Tentative Rulings for October 21, 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).)

19CECG02117 ***Allen v. State of California*** **(Dept. 501)**

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 for Department 501

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Tentative Ruling

Re: ***Ortega, et al. v. Fresno Pacific University***
Superior Court Case No. 19CECG03707

Hearing Date: October 21, 2021 (Dept. 501)

Motion: by Plaintiffs for Pretrial Discovery of Defendant's Financial Condition

Tentative Ruling:

To deny without prejudice. (Civ. Code, § 3295, subd. (c).) Plaintiffs may bring an oral motion for expedited discovery of defendant's financial condition if they are able to prevail on their pertinent claims at trial.

Explanation:

Pretrial discovery by a plaintiff of evidence of the profits or financial condition of a defendant is prohibited, unless the court enters an order permitting it. (2 Witkin, Cal. Evid. (5th ed. 2021) Discovery, § 18.) "No pretrial discovery by the plaintiff shall be permitted with respect to the evidence referred to in paragraphs (1) and (2) of subdivision (a) [i.e., defendant's profits gained by virtue of the wrongful course of conduct of the nature and type shown by the evidence and defendant's financial condition] unless the court enters an order permitting such discovery pursuant to this subdivision." (Civ. Code, § 3295, subd. (c).) However, "[u]pon motion by the plaintiff supported by appropriate affidavits and after a hearing, if the court deems a hearing to be necessary, the court may at any time enter an order permitting the discovery otherwise prohibited by this subdivision if the court finds, on the basis of the supporting and opposing affidavits presented, that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294." (Civ. Code, § 3295, subd. (c).)

Civil Code section 3294, subdivision (a), provides that "[i]n an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Civ. Code, § 3294, subd. (a).) "[A]bsent an intent to injure the plaintiff, 'malice' requires more than a willful and conscious disregard of the plaintiff's interests. [Citations.] The additional component of 'despicable conduct' must be found." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725.) A claim for punitive damages may be supported by showing "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code, § 3294, subd. (c)(1).) " 'Despicable conduct' is conduct that is 'so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.' " (*Johnson & Johnson Talcum Powder Cases* (2019) 37 Cal.App.5th 292, 332-333.) "Such conduct has been described as having the character of outrage frequently associated with crime." (*Id*. at p. 333.) "'Oppression' means despicable conduct that subjects a

person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c)(2).) "To establish conscious disregard, the plaintiff must show that the defendant was aware of the probable dangerous consequences of [its] conduct, and that [it] willfully and deliberately failed to avoid those consequences." (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1055, internal quotation marks omitted.)

With respect to punitive damages claims against an entity defendant, such as here, Civil Code section 3294, subdivision (b), states that, "[a]n employer shall not be liable for [exemplary] damages … based upon acts of an employee … unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

The Court of Appeal in *Jabro v. Superior Court* (2002) 95 Cal.App.4th 754 interpreted Civil Code section 3295, subdivision (c), to mean that plaintiff must show that he or she is "very likely" or has a "strong likelihood" of prevailing on his or her punitive damages claim. (*Id*. at p. 758.) "[B]efore a court may enter an order permitting discovery of a defendant's financial condition, it must (1) weigh the evidence submitted in favor of and in opposition to motion for discovery, and (2) make a finding that it is very likely the plaintiff will prevail on his claim for punitive damages. [Citations.] In this context, we interpret the words "substantial probability" to mean "very likely" or "a strong likelihood" just as their plain meaning suggests. [Citations.] We note that the Legislature did not use the term "reasonable probability" or simply "probability," which would imply a lower threshold of "more likely than not." (*Ibid*.) Thus, it is not enough for plaintiffs to simply make a prima facie showing that they have a reasonable probability of prevailing sufficient to defeat summary judgment. (*Ibid*.) Instead, plaintiffs must show that they are very likely to prevail. (*Ibid*.)

