Tentative Rulings for September 20, 2022
Department 501

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.

19CECG00709 ***Cota v. Aaron's inc.*** **is continued to Tuesday, October 11, 2022 at 3:30 p.m. in Department 501**

19CECG02777 ***West v. Locatelli*** **continued to Tuesday, September 27, 2022 at 3:30 p.m. in Department 501**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 501

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(35)

Tentative Ruling

Re:	***Salinas v. Kasturi et al.*** Superior Court Case No. 21CECG02007
Hearing Date:	September 20, 2022 (Dept. 501)
Motion:	by defendant Clifton Van Putten, M.D., for Summary Judgment

Tentative Ruling:

To grant summary judgment in favor of defendant Clifton Van Putten, M.D. Moving party is directed to submit to this court, within five days of service of the minute order, a proposed Judgment consistent with the court's summary judgment order.

Explanation:

Defendant Clifton Van Putten, M.D., moves for summary judgment based on the declarations of a medical expert, Lundy Campbell, M.D., who has opined that Dr. Van Putten's care and treatment of plaintiff did not fall below the standard of care, and that nothing he did or failed to do caused plaintiff any injury.

"The standard of care in a medical malpractice case requires that physicians exercise in diagnosis and treatment that reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of the medical profession under similar circumstances. ' "The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of the layman."'" (*Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 983–984, internal citations omitted.)

Normally, the question of whether a medical professional's care and treatment of a patient fell within the standard of care or caused the plaintiff's injuries is a matter that can only be established through expert testimony. (*Landeros v. Flood* (1976) 17 Cal.3d 399, 410.) "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." (*Hutchinson v. United States* (9th Cir. 1988) 838 F.2d 390, 392.)

Here, defendant Dr. Van Putten's expert has testified that Dr. Van Putten's care and treatment of plaintiff did not fall below the standard of care or cause her injuries. (Declaration of Lundy Campbell, M.D., ¶ 5.) Dr. Campbell, an anesthesiologist, declares that Dr. Van Putten administered appropriate medications, and thoroughly monitored plaintiff during her thirty-five minute procedure. (*Ibid*.)

Therefore, defendant Dr. Van Putten has met his burden of showing that plaintiff cannot prevail on her claim against Dr. Van Putten of medical negligence, as she cannot show that Dr. Van Putten's care and treatment of her fell below the standard of care.

The burden shifts to plaintiff to come forward with conflicting expert evidence. No opposition was filed to defendant Dr. Van Putten's motion for summary judgment. The court finds that there are no remaining triable issues of material fact as to the only cause of action against Dr. Van Putten, for medical negligence, and grants summary judgment in favor of defendant Clifton Van Putten, M.D. and against plaintiff Elidia Salinas.

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: DTT on 9/15/2022.
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Lyon v. Aguilar***
Superior Court Case No. 20CECG01980

Hearing Date: September 20, 2022 (Dept. 501)

Motion: by Defendants for Leave to File Amended Answer to Complaint

Tentative Ruling:

To grant defendants' motion for leave to file a First Amended Answer to the Complaint. (Code Civ. Proc. § 473, subd. (a).) Defendants shall serve and file their First Amended Answer within ten days of the date of service of this order.

Explanation:

Under Code of Civil Procedure section 473, subdivision (a), "[t]he court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars..." (Code Civ. Proc., § 473, subd. (a).)

" 'Code of Civil Procedure section 473, which gives the courts power to permit amendments in furtherance of justice, has received a very liberal interpretation by the courts of this state.... In spite of this policy of liberality, a court may deny a good amendment in proper form where there is unwarranted delay in presenting it.... On the other hand, where there is no prejudice to the adverse party, it may be an abuse of discretion to deny leave to amend. In the furtherance of justice, trial courts may allow amendments to pleadings and if necessary, postpone trial.... Motions to amend are appropriately granted as late as the first day of trial ... or even during trial ... if the defendant is alerted to the charges by the factual allegations, no matter how framed ... and the defendant will not be prejudiced.' " (*Rickley v. Goodfriend* (2013) 212 Cal.App.4th 1136, 1159, citations omitted.)

