Tentative Rulings for June 7, 2023
Department 503

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)

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.

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 503

Begin at the next page

(20) **Tentative Ruling**

Re: ***Lewis v. Omni Family Health Organization***
Superior Court Case No. 21CECG02922

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

Motion: Demurrer to Complaint

Tentative Ruling:

To overrule the special demurrers. (Code Civ. Proc., § 430.10, subd. (f).) To sustain the general demurrers to the first, second, third and fourth causes of action, with plaintiff granted 20 days' leave to file an amended complaint. All new allegations in the amended complaint shall be in **boldface** type. The time in which the complaint may be amended will run from service of the order by the clerk.

In light of plaintiff's counsel's refusal to meet and confer prior to the filing of the demurrer, the court will require plaintiff to initiate and conduct a telephonic or in-person conference of the parties prior to amending the complaint. (See Code Civ. Proc., § 430.41, subd. (c).) Plaintiff's counsel shall file with the amended complaint a declaration describing the substance of the discussion about the sufficiency of the proposed first amended complaint. If plaintiff's counsel files an amended complaint but no declaration, or with a declaration describing inadequate meet and confer, the court will strike the amended complaint *sua sponte*.

Explanation:

Initially the court notes that plaintiff's counsel failed to cooperate in the statutorily required meet and confer process. The demurring party is required to meet and confer in person or by telephone prior to filing the demurrer. (Code Civ. Proc., § 430.41, subd. (a).) Defense counsel sent plaintiff's counsel a meet and confer communications, and attempted numerous times to schedule a telephone call to discuss the issues raised in the demurrer. Plaintiff's counsel never responded to these attempts to confer telephonically. The court expects plaintiff's counsel to cooperate in the meet and confer process. Counsel does not get to unilaterally decide that complying with the statute would be fruitless. In light of plaintiff's counsel's failure to participate in the required meet and confer process, the court will require plaintiff's counsel to conduct a conference of the parties as described in section 430.41, subdivision (c), prior to amending the Complaint.

Plaintiff alleges that she was discriminated against based on her race in her employment with Omni Family Health Organization. She sues Omni and three Omni employees (Joseph Hayes, Aurora Cooper and Gloria Placieb) for (1) racial harassment and hostile work environment; (2) failure to prevent harassment; (3) defamation; and (4) wrongful discharge. Defendants generally and specially demur (on grounds of uncertainty) to each cause of action.

The special demurrer is not well taken. A demurrer for uncertainty will be sustained only where the complaint is so bad that defendant cannot reasonably respond—i.e., he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or her. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.) This clearly is not the case with the Complaint here. Defendants only argue that the Complaint fails to allege facts sufficient to assert the various causes of action. The special demurrer is entirely unsupported by any argument.

First Cause of Action

All claims in the Complaint are based on allegations that, unlike others in her position, plaintiff was not given an office of her own, nor a double screen desktop computer nor a telephone with an extension, but instead had to work in a cubicle using a laptop computer. (Complaint, ¶¶ 13, 17-18, 25.) Around seven months later, defendants Cooper and Placieb reviewed and opposed the performance evaluations conducted by plaintiff and placed her on a Performance Improvement Plan, which included an unsatisfactory rating and a statement that plaintiff was racially biased against a Latina LVN, and indicated that her job performance would be evaluated on a monthly basis. (Complaint, ¶¶ 18, 29-32, 36.) The Complaint alleges that Cooper and Placieb did not include her in all meetings she needed to attend, and that they denied her request for a day off work because she failed to submit her request at least 30 days in advance in accordance with Omni's Employee Handbook. (Complaint ¶¶ 11, 22, 37.)

Under the Fair Employment and Housing Act ("FEHA"; Gov. Code, § 12900 et seq.), it is an unlawful employment practice "[f]or an employer, ... because of race ... [or] national origin ... to harass an employee." (§ 12940, subd. (j)(1), italics added.)

"To establish a prima facie case of a racially hostile work environment, [a plaintiff is] required to show that (1) he was a member of a protected class; (2) he was subjected to unwelcome racial harassment; (3) the harassment was based on race; (4) the harassment unreasonably interfered with his work performance by creating an intimidating, hostile, or offensive work environment; and (5) the [defendant] is liable for the harassment." (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 876.)

"[E]mployee[s] claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their [protected status]." (*Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 582 (internal quotations omitted); see also CACI 2521A [same; conduct directed at the plaintiff]; *Alexander v. Community Hospital of Long Beach* (2020) 46 Cal.App.5th 238, 262 ["To prevail on a claim of harassment so severe or pervasive as to create a hostile work environment, an employee 'must demonstrate that the conduct complained of was *severe enough or sufficiently pervasive* to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their [protected category]…'"].)

