Tentative Rulings for May 19, 2022
Department 403

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.

_____

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

Begin at the next page

(34)

Tentative Ruling

Re: ***Ross Herman v. Jeff Davis***
Superior Court Case No. 21CECG02366

Hearing Date: May 19, 2022 (Dept. 403)

Motion: Defendants Motion to Compel Arbitration and Stay Current Action

Tentative Ruling:

To grant the motion to compel arbitration, and to stay proceedings pending arbitration of plaintiff's claims.

Explanation:

With a motion to compel arbitration, the moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. The party opposing the motion must then prove by a preponderance of evidence that a ground for denial of the motion exists (e.g., fraud, unconscionability, etc.). (*Rosenthal v. Great Western Fin'l Securities Corp.* (1996) 14 Cal.4th 394, 413-414; *Hotels Nevada v. L.A. Pacific Ctr., Inc.* (2006) 144 Cal.App.4th 754, 758; *Villacreses v. Molinari* (2005) 132 Cal.App.4th 1223, 1230.) There is a strong public policy in favor of arbitration agreements and "doubts concerning the scope of arbitrable issues are to be resolved in favor of arbitration." (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1278 (*quoting Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 323).)

In the case at bench, defendant Davis seeks to compel arbitration of the dispute that has arisen as a result of plaintiff Herman's withdrawal as a member of Turbo Spas LLC. The parties entered into an Operating Agreement in 2014 upon plaintiff's buy-in to 50% ownership and membership of Turbo Spas, LLC. Within the Operating Agreement is a provision stating: "It is agreed, In the event a dispute arises that the partners cannot resolve between themselves, then binding arbitration and/or mediation will be the means to settle the disagreement, not legal action through the courts or lawsuits." (Davis Decl., Exh. A.)

Pursuant to that provision, when disputes arose between the partners as to how the company should be managed, plaintiff demanded mediation of those disputes. (Complaint ¶ 13.) Defendant did not respond to the demand for mediation of these issues. (Complaint ¶ 15.) Between January and February 2021 it became clear to plaintiff that it would not be possible to continue the partnership. (Complaint ¶ 16.)

Plaintiff alleges the parties reached an agreement for a "buyout" of plaintiff's 50% ownership of the LLC and the breach of this Buyout Agreement gives rise to the complaint. (Complaint ¶¶ 17-21.) Plaintiff alleges this is a written agreement between the parties separate and apart from the Operating Agreement and is therefore not subject

to the arbitration provision. Plaintiff has not produced a copy of the executed Buyout Agreement with his complaint or in support of his opposition to this motion to compel arbitration.

Defendant contends the terms of the buyout were not finalized and, lacking a meeting of the minds, do not constitute a contract between the parties. Rather, the dispute in the complaint is related to the withdrawal of plaintiff from the LLC, an action governed by the LLC's Articles of Organization and related to the Operating Agreement wherein plaintiff's membership in the LLC was agreed upon. As such, the requirement to arbitrate and/or mediate this dispute as to the terms of plaintiff's withdrawal is subject to the arbitration provision. (*Ramos v. Superior Court* (2018) 28 Cal.App.5th 1042, 1052.)

After the filing of the complaint counsel for defendant advised plaintiff of the arbitration provision and requested the parties stay the action and pursue arbitration. (Chapman Decl. ¶ 4-5.) Plaintiff was not agreeable to the stipulation proposed. (Id. at ¶ 6.) Defendant has demonstrated the existence of a valid arbitration agreement and that the dispute regarding the terms of plaintiff's withdrawal from the LLC is covered by that agreement. Defendant has also demonstrated that plaintiff is unwilling to arbitrate the controversy.

