Tentative Rulings for May 24, 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).)

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

19CECG02836 ***Josephine Carranza v. Salvador Garcia Lopez*** **is continued to Wednesday, June 8 2022 at 3:30 in Department 403**

20CECG00975 ***Marilou Moya v. Saint Agnes Medical Center*** **is continued to Thursday, May 26, 2022 at 3:30 in Department 403**

21CECG01375 ***Valdovinos v. Davila*** **is continued to Wednesday, June 8, 2022 at 3:30 in Department 403**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

Begin at the next page

(35)

Tentative Ruling

Re: ***Bryce Tahajian v. Teri McMichael***
Superior Court Case No. 20CECG02450

Hearing Date: May 24, 2022 (Dept. 403)

Motion: by defendant Teri Elizabeth McMichael for terminating sanctions

By defendant Uber Technologies, Inc. to deem requests for admissions admitted

Tentative Ruling:

To grant defendant Teri Elizabeth McMichael's motion for terminating sanctions against plaintiff Bryce Tahajian, as plaintiff has willfully refused to comply with this court's order compelling him to respond to discovery. (Code Civ. Proc. §§ 2023.010, subd. (g); 2030.290, subd. (c); 2031.300, subd. (c).) To strike plaintiff's complaint and dismiss the action against defendant Teri Elizabeth McMichael. The court intends to sign the proposed judgment as to defendant Teri Elizabeth McMichael only. To deny defendant Uber Technologies, Inc., Rasier, LLC, and Rasier-CA, LLC's joinder regarding terminating sanctions.

To grant defendant Uber Technologies, Inc.'s motion seeking an order deeming the truth of matters specified in the Request for Admission, Set One against plaintiff **unless** responses in substantial conformity with Code of Civil Procedure section 2033.220 are served **prior** to the hearing. To grant defendant Rasier, LLC's motion seeking an order deeming the truth of matters specified in the Request for Admission, Set One against plaintiff **unless** responses in substantial conformity with Code of Civil Procedure section 2033.220 are served **prior** to the hearing. To grant defendant Rasier-CA, LLC's motion seeking an order deeming the truth of matters specified in the Request for Admission, Set One against plaintiff **unless** responses in substantial conformity with Code of Civil Procedure section 2033.220 are served **prior** to the hearing. To grant monetary sanctions against plaintiff in favor of defendants Uber Technologies, Inc., Rasier, LLC, and Rasier-CA, LLC, in the amount of $680. Within thirty (30) days of service of the order by the clerk, plaintiff shall pay sanctions to defendants' counsel.

To direct defendants Rasier, LLC and Rasier-CA, LLC to each remit $60 for the consideration of their motions within fifteen days of the date of the hearing.

Explanation:

Terminating Sanctions

Code of Civil Procedure section 2023.010(g) makes "[d]isobeying a court order to provide discovery" a "misuse of the discovery process," but sanctions are only authorized

to the extent permitted by each discovery procedure. Once a motion to compel answers is granted, continued failure to respond or inadequate answers may result in more severe sanctions, including evidence, issue or terminating sanctions, or further monetary sanctions. (Code Civ. Proc. §§ 2030.290, subd. (c); 2031.300, subd. (c).)

Sanctions for failure to comply with a court order are allowed only where the failure was willful. (*Biles v. Exxon Mobil Corp*. (2004) 124 Cal.App.4th 1315, 1327.) If there has been a willful failure to comply with a discovery order, the court may strike out the offending party's pleadings or parts thereof, stay further proceedings by that party until the order is obeyed, dismiss that party's action, or render default judgment against that party. (Code Civ. Proc. § 2023.030, subd. (d).)

On October 28, 2021, this court ordered plaintiff to serve verified responses to the discovery requests within 10 days of the court's order, as well as to pay $735 in monetary sanctions to defendant Teri Elizabeth McMichael within 30 days. The court's order was served on plaintiff on October 29, 2021, by mail. However, plaintiff never served verified responses to any of the discovery requests nor has he paid the monetary sanctions as ordered, despite the passage of more than 30 days since the order was served on him. (Declaration of E. Susie Mendoza, ¶ 9.)

