

Tentative Rulings for October 15, 2020  
Departments 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).)

19CECG03770      *Henson v. Prime Time Restaurants, LLC* (Dept. 501)

19CECG03643      *Immerge, Inc. v. I M Enterprises, LLC* (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.

15CECG02493      *Ross v. Netafim Irrigation* is continued to Tuesday, November 3, 2020 at 3:30 p.m. in Department 502.

17CECG00651      *Pompey v. JD's RV Outlet* is continued to Tuesday, November 3, 2020 at 3:30 p.m. in Department 503.

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(Tentative Rulings begin at the next page)

## Tentative Rulings for Department 403

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# Tentative Rulings for Department 501

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(20)

**Tentative Ruling**

Re: *Torres v. Ford, M.D., et al.*  
Superior Court Case No. 17CECG02097

Hearing Date: October 15, 2020 (Dept. 501)

Motion: by Defendant Fresno Community Hospital and Medical Center for Motion for Summary Judgment/Adjudication

**Tentative Ruling:**

To continue the hearing to Thursday, November 12, 2020, at 3:30 p.m. in Department 501. The moving papers filed on March 26, 2020 do not include the declarations of Peter C. Cassini, M.D., and Norman D. Morrison IV. Based on the content of the opposition, the declarations appear to have been timely served on plaintiff, but they were not filed with the court. Moving party shall file the declarations that were served on plaintiff within 5 days of service of the order by the clerk. No further filings in connection with this motion will be permitted.

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: DTT on 10/9/2020.  
(Judge's initials) (Date)



## Tentative Rulings for Department 502

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(03)

**Tentative Ruling**

Re: ***Hauert v. Dycora Transitional Health-Clovis***  
Superior Court Case No. 20CECG00313

Hearing Date: October 15, 2020 (Dept. 502)

Motion: By Plaintiff for Trial Preference

**Tentative Ruling:**

To deny plaintiff's motion for a trial preference, without prejudice, for failure to show that plaintiff's health is such that a preference is necessary to prevent prejudicing her interest in the litigation. (Code Civ. Proc. § 36, subd. (a).)

**Explanation:**

Under Code of Civil Procedure section 36, subdivision (a),

A party to a civil action who is over 70 years of age may petition the court for a preference, which the court shall grant if the court makes both of the following findings:

(1) The party has a substantial interest in the action as a whole.

(2) The health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation. (Code Civ. Proc., § 36, subd. (a).)

"Upon the granting of such a motion for preference, the court shall set the matter for trial not more than 120 days from that date and there shall be no continuance beyond 120 days from the granting of the motion for preference except for physical disability of a party or a party's attorney, or upon a showing of good cause stated in the record. Any continuance shall be for no more than 15 days and no more than one continuance for physical disability may be granted to any party." (Code Civ. Proc., § 36, subd. (f).)

Assuming the elements of the statute are met and there has not been untoward delay by the plaintiff or other extenuating circumstance, the plaintiff is entitled to a mandatory trial preference. (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 696-697.) "Mere inconvenience to the court or to other litigants is irrelevant. Failure to complete discovery or other pretrial matters does not affect the absolute substantive right to trial preference for those litigants who qualify for preference under subdivision (a) of section 36. The trial court has no power to balance the differing interests of opposing litigants in applying the provision. The express legislative mandate for trial preference is a substantive public policy concern which supersedes such considerations." (*Swaithes v. Superior Court* (1989) 212 Cal.App.3d 1082, 1085-1086, internal citations omitted.)

Moreover, "An affidavit submitted in support of a motion for preference under subdivision (a) of Section 36 may be signed by the attorney for the party seeking

preference based upon information and belief as to the medical diagnosis and prognosis of any party. The affidavit is not admissible for any purpose other than a motion for preference under subdivision (a) of Section 36." (Code Civ. Proc., § 36.5.) Thus, the party moving for a trial preference does not need to present a doctor's declaration in support of their motion, and can instead rely on an attorney's declaration that is based on hearsay and conclusions. (*Fox v. Superior Court* (2018) 21 Cal.App.5th 529, 534.)

Also, a plaintiff moving for a trial preference under subdivision (a) does not have to show that she is likely to die or become incapacitated before the case goes to trial if a preference is not granted. "Section 36, subdivision (a), says nothing about 'death or incapacity.' Whether there is 'substantial medical doubt of survival ... beyond six months' is, to be sure, a matter of specific concern under subdivision (d), but the relevant standard under subdivision (a) is more open-ended. The issue under subdivision (a) is not whether an elderly litigant might die before trial or become so disabled that she might as well be absent when trial is called. Provided there is evidence that the party involved is over 70, all subdivision (a) requires is a showing that that party's 'health ... is such that a preference is necessary *to prevent prejudicing [her] interest in the litigation.*'" (*Ibid*, italics in original.) The moving party does not have to show that he or she would be likely to be unavailable for trial, but only that his or her interests in litigation would be prejudiced if a preferential date is not granted. (*Ibid*.)