Plaintiff has made no arguments that the arbitration provision is unenforceable but contends that by failing to mediate the dispute when demanded, defendant has waived his ability to demand arbitration. The complaint describes plaintiff's demand to mediate disputes regarding management of the LLC, not the terms of his withdrawal. (Complaint ¶ 13.) There is no evidence of plaintiff demanding to arbitrate or mediate the disputes that have arisen over the terms of his withdrawal from membership in the LLC. Defendant has not waived his right to enforce the arbitration provision in the parties' Operating Agreement to resolve the dispute described in plaintiff's complaint.

The motion to compel arbitration is therefore granted.

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 05/17/22.
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Megan Zupancic v. Stephen Labiak***
Superior Court Case No. 19CECG04425

Hearing Date: May 19, 2022 (Dept. 403)

Motion: Defendant's Demurrer and Motion to Strike Portions of the First Amended Complaint

Tentative Ruling:

To sustain, with leave to amend, defendant's demurrer to each cause of action, for failure to state sufficient facts to state a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

To grant, with leave to amend, defendant's motion to strike the general negligence cause of action listed on the First Amended Complaint, Judicial Council Form Item 10, box (b).

To deny defendant's motion to strike the legal malpractice cause of action listed on the First Amended Complaint, Judicial Council Form Item 10, box (f).

To grant, with leave to amend, defendant's motion to strike the portions of the First Amended Complaint referencing to Exhibits A and B, on the document titled "AMENDED COMPLAINT #1, Causes of Action, Negligence and Legal Malpractice" page 1, lines 21, 24 and 25.

To grant, with leave to amend, defendant's motion to strike the prayer for punitive damages on the First Amended Complaint. Judicial Council Form Item 14(a), box (2).

Plaintiff is granted 20 days' leave to file the third amended complaint. The time to file the third amended complaint will run from service by the clerk of the minute order. All new allegations in the third amended complaint are to be set in **boldface** type.

Explanation:

As a preliminary matter, since plaintiff is self-represented, the court will consider the document titled "AMENDED COMPLAINT #1, Causes of Action, Negligence and Legal Malpractice" ("Attachment to FAC") filed in conjunction with the First Amended Complaint on July 26, 2021, to be an attachment to the First Amended Complaint (collectively, the "FAC"). It is apparent by the face of the documents that this is the result that plaintiff intended.

Meet and Confer:

Code of Civil Procedure, sections 431.41 (demurrer) and 435.5 (motion to strike) provide that prior to bringing his motion, "the moving party shall meet and confer *in*

person or by telephone with the party who filed the pleading that is subject to the…" demurrer and motion to strike. (Code Civ. Proc., § 431.41, subd. (a); 435.5, subd. (a) [emphasis added].) The moving party is not excused from this requirement unless he shows that the plaintiff failed to respond to the meet and confer request or otherwise failed to meet and confer in good faith. (*Id*., subd. (a)(3)(B).)

Here, defendant asserts that upon receiving service of plaintiff's FAC on December 6, 2021, he made over ten attempts to call plaintiff at the number listed in the summons to conduct the meet and confer process, but to no avail. (Labiak, Decl., ¶ 2.) In support, defendant attaches screenshots of his call logs with an individual identified as "Zup" whose contact number reflects 765-5273, indicating that defendant made eleven outgoing calls to this individual from December 7, 2021 – December 20, 2021. (Reply, 1:25-28; 2:1.) Defendant asserts that this individual is plaintiff and points out that the contact number on the screenshots matches the contact number plaintiff has on file with the court. The court notes that the contact number 765-5273 indeed matches plaintiff's contact number on file with the court. On the other hand, plaintiff provides that she received no messages from defendant regarding the meet and confer for his demurrer and motion to strike. Since defendant declares that he has made numerous attempts to contact plaintiff by telephone and has shown that he made these attempts over the course of two weeks, the court finds that defendant has properly shown that plaintiff has failed to respond to his meet and confer attempts and is excused from this requirement.

The court expects both parties to adhere to the statutory requirement of meeting and conferring in the future.