"Ordinarily, courts should 'exercise liberality' in permitting amendments at any stage of the proceeding. In particular, liberality should be displayed in allowing amendments to answers, for a defendant denied leave to amend is permanently deprived of a defense. [¶] '[N]evertheless, whether such an amendment shall be allowed rests in the sound discretion of the trial court. And courts are much more critical of proposed amendments to answers when offered after long unexplained delay or on the eve of trial, or where there is a lack of diligence, or there is prejudice to the other party.'" (*Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1159, citations omitted.)

Here, defendants seek leave to amend their Answer to add an affirmative defense under Vehicle Code section 17151, subdivision (a), which they contend would cap Say Jay Leasing's damages as the owner of the subject truck to $15,000 for personal injury damages and $5,000 for property damages. Defense counsel claims that they did not learn of the possibility that they could raise the defense until March 25, 2022, when they replaced defendants' prior counsel in the case and reviewed the discovery and Answer in the case. (Konczal decl., ¶¶ 6-8.) Thus, defendants contend that they should be allowed to amend the Answer to allege the new affirmative defense.

Plaintiffs have opposed the motion to amend, contending that defendants were not diligent in seeking leave to amend, and that they have not offered a sufficient explanation for the reason they did not raise the defense sooner. They also claim that defendants and their counsel have known that Say Jay Leasing leased the subject truck to defendant Aguilar's employer for almost two years, since they served discovery responses indicating that the truck was leased in October 2020. They also point out that it has been about six months since defendants' new counsel replaced their old attorneys, so defendants have not been diligent in moving to amend.

Indeed, it does seem questionable whether defendants were diligent in attempting to amend their Answer as that they apparently knew for the last two years that Say Jay had leased the truck to Aguilar's employer. Defendants have also failed to offer any clear explanation for the delay, other than that their new attorneys have allegedly only recently discovered that they might be able to raise the defense based on discovery and review of the answer. Again, however, these facts should have been apparent based on a review of the case file. Defense counsel does not explain why they did not review the file back in March and bring their motion immediately thereafter rather than waiting until August to file their motion to amend. Thus, defendants and their attorneys have failed to show that they diligently sought to amend the answer as soon as they learned of the potential defense under Section 17151.

Nevertheless, plaintiffs have failed to present any evidence showing that they have been prejudiced by the delay in seeking leave to amend, or that they will suffer any prejudice if leave to amend is granted now. Plaintiffs appear to contend that they will be prejudiced because the trial date is set for October 31, 2022, and they will not have enough time to investigate the new defense. However, plaintiffs' counsel offers no evidence to support this contention, and points to nothing that would tend to show that the late amendment would actually cause his clients any harm. It does not appear that the amendment will require a delay in the trial date, as the new defense is based on the same facts that the parties have been aware of since early in the case. At most, the new defense will allow defendant Say Jay to cap its damages based on the statutory limits, but this is a purely legal issue which should not require much, if any, new discovery.

Additionally, courts liberally permit amendments up to the day of trial. (*Rickley v. Goodfriend*, *supra*, 212 Cal.App.4th at p. 1159.) Here the trial is not set to begin for almost two months, so it does not appear that the looming trial date is enough to show that plaintiffs will be prejudiced by the amendment. If plaintiffs believe that they do not have enough time to conduct discovery into the new defense, they may seek a continuance of the trial. At this time, however, they have not made any request for a trial continuance. Nor does it appear that they will be prejudiced if the court grants leave to amend.

Therefore, the court intends to grant the motion for leave to amend the Answer and allow defendants to allege their new affirmative defense.