Therefore, it appears that plaintiff is willfully refusing to comply with the court's order compelling him to answer the discovery requests, as well as the order to pay monetary sanctions. Nor does it appear likely that any lesser sanctions would be effective to obtain plaintiff's compliance here, as it appears that he has no interest in responding to defendant's discovery or otherwise participating in the action that he filed. Moreover, plaintiff has failed to respond to either the prior motion to compel or the instant motion for terminating sanctions. Accordingly, the court grants the motion for terminating sanctions, and orders plaintiff's complaint stricken and the action dismissed as to defendant Teri Elizabeth McMichael.[1]

Deemed Admissions

Under Code of Civil Procedure section 2033.280, "[i]f a party to whom requests for admission are directed fails to serve a timely response, the following rules apply: [¶] (a) The party to whom the requests for admission are directed waives any objection to the requests… [¶] (b) The requesting party may move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted, as well as for a monetary sanction…" (Code Civ. Proc. § 2033.280, subd. (a), (b).) Also, "[t]he court shall make this order, unless it finds that the party to whom the requests for admission have been directed has served, before the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with Section 2033.220. It is mandatory that the court impose a monetary sanction … on the party or attorney, or both, whose failure to serve a timely response to requests for admission necessitated this motion." (*Id.*, § 2033.280, subd. (c).)

[1] Though defendants Uber Technologies, Inc., Rasier, LLC, and Rasier-CA, LLC join in the motion for terminating sanctions, plaintiff has no prior history of violation of a court order as to these defendants. The joinder is denied.

On April 15, 2022, defendants Uber Technologies, Inc, Rasier, LLC, and Rasier-CA, LLC filed and served motions seeking an order that the truth of any matter specified in the requests be deemed admitted pursuant to Code of Civil Procedure section 2033.280, subdivision (b). No opposition to any of the motions has been filed. No responses have been served since the filing of the motions. The motions to deem the truth of the matters specified in the respective Requests for Admissions, Set One are granted. Mandatory monetary sanctions are granted in the amount of $500 in fees, and $180 in costs, for a total of $680. Defendants Rasier, LLC and Rasier-CA, LLC are directed to each remit $60 for the consideration of their motions within fifteen days of the 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: KCK on 05/20/22.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Annayulissa Sanchez v. Nicholas De Benedetto***
Superior Court Case No. 20CECG00385

Hearing Date: May 24, 2022 (Dept. 403)

Motion: Expedited Petition to Compromise Claim of Minor

Tentative Ruling:

To deny without prejudice. In the event that oral argument is requested the minor is excused from appearing.

Explanation:

An expedited petition for a minor's compromise is authorized where the "total amount payable to the minor . . . and all other parties under the proposed compromise or settlement is $50,000 or less[.]"California Rules of Court, Rule 7.950.5(a)(8) states that this is based on the amount of the "total settlement," i.e., the gross settlement, and not the minor's *net* settlement. There are exceptions to this, as stated in Rule 7.950.5(a)(8)(A)-(B), but these do not appear to apply given the box checked at Item 3g(1) of the petition.

The face of the petition reveals that the settlement is for the amount of $75,000. (Petn., Item 11.) Accordingly, it appears petitioner's only option to have this compromise approved is via a standard petition to approve compromise (form MC-350), with a properly calendared 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: KCK on 05/20/22.
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Kilburn v. Quinlan, Kershaw & Fanucchi, LLP***
Superior Court Case No. 21CECG01705

Hearing Date: May 24, 2022 (Dept. 403)

Motion: Plaintiff's Motion for Leave to Amend First Amended Complaint

Tentative Ruling:

To grant. (Code Civ. Proc., § 473, subd. (a)(1); *California Casualty Gen. Ins. Co. v. Superior Court* (1985) 173 Cal.App.3d 274, 281.)

Explanation:

Plaintiff seeks leave to amend to add Karen Kilburn acting as the Executrix of the Estate of Kent L. Kilburn as a plaintiff in the action. Plaintiff asserts that the terms "Individually and as Executrix of the Estate of Kent L. Kilburn, deceased" were inadvertently omitted from the caption of the First Amended Complaint("FAC") as a result of a clerical error and that it is apparent by the face of the FAC that plaintiff intended to bring suit in her individual and representative capacity.

