Tentative Rulings for March 23, 2022
Department 503

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

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 503

Begin at the next page

(24)

Tentative Ruling

Re: ***Parra v. Harrell***
Superior Court Case No. 20CECG03719

Hearing Date: March 23, 2022 (Dept. 503)

Motion: Petition for Approval of Compromise of Claim of Minor

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: KAG on 3/14/2022 .
(Judge's initials) (Date)

(20)

Tentative Ruling

Re: ***Anderson v. Western Health***
Superior Court Case No. 14CECG02461

Hearing Date: March 23, 2022 (Dept. 503)

Motion: Motion by Defendant Kenneth Smith, M.D. for Summary Judgment or, in the Alternative, Summary Adjudication

Tentative Ruling:

To deny. To sustain plaintiff Linda Anderson's evidentiary objection numbers 1 (Exhibit J to defendant Kenneth Smith, M.D.'s Statement of Evidence), and 2 (the entirety of the Declaration of David Barcay, M.D.).

Explanation:

This action alleges a series of negligent actions by numerous healthcare providers, commencing with plaintiff Linda Anderson having knee replacement surgery. From there, plaintiff suffered through various complications, many of which she alleges were either caused or worsened by the treatment she received from the various defendants. Plaintiff's husband, Lloyd Anderson, also sues for loss of consortium against each defendant.

The court must always examine the pleadings, as they determine the outer measure of materiality on summary judgment. (*Nieto v. Blue Shield of Calif. Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 73 ["It is well established that the pleadings determine the scope of relevant issues on a summary judgment motion."].)

According to the Third Amended Complaint ("TAC"), immediately preceding the care plaintiff received from moving party Dr. Smith, plaintiff was evaluated by Dr. Hongshik Han, who operated on her leg on December 19, 2013. Plaintiff was released from the hospital on December 23, 2013, and, within a week, plaintiff began to see signs of infection. There was a strong odor coming from the surgical site. On December 31, 2013, she had become so sick she had to be taken by the Coalinga Fire Department to the Coalinga Regional Medical Center ER, where she saw Dr. Smith. He diagnosed her with a urinary tract infection, but failed to remove the dressing from her wound, or evaluate the wound on her right leg in any way. Dr. Smith discharged her home within a few hours of her arrival, without any prescription for the urinary tract infection he had diagnosed. (TAC, ¶¶ 28-30, 71.)

Dr. Smith now moves for summary judgment.

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.)

Dr. Smith's motion is supported by an expert declaration by David Barcay, M.D., who opines that Dr. Smith met the applicable standard of care for an emergency physician with respect to his care and treatment of plaintiff, and that Dr. Smith was not the proximate cause of plaintiff's damages/injuries.

An expert witness who is a nontreating physician with no personal knowledge of a case may not testify to facts derived from medical records unless the proper evidentiary foundation to qualify the records as business records has been presented. (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 742; *Young v. Bates Valve Bag Corp.* (1942) 52 Cal.App.2d 86, 96.)

Dr. Barcay's opinions are based in part on medical records (Dr. Smith's Statement of Evidence, Exhibit J) produced by Dr. Han in response to a request for production of documents. (Barcay Decl., ¶ 9.) Plaintiff objects to Exhibit J as lacking in foundation and authentication. Dr. Smith contends that the records are authenticated by virtue of the fact that Dr. Han signed a verification with his discovery response that accompanied the document production.

> Documents obtained in discovery in response to a request for production but must be presented in admissible form. This means the evidence must be (1) properly identified and authenticated, (2) admissible under the secondary evidence rule, (3) nonhearsay or admissible under some exception to the hearsay rule, and (4) a complete record, not selected portions of the document. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2013) ¶¶ 10:168-to 10:169, pp. 10-70 to 10-71.) (rev. # 1, 2013).) Unless the opposing party admits the genuineness of the document, the proponent of the evidence must present declarations or other "evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is." (Evid. Code, § 1400; see Evid. Code, §§ 1410 et seq. for methods of authenticating documents.)