Here, plaintiff's counsel has submitted her declaration in support of the motion for trial preference, as well as copies of some of plaintiff's medical records. (Tenney decl. and exhibits thereto.) As discussed above, it is proper to rely on an attorney's declaration containing hearsay and conclusions to support a motion for trial preference. (Code Civ. Proc. § 36.5; *Fox v. Superior Court, supra*, at p. 534.) Counsel's declaration shows that plaintiff is 70 years old and that she has a history of multiple serious health conditions, including a rare autoimmune disease called "stiff person syndrome", type 2 diabetes mellitus, asthma, gastro-esophageal reflux disease, anemia, hypothyroidism, hyperlipidemia, hypokalemia, hypertension, osteoporosis, breast cancer, and a fall that led to a fractured femur. Counsel also alleges that plaintiff acquired a MRSA urinary tract infection while she was a resident at defendant's facility in February to April of 2019, which led to diabetic ketoacidosis, which in turn led to generalized weakness, which led to aspiration pneumonia and hypoxia. While at defendant's facility, plaintiff also developed two pressure ulcers, including an unstageable sore on her coccyx, and suffered from severe weight loss, malnutrition, and critical myopathy (dysfunction of muscle fiber). In addition, she was hospitalized in May 2019 for bilateral pneumonia and hyponatremia.

Yet most of the health conditions described by plaintiff's counsel appear to be older injuries and illnesses, many of which have apparently resolved. For example, the fall and broken femur occurred in early 2019, over 18 months ago. Plaintiff has apparently recovered from these injuries. Plaintiff's two pressure sores developed while she was in defendant's facility between February and April of 2019, about a year and a half ago. Again, it appears that plaintiff has recovered from the sores, and there is no indication that they are likely to cause any prejudice to her ability to litigate her case now.

Likewise, plaintiff's serious MRSA infection that placed her in the emergency department occurred in April of 2019, and she has apparently fully recovered from that



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**Tentative Ruling**

Re: ***In re: Nathan Vang***  
Superior Court Case No. 20CECG02439

Date: October 15, 2020 (Dept. 502)

Motion: Petition to compromise claim of a minor

To grant. Hearing off calendar. Petitioner to submit properly completed orders for signature and notify department clerk upon filing.

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: RTM on 10/13/20.  
(Judge's initials) (Date)

(24)

**Tentative Ruling**

Re: ***Welch v. Central Valley Children's Services Network***  
Superior Court Case No. 20CECG00394

Hearing Date: October 15, 2020 (Dept. 502)

Motion: By Defendants in Demurrer to Complaint

**Tentative Ruling:**

To strike, *sua sponte* the First Amended Complaint (FAC) plaintiff filed on September 15, 2020. To deny defendant's request to strike and not consider the opposition brief. To sustain the general demurrers to all causes of action, except for the claim under Business and Professions Code section 17200, *et seq.* (the Unfair Competition Law, or "UCL" claim), without leave to amend. To sustain the special demurrer for uncertainty to the UCL claim, with leave to amend. To overrule the general demurrer to the UCL claim, but with defendants being given leave to demur generally to this claim should plaintiff file an amended complaint.

To be clear to plaintiff: she is given leave only to file an amended complaint raising a UCL claim, since all of her other claims are barred by the relevant statutes of limitation. Plaintiff is granted 20 days' leave to file the First Amended Complaint, which will run from service by the clerk of the minute order.

**Explanation:**

*Late Opposition and FAC*

The court always has discretion to consider late-filed opposition, even without a prior order finding good cause therefor. (*Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 623; *Juarez v. Wash Depot Holdings, Inc.* (2018) 24 Cal.App.5th 1197, 1202 [no abuse of discretion to consider late opposition even without a showing of mistake or excusable neglect].) The hearing on September 17, 2020 was continued to October 15, 2020, by notice in the published Tentative Ruling, which gave defendants ample time to file a reply, so they were not prejudiced by the late filing.

