Tentative Rulings for September 30, 2021
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.

19CECG04621 ***Martin v. Atwal*** **is continued to Thursday, October 21, 2021 at 3:30 p.m. in Dept. 503**

20CECG02034 **Press v. Nordhaven, LLC. Is continued to Thursday, October 7, 2021 at 3:30 p.m. in Dept. 503**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

Begin at the next page

(2)

Tentative Ruling

Re: ***In re Sophia Tovar***
Superior Court Case No. 21CECG01532

Hearing Date: September 30, 2021 (Dept. 503)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. Orders signed. Hearing off calendar.

Pursuant to California Rules of Court, Rule 3.1312, subd. (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 9/22/2021 .
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***Jay v. New Hampshire Ins. Co.***
Superior Court Case No. 19CECG04552

Hearing Date: September 30, 2021 (Dept. 503)

Motion: Plaintiffs' Motion for Summary Judgment
Defendant's Motion for Summary Judgment

Tentative Ruling:

To deny plaintiffs' motion for summary judgment. To grant defendant's motion for summary judgment.

Explanation:

Plaintiffs' Motion for Summary Judgment

The purpose of Code of Civil Procedure section 437c, establishing summary judgment proceedings, is to expedite litigation by eliminating needless trials. (*Cone v. Union Oil Co.* (1954) 129 Cal.App.2d 558, 562.) Summary judgment is permissible in actions for declaratory relief. (*Walker v. Munro* (1960) 178 Cal.App.2d 67, 70-71, *overruled on other grounds by Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055.)

Plaintiffs seek declaratory relief by judicial determination that the commercial general liability policy issued by defendant, for the benefit of Swim America Family Swim School, Inc. ("Swim America"), provided coverage of plaintiffs' claims in a separate action in the amount of $2 million. Plaintiffs argue that the policy terms dictate a finding that coverage triggered for two separate occurrences, each providing a limit of $1 million, for an aggregate total of $2 million, for two primary reasons. First, plaintiffs argue that the two causes of action in the separate underlying action dictate two occurrences within the meaning of the policy. Second, plaintiffs argue that the policy itself is ambiguous as to the definition of the term "occurrence," and the ordinary and popular definition of the term dictates a finding that each of the two causes of action in the separate underlying action fall within such an ordinary and popular definition.

Facts of the Separate Underlying Action

The facts in the present motion are undisputed. On or about August 25, 2015, decedent Tyler Jay drowned in a swimming pool while under the supervision of Swim America. On August 8, 2016, plaintiffs filed suit for (1) negligence constituting wrongful death; (2) negligent infliction of emotional distress ("NIED"); (3) negligent misrepresentation; and (4) negligence per se. Specifically, as to the NIED claim, plaintiffs alleged that plaintiff Karina Jay was in close proximity of decedent's drowning and personally witnessed her lifeless son's body in the swimming pool, causing her severe emotional distress and mental pain and suffering.

At the time of the incident, defendant had issued a policy to Swim America, number 6414387, covering the period of the incident and providing commercial general liability coverage of $1 million per occurrence, and $3 million aggregate. The parties to this separate underlying action settled under confidential terms, and the suit was dismissed on or about January 14, 2020.

On December 18, 2020, the present action was filed with the primary question of whether there were two occurrences (negligence constituting wrongful death and NIED) from the one incident such that defendant's policy triggered twice.[1]

Issue 1: Whether Two Causes of Action Dictate Two Occurrences

The negligent causing of emotional distress is not a discrete tort from the tort of negligence. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984, citing, e.g., *Burgess v. Sup. Ct.* (1992) 2 Cal.4th 1064, 1073.) There is no duty to avoid negligently causing emotional distress to another, and damages for emotional distress are therefore only recoverable if the defendant has breached some other duty to the plaintiff. (*Potter*, *supra*, 6 Cal.4th at p. 984.) Such other duty may be imposed by law, be assumed by a defendant, or exist by virtue of a special relationship. (*Ibid*.) The court in *Potter* explained as follows:

> Unless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty. Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests.

(*Id.* at p. 985.)

This reasoning is reflected in both direct and bystander theories of NIED, each of which relies on the finding of negligence. (*See* Judicial Council of California Civil Jury Instructions Nos. 1620-1621 [requiring a finding that a defendant was negligent]; *cf.* *Burgess*, *supra*, 2 Cal.4th at p. 1076 [finding that an obstetrician has a separate duty to a mother in labor as to emotional anguish].)

