Tentative Rulings for June 7, 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.

21CECG00422 **Abdul Jawad v. Central Valley Energy is continued to Thursday, June 30, 2022 at 3:30 p.m. in Department 503**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

Begin at the next page

(20) **Tentative Ruling**

Re: ***Garcia v. Lightning Source, LLC, et al.***
Superior Court Case No. 20CECG01641

Hearing Date: June 7, 2022 (Dept. 503)

Motion: Plaintiff's Motion for Preliminary Approval of Class Settlement

Tentative Ruling:

To deny without prejudice.

Explanation:

Certification

Settlements preceding class certification are scrutinized more carefully to make sure that absent class members' rights are adequately protected, although there is less scrutiny of manageability issues. (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 240; see *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1803, fn. 9.) The trial court has a "fiduciary responsibility" as the guardian of the absentee class members' rights to decide whether to approve a settlement of a class action. (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 95.)

A precertification settlement may stipulate that a defined class be conditionally certified for settlement purposes. The court may make an order approving or denying certification of a provisional settlement class after the preliminary settlement hearing. (Cal. Rules of Court, rule 3.769(d).) Before the court may approve the settlement, however, the settlement class must satisfy the normal prerequisites for a class action. (*Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 591, 625-627.)

"The burden is on the party seeking certification to establish the existence of both an ascertainable class and a well-defined community of interest among the class members." (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104, internal quotes and citation omitted.)

> Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. [Citations.] In turn, the community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.

(*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089.)

Plaintiff bears the burden of establishing the propriety of class treatment with admissible evidence. (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470; *Lockheed Martin Corp. v. Superior Court*, *supra,* 29 Cal.4th at pp. 1107-1108.)

Plaintiff moves for preliminary approval of the settlement, but only addresses certification of the class for settlement purposes with conclusory statements and no evidence. (See MPA p. 17, lines 12-28.) In order to obtain preliminary approval, plaintiff must fully brief and submit admissible evidence on each factor relevant to class treatment.

Ascertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata. (*Bell v. Superior Court* (2007) 158 Cal.App.4th 147, 166.) "Whether a class is ascertainable is determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members." (*Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1271.)

Plaintiff presents no admissible evidence of the number of persons falling within the class definition proposed: "all current and former non-exempt employees who worked for Defendants in the State of California at any time during the Class Period [April 6, 2016 through June 28, 2021]." (Settlement Agreement ¶¶ 6, 8.) The sole evidence found in the papers consists of references in counsel's declaration to there being 127 class members. While this would be sufficiently numerous, actual evidence is required. Approval of class settlements is not permitted where "there was nothing before the court to establish the sufficiency of class counsel's investigation other than their assurance that they had seen what they needed to see." (*Kullar v. Foot Locker Retail* (2008) 168 Cal.App.4th 116, 129.)

The class representative must be able to represent the class adequately. (*Caro v. Procter & Gamble* (1993) 18 Cal.App.4th 644, 669.) "[I]t has never been the law in California that the class representative must have identical interests with the class members." (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 46.) The focus of the typicality requirement entails inquiry as to whether the "plaintiff's individual circumstances are markedly different or ... the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based." (*Eisenberg v. Gagnon* (3d Cir. 1985) 766 F.2d 770, 786, superseded on other grounds in *Mielo v. Steak 'n Shake Operations* (3d. Cir. 2018) 897 F.3d 467.)

Here, plaintiff presents no evidence regarding typicality. In his declaration, plaintiff discusses his job duties and what he experienced as far as the violations alleged in the complaint, but there is no evidence that he is in the same or similar position to the class members. The moving papers submit no *evidence* of common policies or means of proof.

Handbooks and manuals or other written evidence of employer policies are commonly used to determine employer practices, typicality, and possible predominant issues of fact and law. (See, e.g., *Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.* (C.D. Cal. 2015) 311 F.R.D. 590, 595, 603; *Clausnitzer v. Federal Exp. Corp.* (S.D. Fla. 2008) 248 F.R.D. 647, 649, 656; *Butler v. DirectSAT USA, LLC* (D. Md. 2014) 47 F. Supp. 3d 300, 308; *Romulus v. CVS Pharmacy, Inc.* (D. Mass. 2017) 321 F.R.D. 464, 469; *Williams v. Sweet Home*

Healthcare, LLC (E.D. Pa. 2018) 325 F.R.D. 113, 127.) An absence of written materials setting forth legally compliant policies may also be sufficient evidence of predominance. (*Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701.)

"California courts consider pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate." (*Jaimez v. DAIOHS USA* (2010) 181 Cal.App.4th 1286, 1298.) Plaintiff has produced no evidence of the procedures and policies for defendants. Discovery responses, declarations from the defendant, or deposition testimony are needed, along with the policies, to show common questions and the predominance of same.

Also of concern is that the class encompasses *all* non-exempt employees of defendants during the class period. The moving papers do not include any discussion of what different employment positions this would entail, or any showing that employees in different positions were subject to the same polices and experienced the same violations. Moreover, there are numerous defendants; it is unclear if there are likewise numerous work locations that would be encompassed within the class. If so, were employees at different locations subject to the same policies and practices?

Plaintiff must submit evidence of the common policies or practices that plaintiff and other employees were subjected to with respect to each claim set forth in the complaint and compromised by this settlement, and show that plaintiff's claims are typical of the class.

The adequacy of representation component of the community of interest requirement for class certification comes into play when the party opposing certification brings forth evidence indicating widespread antagonism to the class suit. " 'The adequacy inquiry … serves to uncover conflicts of interest between named parties and the class they seek to represent.' [Citation.] '… To assure "adequate" representation, the class representative's personal claim must not be inconsistent with the claims of other members of the class. [Citation.]' [Citation.]" (*J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 212.)

In light of the fact that this is an unopposed motion, the court finds class counsel to be qualified. But again, plaintiff must show that his claims are not inconsistent with the claims of the class.

Relevant to the adequacy of representation is the incentive payment plaintiff is to receive.

> Where, as here, the class representatives face significantly different financial incentives than the rest of the class because of the conditional incentive awards that are built into the structure of the settlement, we cannot say that the representatives are adequate. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 627, 117 S. Ct. 2231, 138 L Ed 2d 689 (1997) ("The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation....").

