Tentative Rulings for February 7, 2023
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).)

If a remote appearance is requested and approved, it will be through Zoom. Please give the clerk a correct email address.

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

18CECG01290 ***Francisco Tapia v. Paul Blanco's Good Car*** **is continued to Wednesday, February 8, 2023, at 3:30 p.m. in Department 503**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

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(03)

Tentative Ruling

Re: ***Trew v. Clovis Unified School District***
Superior Court Case No. 22CECG01162

Hearing Date: February 7, 2023 (Dept. 503)

Motion: Defendants Clovis Unified School District, Kathy Chittum, and Matt Verhalen's Demurrer to Complaint and Motion to Strike Portions of the Complaint

Tentative Ruling:

To sustain the demurrer to all causes of action in the complaint, for failure to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) To deny leave to amend as to plaintiffs Leslie Trew and Najib Allabadi. To grant leave to amend as to plaintiff Zade Allabadi.

To grant the motion to strike the prayer for attorney's fees, as improperly alleged. (Code Civ. Proc., §§ 435, 436.) To deny leave to amend to seek attorney's fees.

Plaintiffs shall serve and file their first amended complaint within 10 days of the date of service of this order. All new allegations shall be in **boldface**.

To order plaintiffs to file an application for appointment of a guardian ad litem for Zade Allabadi, since he is a minor. (Code Civ. Proc., § 372.)

Explanation:

Guardian ad Litem for Minor Plaintiff: First of all, it does not appear that plaintiffs have obtained an order appointing a guardian ad litem for Zade Allabadi, who is a minor. Plaintiffs must file an application for a guardian ad litem order so that Zade can appear as a party to the action. Under Code of Civil Procedure section 372, subdivision (a), in any proceeding in which a minor or an incompetent person is a party, "that person *shall* appear ... by a guardian ad litem appointed by the court in which the action or proceeding is pending, or by a judge thereof, in each case." (Code Civ. Proc., § 372, subd. (a), italics added.) Thus, "[w]hen a minor is a party to an action, a guardian ad litem must be appointed for the minor as a matter of law." (*In re D.D.* (2006) 144 Cal.App.4th 646, 652–653, citation omitted.) Consequently, plaintiffs need to submit an application to appoint a guardian ad litem for Zade before he can proceed as a plaintiff in the action.

Demurrer: With regard to the negligence causes of action, specifically causes of action one to four[1], plaintiffs have failed to allege sufficient facts to support their claims.

[1] It is unclear why plaintiffs have not alleged one negligence claim against all four defendants instead of four separate causes of action. The claims are identical other than being against

The elements of a cause of action for negligence are (1) the existence of a duty of care owed by the defendant toward the plaintiff, (2) defendant's breach of duty, (3) proximate cause, and (4) resulting damage to plaintiffs. (*Thomas v. Stenburg* (2012) 206 Cal.App.4th 654, 662.)

Defendants contend that plaintiffs have not alleged sufficient facts to show that they owed a duty of care toward the plaintiffs, nor have they alleged any other facts to support the elements of the negligence claims. However, as defendants admit, under Education Code section 44807, teachers and principals in public schools owe a duty to supervise their students while they are at school. Plaintiffs have alleged that defendants, who are the Clovis Unified School District, Lincoln Elementary School[2], teacher Kathy Chittum, and Principal Matt Verhalen, had a duty to supervise their son, Zade Allabadi, who has special needs, to ensure that he did not wander off. (Complaint, ¶¶ 20-23.) Defendants were aware of Zade's special needs, but nevertheless failed to supervise him. (*Id*. at ¶¶ 23-24.) Zade wandered off the campus, and he was returned about ten minutes later by a private person not affiliated with the school. (*Id*. at ¶¶ 25-27.) Defendants failed to contact Zade's parents or the police while he was missing. (*Id*. at ¶ 28.)

