**Tentative Rulings for May 9, 2024**
**Department 502**

**For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)**

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**There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)**
***The above rule also applies to cases listed in this "must appear" section.***

**21CECG00315** ***GPH Fresno LP v. William-Foster Group LLC*** **(Dept. 502)**

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

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**(Tentative Rulings begin at the next page)**

# Tentative Rulings for Department 502

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(36)

**Tentative Ruling**

Re: ***Janette Peters v. Kristina Dickens***
Superior Court Case No. 23CECG02959

Hearing Date: May 9, 2024 (Dept. 502)

Motion: by defendant to Strike Portions of the Complaint

**Tentative Ruling:**

To grant the motion to strike, with leave to amend. (Code Civ. Proc., § 436.) The portions of the complaint regarding plaintiffs' request for punitive damages, specifically, page 4, paragraph 16; page 4, paragraph 17; page 5, paragraph 22; pages 5-6, paragraph 23; and page 7, line 15, are stricken.

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

**Explanation:**

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., § 436.) A motion to strike is the proper procedure to challenge an improper request for relief, or improper remedy, within a complaint. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166-167.)

Defendant claims that there are insufficient facts to support a claim for punitive damages. With respect to punitive damage allegations, mere legal conclusions of oppression, fraud or malice are insufficient (and hence improper) and therefore may be stricken. (*G.D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 29-30.)

Here, plaintiffs allege that defendant consumed alcoholic beverages to excess, knew the risks of driving while intoxicated, and drove while under the influence at an excessive rate of speed, causing her to crash into the vehicle that plaintiffs were the driver and passenger in.

Plaintiffs may recover punitive damages against a defendant where the defendant's conduct in driving while intoxicated caused the plaintiff's injuries. (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 896-897.) In *Taylor*, the California Supreme Court stated, "we have concluded that the act of operating a motor vehicle while intoxicated may constitute an act of 'malice' under section 3294 if performed under circumstances which disclose a conscious disregard of the probable dangerous consequences." (*Id.* at 892.) Thus, the Supreme Court found that a plaintiff may recover punitive damages against a drunk driver, even if the driver did not intend to cause harm to the plaintiff.

> There is a very commonly understood risk which attends every motor vehicle driver who is intoxicated. [Citation.] One who wilfully consumes alcoholic beverages to the point of intoxication, knowing that he thereafter must operate a motor vehicle, thereby combining sharply impaired physical and mental faculties with a vehicle capable of great force and speed, reasonably may be held to exhibit a conscious disregard of the safety of others. The effect may be lethal whether or not the driver had a prior history of drunk driving incidents.

(*Id*. at 896-897.)

The plaintiffs in *Taylor* alleged that the defendant had a history of drunken driving and arrests for drunk driving, and was actually on probation for driving while intoxicated when he was involved in the accident that formed the basis for the plaintiff's claim. Yet the Supreme Court noted in its opinion that a plaintiff did not have to allege any prior history of drunk driving, arrests for DUI, or accidents caused by defendant's drinking and driving in order to obtain punitive damages.

> Certainly, the foregoing allegations may reasonably be said to confirm defendant's awareness of his inability to operate a motor vehicle safely while intoxicated. Yet the essence of the Gombos and present complaints remains the same: Defendant became intoxicated and thereafter drove a car while in that condition, despite his knowledge of the safety hazard he created thereby. This is the essential gravamen of the complaint, and while a history of prior arrests, convictions and mishaps may heighten the probability and foreseeability of an accident, we do not deem these aggravating factors essential prerequisites to the assessment of punitive damages in drunk driving cases.

(*Id.* at 896.)

Thus, according to the Supreme Court in *Taylor*, the simple act of operating a motor vehicle while intoxicated is enough to show conscious disregard for the rights and safety of others. (*Id.* at 896-897.)