The Opposition:

"All papers opposing a motion so noticed shall be filed with the court and a copy served on each party at least nine court days […] before the hearing." (Code Civ. Proc., § 1005, subd. (b).)" Here, plaintiff has failed to provide a proof of service indicating that her response to defendant's moving papers, (the "opposition") has been served in accordance with Code of Civil Procedure, section 1005. Moreover, defendant asserts that he did not receive the opposition until three court days prior to the original scheduled hearing for the instant demurrer and motion to strike. Since the court cannot determine whether plaintiff has adhered to the statute by providing timely notice of her opposition to defendant, the court will deem the opposition to have been untimely filed. However, the court will treat defendant's response to plaintiff's response (the "reply") on the merits as a waiver of the insufficient or defective notice. (*Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 7 [The court found that the parties' appearance at the hearing and his opposition to the motion on its merits constituted a waiver of the defective notice of motion.].)

Demurrer:

"Notices must be in writing, and the notice of a motion, other than for a new trial, must state when, and the grounds upon which it will be made, and the papers, if any, upon which it is to be based." (Code Civ. Proc., § 1010.) It must also provide "the nature of the order being sought and the grounds for issuance of the order." (Cal. Rules of Court, rule 3.1110, subd. (a).) Here, defendant's notice of demurrer seeks "an order sustaining a

general demurrer to the unlawful detainer complaint filed by [p]laintiff without leave to amend." (Notice of Demurrer, 1:21-23 [brackets added].) Notably, the court finds no such unlawful detainer complaint filed by plaintiff in this action. However, the court will treat plaintiff's opposition on the merits as a waiver of the insufficient or defective notice provided by the notice of demurrer. (*Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 7 [The court found that the parties' appearance at the hearing and his opposition to the motion on its merits constituted a waiver of the defective notice of motion.].)

- *Demurrer to First Cause of Action—Negligence:*

Defendant demurs to the first cause of action for negligence on the grounds that plaintiff fails to state a claim and for uncertainty.

The elements for negligence are: (1) a legal duty owed to the plaintiff to use due care; (2) breach of duty; (3) causation; and (4) damage to the plaintiff. (*County of Santa Clara v. Atlantic Richfield Co*. (2006) 137 Cal.App.4th 292, 318.) Defendant summarily contends that plaintiff has not alleged facts to satisfy any of these requirements.

Plaintiff has alleged insufficient facts to support her negligence claim against defendant. Although she alleges that she was attacked and bitten by two large dogs (Attachment to FAC, 1:18-19.), it is not known how these two dogs are at all related to defendant, i.e., whether he was the owner or caretaker of the dogs. If plaintiff intended to alleged this fact only to provide background for the underlying personal injury case that she hired defendant to represent her in, then plaintiff has alleged no facts to support her general negligence claim, since other than this fact, there are no facts indicating that plaintiff is alleging liability arising from conduct outside of the parties' attorney-client relationship, which is already addressed by plaintiff's legal malpractice cause of action. A cause of action which adds nothing to the complaint by way of fact or theory of recovery cannot withstand demurrer. (*Award Metals, Inc. v. Superior Court* (1991) 228 Cal.App.3d 1128, 1135 [internal citations omitted.].) In *Award Metals, Inc.*, the plaintiff alleged five causes of action, wherein the first and fifth contained allegations that were virtually identical, with the exception of one conclusory allegation that the defendant acted negligently.

Thus, the court intends to sustain the demurrer to the first cause of action for negligence, with leave to amend, as it is possible that plaintiff may be able to allege more facts to show that she has a negligence claim stemming from facts that are not already alleged in support of her legal malpractice cause of action.

Additionally, objections that a complaint is ambiguous or uncertain, or that essential facts appear only inferentially, or as conclusions of law, or by way of recitals, must be raised by *special demurrer*." (*Johnson v. Mead* (1987) 191 Cal.App.3d 156, 160 [emphasis in original; internal quotes omitted].) Here, defendant has raised only a general demurrer, which is inappropriate for the ground of uncertainty. Thus, the court does not consider the merit of defendant's uncertainty contentions.