Plaintiffs seek an order pursuant to Civil Code section 3295, subdivision (c), to permit pretrial discovery of the financial condition of defendant Fresno Pacific University. Defendant opposes the motion. In support of their motion, plaintiffs submit evidence to show that the Acu-Trol Chemical Controller Model AK110 ("AK110") manufactured by Pentair Water Pool and Spa, Inc. ("Pentair") had not been installed by a licensed plumber or a licensed electrician, even though the manual allegedly called for installation by licensed professionals (Michael Louis Kelly Decl., Ex. B, AK110 Installation and User's Guide, p. 10, 14, Ex. C, Hoskins Depo. 82:25-83:18 and 122:8-21); that defendant failed to hire a licensed plumber and licensed electrician to maintain the plumbing and electrical aspects of the AK110 and other pool equipment in order to curb costs (Kelly Decl., Ex. C, Hoskins Depo. 121:8-122:21); that the AK110 malfunctioned because of improper installation and plumbing (Kelly Decl., Ex. C, Hoskins Depo. 61:2-9, 16-21, Ex. D, Shelton Depo. 34:24-35:24); that defendant did not have proper policies and protocols in place regarding pool maintenance while swimmers were in the pool (Kelly Decl., Ex. C, Hoskins Depo. 100:5-18, 100:23-101:5, 102:20-103:3, 104:5-12, 108:3-7 and 135:14-136:3); and that defendant ignored its employee's complaints regarding the performance of pool

maintenance while the pool was in use. (Kelly Decl., Ex. H, Wood Depo. 40:8-17 & 42:4-15). Plaintiffs also present evidence to show that following the incident, the Fresno Department of Health urged defendant to adopt and implement proper policies and procedures prior to reopening the pool to prevent similar incidents from reoccurring. (Kelly Decl., Ex. C, Hoskins Depo. 108:3-7, Ex. J, Policies, Ex. K, Procedures.) Plaintiffs claim that by using unlicensed professionals to install, plumb and maintain the pool equipment with a view to saving costs, ignoring its employee's complaints regarding maintenance being performed on the pool while it was in use, not having proper policies and procedures in place regarding pool maintenance while the pool was in use, improperly installing and maintaining pool equipment, and performing maintenance with hazardous chemicals while student athletes were in the pool, defendant acted in clear and conscious disregard of plaintiffs' rights, thus warranting the imposition of punitive damages.

Defendant opposes the motion on the grounds that plaintiffs' evidence is insufficient to show that defendant acted with malice, fraud or oppression. Defendant points out that Pentair's employee, Nick Shelton, testified that he was not an expert regarding the AK110, that he made no determination as to whether contaminants in the mixing bowl would hamper the sensor's ability to perform, and that he made no determination as to what caused excessive chlorine to be released into the pool. (Ramsey Kubein Decl., Ex. C, Shelton Depo. 38:2-10, 49:15-19, 57:13-19.) Defendant's Head Swim and Dive Coach Joshua Christensen testified that he did not remember if he ever specifically complained to anyone about any concerns regarding maintenance personnel working on the pool while students were in it. (Kubein Decl., Ex. B, Christensen Depo. 31:2-16.) Christensen also testified that he did not use the word "mishap," and his testimony suggests that his frustrations at the time had nothing to do with pool safety or safety in general. (Kubein Decl., Ex. B, Christensen Depo. 31:19-25-32:1-25.) Defendant also contends that its Chief Engineer Stuart Hoskins' knowledge and long tenure in the building and engineering trades made him overqualified to install the chemical controller at issue (Kubein Decl., Ex. E, FPU Response to Form Interrogatories (Set Three) Nos. 26-28 Propounded by Misquito) and that following the incident, neither the County Health Department nor any other authority took issue with the installation of the chemical controller, and that Hoskins was given the green light to reopen the pool with the same controller in place. Hoskins testified that the chemical controller had operated for six years without incident prior to the accident. (Kubein Decl., Ex. D, Hoskins Depo. 28:17.) He also pointed out that the AK110 Installation and User's Guide allowed for the modified installation he had performed. (Kubein Decl. Ex. D, Hoskins Depo. 88:23-25- 89:1-7) Defendant also contends that the pool maintenance being conducted at the time of the accident did not involve the handling of any chemicals, but the replacement of a mechanical part. (Kelly Decl., Ex. F, Mark Wancewicz Incident Report.) Defendant also argues that Plaintiffs' introduction of evidence regarding Defendant's post-incident adoption of policies and procedures regarding pool maintenance is inadmissible. Pursuant to Evidence Code section 1151, "[w]hen, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event.].) Plaintiffs' First Amended Complaint alleges causes of action for premises liability, negligence, and negligent hiring, supervision, or retention of employees against Defendant. Thus, any evidence offered by plaintiffs regarding defendant's post-incident

implementation of remedial and precautionary measures is inadmissible to prove negligence.