(*Radcliffe v Experian Information Solutions, Inc.* (2013) 715 F.3d 1157, 1165.)

"We once again reiterate that district courts must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives. The conditional incentive awards in this settlement run afoul of our precedents by making the settling class representatives inadequate representatives of the class." (*Id*. at p. 1164.)

The $10,000 agreed to is not clearly in excess of service awards that are often approved. But, with a motion for final approval, plaintiff will have to submit a more detailed declaration setting forth his actual work done in prosecuting this case, the number of hours expended, if his deposition was taken, and the amount of his recovery under the class settlement as a class member without the incentive award.

Settlement Approval

"[I]n the final analysis it is the court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing litigation. The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement." (*Kullar v. Foot Locker Retail, Inc*., *supra*, 168 Cal.App.4th at p. 129, internal quotations omitted.) "[T]o protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished. To make this determination, the factual record before the … court must be sufficiently developed." (*Id.* at p. 130, internal citations and quotations omitted.)

The court in *Clark v. America Residential Services* (2009) 175 Cal.App.4th 785 vacated approval of a class settlement coupled with class certification, an award of $25,000 each to two named plaintiffs, and more. The problem was that the plaintiffs presented "no evidence regarding the likelihood of success on any of the 10 causes of action, or the number of unpaid overtime hours estimated to have been worked by the class, or the average hourly rate of pay, or the number of meal periods and rest periods missed, or the value of minimum wage violations, and so on." (*Id*. at p. 793.)

Here, the moving papers do include a reasoned and detailed discussion of the fairness of the settlement, how counsel valued the case, and the weaknesses of the class claims. At this stage, the settlement appears reasonable.

The court has concerns about the allocation of the settlement payments for tax purposes. The settlement agreement deems 10 percent of the payments to be wages (reported on a Form W-2), and the remainder is considered penalties and interest (reported on Forms 1099-MISC and 1099-INT). (Settlement Agreement ¶ 71.) However, the actual values are nearly the opposite.

Payments made under Labor Code section 203 are penalties, not wages, while payments made under Labor Code section 226.7 are wages rather than penalties.

(*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1108–1109.) Based on counsel's valuation of the claims, moneys for unpaid wages, off-clock work, overtime wages, and missed meal and rest periods, they total $715,374.28. Claims for business expense reimbursement, wage statement penalties, waiting time penalties and 25 percent of PAGA penalties total $116,682.88. Thus, about 86 percent of the payments are wages, while 14 percent are penalties. In any renewed motion for preliminary approval, the court expects the parties to either (a) revise the settlement agreement to accurately allocate the settlement payments between wages and penalties/interest, or (b) address in points and authorities why this is not a problem preventing preliminary approval.

The settlement agreement provides that class counsel is to receive $286,666.67 in attorneys' fees (one-third of the gross settlement). This is in line with fee awards that are commonly approved. However, in any motion for final approval, plaintiff shall address the lodestar as a check on the reasonableness of the percentage of settlement sought.

It is required by case law that the notice to the class advise the class of the estimated amount of fees that will be sought. (*Grunin v. International House of Pancakes* (8th Cir. 1975) 513 F.2d 114, 122; *In RE BMC Engine Interchange Litigation* (7th Cir. 1979) 594 F. 2d 1106, 1129-1130.) An attorney's fees motion must be filed and available (such as by posting on counsel's website or that of the administrator) *prior* to the due date for objections. The notice to the class need provide a link for the fees motion so that class members can view it to determine if they wish to object. (See *Allen v. Bedolla* (9th Cir. 2015) 787 F.3d 1218, citing *In re Mercury Interactive Crop. Securities Litigation* (9th Cir. 2010) 618 F.3d 988, 993.) To do otherwise "borders on a denial of due process because it deprives objecting class members of a full and fair opportunity to contest class counsel's fee motion." (*Ibid*.)

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 6/1/2022 .
(Judge's initials) (Date)

(27) **Tentative Ruling**

Re: ***Lopez v. Willow Creek Post Acute, LLC***
Superior Court Case No. 21CECG02990

Hearing Date: June 7, 2022 (Dept. 503)

Motion: By Defendant to Compel Arbitration and Stay Proceedings

Tentative Ruling:

To grant and order plaintiff to arbitrate her claims against defendant. The action is stayed pending completion of arbitration. (Code Civ. Proc., § 1281.4.)

Explanation:

"California law, like federal law, favors enforcement of valid arbitration agreements." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 97.) "When presented with a petition to compel arbitration, the initial issue before the court is whether an agreement has been formed." *(Diaz v. Sohnen Enterprises* (2019) 34 Cal.App.5th 126, 129.) In addition, 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, citations omitted; see also *Marcus & Millichap Real Est. Inv. Brokerage Co.* (1998) 68 Cal.App.4th 83, 89.)

In addition, "[o]nce the moving party has satisfied its burden, the litigant opposing arbitration must demonstrate grounds which require that the agreement to arbitrate not be enforced." (*Harris v. TAP Worldwide* (2016) 248 Cal.App.4th 373, 380-381; see also *Rosenthal v. Great Western Fin'l Securities Corp.* (1996) 14 Cal.4th 394, 413-414 [party opposing the motion must then prove by a preponderance of evidence that a ground for denial of the motion exists (e.g., fraud, unconscionability, etc.)]; *Hotels Nevada v. L.A. Pacific Ctr., Inc.* (2006) 144 Cal.App.4th 754, 758; *Villacreses v. Molinari* (2005) 132 Cal.App.4th 1223, 1230.)

Defendant's motion is supported by a declaration from Luis Torres, who is a manager of the company defendant hired to perform administrative services, including the processing of on-boarding documents and employee arbitration agreements. (Torres Decl. ¶¶ 3-4.) Mr. Torres has personal knowledge of the services provided and access to the personnel records of client employees such as plaintiff. Mr. Torres' declaration attaches plaintiff's electronically signed arbitration agreement. (Torres Decl. Ex. 1.)

Considering the uncontroverted evidence that plaintiff expressly accepted the arbitration agreement, defendant has established its burden to show an enforceable agreement to arbitrate. In addition, plaintiff has not opposed the motion, and there is no claim that the arbitration agreement should not be enforced. Therefore, defendant's motion to compel arbitration and stay these proceedings 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: KAG on 6/3/2022 .
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Higgins v. Gooch***
Superior Court Case No. 20CECG02931

Hearing Date: June 7, 2022 (Dept. 503)

Motion: Application of Reyna Lubin for Admission *Pro Hac Vice* on Behalf of Plaintiffs

Tentative Ruling:

To deny.