- *Demurrer to Second Cause of Action—Legal Malpractice:*

Defendant demurs to the second cause of action for legal malpractice on the grounds that plaintiff fails to state a claim and the pleading is uncertain. Defendant summarily contends that plaintiff has not alleged sufficient facts to state a cause of action for legal malpractice and that plaintiff's allegations are false. Since defendant's argument as to the falsity of the allegations is inappropriate on demurrer, the court limits its analysis only to whether plaintiff has sufficiently pled facts to state a cause of action. (*Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 352, 359 [the demurrer admits the truth of all material facts properly pleaded.].) Additionally, for reasons explained above, the court does not consider the merit of defendant's uncertainty contentions.

To "establish a cause of action for legal malpractice[,] the plaintiff must demonstrate: (1) breach of the attorney's duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a proximate causal connection between the negligent conduct and the resulting injury; and (3) actual loss or damage resulting from the negligence." (*Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 661 [brackets added, internal citations omitted].)

Here, plaintiff alleges that defendant breached his duty of due care in his representation of her and that his actions fall below the standard of practice for professionals in the legal field. (Attachment to FAC, 2:12-17.) Specifically, the FAC alleges that defendant coerced plaintiff, by way of threatening to take her settlement monies, into settling immediately and dismissing the case. (Attachment to FAC, 1:25-28; 2:1-2.) It is well-known in the legal profession that the decision on any matter affecting the client's substantive rights, including settlement and/or dismissal decisions, is within the client's sole authority. (Rules Prof. Conduct, rule 1.2, subd. (a); *Marriage of Helsel* (1988) 198 Cal.App.3d 332, 339.) Thus, this allegation alone sufficiently alleges that defendant breached his duty of due care as an attorney.

The FAC also alleges that defendant lied to plaintiff regarding the distribution of plaintiff's settlement funds. Plaintiff alleges that defendant promised to immediately write her a check from his account for her portion of the settlement after she signed the settlement check allowing defendant to deposit the settlement check into his account. However, after depositing the settlement check into his own account, defendant instead informed plaintiff that he would only provide plaintiff with her portion of the settlement if she agreed to dismiss him from the case before trial. (Attachment to FAC, 2:3-10.) Since the complaint must be liberally construed, the court interprets this allegation to mean defendant would only provide her with her portion of the settlement so long as plaintiff agreed to terminate their attorney-client relationship prior to trial. (Code Civ. Proc., § 452; *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 601.)

Upon the request of a client, attorneys are required to promptly distribute any undisputed funds or other property in the lawyer's or law firm's possession that the client is entitled to receive. (Rules Prof. Conduct, rule 1.15, subd. (d)(7).) Additionally, while clients have the absolute right to terminate their lawyer's services at any time, it is widely recognized that the inverse is not true. Rather, even where grounds for termination exist, attorneys seeking to withdraw must comply with the procedures set forth in California Rules of Professional Conduct, rule 1.16. (Rules Prof. Conduct, rule 1.16.) Thus, by alleging

that defendant conditioned the distribution of plaintiff's portion of her settlement on the termination of their attorney-client relationship prior to trial, plaintiff has sufficiently pled facts to support her allegation that defendant breached his duty of due care as an attorney.

However, the FAC fails to allege the existence of any injury, much less any actual loss or damage resulting from or proximately caused by defendant's conduct. Thus, the court intends to sustain the demurrer to the second cause of action, with leave to amend to allege the facts necessary to establish a cause of action for legal malpractice.

Motion to Strike:

A motion to strike can be used to cut out any "irrelevant, false or improper" matters or "a demand for judgment requesting relief not supported by the allegations of the complaint." (Code Civ. Proc., § 431.10, subd. (b); see also Grieves v. Superior Court (1984) 157 Cal.App.3d 159, 164 [A motion to strike is the proper procedure to challenge an improper request for relief or improper remedy within a complaint.].)

