Tentative Rulings for August 6, 2020
Departments 403, 501, 502, 503

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).)

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

19CECG00950 ***Kendrick v. Brix*** **is continued to Tuesday, August 18, 2020 at 3:30 p.m. in Department 503**

19CECG01922 ***De Santis v. De Santis*** **is continued to Tuesday, August 18, 2020 at 3:30 p.m. in Department 503**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

(20) **Tentative Ruling**

Re: ***Williams et al. v. Brewer et al.***
Superior Court Case No. 19CECG01238

Hearing Date: August 6, 2020 (Dept. 403)

Motion: (1) Plaintiffs' Motion to Compel Further Responses to Special Interrogatories, Document Demands and Requests for Admissions from Keith Ross
(2) State Farm General Insurance Company's Motion to Compel Psychological Records

Tentative Ruling:

(1) Plaintiffs' Motion to Compel Further Responses: To grant in part. Within 20 days of service of the order by the clerk, defendant Keith Ross (hereinafter "Ross") shall provide further verified responses to Special Interrogatory nos. 1, 2, 4, 13-16, 22-24, 33, Requests for Production of Document nos. 1-5, 7, 9, 17, 18, 20, 21, and Requests for Admission nos. 9, 19-21, 29. The motions are otherwise denied. All documents responsive to the above production demands shall be produced within 20 days of service of the order. To impose $6,494 in monetary sanctions against Keith Ross and in favor of plaintiffs, to be paid to plaintiffs' counsel within 30 days of service of the order. (Code Civ. Proc., §§ 2033.290(d), 2031.300(d), 2031.310(h), and 2023.010-040.)

(2) State Farm's Motion to Compel Psychological Records: To deny without prejudice.

Explanation:

Plaintiffs' Motion to Compel Further Responses

Special Interrogatories

No. 1: Grant the motion to compel a further response. Ross shall provide the information requested by the interrogatory. Ross seems to concede that his attorney was not the only person to assist in the preparation of the interrogatories, but has refused to amend his response to identify such other persons. Plaintiffs' own discovery responses are irrelevant to the sufficiency of Ross' response to this interrogatory.

No. 2: Grant in part. Objection sustained (overbroad) as to that part of the interrogatory seeking identification of all persons hosted by Ross at the unit for more than one hour since Ross began residing in the unit. However, there is no basis for refusing to identify each person over the age of 18 who resided in the unit. "If only a part of an

interrogatory is objectionable, the remainder of the interrogatory shall be answered." (Code Civ. Proc., § 2030.240, subd. (a).)

No. 4: Grant. The response does not indicate that Ross made a good faith effort to obtain the information sought. In fact, by asserting the marital communication privilege, Ross makes clear that he did no more than identify the one detective whose name he could recall off the top of his head. "If the responding party does not have personal knowledge sufficient to respond fully to an interrogatory, that party shall so state, but shall make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except where the information is equally available to the propounding party." (Code Civ. Proc., § 2030.220, subd. (c).) Ross inquiring of his wife would not implicate any marital communications. (See *Troy v. Superior Court* (1986) 186 Cal.App.3d 1006, 1013 ["the privilege conferred by section 980 is ... unavailable to Troy, since the information sought relates to the existence of assets, not to confidential communications between Mr. Troy and his spouse"].)

No. 9: Deny. The interrogatory is confusing as drafted, and overbroad in asking Ross to identify each and every City of Fresno Police Ross has ever spoken with.

No. 10: Deny. See No. 9. Additionally, the interrogatory is not full and complete in and of itself. (Code Civ. Proc., § 2030.060, subd. (d).)

No. 11: Grant. The answer to the interrogatory is non-responsive. Ross has a duty to make an inquiry. (Code Civ. Proc., § 2030.220, subd. (c).) The objection based on speculation is overruled. And even if Ross does not know who was outside of the unit, he may know who was at or inside the unit. "If an interrogatory cannot be answered completely, it shall be answered to the extent possible." (Code Civ. Proc., § 2030.220, subd. (b).)