Thus, plaintiffs have alleged sufficient facts to show that defendants owed them a duty to supervise Zade while he was on campus. (Education Code, § 44807.) They also allege facts showing that defendants breached that duty by failing to supervise Zade, which resulted in Zade wandering off campus for a short period of time until he was returned by a private person. However, they have failed to allege facts showing that there was any resulting harm to Zade or his parents due to the defendants' breach of their duty of care. Plaintiffs fail to allege any facts showing that Zade was injured in any way while he was off campus, or that he suffered any severe emotional distress during the time he wandered away. Plaintiffs allege that defendants failed to contact them or the police while Zade was missing, but without some actual harm to Zade during the time he was off campus, the failure to contact his parents or the police does not show that plaintiffs suffered any actual harm.

In their opposition, plaintiffs contend that they have alleged all of the required elements of negligence, and therefore the demurrer should be overruled. Yet plaintiffs simply recite the elements of negligence without any facts to show how the elements apply to the present case. While the facts alleged in the complaint support plaintiffs' claim that defendants owed them a duty of care and that they breached their duty, they fail to show that defendants' breach was the proximate cause of any harm to plaintiffs, or even that plaintiffs ever suffered harm from the alleged breach. Therefore, the court intends to sustain the demurrer to the first, second, third, and fourth causes of action for negligence.

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different defendants. Plaintiffs should consolidate the first four causes of action into one cause of action.

[2] Defendants also contend that Lincoln Elementary School is not a proper defendant, as it is not a separate public entity. However, while it is likely that defendants are correct, they have not demurred on the ground of a defect or misjoinder of parties, so the court should disregard this contention.

Furthermore, the court intends to deny leave to amend the negligence claims as to Leslie Trew and Najib Allabadi, as they admit that they were not present on campus when Zade went missing and they were unaware of the fact that he was missing until after he had been returned. (Complaint, ¶¶ 28.) Thus, Trew and Allabadi apparently were not personally harmed by defendants' alleged negligence. While Zade might be able to state a claim if he was harmed while off campus, his parents have not shown that they were personally harmed when their son went missing. Therefore, the court intends to sustain the demurrer to the first through fourth causes of action without leave to amend as to Trew and Allabadi, but grant leave to amend as to Zade's claims.

Next, the court intends to sustain the demurrer to the negligent hiring, retention, supervision, and training claims, causes of action five through twelve.[3] The negligent hiring, retention, supervision and training claims have the same elements as any other negligence claim, namely a legal duty to use reasonable care, breach of that duty, proximate cause, and resulting harm to plaintiff. (*Phillips v. TLC Plumbing, Inc*. (2009) 172 Cal.App.4th 1133, 1139.) However, when alleging a claim against an employer based on the employee's unfitness, the plaintiff must also allege that the employer knew or should have known of the employee's unfitness or incompetence, that the employee's unfitness created a particular risk or hazard, and that the particular harm materialized. (*Ibid*.)

Here, plaintiffs allege that defendants Clovis Unified School District and Lincoln Elementary School hired, retained, trained, and supervised Chittum and Verhalen, that Chittum and Verhalen were unfit or incompetent to perform their jobs, that defendants knew or should have known that Chittum and Verhalen were unfit or incompetent, that their unfitness or incompetence created a particular risk to others, that their unfitness or incompetence harmed plaintiffs, and that defendants' negligence was a substantial factor in causing the harm. (Complaint, ¶¶ 55-102.) However, plaintiffs allege no facts to support their conclusory allegation that Chittum and Verhalen were unfit or incompetent to perform their jobs. They do allege that Chittum and Verhalen failed to supervise Zade, who wandered off campus for about ten minutes before being returned by a stranger, but the mere fact that Zade was left unsupervised does not necessarily show that Chittum or Verhalen were incompetent or unfit to do their jobs.