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: DTT on 9/15/2022.
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Richardson v. County of Fresno***
Case No. 20CECG02538

Hearing Date: September 20, 2022 (Dept. 501)

Motion: Petitions to Compromise Minors' Claims of Aliah Richardson and Jasmine Richardson

Tentative Ruling:

To deny the Petitions, without prejudice. (Prob. Code § 3500, et seq., Code Civ. Proc. § 372.)

Explanation:

No medical reports or follow-up letters from the treating doctors have been submitted, so there is no evidence regarding the minors' injuries or whether they have fully recovered.

Also, counsel has not attached a copy of the retainer agreement, which appears to be the basis of the request for $1,000 in attorney's fees from each minor, or 25% of the gross settlement. Attachment 18(a) to the Petitions states that a copy of the retainer agreement is attached, but there is no such attachment. Counsel has submitted a declaration regarding his fees, but it is extremely brief and vague and says almost nothing about the work done on the case. It also inaccurately states that counsel is seeking $4,000 in fees, when he is only seeking $1,000 per minor or $2,000 in total. Therefore, the request for $1,000 in fees from each minor's settlement is not adequately supported. (See Cal. Rules of Court, rule 7.955(c) [counsel seeking fees in minor's compromise must submit declaration addressing factors set forth in rule 7.955(b)].)

The Petitions are also not dated by either the petitioner or counsel. The proposed Orders Approving Compromise of Claim are also incomplete, as they do not list the name or address of the bank where the funds will be deposited. (See Order Approving Compromise of Claim or Action, ¶ 9a.) Therefore, the court intends to deny the Petitions for minors' compromise without prejudice.

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: DTT on 9/15/2022.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Watson v. Covenant Care California, LLC***
Superior Court Case No. 21CECG03568

Hearing Date: September 20, 2022 (Dept. 501)

Motion: by Defendant for Ordering Compelling Arbitration and Staying Proceedings

Tentative Ruling:

To grant and order plaintiff to arbitrate her claims against defendant Covenant Care California, LLC. The action is stayed pending completion of arbitration. (9 U.S.C. § 3.)

Explanation:

Enforcement of Arbitration Agreement against non-signatories

Both California and federal law "favor[] the enforcement of valid arbitration agreements." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 97.) Nevertheless, arbitration is a " 'matter of consent, not coercion,'" and " 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.) A court may refuse to compel arbitration against a third party who is not bound by the underlying arbitration agreement. (Code Civ. Proc., § 1281.2, subd. (c); *Daniels v. Sunrise Senior Living, Inc.* (2013) 212 Cal.App.4th 674, 679 (*Daniels*).)

The California Supreme Court has held that "wrongful death plaintiffs may be bound by agreements entered into by decedent that limit the scope of the wrongful death action." (*Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 851.) In other words, "[a]lthough wrongful death is technically a separate statutory cause of action in the heirs, it is in a practical sense derivative of a cause of action in the deceased. Decedents are able to bind their heirs through wills and other testamentary dispositions so the concept is not new or illogical. Instead it is the only pragmatic solution in such a situation." (*Herbert v. Superior Court* (1985) 169 Cal.App.3d 718, 725 [health care provider's arbitration agreement enforced against nonsigning heirs].)

There are examples where an arbitration agreement is not enforced against nonsigning heirs. In *Daniels, supra*, the underlying arbitration agreement stated "[b]y entering into this Agreement, you agree that any and all claims and disputes arising from or related to this Agreement or to your residency ….." (*Id*. at fn. 4.) The use of the term "your" meant the arbitration agreement applied only to the resident, not the person possessing power of attorney who signed the agreement on the resident's behalf. (*Id*. at p. 678.) Accordingly, the court held that such a phrase did not show "manifest[] inten[t][] to bind third party wrongful death claimants" and thus was insufficient to bind the third party. (*Id*. at p. 683.)