Here, plaintiffs argue that plaintiff Karina Jay held a bystander NIED claim. A bystander NIED is not a discrete claim from the negligence itself as a matter of duties owed, and cannot be brought independently of a negligence claim, unlike a loss of consortium claim which can be brought independently because of a separate duty owed to a separate individual. (See *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 803-804.)

[1] Plaintiffs' Request for Judicial Notice of the December 18, 2019 complaint is granted to the extent it demonstrates that a complaint was filed on the date identified. (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482.)

Thus, although plaintiffs are correct that emotional damages are not an available remedy in wrongful death claims, seeking emotional damages under an NIED claim does not demonstrate that NIED is a separate cause of action from wrongful death. Plaintiffs present no other legal authority to support their position that separate wrongful death and NIED claims constitute two occurrences within the meaning of defendant's policy, and the court is aware of no such authority.

Issue 2: Purported Ambiguity of Term "Occurrence"

The contract language governs its interpretation "if the language is clear and explicit." (Civ. Code, § 1638.) Thus, "where the language of a contract is clear, [the court] ascertain[s] intent from the plain meaning of its terms and go[es] no further." (*Blackhawk Corp. v. Gotham Ins. Co.* (1997) 54 Cal.App.4th 1090, 1095.) Words are "understood in their ordinary and popular sense . . . unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." (Civ. Code, § 1644.)

To ascertain the existence of an ambiguity, "the disputed policy language must be examined in context with regard to its intended function in the policy. This requires a consideration of the policy as a whole, the circumstances of the case in which the claim arises and common sense." (*Kavruck v. Blue Cross of Cal.* (2003) 108 Cal.App.4th 773, 780.) A provision is ambiguous if it "is capable of two or more constructions, both of which are reasonable." (*Waller v. Truck Ins. Exch., Inc.* (1995) 11 Cal.4th 1, 18.) In such a case, the court must "adopt an interpretation which provides the greatest coverage." (*Holcomb v. Hartford Cas. Ins. Co.* (1991) 230 Cal.App.3d 1000, 1008.)

Here, plaintiffs argue that the use of quotations in the policy dictates when terms such as "occurrence" are to be given special meaning as defined by the policy. The policy itself states as much. (Joint Compendium of Exhibits, Ex. 2, p. 11.) "Occurrence" is defined by the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (*Id.*, Ex. 2 at p. 24.)

Plaintiffs argue that the term "occurrence" is used both in quotations, such as in Section I, and without quotations, such as in Section III, creating ambiguity as to the use of the term. As plaintiffs concede, under Section I, the Coverage portion of the policy, "occurrence" appears in quotations and, therefore, unambiguously refers to the defined term in Section V of the policy. Although the word "occurrence" does not appear in quotations in Section III, the Limits of Insurance, the term appears as part of a phrase, "Each Occurrence Limit," which appears to correlate to a line-item statement of coverage. (*Id.*, Ex. 2 at p. 7.) Given the correlation to the policy declaration, and noting the intended function in the policy to define a limit per occurrence, the court declines to read ambiguity into otherwise clear intent and language. (*Waller*, *supra*, 11 Cal.4th at pp. 18-19.) Plaintiffs do not argue any other specific instances of the term "occurrence" without quotations, as relevant to the position that the policy affords a $2 million limit in this case.

In seeking a declaration in their motion for summary judgment that defendant's policy limits applicable to plaintiffs' claims are $2 million, plaintiffs fail to demonstrate there are no triable issue of material fact. Neither have plaintiffs established that the

policy, as a matter of law, affords $2 million in coverage under the circumstances. As such, plaintiffs' motion for summary judgment is denied.

Defendant's Motion for Summary Judgment

Where a defendant seeks a motion for summary judgment in a declaratory relief action, the defendant's burden is to establish that the plaintiffs are not entitled to a declaration in their favor by establishing that (1) the sought-after declaration is legally incorrect; (2) the undisputed material facts do not support the premise for the sought-after declaration; or (3) the issue is otherwise not appropriate for declaratory relief. (*Gafcon, Inc. v. Ponsor & Assoc.* (2002) 98 Cal.App.4th 1388, 1402.) On such a showing, the court will only decree that plaintiffs are not entitled to the declarations in their favor. (*Ibid.*)

Here, defendant seeks summary judgment that plaintiffs are not entitled to a declaration in their favor on two grounds. First, the emotional distress suffered by plaintiff Karina Jay is not an "occurrence" within the meaning of the policy because an "occurrence" looks to the actions of the insured, not the injuries of third parties. Second, in looking at the insured's actions, "occurrence" thereafter refers to discrete causes of injury, rather than the amount of injuries. Defendant's positions effectively seek to demonstrate that plaintiffs' sought-after declaration is legally incorrect, or that the undisputed material facts do not support the premise for the requested declaration. Defendant does not appear to contest that the issue is appropriate for declaratory relief.