Also, plaintiffs have not alleged any facts showing that defendants' allegedly negligent hiring, retention, training or supervision of Chittum and Verhalen caused any actual harm to plaintiffs. The allegations of the complaint do not show that Zade was harmed in any way during the brief period when he wandered off campus, and it appears that he was returned to the school unharmed. Nor have plaintiffs alleged any facts showing that Zade suffered any severe emotional distress as a result of his brief departure from the campus. Therefore, plaintiffs' claims for negligent hiring, retention, supervision, and training are inadequately alleged and fail to state valid causes of action. As a result, the court intends to sustain the demurrer to the fifth through twelfth causes of action for failure to state a claim.

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[3] Again, it is not clear why plaintiffs needed to allege so many separate causes of action here. The claims could have been alleged as one or two causes of action, rather than alleging them separately as to each defendant.

Moreover, the court intends to deny leave to amend as to Trew and Allabadi, as they have not alleged any facts showing that they were personally harmed by defendants' alleged negligence, and it appears that they were not present at the time of the incident and thus were not harmed. On the other hand, the court intends to grant leave to amend as to Zade, since he may be able to allege further facts showing that he suffered some harm as a result of being allowed to wander off campus.

Finally, the court intends to sustain the demurrer to the thirteenth through sixteenth causes of action[4] for negligent infliction of emotional distress. "'[The] *negligent* causing of emotional distress is not an independent tort but the tort of *negligence* ....' 'The traditional elements of duty, breach of duty, causation, and damages apply.'" (*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 588–589, citations omitted, italics in original.) A plaintiff may state a claim for emotional distress if the plaintiff suffered direct physical or emotional harm due to defendant's negligence (a so-called "direct victim" claim), or based on witnessing harm to a close family member that causes the plaintiff to suffer severe emotional distress (a so-called "indirect victim" or "bystander" claim). (*Id*. at p. 589.) The emotional distress suffered by the plaintiff must be so severe and enduring that no reasonable person could be expected to endure it. (*Bogard v. Employers Causalty Co*. (1985) 164 Cal.App.3d 602, 617-618.)

In the case of a claim for bystander emotional distress, the California Supreme Court in *Thing v. La Chusa* (1989) 48 Cal.3d 814 held that "a plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances." (*Id*. at pp. 667–668, footnotes omitted.)

In *Thing*, the California Supreme Court held that, where the plaintiff was not present at the scene of the accident where her son was injured, she did not observe the defendant's conduct, and she was not aware of her son's injury at the time it occurred, the plaintiff could not recover for negligent infliction of emotional distress. (*Id*. at p. 669.)

Likewise, in *Fife v. Astenius* (1991) 232 Cal.App.3d 1090, the Court of Appeal held that plaintiffs could not recover because they were not present at the moment that their relative was injured and did not contemporaneously perceive the injury, even though they arrived at the scene within seconds of hearing the impact. (*Id*. at pp. 1092-1093.) "*La Chusa* makes clear that recovery for NIED is possible only if a plaintiff is present at the scene of an accident and *is then aware* a family member is being injured. Recovery is precluded when a plaintiff perceives an accident but is unaware of injury to a family member until minutes or even seconds later. Therefore, the Fifes, even if considered present at the scene, cannot recover because they did not know Meghan was involved

[4] Again, there does not appear to be any reason why plaintiffs need to bring four separate claims for negligent infliction of emotional distress, which are identical other than the defendants against whom they are brought. Ideally, plaintiffs would allege one claim that covers all of the defendants.

in the accident at the time they heard the collision." *(Id.* at p. 1093, footnotes omitted, italics in original.)

Similarly, in *Bird v. Saenz* (2002) 28 Cal.4th 910, the California Supreme Court held that the plaintiffs, who were the children of the victim, could not recover for negligent infliction of emotional distress because they were not present at the time of the injury-producing event and they did not perceive the transection of their mother's artery at the moment it occurred. (*Id*. at p. 916.)

