Tentative Rulings for May 24, 2022
Department 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.

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(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

Begin at the next page

(20) **Tentative Ruling**

Re: ***Harvey v. Watts***
Superior Court Case No. 20CECG03761

Hearing Date: May 24, 2022 (Dept. 503)

Motion: Demurrer and Motion to Strike

Tentative Ruling:

To sustain the demurrer to the complaint, without leave to amend. (Code Civ. Proc., § 430.10, subd. (e).) To take the motion to strike off calendar as moot in light of the ruling on the demurrer to the complaint. Defendant shall submit to the court a proposed judgment dismissing the action within five (5) days of service of the order.

Explanation:

In her complaint, plaintiff alleges two causes of action (negligence and intentional tort) against defendant Kate Watts, an instructor employed by State Center Community College District ("SCCCD"). Paragraph 5 of the complaint is where plaintiff is to check boxes indicating whether she is required to comply with a claims statute, and either has complied or is excused from complying. Plaintiff checked no boxes, indicating she is not required to comply and did not file any claim.

"[A] plaintiff must allege facts demonstrating or excusing compliance with the claim presentation requirement." (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1243.) "Otherwise, his complaint is subject to a general demurrer for failure to state facts sufficient to constitute a cause of action." (*Ibid*.) Under Government Code section 945.4, "no suit for money or damages may be brought against a public entity . . . until a written claim therefore has been presented to the public entity and has been acted upon . . . ."

No suit may be brought against a public entity until a written claim has been presented to the public entity and has been acted upon by the Board, or has been deemed to be have been denied by the Board. (Gov. Code, § 945.4.) The claim filing requirement applies to any lawsuit for damages against the State or its employees. (Gov. Code, §§ 911.2, 950.2, 945.4.)

In light of the allegation that defendant was a SCCCD employee and was sued for her actions as an SCCCD employee, plaintiff was required to comply with the Government Claims Act claims procedure. Plaintiff failed to plead such compliance, and accordingly is barred from bringing a suit against SCCCD and its employees. (Gov. Code, §§ 945.4, 950.2; *State v. Superior Court* (2004) 32 Cal.4th 1234, 1237.) Compliance with the claims presentation requirement is an element of a plaintiff's cause of action. (*Id.* at p. 1240.)

Moreover, facts subject to judicial notice show that plaintiff failed to comply with the Government Claims Act. (See *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1750

[taking judicial notice of absence of a claim in State Board of Control's records].) As established by the declaration of Cheryl Sullivan, Vice Chancellor, Finance and Administration at SCCCD, there is no record that plaintiff filed a claim against defendant.

Plaintiff is time-barred from presenting a claim because she was required to present a claim within six months of the date of damage. (Gov. Code, §§ 901, 911.2.) The statute of limitations that commences an action against a public employee on a rejected claim is the same as that which applies to actions against public entities. (See Gov. Code, § 950.6, subd. (b).) Plaintiff alleged that acts or omissions occurred between June 24, 2019 and August 4, 2019. Therefore, plaintiff needed to file a claim no later than February 4, 2020 (six months after her causes of action accrued). Since no claim has been filed (see Sullivan Decl.), the claims set forth in the complaint are time barred.

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 5/20/2022 .
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***SunPower Capital, LLC v. Mendez Jr.***
Superior Court Case No. 20CECG02010

Hearing Date: May 24, 2022 (Dept. 503)

Motion: By Plaintiff to Enforce Settlement

Tentative Ruling:

To grant. The court intends to sign the proposed judgment. The arbitration status conference is vacated.

Explanation:

Code of Civil Procedure Section 664.6, subdivision (a) provides: "If parties to pending litigation stipulate, in a writing signed by the parties outside of the presence of the court . . . , for settlement of the case . . . , the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." Due to the summary nature of the statute authorizing judgment to enforce a settlement agreement, strict compliance with its requirements is a prerequisite to invoking the power of the court to impose a settlement agreement. (*J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, 984.)