Plaintiff has met the formalities required of a motion to amend the first amended complaint and has given due notice to all appearing defendants. Motions for leave to amend the pleadings are directed to the sound discretion of the judge. "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading …" (Code Civ. Proc., § 473, subd. (a)(1); Code Civ. Proc., § 576.) Judicial policy favors resolution of cases on the merits, and thus the court's discretion as to allowing amendments will usually be exercised in favor of permitting amendments. This policy is so strong, that denial of a request to amend is rarely justified, particularly where "the motion to amend is timely made and the granting of the motion will not prejudice the opposing party." (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.)

Defendant argues that leave to amend should be denied because an attorney-client relationship never existed between defendant and plaintiff in her representative capacity, and any claims brought in plaintiff's representative capacity are barred by the applicable the statute of limitations.

Attorney-Client Relationship Between Plaintiff as a Representative of the Decedent's Estate and Defendant:

. "One of the requisite elements of a legal malpractice claim is the existence of an attorney-client relationship or other basis for a duty of care owed by the attorney." (*Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441, 444 [internal citations omitted].) Defendant references Exhibits A-F attached to the FAC to support its argument that it never represented plaintiff in her representative capacity. While these exhibits tend to

suggest the existence of an attorney-client relationship between plaintiff, individually, and defendant, they do not conclusively prove that an attorney-client relationship never existed between plaintiff in her representative capacity and defendant. (FAC, Exh. A-F.)

Moreover, "in determining who the parties to an action are the whole body of the complaint is to be taken into account, and not the caption merely." (*Plumlee v. Poag* (1984) 150 Cal.App.3d 541, 547.) In *Plumlee*, the plaintiff sued on a creditor's claim against a decedent's estate. The caption named the defendant individually, but the body of the complaint alleged that defendant was being sued as executor of the decedent's estate, so defendant was not misled as to the capacity in which he was being sued. Similarly, here plaintiff has identified herself as an individual and the duly authorized representative of the Estate of Kent L. Kilburn in the Parties and General Allegations section of the FAC (FAC, ¶ 1.), and that plaintiff, in her individual and representative capacity, engaged defendant to represent her in the underlying claim giving rise to the instant action. (FAC, ¶ 5.) Thus, it is evident from the body of the FAC that (1) plaintiff intended to designate herself in both her individual and representative capacity as parties to the action; and (2) plaintiff has alleged facts sufficient to show that an attorney-client relationship existed between defendant and plaintiff in her representative capacity. Since defendant has not sufficiently shown that such attorney-client relationship *did not* exist, the court finds defendant's argument to be unpersuasive.

Statute of Limitations:

"An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first." (Code Civ. Proc., § 340.6, subd. (a).)

It is undisputed that the statute of limitations on the plaintiffs' legal malpractice claims against defendant, absent the tolling agreements, would have expired in March 2020, since on March 18, 2019, defendant informed plaintiff that the limitations period of the underlying case had expired and that defendant had failed to timely file the complaint. (FAC, ¶ 11; see also Exh. E to the FAC.) Moreover, it is alleged that defendant ceased to represent plaintiffs in the underlying case on March 23, 2019. (FAC, ¶ 12.) Similarly it is also undisputed that the parties timely entered into a series of tolling agreements that ultimately tolled the limitations periods for plaintiff's individual claims to June 21, 2021. (FAC, ¶ 12.) Plaintiff filed her original complaint for the instant action on June 14, 2021.

However, defendant argues that plaintiff, in her representative capacity, was not a party to the tolling agreements; therefore, the statute of limitations on any claims brought by plaintiff, as a representative of the decedent's estate, expired in March 2020.

Ordinarily, each person to be bound by the tolling agreement must sign. (*FNB Mortg. Corp. v. Pacific General Group* (1999) 76 Cal.App.4th 1116, 1135 [a tolling agreement has no effect on other potential parties not in privity.].) Here, the FAC identifies the underlying case to be a medical malpractice, wrongful death, and/or survivor action. (FAC, ¶ 7, 14 and Exh. D.) The right to sue for wrongful death belongs to the heirs. (*Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 596.) Similarly, in a survivor action, that right belongs to the decedent's estate. (Code Civ. Proc., § 377.60; *Castaneda v. Department of Corrections & Rehab.* (2013) 212 Cal.App.4th 1051, 1063.)

A review of the original tolling agreement signed in February 2020 ("Original Tolling Agreement") shows that the agreement was:

> [E]ntered into by and among David M. Moeck and Quinlan Kershaw & Fanucchi, LLP ("QK&F") a California law firm and Karen Kilburn, surviving biological child of Decedent, and client of QK&F in the matter of Kent Kilburn v. William Franklin, M.D. et al.

