Tentative Rulings for July 14, 2021
Department 501

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.

_____

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 501

Begin at the next page

(32)

Tentative Ruling

Re: ***Taylor v. Mitroo, M.D., et al.***
Superior Court Case No. 19CECG03767

Hearing Date July 14, 2021 (Dept. 501)

Motion: by Defendant Fresno CA Endoscopy ASC, LP dba Central California Endoscopy Center's for Summary Judgment

Tentative Ruling:

To grant. (Code Civ. Proc., § 437c, subd. (c).) The prevailing party is directed to submit to this court, within five (5) days of service of the minute order, a proposed judgment consistent with the court's summary judgment ruling.

Explanation:

A trial court shall grant summary judgment where there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.) As the moving party, defendant bears the initial burden of proof to show that plaintiff cannot establish one or more elements of her cause 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. (Code Civ. Proc., § 437c, subd. (p)(2).)

The elements of a cause of action for medical malpractice are: "(1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage." (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968.) "Both standard of care and defendants' breach must normally be established by expert testimony in a medical malpractice case." (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 467.) "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 University of California* (1989) 215 Cal.App.3d 977, 984-85, internal citations omitted.)

Defendant Fresno CA Endoscopy ASC, LP dba Central California Endoscopy Center ("CCEC") submits the declaration of Thomas B. Hargrave III, M.D., a well-qualified expert board certified in Internal Medicine and Gastroenterology. Based on his review of the First Amended Complaint, Plaintiff's medical records from CCEC, Plaintiff's discovery responses and her deposition testimony, and after providing a factual chronology of the

care and treatment received by Plaintiff, Dr. Hargrave opines that the care and treatment provided by the medical staff at CCEC met the applicable standard of care. He also concludes that no act or omission on the part of the medical staff at CCEC caused, contributed to or was a substantial factor in causing Plaintiff's alleged injuries. Dr. Hargrave concludes that CCEC medical staff appropriately and timely followed the physician's orders in carrying out the care and treatment of Plaintiff, and that CCEC medical staff complied with the standard of care in all respects with regard to the healthcare services provided to Plaintiff on October 17, 2018.

CCEC also presents evidence to show that Plaintiff's treating physician, Dr. Mitroo, was an independent contractor and not an agent or employee of CCEC. (See *Mayers v. Litow* (1957) 154 Cal.App.2d 413 ["In an action charging malpractice with respect to an operation performed by defendant physician in defendant hospital, a judgment of nonsuit as to the hospital was proper where there was no evidence that defendant physician or anyone present at the operation was an agent or employee of the hospital ...."] Here, CCEC presents evidence to the effect that it neither possesses nor exercises control over the details or methods by which physicians perform their professional, clinical or operational services at CCEC, that it exercises no control over any documentation contained in the medical records of any such physicians, that CCEC did not compensate Dr. Mitroo for any of the services she may have provided to Plaintiff, that it did not charge physicians for any nursing services which may have been provided to patients, that it did not provide any financial benefit to such physicians and that, at all relevant times, CCEC required Dr. Mitroo to maintain her own separate liability insurance apart from CCEC's insurance. (See Declaration of Cindy Vasquez, CCEC's Administrator, Statement of Evidence Exhibit No. "7".) Therefore, CCEC has shown that it is not liable on a theory of respondeat superior for any alleged negligence on the part of Dr. Mitroo.

Moving party's evidence is sufficient to shift the burden to Plaintiff. (See *Munro v. Regents of University of California, supra,* 215 Cal.App.3d 977, 985; Code Civ. Proc., § 437c, subd. (p)(2).) As no opposition appears to have been filed, moving party's motion for summary judgment is granted.

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

Tentative Ruling
Issued By: DTT on 7/6/2021 .
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Canales v. 38SDJV Holdings, LLC***
Superior Court Case No. 19CECG03886

Hearing Date: July 14, 2021 (Dept. 501)

Motion: Defendants' demurrer to and motion to strike portions of Complaint

Tentative Ruling:

To take all motions off calendar for failure of moving parties to comply with Code of Civil Procedure sections 430.41 and 435.15. The parties are ordered to meet and confer pursuant to the statute and, if necessary, to calendar a new hearing date. Any new hearing date must be obtained pursuant to Fresno County Superior Court Local Rules, rule 2.2.1.

Explanation:

It appears that the only thing moving parties' counsel did to comply with the meet and confer requirement was to write a letter to plaintiff's counsel. Then, the declaration states that defense counsel did not hear back from plaintiff's counsel. This extraordinarily minimal interaction is insufficient. There is no problem with sending written communication first, and in fact it can be helpful to the process, but this does not shift the burden for meeting and conferring to plaintiff. The statute clearly places the burden on the moving party, who is not excused from this requirement unless they show that the plaintiff failed to respond to the meet and confer request or otherwise failed to meet and confer in good faith. (Code Civ. Proc., §§ 430.41, subd. (a)(3)(B), 435.15, subd. (a)(3)(B).) The evidence does not show a bad faith refusal to meet and confer on plaintiff's part which would serve to excuse defendant from complying with the statute.