No. 12: Deny. The interrogatory is compound. (Code Civ. Proc., § 2030.060, subd. (f).)

Nos. 13-16: Grant. As the objecting party, Ross has the burden to justify any objection or failure fully to answer the interrogatories. (*Coy v. Superior Court* (1962) 58 Cal.2d 210, 220-221.) These interrogatories are lacking in context for the court, and Ross makes no attempt to show how the privacy objections apply. The interrogatories are not compound.

No. 22: Grant. Code of Civil Procedure section 2030.230 does not apply, as an answer does not "necessitate the preparation or the making of a compilation ... or summary of or from the documents of the party to whom the interrogatory is directed …" Moreover, the specification in the response is not "in sufficient detail to permit the propounding party to locate and identify, as readily as the responding party can, the documents from which the answer may be ascertained." (*Ibid.*)

No. 23: Grant. Ross does not articulate why the right of privacy would protect information as to where he has lived since 2000.

No. 24: Grant. The Code of Civil Procedure section 2030.230 election may be appropriate if the document identified and produced contained all of the requested information, but it does not. And Ross does not articulate why the interrogatory is impermissibly overbroad. The opposition merely disagrees with plaintiffs, which is not enough to substantiate the objections raised.

Nos. 28, 29: Deny. The interrogatory is compound and asks Ross to speculate about the intent of other persons.

No. 33: Grant. The objections have no apparent merit, and the substantive response does not answer the call of the interrogatory.

Requests for Production of Documents

No. 1: Grant. The opposition does not address demand no. 1. While the response is sufficient, plaintiffs explain why it appears that not all responsive documents have been produced. Given the lack of opposition, the motion is granted. All responsive documents shall be produced. Production in accordance with a statement of compliance can be ordered pursuant to Code of Civil Procedure section 2031.320.

No. 2: Grant. The response ("Please see Exhibit 2") does not comply with Code of Civil Procedure section 2031.210, subdivision (a), which requires the responding party to respond with any of three statements: (1) A statement that the party will comply with the particular demand by the date set for the inspection; or (2) A representation that the party lacks the ability to comply with the demand for inspection or copying of a particular item or category of item; or (3) An objection to the particular demand for inspection or copying. Ross' response is none of those. The court notes that Ross does not oppose the motion as to this demand.

No. 3: Grant. There is no rule or statute prohibiting inspection demands from being compound. And Ross makes no effort to substantiate any of the other objections, which are therefore overruled.

Nos. 4, 5: Grant. The objections, which the opposition makes no attempt to substantiate, are overruled. The apparent statement of compliance, merely referencing Exhibit 3, does not comply with Code of Civil Procedure section 2031.210, subdivision (a). Ross shall produce any responsive documents not previously produced.

No. 7: Grant. The opposition does not attempt to justify why any privacy interest would outweigh the rights of a litigant to discovery of otherwise discoverable material. (See *Williams v. Superior Court* (2017) 3 Cal.5th 531, 557.) The objections are overruled, and all responsive documents must be produced.

No. 9: Grant. The opposition does not attempt to justify the privacy objection.

Nos. 17, 18: Grant. The opposition does not attempt to justify the marital communication privilege objection, which would not appear to apply to communications with a person not his spouse. To the extent the demand encompasses

spousal communications ("relating to ... any communications with Lindsey Brewer [etc.]"), such must be identified in a privilege log.

Nos. 20, 21: Grant. To the extent the martial communication privilege applies, such documents must be identified in a privilege log. But the demand does not seek only communications between Ross and his wife, even if such communications are encompassed within the request. As for any other communications, Ross must provide a response compliant with Code of Civil Procedure section 2031.210, subdivision (a)(1) or (2). Ross does not attempt to justify the general privacy objection.

Requests for Admissions

No. 9: Grant. It is possible that the request could implicate the marital communication privilege of Evidence Code section 980. But to the extent there were any requests or suggestions that Ross and/or his wife manufacture or process meth that did not come from one spouse to another, Ross must "[a]dmit so much of the matter involved in the request as is true … or as reasonably and clearly qualified by the responding party." (Code Civ. Proc., § 2033.220, subd. (a), (b)(1).) The response must be properly qualified.