However, defendant points out that the Legislature amended Civil Code section 3294, subdivision (a) in 1987, after the *Taylor* and *Dawes* decisions, to require a plaintiff seeking punitive damages to prove by clear and convincing evidence that defendant was guilty of "despicable conduct." (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1211.) Thus, plaintiff must not only prove that defendant acted with conscious disregard for the rights and safety of others, but also that defendant acted in a manner that is "base", "vile", or "contemptible." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725.) "As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*Ibid.*, internal citations omitted.)

Thus, merely showing that a defendant acted with reckless disregard for the safety of others is not enough. The defendant's conduct must also be despicable. "'... so vile,

base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.' " (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1210, internal citations omitted.) In *Lackner*, the Court of Appeal found that a snowboarder who accidently struck a skier could not be held liable for punitive damages, as there was no evidence that he acted intentionally or that his conduct was despicable. (*Id*. at 1210-1213.) However, *Lackner* was decided on summary judgment, not on a demurrer or motion to strike, so it is not necessarily helpful in analyzing the allegations needed to state a valid claim for punitive damages, as opposed to the evidence needed to defeat a summary judgment motion.

Here, while plaintiffs will ultimately need to prove their allegations of malice by clear and convincing evidence of despicable conduct, at the pleading stage it is sufficient to allege that defendant acted with conscious disregard for the rights and safety of others by willfully driving under the influence with knowledge that such conduct posed an unreasonable danger to others.

In the present case, plaintiffs have not alleged any specific facts to support their punitive damage claim, other than some conclusory allegations that defendant willfully drove while intoxicated and with knowledge of the risk that her conduct would injure others. Plaintiffs allege no *facts* showing that defendant was aware of the dangers posed by driving under the influence, and that she chose to drive while intoxicated despite those dangers. On opposition, plaintiffs indicate that they are able to amend the complaint to allege facts sufficient to plead a claim for punitive damages. Therefore, the motion to strike is granted with 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: KCK on 05/07/24.**
(Judge's initials) (Date)

(36)

**Tentative Ruling**

Re: ***Maria Gomez v. Austin Cortez***
Superior Court Case No. 21CECG01229

Hearing Date: May 9, 2024 (Dept. 502)

Motions: (1) by Defendants to File Late Memorandum of Costs; and
(2) by Plaintiff to Strike Defendants' Memorandum of Costs or, in the alternative, to Tax Costs;

**Tentative Ruling:**

To grant defendants' motion to file a late memorandum of costs. (Code Civ. Proc., § 473, subd. (b).)

To deny plaintiff's motion to strike the entirety of defendants' memorandum of costs, and to grant plaintiff's alternative motion to tax costs in the amount of $19,450. (*Ladas v. Calif. State Auto. Assn*. (1993) 19 Cal.App.4th 761, 774.)

**Explanation:**

Untimely Filing

"A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of service of the notice of entry of judgment or dismissal by the clerk under Code of Civil Procedure section 664.5 or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first." (Cal. Rules of Court, rule 3.1700(a)(1).)

The time limit is mandatory and failure to timely file and serve a cost bill may result in waiver of costs. (*Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 Cal.App.3d 924, 929.) However, the trial court has discretionary power to grant relief under Code of Civil Procedure section 473, subdivision (b) for mistake, inadvertence, surprise, and excusable neglect. (*Soda v. Marriott* (1933) 130 Cal.App.589, 592-593 citing *Coast Electric Service, Inc. v. Jensen* (1931) 111 Cal.App.124 and *Dow v. Ross* 90 Cal.562.)

"The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." (Code Civ. Proc., § 473, subd. (b).) "The trial court has a reasonable discretion in determining the necessities and the reasonableness of each request for relief as well as determining the reasonableness of the time within which relief is asked." (*Soda v. Marriott* (1933) 130 Cal.App. 589, 593.)

Here, it is undisputed that defendants are the prevailing party in this action. On August 9, 2023, defendants served the Notice of Entry of Judgment to plaintiff by electronic mail. (Hergenroether Decl., ¶ 4, Exh. B.) However, it was not until September

28, 2023 that defendants filed their Memorandum of Costs, and plaintiff filed its motion to strike the costs bill in its entirety, or in the alternative, to tax the line items related to Dr. Paul Kaloostian's expert witness fees. Defendants concede that the filing was untimely, and move for relief under Code of Civil Procedure, section 473, subdivision (b).