(*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 855.)

The Rutter Guide lists several shortcuts to authentication: stipulations; pleading admissions (i.e., admitting genuineness in an answer); requests for admissions; judicial notice (of court files and records, for instance); business records subpoena directed at non-party produced with affidavit of custodian of records; and self-authenticating records (such as notarized deeds or certified copies of public records). (Wegner, Fairbanks & Epstein, *Cal. Practice Guide: Civil Trials and Evidence* (TRG 2021) ¶¶ 8:319-8:325.)

None of these shortcuts were used here. The closest one is records produced pursuant to a business records subpoena, accompanied by an affidavit by a custodian of records. The verification signed by Dr. Han with the document production does not satisfy these criteria. An affidavit by a custodian of records must identify the records; describe the mode of preparation of the records; and state that the copies are "true copies" of originals prepared in the ordinary course of business at or near the time of the event. (Wegner, Fairbanks & Epstein, *supra*, ¶ 8:324.) Dr. Han's discovery response verification does none of this.

Since Dr. Barcay's declaration is based, at least in part, on medical records that have not been authenticated, the objection to the declaration must be sustained. It is unclear the extent to which Dr. Barcay relied on Dr. Han's records. Given that Dr. Smith's alleged negligence directly followed alleged negligence by Dr. Han, the court cannot assume that this omission is inconsequential.

> [Code of Civil Procedure] [s]ection 437c is a complicated statute. There is little flexibility in the procedural imperatives of the section, and the issues raised by a motion for summary judgment (or summary adjudication) are pure questions of law. As a result, section 437c is unforgiving; a failure to comply with any one of its myriad requirements is likely to be fatal to the offending party.

(*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1607 [brackets added].)

Furthermore, the charging allegations against Dr. Smith, as referenced above, concern treatment plaintiff received in the Emergency Department of Coalinga Regional Medical Center. By statute, the court can consider expert testimony as to standard of care "only from physicians and surgeons who have had substantial professional experience within the last five years while assigned to provide emergency medical coverage in a general acute care hospital emergency department." (Health & Saf. Code, § 1799.110, subd. (c).) In *Stokes v. Baker* (2019) 35 Cal.App.5th 946, 966, the court found that section 1799.110 was rightly applied strictly (i.e., under its "literal construction") with standard of care testimony. Health and Safety Code section 1799.110 clearly applies, and Dr. Smith does not contend otherwise.

> According to, section 1799.110, subdivision (c), whether the proposed expert has the required " 'substantial professional experience' shall be determined by the custom and practice of the manner in which emergency medical coverage is provided in general acute care hospital emergency departments **in the same or similar localities** where the alleged negligence occurred." This command is obviously intended to ensure that

> the performance of an emergency room physician sued for alleged malpractice in rendering emergency room treatment is evaluated under a standard of care essentially equivalent to that prevailing in emergency rooms at the time **in the locality** where the alleged negligence took place. The professional expertise required by the express statutory language is therefore skill and knowledge acquired "on the job" as an emergency room physician ***in a locality*** **where hospital emergency care is provided in a manner substantially the same as such care is given *in the locale where and when the alleged malpractice occurred***. In other words, academic credentials, or experience acquired while serving as an "on-call" specialist, or emergency room experience gained solely in hospitals or other facilities which do not deliver emergency care **in essentially the same manner as it is delivered in the locale where the cause of action arose**, are not enough, singly or together, to meet the demands of subdivision (c) of section 1799.110.

(*Miranda v. National Emergency Services, Inc.* (1995) 35 Cal.App.4th 894, 905–906, emphasis added.)