(FAC, Exh. F, ¶ 1 [brackets added].)

Moreover, the signatories of the Original Tolling Agreement were "David L. Moeck, individually and as agent for Defendant QK&F," "Karen Kilburn," and their respective counsel. (FAC, Exh. F.) Defendant also points out that nowhere in the Original Tolling Agreement does it mention the Estate of Kent Kilburn, the heirs of Kent Kilburn, or plaintiff's role as personal representative of that estate.

However, plaintiff contends that the tolling agreements preserve any and all claims in the legal malpractice action against defendant arising from the underlying case because the underlying action is a wrongful death action. Plaintiff argues that it has been long established that a party bringing a wrongful death action is required to name all persons to whom the right is given. (*Watkins v. Nutting* (1941) 17 Cal.2d 490, 498.) In other words, plaintiffs' argument is that since a wrongful death action is considered joint, single and indivisible, plaintiff's tolling agreement with defendant serves to preserve all of the claims of the decedent's heirs. Notably, no party has provided any authority on the issue of whether a tolling agreement signed by one heir, like the one executed by the parties here, is applicable to toll the limitations period for a decedent's estate and other heirs in a legal malpractice case where the underlying action is a wrongful death and/or survivor's action.

Plaintiff also refers to a letter, dated February 21, 2020, from her counsel addressed to defense counsel to argue that this letter showcases plaintiff's intent to preserve her claims as executrix of Kent Kilburn's estate; however, no such explicit terms appear on the face of the letter. (Reply, Exh. F.) Even if the letter did reflect such intent, correspondence between the parties discussing the terms of the potential tolling agreement is insufficient for tolling. Like any agreement, a tolling agreement is created only by the concurrence of the parties to its terms. (*Peles v. LaBounty* (1979) 90 Cal.App.3d 431, 437.)

Where "the legal sufficiency of the proposed [amendment] is a novel question… the preferable practice would be to permit the amendment and allow the parties to

test its legal sufficiency by demurrer, motion for judgment on the pleadings or other appropriate proceedings." (*California Casualty Gen. Ins. Co. v. Superior Court* (1985) 173 Cal.App.3d 274, 281.) "Should a general demurrer ultimately be sustained to the proposed defense, the appellate court would at least be apprised of the ground on which the proposed defense was rejected and thus be in a position to focus its attention on the appropriate considerations on review." (*Ibid* [internal citations omitted].) Thus, the court intends to grant plaintiff's motion for leave to amend.

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 05/20/22.
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Kilburn v. Quinlan, Kershaw & Fanucchi, LLP***
Superior Court Case No. 21CECG01705

Hearing Date: May 24, 2022 (Dept. 403)

Motion: Defendant's Motion to Strike Portions of the First Amended Complaint

Tentative Ruling:

To take off calendar as moot, due to the court's ruling on plaintiff's motion for leave to amend her first amended complaint. (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1054; *People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 506.) Any challenges to the amended pleading must be raised by new motion(s).

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 05/20/22.
(Judge's initials) (Date)

(17)

Tentative Ruling

Re: ***Yuba County Water Agency v. State Water Resources Control Board***
Superior Court Case No. 20CECG03342

Hearing Date: May 24, 2022 (Dept. 403)

Motion: Petitioner's Motion for Judgment on the Writ [C.C.P. § 1094]

Tentative Ruling:

To grant the motion.

Explanation:

The Court denies Petitioner's request for judicial notice of the parties' argument before the Ninth Circuit on May 12, 2022.

Code of Civil Procedure section 1094 provides, in relevant part: "If a petition for a writ of mandate filed pursuant to Section 1088.5 presents no triable issue of fact or is based solely on an administrative record, the matter may be determined by the court by noticed motion of any party for a judgment on the peremptory writ." This motion presents only issues of law.

The inquiry in a writ of administrative mandate includes whether "the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." (Code Civ. Proc., § 1094.5, subd. (b).) Here, Petitioner argues that Respondent lacked the jurisdiction to issue a Section 401 certification in the absence of a pending application for such a certification.