Explanation:

There are several problems with this motion, which mandate denial:

First, California Rules of Court, rule 9.40(a) requires the applying attorney to show that he or she is not ineligible to appear as counsel *pro hac vice* by showing clearly that he or she is (*inter alia*) not regularly employed in the State of California, and not regularly engaged in substantial business, professional, or other activities in the State of California. Here, counsel's declaration fails to make these points clear.

Second, rule 9.40(c) is not satisfied, since there is no proof of service, as prescribed in Code of Civil Procedure section 1005, on all parties who have appeared in the action, or on the State Bar of California at its San Francisco office.

Third, rule 9.40(e) is not satisfied, since there is no proof of payment of the required $50 fee to the State Bar of California.

Also, the court notes that Ms. Lubin filed and signed the Notice of Hearing, which she should not have done since she has not yet been admitted *pro hac vice*. This should have been filed by the California attorney of record, Lawrance A. Bohm. Further, the face pages of the two moving papers filed lists another attorney at Ms. Lubin's firm, as follows: "Eric M. Baum (PHV: 00656497*)*." It is not clear what "PHV" stands for. If this is meant to stand for "*pro hac vice*," this is incorrect, at least for this case: Mr. Baum has not been admitted to appear *pro hac vice* in this action. Therefore, it is not clear why his name is mentioned on the face sheets.

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 6/3/2022 .
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Hok v. FCA US, LLC, et al.***
Superior Court Case No. 21CECG01612

Hearing Date: May 10, 2022 (Dept. 503)

Motion: By Defendants to Compel Arbitration and Stay Action

Tentative Ruling:

To deny defendants' motion to compel arbitration and request to stay the action pending arbitration.

Explanation:

On June 04, 2021, plaintiff filed the present action regarding the purchase of a 2021 Chrysler Pacifica, which plaintiff alleges came with certain warranties. Problems with the vehicle ensued, forming the basis of the instant complaint for damages. The complaint alleges six causes of action against defendant FCA US LLC ("FCA US"), and one cause of action against defendant Fresno Chrysler Jeep Inc. dba Clovis Chrysler Dodge Jeep Ram ("Clovis CDJR") for negligent repair. All of the causes of action against FCA US comprise alleged breaches of Civil Code section 1790 *et seq.* regarding consumer warranties and fraud by omission that FCA US was aware of defect(s) to the transmission and/or Powertrain Control Module (the "Stalling Defect"), but concealed the defect from plaintiff, who would not have purchased the vehicle had he been made aware of the defect.

Defendants move to compel arbitration based on an arbitration clause in a sales contract made between plaintiff and Hoblit Chrysler Dodge Jeep Ram ("Hobilt CDJR"), who is not a party to this action.

Applicable Law

A trial court is required to grant a motion to compel arbitration "if it determines that an agreement to arbitrate the controversy exists." (Code Civ. Proc., § 1281.2.) However, there is "no public policy in favor of forcing arbitration of issues the parties have not agreed to arbitrate." (*Garlach v. Sports Club Co.* (2012) 209 Ca1.App.4th 1497, 1505.) Thus, in ruling on a motion to compel arbitration, the court must first determine whether the parties actually agreed to arbitrate the dispute. (*Mendez v. Mid-Wilshire Health Care Center* (2013) 220 Cal.App.4th 534, 541.)

Defendants are not signatories to the arbitration agreement in question. (See Jackson Decl., ¶ 2, Ex. A.) "Generally speaking, one must be a party to an arbitration agreement to be bound by it or invoke it." (*Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 763.) "The strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration

agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration." (*Buckner v. Tamarin* (2002) 98 Cal.App.4th 140, 142, internal quotations and citation omitted.) "However, both California and federal courts have recognized limited exceptions to this rule, allowing nonsignatories to an agreement containing an arbitration clause to compel arbitration of, or be compelled to arbitrate, a dispute arising within the scope of that agreement." (*DMS Services, LLC v. Superior Court* (2012) 205 Cal.App.4th 1346, 1353.) Here, defendants contend they may compel arbitration as third party beneficiaries of the contract or, alternatively, under a theory of equitable estoppel. (*Felisilda v. FCA US LLC* (2020) 53 Cal.App.5th 486, 496 ("*Felisilda*"); *Goldman v. KPMG, LLP* (2009) 173 Cal.App.4th 209, 230.)

Pertinent Language of the Arbitration Agreement

As pertinent to the issue of standing to compel arbitration based on either equitable estoppel or as a third party beneficiary, the arbitration provision included in the agreement plaintiff signed reads as follows:

> ARBITRATION PROVISION
> PLEASE REVIEW – IMPORTANT – AFFTECTS YOUR LEGAL RIGHTS
>
> 1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.
>
> …
>
> Any claim or dispute, whether in contract, tort, statute or otherwise … between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action.

(Jackson Decl., ¶ 2, Ex. A.)

The first page of the agreement indicates that the word "you" refers to "the Buyer" (i.e., plaintiff), and the words "we" or "us" refers to the "Seller – Creditor" (i.e., Hoblit CDJR). (*Ibid.*) Defendants are neither of these parties and cannot be said to have "express" authority to compel arbitration under the plain language of the arbitration agreement.

Third Party Beneficiary

Third-party beneficiaries are permitted to enforce arbitration clauses even if not named in the agreement. (*Cohen v. TNP 2008 Participating Notes Program, LLC* (2019) 31 Cal.App.5th 840, 856; *Harris v. Superior Court* (1986) 188 Cal.App.3d 475, 478.) Defendants contend that they can enforce the arbitration agreement as third party beneficiaries to the agreement. The arbitration provision expressly states it applies to

"any resulting transaction or relationship (*including any such relationship with third parties who do not sign this contract*)…." (Jackson, Decl., ¶ 2, Ex. A, emphasis added.)