Dr. Barcay states that he is a board-certified emergency physician who has been practicing in the emergency department of Cedars-Sinai Medical Center, an acute care hospital, since 1988. The hospital where Dr. Smith provided the emergency services to plaintiff is a regional, rural, hospital. Cedars-Sinai in Los Angeles is quite a different locale than Coalinga. Dr. Barcay does not show that he has substantial experience providing emergency medical coverage "in essentially the same manner as it is delivered in the locale where the cause of action arose …." (*Miranda, supra*, 35 Cal.App.4th 894.) Dr. Barcay only states in his declaration that, based on his education, background, and experience as an emergency physician, he is familiar with the standard of care required of emergency physicians practicing in his field. But this does not fully satisfy the requirements of section 1799.110. For this additional reason, the objection to the declaration of Dr. Barcay is sustained.

Therefore, the court concludes that Dr. Smith failed to meet his burden of production on the motion. If the moving party fails to meet its burden of production, the opposing party has no evidentiary burden to even oppose the motion. (See *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468 ["There is no obligation on the opposing party ... to establish anything by affidavit unless and until the moving party has by affidavit stated facts establishing *every element* ... necessary to sustain a judgment in his favor." (Emphasis in original; internal quotes omitted)].)

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: KAG on 3/16/2022 .
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Doe v. Clovis Unified School District et al.***
Superior Court Case No. 21CECG01008

Hearing Date: March 23, 2022 (Dept. 503)

Motions: Demurrer and Motion to Strike by Defendant Stacey Aprile
Demurrer by Defendant Clovis Unified School District

Tentative Ruling:

To overrule defendant Stacey Aprile's ("Aprile") demurrer to the complaint. (Code Civ. Proc., § 430.10, subd. (b), (d).) To deny Aprile's requests for judicial notice.

To grant Aprile's motion to strike paragraphs 32 and 33 of the complaint, without leave to amend. (Code Civ. Proc., § 436, subd. (a).)

To sustain Clovis Unified School District's ("CUSD") demurrer to the fourth cause of action, with plaintiff granted 10 days' leave to amend the fourth cause of action only. (Code Civ. Proc., § 430.10, subd. (e).) The time in which the complaint may be amended will run from service of the order by the clerk.

Explanation:

Aprile's Demurrer

Aprile demurs to the complaint on the ground that plaintiff does not have the capacity to sue under a fictitious name, and in doing so has created a defect of parties. The demurrer is brought pursuant to Code of Civil Procedure section 430.10, subdivisions (b) and (d), which provide, in relevant part:

> The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds:
>
> …
>
> (b) The person who filed the pleading does not have the legal capacity to sue.
>
> …
>
> (d) There is a defect or misjoinder of parties.

Aprile cites to no authority providing that improper filing under a pseudonym is grounds for demurrer. As explained by the court in *Doe v. Lincoln Unified School*

Dist. (2010) 188 Cal.App.4th 758 [suit by teacher under fictitious name against school district],

> The question here is not one of standing. Code of Civil Procedure section 367 states that "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." Defendants contend this provision requires that a party sue in his or her own name. It does not. Notwithstanding its wording, this provision requires that an action be brought by the real party in interest. (*Redevelopment Agency of San Diego v. San Diego Gas & Electric Co.* (2003) 111 Cal.App.4th 912, 920 ….) "'A real party in interest ordinarily is defined as the person possessing the right sued upon by reason of the substantive law.' [Citation.] A complaint filed by someone other than the real party in interest is subject to general demurrer on the ground that it fails to state a cause of action. [Citation.] The purpose of this section is to protect a defendant from harassment by other claimants on the same demand. [Citation.]" (*Id.* at pp. 920–921 ….)

(*Doe v. Lincoln Unified School Dist., supra,* 188 Cal.App.4th at p. 765.)

"The question for purposes of standing is not the name used by the party suing but whether the party suing is the party possessing the right sued upon. In this matter, there is no question plaintiff is the party injured by virtue of defendants' actions and, therefore, she is the party possessing the right sued upon. Thus, the question is not whether plaintiff has standing to sue but whether she may do so using a fictitious name." (*Id.* at p. 765.)