However, the First Amended Complaint must be treated differently. A plaintiff may amend her pleading once without leave of court in response to a demurrer only if "the amended pleading is filed and served no later than the date for filing an opposition to the demurrer[.]" (Code Civ. Proc., § 472, subd. (a) [operative until Jan. 1, 2021].) The statute does not appear to confer discretion on the court to allow the untimely-filed amended pleading. Furthermore, there are definite issues with the complaint which would not be addressed if the FAC were allowed to stand. The court will strike the amended complaint, *sua sponte*. (Code Civ. Proc., §436 [court may strike all or part of pleading not filed in conformity with the law, at any time in its discretion].)

As for the exhibits plaintiff filed with her opposition, these have been disregarded.

Defendant's request for judicial notice is granted.

Merits

- *Relevant Dates*

Plaintiff's employment with defendant CVCSN ended on September 29, 2016 (she concedes there was a typo at Paragraph 10 of her complaint which put the year at 2017). She filed her claim with the EEOC on October 28, 2016. She filed her complaint with the DFEH at some point between November 16, 2016 and December 2, 2016 (her signature is dated the former and the DFEH received stamp is dated the latter).

The EEOC issued its right-to-sue notice on December 7, 2018, which then also becomes the operative date for the issuance of DFEH's right-to-sue notice since DFEH deferred to the EEOC for investigating the claims. The court disregards plaintiff's allegation that the EEOC notice was issued on February 1, 2019, since the letter bearing that date was simply transmitting copies of the notices to plaintiff. The notices themselves state that EEOC mailed the notices on December 7, 2018, which is what the court must deem as true for purposes of demurrer. (*Dodd v. Citizens Bank* (1990) 222 Cal.App.3d 1624, 1626-1627 [on demurrer, facts stated in exhibit take precedence over conflicting allegations in complaint].)

The pertinent question, then, is when the limitations period began for plaintiff's federal and state statutory employment discrimination/harassment claims. The result is different for each. With federal claims (i.e., under Title VII), the 90-day limitations period commences when the employee or the employee's attorney *receives* the letter. (*Threadgill v. Moore U.S.A., Inc.* (7th Cir. 2001) 269 F.3d 848, 850.) The complaint is silent on when plaintiff received the letter, but when the claimant has asked for the right-to-sue notice to be issued (and here the notice indicates she did ask for it), courts will not condone a lack of diligence in plaintiff making minimal effort to make an inquiry as to late or missing letters, and thus will assume a reasonable mailing time and deem constructive receipt of the notice. (*Kerr v. McDonald's Corp.* (11th Cir. 2005) 427 F.3d 947, 953 [Reasonable to assume three days for either delivery of the mail, or that by then plaintiffs should have called to inquire why they had not received the letters (i.e., constructive notice); See also *Baldwin County Welcome Center v. Brown* (1984) 466 U.S. 147, 1724, fn 1 [rebuttable presumption of delivery in three days, citing former FRCP 6, subd. (e), now 6, subd. (d)].) In considering a federal claim, this court can be guided by precedent from the United States Supreme Court and federal appellate courts.

But for state claims (i.e., under FEHA), the statutory period begins running from the date of the notice, not the date of receipt. (*Williams v. Pacific Mutual Life Insurance Co.* (1986) 186 Cal.App.3d 941, 951.) Thus, for plaintiff's FEHA claim, the operative date is December 7, 2018.

Plaintiff filed her complaint on January 31, 2020.

- *FEHA Claims*

Plaintiff's FEHA claims are time-barred. Plaintiff appears to raise such claims to the extent she makes allegations of a hostile work environment harassment, race-discrimination, or retaliation for a protected act. (Gov. Code, § 12940.) The aggrieved employee has one year from the time the DFEH (or the EEOC, if DFEH deferred to it for the investigation, as here) issues its right-to-sue notice to file her civil suit. (Gov. Code § 12965, subd. (b).)<sup>1</sup> Here, the DFEH issued an immediate right-to-sue notice, which was tolled during the EEOC investigation. Thereafter, the EEOC issued its right-to-sue notice on December 7, 2018, which is the deemed date of issuance of the DFEH's right-to-sue notice. As discussed above, for FEHA claims the statutory period starts running from the date of notice. Therefore, plaintiff had until December 7, 2019, to file her civil suit. But she did not file it until January 31, 2020, so any FEHA claims she is attempting to bring in this lawsuit are barred.

Plaintiff attempts to argue (and plead in her complaint) that this time was extended to three years by the passage of AB 9, which amended Government Code section 12960, subdivision (e). However, this statute simply amended the time in which the aggrieved employee may file an administrative complaint with the DFEH from one year to three years from the time the unlawful practice occurred. The court has taken judicial notice of the Legislative Digest, which makes this clear. But this is also clear from statutory language itself. Subdivision (b) of section 12960 indicates that for the purposes of this section "filing a complaint means filing an intake form with the department," and subdivision (c) also refers to the aggrieved person filing "with the department a verified complaint." Therefore, the three-year period for filing a "complaint" in subdivision (e) clearly refers to the administrative complaint filed with the DFEH. AB 9 did not change the language in Government Code section 12965, subdivision (b), which gives the aggrieved employee one year from the date of the right-to-sue notice to bring "a *civil* action" as distinct from an administrative complaint.