Accordingly, at issue, is whether defendants have made a sufficient showing of a mistake, inadvertence, surprise, and/or excusable neglect warranting grant of relief from the statutory timeframe for filing of the costs memorandum.

The defense counsel formerly in charge of the case, Eric V. Grijalva, who filed the motion for relief but has since left the firm, submits a declaration indicating that on June 22, 2023, his assistant suddenly ended her employment relationship with the firm. (Grijalva Decl., ¶ 6.) He indicates that he was completely caught off guard as he was suddenly responsible for his own calendar and scheduling events that his assistant would normally handle on his behalf. He was also searching for a new assistant during this time. (*Id*., at ¶¶ 7-8.) Mr. Grijalva prepared and submitted the Trial Judgment on Special Verdict on June 30, 2023. Judgment was entered on July 10, 2023. (*Id*., at ¶¶ 8-9.) On that same day, his new assistant began her employment with the firm. (*Id*., at ¶ 10.) On August 9, 2023, Mr. Grijalva asked his new assistant to file and serve the Notice of Entry of Judgment. The Notice of Entry of Judgment was served on August 9, 2023, and filed on August 10, 2023. (*Id*., ¶¶ 13-15.) During that time, Mr. Grijalva was not aware that his new assistant did not know the proper method of calendaring due dates using the firm's calendaring program. Mr. Grijalva also indicates that he did not independently calendar the deadline to file the costs memorandum, as he had become reliant on the firm's calendaring program. As a result, the deadline to file the Memorandum of Costs was not placed on Mr. Grijalva's calendar. (*Id*., ¶¶ 17-19.)

He further indicates that he realized that the Memorandum of Costs was untimely on September 29, 2023, when he received an email from plaintiff's counsel informing him so, thereby prompting his filing of the motion for relief on October 16, 2023. (*Id*., ¶¶ 20-21.)

It should be noted that under ordinary circumstances, relief pursuant to Code of Civil Procedure, section 473, subdivision (b) is mandatory when an attorney affidavit of fault is submitted, which Mr. Grijalva has done. Although no party has provided any authority to indicate whether the relief is mandatory or discretionary in the context of a costs memorandum, defendants' showing of a mistake, surprise, or excusable neglect is nonetheless, sufficient to warrant relief. Therefore, defendants' motion pursuant to Code of Civil Procedure, section 473, subdivision (b) is granted, and the Memorandum of Costs, filed on September 28, 2024, is deemed filed. Accordingly, plaintiff's motion to strike the Memorandum of Costs, in its entirety, for untimeliness is denied; however, plaintiff's alternative motion to tax costs is addressed below.

Tax Costs

On a motion to tax costs, the initial burden depends on the nature of the costs that are being challenged. "If the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that they were not reasonable or necessary. On the other hand, if the items are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs." (*Ladas*

v. *Calif. State Auto. Assn*. (1993) 19 Cal.App.4th 761, 774.) "The court's first determination, therefore, is whether the statute expressly allows the particular item, and whether it appears proper on its face. If so, the burden is on the objecting party to show them to be unnecessary or unreasonable." (*Ibid*.) In order to meet this burden, where the objections are based on factual matters, the motion should be supported by a declaration. (C*ounty of Kern v. Ginn* (1983) 146 Cal.App.3d 1107, 1113-4.)

Plaintiff challenges the costs for the expert witness, Mr. Paul Kaloostian, M.D.'s services, totaling $19,450, which the Memorandum of Costs indicates are appropriate pursuant to Code of Civil Procedure section 998. (Memo. of Costs, Item 8b.) As relevant here, Code of Civil Procedure section 998, subdivision (c)(1) provides:

> If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant.

(*Id*.)

The policy behind the § 998 penalties is to "encourage settlement by providing a strong financial disincentive to a party--whether it be a plaintiff or a defendant--who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer." (*Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 804.)