Here, defendant moves to strike the following portions of the FAC: (1) cause of action one – negligence; (2) cause of action two – legal malpractice; (3) requests for damages; and (4) request for punitive damages.

- *General Negligence Claim:*

Defendant moves to strike the cause of action, general negligence, listed on the FAC, Judicial Council Form item 10, box (b). As previously discussed above, plaintiff has pled insufficient facts to support her general negligence claim. Accordingly, the court intends to grant defendant's request to strike the general negligence cause of action with leave to amend.

- *Legal Malpractice Claim:*

Defendant also moves to strike the cause of action, legal malpractice, listed on the FAC, Judicial Council Form item 10, box (f), because plaintiff has failed to check the box indicating "Other" cause of actions. Since the complaint is to be liberally construed and it is apparent by the face of the complaint that plaintiff intended to allege a legal malpractice cause of action against defendant, defendant's request is denied.

- *Exhibits Purportedly Attached:*

Defendant seeks to strike the portions of the FAC indicating that certain exhibits were attached. (Attachment to FAC, 1:21; 1:24-25.) As defendant points out, although the FAC references two separate sets of Exhibits A and B, no exhibits were actually attached or filed with the court. Thus, the court intends to grant defendant's request to strike the references to exhibits A and B.

- *Punitive Damages:*

Defendant contends that there are insufficient facts alleged in the complaint that would tend to show that he acted with the malice, fraud, or oppression necessary to support a prayer for punitive damages. (Civil Code, § 3294.) This argument is persuasive. Plaintiff must specifically plead the facts and circumstances which purportedly give rise to liability for punitive damages, which she has not done. (*Lehto v. Underground Constr.* Co. (1977) 69 Cal.App.3d 933, 944; see also *Blegen v. Superior Court* (1981) 125 Cal.App.3d 959, 963.) Thus, the court intends to grant defendant's motion to strike the request for punitive damages.

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 05/17/22.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Giana Gonzalvez v. Foster Farms, LLC***
Superior Court Case No. 20CECG01685

Hearing Date: May 19, 2022 (Dept. 403)

Motion: By Defendant Foster Farms, LLC for summary judgment

Tentative Ruling:

To deny. (Code Civ. Proc., § 437c, subd. (c).)

Explanation:

Burden on Summary Judgment

In ruling on a motion for summary judgment or summary adjudication, the court must "consider all of the evidence' and all of the 'inferences' reasonably drawn there from and must view such evidence and such inferences 'in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843.) In making this determination, courts usually follow a three-prong analysis: identifying the issues as framed by the pleadings; determining whether the moving party has established facts negating the opposing party's claims and justifying judgment in the movant's favor; and determining whether the opposition demonstrates the existence of a triable issue of material fact. (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493.)

The moving party bears the burden of showing the court that the plaintiff 'has not established, and cannot reasonably expect to establish, a prima facie case ... .' [Citation.]" (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.) Furthermore, "[t]o avoid summary judgment, admissible evidence presented to the trial court, not merely claims or theories, must reveal a triable, material factual issue. [Citations.] Moreover, the opposition to summary judgment will be deemed insufficient when it is essentially conclusionary, argumentative or based on conjecture and speculation." (*Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 11.) In essence, if the party opposing summary judgment relies on inferences, those inferences must be "reasonably deducible" from the evidence. (*Joseph E. Di Loreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 161.)

"Only when the inferences are indisputable may the court decide the issues as a matter of law.... An issue of fact becomes one of law only when 'the undisputed facts leave no room for a reasonable difference of opinion.'" (*Manuel v. Pacific Gas & Electric Co.* (2009) 173 Cal.App.4th 927, 937.) A court will liberally construe the evidentiary submissions of a party opposing summary judgment, but will strictly scrutinize the moving party's own evidence, "in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64.) However, "[c]ourts liberally construe declarations submitted in opposition to summary adjudication only to the extent the declarations are admissible." (*Esparza v. Safeway, Inc.* (2019) 36

Cal.App.5th 42, 57.) Finally, "an issue of fact can only be created by a conflict of evidence." (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807.) "It is not created by speculation or conjecture." (*Ibid*.)

