Tentative Rulings for February 2, 2022
Department 403

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).)

18CECG02376 ***Dominguez v. Paul Blanco's Good Car Company Fresno, Inc.*** **(Dept. 403)**

18CECG02375 ***Calderon v. Paul Blanco's Good Car Company Fresno, Inc.*** **(Dept. 403)**

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

19CECG01665 ***Friedland v. Zinkin Development Company, Ltd.*** **Is continued to February 3, 2022 at 3:30 p.m. in Dept. 403**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

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(03)

Tentative Ruling

Re: ***Castillo v. Smith***
Superior Court Case No. 19CECG2565

Hearing Date: February 2, 2022 (Dept. 403)

Motion: Defendants' Motion to Exclude Plaintiffs' Expert Toxicologist

Tentative Ruling:

To deny defendants' motion to exclude plaintiffs' expert toxicologist. (Code Civ. Proc. § 2034.300.)

Explanation:

"After the setting of the initial trial date for the action, any party may obtain discovery by demanding that all parties simultaneously exchange information concerning each other's expert trial witnesses to the following extent: [¶] (a) Any party may demand a mutual and simultaneous exchange by all parties of a list containing the name and address of any natural person, including one who is a party, whose oral or deposition testimony in the form of an expert opinion any party expects to offer in evidence at the trial." (Code Civ. Proc., § 2034.210, subd. (a).)

"The exchange of expert witness information shall include either of the following: [¶] (1) A list setting forth the name and address of a person whose expert opinion that party expects to offer in evidence at the trial." (Code Civ. Proc., § 2034.260, subd. (b)(1).)

"Within 20 days after the exchange described in Section 2034.260, any party who engaged in the exchange may submit a supplemental expert witness list containing the name and address of any experts who will express an opinion on a subject to be covered by an expert designated by an adverse party to the exchange, if the party supplementing an expert witness list has not previously retained an expert to testify on that subject." (Code Civ. Proc., § 2034.280, subd. (a).)

Also, under Code of Civil Procedure section 2034.300, "on objection of any party who has made a complete and timely compliance with Section 2034.260, the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following: [¶] (a) List that witness as an expert under Section 2034.260." (Code Civ. Proc., § 2034.300, subd. (a).)

"Failure to comply with expert designation rules may be found to be 'unreasonable' when a party's conduct gives the appearance of gamesmanship, such as undue rigidity in responding to expert scheduling issues. The operative inquiry is whether the conduct being evaluated will compromise these evident purposes of the discovery statutes: 'to assist the parties and the trier of fact in ascertaining the truth; to encourage settlement by educating the parties as to the strengths of their claims and defenses; to expedite and facilitate preparation and trial; to prevent delay; and to

safeguard against surprise.'" (*Staub v. Kiley* (2014) 226 Cal.App.4th 1437, 1447, internal citation omitted.)

In *Staub*, the Court of Appeal held that the trial court erred in excluding the plaintiffs' expert. "The record here does not support a determination that plaintiffs so unreasonably failed to timely disclose their experts that exclusion of all expert testimony was warranted. Neither plaintiffs nor their counsel engaged in actions that can be characterized as gamesmanship, nor did they engage in a 'comprehensive attempt to thwart the opposition from legitimate and necessary discovery,' justifying exclusion of evidence." (*Ibid*, internal citation omitted.)

The *Staub* court also likened the granting of the motion to exclude plaintiffs' expert to an order granting terminating sanctions, which "eviscerated" the plaintiffs' case. The court found that, in the absence of evidence that the plaintiffs had engaged in a history of discovery abuse, such a severe sanction was unwarranted. (*Id*. at p. 1448.)

Likewise, in *Du-All Safety, LLC v. Superior Court* (2019) 34 Cal.App.5th 485, the Court of Appeal held that, where the defendant had timely designated its initial experts under section 2034.210, and then timely designated its supplemental experts in the same fields as the plaintiffs' designated experts under section 2034.280, defendant had complied with the requirements of the expert designation statutes and the trial court erred in excluding the defendant's supplementally disclosed expert. (*Id*. at pp. 497-498.)

"There is no dispute that Du-All timely and simultaneously designated its initial experts. And also no dispute it timely designated its rebuttal experts in the same fields as plaintiffs' initially designated experts. In short, Du-All complied with the express language of the expert designation statutes. That ends it." *(Id*. at p. 497.)

"In short, Du-All had a right to do what it did. And the trial court's order was error, especially as Du-All complied with its disclosure obligations, there is no indication it acted unreasonably or engaged in gamesmanship, and there was no prejudice to plaintiffs." (*Id*. at p. 498.) Also, the Court of Appeal noted that it would be unjust to force the defendant to defend itself against plaintiffs' four experts without any experts of its own, which would have the effect of "eviscerating" its defense on the issues on which the experts would testify. (*Id*. at p. 500.)

In addition, the court found that there was no prejudice to plaintiffs from the supplemental designation. "The fact is that at the time the supplemental disclosure was served, neither party had deposed any expert witnesses. Beyond that, before the trial court ruled on plaintiffs' motion to strike, the court had continued trial to October 29, with expert discovery to remain open until 30 days before trial." (*Id*. at p. 501.) The court also found no evidence of gamesmanship by the defendant or any comprehensive attempt by defendant or its counsel to thwart discovery. (*Id*. at pp. 501-502.)