Here, plaintiffs submit evidence to show that defendant used unlicensed professionals to install, plumb and maintain the AK110 in an effort to keep costs down, that defendant's employee failed to follow the warnings in the AK110 Installation and User's Guide, that defendant failed to have proper safety protocols and procedures in place with regard to pool maintenance, that maintenance workers handled hazardous chemicals by the pool while student athletes were using it, and that defendant failed to respond to its employee's complaints with regard to pool maintenance work being performed while students were using the pool. Plaintiffs claim that such conduct illustrates malice and oppression justifying an award of punitive damages against defendant.

After weighing plaintiffs' evidence in support of the motion and defendant's evidence in opposition to the motion, the court concludes that plaintiffs have not established that there is a "substantial probability" that they will prevail on their punitive damages claim, i.e., that they will be able to prove, by clear and convincing evidence, that defendant acted with malice, fraud or oppression. (See *Kerner v. Superior Court* (2012) 206 Cal.App.4th 84, 119-120 [plaintiff must show it is "very likely" that plaintiff will prevail on the claim for punitive damages].) The "clear and convincing evidence" standard requires that the evidence be "sufficiently strong to command the unhesitating assent of every reasonable mind." (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 84.) The court concludes that the evidence presented by plaintiffs fails to show that defendant acted with malice, i.e., conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct [conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people] which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. (See Civ. Code, § 3294, subd. (c)(1).) Neither does the evidence support a finding of oppression [despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights]. (See Civ. Code, § 3294, subd. (c)(2).)"Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate." (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287.) Defendant's conduct simply does not rise to that level. The court does not find the evidence presented "sufficiently strong to command the unhesitating assent of every reasonable mind" that defendant acted with malice or oppression. (See *Christian Research Institute v. Alnor*, *supra,* 148 Cal.App.4th 71, 84.) Moreover, given that defendant is an entity, the evidence presented here does not permit the court to conclude that it is very likely that plaintiffs will prove, by clear and convincing evidence, that one or more officers, directors, or managing agents of defendant engaged in any particular conduct that would warrant the imposition of punitive damages against defendant. (See Civ. Code, § 3294, subd. b.)

The court finds that plaintiffs have not met their burden on this motion to warrant pretrial discovery of defendant's financial condition under Civil Code section 3295, subdivision (c). Accordingly, the court intends to deny the motion. However, the court's decision does not bar plaintiffs from seeking expeditious discovery of defendant's financial condition during trial if the jury finds that defendant is liable and punitive

damages are warranted. (See *I-CA Enterprises, Inc. v. Palram Americas*, Inc. (2015) 235 Cal.App.4th 257, 284.)

The court declines to rule on plaintiffs' objection to the deposition testimony of Jeremiah Wood as the evidence objected to is not material to the disposition of the instant motion.

Pursuant to California Rules of Court, rule 3.1312, 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 10/18/2021.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Storment, et al. v. Santillanez, et al.***
Superior Court Case No. 19CECG02689

Hearing Date: October 21, 2021 (Dept. 501)

Motion: by Defendants to Reopen Discovery

Tentative Ruling:

To grant. (Code. Civ. Proc. § 2024.050.) To award $410 in monetary sanctions against plaintiffs and in favor of defendants, to be paid to the Cooper & Hastie LLP law firm within 30 days of service of the order by the clerk. (Code Civ. Proc. § 2024.050, subd. (c).)

Explanation:

In light of the passing for Dr. Donald Huene, whose testimony was unable to be preserved for trial by videotaped deposition, the court finds that reopening discovery is warranted under Code of Civil Procedure section 2024.050, subdivision (b), for the limited purpose of demanding new physical examinations of plaintiffs.

In the very unlikely event the parties are unable to come to an agreement after meeting and conferring as to whether and/or when the second physical exams will go forward, the court will expeditiously set a Pre-Trial Discovery Conference upon request. (Superior Court of Fresno County, Local Rules, rule 2.1.17.)

Sanctions shall be imposed on the party who unsuccessfully brings or opposes a motion to reopen discovery, unless the court finds the party acted with substantial justification. (Code Civ. Proc. § 2024.050, subd. (c).) The court observes no substantial justification for opposing the motion. The six hours asserted by defense counsel for having prepared the motion do not appear reasonable and the filing fee paid was $60 not $180. Accordingly, the court will award sanctions in a reduced amount of $410 in favor of defendants and against plaintiffs.

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 10/19/2021.
(Judge's initials) (Date)