"Actionable harassment consists of more than 'annoying or merely offensive comments in the workplace,' and it cannot be 'occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated,

routine, or a generalized nature.'" (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 940.)

"[C]ommonly necessary personnel management actions such as hiring and firing, job project assignments, office or workstation assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like, do not come within the meaning of harassment." (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 879.) The common personnel decisions forming the basis of the Complaint, including workstation assignment, provision of equipment, and performance evaluations, do not constitute harassment. (See *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 63.)

Moreover, supervisors are not liable for harassment merely because they knew about the harassment and failed to stop it. There is no duty by supervisors to prevent harassment. (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1326.) Plaintiff does not allege any harassment by Hayes.

The cause of action seems to allege retaliatory harassment. A retaliation claim can only be made against an employer, not a supervisor or other nonemployer individual. (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173.) Accordingly, there is no viable claim for retaliation against Hayes and Cooper.

Nor does the Complaint allege a viable retaliation claim against her employer, Omni. To assert a retaliation claim, "an employee must demonstrate that he or she has been subjected to an adverse employment action that materially affects the terms, conditions, or privileges of employment…" (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1168, internal quotations omitted.) The alleged conduct, as explained above, does not constitute an adverse employment action.

Accordingly, the court intends to sustain the demurrer to the first cause of action as to Omni, Hayes and Cooper.

Second Cause of Action

The second cause of action is for failure to prevent retaliation and harassment. Inasmuch as there is no viable claim pled for retaliation or harassment, the cause of action for failure to prevent fails as well. (See *Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, 1316-1318.) And as set forth above, a supervisory employee is not personally liable under FEHA for failing to prevent harassment, discrimination or retaliation; such a cause of action may only be asserted against an employer. (*Fiol, supra*, 50 Cal.App.4th at 1326.) The court therefore intends to sustain the demurrer to the second cause of action.

Third Cause of Action

"To establish defamation, a plaintiff must show a publication that was false, defamatory, unprivileged, and that has a natural tendency to injure or cause special damages." (*Medical Marijuana, Inc. v. ProjectCBD.com* (2020) 46 Cal.App.5th 869, 884.)

California law requires that "the words constituting an alleged libel [or defamation] must be specifically identified, if not pleaded verbatim, in the complaint." (*Glassdoor, Inc. v. Superior Court* (2017) 9 Cal.App.5th 623, 635, *quoting Kahn v. Bower* (1991) 232 Cal. App.3d 1599, 1612, fn.5.)

The Complaint clearly fails in this regard. The Complaint alleges that Cooper "knowingly spread false and harmful statements to Plaintiff's staff and other employees of Omni," and accused Plaintiff of racial discrimination and racial bias. (Complaint, ¶ 49.) The Complaint also alleges that these same unspecified statements were included in plaintiff's personnel file. This is insufficient, as the defamatory statements are not identified. Plaintiff's opposition makes no argument in support of the sufficiency of the cause of action for defamation. The court therefore intends to sustain the demurrer with leave to amend.

Defendants also contend that the statements are privileged under Civil Code section 47, subdivision (c). However, this argument is made for the first time in the reply. The court will not sustain a demurrer on a ground not raised in the moving papers.

Fourth Cause of Action

The fourth cause of action is for wrongful termination, or constructive discharge. The Complaint alleges that plaintiff was forced to quit her employment due to the "malicious, harassing, oppressive, and discriminatory working conditions became intolerable …" (Complaint, ¶ 57.)

Plaintiff must allege facts showing that she was subjected to intolerable working conditions such that a reasonable person in her position would have no reasonable alternative except to resign. Whether conditions are so intolerable that they justify an employee's decision to quit is judged by an objective reasonable-employee standard. (See *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1247.) A constructive discharge occurs "when the employer's conduct effectively forces an employee to resign." (*Id.* at pp. 1244-45.) To amount to a constructive discharge, the adverse working conditions "must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable." (*Id.* at p. 1247.) The "conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer." (*Id.* at p. 1246 ["proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee."])

The court finds that the facts alleged, discussed above, fail to rise to the level of conduct that would support a constructive discharge claim, and the demurrer should be sustained.