In the present case, defendants move to exclude plaintiffs' supplementally designated toxicology expert, contending that plaintiffs should have designated the toxicologist in their initial designation that they served after the court continued the trial date and reopened discovery. They point out that the entire reason that the court continued the trial date and allowed discovery to reopen was because plaintiffs had

discovered evidence that defendant Smith had failed a drug test after the accident, and they wanted to add a claim for punitive damages and conduct further discovery into whether he was under the influence of drugs at the time of the accident. Thus, they contend that plaintiffs knew at the time of the initial designation that they needed to designate a toxicologist, yet they waited until after defendants designated a toxicologist before serving a supplemental designation with their own toxicology expert. Defendants argue that plaintiffs are engaging in gamesmanship and attempting to thwart defendants' right to discovery, and therefore their toxicologist should be excluded.

However, it does not appear that plaintiffs have engaged in the type of gamesmanship or obstruction of the discovery process that would warrant excluding their expert. First of all, plaintiffs properly served a timely designation of experts after the court granted their motion to continue the trial and reopen discovery. (Exhibit H to Dawson decl.) Their initial designation did not list a toxicology expert, but it did list several other retained experts. (*Ibid*.) Defendants also served their own designation, which did list a toxicologist as a retained expert, as well as several other retained experts. (Exhibit G to Dawson decl.) Plaintiffs then served their supplemental designation in response to defendants' designation, which listed a retained toxicology expert. (Exhibit I to Dawson decl.) The supplemental designation was served less than 20 days after defendants served their designation. (*Ibid*.)

Thus, plaintiffs complied with the literal language and requirements of the expert designation statutes. (Code Civ. Proc. §§ 2034. 210; 2034.260; 2034.280.) They served an initial designation simultaneously with defendants, and they served a supplemental designation in response to defendants' designation less than 20 days after defendants designated their toxicology expert. Defendants do not point to any flaw in plaintiffs' compliance with the requirements of the designation statutes, and in fact they seem to concede that the plaintiffs could serve a supplemental designation in response to defendants' designation.

Nevertheless, defendants contend that plaintiffs knew that they had to designate a toxicologist because they were alleging that Smith was under the influence of drugs at the time of the accident, and thus they should have designated the toxicologist at the time of the initial designation rather than waiting for defendants to designate their toxicologist first. Yet, while it may have been preferable for plaintiffs to designate their toxicologist in the initial designation, there is nothing in the statutes that requires them to do so. They were entitled to wait to see if defendant designated a toxicologist and then serve a supplemental designation with their own toxicologist disclosed.

Also, defendants have not presented any evidence that would tend to show that they were prejudiced by the allegedly dilatory behavior of plaintiffs. They claim that plaintiffs have caused them delay and expense, but it does not appear that the purportedly late designation caused them any real harm. The trial date is now set for August of 2022 and expert depositions have not yet been completed, so defendants still have several months in which to depose plaintiffs' toxicologist and learn the basis for his opinions.

Nor is there any evidence that plaintiffs have engaged in a pattern of thwarting discovery or unreasonably attempting to delay the case. Defendants have not pointed

to any other instances of plaintiffs refusing to respond to discovery or any other obstructive behavior. Plaintiffs did seek and obtain a continuance of the trial date, but their request was based on the discovery of evidence that Smith was under the influence of drugs at the time of the accident, which the court found was a valid reason to continue the trial and reopen discovery.

Given the lack of any evidence of obstructive or unreasonable behavior by plaintiffs, it would be unjust and unduly punitive to grant what amounts to an extreme sanction against them by excluding their toxicology expert from trial. As the courts in *Staub* and *Du-All* held, it would be unjust to eviscerate plaintiffs' claims by denying them the right to present expert testimony on the issue of whether Smith was intoxicated at the time of the accident without evidence showing a pattern of obstructive and unreasonable conduct by plaintiffs or their counsel. (*Staub*, *supra*, 226 Cal.App.4th at p. 1448; *Du-All, supra*, 34 Cal.App.5th at p. 500.) Therefore, the court intends to deny the motion to exclude plaintiffs' toxicology expert from testifying at trial.

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 01/25/22.
(Judge's initials) (Date)

(20)

Tentative Ruling

Re: ***Washington v. Xiong***
Superior Court Case No. 19CECG00046

Hearing Date: February 2, 2022 (Dept. 403)

Motion: Petition for Approval of Compromise of Disputed Claim of Minor

Tentative Ruling:

To grant. No appearance required. Petitioner shall submit Order Approving Compromise and Order for Deposit for signature (while an Order for Deposit was submitted, it states the wrong deposit amount – $3,636.59 instead of $4,219.69). In the event that oral argument is requested, the minor is excused from appearing.

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 01/25/22.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***In Re Noah Avila***
Superior Court Case No. 21CECG02945

Hearing Date: February 2, 2022 (Dept. 403)

Motion: Petition for Approval of Disputed Claim of Minor Noah Avila

Tentative Ruling:

To grant. Orders signed. No appearances necessary.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 02/01/22.
(Judge's initials) (Date)