Here, plaintiff submits a writing, signed by plaintiff and defendant Domingo Mendez Jr. ("defendant"), made outside the presence of the court, and litigation is still pending (i.e., no dismissal has yet been filed). Also, the writing reflects that this court retains jurisdiction under section 664.6 to enforce the writing. (Friedman Decl., ¶ 2 & Ex. A.) The settlement agreement provides for the repayment of certain unpaid balances, under the following terms:

1. Defendant agrees to make monthly payments according to an attached schedule, following an initial payment of $1,500;

2. In the event of default, judgment shall be entered in favor of plaintiff and against defendant in the amount of the $29,074.94, less payments made, plus interest;

3. If defendant fails to pay plaintiff installments according to the attached schedule more than three days after the due date of the installment, and advisement of the failure is given in writing to defendant's counsel with five days to cure, defendant shall be deemed in default and judgment may be sought; and

4. Notice to defendant shall be through counsel Justin Vecchiarelli, via email at justin@properdefenselaw.com.

(*Ibid.*)

Plaintiff submits that, on March 1, 2021, defendant was required to make a payment of $1,500, and failed to do so. On March 3, 2021, and again on April 19, 2021, counsel for plaintiff served notices to defendant to cure as provided in the agreement. As of the filing of the present motion, defendant has failed to cure the default. (Friedman Decl., ¶ 4.) Thus, defendant is in default under the terms of the settlement, and plaintiff is entitled to seek judgment on the terms of the settlement.

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 5/20/2022 .
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Garcia v. Clawson Honda of Fresno***
Superior Court Case No. 21CECG03242

Hearing Date: May 24, 2022 (Dept. 503)

Motion: Compel Plaintiff's Responses to Form Interrogatories, Special Interrogatories and Request for Production of Documents; Sanctions

Tentative Ruling:

To grant defendant Clawson Honda of Fresno's motions to compel plaintiff to provide initial verified responses to form interrogatories, set one; special interrogatories, set one; and request for production of documents, set one. (Code Civ. Proc., §§ 2030.290, subd. (b); 2031.300, subd. (b).) Plaintiff is ordered to serve complete verified responses to all discovery set forth above, without objection, within 10 days of the clerk's service of the minute order.

To impose monetary sanctions in favor of defendant, and against plaintiff. (Code Civ. Proc., §§ 2023.010, subd. (d); 2023.030, subd. (a); 2031.300, subd. (c).) Plaintiff is ordered to pay $812.50 in sanctions to Yoka Smith LLP law firm within 30 days of service of this order.

Explanation:

A party that fails to serve a timely response to a discovery request waives "any objection" to the request. (Code Civ. Proc., §§ 2030.290, subd. (a); 2031.300, subd. (a); 2033.280, subd. (a).) The propounding party may move for an order compelling a party to respond to the discovery request. (Code Civ. Proc. §§ 2030.290, subd. (b); 2031.300, subd. (b).) In the case of requests for admission, the propounding party may move for an order that the truth of any matters specified in the requests be deemed admitted. (Code Civ. Proc., § 2033.280, subd. (b).)

Where responses are served after the motion is filed, the motion to compel may still properly be heard. (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 409.) Unless the propounding party takes the matter off calendar, the court may determine whether the responses are legally sufficient, and award sanctions for the failure to respond on time. (*Ibid*.)

In the case at bench, defendant served form interrogatories (set one), special interrogatories (set one), and requests for production of documents (set one) on plaintiff. To date, no responses have been served. The motions are therefore granted.

The court may award sanctions against a party that fails to provide discovery responses. (Code Civ. Proc., §2023.010, subd. (d).) The attorney declarations request a total of $2,737.50 in attorney fees and costs for filing the motions to compel interrogatories

and requests for production of documents. The requests are premised on the necessity of reviewing an opposition, preparing a reply and attending a hearing. Anticipating a hearing will not go forward, sanctions for all motions totaling $812.50 are awarded in favor of defendant. This amount reflects the hours spent preparing the three motions and the filing fees.

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 5/20/2022 .
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Oglesby, et al. v. Jawad, Inc., et al.***
Superior Court Case No. 21CECG02351

Hearing Date: May 24, 2022 (Dept. 503)

Motion: Motion for Leave to File Second Amended Complaint

Tentative Ruling:

To grant. (Code Civ. Proc., § 473, subd. (a)(1).)

Explanation:

Plaintiffs seek leave to amend to add an additional cause of action under the Magnuson-Moss Warranty Act.