Similarly, in *Monschke v. Timber Ridge Assisted Living, LLC* (2016) 244 Cal.App.4th 583 (*Monschke*) the arbitration clause stated "[Y]ou agree that any and all claims and disputes arising from or related to this Agreement or to your residency, care or services at [the defendant facility] shall be resolved by submission to neutral, binding arbitration …." (*Id*. at p. 585.) The court declined to find that such a clause included the plaintiff's wrongful death claim.

Plaintiff contends that, at least for purposes of her wrongful death claim, because she is not a party to the subject arbitration agreement, it should not be enforced. Plaintiff primarily relies on *Daniels,* but that case is distinguishable because there the express language of the subject arbitration clause specified that it was limited to the resident. In contrast, the arbitration clause here states "By executing this Agreement, the Parties understand and agree that Resident's heirs, representative, executors, administrators, successors, assigns, *and any person whose claim is derived through or on behalf of Resident or is predicated on conduct involving Resident*, including without limitation any parent, spouse, child, guardian, executor, administrator, surrogates, or legal representative, shall receive the benefit of this Agreement and be bound by this Agreement." (See Moya Decl. Ex. 2, emphasis added.) In essence, unlike the language found insufficient to bind the third parties in *Daniels* and *Monschke*, here the arbitration clause specifically included express language making it binding on "any person whose claim is derived through or on behalf of Resident …."

Furthermore, "[a]lthough the scope of an arbitration clause is generally a question for judicial determination, the parties may, by clear and unmistakable agreement, elect to have the arbitrator, rather than the court, decide which grievances are arbitrable." (*Rodriguez v. American Technologies, Inc*. (2006) 136 Cal.App.4th 1110, 1123.) Here, the arbitration clause states that the arbitrator shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this agreement." (Moya Decl. Ex. 2 § 11.) Accordingly, "any issues concerning the scope of the arbitration clause should be determined by the arbitrator in the arbitration proceeding." (*Rodriguez v. American Technologies, Inc., supra*, 136 Cal.App.4th at p. 1123.)

Unconscionability

"Because unconscionability is a reason for refusing to enforce contracts generally, it is also a valid reason for refusing to enforce an arbitration agreement …." (*Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at p. 114.) Unconscionability has both a procedural and a substantive element. While both must be present, they need not be present in the same degree and are evaluated on a sliding scale. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 247 (*Pinnacle*).) "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz v. Foundation Health Psychcare Services, Inc*., *supra*, 24 Cal.4th at p. 114.)

Procedural unconscionability involves oppression or surprise due to unequal bargaining power. (*Baltazar v. Forever 21, Inc*. (2016) 62 Cal.4th 1237, 1243.) It exists where

there is an absence of meaningful choice on the part of one of the parties to a contract, such as with a contract of adhesion. (*Ibid*.) Plaintiff contends that the circumstances here are analogous to those of *Dougherty v. Roseville Heritage Partners* (2020) 47 Cal.App.5th 93 (*Dougherty*), where the court held a particular arbitration agreement was unconscionable and thus unenforceable. In *Dougherty*, a resident suffering from dementia had been removed from two previous facilities due to "aggressive behaviors." His daughter, who was "crying" and "emotionally exhausted," but "relieved" to find placement, toured the defendant's facility then was presented with 70 pages of admission documents, including an arbitration agreement.

The *Dougherty* court found procedurally unconscionability because the two previous facilities deeming the resident unsuitable for placement and the plaintiff's communicating her lack of bargaining power to the defendant's marketing director, were peculiar circumstances showing an unfair degree of "adhesiveness." (*Dougherty, supra,* 47 Cal.App.5th at p. 104.) The agreement was "imposed on a 'take it or leave it' basis and evinced a high degree of procedural unconscionability." (*Ibid*.)