Nos. 19, 21: Grant. The response is evasive. If Ross does not know what the police were looking for, and was never informed of what they were looking for, that is fine. If the responding party can admit the truth of only part of the request for admission, the party shall specify the matter in the request as to which the party lacks sufficient information or knowledge. (Code Civ. Proc., § 2033.220, subd. (b).) If the party gives lack of information or knowledge as a reason for failure to admit a part of a request for admission, the party shall "state in the answer that a reasonable inquiry concerning the matter in the particular request has been made, and that the information known or readily obtainable is insufficient to enable that party to admit the matter." (*Ibid*., subd. (c).) Ross must provide a response compliant with section 2033.220.

No. 20: Grant. The answer is non-responsive. The request asks what Ross did, not what he would do. The response does not comply with section 2033.220, subdivisions (b)(3) and (c).

No. 29: Grant. The request is not compound. The objection must be withdrawn and answered without reservation.

No. 31. Deny. The request is compound. (Code Civ. Proc. § 2033.060, subd. (f).)

No. 34: Deny. Seeking information as to any and all "drugs" or "controlled substances" for Ross's lifetime is overbroad. The request is also compound. (Code Civ. Proc., § 2033.060, subd. (f).)

Sanctions

Sanctions should be awarded for unsuccessfully opposing the motions to compel. (Code Civ. Proc., §§ 2033.290(d), 2031.300(d), 2031.310(h), and 2023.010-040.) "The failure to participate in the meet-and-confer process in good faith is an independent discovery abuse "for which sanctions are statutorily authorized." (*Moore v. Mercer* (2016) 4

Cal.App.5th 424, 448–449, quoting *Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1104.)

Ross and/or his counsel clearly made very little effort to respond to the discovery at issue, offered little of substance in the way of opposition to the motion, and did not substantively meet and confer on the issues presented in the motion. Accordingly, the court awards $6,494 in monetary sanctions.

State Farm's Motion to Compel Psychological Records

At times State Farm requests that non-party deponent Dr. David Hellwig be ordered to produce the subpoenaed records, and at other times State Farm requests that the court order plaintiff Saundra Williams (hereinafter "Saundra") to provide Dr. Hellwig with a signed authorization to release the records.

As against Dr. Hellwig

"If a deponent fails to answer any question or to produce any document, electronically stored information, or tangible thing under the deponent's control that is specified in the deposition notice or a deposition subpoena, the party seeking discovery may move the court for an order compelling that answer or production." (Code Civ. Proc., § 2025.480, subd. (a); see also *Kramer v. Superior Court* (1965) 237 Cal.App.2d 753.) Moreover, Code of Civil Procedure section 1987.1, subdivision (a), provides that the court can grant a motion directing compliance with a subpoena requiring the production of documents.

The court cannot order Dr. Hellwig to do anything because the notice of motion is deficient, and he has not been properly served. The notice of motion seeks "an order to compel the production of records pertaining to Plaintiff Saundra Williams' psychological records maintained by Dr. David Hellwig and for sanctions against Plaintiffs." But the notice does not make clear that Dr. Hellwig would be ordered to do anything. A motion must identify the parties to whom it is addressed. (Cal. Rules of Court, Rule 3.1112(d)(2).)

Not only is Dr. Hellwig not specifically identified as a person against whom relief is sought, he has not been properly served with the motion.

> A written notice and all moving papers supporting a motion to compel an answer to a deposition question or to compel production of a document or tangible thing from a **nonparty deponent must be personally served** on the nonparty deponent unless the nonparty deponent agrees to accept service by mail or electronic service at an address or electronic service address specified on the deposition record.

(Cal. Rules of Court, Rule 3.1346, emphasis added.)

State Farm's amended proof of service filed on 6/15/20 merely indicates that a courtesy copy of the motion was mailed to Dr. Hellwig. While it appears that Dr. Hellwig may not have any objection to the lack of due process (see Dana Supp. Dec. Exh. 19), the court is not willing to make an order directed at an individual who has not been properly served.