On August 24, 2017, Petitioner filed an application with Respondent for a Section 401 certification for the relicensing of its Yuba River Development Project. On August 8, 2018, Petitioner withdrew and re-submitted its application. On July 31, 2019, Respondent denied the re-submitted application without prejudice. On July 17, 2020, Respondent issued a Section 401 certification. Respondent admits that Petitioner had no application then pending, but argues its action is not prohibited by law and it acted to facilitate the intent of the federal Clean Water Act and California Cologne-Porter Water Act and the "unique situation" presented by a change in state law.

"[I]t is fixed law that an administrative agency is bound by its own regulations." (*Bonn v. California State University, Chico* (1979) 88 Cal.App.3d 985, 990, citing *United States v. Nixon* (1974) 418 U.S. 683.) A review of Respondent's regulations illustrates that Respondent's authority to issue a Section 401 certification is dependent on the existence of a pending application for such certification.

The court applies the same rules governing interpretation of statutes to the interpretation of administrative regulations, with the fundamental goal of ascertaining the agency's intent and effectuating the purpose of the law. (*Pang v. Beverly Hospital,*

Inc. (2000) 79 Cal.App.4th 986, 994-995.) We seek to "give the regulatory language its plain, commonsense meaning ..., and we must read regulations as a whole so that all of the parts are given effect." (*County of Kern v. State Dept. of Health Care Services* (2009) 180 Cal.App.4th 1504, 1512.)

Respondent's regulations authorize only certification in connection with applications. Respondent may only issue or deny certification "… [a]fter review of the application, all relevant data, and any recommendations of a regional board, other state and federal agencies, and any interested person." (Cal. Code Regs. tit. 23, § 3859, subd. (a). "The executive director, or his/her designee, is authorized to take all actions connected with applications for certification, including issuance and denial of certification." (Cal. Code Regs. tit. 23, § 3838, subd. (a).) (See also Cal. Code Regs. tit. 23, § 3835, subd. (d) ["A request for certification shall be considered valid if and only if a complete application is received by the certifying agency."]; § 3836, subd. (a) ["Once a certifying agency determines that an application is complete, it may request further information from the applicant."]; § 3855, subd. (b)(1) ["An application for water quality certification shall be filed with the state board executive director …"].)

Respondent claims "the existence of regulations governing the State Board's typical process does not preclude the State Board from proceeding in factual scenarios not contemplated by a regulation" and that "[n]owhere in the State Board regulations relied on by YCWA is there a prohibition on the issuance of a 401 certification in the absence of an application." Respondent further argues that "[c]onstruing the State Board's regulations to limit the authority otherwise conferred on the State by Section 401 would conflict with the California Legislature's delegation of authority to the State Board, and would create a further inconsistency with the State Board's regulations that require it to act in order to avoid waiving its authority."

Regulations are not interpreted in a manner that results in absurd consequences or defeats the core purpose of their adoption. (See *People v. Souza* (1993) 15 Cal.App.4th 1646, 1652.) "The contemporaneous administrative construction of a regulation by the agency charged with its enforcement and interpretation is entitled to great weight. Accordingly, courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." (*Maples v. Kern County Assessment Appeals Bd.* (2002) 96 Cal.App.4th 1007, 1015.) Reading Respondent's regulations to grant Respondent unfettered power to grant or deny certification its own initiative in the absence of a pending application would lead to absurd and unauthorized results.

Respondent further argues that it may issue a certification on an application it had previously denied. However, California Code of Regulations, title 23, section 3867, subdivision (b)(1) provides that, when reconsidering its own actions, Respondent must "notify the applicant (if any), the federal agency, and all interested persons known to the state board or executive director and give those notified the opportunity to submit information and comments before taking a final reconsideration action …". Here Respondent does not allege that it complied with section 3867 when issuing the Section 401 certification on an already denied petition.

Nor does section 401's language authorize Respondent's actions. "Any applicant for a Federal license or permit to conduct any activity . . . which may result in any

discharge to the navigable waters, shall provide the licensing or permitting agency a certification from the State . . . that [the] discharge will comply with the applicable provisions of [the Clean Water Act]…" (33 U.S.C. § 1341(a)(1).) Section 401 further provides that States: "… shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. …" (*Ibid*.) It makes no sense to read Section 401 as not requiring that an application be made to the State in order for it to issue a certification, as the requirement for public notice and, when appropriate a public hearing, would only apply in conjunction with applications, and actions on the State's own initiative would be free of such a requirements.

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 05/23/22 .
(Judge's initials) (Date)