Issue 1: Occurrence within Meaning of Policy

The policy, under Section V, lists specially defined terms, including the term "occurrence." (Joint Compendium of Exhibits, Ex. 2, p. 22 et seq.) "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (*Id.*, Ex. 2, at p. 24.) An accident refers to an "unexpected, unforeseen or undersigned happening or consequence from either a known or unknown cause." (*Liberty Surplus Ins. Corp. v. Ledesma & Meyer Construction Co.* (2018) 5 Cal.5th 216, 221.) Accident, within the meaning of the coverage clause of a liability refers to the conduct of the insured for which liability is sought to be imposed. (*Ibid.*, citing *Delgado v. Interinsurance Exchange of Automobile Club of S. Cal.* (2009) 47 Cal.4th 302, 311.) Accordingly, a policy providing a defense and indemnification for bodily injury caused by an accident promises coverage resulting from the insured's negligent acts. (*Liberty*, *supra*, 5 Cal.5th at pp. 222-223, citing *Safeco Ins. Co. v. Robert S.* (2001) 26 Cal.4th 758, 765.)

Here, it is undisputed that defendant's policy provides coverage for "those sums the insured becomes legally obligated to pay as damages because of 'bodily injury' . . . to which this insurance applies." (UMF No. 8.) It is undisputed that defendant's policy further provides: "This insurance applies to 'bodily injury' . . . only if (1) The 'bodily injury' . . . is caused by an 'occurrence' that takes place in the 'coverage territory.'" (UMF No. 9.) It is undisputed that "'Occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (UMF No. 12.) As noted above, "accident" as used to determine liability, refers to the conduct of the insured for which liability is sought to be imposed. (*Liberty*, *supra*, 5 Cal.5th at p. 221.)

Issue 2: Occurrence Refers to Discrete Causes of Injury

In analyzing coverage under a liability policy, a tort approach to causation of damages is appropriate. (*State of Cal. V. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1035.) This applies to policies covering liability for personal injury. (*Liberty*, *supra*, 5 Cal.5th at p. 223.) Thus, where there is a single cause of multiple injuries, courts look to the cause, rather than the injuries, in determining the amount of insurance coverage. (*Safeco Ins. Co. of America v. Fireman's Fund Ins. Co.* (2007) 148 Cal.App.4th 620, 633.) In such a case, the result is a finding of only one claim. (*Ibid.*) Otherwise, the insurer's efforts to limit its liability per occurrence would be substantially weakened. (*Whittaker Corp v. Allianz Underwrites, Inc.* (1992) 11 Cal.App.4th 1236, 1242; *see also Kavruck v. Blue Cross of Cal.* (2003) 108 Cal.App.4th 773, 780 [stating disputed policy language must be examined in context with regard to its intended function in the policy].)

Here, the material facts submitted are undisputed, except as to the amount in coverage. Among those material facts is agreement that plaintiffs filed suit against defendant's insured for the wrongful death of decedent Tyler Jay and for emotional damages by plaintiff Karina Jay. (UMF Nos. 1-5.) There is no material dispute that the underlying action arises from one single cause, defendant's insured's care for decedent Tyler Jay, which resulted in multiple injuries, including both wrongful death and negligent infliction of emotional distress. (UMF Nos. 3-5.) The material portions of the policy identified in the separate statement are also undisputed, except as to the amount of coverage. (UMF Nos. 8-12.) There appears no dispute among the parties that the policy affords, at a minimum, $1 million in coverage. (UMF Nos. 13-14.)

Although defendant demonstrates that the undisputed material facts do not support the premise for plaintiffs' requested declaration that the policy provides coverage in the amount of $2 million, as defendant noted in its moving papers, plaintiffs may be entitled to declaratory relief, including, as plaintiffs sought in the alternative, that the policy provides coverage in the amount of $1 million. As a result, at oral argument on September 9, 2021, the court indicated its intent to deny both plaintiffs' and defendant's motions for summary judgment—plaintiffs' motion for failure to demonstrate a lack of triable issues of material fact entitling them to declaratory relief that defendant's policy had an applicable limit of $2 million, and defendant's motion for failure to demonstrate a lack of triable issues of material fact as to whether plaintiffs were entitled to any declaratory relief as sought, including whether defendant's policy had an applicable limit of $1 million. (See *Gafcon*, *supra*, 98 Cal.App.4th at p. 1402.)