As against Plaintiffs

Aside from seeking compliance from Dr. Hellwig, State Farm requests that the court order Saundra to provide Dr. Hellwig with a signed authorization to release the records. This is not an available discovery procedure under the Discovery Act. The moving papers cite to no authority for such an order.

The authorized methods of discovery are: oral and written depositions, interrogatories to a party, inspections of documents, things and places, physical and mental examinations, requests for admissions, and simultaneous exchanges of expert trial witness information. (Code Civ. Proc., § 2019.010.) The methods that may be used to obtain discovery from a nonparty are: an oral deposition, a written deposition, and a deposition for production of business records and things; the process by which a nonparty is required to provide discovery is a deposition subpoena. (Code Civ. Proc., § 2020.010; see also Code Civ. Proc., §§ 1985-1987, 2025.010, 2025.280; Evid. Code, § 1560-1564.)

An inspection demand or subpoena for documents seeks inspection of documents or things in the possession, custody, or control of a party or witness. (Code Civ. Proc., §§ 1987, subd. (b), 2031.010.) It is not a proper vehicle by which to compel a party to create a document; it presupposes the existence of the documents or things sought. (*Flora Crane Service, Inc. v. Superior Court* (1965) 234 Cal.App.2d 767, 784.) Thus, a demand for inspection or production of documents or a subpoena cannot be used to compel a party to create a document that does not exist (e.g., by compelling plaintiff to sign an authorization for release of records).

As the Discovery Act does not provide a procedure for compelling a party to sign a release form authorizing a medical provider to release records to another party, the motion should be denied.

Lack of Separate Statement

The subpoena seeks a very broad array of documents from Dr. Hellwig. But State Farm offers nothing by way of showing good cause for all of these records. Clearly the records fall under a right of privacy and psychotherapist-patient privilege. Waiver of privacy interests "encompasses only discovery directly relevant to the Plaintiff's claim and essential to the fair resolution of the lawsuit." (*Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1014.) The *Davis* court stated:

> Even when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must then be a careful balancing of the compelling public need for discovery against the fundamental right of privacy. [Citation.] **The scope of any disclosure must be narrowly circumscribed, drawn with narrow specificity, and must proceed by the least intrusive manner**.

(*Id.*, emphasis added.)

Rule of Court 3.1345(a)(5), requires a separate statement for any motion to compel production of documents at a deposition. Given the extremely broad scope of

the subpoena, the court is not comfortable granting the motion where there is no showing specific to all of the records sought. The motion is denied without prejudice because it does appear that production of some records from Dr. Hellwig would be warranted. State Farm may re-file the motion, or if timeliness would be an issue, serve another subpoena and start the process over again. If another subpoena is issued, the court suggests narrowing the scope of the records sought. Plaintiffs' requests to strike Denno's declaration and statements in State Farm's points and authorities are denied. No sanctions will be awarded at this time, but the issue may be raised again in the context of a future motion to compel.

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: KCK on 08/05/2020 .
(Judge's initials) (Date)

Tentative Rulings for Department 501

Tentative Rulings for Department 502

(19)

Tentative Ruling

Re: ***Producers Diary Foods, Inc. v. Aguilera***
Fresno Superior Court Case No. 20CECG00174

Hearing Date: August 6, 2020 (Dept. 502)

Motion: By plaintiff to deem request for admissions, set no. 1, admitted by defendant Elizabeth Aguilera.

By plaintiff to deem requests for admissions, set no. 1, admitted by defendant Aurora Martinez.

Tentative Ruling:

To grant both motions. To order $60 in sanctions payable by defendant Elizabeth Aguilera to plaintiff. To also order $60 in sanctions payable by defendant Aurora Martinez to plaintiff. Sanctions are to be paid by August 27, 2020.

Explanation:

The Governor's pandemic orders did not stay the need to respond to discovery, nor did the Emergency Orders of the Judicial Council. The Court is required to grant the motions where responses substantially compliant with the Code are not served by the hearing. Code of Civil Procedure section 2033.280(b).

