

**Tentative Rulings for October 18, 2016**  
**Departments 402, 403, 501, 502, 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).)

16CECG02407      *Sevilla v. Carrillo* (Dept. 502)

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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.

16CECG02614      *Daniel Nieto v. Fresno Beverage Company, Inc., et al.* is continued to Wednesday, October 26, 2016, at 3:30 p.m., in Dept. 501.

15CECG02640      *Anzures v. Hunter* is continued to Thursday, October 20, 2016 at 3:30 p.m. in Dept. 503

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(Tentative Rulings begin at the next page)

# **Tentative Rulings for Department 402**

# **Tentative Rulings for Department 403**

(30)

Re: **Sylvia Garnica v. Olga Cruz**  
Superior Court Case No. 15CECG00652

Hearing Date: Tuesday October 18, 2016 (**Dept. 403**)

Motion: Default Hearing

## **Tentative Ruling:**

To deny.

**If any oral argument is requested it will be heard, October 20<sup>th</sup>, 2017 at 3:30 pm.**

## **Explanation:**

Code of Civil Procedure section 425.11

A statement of damages pursuant to Code of Civil Procedure section 425.11 must be filed with the Request to Enter Default, when it is the notice of special and general damages claimed. (Cal. Rules of Court, rule 3.250(a)(20).) This is because notice sets the ceiling on default judgments. (*Marriage of Lippel* (1990) 51 Cal.3d 1160.)

Here, Plaintiffs did not file their statement of damages that was served upon Defendants. But since this statement provides notice, it sets the ceiling for what This Court can award. No default judgment can be entered without it. Upon resubmission, Plaintiffs must submit their statement of damages.

## Damages

In Strict Liability dog bites, Plaintiff may recover for all harm proximately caused by the dog bite. (Civ. Code, §§ 3281-3288, 3333.) And in Negligence, Plaintiff may recover for all harm proximately caused by Defendants' wrongful acts. (Civ. Code, §§ 3281-3282, 3333.) But, This Court is required to render default judgment only "for that relief ... as appears by the evidence to be just." (Code Civ. Proc., § 585(b).) Therefore, it is up to plaintiff to "prove up" the right to relief, by introducing sufficient evidence to support his or her claim. Without such evidence, the court may refuse to grant a default judgment for any amount, notwithstanding defendant's default. (*Taliaferro v. Hoogs* (1963) 219 Cal.App.2d 559, 560; *Holloway v. Quetel* (2015) 242 Cal.App.4th 1425, 1434-1435.) Further, it is the court's duty to ensure a minor's interests are protected. (*McClintock v. West* (2013) 219 Cal.App.4th 540, 549.)

Here, Plaintiffs offer *no* evidence to support their requests for damages (i.e. medical bills). So the requests cannot be granted. Upon resubmission, Plaintiffs must submit evidence to justify damages. And because Plaintiff Alex Najjar is a minor, evidence that damages are apportioned correctly must also be submitted.



(24)

**Tentative Ruling**

Re: ***Tran v. People of the State of California***  
Court Case No. 15CECG01072

Hearing Date: **October 18, 2016 (Dept. 403)**

Motion: 1) Defendant State of California's Motion to Amend Answer  
2) Plaintiffs' Demurrer to the Answer, or in the Alternative to Strike the Answer

**Tentative Ruling:**

To consider both requests made by plaintiffs' motion (which both demurs to and moves to strike), and to strike defendant's Answer filed on September 29, 2016, without leave of court. To grant defendant's motion to amend, and to deem the proposed First Amended Answer as being filed and served as of the date of the granting of the motion to amend. Defendant is directed to file a Notice of Ruling in conformance with Code of Civil Procedure section 1019.5, subdivision (a).

For the sake of judicial efficiency, the merits of plaintiffs' demurrer has been considered as being raised to the now-deemed-filed First Amended Answer. The demurrer is overruled.

Plaintiff's request for trial continuance is denied, without prejudice to further ex parte application for same which establishes sufficient cause for continuance. Discovery cutoff as to the issues raised by the new affirmative defense is extended to November 4, 2016, or as further extended by the parties' written agreement.

