

**Tentative Rulings for March 29, 2022**  
**Department 501**

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

21CECG03838      *Larios et al. v. Wallace et al.*

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

20CECG03370      *Coe v. Pinehurst Lodge* is continued to Tuesday, April 19, 2022 at 3:30 p.m. in Dept. 501

21CECG01408      *Santiago-Lugo v. The Neil Jones Food Co.* is continued to Tuesday, April 19, 2022 at 3:30 p.m. in Dept. 501

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## **Tentative Rulings for Department 501**

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**Tentative Ruling**

Re: ***In re: Nikki Somphoume***  
Superior Court Case No. 21CECG03479

Hearing Date: March 29, 2022 (Dept. 501)

Motion: Petition to Compromise Claim of Minor

**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 and proposed Orders do not include sufficient information regarding the settlement for the court to evaluate. The Petition is mostly blank and does not include the settlement amount. None of the proposed Orders include the settlement amount or balance to the minor. Although records are attached, the court is not in a position to assume these are the only records for treatment and the Petition Items regarding injuries, medical treatment and bills must be completed.

Petitioner is requested to submit a completed Amended Petition, including all attachments, and proposed Orders and to obtain a new hearing date.

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 3/25/2022.  
(Judge's initials) (Date)

(35)

**Tentative Ruling**

Re: ***Kilgore v. Ciresi, M.D. et al.***  
Superior Court Case No. 20CECG02700

Hearing Date: March 29, 2022 (Dept. 501)

Motion: by defendant Athenix Body Sculpting Institute for summary judgment or, in the alternative, summary adjudication

by defendant for summary Kevin Ciresi, M.D. for summary judgment or, in the alternative, summary adjudication

**Tentative Ruling:**

To grant summary judgment in favor of Athenix Body Sculpting Institute and defendant Kevin Ciresi, M.D.

**Explanation:**

Plaintiff, individually and as successor-in-interest to decedent Jessica Cortez, brought a single cause of action against defendants Kevin Ciresi, M.D. and Athenix Body Sculpting Institute for wrongful death based on medical malpractice. The complaint alleges that on September 24, 2019, defendants care and treatment of decedent breached the standard of care, causing decedent's death. On January 18, 2022, plaintiff amended his complaint, only to add nominal defendants who were decedent's children.<sup>1</sup> Ciresi and Athenix now move for summary judgment or, in the alternative, summary adjudication.

A trial court shall grant summary judgment where there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc. §437c(c); *Schacter v. Citigroup* (2009) 47 Cal.4th 610, 618.) The issue to be determined by the trial court in consideration of a motion for summary judgment is whether or not any facts have been presented which give rise to a triable issue, and not to pass upon or determine the true facts in the case. (*Petersen v. City of Vallejo* (1968) 259 Cal.App.2d 757, 775.)

The moving party bears the initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he or she carries this burden, the burden shifts to plaintiff to make a prima facie showing of the existence of a triable issue. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) A defendant has met his burden of showing that a cause of action has no merit if he has shown that one or more elements of the cause of action cannot be established, or that there is a complete defense to that cause of action. (*Ibid.*) Once the defendant has met that

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<sup>1</sup> On December 2, 2021, this court, on motion by Ciresi, ordered joinder of the Alyza Boriphanvichitr and Isaiah Boriphanvichitr, adult children of decedent, as necessary parties to the wrongful death suit.

burden, the burden shifts to the plaintiff to show a triable issue of one or more material facts exists as to the cause of action or a defense thereto. (*Ibid.*)

Affidavits of the moving party must be strictly construed and those of the opponent liberally construed. (*Petersen, supra*, 259 Cal.App.2d at p. 775.) The opposing affidavit must be accepted as true, and need not be composed wholly of strictly evidentiary facts. (*Ibid.*) Any doubts are to be resolved against the moving party. The facts in the affidavits shall be set forth with particularity. (*Ibid.*) The movant's affidavit must state all of the requisite evidentiary facts and not merely the ultimate facts or conclusions of law or conclusions of fact. (*Ibid.*) All doubts as to the propriety of granting the motion are to be resolved in favor of the party opposing the motion. (*Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 502.)

#### Athenix Body Sculpting Institute

Athenix argues that no triable issues of material fact exist as to the sole cause of action of medical malpractice because Athenix and Dr. Ciresi complied with the applicable standard of care in treating and caring for decedent; and because no negligent act or omission by Athenix and/or Dr. Ciresi caused or substantially contributed to decedent's death.