Plaintiff has met the formalities required of a motion to amend the complaint and has given due notice to all appearing defendants. Motions for leave to amend the pleadings are directed to the sound discretion of the judge. "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading …." (Code Civ. Proc., § 473, subd. (a)(1); Code Civ. Proc., § 576.) Judicial policy favors resolution of cases on the merits, and thus the court's discretion as to allowing amendments will usually be exercised in favor of permitting amendments. This policy is so strong that denial of a request to amend is rarely justified, particularly where "the motion to amend is timely made and the granting of the motion will not prejudice the opposing party." (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.)

Even so, the court has discretion to deny leave to amend where the proposed amendment fails to state a valid cause of action (*Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 230), or the party seeking the amendment has been dilatory and the delay has prejudiced the opposing party (*Hirsa v. Superior Court* (1981) 118 Cal.App.3d 486, 490). No opposition was filed, so no facts were presented to warrant denial of plaintiffs' motion for leave to amend.

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 5/20/2022 .
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***In re Nora Gamez***
Superior Court Case No. 22CECG01312

Hearing Date: May 24, 2022 (Dept. 503)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. Order 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: KAG on 5/20/2022 .
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Anderson v. Western Health***
Superior Court Case No. 14CECG02461

Hearing Date: May 24, 2022 (Dept. 503)

Motion: Motion by Defendant Paul A. Griffin, M.D. for Summary Judgment

Tentative Ruling:

To grant summary judgment in favor of defendant Paul A. Griffin, M.D. Dr. Griffin is directed to submit to this court, within five days of service of this order, a proposed judgment of dismissal.

Explanation:

In this case, plaintiff Linda Anderson alleges a series of negligent actions by numerous healthcare providers, commencing with her having knee replacement surgery. From there, she suffered through various complications, many of which she alleges were either caused or worsened by the treatment she received from the various defendants. Plaintiff's husband, Lloyd Anderson, also sued for loss of consortium against each defendant, but he died on December 20, 2019. Dr. Griffin seeks summary judgment of Ms. Anderson's twenty-sixth cause of action for medical negligence and of Mr. Anderson's twenty-seventh cause of action for loss of consortium.[1]

According to the third amended complaint, plaintiff underwent a total right knee replacement at defendant Community Regional Medical Center on June 6, 2013. Plaintiff alleges that, over the course of approximately six months post-surgery, she experienced multiple complications related to her surgery. The severity of the complications was such that plaintiff visited multiple medical facilities to receive treatment. One such medical provider was Dr. Griffin. The twenty-sixth cause of action alleges that Dr. Griffin failed to "properly monitor, diagnose and treat [p]laintiff's pressure sore which led to an MRSA infection." (TAC ¶ 140.) Due to Dr. Griffin's negligence, plaintiff alleges she "sustained serious physical injury, including, but not limited to, and a MRSA infection down to the bone of the right leg, requiring more surgery and extremely painful medical treatment." (TAC ¶ 141.) Plaintiff alleges that she "was visited and examined by [d]efendant PAUL GRIFFIN M.D. her family physician while a patient at [d]efendant COALINGA REGIONAL MEDICAL CENTER d/b/a RALPH NEATE EXTENDED CARE CENTER on September 10, 2013, October 2, 2013, November 1, 2013 and November 14, 2013[.]" (TAC ¶ 23.) Dr. Griffin was employed by Coalinga Regional Medical Center. (TAC ¶ 5.) Plaintiff was released from Coalinga Regional Medical Center around November 25, 2013 to return home. (TAC ¶ 24.)

Declarations by expert witnesses are generally required when expert witness testimony would be required at trial, such as on the issue of the standard of care in a

[1] Given Mr. Anderson's death, use of the word "plaintiff" hereafter will refer to Ms. Anderson only.

professional malpractice case. (See, e.g., *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523.) A declaration stating an expert's opinion is admissible to support or defeat a summary judgment motion if the requirements for admissibility are established in the same manner as if the declarant was testifying at trial. When the defendant in a medical malpractice action moves for summary judgment and supports the motion with an expert declaration opining 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. (*Munro v. Regents of Univ. of Cal*. (1989) 215 Cal.App.3d 977, 983-985.)