In the present case, while they title their negligent infliction claims "direct victim", plaintiffs Trew and Allabadi do not allege that they were personally harmed by defendants' alleged negligence. Instead, it appears that they are actually asserting indirect victim bystander claims based on their emotional distress at learning of the fact that their son wandered off campus for ten minutes before being returned by a stranger. However, they allege no facts showing that they were present at the time of the incident, or that they were contemporaneously aware of the fact that their son had wandered away at the time he was missing. Nor do they allege any facts showing that they suffered from the type of severe emotional distress needed to support a claim for negligent infliction of emotional distress. As a result, they have not stated a valid claim for negligent infliction of emotional distress under a bystander theory.

Nor does it appear that Trew or Allabadi can state a claim for bystander emotional distress, as they apparently admit that they were not present when their son went missing and they were not aware of the fact that he went missing until after he had already been returned. (Complaint, ¶ 28.) Thus, Trew and Allabadi have not stated a valid claim for negligent infliction of emotional distress, and it does not appear that they can cure the defect by further amendment. As a result, the court intends to sustain the demurrer to the thirteenth through sixteenth causes of action with regard to Trew and Allabadi, without leave to amend.

On the other hand, Zade appears to be alleging a direct victim claim based on his emotional distress after being allowed to wander away from the school. While he could potentially state an emotional distress claim under the circumstances, he has not alleged that he suffered any physical injuries or severe emotional harm during the brief time that he was off campus. To the extent that he alleges that he suffered "serious emotional distress", he has not alleged any facts showing that his distress was so severe and enduring that it constituted the type of severe emotional distress that would support a claim for negligent infliction of emotional distress. Zade alleges in conclusory fashion that he suffered "serious emotional distress", but he alleges no further facts to show that his emotional distress was so severe that no reasonable person could be expected to endure it. (*Bogard v. Employers Causalty Co*., *supra*,164 Cal.App.3d at pp. 617-618.) Therefore, Zade has not stated sufficient facts to support his claims for negligent infliction of emotional distress, and the court intends to sustain the demurrer to the thirteenth through sixteenth causes of action as to him. However, it is possible that Zade might be able to allege more facts to support his claims, so the court will grant leave to amend as to Zade only.

Motion to Strike: The court also intends to grant the motion to strike the prayer for attorney's fees from the complaint, without leave to amend. Under the "American Rule",

a party can only recover their attorney's fees when a statute or contract provides for such fees. (Code Civ. Proc., § 1021.) Attorney's fees are generally not recoverable in negligence or tort actions, unless there is a statute that provides for them. (*Oakes v. Progressive Transportation Services, Inc*. (2021) 71 Cal.App.5th 486, 506.) A motion to strike will lie where a party improperly seeks attorney's fees that are not authorized by a statute or contract. (Code Civ. Proc., §§ 435, 436.)

Here, plaintiffs have alleged 16 causes of action, but all of their claims are based on various types of negligence. Plaintiffs have not alleged any contractual or statutory basis for their prayer for attorney's fees. Therefore, plaintiffs' request for attorney's fees is improper and will be stricken from the complaint.

In their opposition, plaintiffs contend that their request for attorney's fees is proper under either the "common fund" exception or the "tort of another" doctrine. However, neither of these exceptions apply to the present case.

The "common fund" exception states that "one who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits, may require those passive beneficiaries to bear a fair share of the litigation costs." (*Quinn v. State of California* (1975) 15 Cal.3d 162, 167.) Here, however, plaintiffs have not sought to create a "common fund" that would benefit anyone other than themselves. They seek to recover damages against defendants that would be paid directly to them to compensate them for their alleged injuries. No other third parties would benefit if plaintiffs prevail on their claims. Plaintiffs have not explained how their claims would create a common fund for the benefit of others that would justify allowing them to recover their fees out of the fund. Thus, the "common fund" exception to the rule against recovery of attorney's fees does not apply here.