"A third party beneficiary is someone who may enforce a contract because the contract is made expressly for his benefit." (*Jensen v. U-Haul Co. of California* (2017) 18 Cal.App.5th 295, 301, citing and quoting *Matthau v. Superior Court* (2007) 151 Cal.App.4th 593, 602.) The intent to benefit that third party must appear from the terms of the contract. (*Ibid.*) The third party must show that the arbitration clause was "made expressly for his benefit." (*Fuentes v. TMCSF, Inc.* (2018) 26 Cal.App.5th 541, 552.) "A nonsignatory is entitled to bring an action to enforce a contract as a third party beneficiary if the nonsignatory establishes that it was likely to benefit from the contract, that a motivating purpose of the contracting parties was to provide a benefit to the third party, and that permitting the third party to enforce the contract against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties." (*Hom v. Petrou* (2021) 67 Cal.App.5th 459, citing *Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 821.)

Here, simply pointing out that the provision contains a reference to "third parties" and that defendants are "third parties" does not show that the arbitration clause was expressly intended to benefit any particular third party, much less does it show that this provision was made expressly for defendants' benefit. There is nothing in the agreement indicating that the motivating purpose for the parties to the contract was to benefit defendants, or that allowing defendants to compel arbitration was within the parties' reasonable expectations at the time of contracting. The court cannot find defendants to be third party beneficiaries of the arbitration agreement.

Equitable Estoppel

"The *sine qua non* for allowing a nonsignatory to enforce an arbitration clause based on equitable estoppel is that the claims the plaintiff asserts against the nonsignatory are dependent on or inextricably bound up with the contractual obligations of the agreement containing the arbitration clause." (*Goldman v. KPMG, LLP , supra*, 173 Cal.App.4th at pp. 213-214.) Even if a plaintiff's claims touch matters relating to the arbitration agreement, the claims are not arbitrable unless the plaintiff relies on the agreement to establish its cause of action. (*Fuentes v. TMCSF, Inc., supra,* 26 Cal.App.5th at p. 552.) "The reason for this equitable rule is plain: One should not be permitted to rely on an agreement containing an arbitration clause for its claims, while at the same time repudiating the arbitration provision contained in the same contract." (*DMS Services, LLC v. Superior Court, supra,* 205 Cal.App.4th at p. 1354.)

None of plaintiff's claims against defendants are intimately founded in the agreement. Defendants rely heavily on the fact that plaintiff's claims concern the "condition of the vehicle" and this term is mentioned in the agreement as a potential subject of a claim where arbitration could be compelled. However, plaintiff's claims about the condition of the vehicle clearly do not depend upon any language in the agreement in order to bring them. If plaintiff had paid cash for the vehicle, and thus would not have signed the agreement, he still could bring claims under the Song-Beverly Act and under common law concerning the "condition of the vehicle." (See, *e.g., Fuentes v. TMCSF, Inc., supra,* 26 Cal.App.5th at p. 553 [finding no standing to compel

arbitration based on equitable estoppel because "[e]ven if he had paid cash for the motorcycle, his complaint would be identical"].) It is accurate to say that plaintiff's claim is intimately founded in "the condition of the vehicle," but the fact that this term can also be found in the agreement does not mean plaintiff's claims are intimately *founded in that contract*. Therefore, it is inaccurate to say that plaintiff's causes of action against FCA US are "taking advantage of" the agreement, such that it would be equitable to find that plaintiff is estopped from avoiding its terms requiring arbitration.

Defendants rely on a recent opinion from the Third District Court of Appeal, *Felisilda*, *supra*, 53 Cal.App.5th 486, in arguing that equitable estoppel is appropriate here because the arbitration clause in that case used the exact same language as used in the Retail Installment Sale Contract ("RISC") (as quoted above). (See *id*. at p. 490.) In *Felisilda*, the motion to compel arbitration was filed by the dealership (Elk Grove Dodge), and included a request that its co-defendant, manufacturer FCA US, also be included as a party to the arbitration. (*Id.* at p. 498.) FCA US filed a notice of nonopposition. (*Ibid.*) The trial court granted the motion. After the motion was granted, the plaintiffs dismissed Elk Grove Dodge. (*Id.* at p. 489.) FCA US prevailed at arbitration, and the plaintiffs appealed. The appellate court found that it was appropriate to compel arbitration based on the theory of equitable estoppel. (*Id.* at p. 497.) Defendants argue that this case controls, and mandates that this court find that they have standing to compel arbitration based on equitable estoppel.

However, there are important distinctions between the facts of that case and the one at bench. The motion there was by the dealership and not the manufacturer, which took no part in the motion beyond filing a notice of nonopposition. Also, the plaintiffs did not dismiss the dealership until *after* the motion to compel was granted. Here, however, the dealership is not the party seeking to compel arbitration. Moreover, the dealership is not and never was a party to this action. This makes a difference and limits the application of *Felisilda*. At best, *Felisilda* stands for the proposition that, where a plaintiff buyer files a complaint against both the dealership and the manufacturer, the dealership can compel plaintiff to arbitrate the claims against both. This is consistent with the language of the arbitration agreement, since it provides that any claim or dispute "which arises out of or relates to your . . . purchase or condition of this vehicle . . . or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, *at your or our election* be resolved" by arbitration. (Jackson, Decl., ¶ 2, Ex. A, emphasis added.) As defined by the contract, the word "our" means Hobilt CDJR, not FCA US or Clovis CDJR. Thus, under the express language of the arbitration clause, arbitration could be compelled *on behalf of* a third party non-signatory, but there is nothing in this language authorizing it to be compelled *by* a third party non-signatory.

As the appellate court in *Felisilda* clearly stated, "It is the motion that determines the relief that may be granted by the trial court." (*Felisilda, supra,* 53 Cal.App.5th at p. 498.) The motion before the trial court, and, thus, the issue considered on appeal, was whether the dealership's motion, asking for arbitration to also be compelled *on behalf of* the nonsignatory manufacturer, was correctly granted. Therefore, the court had no cause to consider whether a nonsignatory manufacturer, as sole defendant, could successfully compel arbitration. That was not the posture of the case. As the court summed up its holding, since *the dealership's motion* argued that the claim against both

defendants should be arbitrated, "the trial court had the prerogative to compel arbitration of the claim against FCA [US]." (*Id.* at p. 499.) Also, the phrase "had the prerogative" suggests that the court of appeal was supporting the trial court's *use of discretion* in making its ruling, and was not finding that compelling arbitration was mandated under the equitable estoppel theory. In short, it is not clear how the Third District Court of Appeal would have ruled had the trial court ruling emanated from a motion brought by the sole defendant, the nonsignatory manufacturer, as here. This court will not extend *Felisilda* beyond its borders.