In support of his motion, Dr. Griffin presents the expert declaration of Gary W. Steinke, M.D., who opines that Dr. Griffin met the applicable standard of care in his care and treatment provided to plaintiff (UMF No. 22), and that Dr. Griffin was not the proximate cause of plaintiff's damages/injuries (UMF No. 23). In opposition, plaintiff does not attempt to defeat summary judgment by presenting an expert opinion of her own to contradict the defense expert, but instead relies on evidentiary objections to invalidate Dr. Steinke's declaration. As a result, these objections are considered in detail below.

Evidentiary Objections

- *Objections 1-4 and 5*

These objections to Exhibits D-G are made on the ground that the exhibits are not authenticated by a custodian of records.

Writings must be *authenticated* before they, or secondary evidence of their contents, are received into evidence. (Evid. Code, § 1401.) "Authentication" means either: the *introduction of evidence* sufficient to sustain a finding that the writing is what the proponent claims it is; or "the establishment of such facts by *any other means* provided by law" (e.g., by stipulation or admissions). [Evid. Code, § 1400, emphasis added.) The Rutter Guide lists several shortcuts to authentication: stipulations; pleading admissions (i.e., admitting genuineness in an answer); requests for admissions; judicial notice (of court files and records, for instance); business records subpoena directed at non-party produced with affidavit of custodian of records; and self-authenticating records (such as notarized deeds or certified copies of public records). (Wegner, Fairbanks & Epstein, Cal. Practice Guide: Civil Trials and Evidence (TRG 2021) ¶¶ 8:319-8:325.)

Exhibit D, records of Deniz Baysal, M.D., are authenticated by the custodian of records. The objection is based on the fact that the records custodian only checked the box indicating she was authenticating billing records, not medical records. There are three pages of billing records following dozens of pages of medical reports. The critical fact is that the records custodian authenticated the records that followed the declaration. There is no suggestion that the records that follow the declaration are not exactly what was produced with the declaration. Whether those records are referred to as billing records or medical records is not determinative of their authenticity or status as business records. The objection to Exhibit D is overruled.

Exhibits E, F, and G are plaintiff's records from Clovis Community Medical Center, Community Regional Medical Center Fresno, and Hongshik Han, M.D., Inc. These records are not produced with custodial declarations, but with discovery verifications.

> Documents obtained in discovery in response to a request for production but must be presented in admissible form. This means the evidence must be (1) properly identified and authenticated, (2) admissible under the secondary evidence rule, (3) nonhearsay or admissible under some exception to the hearsay rule, and (4) a complete record, not selected portions of the document. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2013) ¶¶ 10:168-to 10:169, pp. 10-70 to 10-71.) (rev. # 1, 2013).) Unless the opposing party admits the genuineness of the document, the proponent of the evidence must present declarations or other "evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is." (Evid. Code, § 1400; see Evid. Code, §§ 1410 et seq. for methods of authenticating documents.)

(*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 855, emphasis added.)

The discovery verifications do not satisfy the criteria noted in *Serri*. "Although hospital and medical records are hearsay, they can be admitted under the business records exception to the hearsay rule." (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 742.) An affidavit by a custodian of records is sufficient to qualify under that exception if it states:

> (a) The writing was made in the regular course of a business;
> (b) The writing was made at or near the time of the act, condition, or event;
> (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
> (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

(Evid. Code, § 1271.)

None of the verifications contain this required information. Objections 2-4 to Exhibits E-G are sustained, rendering the evidence inadmissible. Accordingly, the portions of Dr. Steinke's declaration based on these exhibits are also inadmissible. (*Garibay v. Hemmat, supra,* 161 Cal.App.4th at p. 743.) Objection 5 is simply directed at the portions of defense counsel's declaration that submit Exhibits D-G. It is duplicative of objections 1-4, and will be sustained in part with regards to Exhibits E-G.

The sustaining of these objections is not fatal to the motion, and does not require disregard of Dr. Steinke's opinions. These records, and the facts summarized in Dr. Steinke's declaration from those records, present background information about plaintiff's treatment by other physicians. The reply correctly points out that none of these directly relate to the care and treatment provided to plaintiff by Dr. Griffin. Plaintiff makes no showing that the information contained in these records was central to Dr. Griffin's care and treatment of her. Accordingly, the sustaining of objections 2-4 does not

invalidate the rest of Dr. Steinke's declaration or his opinions regarding the care and treatment provided by Dr. Griffin.