As the moving party, a defendant bears the initial burden of proof to show that plaintiff cannot establish one or more elements of their causes of action or to show that there is a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2).) Only after the moving party has carried this burden of proof does the burden of proof shift to the other party to show that a triable issue of one or more material facts exists – and this must be shown via specific facts and not mere allegations. (*Ibid.*)

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. (*Munro v. The Regents of Univ. of Cal.* (1989) 215 Cal.App.3d 977, 983–984.) 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. (*Ibid.*)

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 typically 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 where medical malpractice is alleged. 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. (*Willard v. Hagermeister* (1981) 121 Cal.App.3d 406, 412.)

Athenix relies on the expert declarations of Terry J. Dubrow, M.D. and Aiden R. Raney, M.D., who both opined that the treatment and care provided by Athenix and Ciresi met the applicable standards of care. (Compendium of Evidence, Ex. A [Declaration of Terry J. Dubrow, M.D.], ¶¶ 24-30; Ex. B [Declaration of Aiden R. Raney, M.D.], ¶¶ 7-9.) Athenix further submits the declaration of Dr. Dubrow who opined that the condition of the decedent prior to care did not contribute to her cause of death. (*Id.*, Ex. A, ¶ 36; Ex. C [Declaration of Joseph C. Preston, M.D.], ¶¶ 6-7.)

This is sufficient to negate elements of plaintiff's malpractice claim as to breach of duty and causation. (*Munro, supra*, 215 Cal.App.3d at p. 983-984.) The burden therefore shifts to plaintiff to show the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).) Plaintiff did not file an opposition to the motion. Accordingly, the court finds that Athenix and Ciresi met the applicable standards of care, and the motion for summary judgment is granted.

#### Kevin Ciresi, M.D.

Ciresi argues that no triable issues of material fact exist because plaintiff, as successor-in-interest to decedent, cannot demonstrate a breach of duty in his wrongful death due to medical malpractice cause of action; and that plaintiff, as an individual, was owed no separate duty.

Here, Ciresi relies on the same experts as Athenix, who have testified that Dr. Ciresi's care and treatment of plaintiff did not fall below the standard of care or cause her death. (Declaration of Terry J. Dubrow, M.D., ¶¶ 24-30.; Declaration of Aidan Raney, M.D., ¶¶ 7-9.) Dr. Dubrow and Dr. Raney both declared relying on charts of defendants kept by defendant Athenix Body Sculpting Institute, and records kept by Adventist Healthcare Tulare and Kaweah Delta Medical Center. No evidence of those records reviewed were submitted with Ciresi's motion.<sup>2</sup>

An expert's declaration submitted in connection with a summary judgment motion must not be speculative, lacking in foundation, and must be made with sufficient certainty. An expert declaration is sufficient if it establishes the matters relied upon in expressing the opinion, that the opinion rests on matters of a type reasonably relied upon, and provides the bases for the opinion. (*Sanchez v. Hillerich & Bradsby Co.* (2002) 104 Cal.App.4th 703, 718.) A defendant's expert declaration must be detailed, explaining the basis for the opinion and the facts relied upon. (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 125; *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 521, 524-525.) Moreover, because expert opinion may not be based on assumptions of fact that are without evidentiary support and experts may not recite hearsay as fact, properly authenticated medical records reviewed by the experts must be included in the motion for summary judgment. (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 743.)

Based on the lack of admissible evidence in support of Ciresi's motion, had the motion been heard any time before Athenix's motion rather than concurrently, the court could not have found the declarations of Dr. Dubrow and Dr. Raney sufficient to shift the

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<sup>2</sup> The court further notes that the *curriculum vitae*, Exhibit A to Dr. Dubrow's declaration was also not attached.

burden to plaintiff, and both summary judgment and adjudication would have been denied.<sup>3</sup> However, because the court finds that Athenix has sufficiently established no triable issues of material fact that Ciresi did not breach any applicable standards of care, specifically based on the same declarations, properly supported, in Athenix's motion for summary judgment as now relied upon by Ciresi, the court finds the lack of evidence in support of Ciresi's motion for summary judgment as moot. Because Ciresi submits on the same expert declarations as Athenix and those expert declarations also found that Ciresi met the applicable standards of care, and plaintiff did not oppose the motion, 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:** DTT **on** 3/28/2022.  
(Judge's initials) (Date)

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<sup>3</sup> The court further notes that Ciresi's Separate Statement of Undisputed Material Facts made no attempt to separate the 73 asserted material facts by cause of action, claim for damages, or issue for duty as required by California Rules of Court. (Cal. Rules of Ct., rule 3.1350(d)(1)(A).)