Another important distinction between *Felisilda* and the instant case is that there the plaintiffs' complaint consisted of one combined cause of action against both defendants. (*Felisilda, supra,* 53 Cal.App.5th at p. 491.) No doubt that factor weighed heavily in the court's finding that the plaintiffs' claims against the manufacturer were intertwined with their claims against the dealership, such that it was fair to require arbitration to proceed against both. Here, however, not only did plaintiffs never commingle causes of action against dealership and manufacturer, the dealership was never a part of this action. Further, as discussed above, the claims against defendants do not "depend upon," nor are they "intimately found in," the contract plaintiff entered into with the dealership. Although defendants argue that plaintiff's injury stems from the RISC, a plain reading of the complaint does not support such a finding. The pertinent causes of action to FCA US, including the fraudulent inducement claim, arise under alleged breaches of statutory obligations, via express warranties made by FCA US directly, not by anything conferred to plaintiff by the agreement. Similarly, the cause of action as to Clovis CDJR arises from alleged negligent repair from Clovis CDJR directly.

For the above reasons, the motion to compel arbitration is denied, as is the request to stay the action.[1]

Request for Judicial Notice

Plaintiff filed a request for judicial notice of (1) eight federal district court decisions (Plaintiff's Request for Judicial Notice, Exs. A-G, J), and (2) two published California appellate opinions (Plaintiff's Request for Judicial Notice, Exs. H-I). Defendants object to the request, arguing that federal court decisions on points of state law are neither binding nor controlling on matters of state law, and that *Felisilda* is binding. The court may take judicial notice of the records or files of any court of record under Evidence code section 452, subdivision (d). Defendants' objections are overruled, and the court grants plaintiff's request.

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

[1] Based on the court's finding, the court does not address FCA US's further arguments regarding arbitrability and waiver, which would only have merit if the court found that FCA US had standing to compel arbitration.

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 6/3/2022 .
(Judge's initials) (Date)

(20) **Tentative Ruling**

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

Hearing Date: June 7, 2022 (Dept. 503)

Motion: Defendant Western Health Resources' Motion for Summary Judgment/Adjudication

Ruling:

To deny summary judgment. (Code Civ. Proc., § 437c, subd. (c).) To grant summary adjudication of the first, third, fourth, fifth and sixth causes of action. To deny summary adjudication of the second, forty-third, and forty-fourth causes of action, as well as the request for enhanced remedies under Welfare and Institutions Code section 15657. (Code Civ. Proc., § 437c, subd. (h).)

Explanation:

In this case, plaintiff Linda Anderson ("plaintiff") alleges a series of negligent actions by numerous healthcare providers, commencing with her having knee replacement surgery. From there, she 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 sued for loss of consortium against each defendant, but he died on December 20, 2019. Defendant Western Health Resources d/b/a Adventist Home Health Care ("WHD"), which provided physical therapy and nursing care, moves for summary judgment, or alternatively for summary adjudication of the causes of action asserted against it.

As the moving party, a defendant bears the initial burden of proof to show that plaintiff cannot establish one or more elements of its 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.*)

> "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."

(*Munro v. Regents of Univ. of Calif*. (1989) 215 Cal.App.3d 977, 984-985, citation omitted.)

Where the moving party produces competent expert opinion declarations showing that there is no triable issue of fact on an essential element of the opposing party's claim (e.g. that a medical defendant's treatment fell within the applicable

standard of care), the opposing party's burden is to produce competent expert opinion declarations to the contrary. (Weil & Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (TRG 2021) ¶ 10:205.5, citing *Ochoa v. Pacific Gas & Elec. Co.* (1998) 61 Cal.App.4th 1480, 1487.)

To establish that a physician's care was negligent, a plaintiff must provide expert testimony establishing that the treatment fell below the applicable standard, unless the medical process at issue is a matter of common knowledge and thus susceptible to comprehension by a lay juror. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.)

First Cause of Action

The first cause of action alleges professional negligence in providing home health care services to plaintiff on or about June 10, 2013. (TAC ¶ 36.) Plaintiff alleges that WHR ignored physician orders that she was not to undergo any physical therapy, and that WHR injured plaintiff by "placing a towel underneath Plaintiff's right knee and then rotating and manipulating the leg causing movement of the recently implanted internal hardware, by failing to check Plaintiff's surgical wound and examine the right leg for signs of bleeding despite the fact that Plaintiff pointed out to Defendant that she was bleeding after his manipulation of her knee and by failing to summon further medical care or refer Plaintiff for further emergency medical care once Defendant was advised by Plaintiff that she was bleeding after the manipulation of her right knee." (TAC ¶ 37.)

In seeking summary adjudication of this cause of action, WHR relies on the expert declaration of Kevin Louie, M.D., a board certified orthopedic surgeon with experience in total knee replacements. Dr. Louie identifies, in paragraph 4, the records that he reviewed. In paragraph 7, Dr. Louie states that it is his "opinion that there was no act or omission by the WHR home health physical therapist Robert Mamangun, P.T., that was a substantial factor in causing harm to Ms. Anderson." In subparts (a) – (j) of paragraph 7, Dr. Louie discusses the relevant background medical facts (particularly care provided by Dr. Baysal who performed the knee replacement surgery) and his physical therapy order. He discusses Mr. Mamangun's home health visit on June 11, 2013 (it was not June 10, 2013). He specifically addresses how plaintiff described Mamangun's contact with her leg on that date, and why that contact (pressing down on her kneecap for a second or two with a few fingertips) was insufficient to cause a dislocation of her knee. (Louie Decl., ¶ 7(d).)