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 (Judge's initials) on 8/3/20 (Date).

(30)

Tentative Ruling

Re: ***County of Santa Cruz v. Bureau of Cannabis Control***
Superior Court No. 19CECG01224

Hearing Date: August 6, 2020 (Dept. 502)

Motion: Complaint for declaratory and injunctive relief

Tentative Ruling:

The court intends to continue the hearing to allow further briefing on the issue of ripeness. The hearing will be continued for approximately one month, to a date which is amenable to the parties.

The court acknowledges that plaintiffs filed a complaint for declaratory and injunctive relief. The court elects to treat the complaint as a writ of mandate.

Explanation:

The challenger of the validity of a regulation may bring a declaratory relief action against the state agency that adopted the regulation in accordance with the Code of Civil Procedure section 1060. (Gov't. Code, § 11350, subd. (a).) However, under the Code of Civil Procedure section 1060, a party seeking a declaration of rights and duties with respect to another may only do so in cases where there is an "actual controversy relating to the legal rights and duties of the respective parties." (Code Civ. Proc., § 1060.) Courts therefore should decline to exercise their power where a "declaration or determination is not necessary or proper at the time under all the circumstances." (Code Civ. Proc., § 1061.) Declaratory judgments and injunctive remedies are discretionary, and "courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." (*Pacific Legal Foundation v. Cal. Coastal Comm.* (1982) 33 Cal.3d 158, 171 ("*Pacific Legal*").)

"[A] basic prerequisite to judicial review of administrative acts is the existence of a ripe controversy." (*Pacific Legal Foundation v. Cal. Coastal Comm, supra*, 33 Cal.3d 158 at p. 169.) The ripeness doctrine prevents the courts from issuing purely advisory opinions or engaging in premature adjudication of abstract disagreements. (*Ibid*.) "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. [Citation.] It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts. [Citation]." (*Id*. at pp. 170-71.) "A controversy is 'ripe' when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made." (*Cal. Water & Telephone Co. v. County of L.A.* (1967) 253 Cal.App.2d 16, 22.) "[T]he ripeness doctrine is primarily bottomed on the recognition that judicial decision-making is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make

a decree finally disposing of the controversy." (*Pacific Legal Foundation v. Cal. Coastal Comm, supra*, 33 Cal.3d 158 at p. 170.)

Here, plaintiffs' challenge to California Code of Regulations, title 16 section 5416, subdivision (d) is not ripe under the two-pronged test set forth by the California Supreme Court in *Pacific Legal*, which calls on a court to evaluate (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. (*Pacific Legal Foundation v. Cal. Coastal Comm, supra*, 33 Cal.3d 158 at p. 171; see also *Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 540.) Under the first prong of the *Pacific Legal* test, the issues here are not yet appropriate for judicial resolution due to the hypothetical nature of plaintiffs' alleged injury. This is because some of the plaintiffs either do not have an ordinance regarding commercial cannabis delivery (*e.g.*, City of Ceres) or do not ban such delivery (*e.g.*, City of Angels Camp, City of Vacaville). (See plaintiffs' RJN Exh. 3, 13, 35.)

Defendant makes this point in opposition, but does not brief the issue of ripeness with regard to every plaintiff (*e.g.*, not every city is evaluated for standing – just a few examples are provided). On reply, plaintiffs concede the point (that not all of the cities have ordinances), but argue that the issue is ripe nonetheless. Plaintiffs' argue that depriving localities of their statutorily preserved local control through 5416, subdivision (d) *per se* damages California localities, *both* as to any present conflicting or inconsistent ordinance *and* as to any future ordinance, presently contemplated or not. This court does not find plaintiffs' argument compelling. Plaintiffs must have an ordinance in place which is contrary to California Code of Regulations, title 16 section 5416, subdivision (d), or there is no dispute.

Accordingly, the parties are ordered to brief the issue of ripeness with regard to each and every plaintiff and to submit such briefing according to the schedule agreed upon by the parties at the upcoming hearing. Plaintiffs that do not have standing are invited to withdraw. Plaintiffs that allege standing must submit evidence to show that they have an ordinance in place which is contrary to California Code of Regulations, title 16 section 5416, subdivision (d). Plaintiffs must also point to the exact place in record where the evidence is located (*e.g.*, volume, page number, line number). Plaintiffs who cannot establish standing will be dismissed.