There is no doubt that defendants achieved a better result (finding of no liability) than the $5,000 offer.

However, plaintiff contends that the proper amount of expert witness fees is unascertainable. Plaintiff concedes that defendants served an offer pursuant to Code of Civil Procedure section 998 on her on May 26, 2023; however, she indicates that plaintiff was examined by Dr. Kaloostian on May 5, 2023 and Dr. Kaloostian was not deposed leading up to trial. Since no explanation is provided in support of Dr. Kaloostian's fees, plaintiff indicates that she can only assume that Dr. Kaloostian charged $19,450 for one half day of trial testimony.

A review of the Memorandum of Costs shows a breakdown of costs as follows:

| **Name of witness** | **Fees** | |
|---|---|---|
| (1) Paul Kaloostian, MD | 9 hours at $750/hr | $6,750 |
| (2) Paul Kaloostian, MD | | $10,000 |
| (3) Paul Kaloostian, MD | | $1,500 |
| (4) Paul Kaloostian, MD | | $1,200 |

(Memo. of Costs, Item 8(b).)

Based on this information alone, the court cannot determine the amount of expert witness fees defendants are reasonably entitled to recover and plaintiff has met her burden in challenging the costs. Since an opposition is not filed, the motion to tax the expert witness fees, $19,450, 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: KCK on 05/07/24.**
(Judge's initials) (Date)

(37)

**Tentative Ruling**

Re: ***Cortney Marple v. Tracy Martinez***
Superior Court Case No. 23CECG04216

Hearing Date: May 9, 2024 (Dept. 502)

Motion: By Defendant Fresno Community Hospital and Medical Center to Compel Arbitration and Stay the Proceedings

**Tentative Ruling:**

To deny.

**Explanation:**

In moving to compel arbitration, defendants 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 policy in favor of arbitration. (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339.) Courts are to enforce arbitration agreements according to their terms. (*Ibid*.) In ruling on a motion to compel arbitration, the court must first determine whether the parties actually agreed to arbitrate the dispute, and general principles of California contract law guide the court in making this determination. (*Mendez v. Mid-Wilshire Health Care Center* (2013) 220 Cal.App.4th 534, 540-543.)

*Electronic Signature*

Here, the arbitration agreement in question was a document contained within the iCIMS platform. This platform was used by defendant hospital for plaintiff to complete her application and onboarding process for new employees. (Milton Supp. Decl., ¶ 6.) The document has a section at the bottom where the employee checks a box to indicate consent to the agreement. (Woodward Decl., Exh. A.) A red check appears and next to it reads "Signature Cortney Davis 10/29/2019 3:34 PM". (Ibid.)

With the moving papers, a declaration was submitted by Carla Milton as the Senior Vice President and Chief Human Resources Officer for the hospital. (Milton Decl., ¶ 1.) She asserts personal knowledge in her role and familiarity with the electronic onboarding process and how the system verifies identity. (Id. at ¶¶ 2-3.) She reviewed the arbitration agreement attached to counsel's declaration, and recognizes it as the one used for all employees. (Id. at ¶ 3.) She declares that the arbitration agreement attached to counsel's declaration is a true and correct copy of the electronic version of the

document which is stored in their electronic system and was electronically signed by Cortney Davis on October 29, 2019 at 3:34 p.m. (Id. at ¶ 4.)

Plaintiff has provided her own declaration in her opposition. She asserts that she has no recollection of agreeing to arbitrate, has never seen the arbitration agreement before, and would not have signed it. (Marple Decl., ¶¶ 2-4.)