Plaintiff first challenges the declaration on the ground that Dr. Loiue does not articulate the standard of care. It is true Dr. Louie never explicitly states "the standard of care is …." However, the declaration clearly is designed to address the question of causation. (See Louis Decl., ¶¶ 7 ["It is my opinion that there was no act or omission by the WHR home health physical therapist Robert Mamangun, P.T., that was a substantial factor in causing harm to Ms. Anderson"; 7(i) ["It is more likely than not that Ms. Anderson's posterior knee dislocation occurred from some other cause, rather than by anything the physical therapist did."]; 8 ["In summary, it is more likely than not, that Ms. Anderson's knee dislocation was caused by one of the more common transfer movements or body position changes described above in combination with the force of the patient's own body weight and her weakness, rather than from the momentary and unidirectional

fingertip pressure by the physical therapist."].) Dr. Louie's declaration adequately deals with the allegations of the third amended complaint, and negates the element of causation, shifting the burden of production to plaintiff. Plaintiff has not presented a contradictory expert declaration.

Accordingly, summary adjudication is granted as to the first cause of action.

Second Cause of Action

The second cause of action is for medical malpractice in failing to refer plaintiff to a specialist or summon medical care "when Plaintiff's right leg pressure sore continued to get worse during the approximate time period between November 26 and December 11, 2013 and December 23, 2013 through January 2, 2014." (TAC ¶¶ 42, 43.)

With regard to this cause of action, WHR relies on the expert declaration of Anne Noder, a registered nurse with experience in wound care. Ms. Noder opines that WHR's home health nurses complied with the standard of care, they were competent for their job duties, their conduct did not constitute elder neglect or recklessness neglect, and it did not cause plaintiff's alleged injuries.

Plaintiff contends that this declaration similarly fails to discuss the standard of care, and simply consists of a long summary of the medical records followed by a conclusion that WHR met the standard of care without any discussion of the standard of care. However, the third amended complaint does not specify the manner in which WHR allegedly breached the standard of care. It just states that the standard of care was breached during a range of dates. Ms. Noder went through the medical records, detailed the care that was provided during those time periods, and concluded that "[t]he WHR nurses complied with the standard of care because they followed the physician orders and communicated the patient's condition to Dr. Griffin on a regular basis. There was no need for the nurses to contact another physician because Dr. Griffin was responsive." (Noder Decl., ¶¶ 11, 11(ff).) Based on her summary of the nursing care provided, Ms. Noder concluded "that the WHR home health nurses (a) had the degree of learning and skill ordinarily possessed by reputable home health nurses who care for patients like Ms. Anderson, practicing in the same or similar locality under similar circumstances, (b) used the care and skill ordinarily exercised by reputable home health care providers practicing in the same or similar locality under similar circumstances, and (c) used reasonable diligence and their best judgment in the exercise of skill and the application of learning." (Noder Decl., ¶ 13.) Given the non-specific, generalized allegations of the complaint, this is sufficient to shift the burden to plaintiff.

Plaintiff submits an expert declaration from nurse Wanda Pene, explaining various ways in which WHR breached the standard of care. Ms. Pene opines that WHR breached the standard of care numerous times, including but not limited to: on December 29, 2013 (failed to educate the primary care giver on the correct use of Santyl); failing to visit plaintiff during the period December 4 through December 18, 2013; on December 9, 2013 (failed to document whether the primary care giver was doing dressing changes appropriately or how frequently they were being done and failing to document the records with a photograph of the worsening pressure sore); on December 15, 2013 (failed to document whether the primary care giver was doing dressing changes appropriately

or how frequently they were being done, failing to document the records with a photograph of the worsening pressure sore, failing to document the measurement of the wound; by noting findings that are inconsistent with those on December 13, 2013 (where the wound was noted as 100 percent slough while on December 17, 2013 the wound was determined to be infected) and failing to take any action in response to finding that the wound was "beefy/red (granulation)" and "seropluruent (yellow/tan)" with drainage sufficient to stain the dressing); by only seeing Plaintiff twice by during the time period December 23 through December 31, 2013; on December 27, 2013 (home health care nurse documented plaintiff was unable to perform activities of daily living, her spouse was fatigued and they may require home health aides to assist with activities of daily living but failing to initiate any arrangements for such help, and by failing to seek out any physician orders for care when none were given); on December 12, 2013 (failed to document in the record that the nurse checked for any signs or symptoms of infection). (Pene Decl., ¶¶ 6-16.)

In the reply, WHR contends that Ms. Pene is not qualified to opine that certain omissions led to a "worsening of the infection and the resultant need for the surgical intervention to resolve the infection." After summarizing numerous ways that WHR's nurses breached the standard of care, Ms. Pene concludes:

> Again, in the case of post-surgical patients, especially those with open pressure wounds such as Mrs. Anderson had, the minimum standard of care for home health care personnel visits to the patient is at least two to three times per week. Between December 3 and January 1, 2014, Plaintiff received a total of only four visits from Defendant, which fell below the standard of care. Also in the case of such wounds, the standard of care requires that the home health care nurse document the size of the wound, which Defendant failed to do consistently, required photographic documentation of the wound, which Defendant failed to do. The standard of care with open wounds also requires that on subsequent visits to see the patient the home health nurse must determine the primary care giver is performing the wound dressing changes and doing so as frequently as directed, which Defendant failed to do or failed to document. These omissions led to the worsening of the infection and the resultant need for the surgical intervention to resolve the infection[.]

(Pene Decl., ¶ 16.)

However, Ms. Pene's declaration is no less admissible on the issue of causation than Ms. Noder's (see paragraph 17, where Noder similarly concludes that it "is my opinion that no act or omission by the home health nurses was a substantial factor in causing harm to plaintiff"). While a defendant's expert's declaration has to be detailed and with foundation in order to obtain a summary judgment, a plaintiff's expert's declaration in opposition to a summary judgment motion does not have to be detailed and is entitled to all favorable inferences. (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 125.) The court emphasized that "we liberally construe the declarations for the plaintiff's experts and resolve any doubt as to the propriety of granting the motion in favor of the plaintiff." (*Id*. at pp. 125–126.) In *Powell*, the plaintiff's expert "opined that it is medically probable [that the defendant's] care and treatment caused [the plaintiff]

injury." (*Id*. at p. 129.) "However obtuse [the expert's] declaration may appear, as a party opposing summary judgment, [the plaintiff] is entitled to all favorable inferences that reasonably may be derived from it, which includes a reading of the declaration to state that [the plaintiff's] injuries were caused by [the defendant's] conduct, which conduct fell below the applicable standard of care." (*Ibid*.)

The court finds the Pene declaration sufficient to create a triable issue of fact as to causation and breach of the standard of care. Accordingly, summary adjudication of the second cause of action is denied.