The court fully expects both sides to honor their statutory meet and confer obligations. If plaintiff's counsel refuses reasonable attempts at in-person or telephonic contact, he will be required to appear personally in this court and explain why he believes the statute does not apply to him.

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

Tentative Ruling
Issued By: DTT on 7/9/2021.
(Judge's initials) (Date)

(5)

Tentative Rulings

Re: ***Cal LeDuc et al. v. Infinity Select Insurance Company et al.***
Superior Court Case No. 19CECG01278

Date: July 14, 2021 (Dept. 501)

Motion: by Defendants Infinity Select Insurance Company and Infinity Property and Casualty Corporation for Summary Judgment or, in the Alternative, Summary Adjudication

Tentative Rulings:

To request further briefing as stated herein as to whether the costs award in the underlying case Superior Court case number 13CECG03811 falls within the scope of Insurance Code section 11580, subdivision (b)(2). A determination of this issue is necessary for purposes of ruling on the motion for summary adjudication as to the first cause of action for violation of Insurance Code section 11580, subdivision (b)(2). The parties must file and serve supplemental briefs on or before **July 21, 2021**. No reply briefs will be permitted. The hearing will be continued to August 4, 2021.

To deny the motion for summary adjudication of the second cause of action as stated herein.

To sever the action pursuant to Code of Civil Procedure section 1048, subdivision (b), as follows:

1. The second cause of action for declaratory relief will be tried first.
2. The third through eighth causes of action will be tried after the resolution of the cause of action for declaratory relief.

As a result, the motion for summary adjudication as to the third through eighth causes of action is rendered moot.

Explanation:

First Cause of Action

In the underlying case number 13CECG03811 entitled *Cal LeDuc; Tori Abby; Miley Abby, a minor by and through her Guardian ad litem, Tori Abby, Mandy Jobe, Lukus LeDuc, Jay LeDuc and Cal LeDuc as successor in interest to the estate of Marsha Kay LeDuc v. Mario Alberto Guerro; Daniel M. Canchola and Guerra Produce*, defendants filed for bankruptcy protection on April 24, 2017, shortly before the initial trial date. Plaintiffs petitioned for and were successful in obtaining a lifting of the stay as to the insurer of defendants only. The case went to trial on October 5, 2017.

On the fifth day of testimony, the parties reached a settlement with the participation of an attorney for defendants' insurer, Infinity Select Insurance Company. The settlement was placed on the record. (See Reporter's Transcript dated October 17, 2017, attached as Exhibit 13 to the moving Defendant's motion for summary judgment or in the alternative, summary adjudication.) Later, a formal Settlement Agreement was drafted and signed by all parties including the attorney for Infinity. (See Exh. 13.)

Pursuant to the Settlement Agreement at page 4 Part IV Subsection 1 and as stated on the record, plaintiffs were permitted to file a Memorandum of Costs prior to the filing of a request for dismissal. The Memorandum was filed on November 2, 2017. Defendants filed a motion to strike and/or tax. The motion was heard on January 17, 2018. The motion was granted in part in that $28.80 was taxed. Thus, the remaining request of **$836,355.59** in costs was awarded. On March 27, 2018, plaintiffs filed a request for *dismissal* with prejudice but **without** waiver of costs and fees. Dismissal was entered on April 27, 2018.

A necessary requirement to state a judgment creditor's cause of action against the insurer is a judgment. [*Shaolian v. Safeco Ins. Co.* (1999) 71 Cal.App.4th 268.] Here, whether the dismissal with an award of costs constitutes a "judgment" within the meaning of Insurance Code section 11580, subdivision (b)(2), is unclear. (Compare *Pruyn v. Agricultural Insurance Co.* (1995) 36 Cal.App.4th 500 with *Rose v. Royal Ins. Co.* (1991) 2 Cal.App.4th 709.) Therefore, further briefing on this issue is requested in order to facilitate a ruling on the motion for summary adjudication as to the first cause of action.

Second Cause of Action

The second cause of action seeks declaratory relief. A cause of action for declaratory relief is governed by Code of Civil Procedure section 1060. It states:

> Any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and the declaration shall have the force of a final judgment. The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.
>
> A complaint for declaratory relief should show the following:

(1) A proper subject of declaratory relief within the scope of Code of Civil Procedure section 1060; and

(2) An actual controversy involving justiciable questions relating to the rights or obligations of a party. (See *Tiburon v. Northwestern Pac. R. Co.* (1970) 4 Cal.App. 160, 170.)