Thus, any causes of action for discrimination, harassment, or retaliation based on the FEHA are time-barred, and the general demurrer must be sustained without leave to amend, since plaintiff has not shown how she would be able to plead around this bar.

- *Title VII*

The discrimination claims plaintiff brings under Title VII are also time-barred, since a claimant bringing an EEOC claim alleging Title VII violations must bring suit within 90 days after receipt of the EEOC's right-to-sue notice. (42 U.S.C., § 2000e, subd. (f)(1); *Scholar v. Pacific Bell* (9th Cir. 1992) 963 F.2d 264, 267.) As discussed above, the EEOC issued its notice on December 7, 2018. The plaintiff does not allege when she received the notice, but even if the court assumed, for the sake of liberally construing the complaint, that plaintiff did not receive it until sometime in February 2019, she filed her complaint well after the 90-day period, and thus any Title VII claims are time-barred and demurrer must be sustained without leave to amend.

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<sup>1</sup> Defendant erroneously referred to Government Code section 12940, subdivision (b) as the statute with the limitations period (Memo., p. 7:19-26).

- *California Equal Pay Act*

The California Equal Pay Act (CEPA), at Labor Code section 1197.5, provides at subdivision (i) that a civil action to recover wages for unequal pay for the same work based on gender has a two-year limitations period, unless it is a willful violation, in which case the limitations period is three years. It also provides at subdivision (k) that an action for discrimination or retaliation against an employee who takes action to invoke or assist in enforcing the EPA has a one-year limitations period. These limitations periods all run from the date the cause of action accrues, as opposed to the date a right-to-sue notice is issued, so any cause of action clearly accrued no later than the date of plaintiff's termination on September 29, 2016. Since plaintiff's complaint was filed well after three years from this date (i.e., after the longest of the limitations periods), any claim under the CEPA is time-barred, and the general demurrer must be sustained, without leave to amend.

- *Federal Equal Pay Act*

To the extent plaintiff is attempting to bring claims under the Federal Equal Pay Act (FEPA), found at 29 United States Code section 206, subdivision (d), a civil action must be filed within two years after the cause of action accrues, or three years if the violation was willful. (29 U.S.C., § 255, subd. (a).) Unlike Title VII claims, the employee need not exhaust administrative remedies before filing a civil action. (*Washington County v. Gunther* (1981) 452 U.S. 161, 175, fn 14.) Therefore, any claims under the FEPA ran, at the latest, from plaintiff's date of termination and thus they are likewise time-barred and the demurrer must be sustained, without leave to amend.

- *Waiting Time Penalties*

The statute of limitations pertaining to an action against an employer for failure to pay wages due upon termination, arising under Labor Code sections 201, *et seq.*, is the three-year limitations period under Code of Civil Procedure section 335, subdivision (a), an "action upon a liability created by statute, other than a penalty or forfeiture." (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1395.) Since plaintiff was terminated on September 29, 2016, she should have filed her action on or before September 29, 2019, and she did not. Therefore, her claim for waiting time penalties is time-barred and the demurrer to this claim must be sustained, without leave to amend.

- *Wrongful Termination Claim*

A common law cause of action for wrongful termination is governed by the two-year limitations period concerning torts, Code of Civil Procedure section 335.1. (*Prue v. Brady Co./San Diego, Inc.* (2015) 242 Cal.App.4th 1367, 1382.) As with the waiting time penalty claim, that means plaintiff should have filed her action on or before September 29, 2019, and she did not. The demurrer to this cause of action must be sustained, without leave to amend.

- *Unfair Business Practices*

Plaintiff only lists a cause of action for Unfair Business Practices pursuant to Business and Professions Code section 17200, *et seq.* (a "UCL claim"), in the title of the complaint. There is no attempt to allege it under an identifiable heading, so it is impossible to know which allegations are directed to this claim. This cause of action has a four-year statute of limitations, accruing at the time the unfair practices are performed. (Bus. & Prof. Code, § 17208.) It is not clear from the face of the complaint or facts judicially noticeable that this claim is barred (moreover, defendants did not clearly argue that it was time-barred). The four-year statute applies even when the action is based on violation of a statute with a shorter limitations period. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 178-179.) Assuming the date of termination as one occurrence of unfair practices, the four-year period would not have passed until after September 29, 2020. So to the extent defendants raised a general demurrer based on the claim being time-barred, it must be overruled.