- *Objections 6 and 7*

Plaintiff seeks to exclude the entire Steinke declaration, arguing that it is impossible to determine what portions of his opinions are based on admissible evidence as opposed to the inadmissible evidence. (See Opp., p. 6:23-27.) As noted above, however, the exclusion of limited background information about treatment by other medical providers does not invalidate Dr. Steinke's opinions about *Dr. Griffin's* treatment of plaintiff.

Plaintiff contends that Dr. Steinke's declaration is also based on records that are not before the court. Plaintiff argues the following: "According to Dr. Steinke's Declaration the opinions stated therein '*are based on my . . . review of [plaintiff's] medical records from . . . Golden Living Center Hy-Lond, Fresno Heart and Surgical Hospital, . . . and the transcript of the first session of the deposition of [plaintiff]*.' (Steinke Dec., ¶7 at pg. 3, line 24-p. 4, line 7.) He goes on to reference the deposition testimony again at ¶8 at pg. 4, lines 24-25: '*Based upon my review of the pertinent medical records and deposition testimony . . .*' Then, the records of Fresno Heart and Surgical Hospital at ¶8J (pg. 10, lines 8-10). Next, Dr. Steinke refers to the records of Humberto Villavazo MD relating to care received at the Wound Care Center at Hanford Community Hospital, which again were not included with the records filed in support of this motion. (Steinke Dec., ¶8T, pg. 15, lines 2-4.)" (Opp. p. 5:5-15, emphasis in original.)

While there is reference to reliance on records not produced, in the next sentence of paragraph 7, Dr. Steinke states that *pertinent* portions of plaintiff's medical records would be produced, and this statement does not reference records from "Golden Living Center Hy-Lond, Fresno Heart and Surgical Hospital, . . . and the transcript of the first session of the deposition of [plaintiff]." (Steinke Decl., ¶ 7.) Thus, while Dr. Steinke references having reviewed these records, there is no further reference to them and they do not appear to form a basis for his opinions. Objections 6 and 7 are overruled.

- *Objections 8 through 22*

These objections are directed at various portions of paragraph 8, where Dr. Steinke summarizes the medical care plaintiff received from various healthcare providers.

In light of the court sustaining the objections to Exhibits E-G, paragraphs 8F, H, I, J, Q, R and T are without foundation, and therefore objections 14-17, 20 and 22 are also sustained. But again, this is background information, the exclusion of which does not invalidate the remainder of Dr. Steinke's declaration. The specific basis for sustaining objections to the other portions of paragraph 8 is unclear. Those objections are overruled.

- *Objections 23 through 25*

These objections are directed at paragraphs 11, 12 and 14 of Dr. Steinke's declaration.

In paragraph 11, Dr. Steinke identifies the standard of care, and provides a brief summary of plaintiff's past medical care: "Following removal of [plaintiff's] right knee prosthesis and the placement of an antibiotic spacer, [plaintiff] was placed non-weight bearing in a knee brace. [Plaintiff] was then admitted to Coalinga Regional Medical Center/Ralph Neate Extended Care on July 26, 2013, where she received 24 hour care including continued IV antibiotic therapy for a septic right knee and wound care treatment. At the time of her admittance to Ralph Neate Extended Care, [plaintiff] was also being followed by her orthopaedic surgeon, who made recommendations regarding the care and treatment of [plaintiff's] wounds and right knee bracing." (Steinke Decl., ¶ 11.)

The orthopaedic surgeon is Dr. Baysal. As noted above, the objections to Dr. Baysal's medical records are overruled, and accordingly this evidence is properly considered. The objection to paragraph 11 is overruled.

In paragraph 12, Dr. Steinke offers and explains his opinion that Dr. Griffin did not breach the standard of care. He notes Dr. Griffin's reliance on plaintiff's orthopaedic surgeon (Dr. Baysal) for input, as well as information from and care provided to plaintiff at Coalinga Regional Medical Center/Ralph Neale Extended Care. (Steinke Decl., ¶ 12.) These medical center records are not subject to objections due to failure to submit or authenticate the records. There is no basis for sustaining an objection to paragraph 12. The objection is overruled.