Here, there is no question that plaintiff is the real party in interest. It may be subject to debate whether plaintiff has properly filed this action under a pseudonym, but Aprile makes no showing that a demurrer is the proper procedural vehicle to challenge filing under a fictitious name.

Aprile's Motion to Strike

Code of Civil Procedure section 436 provides, "The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading, (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court."

Aprile moves to strike two paragraphs concerning statements Aprile allegedly made to Clovis Police Department in 2006 (complaint, ¶¶ 32, 33), years after the abuse is alleged to have occurred and ended.

"[A] complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872.) An allegation is immaterial if it "is not essential to the statement of a claim or defense." (Code Civ. Proc., § 431.10, subd. (b)(1).) The statements and admissions alleged to have been made in paragraphs 32 and 33 are relevant to plaintiff's causes of action; if true they provide some evidentiary support for the material facts of the complaint. But they

are not necessary to state a cause of action. For that reason, these evidentiary facts will be stricken.

CUSD's Demurrer

CUSD's demurrer is directed at the fourth cause of action for failure to report suspected child abuse. Plaintiff alleges that CUSD, acting through its agents and employees, was at all relevant times a "mandated reporter."

The Child Abuse and Neglect Reporting Act ("CANRA"), Penal Code section 11164 et seq., amended in 2000, created criminal liability for mandatory reporters for failure to report suspected child abuse and neglect against any person who is under the age of 18. (Pen. Code, §§ 11165, 11165.7, 11166.)

CUSD first contends that the fourth cause of action fails because CUSD as an entity is not a mandated reporter. Penal Code section 11166, subdivision (a), provides that a mandated reporter shall make a report to one of the specified agencies "whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect."

Penal Code section 11165.7 defines "mandated reporter" by listing 49 positions that fall under that category. CUSD correctly points out that the definition specifies the *individuals* who are subject to CANRA. It does not identify any entities or organizations as mandated reporters.

However, two appellate court decisions clearly indicate that public entity employers of mandated reporters can be held liable under CANRA. (See *Kassey S. v. City of Turlock* (2013) 212 Cal.App.4th 1276; *Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180.) The demurrer will not be sustained on this ground.

CUSD next argues that the complaint does not allege facts that rise to the level of reasonable suspicion for CUSD or any of its agents to suspect child abuse or neglect. "'[T]o state a cause of action against a public entity, every fact material to the existence of its statutory liability must be pleaded with particularity.'" (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795.)

A mandated reporter is required to report an account of child abuse when "in the mandated reporter's professional capacity or within the scope of the mandated reporter's employment, [the mandated reporter] has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect." (Pen. Code, § 11166, subd. (a).) "'[R]easonable suspicion' means that it is objectively reasonable for a person to entertain a suspicion, based upon facts that could cause a reasonable person in a like position, drawing, when appropriate, on the person's training and experience, to suspect child abuse or neglect. 'Reasonable suspicion' does not require certainty that child abuse or neglect has occurred nor does it require a specific medical indication of child abuse or neglect; any 'reasonable suspicion' is sufficient." (Pen. Code, § 11166, subd. (a)(1).)

In the opposition, plaintiff points to numerous allegations of the complaint, many of which do not support a duty to report under CANRA because there is no indication those events were known to or reported to mandated reporters. (See Complaint ¶¶ 13, 15, 19 and 20, 21, 22 and 23.) Pertinent to this claim are paragraphs 11 and 12 of the complaint, which allege that parents complained to CUSD that Aprile:

- was alone with their children off school grounds without any basis for doing so,
- spoke with their children about improper topics, including what they should do when they are in relationships with members of the opposite sex, and
- talked to students on the phone about topics unrelated to school, such as details of their personal lives.