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 6/5/23 .
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Torres-Amador v. County of Fresno, et al.***
Superior Court Case No. 20CECG00420

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

Motion: (1) by Plaintiff to Withdraw Admission Deemed Admitted
(2) by Defendants County of Fresno and Fresno County Sheriff's Office for Summary Judgment

Tentative Ruling:

To grant plaintiff's motion to withdraw his admission to County of Fresno's Request for Admissions, Set One, No. 7, conditioned upon plaintiff sharing equally in the costs of any depositions noticed by Defendants County of Fresno and Fresno County Sheriff's Office ("County Defendants") of plaintiff, Dale Blickenstaff, and/or other witnesses identified in those depositions. (Code Civ. Proc. § 2033.300, subd. (c).)

To deny Defendants County of Fresno and Fresno County Sheriff's Office's motion for summary judgment. (Code. Civ. Proc. § 437c, subd. (p)(2).)

Explanation:

Plaintiff's Motion to Withdraw Admissions Deemed Admitted

Plaintiff moves for an order pursuant to Code of Civil Procedure section 2033.300 withdrawing the admission of County of Fresno's Request for Admissions, Set One, No. 7, "Admit that YOU never requested medical help from individuals employed by the County of Fresno/Fresno County Sheriff's Office." (Harralson Decl., Exh. A.) The request was deemed admitted on February 23, 2023 after plaintiff failed to serve verified responses to the requests prior to the hearing on the County's motion pursuant to Code of Civil Procedure section 2033.280, subdivision (b). (*Id*. at ¶ 10.) Unverified responses were served to the County's requests for admissions on January 31, 2023 before the hearing on the motion to deem the requests admitted. (*Id*. at ¶ 7.) The responses admitted all requests with the exception of request no. 7.

Plaintiff's counsel sent his client written discovery and verifications by mail some time before a December 16, 2022 deadline set by the propounding party in meet and confer correspondence. (Harralson Decl., ¶¶ 5-6.) Plaintiff lives in Honduras and does not have reliable internet service or the ability to receive documents by facsimile. (*Id*. at ¶ 11.) As a result, counsel's primary means of sending documents to the client was the postal system. (*Ibid*.) After the motion to deem the admissions admitted was filed and served, objection-free, unverified discovery responses were served. (*Id*. at ¶ 7.) Counsel sent verifications by mail to his client again on February 14, 2023 under a mistaken belief that the signed verifications could be returned by his client before the hearing on the motion February 23, 2023. (*Id*. at ¶ 8.)

The evidence presented by the plaintiff demonstrates that using the mail system was the only available option to send documents to plaintiff overseas. Thus, a reasonably prudent person would have used the same method to deliver documents to their client and could have then found themselves in a similar situation of having twice sent verifications to a client without receiving a timely response. The County had received responses to the request for admission at issue that were otherwise compliant with Code of Civil Procedure section 2033.220 prior to the hearing on the motion as required to avoid the requests being deemed admitted. It was the lack of verifications, absent due to an excusable mistake or inadvertence in relying on the postal system of a foreign country, rather than the untimely responses that resulted in the County's motion being granted.

County of Fresno has not demonstrated that they will be prejudiced by the withdrawal of the motion. That the defendants relied on the admission at issue as their only evidence to support a material fact of their motion for summary judgment, knowing the plaintiff denied the request for admission and that the defendants' knowledge of plaintiff's need for medical care would otherwise be an issue of fact for a jury, was a strategic decision by defendant. The court is not now willing to deem the withdrawal of the admission prejudicial to defendants because they made the decision to proceed with the motion for summary judgment.

Accordingly, the court intends to grant the plaintiff's motion for withdrawal of the admission of request for admission no. 7. However, the court intends to condition the withdrawal on plaintiff sharing equally in the costs of any depositions noticed by Defendants County of Fresno and Fresno County Sheriff's Office ("County Defendants") of plaintiff, Dale Blickenstaff, and/or other witnesses identified in those depositions. (Code Civ. Proc. § 2033.300, subd. (c).)

County Defendants' Motion for Summary Judgment

Defendants County of Fresno and Fresno County Sheriff's Office ("County Defendants") move for summary judgment of the plaintiff's cause of action for negligence premised on the alleged violation of Government Code section 845.6. (SAC, p. 4.) Plaintiff alleges that on or about December 15, 2018 and continuing thereafter, he was denied timely and adequate medical care by County Defendants while in custody in the Fresno County Jail.