**If any oral argument is requested it will be heard, October 20<sup>th</sup>, 2017 at 3:30 pm.**

**Explanation:**

The motion was procedurally deficient in several respects. A motion to amend must comply with California Rules of Court, rule 3.1324. Under this rule, a motion to amend must: (1) include a serially-numbered copy of the proposed amendment, (2) state what allegations in the previous pleading are proposed to be deleted, if any, and where, by page, paragraph, and line number, the deleted allegations are located, and (3) state what allegations are proposed to be added to the previous pleading, if any, and where, by page, paragraph, and line number, the additional allegations are located. (Cal. Rule of Court, Rule 3.1324, subd. (a).) Additionally, a separate declaration must accompany the motion which specifies: (1) the effect of the amendment, (2) why the amendment is necessary and proper, (3) when the facts giving rise to the amended allegations were discovered, and (4) the reasons why the request for amendment was not made earlier. (Cal. Rule of Court, Rule 3.1324, subd. (b).)

Defendant's motion failed state what allegations in the previous pleading were proposed to be deleted and what allegations defendant proposed to add, and failed to reference the "page, paragraph, and line number" where these occur. The Notice of

Motion merely stated that defendant wanted to amend “by adding an affirmative defense and removing a couple of other affirmative defenses.” (Emphasis added.) Neither the supporting declaration nor the memorandum provided any further detail, merely referring to deleting unidentified defenses that “do not apply” and indicating defendant wanted to add a new, *also unidentified*, defense. It was only from the Opposition brief the court was able to discern what new defense defendant sought to add, and only by comparing the (now-filed) original Answer with the proposed Amended Answer that the court could discern what defendant sought to delete. Additionally, counsel’s declaration failed to indicate why the request for amendment was not made earlier.

The motion could have been denied based on these procedural defects. However, in deference to the court’s policy of liberally allowing amendment, the court has considered the merits of the motion. On balance, the prejudice to defendant in losing an affirmative defense would be greater than any prejudice to plaintiff caused by the lateness of this amendment, since the latter can be easily addressed by extending the discovery deadline, as defendant has agreed to, or by continuing the trial date. Courts display great liberality in allowing amendments to answers because “a defendant denied leave to amend is permanently deprived of a defense.” (*Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1159.)

Plaintiffs’ argument in opposing the motion to amend and on demurrer, i.e., that claims related to condemnation actions are not subject to the claim-filing requirement, misses the point. If defendant is successful in establishing that plaintiffs’ claim is not one for inverse condemnation but rather is simply a breach of contract action, then it would be (would have been) subject to the pre-lawsuit claim-filing requirement. Defendant should not be deprived of this defense. For this same reason, plaintiffs’ demurrer to the First Amended Answer is overruled.

Related to the trial continuance plaintiffs requested, it appears this new defense will not greatly expand the issues. Plaintiffs knew they would be litigating defendant’s contention that their claim was actually a breach of contract claim, as this was the subject of defendant’s former Twenty-third affirmative defense (the Seventeenth in the First Amended Answer). Thus, plaintiffs were already on notice discovery was needed on that issue. The new affirmative defense regarding claim-filing is contingent on the success of that existing defense. If this new defense comes into play, the only factual issue would appear to be whether or not plaintiffs filed a pre-lawsuit claim, about which plaintiffs would need no discovery. Thus, the extension of the discovery cutoff to November 4, 2016, appears sufficient to address any possibility of prejudice to plaintiffs. Alternatively, the court will approve a stipulation continuing the trial to be heard on the same date as the State’s condemnation action, by the same judge, in the order agreeable to the parties.