Procedural Compliance

California Rules of Court rule 3.1350 sets forth several procedural requirements for motions for summary judgment or adjudication. In particular, such motions must be accompanied by a separate statement which identifies the motion's subject and supporting material facts. (See rule 3.1350(d).) The purpose of the separate statement is to provide due process, it "is not merely a technical requirement, it is an indispensable part of the summary judgment or adjudication process." (*Whitehead v. Habig* (2008) 163 Cal.App.4th 896, 902; *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316 [purpose of separate statement is to inform the opposing party of the evidence as basis for the motion].)

The essential issue of defendant's motion is whether plaintiff can maintain a theory of vicarious liability against it. Likewise, defendant's separate statement is framed around these same grounds. Accordingly, defendant's separate statement is sufficient to inform the opposing party of the evidence asserted as basis for the motion.

Independent Contractor/Employee

The moving party here – defendant Foster Farms, LLC – contends summary judgment is justified because it did not employ the van driver and thus cannot be vicariously liable for his conduct. That determination can be resolved as a matter of law only if that is the only conclusion reasonably drawn from the asserted evidence. (*Angelotti v. The Walt Disney Co.* (2011) 192 Cal.App.4th 1392, 1404; *Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 590.) In other words, if the undisputed evidence shows that the van driver was acting solely as an employee of E.M.V. when the subject accident occurred, the relationship between Foster Farms and the driver is that of an independent contractor, and Foster Farms is not vicariously liable for his conduct. (*Garcia v. W&W Community Development, Inc.* (2010) 186 Cal.App.4th 1038, 1049.)

The principal test of determining an employment relationship is the "'right to control over the manner and means of accomplishing the result desired.' [Citation.]" (*Isenberg v. California Employment Stabilization Commission* (1947) 30 Cal.2d 34, 39.) The " 'control'" test is the " 'most important'" or " 'most significant' consideration …." (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350 (*Borello*).)

Nevertheless, because "rigid" or "isolat[ed]" application of the control test is "often of little use in evaluating the infinite variety of service arrangements," the California Supreme Court has recognized several secondary factors to be considered in determining whether an alleged employer exhibited sufficient control over the alleged employee to constitute employment. (*Borello, supra*, 48 Cal.3d at pp. 350-351; *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 949.) These factors include: are "(a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work

is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee." (*Tieberg, supra,* 2 Cal.3d at p. 949.)

However, "the significance of the various factors varies depending upon the circumstances of the case." (*Missions Ins. Co. v. Workers' Comp. Appeals Bd.* (1981) 123 Cal.App.3d 211, 221 (*Missions*).) Accordingly, a tribunal errors when it emphasizes factors "all but irrelevant to the right to control the means by which the result … is achieved." (*Id*. at p. 221.) In essence, although the facts are often the same for an employee or independent contractor, the essential inquiry remains whether the alleged employer "controlled *the manner in which the desired result was to be achieved.*" (*Ibid*; *Millsap v. Federal Express Corp.* (1991) 227 Cal.App.3d 425, 431 [delivery driver found to be independent contractor where he supplied his own vehicle and was not instructed how to make deliveries or how to drive his car]; *Borello, supra*, 48 Cal.3d at p. 351, fn. 5 [noting that even the Legislature itself has recognized the " 'control of work details' is not necessarily the decisive test for independent contractorship," and has promulgated extensive statutory guidelines to aid the analysis]; *Tieberg, supra*, 2 Cal.3d at p. 953 [despite the weightiness afforded the parties' contract, the retention of control over the manner and means of the work was the determinate factor].)

