort in Plaintiff Robin Bebout's ("Plaintiff") first amended complaint pursuant to Code of Civil Procedure section 430.10, subdivision (e).

In order to prove that they complied with the meet and confer requirement of Code of Civil Procedure section 430.41, subdivision (a) before filing their demurrers, Defendants have each filed the declaration of their counsel, Jill K. Cohoe. In each declaration, Ms. Cohoe asserts that she met and conferred by telephone with Plaintiff's counsel on April 4, 2016 regarding Defendants' objections to Plaintiff's third cause of action. (Declaration of Jill K. Cohoe, ¶ 4.) On April 5, 2016, Plaintiff's counsel sent Defendants' counsel an e-mail stating that he would be filing a first amended complaint to address the issues that counsel had discussed during their phone

conversation. (Cohoe Decl., ¶ 5.) Ms. Cohoe declares that, while Plaintiff's first amended complaint includes some changes, no changes were made to Plaintiff's third cause of action for intentional tort. (Cohoe Decl., ¶ 6.) Ms. Cohoe states that, since the third cause of action in the first amended complaint is identical to the third cause of action in Plaintiff's original complaint, Plaintiff and Defendants had already met and conferred about Defendants' grounds for demurring to Plaintiff's first amended complaint and had not reached an agreement resolving Defendants' objections. (Cohoe Decl., ¶ 7.)

However, Code of Civil Procedure section 430.41, subdivision (a) requires that "[i]f an amended complaint ... is filed, the responding party shall meet and confer again with the party who filed the amended pleading before filing a demurrer to the amended pleading." Therefore, even assuming that Plaintiff's third cause of action is identical in both the original complaint and the first amended complaint, Defendants were still required to meet and confer in person or by telephone with Plaintiff before filing the instant demurrers. Since Defendants have admitted that they did not meet and confer with Plaintiff regarding Defendants' objections to Plaintiff's first amended complaint before filing the instant demurrers, Defendants have failed to establish that they have adequately complied with Code of Civil Procedure section 430.41, subdivision (a).

Accordingly, the Court takes the hearings on Defendants' demurrers off calendar. The Court orders Plaintiff and Defendants' counsel to meet and confer in person or by telephone as required by Code of Civil Procedure section 430.41, subdivision (a).

#### Defendants' Three Motions to Strike Claim for Punitive Damages

Also, on May 13, 2016, Defendants each filed a motion to strike the claim for punitive damages in Plaintiff's first amended complaint pursuant to Code of Civil Procedure sections 435, subdivision (b), and 436, subdivision (a). However, since California Rules of Court, rule 3.1322(b) requires that a motion to strike be "heard at the same time as [a] demurrer[.]" the Court also takes the hearings on Defendants' three motions to strike off calendar.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (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:** A.M. Simpson on 7/13/16 .  
(Judge's initials) (Date)