In paragraph 14, Dr. Steinke provides his opinion on the issue of causation. He first describes the standard for establishing causation, and then concludes that "there was no negligent act or omission to act on the part of Dr. Griffin which was a cause of damage to [plaintiff]." (Steinke Decl., ¶ 14.) Again, the opinion will not be excluded simply because some documentation providing background facts relating to other physicians' care of plaintiff is not authenticated, as those records do not pertain directly to Dr. Griffin's care and treatment of plaintiff. The objection is overruled.

In conclusion, while a few evidentiary objections are sustained, they do not impact the outcome of the motion or the admissibility of Dr. Steinke's declaration as a whole or his opinions about Dr. Griffin's medical care.

Other Arguments Against Dr. Steinke's Declaration

Plaintiff contends that Dr. Steinke's declaration itself discloses the existence of triable issues of fact.

Plaintiff first notes that Dr. Steinke proclaims that "the standard of care for a physician providing medical care and treatment to an elderly patient in a skilled nursing setting is to round on the patient at least once a month, (or more frequently if indicated), and to respond to any information provided to the physician concerning the patient's care." (Steinke Decl., ¶11.) Plaintiff points out that Dr. Steinke states that plaintiff was at Golden Living Center Hylond from June 17, 2013 through July 14, 2013 (Steinke Decl., ¶ 8I, J), but Dr. Griffin did not round on plaintiff during this 28-day time period. Thus, plaintiff concludes that Dr. Griffin breached the standard of care outlined by Dr. Steinke above, and Dr. Steinke's declaration therefore raises a triable issue of material fact.

Initially, Dr. Steinke never states that Dr. Griffin did not round on plaintiff during that period. Plaintiff seems to be inferring as much because it is not mentioned in paragraphs 8I and J. But plaintiff submits no evidence showing that plaintiff was under Dr. Griffin's care at that particular point in time. The third amended complaint alleges that she was visited and examined by Dr. Griffin on September 10, 2013, October 2, 2013, November 1, 2013 and November 14, 2013. (TAC ¶ 23.) The third amended complaint does not allege that any action should have been taken by Dr. Griffin prior to those dates. Dr. Steinke's declaration reflects the same understanding:

> With regard to Dr. Griffin's involvement, it is my understanding that [plaintiff] is alleging in her Third Amended Complaint that Dr. Griffin failed to properly monitor, diagnose and treat her pressure sore on her right leg, while a patient at Ralph Neate Extended Care, during his examinations of [plaintiff] on September 10, 2013, October 2, 2013, November 1, 2013 and November 14, 2013, which led to an MRSA infection and further surgery. I also understand based on [plaintiff's] responses to Dr. Griffin's Special Interrogatories, Set One, that [plaintiff] is contending that Dr. Griffin failed to return telephone calls from the home health nurse regarding [plaintiff's] pressure sore during the time between November 15th and December 15, 2013.

(Steinke Decl., ¶ 9.)

Plaintiff takes issue with the fact that Dr. Griffin and Dr. Steinke rely on plaintiff's two-year-old third amended complaint and six-year-old discovery responses as setting forth plaintiff's theories. Plaintiff argues that, since Dr. Griffin failed to obtain any supplemental responses from her before filing this motion, he failed to elicit all current information/claims [p]laintiff may be making . . . ." (Opp., p. 8:12-16.)

Plaintiff's argument ignores the fact that there are <u>two</u> methods for a defendant to shift the burden to the plaintiff on summary judgment: (1) by relying on "factually insufficient discovery responses by the plaintiff to show that the plaintiff cannot establish an essential element of the cause of action sued upon" <u>or</u> (2) by using "the tried and true technique of negating ('disproving') an essential element of the plaintiff's cause of action." (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1598.) Here, Dr. Griffin is clearly using the latter technique: he contends that nothing in his care or treatment of plaintiff was negligent. The issue of updated discovery responses is irrelevant.

Moreover, it is the operative complaint that delineates the issues to be addressed in a summary judgment motion. (*Nieto v. Blue Shield of Calif. Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 73 ["It is well established that the pleadings determine the scope of relevant issues on a summary judgment motion."].) If plaintiff was to rely on new theories (which are not even presented in opposition to the motion for summary judgment), she should have supplemented her discovery responses and/or amended her complaint.