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



(6)

**Tentative Ruling**

Re: ***Baldwin v. Aon Risk Services Companies, Inc.***  
Superior Court Case No.: 14CECG00572

Hearing Date: October 18, 2016 (**Dept. 403**)

Motion: By Plaintiffs/Cross Defendants Peter Baldwin, Nicholas Bellasis, Ralph Busch, Regina Carter, John Day, Gerald Droz, Larry Edde, Steven Edwards, Salvatore Marra, Tomlyn Winn, and Cross Defendant Alliant Insurance Services, Inc., to seal Cross Defendants' reply memorandum in support of motion for summary judgment or, in the alternative, summary adjudication; Cross Defendants' reply separate statement in support of motion for summary judgment or, in the alternative summary adjudication; Cross Defendants' response to Cross Complainants' separate statement of disputed and undisputed material facts (part II) or, in the alternative, Cross Complainants' purported facts and Cross Defendants' responses and supporting evidence for the following fact numbers in Cross Defendants' separate statement of disputed and undisputed material facts (part II): 23, 24, 34, 49, 50, 52, 90, 120, 121, 131, 147, 148, 150, 192, 221, 222, 232, 247, 248, 250, 288, 307, 317, 334, 335, 335, 379, 399, 409, 426, 427, 428, 471, 532, 533, 567, 609, 610, 644, 686, 687, 721, 763, 764, 798, 831, 841, 849, 860, 861, and 902; and Cross Defendants' objections to evidence submitted in opposition to their motion for summary judgment

**Tentative Ruling:**

To grant, in part, with Plaintiffs/Cross Defendants to arrange with the clerk's office, no later than October 31, 2016, to remove the Cross Defendants' separate statement of disputed and undisputed material facts (part II) previously lodged with the court, and to e-file newly-redacted versions, redacting out the salary amounts, and to submit new sealed, unredacted versions for the following facts: 23, 24, 34, 49, 50, 52, 90, 120, 121, 131, 147, 148, 150, 192, 221, 222, 232, 247, 248, 250, 288, 307, 317, 334, 335, 335, 379, 399, 409, 426, 427, 428, 471, 532, 533, 567, 609, 610, 644, 686, 687, 721, 763, 764, 798, 831, 841, 849, 860, 861, and 902, for the clerk of the court to attach a cover sheet on the non-redacted versions with a file-endorsed copy of the court's order, and to otherwise proceed with California Rules of Court, rule 2.551(e)(1), with the court to remove the other conditionally-sealed documents which are the subject of this motion and to place them in the court file.

**If any oral argument is requested it will be heard, October 20<sup>th</sup>, 2017 at 3:30 pm.**







(5)

**Tentative Ruling**

Re: ***Watanabe et al. v. Castech Pest Services et al.***  
Superior Court Case No. 15 CECG 01374

Hearing Date: October 18, 2016 (**Dept. 501**)

Motion: Compel Compliance with Demands for Physical  
Examinations of each Plaintiff

**Tentative Ruling:**

To deny the motion without prejudice. Defendant did not comply with Local Rule 2.1.17.

**Explanation:**

Background

Plaintiffs are husband and wife. They rented an apartment at the Manchester Townhomes. The property is managed by Defendant WA Funding, Inc. dba Regency Property Management. The apartment had a pest infestation. Plaintiffs reported the problem to the property management. Defendant WA Funding had a contract with Defendant Castech Pest Services for pest control.

On November 4, 2013, Castech sent its employee, Defendant Mitch Conroy to the Plaintiffs' apartment to "fog it." For reasons unknown, Conroy did not apply the proper pesticide. Instead, he mistakenly applied a pesticide known as Cyper TC. He did not leave the mandatory notice informing the Plaintiffs of the type of chemical applied.

Plaintiffs allege that when they returned to the apartment on November 4, 2013, they and their children became violently ill. Melissa Watanabe was pregnant at the time. On November 5, 2013, Conroy reported to his supervisor that he may have applied the wrong pesticide. On November 7, 2013, Ed Gill of Castech contacted the Plaintiffs and informed them that the "wrong pesticide" was applied. On May 1, 2015 Plaintiff filed a complaint.

