

**Tentative Rulings for September 29, 2021**  
**Department 503**

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

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

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(Tentative Rulings begin at the next page)

## **Tentative Rulings for Department 503**

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**Tentative Ruling**

Re: ***Askew v. Clovis Community Medical Center***  
Superior Court Case No. 20CECG00682

Hearing Date: September 29, 2021 (Dept. 503)

Motion: Defendant Angelica R. Jimenez, M.D.'s Demurrer to and  
Motion to Strike Portions of Second Amended Complaint

**Tentative Ruling:**

To sustain defendant's general demurrer to the cause of action for defamation (slander), with leave to amend. To overrule defendant's demurrer to the cause of action for defamation (libel). To grant defendant's motion to strike, without leave to amend, as to request 1 (page 5, paragraph 22), request 2 (page 14, paragraph 81), and request 3 (page 16, paragraph 92). To grant defendant's motion to strike, with leave to amend, as to request 4 (page 16, paragraph 95).

Plaintiffs are granted 20 days, running from service of the minute order by the clerk, to file and serve a third amended complaint. All new allegations in the amended complaint are to be set in **boldface** type.

**Explanation:**

Demurrer

Slander. Defendant contends that the second amended complaint fails to state a cause of action for defamation by way of slander. Slander is defined by statute as a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:

1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;
3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;
4. Imputes to him impotence or a want of chastity; or
5. Which, by natural consequence, causes actual damage.

(Civ. Code, § 46.)

If a statement falls within the first four categories listed in the California statute defining slander, it is considered defamatory per se and requires no proof of actual damages. (*Crowe v. County of San Diego* (9th Cir. 2010) 608 F.3d 406, referring to Civ. Code, § 46, subds. (1)-(4).) When the words do not fall within the first four categories of section 46, a plaintiff must prove that the publication caused actual damages. (See *Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434; Civ. Code, § 46, subd. (5).)

Plaintiffs contend that they have alleged slander under three out of the above five categories, two of them being slander per se. The slander per se categories that plaintiffs believe are implicated here are the first (a statement charging plaintiff (Mrs. Askew) with a crime, i.e., an oral utterance accusing her of lying about her pain in order to obtain pain medications), and the second (an oral statement imputing in her the present existence of an infectious, contagious, or loathsome disease, i.e., drug addiction). Plaintiffs contend that defendant stated to Mrs. Askew's daughter and a family friend that Mrs. Askew was not sick, and that she had only presented to the emergency room for more pain medications. (SAC ¶ 81.) Plaintiffs allege that defendant disputed the intensity of Mrs. Askew's pain, and that upon Mrs. Askew's retiring to the restroom, defendant asked Mrs. Askew's daughter and her friend whether Mrs. Askew was seeking drug medications, looking for drugs, and whether she was a drug addict. (SAC ¶¶ 22, 81.) Plaintiffs contend that the "gist" or "sting" of defendant's statements and questions were false and defamatory. (SAC ¶ 85.) Plaintiffs claim that defendant's conduct was a substantial factor in causing Mrs. Askew actual damages, such as harm to Mrs. Askew's reputation, and/or shame, mortification, and/or hurt feelings. (SAC ¶ 89.)

With regard to the slander per se "charge of crime" category, it is usually held that the offense must be one involving moral turpitude, indictable or punishable by death or imprisonment. (*Cunningham v. Simpson* (1969) 1 Cal.3d 301, 307; *Clay v. Lagiss* (1956) 143 Cal.App.2d 441, 448.) According to plaintiffs, defendant stated that Mrs. Askew was not sick but only presented to the emergency room for more pain medications. Plaintiffs claim that the statements made by defendant tend to imply that Mrs. Askew was lying about the intensity of her pain in order to obtain pain medications. But a statement accusing someone of lying is not tantamount to a communication charging someone with a crime. Neither is there anything to suggest that defendant made any statement implying that Mrs. Askew had been indicted, convicted or punished for crime. (See Civ. Code., § 46, subd. (1).)

As for the statements purportedly accusing Mrs. Askew of being a drug addict, plaintiffs have not cited to any authority, and the court is aware of none, equating "drug addiction" with an "infectious, contagious, or loathsome disease." (See Civ. Code., § 46, subd. (2).) With respect to this category of slander per se, the diseases considered loathsome have tended to be limited to venereal diseases such as syphilis or gonorrhea and leprosy. (Rest.2d Torts, § 572, com. b, p. 109.) Some broader statements of the rule would treat as slanderous per se any disease that society might consider particularly contagious or repugnant, such as would normally cause a person to be excluded from society. (See *Brown v. Williamson Tobacco Corp. v. Jacobson* (7th Cir. 1983) 713 F.2d 262 [a communicable disease that would exclude one from society].) It cannot be said that drug addiction is a condition that society might consider particularly repugnant or contagious, or is likely to expose one to ostracism.