Here, unlike the clear signs of distress discernible in *Daugherty*, plaintiff attempts to find procedural unconscionability on one entry in the decedent's medical chart for "altered mental status, unspecified." (See Smith Decl, Ex. 6, at p. 1005.) The "unspecified" nature of the singular entry is insufficient to meet plaintiff's burden to show surprise and unequal bargaining power sufficient to constitute procedural unconscionability (see *Rosenthal v. Great Western Fin'l Securities Corp*. (1996) 14 Cal.4th 394, 413-414 [requiring the party opposing the motion prove by preponderance of evidence), especially considering that defendant has produced rebuttal evidence which includes a more specific report stating that the decedent had "mental capacity." (Luevanos, Decl. Ex. A, p. 648.)

The *Daugherty* court also found substantive unconscionability noting that the subject arbitration agreement did not allow for interrogatories, and depositions were only allowed in "'exceptional cases.'" (*Daugherty, supra,* 47 Cal.App.5th at pp. 100, 106.) Here, in contrast, the subject arbitration agreement allows the arbitrator to "custom tailor" discovery and allows the parties to "conduct the discovery to which they agree." (Luevanos, Decl. Ex. B, p. 10/17.) Allowing an arbitrator to limit discovery is not unconscionable. (See *Dotson v. Amgen, Inc*. (2010) 181 Cal.App.4th 975, 982–985 [specifically rejecting the assumption that an arbitrator would not be fair in determining whether additional depositions were necessary].) Therefore, the limitations placed on discovery do not render the agreement unconscionable.

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: DTT on 9/16/2022 .
(Judge's initials) (Date)

(38)

Tentative Ruling

Re: ***Coronado v. Ekmalian***
Superior Court Case No. 21CECG00607

Hearing Date: September 20, 2022 (Dept. 501)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To deny, without prejudice. Petitioner must file an Amended Petition, with appropriate supporting papers and proposed Orders, and obtain a new hearing date for consideration of the Amended Petition. (Super. Ct. Fresno County, Local Rules, rule 2.8.4.)

Explanation:

The Petition cannot be granted at this time for the following reasons:

Medical Treatment and Recovery:

The Petition states that the minor received medical treatment from EPU Children's Center, but no medical records have been provided. Additionally, the Petition states that the minor has recovered completely, but no substantiating documentation has been provided. A copy of any doctor's report containing a diagnosis of the claimant's injuries or a prognosis for the claimant's recovery, and a report of the claimant's current condition, must be attached to the Petition as Attachment 8.

Medical Expenses and Reimbursements:

Petitioner has not substantiated the medical expenses. No billing records were attached to the Petition. The Petition states that $4,473.43 of the settlement proceeds will be paid to the Department of Health Care Services to satisfy the lien rights of Medi-Cal. A copy of the final Medi-Cal demand letter or letter agreement must be attached to the Petition as Attachment 12b(4)(c). The court notes that there is a statement on page 11 of the Petition that a "copy of Final Med-Cal lien is attached." However, no such attachment was filed with the Petition.

Additionally, item 14 of the Petition includes inconsistent statements regarding reimbursement of fees and expenses. Petitioner has checked the box at 14a indicating that petitioner has paid none of the fees or expenses for which reimbursement is requested. However, the expenses are then listed in item 14b. Expenses should only be listed in item 14b if petitioner has paid those expenses and is seeking reimbursement, which does not appear to be the case here.

Attorney Fee Agreement:

The Petition states, at item 17a(2), that petitioner and their attorney have an agreement for services provided in connection with the minor's claim, however no copy of the agreement has been provided. A copy of the agreement must be submitted as Attachment 17a. The court notes that there is a statement on page 11 of the Petition that a "copy of the Retainer Agreement is attached." However, no such attachment was filed with Petition.

Proposed Order Approving Compromise:

The box at item 6b of the proposed Order should be checked because the claimant is a minor. Additionally, details regarding the proposed blocked account for the balance of the settlement must be stated in the proposed Order. At item 9a, the Petition must specify the name, branch, and address of the bank, and the amount of each account.

Pursuant to California Rules of Court, rule 3.1312, 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: DTT **on** 9/16/2022.
(Judge's initials) (Date)