Under section 845.6, a public entity and public employees are not liable for injury caused by the failure to obtain medical care for a prisoner in their custody except if "the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care." (Gov. Code § 845.6.) "The second phrase creates a limited public-entity liability when: (1) the public employee "knows or has reason to know [of the] need," (2) of "*immediate* medical care," and (3) "fails to take reasonable action to *summon* such medical care." (§ 845.6, italics added.)" (*Castaneda v. Department of Corrections & Rehabilitation* (2013) 212 Cal.App.4th 1051, 1070.) Liability under section 845.6 is limited to "serious and obvious medical conditions requiring immediate care." (*Watson v. State of California* (1993) 21 Cal.App.4th 836, 841.) A public employee's knowledge of the need for immediate health care and the reasonableness of his or her actions in summoning care are factual

questions for a jury. (*Castaneda*, supra, 212 Cal.App.4th at p. 1073, citing *Hart v. Orange County* (1967) 254 Cal.App.2d 302, 307.)

In the case at bench, the plaintiff suffered from a medical condition of his eyes requiring care while in custody at the Fresno County Jail. County Defendants assert there is no dispute that the material facts of this case demonstrate that their employees had no knowledge of the need to summon "immediate" health care for plaintiff because plaintiff never requested medical help from individuals employed by the County of Fresno or the Fresno County Sheriff's Office. (UMF 2.) The only support for this material fact is a request for admission of the same, deemed admitted by plaintiff pursuant to the court's February 23, 2023 order. (Weakley Decl., Exh. 2, RFA No. 7, Request for Judicial Notice, Exh. 3.) Defendants reason that "[a]bsent some visibly noticeable trauma to Plaintiff's eyes, County Defendants' employees would not be aware of any immediate need for medical care for plaintiff's eyes, unless Plaintiff actually notified them of such an immediate medical need." (Defendants' Memo., 5:24-26.) Thus, plaintiff's request for care is required to impart knowledge on the County Defendants' employees that his need for care was immediate.

It is undisputed that plaintiff was provided medical care for his eye condition by an off-site ophthalmology clinic on December 14, 2018. (UMF 3 and 4.) It is undisputed that thereafter plaintiff was admitted to outpatient housing until his surgery was scheduled, however, plaintiff declined to have the emergency surgery recommended. (UMF 5 and 6.)

Plaintiff's motion to withdraw the admission of his never having requested medical help is set concurrently with this motion for summary judgment and the court intends to grant the motion. As a result, this material fact is left without evidentiary support and County Defendants have not meet their burden on summary judgment. (Code Civ. Proc. § 437c, subd. (p)(2).)

Regardless of the ruling on the plaintiff's motion to withdraw the admission, plaintiff has produced evidence that his criminal attorney, Dale Blickenstaff knew of plaintiff's eye condition and made requests for treatment on his client's behalf to individuals employed by County Defendants. (Blickenstaff Decl., ¶ 4[1].) Strictly construing the request for admission, Mr. Blickenstaff having requested medical care for his client does not contradict the "admission" that plaintiff himself did not request medical care. Defendants' objections to the declaration of Mr. Blickenstaff as vague regarding when he contacted County Defendants' employees, who he contacted, and what information was provided, demonstrate that there are questions of fact regarding what the employees knew or should have known that further reinforce why summary judgment is not proper in this case.

Defendants also move for summary judgment on the basis that the plaintiff's claim submitted to comply with the requirements of the Government Code section 910 limits his claims to the date of December 15, 2018. The form provides the date December 15,

[1] Objections to the Blickenstaff Declaration as to what he personally did to notify persons of plaintiff's need for medical care would have been overruled if necessary in the disposition of the motion.

2018 in response to the question of when the injury or damage occurred. (Thompson Decl., ¶ 5, Exh. 5, p. 1.) The second amended complaint, however, alleges the violations began December 15, 2018 and continued thereafter. Defendants argue that the factual basis of the claim being a continuing injury is not reflected in the claim form and to the extent the complaint seeks damages for violation occurring at some time other than December 15, 2018, the claims are time barred.

The issue of whether plaintiff's government claim form stating the date of injury as December 15, 2018 and not explicitly stating that the plaintiff was alleging a continuous injury does not dispose of the entire cause of action for negligence in the violation of Government Code section 845.6. Resolving the question in County Defendants' favor would leave a claim for negligence on December 15, 2018 intact. There is no stipulation on file pursuant to Code of Civil Procedure section 437c, subdivision (t) that would allow the court to rule on the issue. As a result, the court declines to rule on the issue.

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 6/5/23.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Torres-Amador v. County of Fresno, et al.***
Superior Court Case No. 20CECG00420

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

Motion: by Defendant Wellpath for Summary Judgment

Tentative Ruling:

To grant defendant Wellpath's motion for summary judgment as to the entire complaint. (Code Civ. Proc. § 437c.) Defendant shall submit a judgment consistent with the terms of this ruling within 10 days of service of the order.