Importantly, the pleadings determine the "outer measure of materiality" in a summary judgment motion. [*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74—"the pleadings determine the scope of relevant issues on a summary judgment motion." Also, summary adjudication must completely dispose of the cause of action, defense, damages claim or duty issue to which it is directed. [CCP § 437c, subd. (f)(1)] If there is a properly pleaded cause of action for declaratory relief, summary adjudication may be proper even though the controversy between the parties spills over into other causes of action. (*Southern Calif. Edison Co. v. Sup.Ct. (Energy Develop. & Const. Corp.)* (1995) 37 Cal.App.4th 839, 845 — same issue raised in declaratory relief claim also raised in breach of contract and specific performance claims.) But, in the case at bench, the cause of action is not properly pleaded. It seeks multiple declarations not related to the policy. (See ¶¶ 50-54.) Of more concern is the fact that it incorporates by reference the previously pleaded 48 paragraphs. (Id. at ¶ 49.) Thus, "material" facts may be located outside the cause of action. As a result, summary adjudication is improper. (*Id*. at 846.)

Severance

Code of Civil Procedure section 1048, subdivision (b), states:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of trial by jury required by the Constitution or a statute of this state or of the United States.

In the instant case, defendants in the underlying action have been added as plaintiffs in the fourth through eighth causes of action. They allege causes of action for bad faith, breach of contract, professional negligence, breach of fiduciary duty and negligent failure to procure requested coverage against *inter alia* Infinity Select Insurance Company, Joseph Cooper, Sr., and Academy West Insurance Services, Inc. It strongly appears that severance of the causes of action related to these plaintiffs will:

- Save judicial time and avoid duplication of effort; and
- Enable the trier(s) of fact in separate trials to evaluate the claims more fairly and avoid confusion.

(See *McMillan Homes Constr., Inc. v National Fire & Marine Ins. Co.* (2019) 35 Cal.App.5th 1042 and *Plaza Tulare v Tradewell Stores* (1989) 207 Cal.App.3d 522.) In addition, the third

cause of action is brought by the LeDuc plaintiffs as assignees of the claims of defendants in the underlying action. Accordingly, severance is necessary to avoid confusion. (*Id*.)

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

Tentative Ruling

Issued By: DTT on 7/13/2021 .
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Tovar v. Olive-Broadway Enterprises, Inc.***
Superior Court Case No. 20CECG00579

Hearing Date: July 14, 2021 (Dept. 501)

Motion: by Defendants Olive/Broadway Enterprises, Inc., dba Bobby Salazar's Taqueria, and Robert "Bobby" Salazar to Compel Responses to Discovery

Tentative Ruling:

To continue the matter to August 18, 2021, at 3:30 p.m. in Department 501. No later than August 9, 2021, defense counsel shall file additional, *separate*, declarations dealing with each and every separate type of propounded discovery which is the subject of this motion. See the explanation below for further detail as to what each declaration should include (separate declarations are required only as an aid to the court in analyzing the motion). No additional filings are permitted, by either side, without prior leave of court.

On or before July 26, 2021, defendant shall pay to the clerk of the court an additional $60 motion fee, beyond the single $60 motion fee already paid, for each type of discovery which is the subject of this motion.

Explanation:

According to defendants' Notice of Motion, this motion concerns the following discovery propounded by defendants: 1) form interrogatories, general, set one, from defendant Robert "Bobby" Salazar ("defendant Salazar"); 2) form interrogatories, general, set one, from defendant Olive/Broadway Enterprises, Inc. dba Bobby Salazar's Taqueria ("defendant BST"); 3) defendant Salazar's form interrogatories, employment, set one; 4) defendant BST's form interrogatories, employment, set one; 5) defendant Salazar's special interrogatories, set one; 6) defendant BST's special interrogatories, set one; 7) defendant Salazar's request for production of documents, set one; 8) defendant Salazar's request for production of documents, set two; 9) defendant BST's request for production of documents, set one; 10) defendant BST's request for production of documents, set two; and 11) defendant Salazar's request for admissions, set one.

The court agrees with plaintiff's observation that defendants' Request for Pretrial Discovery Conference form filed on January 22, 2021, was not clear that it dealt with this many propounded forms of discovery; they did not clearly set forth the discovery involved on the first page of the form, as required, and the narrative set forth in the request did not refer to each form of discovery in any organized fashion. However, the court's order did give defendants permission to file a motion concerning all the discovery to which the request related, so defendants did not violate the court's order, as plaintiff argues.