A UCL claim applies to conduct which violates state or federal employment laws. Thus, even if plaintiff's FEHA and Title VII claims and her Labor Code violation claims are barred, a UCL claim might not be. Even so, only injunctive and restitutionary relief (disgorgement of money or property unlawfully obtained) are available in a private action under the UCL. Damages are not available. (See Bus. & Prof. Code, § 17203; *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 173 [UCL "is not an all-purpose substitute for a tort or contract action"]; (*Pineda v. Bank of America, N.A.*, *supra*, 50 Cal.4th at pp. 1401-1402 [statutory penalties not recoverable].)

But this claim is subject to defendants' special demurrer for uncertainty, since all plaintiff has done is list the claim in the title of the complaint. She has not made clear what acts she alleges as unfair business practices. "A plaintiff alleging unfair business practices under these statutes must state with reasonable particularity the facts supporting the statutory elements of the violation." (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619.) The court must sustain the special demurrer for uncertainty, but with leave to amend. The general demurrer based on insufficiency of the allegations, even as to the individual defendants, is overruled at this time, but only because it is not clear which allegations are encompassed within this claim. Defendants are given leave to demur generally to this cause of action again should plaintiff file an amended complaint.

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: RTM on 10/14/20.  
(Judge's initials) (Date)

## Tentative Rulings for Department 503

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(03)

**Tentative Ruling**

Re: ***Nerey v. Van Ness Auto Repair, Inc.***  
Superior Court Case No. 19CECG00502

Hearing Date: October 15, 2020 (Dept. 503)

Motion: By Plaintiff for Bifurcation of Trial

**Tentative Ruling:**

To deny plaintiff's motion to bifurcate the trial, without prejudice. (Code Civ. Proc., §§ 1048, 598.)

**Explanation:**

Under Code of Civil Procedure section 1048, "[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action . . . ." (Code Civ. Proc., § 1048, subd. (b).) Also, Code of Civil Procedure section 598 provides:

The court may, when the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby, on motion of a party, after notice and hearing, make an order, *no later than the close of pretrial conference* in cases in which such pretrial conference is to be held, or, in other cases, no later than 30 days before the trial date, that the trial of any issue or any part thereof shall precede the trial of any other issue or any part thereof in the case, except for special defenses which may be tried first pursuant to Sections 597 and 597.5.

(Code Civ. Proc., § 598, italics added.)

In addition, under California Rules of Court, rule 3.727, "[i]n any case management conference or review conducted under this chapter, the parties must address, if applicable, and the court may take appropriate action with respect to, the following: [¶] . . . [¶] (10) Whether the case should be bifurcated or a hearing should be set for a motion to bifurcate under Code of Civil Procedure section 598[.]" (Cal. Rules of Court, rule 3.727.)

"It is within the discretion of the court to order a severance and separate trials of such actions, and the exercise of such discretion will not be interfered with on appeal except when there has been a manifest abuse thereof." (*McLellan v. McLellan* (1972) 23 Cal.App.3d 343, 353, internal citations omitted.)

Here, plaintiff seeks to have the trial bifurcated into two phases, with the bench trial of the unfair competition law ("UCL") and accounting claims heard first, and the jury trial of the remaining claims taking place approximately six months later. Plaintiff claims that it would increase efficiency and serve the interests of justice to try the UCL and

accounting claims first, since resolution of the issues underlying those claims would allow the other claims to be resolved quickly, either through settlement or after a brief jury trial.

However, plaintiff did not comply with the requirements of Code of Civil Procedure section 598 and California Rules of Court, rule 3.727 by requesting bifurcation at the time of the initial pretrial conference, which was held in July of 2019, or at the subsequent case management conference held in October of 2019, or prior to the original trial date of September 8, 2020. Plaintiff only raised the issue for the first time when he filed the present motion on September 11, 2020, almost a year after the last case management conference. Thus, plaintiff failed to request bifurcation of the trial in a timely manner under section 598 and rule 3.727.