These complaints would not have given CUSD a reasonable suspicion of sexual child abuse as defined in Penal Code section 11165.1: statutory rape, rape in concert, incest, sodomy, oral copulation, lewd or lascivious acts upon a child, sexual penetration, child molestation, sexual trafficking of a child, using a child for production of obscene sexual conduct, child prostitution, or providing food, shelter, and the like in exchange for performance of a sexual act. A mandated reporter must make a report of suspected child abuse "whenever the mandated reporter, in the mandated reporter's professional capacity or within the scope of the mandated reporter's employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect." (Pen. Code, § 11166, subdivision (a), emphasis added.) The allegations of what was observed or reported to mandatory reporters would not give them a "reasonable suspicion" that plaintiff "has been the victim of child abuse …." Accordingly, the facts alleged do not give rise to an obligation to make a report of suspected child abuse under CANRA.

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: KAG on 3/18/2022 .
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Ponce v. Hill***
Superior Court Case No. 20CECG02741

Hearing Date: March 23, 2022 (Dept. 503)

Motion: Defendants' Motion for Terminating Sanctions

Tentative Ruling:

To continue the motion to Tuesday, April 26, 2022, at 3:30 p.m. in Department 503, and to order plaintiff to serve, on or before Friday, April 8, 2022, verified responses to defendant's Special Interrogatories, Set One, and to the Request for Production of Documents, Set One. Defense counsel may file a supplemental declaration to inform the court whether this discovery was timely served, with said declaration to be filed on or before Tuesday, April 19, 2022. Provided the responses are timely served, the court intends to deny the request for terminating sanctions, but will order monetary sanctions, for this motion only.

Explanation:

Provided plaintiff serves verified responses to the at-issue discovery (as this court has already ordered him to do), terminating sanctions will not be warranted, as this would only serve to punish plaintiff for the delay which was apparently caused only by his attorney. Sanctions are supposed to further a legitimate purpose under the Discovery Act, i.e. to compel disclosure so that the party seeking the discovery can prepare its case, and secondarily to compensate the requesting party for the expenses incurred in enforcing discovery. (*Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 262; *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796.) Sanctions should not constitute a "windfall" to the requesting party, giving the moving party more than would have been obtained had the discovery been answered. (*Caryl Richards, Inc. v. Superior Court* (1961) 188 Cal.App.2d 300, 305.) Any sanctions imposed must be "suitable and necessary" to allow the propounding party to obtain the information sought, but they are not designed to "impose punishment." (*Id.* at p. 304.) The imposition of terminating sanctions is a drastic consequence, one that should not lightly be imposed, or requested. (*Ruvalcaba v. Government Employees Ins. Co*. (1990) 222 Cal.App.3d 1579, 1581.)

Plaintiff's counsel has provided an explanation for the delay in responding to the court's prior order compelling discovery responses, which constitutes excusable neglect on his part. He indicated in his declaration that the discovery responses had now been served, without objections, and the court initially interpreted this to mean he served responses to <u>all</u> of the at-issue discovery. However, on reply, defendants indicated that only the responses to the Form Interrogatories, Set One, had been served, and there have been no responses to the Special Interrogatories, Set One, and the Request for Production of Documents, Set One. If that is true, then the responses to the other discovery must be served by the deadline given above if plaintiff hopes to avoid more severe consequences for failing to obey the court's order.

As for defendants' alternative request for monetary sanctions, the court must point out that it is quite inaccurate for defense counsel to state that the court denied monetary sanctions on the original motions[1] to compel and "chose not to award monetary sanctions even though monetary sanctions were completely justified." (Memorandum, p. 7:5-7; Hitchcock Dec., p. 4:5-6.) No monetary sanctions were ordered on the motions to compel because *none were requested*. The court denies defendants' request that the court order sanctions now for those motions. Those motions have already been ruled on, and are no longer before the court. The court will determine the proper amount for monetary sanctions at the continued hearing.

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: KAG on 3/18/2022 .
(Judge's initials) (Date)

[1] While counsel consistently refers to *one* prior motion to compel, defendants actually filed three separate motions.