During oral argument, the parties advised that they intended the matter to be resolved on cross-motions for summary judgment, as the underlying facts are not in dispute. They requested a continuance of the hearing and leave to file a joint stipulation of additional undisputed material facts to clarify the issues. The court granted the request. On September 22, 2021, the parties filed a joint supplemental statement of undisputed material facts.

The Applicable Policy Limit at $1 Million, Based on Further Filings

The parties' joint supplemental statement of undisputed material facts narrowed the scope of material facts on the declaratory relief being sought in this action. The

parties agree that the sole issue before the court is whether plaintiffs' claims in the separate underlying action arose from one "occurrence" or two "occurrences" pursuant to defendant's policy, resulting in plaintiffs' potential recovery limit increasing by $1 million, i.e., from $1 million to $2 million. (Joint Supplemental UMF Nos. 4-6.)

The joint supplemental statement has the effect of removing actual controversy from the alternative declaratory relief sought by plaintiffs, that defendant's policy had an applicable limit of $1 million. As such, the issue of whether defendant's policy had an applicable limit of $1 million does not qualify for declaratory relief for lack of actual controversy. (Code Civ. Proc., §§ 1060-1061; *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 909 [requiring, among other things, an actual controversy to qualify for declaratory relief].) Thus, the only remaining actual controversy subject to declarative relief is whether defendant's policy affords plaintiffs a second "each occurrence limit" coverage.

Based on the undisputed material facts of defendant's motion for summary judgment, as well as the joint supplemental statement of undisputed material facts, the court finds that, as a matter of law discussed above, plaintiffs are not entitled to a declaration that the subject policy provides coverage for a second $1 million "each occurrence" limit, on top of the $1 million "each occurrence" limit they already received from the insurer. (Joint Supplemental UMF No. 6.) The court therefore grants defendant's motion for summary judgment, as plaintiffs are not entitled to the only remaining declaratory relief sought.

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 9/28/2021.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Diana Deniz v. PTGMB LLC, et al.***
Superior Court Case No. 21CECG00181

Hearing Date: September 30, 2021 (Dept. 503)

Motions: (1) Defendant's Motion to Compel Arbitration with AAA; Stay the Action

(2) Plaintiff's Motion to Compel Arbitration with JAMS; Stay the Action

Tentative Ruling:

To find defendant PTGMB LLC's motion to compel arbitration moot. To grant the motion to stay the proceedings pending arbitration of plaintiff's claims.

To deny plaintiff Diana Deniz's motion to compel arbitration with JAMS.

Explanation:

With a motion to compel arbitration, the moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. The 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.). (*Rosenthal v. Great Western Fin'l Securities Corp.* (1996) 14 Cal.4th 394, 413-414; *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.) There is a strong public policy in favor of arbitration agreements and "doubts concerning the scope of arbitrable issues are to be resolved in favor of arbitration." (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1278 (quoting *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 323).)

In the case at bench, there is no dispute as to whether the arbitration agreement exists or whether the dispute is covered by the agreement. Rather, the parties disagree as to whether a request for arbitration made by plaintiff with JAMS was in compliance with the arbitration agreement.

"The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. (Civ. Code, § 1636.) If contractual language is clear and explicit, it governs. (Civ. Code, § 11638.)" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) Any ambiguity in the language of the arbitration clause must be interpreted against the drafter. (Civ. Code, § 1654; *Victoria v. Superior Court* (1985) 40 Cal.3d 734,745, 747.)

The provision of the agreement at issue reads: "You may choose the American Arbitration Association [address omitted] or any other organization to conduct the

arbitration subject to our approval." Defendant interprets the language to mean that arbitration with AAA is required. This is not in the plain language of the provision. An alternative organization can be used, but it must be approved by defendant.

Plaintiff's request to arbitrate with JAMS was not in and of itself contrary to the language of the agreement. The agreement requires defendant to approve of an organization other than AAA. The correspondence between the parties demonstrates that defendant was silent regarding its approval or disapproval of JAMS. Silence is not enough to indicate "approval" as written in the agreement. As such, the court is unable to grant the motion to compel arbitration with JAMS, as defendant did not approve of the alternative organization as required by the language of the arbitration agreement.

The court also notes that the parties have both submitted the matter to arbitration with AAA since the filing of these motions. They have participated in a preliminary conference and set the in-person arbitration hearing date. In light of the status of arbitration with AAA, defendant's motion to compel arbitration with AAA is moot. The motion to stay the proceedings pending the arbitration of plaintiff's claims 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 9/28/2021 .
(Judge's initials) (Date)