On the other hand, plaintiff's delay does not necessarily bar him from seeking bifurcation, since the trial date was vacated. Still, plaintiff has not shown that it would be more efficient to hold two separate trials in the action, since the UCL and accounting claims will involve the same issues, witnesses, and evidence as the other claims. Plaintiff's other claims primarily allege failure to pay minimum wages, overtime, provide accurate wage statements, waiting time penalties, and personal injury/failure to provide workers' compensation insurance.<sup>2</sup> The claims all arise out of the same common set of facts and legal issues, namely whether defendant misclassified plaintiff as an independent contractor rather than an employee, and whether defendant failed to provide plaintiff with the pay, insurance, and benefits to which he was entitled as an employee. Thus, if two trials are held, plaintiff will have to present the same witnesses and evidence at both trials, which will result in the duplication of time and effort. There will also be a substantial delay in the resolution of the action if the second trial is delayed by six months or more after the first trial, which is likely to be prejudicial to the parties.

While plaintiff argues that a finding by the court in his favor in the first phase of the trial would be likely to promote a settlement that would obviate the need for a second phase of the trial, plaintiff's contention appears to be nothing more than speculation. Indeed, it appears that the bifurcation would actually result in a greater consumption of resources than if only one trial is held, since the second trial would require a second round of testimony and evidence. In their case management statements, the parties have estimated that the trial would take five to ten days if it is not bifurcated. However, it seems likely that holding the trial in two phases would extend the length of the trial by several days, since the same witnesses and evidence would have to be presented twice. Therefore, plaintiff has failed to meet his burden of showing that bifurcation would increase economy or serve the interests of justice.

Also, the motion to bifurcate the trial is premature, since there is currently no trial date set, and it is unlikely that the new trial date will be held anytime in the near future. Due to the ongoing pandemic, it is more likely that the trial will be set many months from now. Thus, there does not appear to be any reason to make a final decision on whether the trial should be bifurcated at this relatively early stage of the case.

As a result, the court denies the motion to bifurcate the trial without prejudice to raising the issue again when the trial date has been set and is closer in time.

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<sup>2</sup> Plaintiff states that he intends to dismiss several of his other claims.



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**Tentative Ruling**

Re: ***Carmon v. Horizon Health & Subacute Center***  
Superior Court Case No. 19CECG01541

Hearing Date: October 15, 2020 (Dept. 503)

Motion: Defendant Horizon Health and Subacute Center's Demurrer to the First Amended Complaint and Motion to Strike Portions of the First Amended Complaint

**Tentative Ruling:**

To sustain the demurrer, with leave to amend. (Code of Civ. Proc., § 430.10, subd. (e).) To grant the motion to strike, with leave to amend. (Code of Civ. Proc., §§ 435, 436.) Plaintiffs are granted 20 days' leave to file a second amended complaint. The time in which the complaint may be amended will run from service of the minute order by the clerk. All new allegations shall be in **boldface** type.

**Explanation:**

Demurrer

"[T]he rule governing pleading in this state is that a plaintiff need only 'set forth the ultimate facts constituting the cause of action, not the evidence by which [the] plaintiff proposes to prove those facts.' [Citation.]" (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 431.) Further, "[w]e treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318, internal quotations omitted.)

The function of a demurrer is to test the sufficiency of a plaintiff's pleading by raising questions of law. (*Plumlee v. Poag* (1984) 150 Cal.App.3d 541, 545.) The test is whether the plaintiff has succeeded in stating a cause of action; the court does not concern itself with the issue of the plaintiff's possible difficulty or inability in proving the allegations of his complaint. (*Highlanders, Inc. v. Olsan* (1978) 77 Cal.App.3d 690, 697.) In assessing the sufficiency of the complaint against the demurrer, we treat the demurrer as admitting all material facts properly pleaded, bearing in mind the appellate courts' well-established policy of liberality in reviewing a demurrer sustained without leave to amend (liberally construing the allegations with a view to attaining substantial justice among the parties). (*Glaire v. LaLanne-Paris Health Spa, Inc.* (1974) 12 Cal.3d 915, 918.)

Any valid cause of action overcomes a general demurrer. (*Quelimane Co., Inc. v. Stewart Title Guarantee Co.* (1998) 19 Cal.4th 26, 38-39; *Adelman v. Associated International Insurance Co.* (2001) 90 Cal.App.4th 352, 359.) In ruling on a demurrer, the court will give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 42.)

## 1. Standing – Compliance with Code of Civil Procedure Section 377.32

Defendant demurs to the first amended complaint on the ground that plaintiffs failed to comply with the requirements of Code of Civil Procedure section 377.32, and plaintiffs therefore lack standing to bring this action on behalf of decedent. Particularly, defendant contends that plaintiffs have not provided a death certificate.