Plaintiff relies on *Borello, supra*, 48 Cal.3d 341 where the California Supreme Court rejected a "share farmer" agreement which was advanced by a farm operation as creating an independent contractor, rather than an employment, relationship between the farm operation and cucumber harvestors. The Court's analysis, however, was framed in large part by the provisions of the Worker's Compensation Act, and that, "under the Act the 'control-of-work-details' test for determining whether a person rendering service to another is an 'employee' or an excluded 'independent contractor' must be applied with deference to the purposes of the protective legislation. The nature of the work, and the overall arrangement between the parties, must be examined to determine whether they come within the 'history and fundamental purposes' of the statute." (*Id*. at p. 353-354.) Although *Borello* conducted its analysis through the lens of worker's compensation, and thus it may not be as impactful as plaintiff suggests, it nevertheless began its inquiry with the foundational principle that an employment relationship is premised on the employer's right to control the manner and means of achieving the desired result. (*Id*. at p. 351.)

Foster Farms contends it cannot be vicariously liable for the van driver because it did not hire, train, compensate, manage or direct the van driver, nor the work of any other EMV employees, it did not own the van, and the parties' agreement specified that EMV was an independent contractor. (Mtn. at pp. 14:16-18; 20:17-19.) Foster Farms concludes that, like in *Missions, supra,* 123 Cal.App.3d 211, it did not exhibit control over the manner of the van driver's work such that an employment relationship was created.

The facts of *Missions*, however, are material distinguishable for those identified in the present motion. Unlike the alarm servicer in *Missions*, who had individually contracted

to service nonparty customers, here Foster Farms controlled both the instrumentalities integral to harvesting chickens at its farm facilities as well as those required to transport the harvested chickens to its processing facilities. Furthermore, although EMV had previously contracted to perform other operations at other farms, for several years it had only engaged with Foster Farms.

It is essentially undisputed that the van was transporting workers to a facility operated by Foster Farms to harvest chickens destined for a Foster Farms' processing and distribution facility. (Plaintiff's Disputed Material Facts, ¶¶ 28, 29.) EMV's president's deposition testimony stated how Foster Farms specified how many chickens to catch and provided the instrumentalities integral to the operation, i.e. forklifts, catching equipment, chicken cages, ventilation fans, and trailers. (Id. at ¶ 31[1].) Furthermore, it is essentially undisputed that Foster Farms, LLC was the entity that actually purchased the van, even though it was owned, insured, and maintained by co-defendant Foster Poultry Farms. (*Id*. at ¶¶ 36; 37.)

A trier of fact could reasonably infer that Foster Farms' involvement in farm operations, its provision of instrumentalities integral to those operations, and its ownership of the destination facility allowed it to exercise complete and authoritative control in achieving the desired result of the subject enterprise, which was to harvest and transport its livestock to its processing facility. (See *S.A. Gerrard Co. v. Industrial Acc. Commission* (1941) 17 Cal.2d 411, 414 [An employment relationship exists when the employer "exercises complete or authoritative contral, rather than mere suggestion of detail … the right of control is the determinative factor."].) Consequently, a triable issue of material fact exists such that summary judgment cannot be granted. (*Angelotti v. The Walt Disney Co., supra,* 192 Cal.App.4th at p. 1405.)

Therefore, Foster Farms, LLC's motion for summary judgment is denied.

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 05/17/22.
(Judge's initials) (Date)

[1] Defendant's objection to this evidence is overruled.

(24)

Tentative Ruling

Re: ***Christina Saldana v. Thomas Smith***
Superior Court Case No. 22CECG00067

Hearing Date: May 19, 2022 (Dept. 403)

Motion: Petition to Approve Compromise of Minor's Claim

Tentative Ruling:

To grant. Orders signed. No appearances necessary.

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 05/17/22.
(Judge's initials) (Date)