Even so, this court routinely requires separately filed motions for different discovery. Or, even if the moving party chooses to combine related discovery in one motion (*e.g.,* discovery propounded on the same date, with the same general set of facts as to service and responses and meet and confer), the court still requires a separate motion fee to be paid for each type of discovery. Here, defendants have essentially combined 11 motions into one. They must pay a hearing fee for each motion.[1]

The court cannot yet rule on the merits of defendants' motion because defense counsel's declaration does not attach any of the at-issue discovery or plaintiff's responses thereto. This is always required with a motion to compel discovery responses, so as to provide proof of: 1) when and how the discovery was served, which also enables the court to calculate when it was due; 2) when and how responses were served, which also allows the court to determine the deadline for filing a motion to compel; and 3) which responses consisted only of objections and which responses consisted of both responses and objections, since this impacts who must sign the responses, which was a bone of contention during meet and confer. Further, without the discovery being attached, the court is unable to analyze some of the arguments made by the opposing party (for instance whether a certain word used in the propounded discovery was sufficiently defined).

Where the responding party makes a response, that party must verify the response. Where there are both responses and objections, both the party and the attorney must sign the response. If a response consists entirely of objections, only an attorney signature is required (i.e., no verification required). (Code Civ. Proc., §§ 2030.250 [Interrogatories]; 2033.240 [Admissions]; 2031.250 [Document production].) The court finds it impossible at this juncture to determine where a verification was required and where it was not as to the at-issue discovery.

The court requires defense counsel to file a separate declaration as to each type of discovery propounded which: 1) clearly identifies the discovery device and which defendant propounded it; 2) attaches this discovery, including the proof of service; 3) attaches the plaintiff's response, including the proof of service (or if personally delivered, defendant must indicate such and specify the date of service).[2] If plaintiff subsequently produced further responses to defendants' satisfaction, or served separate verifications, this should be clearly stated; the further responses which satisfied defendants do not need to be attached, but the verifications must be attached. Also, the court does not understand defense counsel's argument that

---

[1] Plaintiff argues that defendants have filed *7* motions in one, and not *11*. The court is simply counting from the Notice of Motion. If defendants wish to clarify, in their supplemental declaration(s), that their motion concerns less than 11 forms of discovery, they may do so. The point is that they must pay a separate motion fee for however many types of discovery their motion concerns.

[2] Defense counsel should not attach to her declarations the documents produced in response to the requests for production of documents; only the response should be attached.

a differing date between the client's signature and the attorney's signature renders the verification invalid. This should be further explained, and the authority for this contention provided.

Also, in re-reading the request filed on January 22, 2021, it appears that defendants contend (on the last page before the proof of service) that plaintiff granted them a written extension of the filing deadline for their motion to compel further responses. This is crucial here, given the length of time between when initial responses were served and the filing of the motion. Even with the tolling allowed for the two discovery conference requests, without this extension the motions might be considered untimely and denied on that basis. Defendants must produce a copy of the written extension allegedly granted by plaintiff.

The only substantive point concerning the motion the court will address at this time is plaintiff's counsel's argument that defendants did not serve him with the January 22nd Request for Pretrial Discovery Conference, as required, and especially to address Mr. Whelan's insistent and oft-repeated contention that defense counsel has admitted she did not do so. That does not appear to be the case. Attached to Mr. Whelan's declaration is an email from Ms. Smith wherein she clearly states she *did* give Mr. Whelan notice on January 22, 2021:

> You were served on January 15th when we submitted this PDC request to the Court. You then emailed and asked that we pull the filing and put it off for one week. We then pulled the filing on an emergency basis, per your request, and refiled, a week later, per our email conversation and agreement. **You were notified of the refiling via email on January 22th, just as you were served. Indeed, you indicated, via email, for us to move forward with the PDC. We did.** I am sorry that you did not respond to the filing. However, the time for response has now passed […].

(Whelan Dec., Ex. F, .pdf p. 27.)

While Mr. Whelan continued to insist, in the Exhibit F email chain, that Ms. Smith had not served him, he did not directly address (in fact, he appeared to completely ignore) Ms. Smith's express contention that she <u>had</u> sent him notice via email on January 22, 2021. The court could not see any place in plaintiff's exhibits where Ms. Smith admitted to not serving him, nor did Mr. Whelan ever reference a place (whether in an email or a letter) where Ms. Smith admitted not serving him. The court finds Mr. Whelan's argument unsupported, and it accepts the above statement in Ms. Smith's email, as well as the proof of service under penalty of perjury that was attached to the request, as true.

The court will not deny the motion based on a claim the request was not served, as urged by plaintiff's counsel, but instead will rule on the merits.

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

Tentative Ruling
Issued By: DTT on 7/13/2021.
(Judge's initials) (Date)