Code of Civil Procedure section 377.32 requires that a person seeking to commence an action as a decedent's "successor in interest" execute and file an affidavit or declaration. (See *In re A.C.* (2000) 80 Cal.App.4th 994, 1002-1003.) The death certificate must be attached to the affidavit or declaration. (Code of Civ. Proc., § 377.32, subd. (c).) Compliance with Code of Civil Procedure section 377.32 is challenged by a plea in abatement. (*Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1524 [addressing the failure to file the declaration].)

Here, the caption of the complaint names at least one of plaintiffs as successor in interest. There is no contrary document of which the court is requested to take judicial notice. Thus, under the principle that a demurrer admits all material facts properly pleaded as true, plaintiff Franklin Lacounte is the successor-in-interest to decedent. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.) Furthermore, challenges to compliance with Code of Civil Procedure section 377.32 are the subject of a plea in abatement. (*Parsons v. Tickner, supra*, 31 Cal.App.4th at p. 1524.) Accordingly, the demurrer is overruled on this ground.

## 2. First Cause of Action—Elder Abuse/Neglect

Elder abuse claims are based upon the Elder Abuse and Dependent Adult Civil Protection Act ("Elder Abuse Act") (Welf. & Inst. Code, § 15600 et seq.), making an elder abuse cause of action a statutory claim, which must be plead with particularity. (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 410.)

[S]everal factors . . . must be present for conduct to constitute neglect within the meaning of the Elder Abuse Act and thereby trigger the enhanced remedies available under the Act. The plaintiff must allege (and ultimately prove by clear and convincing evidence) facts establishing that the defendant: (1) had responsibility for meeting the basic needs of the elder or dependent adult, such as nutrition, hydration, hygiene or medical care; (2) knew of conditions that made the elder or dependent adult unable to provide for his or her own basic needs; and (3) denied or withheld goods or services necessary to meet the elder or dependent adult's basic needs, either with knowledge that injury was substantially certain to befall the elder or dependent adult (if the plaintiff alleges oppression, fraud or malice) or with conscious disregard of the high probability of such injury (if the plaintiff alleges recklessness). The plaintiff must also allege (and ultimately prove by clear and convincing evidence) that the neglect caused the elder or dependent adult to suffer physical harm, pain or mental suffering.

(*Carter v. Prime Healthcare Paradise Valley LLC, supra*, 198 Cal.App.4th at pp. 406–407, internal citations omitted; see also *Worsham v. O'Connor Hospital* (2014) 226 Cal.App.4th

331, 338 [allegations not sufficient to render “conduct in failing to provide adequate staffing anything more than professional negligence”].)

The type of relationship contemplated by the Elder Abuse Act, to support the Act’s enhanced remedies, is “a relationship where a certain party has assumed a significant measure of responsibility for attending to one or more of an elder’s basic needs that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance. [¶] . . . [¶] The . . . example of neglect—the [f]ailure to provide medical care for physical and mental health needs— . . . assumes that the defendant is in a position to deprive an elder or a dependent adult of medical care.” (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 158, internal citation and quotations omitted.) Allegations of neglect based on failure to monitor an elder’s carcinoma, vision impairments, dental needs, hearing loss, dietary assessments, personal hygiene, and failing to provide regular health check-ups, resulting in the deterioration of the elder’s health, have been found sufficient to support an allegation of elder abuse under the Elder Abuse Act. (*Knox v. Dean, supra*, 205 Cal.App.4th at p. 431; see also Welf. & Inst. Code § 15610.57.)

Additionally, “[i]n order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve intentional, willful, or conscious wrongdoing of a despicable or injurious nature.” (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31, internal citation and quotations omitted.)

Recklessness requires a showing of “deliberate disregard of the high degree of probability that an injury will occur. Recklessness, unlike negligence, involves more than inadvertence, incompetence, unskillfulness, or a failure to take precautions but rather rises to the level of a conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.” (*Delaney v. Baker, supra*, 20 Cal.4th at pp. 31–32, internal citations and quotation marks omitted.) Pursuant to Civil Code section 3294, subdivision (c):

- (1) “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.
- (2) “Oppression” means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.
- (3) “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.

Lastly, an elder abuse claim must allege facts showing an officer, director, or managing agent’s involvement. (Welf. & Inst. Code, § 15657 subd. (c); Civ. Code, § 3294, subd. (b); *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 167 [employer liability for

punitive damages based on employee's conduct includes employer's advance knowledge of employee's unfitness, authorization or ratification of the wrongful conduct, and personal culpability].)