Third Cause of Action

The third cause of action is for negligent hiring, supervision or retention of physical therapist Mamangun and nurse Susan Metz (discussed in the Noder declaration).

As discussed above, summary adjudication is granted as to the first cause of action, but not the second. Since summary adjudication of a cause of action cannot be granted where just part of the cause of action is deficient (see Code Civ. Proc., § 437c, subd. (h) ["motion for summary adjudication shall be granted only if it completely disposes of a cause of action"]), summary adjudication should be denied if, as to Ms. Metz, WHR either fails to meet its threshold burden as the moving party, or a triable issue is raised as to the negligent hiring, supervision or retention of Ms. Metz.

WHR relies on the declaration of Michael Heil, a healthcare administrator, who opines that WHR complied with the standard of care in hiring, supervising, and retaining its home health staff, and did not cause any injury to plaintiff.

Plaintiff does not submit any contradictory evidence, instead objecting to the declaration, contending that it does not identify the standard of care. However, Mr. Heil is clearly applying the standard of care for a reasonably competent healthcare administrator (Heil Decl., ¶ 2), and he sets forth in detail the facts on which he relied to form his conclusion that WHR met the standard of care in that "there was nothing that WHR knew, or was knowable, that would have indicated that Robert Mamangun, P.T., or Susan Metz, R.N., were unfit, incompetent, or created an undue risk of injury to plaintiff Linda Anderson." (Heil Decl., ¶ 9.) Mr. Heil's conclusion that negating causation does not appear relevant. A healthcare administrator cannot opine on causation in a medical negligence case. But as he has negated the essential element of negligence in this negligent hiring cause of action, the motion is granted as to the third cause of action.

Fourth Cause of Action

This cause of action for battery alleges that plaintiff did not consent to the physical therapy/touching by Mr. Mamangun. "Plaintiff did not consent to this touching and expressly advised ROBERT JAMES MAMANGUM PT she did not wished to be touched as she was instructed not to undergo any form of physical therapy." (TAC ¶ 52.)

WHR attacks the element of causation. (See UMF No. 6 ["There was no act or omission by the WHR home health physical therapist Robert Mamangun, P.T., that was a

substantial factor in causing harm to Ms. Anderson."].) Causation is an element of any tort claim, and a defendant is not liable unless its conduct was a legal cause of the plaintiff's injury. (*Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 664.)

The fourth cause of action asserts a claim for medical battery, which cause of action includes the following elements:

> [*Name of plaintiff*] claims that [*name of defendant*] committed a medical battery. To establish this claim, [*name of plaintiff*] must prove all of the following:
> 1. [That [*name of defendant*] performed a medical procedure without [*name of plaintiff*]'s consent; [or]]
> [That [*name of plaintiff*] consented to one medical procedure, but [*name of defendant*] performed a substantially different medical procedure;]
> 2. That [*name of plaintiff*] was harmed; and
> 3. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.
> A patient can consent to a medical procedure by words or conduct.

(CACI 530A.)

WHR's motion attacks the harm and causation elements. As established in the Mamangun declaration, expert testimony shows that Mr. Mamangun did not cause the injury complained of by plaintiff. Plaintiff has not produced contradictory expert testimony. Accordingly, the motion is granted as to the fourth cause of action.

Fifth Cause of Action

This cause of action is for failure to obtain informed consent to the physical therapy. The element of causation remains. A cause of action for lack of informed consent is a negligence cause of action. (*Cobbs v. Grant* (1972) 8 Cal.3d 229.) The elements of a claim that a defendant failed to obtain informed consent for a medical procedure are: (1) the defendant performed a medical procedure on the plaintiff; (2) the defendant did not disclose the important potential results and risks of the procedure and, if applicable, alternatives to the procedure; (3) a reasonable person in the plaintiff's position would not have agreed to the procedure if she had been adequately informed; and (5) the plaintiff was harmed by a result or risk that should have been explained. (*Id.* at pp. 240-245.) The motion is granted as to this cause of action for the same reason set forth above.

Sixth Cause of Action

This cause of action for loss of consortium fails because plaintiff's spouse has passed away. Plaintiff has acknowledged that this is the case, and has not opposed the motion as to the sixth cause of action. For the reasons stated in the moving papers, the motion is granted as to the sixth cause of action.

Forty-Third and Forty-Fourth Causes of Action

These causes of action for elder abuse under Welfare & Institutions Code section 15610.57 allege that WHR and its staff were care custodians charged with the home health care of during two different time periods, once providing in-home care, and the other providing in-patient care. (TAC ¶¶ 194, 210.) WHR and its staff "failed to use the degree of care that a reasonable person in the same situation would have used in assisting Plaintiff in personal hygiene, providing medical care for physical health needs and protecting Plaintiff from health and safety hazards …." (TAC ¶¶ 195, 211.) WHR employees "failed to provide health care to Plaintiff by failing to summon a physician for Plaintiff despite the fact that her wound continued to deteriorate, such that under Defendant WESTERN HEALTH RESOURCES d/b/a ADVENTIST HOME HEALTH CARE and DOES 2 through 150, inclusive, watch, Plaintiff's wound grew from the outside of her right calf all the way down to her right ankle." (TAC ¶ 195.) They also "failed to provide health care to Plaintiff by failing to take any action when Plaintiff began to suffer from extreme vomiting and failing to take any action to treat Plaintiff's septicemia and/or summon further necessary medical care, which led to the infection spreading to the hardware in Plaintiff s right knee as well as her pacemaker." (TAC ¶ 212.)

Under the Elder Abuse and Dependent Adult Civil Protection Act ("Elder Abuse Act"), Welfare and Institutions Code section 15600, et seq., plaintiffs are entitled to heightened remedies where they establish either neglect, physical abuse, or financial abuse. Neglect includes the failure to provide medical care for physical and mental health needs. (Welf. & Inst. Code, § 15610.57.) The availability of these heightened remedies ultimately requires clear and convincing evidence of "recklessness, oppression, fraud, or malice in the commission of this abuse." (Welf. & Inst. Code, § 15675; *Mack v. Soung* (2000) 80 Cal.App.4th 966, 972; *Sababin v. Superior Court* (2006) 144 Cal.App.4th 81, 87.)