The second amended complaint is also devoid of any allegations suggesting that the statements made by defendant tended to directly injure Mrs. Askew with respect to her office, profession, trade or business, either by imputing to her general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to her office, profession, trade, or business that has a natural tendency to lessen its profits. Neither is there any suggestion that defendant made any statements imputing to Mrs. Askew a want of chastity. In short, the conduct complained of here does not constitute slander per se under any of the categories enumerated in Civil Code section 46, subdivisions (1)–(4).

“A slander that does not fit into any of the four categories of specific charges enumerated by statute is “slander per quod,” and special damages are required for there to be any recovery for that slander.” (*Regalia v. The Nethercutt Collection* (2009) 172 Cal.App.4th 361; see Civ. Code, § 46, subd. (5).) Plaintiffs allege that defendant’s conduct was a substantial factor in causing Mrs. Askew actual damages, such as harm to Mrs. Askew’s reputation, and/or shame, mortification, and/or hurt feelings. (SAC ¶ 89.) Defendant contends, however, that “actual damages” requires some allegation of damage to property, business, profession, or occupation, none of which is alleged here. (See Court’s January 29, 2021 Order.) Special damages must be specially pled in a defamation case. (*Anschutz Entertainment Group, Inc. v. Snapp* (2009) 171 Cal.App.4th 598, 643.) Special damages include pecuniary losses resulting from injury to the plaintiff’s property, business, or occupation. (*Gonzalez v. Fire Insurance Exchange* (2015) 234 Cal.App.4th 1220, 1240, fn. 5.)

It does not appear that defendant is arguing any deficiency in the allegations as they relate to slander per quod beyond the fact that plaintiffs have not sufficiently alleged actual damages. Bare allegations that Mrs. Askew suffered actual damages, including harm to her reputation, and/or shame, mortification, and/or hurt feelings, without any allegations as to pecuniary losses, are insufficient to support a cause of action for slander per quod. Accordingly, defendant’s demurrer to the eighth cause of action for defamation by way of slander is sustained, with leave to amend.

Libel. The second amended complaint appears to assert new allegations regarding a remark made by defendant and memorialized in Mrs. Askew’s medical records. Specifically, plaintiffs allege that “Dr. Jimenez’ statement [regarding drug addiction] was also memorialized in Mrs. Askew’s medical chart as ‘drug-seeking behavior.’” (See SAC ¶¶ 22, 81 & 92.) In so doing, plaintiffs appear to be alleging a separate cause of action for defamation on a theory of libel against defendant. Civil Code section 45 defines libel as “a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.” Plaintiffs are reminded, however, that the Court’s January 29, 2021 Order limited the scope of any amendment to the cause of action for defamation by way of slander, and did not give plaintiffs’ carte blanche to assert an entirely new cause of action for libel. (See *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023 [following an order sustaining a demurrer with leave to amend, a plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend].)

Defendant contends that the second amended complaint fails to state a cause of action for libel, and that plaintiffs improperly amended a separate legal theory into the second amended complaint without leave of court. Defendant is correct in that the libel cause of action exceeds the scope of the order granting leave to amend. The court properly grants a defendant's demurrer without leave to amend as to a new cause of action that the plaintiff added to the amended complaint without obtaining leave to do so. (*Le Mere v. Los Angeles Unified School Dist.* (2019) 35 Cal.App.5th 237, 244-245.) Here, however, the allegations regarding libel are interspersed throughout the second amended complaint and are incorporated into the eighth cause of action for defamation based on slander, rather than being set apart as a separate cause of action for libel. But a demurrer does not lie to a part of a cause of action. (*PH II v. Superior Court* (1995) 33 Cal.App.4th 1680.) A motion to strike may be utilized instead. (*Id.* at p. 1682.) Accordingly, defendant's demurrer to the purported cause of action for libel is overruled. Should plaintiffs desire to amend their pleading to assert a cause of action for libel, plaintiffs will need to comply with the proper procedural requirements and seek leave of court.