The court notes that plaintiffs made representations with regard to ripeness, which are not supported by the evidence. In the complaint, plaintiffs allege: **"**5. Plaintiffs are cities and one county within the State of California. Plaintiffs have adopted ordinances and resolutions regulating—or prohibiting—commercial cannabis activity within their jurisdictions." (Complaint, ¶5.) In their trial brief, plaintiffs state, "Each Plaintiff alleges that it has adopted ordinances or resolutions regulating—or in some cases prohibiting—commercial cannabis deliveries within its jurisdiction." (Trial Brief, page 11, lines 10-12.) Plaintiffs are reminded that by "presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney . . . is certifying that to the best of the person's knowledge . . . the allegations and other factual contentions have evidentiary support." (Code Civ. Proc., § 128.7, subd. (b)(3).)

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 8/3/20 .
(Judge's initials) (Date)

(19)

Tentative Ruling

Re: ***Gonzales v. Bansal***
Fresno Superior Court Case No. 18CECG02044

Hearing Date: August 6, 2020 (Dept. 502)

Motion: by plaintiff for trial preference

Tentative Ruling:

To grant and keep trial date currently set.

Explanation:

Code of Civil Procedure section 36(b) states:

> "A civil action to recover damages for wrongful death or personal injury shall be entitled to preference upon the motion of any party to the action who is under 14 years of age unless the court finds that the party does not have a substantial interest in the case as a whole. A civil action subject to subdivision (a) shall be given preference over a case subject to this subdivision."

Subdivision (a) is for persons 70 years of age and older. Subsection (g) states:

> "(g) Upon the granting of a motion for preference pursuant to subdivision (b), a party in an action based upon a health provider's alleged professional negligence, as defined in Section 364, shall receive a trial date not sooner than six months and not later than nine months from the date that the motion is granted."

The Judicial Council Emergency Rules make clear that depositions were not halted by the pandemic, nor was litigation in general. They did permit email service of documents, and they permitted any party to a deposition to require that it be done via remote means. See Judicial Council Emergency Rules 11 and 12. The trial date was set in December of 2019 and the case is already more than two years old. The trial date set is appropriate chosen as the trial date under the preference statute.

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 8/3/20.
(Judge's initials) (Date)

Tentative Rulings for Department 503

(19)

Tentative Ruling

Re: ***Delao v. Lyons Magnus, Inc.***
Superior Court Case No. 16CECG02119
(Consolidated with Case Nos. 16CECG2225 and 16CECG02776)

Hearing Date: August 6, 2020 (Dept. 503)

Motion: Code of Civil Procedure section 384(b) Report and Review

Tentative Ruling:

To set a hearing on an order to show cause why Simpluris, Inc. shall not be ordered to refund the $2,486.05 in excess costs it paid itself, and redistribute those funds to class members at its own expense. Hearing to be set on September 16, 2020, at 3:30 p.m., in Department 503, with a response filed no later than August 31, 2020.

To continue the hearing on amendment of judgment under Code of Civil Procedure section 384(b) to that date and time.

Explanation:

The Third Amended Settlement Agreement caps costs for administration at $25,000. Simpluris, Inc.'s report states it paid itself $27,486.05 for its administration services. The Third Amended Settlement Agreement called for the Court to retain jurisdiction to handle any disputes involving the Class Administrator's performance. Judgment was entered on the settlement on February 24, 2020.

The clerk is directed to serve a copy of this ruling on the Class Administrator, Simpluris, Inc., at 3194 Airport Loop Driver, Suite C, Costa Mesa, CA 92626, attention: Cassandra Cita.

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: KAG on 5/21/2020.
(Judge's initials) (Date)

(19)

Tentative Ruling

Re: ***Mercedes-Benz Financial Services v. Singh***
Superior Court Case No. 19CECG02711

Hearing Date: August 6, 2020 (Dept. 503)

Motion: By Plaintiff for Writ of Possession

Tentative Ruling:

To deny, without prejudice.