The elements of a claim under Welfare and Institutions Code section 15610.57 are described as follows:

> [*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*/[*name of decedent*]] was neglected by [[*name of individual defendant*]/ [and] [*name of employer defendant*]] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [*name of plaintiff*] must prove all of the following:
> 1. That [[*name of individual defendant*]/[*name of employer defendant*]'s employee] had a substantial caretaking or custodial relationship with [*name of plaintiff/decedent*], involving ongoing responsibility for [his/her/*nonbinary pronoun*] basic needs, which an able-bodied and fully competent adult would ordinarily be capable of managing without assistance;
> 2. That [*name of plaintiff/decedent*] was [65 years of age or older/a dependent adult] while [he/she/*nonbinary pronoun*] was in [[*name of individual defendant*]'s/[*name of employer defendant*]'s employee's] care or custody;
> 3. That [[*name of individual defendant*]/[*name of employer defendant*]'s employee] failed to use the degree of care that a reasonable person in the

same situation would have used in providing for [*name of plaintiff/decedent*]'s basic needs, including [*insert one or more of the following:*]
[assisting in personal hygiene or in the provision of food, clothing, or shelter;]
[providing medical care for physical and mental health needs;]
[protecting [*name of plaintiff/decedent*] from health and safety hazards;]
[preventing malnutrition or dehydration;]
[*insert other grounds for neglect;*]
4. That [*name of plaintiff/decedent*] was harmed; and
5. That [[*name of individual defendant*]'s/[*name of employer defendant*]'s employee's] conduct was a substantial factor in causing [*name of plaintiff/decedent*]'s harm.

(CACI 3103.)

Liability for professional negligence is excluded under the Elder Abuse Act, which would include simple or gross negligence committed by health care providers. (Welf. & Inst. Code, § 15657.2; *Delaney v. Baker* (1999) 20 Cal.4th 23, 32; *Covenant Care v. Superior Court* (2004) 32 Cal.4th 771, 785.) Thus, "the statutory definition of 'neglect' speaks not to the *undertaking* of medical services, but of the failure to *provide* medical care." (*Id.* at p. 783, emphasis original.)

WHR first argues that there was no custodial care relationship. It relies on *Oroville Hospital v. Superior Court* (2022) 74 Cal.App.5th 382, which held that a nursing service's provision of in-home wound care to the patient plaintiff did not give rise to substantial caretaking or custodial relationship required to establish neglect under Elder Abuse Act. "Wound care such as that at issue here is not a 'basic need' of the type an able-bodied and fully competent adult would ordinarily be capable of managing on his or her own.… Unlike a basic need an able-bodied and fully competent adult would be capable of managing without assistance, such as eating, taking medicine, or using the restroom, decedent's wound care required competent professional medical attention." (*Id.* at p. 405.) Rather, a defendant's "alleged failure to provide *adequate* care is relevant to a professional negligence claim rather than a claim under the Elder Abuse Act." (*Id.* at p. 407, emphasis in original.) Ms. Noder opines that the WHR home health nurses were providing skilled nursing care, not basic custodial care, and thus none of their care could be considered statutory neglect. (Noder Decl., ¶¶ 10-16.)

However, an expert declaration is not needed or useful on the question of existence of a custodial care relationship. A properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert's opinion will assist the trier of fact. (Evid. Code, § 801, subd. (a).) This is something that the court or trier of fact could assess on its own based on facts presented regarding the nature of the relationship and responsibilities of WHR. Instead of presenting direct evidence of such facts, WHR relies on an expert declaration to opine that there was no custodial care relationship. This is a basic factual issue, not one requiring expert testimony. While the facts establishing the existence or lack of a custodial care relationship may be found in the voluminous medical records presented in six volumes, the facts relevant to this inquiry are not set forth in the separate statement. The separate statement filed with the motion must separately identify each material fact claimed to be without dispute with respect

to the cause of action. (Cal. Rules of Court, rule 3.1350(d).) And to the extent that Ms. Noder's declaration would be relevant to this issue, it is conclusory, without any discussion of the facts in this particular case going to existence of a custodial care relationship. (See Noder Decl., ¶¶ 5, 11(a), 11(bb), 15.)

The court concludes that WHR has not met its burden of showing there is no triable issue of fact on the question of the existence of a custodial relationship.

WHR next argues that its home health nurses did not cause plaintiff's injuries. Again, causation is an element of the cause of action. (See CACI 3103(5).) As noted above in CACI 1303, the defendant's conduct must be a substantial factor in causing the plaintiff's harm. That element is negated with the Noder declaration. (See Noder Decl., ¶¶ 10-13, 17.) But as discussed above, plaintiff has raised a triable issue of fact by presenting a contradictory expert declaration.

WHR also contends that plaintiff cannot obtain the enhanced remedies under the Elder Abuse Act. To obtain those enhanced remedies, a plaintiff must prove liability for physical abuse or neglect, and that the defendant is guilty of recklessness, oppression, fraud, or malice by clear and convincing evidence. (Welf. & Inst. Code, § 15657, subd. (a); *Sababin v. Superior Court* (2006) 144 Cal.App.4th 81, 88; see also *Delaney v. Baker, supra,* 21 20 Cal.4th at p. 31 ["In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct."].) WHR contends that conduct that complies with the standard of care cannot rise to the level of recklessness, oppression or malice. WHR relies on paragraphs 10-16 of the Noder declaration, wherein she expresses her opinion that WHR met the standard of care. As noted above, there is a triable issue of fact in this regard. WHR also points to paragraph 18, wherein Ms. Noder opines that "WHR, its agents and employees' care, custody, and treatment of Linda Anderson did not rise to the level of recklessness." (Noder Decl., ¶ 18.) This is a legal conclusion for which an expert opinion is not necessary or useful, and it is apparently based on the same facts going to compliance with the standard of care. Accordingly, the court denies summary adjudication of the forty-third and forty-fourth causes of action, as well as the request for enhanced remedies under Welfare and Institutions Code section 15657.

Objections

Finally, the court notes the following rulings on the parties' evidentiary objections.

- Plaintiff's objections to WHR's evidence: overrule the four objections.
- WHR's objections to plaintiff's evidence: overrule objections 1-5, sustain objections 6 and 7.

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 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 6/6/2022 .
(Judge) (Date)