Here, the first amended complaint alleges that decedent suffered specific injuries. (FAC, ¶ 15.) The first amended complaint also alleges generally that defendant failed to ensure decedent received proper food, fluids, hygiene, toileting and medication monitoring. (FAC, ¶ 13.) The first amended complaint also alleges that defendant failed to address decedent's declining health with decedent's physician or registered dietician. (FAC, ¶ 13.) However, other than a generalized reference to staffing levels (FAC, ¶10), there are no specific *facts* of conduct alleged. Without specific allegations of conduct, the first amended complaint only asserts conclusions, which are insufficient to withstand demurrer. (See *Knox v. Dean, supra*, 205 Cal.App.4th at p. 431; see also *Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.) Furthermore, the lack of specific facts as to conduct is similarly insufficient to support plaintiff's claims of recklessness and ratification. The demurrer to this cause of action is sustained.

### 3. Second Cause of Action—Professional Negligence

"To state a cause of action for professional negligence, a party must show '(1) the duty of the professional to use such skill, prudence and diligence as other members of the profession commonly possess and exercise; (2) breach of that duty; (3) a causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional negligence.' [Citation]." (*Giacometti v. Aulla, LLC* (2010) 187 Cal.App.4th 1133, 1137.)

Here, the first amended complaint sets forth several injuries and conditions allegedly suffered by decedent. (See FAC, ¶ 15.) However, there are no specific allegations as to defendant's conduct which caused those injuries. The demurrer is sustained as to this cause of action.

### 4. Third Cause of Action—Wrongful Death

"In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence." (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 105.)

Here, as mentioned above, the elder abuse and negligence causes of action are insufficiently pled. Thus, there is an insufficient basis for the wrongful death cause of action. The demurrer is sustained.

### 5. Fourth Cause of Action—Violation of Patient's Rights

"Health and Safety Code section 1430, subdivision (b) allows a resident or patient of a skilled nursing facility to bring a civil action against the licensee of a facility who violates any rights of the resident or patient as set forth in the Patients Bill of Rights in Section 72527 of Title 22 of the California Code of Regulations, or any other right provided for by federal or state law or regulation." (*Nevarez v. San Marino Skilled Nursing & Wellness Centre, LLC* (2013) 221 Cal.App.4th 102, 123, internal quotations omitted.) The

wording does not limit a section 1430 claim to violation of one of the rights enumerated in section 72527, instead encompassing “any other right provided by for federal or state law or regulation.” (*Ibid.*)

Here, defendant’s argument that its tender of \$500 moots plaintiff’s violation of rights claim is unpersuasive: “The ‘focus’ of . . . [Health and Safety Code section 1430] ‘is preventative.’ It is not a substitute for the standard damage causes of action for injuries suffered by residents of nursing care facilities. Section 1430, subdivision (c) provides, ‘The remedies specified in this section *shall be in addition* to any other remedy provided by law.’” (*Lemaire v. Covenant Care California, LLC* (2015) 234 Cal.App.4th 860, 867, internal citation omitted, emphasis in original.)

However, although the first amended complaint sets forth several injuries and conditions allegedly suffered by decedent (see FAC, ¶ 15), as discussed above, there are no specific allegations as to defendant’s conduct which caused those injuries. Accordingly, there are insufficient factual allegations to support the fourth cause of action. The demurrer is therefore sustained.

#### Motion to Strike

As explained by the court in *Perkins v. Superior Court* (1981) 117 Cal.App.3d 1:

[I]t has long been recognized that “[t]he distinction between conclusions of law and ultimate facts is not at all clear and involves at most a matter of degree. For example, the courts have permitted allegations which obviously included conclusions of law and have termed them ‘ultimate facts’ or ‘conclusions of fact.’” What is important is that the complaint as a whole contain sufficient facts to apprise the defendant of the basis upon which the plaintiff is seeking relief. The stricken language must be read not in isolation, but in the context of the facts alleged in the rest of [the] complaint. Taken in context, the words “wrongfully and intentionally” . . . describe a knowing and deliberate state of mind from which a conscious, disregard of petitioner’s rights might be inferred—a state of mind which would sustain an award of punitive damages.

(*Id.* at p. 6, internal citations omitted.) In addition, “[p]leading in the language of the statute is not objectionable when sufficient facts are alleged to support the allegation.” (*Id.* at pp. 6–7 [allegation that defendants guilty of “oppression, fraud, and malice”].)

As discussed above, the first amended complaint contains insufficient factual allegations to support the causes of action asserted. Consequently, there are insufficient factual allegations to support the requests for punitive damages, treble damages, injunctive relief, attorney fees and general damages pursuant to Welfare and Institutions Code section 15657. The motion to strike is granted.

#### Leave to Amend

Plaintiffs failed to file an opposition to either the demurrer or the motion to strike. Nevertheless, courts generally grant leave to amend in response to the first demurrer.