A supplemental declaration was filed with defendant hospital's reply. Milton expresses confidence that plaintiff electronically signed the agreement because the hospital uses a secure system for digital identity verification, called iCIMS. (Milton Supp. Decl., ¶ 6.) When a candidate applies for a job, they are prompted to create an account in iCIMS. (Ibid.) In this, the candidate selects an email address and creates a password for access to their iCIMS account. (Ibid.) Only users with both the email and password may access the account. (Ibid.) Milton declares that on May 1, 2024, Nicholas Aquino, the Director of Human Resources Information System Data Management, used his administrative credentials to access plaintiff's iCIMS system file and located the arbitration agreement. (Id. at ¶ 7.) Aquino prepared a screenshot of the page showing plaintiff's name, email address, and the audit trail showing the date the agreement was signed. (Ibid and Exh. B.)

Defendant has not established the existence of an arbitration agreement by preponderance of the evidence. Where the agreement was purportedly signed electronically, and the plaintiff does not recall signing it, the petitioner has the burden of proving by a preponderance of the evidence that the electronic signature was authentic. (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 846.)

In *Ruiz*, a declaration that failed to explain how Ruiz's printed electronic signature, or the date and time printed next to the signature, came to be placed on the arbitration agreement was insufficient. A supplemental declaration did not provide the necessary authentication where the declarant explained that the agreement was part of an employee acknowledgment form that "is" presented to all employees and that each employee is required to log into the company's HR system, using his or her "unique login ID and password," to review and sign the employee acknowledgment form. This too was insufficient, as the declarant did not explain how, or upon what basis, she inferred that the electronic signature was "the act of" Ruiz, leaving a critical gap in the evidence supporting the petition. (*Ruiz v. Moss Bros. Auto Group, Inc., supra,* 232 Cal.App.4th at pp. 843-844.)

Here, defendant has attempted to distinguish the evidence presented here from that presented in *Ruiz*. However, it appears that Milton's basis for believing the electronic signature to be that of plaintiff is the same as the information presented in *Ruiz*: 1) creation of an account with a unique login and 2) use of that unique login to electronically review and sign documents. (Milton Supp. Decl., ¶ 6.) Milton has also stated specifically in her declaration that only users with both the email address and password for each iCIMS account can access the account. (Ibid.) However, Exhibit B to her declaration appears to contradict this statement where it shows activity on the account to include that plaintiff's profile was edited by a Pedro Martinez Jr. for plaintiff. This seems to show that someone other than plaintiff not only could access the account, but could also make changes to it. While this same exhibit includes the "Audit Trial" for the Dispute

Resolution Agreement, this information is presented through Milton and describes another individual, Nicholas Acquino's use of administrative credentials to access the iCIMS system file. (Milton Supp. Decl., ¶ 7.) This falls short of explaining how plaintiff's electronic signature came to be on the arbitration agreement. Milton has expressed trust in the program, but has failed to describe how the electronic signature was the act of plaintiff.

The court finds that defendant has not met its burden of production here, particularly regarding an electronic signature.

*Waiver*

Arbitration can be waived by a party acting inconsistently with an agreement to arbitrate. (*Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 991-992.) Courts can consider 1) whether the party's actions are inconsistent with that right, 2) how far along the parties are in litigation before notice of an intent to arbitrate, 3) any delays in seeking arbitration, 4) whether the party seeking arbitration has filed a counterclaim, and 5) whether important intervening steps have occurred. (*St. Agnes Medical Center v. PacifiCare of California, supra*, 31 Cal.4th at p. 1196.)

Here, plaintiff argues that defendant has acted inconsistently with an intent to arbitrate because it has participated in discovery and filed and did not withdraw a demurrer. This argument is not particularly compelling. Courts have found that mere participation in litigation is insufficient, by itself, to constitute a waiver. (*St. Agnes Medical Center v. PacifiCare of California, supra*, 31 Cal.4th at p. 1203.) Considering the demurrer was an initial pleading by defendant and defendant has only responded to discovery, and not propounded any, these acts are insufficient to constitute a waiver. Additionally, defendant addressed the issue of arbitration prior to plaintiff's opposition to the demurrer being due, but plaintiff refused. While the court is denying this motion based on a failure by defendant to meet its burden of production regarding the electronic signature, it does not find that defendant otherwise waived arbitration at this time.

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 05/07/24.**
(Judge's initials) (Date)