Nor does the "tort of another" doctrine apply. Under the "tort of another" doctrine, "[a] person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred." (*Prentice v. North Am. Title Guaranty Corp., Alameda Division* (1963) 59 Cal.2d 618, 620, citations omitted.) The Supreme Court in *Prentice* noted that section 1021 forbids an award of attorney's fees in ordinary two-party tort actions. (*Ibid*.) However, '[t]he section is not applicable to cases where a defendant has wrongfully made it necessary for a plaintiff to sue a third person. In this case we are not dealing with 'the measure and mode of compensation of attorneys' but with damages wrongfully caused by defendant's improper actions." (*Id*. at p. 621, citations omitted.)

Here, plaintiffs were not forced to bring suit to protect their interests and incur attorney's fees because of the tort of a third party. Instead, they are suing defendants for alleged torts that defendants themselves committed. Plaintiffs have not alleged that any third party committed a tort against them that forced them to sue defendants and incur attorney's fees. The facts in the complaint show that this is an ordinary two-party negligence case, and thus attorney's fees are not available here. Therefore, the court intends to grant the motion to strike the prayer for attorney's fees from the complaint. Furthermore, plaintiffs have not shown that there is any possibility that they could amend

the complaint to cure the defect in the attorney's fee prayer, so the court will deny 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: jyh on 2/3/23.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Ramon Avila v. City of Fresno***
Superior Court Case No. 20CECG03751

Hearing Date: February 7, 2023 (Dept. 503)

Motion: By Defendant to Deem Admissions Admitted and Request for Monetary Sanctions

Tentative Ruling:

To deny the merits of the discovery motion as moot.

To impose monetary sanctions in the amount of $562.50 in favor of defendant and against plaintiffs payable within 30 days of service of this order, unless defense counsel agrees to installment payments. (Cal. Rules of Court, rule 3.1348(a).)

Explanation:

Defendant filed this motion on November 28, 2022. The oppositions both attach responses to the subject requests for admissions, and defendant's reply acknowledges that responses were thereafter received (three months late). Accordingly, in light of the responses served the court denies the merits of the instant motion as moot. (See *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 409; *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 778.)

Furthermore, although the reply also contends that plaintiffs' responses are deficient because they have not addressed form interrogatory 17.1, this motion only concerned the two requests for admissions served to each plaintiff on September 13, 2022, and the form interrogatories served in a separate discovery request in November 2021 did not check the box for form interrogatory 17.1. (See Jeffcoach, Decls. filed July 7, 2022, Ex. A.)

The court may proceed to award sanctions even where the merits of a motion to compel are moot. (Cal. Rules of Court, rule 3.1348(a); *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants*, *supra*, 148 Cal.App.4th at p. 409; Code Civ. Proc., § 2033.280, subd. (c) [imposition of sanctions mandatory as to failure to timely serve responses to requests for admissions]; *Cornerstone Realty Advisors, LLC v. Summit Healthcare Reit, Inc.* (2020) 56 Cal.App.5th 771, 790 ["Reasonable expenses may include attorney fees, filing fees, referee fees, and other costs incurred."].)

Plaintiffs served responses only after plaintiff filed this motion. Accordingly, plaintiffs' untimely responses necessitated this motion and monetary sanctions are mandatory. (Code Civ. Proc., § 2033.280, subd. (c).) Furthermore, despite plaintiffs'

generalized claim of "not fully understanding the proceedings," there is no concrete explanation offered for their failure to respond to defense counsel's meet and confer efforts. The court therefore award sanctions totally in the amount of $562.50, which represents 1.5 hours (@$375/hr.) of attorney time incurred in preparation of the motion (per court records, defendant was credited an exemption from the filing fee).

Should plaintiffs request oral argument forcing Defendant's counsel to appear and prepare for the hearing, the court will likely raise the sanction amount to the full hourly expenditure amount requested in the motion to compensate for the extra time. Plaintiffs shall pay the monetary sanctions to defense counsel within 30 days from the date of this order, unless defense counsel is agreeable to different terms in light of plaintiffs' claims of hardship (the court is without authority to order payment terms in this context).

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: jyh on 2/3/23.
(Judge's initials) (Date)