Explanation:

Summary judgment is properly granted when no triable issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) In moving for summary judgment, a "defendant … has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action … cannot be established, or that there is a complete defense to the cause of action." (Code Civ. Proc. § 437c, subd. (p)(2).) If the defendant does not meet that burden, the motion must be denied, even if the plaintiff has not opposed it adequately or at all. (*Villa v. McFerren* (1995) 35 Cal.App.4th 733, 742–743.) Once the moving defendant has met its initial burden, however, the plaintiff must present facts, supported by admissible evidence, raising a triable issue of material fact. (*Id*., subds. (b)(2), (b)(3), (p)(2); *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476–477 (*Merrill*); see *Bozzi v. Nordstrom, Inc*. (2010) 186 Cal.App.4th 755, 761.)

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 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. An expert opinion based on speculation or conjecture is inadmissible. (*In re Lockheed Litig. Cases* (2004) 115 Cal.App.4th 558, 564.) The declaration must contain facts showing the expert's qualifications (competency) to express the opinion in question; e.g., facts showing the declarant has the training, experience or necessary skill to render an opinion on the particular matters in controversy. (*Salasquevara v. Wyeth Labs., Inc.* (1990) 222 Cal.App.3d 379, 387.) It must also include facts showing the matters relied upon by the expert in forming the opinion, the declarant's opinion rests on matters of a type reasonably relied upon by experts, and the factual basis for the opinion. (*Kelley*, *supra*, 66 Cal.App.4th at 524.)

It was held in *Munro v. Regents of the University of California* (1989) 215 Cal.App.3d 977, that

> "California courts have incorporated the expert evidence requirement into their standard for summary judgment in medical malpractice cases. When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence."

(*Munro*, *supra*, 215 Cal.App.3d at 984-985, citing *Hutchinson v. United States* (9th Cir. 1988) 838 F.2d 390, 392; *Willard v. Hagemeister* (1981) 121 Cal.App.3d 406, 412.)

Where the moving party produces competent expert opinion declarations showing that there is no triable issue of fact on an essential element of the opposing party's claim (e.g. that a medical defendant's treatment fell within the applicable standard of care), the opposing party's burden is to produce competent expert opinion declarations to the contrary. (Weil & Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (TRG 2021) ¶ 10:205.5, citing *Ochoa v. Pacific Gas & Elec. Co.* (1998) 61 Cal.App.4th 1480, 1487.)

Here, plaintiff's second amended complaint alleges defendant Wellpath was negligent in its diagnosis and/or treatment of plaintiff resulting in plaintiff's vision loss and its negligence caused plaintiff's injuries and damages. (SAC, p. 4.) To establish that a physician's care was negligent, a plaintiff must provide expert testimony establishing that the treatment fell below the applicable standard, unless the medical process at issue is matter of common knowledge and thus susceptible to comprehension by a lay juror. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.)

<u>Medical Malpractice</u>

> The elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage.

(Johnson v. Superior Court (2006) 143 Cal.App.4th 297, 305 citing *Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606.)

Defendant Wellpath moves for summary judgment based on the undisputed facts that Wellpath complied with the standard of care and the care received by plaintiff from Wellpath neither caused nor contributed to his loss of vision or other claimed injuries and damages.

The motion is supported by an expert declaration from August L. Reader, III, M.D., F.A.C.S. Dr. Reader is a board certified ophthalmologist familiar with the diagnosis, treatment, surgical care, medications, surgical outcomes, and prognosis for microspherophakia, the plaintiff's genetic eye condition. He opines that Wellpath complied with the standard of care and it did not cause or contribute to any injuries or damages claimed by the plaintiff. (UMF 57, 59, 125, 126, 127; Reader Decl. ¶¶ 36, 42-45.) His opinion and the facts set out in his declaration supporting the conclusion are based

upon his review of plaintiff's medical records from Wellpath in the Fresno County Jail, Community Regional Medical Center, Eye Medical Center of Fresno, Pacific Cataract & Laser Institute, and records from Duane Y. Nii, M.D. (Reader Decl., ¶ 8; Saunders Decl. ¶¶ 2-5, Exh. A-D.) Plaintiff did not object to the evidence supporting the motion.

Dr. Reader's opinion is sufficient to shift the burden as to the existence of a triable issue to the plaintiff. Plaintiff, however, neither filed an opposition nor an opposing statement of material fact, timely or otherwise, thus tacitly affirming the merits of defendant's motion. (*Cravens v. State Bd. of Education* (1997) 52 Cal.App.4th 253, 257.)

Therefore, the motion for summary judgment 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: jyh on 6/5/23.
(Judge's initials) (Date)