Explanation:

Orders permitting entry into property for the purpose of seizing an item cannot be issued absent satisfaction of probable cause requirements under the U.S. Constitution's Fourth Amendment. (*Blair v. Pitchess* (1971) 5 Cal.3d 258, 271; Code Civ. Proc. § 512.090, subd. (b).) The location must be precise and must be accurate. (Weil and Brown, Civil Procedure Before Trial (TRG 2020) § 9:812.) "[T]he court must be given facts sufficient to show that the information and the informant are credible and reliable." (6 Witkin, California Procedure (5th ed. 2020), Provision Remedies, § 256.)

Plaintiff's declaration states that all information available was reviewed, and it lists three different addresses for Defendant Bhalwinder Singh himself. One designates a suite number and another lists an apartment number. There are no facts establishing that the semi-tractor (rather than the defendant himself) is at, or could fit into, the three locations listed.

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: KAG on 5/21/2020.
(Judge's initials) (Date)

(19)

Tentative Ruling

Re: ***Alliant Credit Union v. Denissov***
Superior Court Case No. 19CECG02111

Hearing Date: August 6, 2020 (Dept. 603)

Motion: By Plaintiff for Default Judgment
Order to Show Cause as to Why Order for Writ of Possession Should Not Be Vacated

Tentative Ruling:

To grant judgment requested for possession, attorney's fees, and costs.

To vacate the order for a writ of possession, without prejudice to future requests.

Explanation:

Plaintiff's election of remedies cures the problems with its prior request for a default. Plaintiff makes no arguments as to why the order for a writ of possession, filed September 20, 2019, should not be vacated for failure to show good cause to believe the vehicle was located at the place designated.

The Court's September 20, 2019 order for writ of possession is therefore vacated, without prejudice to future requests which set forth the information required.

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: KAG on 7/31/2020.
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Touchstone v. Prescott***
Superior Court Case No. 19CECG00719

Hearing Date: August 6, 2020 (Dept. 503)

Motion: By Defendant Prescott for Summary Judgment
By Defendant Maxwell for Summary Judgment

Tentative Ruling:

To deny both defendants' motions for summary judgment. (Code Civ. Proc., § 437c.)

Explanation:

"The standard of care in a medical malpractice case requires that physicians exercise in diagnosis and treatment that reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of the medical profession under similar circumstances. [Citations.] ' "The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony [citations], unless the conduct required by the particular circumstances is within the common knowledge of the layman." [Citations.]' [Citation.]" (*Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 983–984; see also *Landeros v. Flood* (1976) 17 Cal.3d 399, 410.)

"California courts have incorporated the expert evidence requirement into their standard for summary judgment in medical malpractice cases. When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." (*Hutchinson v. United States* (9th Cir. 1988) 838 F.2d 390, 392; see also *Munro v. Regents of University of California, supra*, 215 Cal.App.3d at pp. 984-985.)

Here, defendants presented the declarations of qualified medical experts, who testified that defendants did not breach the standard of care with regard to their care and treatment of plaintiff, and did not cause his injuries. (See Macy Decl., ¶¶ 10-14; Hanscom Decl., ¶¶ 7-9.) Therefore, defendants have met their burden of showing that plaintiff cannot prevail on his medical negligence claim, and the burden shifts to plaintiff to present his own expert declaration stating that defendants breached the standard of care and caused his injuries.

In opposition,[1] plaintiff submitted the declaration of his medical expert, Dr. Diana Do, who is a board certified ophthalmologist and vitreoretinal surgeon. Dr. Do opines that both defendants breached the applicable standard of care when they failed to advise plaintiff after the cataract surgery of the risk that the displaced intraocular lens might cause his retina to become detached, and that leaving the displaced lens in his eye did in fact cause the retina to become detached. (Do Decl., ¶¶ 10-14.) Thus, plaintiff has submitted a qualified expert's declaration that raises triable issues of material fact as to the questions of breach and causation.