Plaintiff further argues,

> Dr. Steinke further declares that "*The standard of care for a physician providing medical care and treatment to an elderly patient that has*

> *developed a pressure sore on her right lower extremity and is receiving home health care services, is to respond to any information provided to him by the home health nurses concerning the patient's care, to evaluate the patient as is appropriate, and to issue orders as appropriate in response*." (Steinke Dec., ¶11 at pg 16, lines 9-16.) Dr. Steinke acknowledges Defendant had notice that [plaintiff] had an MRSA infection as of November 14, 2013, and that the pressure sore remained open (unhealed). (Steinke Dec., ¶8N, pg. 12, lines 9-13.) He also confirms that on November 29, 2013, Defendant was notified by home health nurses it was suspected that [plaintiff] had a urinary tract infection. (Steinke Dec., ¶8O at pg. 13, lines 7-9.) Yet, Defendant failed to return not one but two telephone calls placed to him by home health nurses on December 3, 2013. (TAC ¶190 pg. 58, lines 6-7.) Nurses attempted again to contact Defendant on December 6, 2013 about the worsening of the pressure sore. (TAC ¶190 pg. 58, lines 8-9.) Finally, on December 9, 2013, home health nurses reached Defendant about the worsening pressure sore. (Steinke Dec., ¶8O, pg. 13, lines 9-11.) Home health nurses had to contact Defendant 4 times and wait six days to get a response from Defendant about [p]laintiff's worsening pressure sore. Defendant breached the standard of care described by Dr. Steinke "*to respond to any information provided to him by the home health nurses*" and Dr. Steinke's own declaration raises a triable issue of material fact.

(Opp., pp. 7:13-8:6, fn. omitted, emphasis in original.)

This argument does not raise a triable issue of fact. Plaintiff is referencing allegations that were stricken from the complaint after the court sustained the demurrer to the second amended complaint. If plaintiff cannot defeat summary judgment by relying on theories not alleged in the complaint (*Hutton v. Fidelity Nat'l Title Co.* (2013) 213 Cal.App.4th 486, 493), she certainly cannot expect the moving party to negate theories or allegations that were excised from the complaint. Moreover, a party may not rely upon his or her own pleadings as a factual source on a motion for summary judgment. (*Romak Iron Works v. Prudential Ins. Co.* (1980) 104 Cal.App.3d 767, 775; see also *Cayley v. Nunn* (1987) 190 Cal.App.3d 300, 306 [plaintiff cannot rely on complaint; defendant cannot rely on answer].) If plaintiff intended to rely on such facts to raise a triable issue of fact, she should have submitted evidence and an expert declaration relying on such facts to conclude that Dr. Griffin breached the standard of care.

Loss of Consortium Claim

If there is no professional negligence claim, there is no claim for loss of consortium either. "When a plaintiff has no cause of action in tort, his spouse has no cause of action for loss of consortium." (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1067, citations omitted.)

Dr. Griffin also contends that the loss of consortium claim fails because Mr. Anderson passed away, and the claim does not survive his death. Plaintiffs in the opposition request that the court dismiss the cause of action in light of Mr. Anderson's death.

Conclusion

The court finds that Dr. Steinke's declaration adequately addresses the claims made in plaintiff's complaint and discovery responses, and is sufficient to meet Dr. Griffin's burden of production. Even without some of the background information about the care that plaintiff received from other medical providers, the declaration includes all the detailed facts that the expert relied upon to conclude that Dr. Griffin met the relevant standard of care, and that nothing he did or did not do with his care of plaintiff caused or contributed to any of the injuries suffered by plaintiff. This met Dr. Griffin's burden of production on the motion, obligating plaintiff to present conflicting expert evidence. (*Munro v. Regents of Univ. of Cal*. (1989) 215 Cal.App.3d 977, 983-985.) Since plaintiff did not do so, and evidentiary objections to all critical information were overruled, summary judgment in favor of Dr. Griffin, as to the twenty-sixth and twenty-seventh causes of action of the third amended complaint, is 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: KAG on 5/23/2022 .
(Judge's Initials) (Date)