### Motion to Strike

"The court may, upon motion ... and upon terms it deems proper ... [s]trike out any irrelevant, false, or improper matter inserted in any pleading." (Code Civ. Proc., § 436, subd. (a).) Defendant moves to strike any allegations in the second amended complaint referencing her written remark in Mrs. Askew's medical chart regarding "drug-seeking behavior." Accordingly, defendant moves to strike the following statements from the second amended complaint:

1. Page 5, paragraph 22: "Dr. Jimenez['s] statement was also memorialized in Mrs. Askew's medical chart as 'drug-seeking behavior.'"
2. Page 14, paragraph 81: "Thereafter, Dr. Jimenez['s] thoughts about the reason Mrs. Askew presented to CCMC were memorialized in Mrs. Askew's chart as 'drug-seeking behavior.'"
3. Page 16, paragraph 92: "(and the written statement 'drug-seeking behavior[''])"

As noted above, plaintiffs improperly seek to assert a new cause of action for libel against defendant in the second amended complaint. Generally, where a court grants leave to amend after sustaining a demurrer, the scope of permissible amendment is limited to the cause(s) of action to which the demurrer has been sustained. (*People v. Clausen* (1967) 248 Cal.App.2d 770, 785-786.) The allegations regarding libel were impermissibly added to the second amended complaint without leave of court. Code of Civil Procedure section 436 states, in relevant part, that "[t]he court may, upon motion ... or at any time in its discretion, and upon terms it deems proper ... [s]trike out all or any part of any pleading not drawn or filed in conformity with the laws of this state ... or an order of the court." (Code Civ. Proc., § 436, subd. (b).) The Court's January 29, 2021 Order limited the scope of the permissible amendment to slander, which did not encompass a cause of action for libel. Accordingly, defendant's motion to strike is granted, without leave to amend as to requests 1-3.

Additionally, defendant moves to strike the request for punitive damages based on the claim for defamation. Specifically, defendant moves to strike the following statement (request 4 of the motion to strike) from the second amended complaint:

4. Page 16, paragraph 95: "thereby entitling the Plaintiff Ms. Askew to request and receive punitive damages in an amount according to proof."

As presently stated, the allegations regarding the eighth cause of action for defamation against defendant are insufficient to support a request for punitive damages. Quite aside from allegations of malice, oppression or fraud required to support a claim for punitive damages under Civil Code section 3294, a viable tort cause of action which will support an award of "actual" damages must first be stated as a predicate to any pendant claim for punitive damages. (See *Weiss v. Blumencranc* (1976) 61 Cal.App.3d 536, 542.) Plaintiffs allege, rather conclusively, that "[b]ecause Defendant Dr. Jimenez ... acted with malice, oppression, and/or fraud, Mrs. Askew may ... request and recover damages to punish Defendant Dr. Jimenez." (SAC ¶ 90.) Plaintiffs claim that the statements made by defendant (both written and oral) were made with the intention of harming Mrs. Askew's reputation with her daughter and her friend and to cause Mrs. Askew injury through shame and mortification. (SAC ¶ 92.) Plaintiffs allege that these statements were maliciously tendered and that defendant intentionally and maliciously intended to cause the above injuries to Mrs. Askew. (SAC ¶¶ 93, 94.) Plaintiffs also allege that defendant committed these actions in an intentional, reckless, and/or negligent manner, thereby entitling Mrs. Askew to punitive damages. (SAC ¶ 95.)

Such conclusory allegations, without more, will simply not support a prayer for punitive damages, and will not defeat a motion to strike the punitive damages allegations. (See *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1042.) Plaintiffs' second amended complaint fails to allege sufficient facts to support the element of malice, oppression or fraud necessary to an award of punitive damages pursuant to Civil Code section 3294. If a claim for punitive damages is not properly pleaded, the claim and related allegations may be stricken. (See *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159.) Since the demurrer to the eighth cause of action for defamation is sustained with leave to amend, defendant's motion to strike is granted, with leave to amend as to request 4 (page 16, paragraph 95).

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 9/24/2021  
(Judge's initials) (Date)

(5)

### Tentative Ruling

Re: ***Compromise of the claim of the minor Alyssa Ruelas  
by and through her Guardian Ad Litem, Cristina Cerna***  
Superior Court Case No. 20CECG02942

Hearing Date: September 29, 2021 (Dept. 503)

Petition: Minor's Compromise

### Tentative Ruling:

To grant the petition upon the submission of the following:

- An amended Order Approving Compromise of Claim with box 6.b. checked;
- An Order to Deposit Funds in Blocked Account. This is the mandatory Judicial Council Form MC-355. The Court cannot order the funds to be paid to the minor's parent. The money is the property of the minor.
- An Acknowledgment of Receipt of Order and Funds for Deposit in Blocked Account from the financial institution must be filed with the Court. This is mandatory Judicial Council Form MC-356.

After the funds have been deposited, if the parent wishes to withdraw funds, then Judicial Council Forms MC-357 and MC-358 must be submitted after the funds have been deposited into a bank account for the minor.