In their replies, defendants argue that Dr. Do's declaration lacks foundation and is inconsistent with the other evidence submitted by them, and is thus insufficient to establish any triable issues of material fact. However, the court overrules defendants' objections to the expert's declaration. Dr. Do has sufficiently explained the basis for her opinion that defendants breached the standard of care and caused plaintiff's injuries, since she states that defendants did not inform plaintiff of the danger posed by the displaced lens, which could float freely inside the eye and cause the retina to become detached. (Do Decl., ¶¶ 10-14.) The failure to remove the displaced lens from the eye eventually allowed the lens to damage the retina. (*Id*. at ¶ 14.)

Dr. Maxwell also argues that plaintiff's case is based on medical negligence rather than lack of informed consent, and thus Dr. Do's opinion that he breached the standard of care by failing to inform him of the danger posed by the displaced lens does not raise a triable issue of material fact with regard to the medical negligence claim. However, plaintiff's complaint clearly alleges that Dr. Maxwell and Dr. Prescott were negligent in that they failed to inform him of the danger posed by the displaced lens after the cataract surgery. (Complaint, ¶ 9.) Thus, plaintiff's expert's opinion is consistent with plaintiff's allegations and raises a triable issue of material fact with regard to whether defendants breached the standard of care.

Dr. Maxwell also points out that plaintiff was informed of the risks of the procedure before he underwent the cataract surgery, including the risk that his retina might become detached. (Maxwell's Appendix of Evidence, p. 234.) He contends that this evidence shows that Dr. Do's statement that plaintiff was not informed of the risks of retinal detachment is simply wrong and inconsistent with the evidence, and therefore does not raise a triable issue of material fact.

However, while the evidence does appear to show that plaintiff gave informed consent before the cataract surgery, plaintiff's expert declaration raises a triable issue as to whether defendant should have warned plaintiff after the surgery that the displaced lens might cause his retina to become detached and that he might want to undergo a further procedure to remove the lens. In other words, once the cataract surgery was complete and the lens was left inside his eye, plaintiff had to make another decision

[1] Plaintiff's opposition was not entered into the court's computer docket until July 31, 2020, which is several days past the deadline for opposition to be filed. However, it appears that plaintiff's counsel attempted to file the opposition on time, but it was rejected by the clerk's office for unknown reasons. Defendants have not objected to the late opposition, and filed replies that argue the merits of the opposition. Thus, it appears that they have not been prejudiced by the late filing, as they were apparently served with the opposition in a timely fashion. Under these circumstances, the court considers the opposition despite its late filing.

about whether to undergo another surgery to remove the lens or leave it in place and hope it would not cause further problems. According to plaintiff's testimony, he was not informed by either Dr. Maxwell or Dr. Prescott that the lens might create a risk of retinal detachment, and in fact they told him that it was a significant and complicated procedure to remove the lens. Also, while Dr. Prescott testified that he did warn plaintiff of the risks posed by leaving the displaced lens in his eye, plaintiff testified that he was not informed of any such risks. (Plaintiff's Depo., at pp. 45:7-46:13, 48:6-17, attached as Exhibit "B" to Russell Decl. at ¶ 5.) Thus, there is a triable issue of material fact as to whether defendants breached the standard of care when they allegedly failed to fully advise plaintiff of the risks of leaving the lens in his eye.

Furthermore, while defendants contend that Dr. Do has not explained the causal link between the alleged failure to inform plaintiff of the risks of leaving the displaced lens in place and the resulting harm, plaintiff's expert has opined that the failure to remove the displaced lens caused plaintiff's retina to become detached. (Do. Decl., ¶ 14.) If defendants had warned plaintiff of the risk posed by the displaced lens, plaintiff could have chosen to undergo the additional procedure to remove the lens, which would have avoided the harm he suffered. Thus, there is a triable issue as to whether defendants' failure to warn of the risks posed by the displaced lens caused plaintiff's damages.

Consequently, the court denies both defendants' motions for summary judgment.

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: KAG on 8/3/2020.
(Judge's initials) (Date)