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: KAG on 9/27/2021  
(Judge's initials) (Date)



(5)

### Tentative Ruling

Re: ***Compromise of the claim of the minor Samantha Moreno by and through her Guardian Ad Litem, Constanza Lopez Flores***

Superior Court Case No. 21CECG01352

Hearing Date: September 29, 2021 (Dept. 503)

Petition: Minor's Compromise

### Tentative Ruling:

To grant the petition and sign the proposed orders. No appearance is necessary.

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: KAG on 9/27/2021.  
(Judge's initials) (Date)

(27)

**Tentative Ruling**

Re: **Thomas v. Remarc. Inc.,**  
Superior Court Case No. 20CECG00412

Hearing Date: September 29, 2021 (Dept. 503)

Motion: Defendant FTF Enterprises, Inc.'s Demurrer to the Fourth and Sixth Causes of Action in the Second Amended Complaint and Motion to Strike Portions of the Second Amended Complaint

**Tentative Ruling:**

To sustain the demurrer of defendant FTF Enterprises, Inc. ("FTF") to the fourth and sixth causes of action, with leave to amend. (Code Civ. Proc., § 430.10, subd. (e).) To grant the motion to strike, with leave to amend. (Code Civ. Proc., § 436, subd. (a).) Plaintiff shall serve and file her third amended complaint within 10 days of the date of service of this order. All new allegations shall be in **boldface** type.

**Explanation:**

Demurrer

*Fourth Cause of Action for Constructive Fraud*

In ruling on a demurrer, the court assumes the truth of the facts alleged in the complaint and the reasonable inferences that may be drawn from those facts. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 883; *Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071, 1076 ["We treat the demurrer as admitting all material facts properly pleaded but not contentions, deductions or conclusions of fact or law."].)

In addition, "[c]onstructive fraud consists of "any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 981, fn. 13.) "'Constructive fraud often exists where the parties to a contract have a special confidential or fiduciary relation, which affords the power and means to one to take undue advantage of, or exercise undue influence over, the other.'" (*Mary Pickford Co. v. Bayly Bros.* (1939) 12 Cal.2d 501, 525, internal citations omitted.)

"Like an action for fraud, constructive fraud must be pled with specificity." (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239,1250; see also *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 ["[I]n California, fraud must be pled specifically; general and conclusory allegations do not suffice."].)

The second amended complaint alleges that FTF concealed material facts, such as its frequent transfer of funds between property accounts and its frequent omissions in monthly cash flow statements. (SAC, ¶¶ 68-72.) However, the second amended complaint does not state facts addressing the frequency of the transfers and omissions, and there are no supporting allegations of how such transfers and omissions allowed FTF to gain an advantage or unduly influence plaintiff.

In addition, although the second amended complaint alleges that Chris Darling misrepresented the “true status” of the properties through monthly writings (see SAC, ¶ 60), no description of these writings is alleged, and generalized facts are insufficient to support a fraud claim. (See *Lazar v. Superior Court*, *supra*, 12 Cal.4th at p. 645 [to support fraud claim, plaintiff must plead facts showing how, when, where, to whom, and by what means representations were tendered].)

Accordingly, the second amended complaint does not allege sufficient facts to support the fraud claim as it relates to FTF. Therefore, FTF's demurrer to the fourth cause of action is sustained, with leave to amend.

#### *Sixth Cause of Action for Financial Elder Abuse*

Elder abuse claims are based upon the Elder and Dependent Adult Civil Protection Act (Welf. & Inst. Code §§ 15600, *et seq.*; “Act”), making an elder abuse cause of action a statutory claim, which must be plead with particularity. (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 410.)

Plaintiff alleges that FTF “maliciously” undertook a “scheme of self-dealing” to maximize its profits to the detriment of plaintiff. However, although the second amended complaint identifies a number of alleged practices, there are no specific allegations identifying specific conduct by FTF. In other words, like the fraud claim, the allegations of the second amended complaint are similarly insufficient to state a claim for financial elder abuse. Therefore, FTF's demurrer to the sixth cause of action is sustained, with leave to amend.

#### *Motion to Strike*

A motion to strike can be used to cut out any “irrelevant, false or improper” matters or “a demand for judgment requesting relief not supported by the allegations of the complaint.” (Code Civ. Proc., § 431.10, subd. (b).) A motion to strike is the proper procedure to challenge an improper request for relief, or improper remedy, within a complaint. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166-167.)

With respect to punitive damage allegations, mere legal conclusions of oppression, fraud or malice are insufficient (and hence improper), and therefore may be stricken. However, if looking to the complaint as a whole, sufficient facts are alleged to support the allegations, then a motion to strike should be denied. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) There must be clear and convincing evidence that the defendant is guilty of oppression, fraud or malice. (Civ. Code, § 3294, subd. (a); *Neal v. Farmers Ins. Exchange* (1978) 21 Cal. 3d 910, 922.)