Demand for Physical Examination

According to the Declaration of Elizabeth Waldow, counsel for Defendant Castech, on April 11, 2016, separate Demands for Medical Examination of each Plaintiff were mailed to Plaintiffs' counsel. The exam was scheduled for May 16, 2016 at the Office of Dr. Marion Fedoruk. On April 25, 2016, Plaintiffs' counsel mailed Bryan Watanabe's Response to Defendants' Demand for Medical Examination. Various conditions were set forth in the response including the audiotaping/videotaping of the exam; refusal to answer questions about medical history that had been asked and answered in Mr. Watanabe's deposition, etc. Defendant did not attempt to "meet and



# Tentative Rulings for Department 502

(20)

## Tentative Ruling

Re: **Gonzalez et al. v. Vemma Nutrition Company et al.**  
Case No. 14CECG00134  
**Alonzo et al. v. Vemma Nutrition Company et al.**  
Case No. 14CECG01023  
**Martinez v. Vemma Nutrition Co. et al.**  
Case No. 14CECG01715  
**Smith v. Union Pacific Railroad et al.**  
Case No. 14CECG02314

Hearing Date: **October 18, 2016 (Dept. 502)**

Motion: (1) Vemma's Motion to Augment Expert Witness Designation;  
(2) Debra and Stephen Smith's Motion to Strike Vemma's Supplemental Designation

### **Tentative Ruling:**

To deny Vemma Nutrition's motion to supplement its expert witness list. To grant Debra and Stephen Smith's motion strike Vemma's supplemental designation.

### **Explanation:**

Code of Civil Procedure section 2034.280, subdivision (a), provides:

Within 20 days after the exchange described in Section 2034.260, any party who engaged in the exchange may submit a supplemental expert witness list containing the name and address of any experts who will express an opinion on a subject to be covered by an expert designated by an adverse party to the exchange, **if the party supplementing an expert witness list has not previously retained an expert to testify on that subject.**

The Smiths and Vemma both initially designated experts to testify as to the impairment of decedents, including Michaela Smith. Obviously, Vemma would be seeking to show that Michaela was impaired, while the Smiths would be seeking to show that Michaela was not impaired. After the initial designations, Vemma served a supplemental expert witness designation, designating Dr. Howard Terrell to testify as to his opinions and conclusions regarding the psychological and physical effect of medications and other drugs in the systems of decedents, including Michaela. (Morovati Dec. Exh. C.) Vemma contends that because Dr. Barbour opined that Michaela was "not impaired" at the time of the subject incident, Vemma is entitled to designate an expert to testify on that subject.



(6)

**Tentative Ruling**

Re: **Ontiveros v. ASFC, LLC**  
Superior Court Case No.: 16CECG00708

Hearing Date: October 18, 2016 (**Dept. 502**)

Motion: Demurrer to and motion to strike portions of first amended complaint by Defendant ASFC, LLC dba Sierra Vista Healthcare Center

**Tentative Ruling:**

To overrule all the special demurrers, to sustain the general demurrers to the first cause of action for elder abuse, the third cause of action for negligent hiring/supervision/retention, and to overrule the remainder; to grant the motion to strike, in part, at page 15:25, 27, seeking attorney's fees and costs under Welfare and Institutions Code section 15657, subdivision (a), and punitive damages, and to deny as to the remainder, with Plaintiff granted 10 days' leave to amend. The time in which the complaint can be amended will run from service by the clerk of the minute order. All new allegations in the second amended complaint are to be set in **boldface** type.

**Explanation:**

Demurrer

A [general] demurrer based on statute of limitations grounds is available only where the dates in question are shown on the face of the complaint. If they are not, there is no ground for general or special demurrer, because dates are not essential to alleging a cause of action. (*Union Carbide Corp. v. Superior Court* (1984) 36 Cal.3d 15, 25; *United Western Medical Centers v. Superior Court* (1996) 42 Cal.App.4th 500, 505.) The special demurrers are overruled. (Code Civ. Proc., § 430.10, subds. (e).)

The first cause of action for elder abuse fails to state facts sufficient to constitute a cause of action, because the supporting allegations do not rise to the level of recklessness. (Code Civ. Proc., § 430.10, subd. (e).)

Where a complaint alleged that a rehabilitation facility was required to maintain specific staff-to-patient ratios to address the needs of patients, and that the facility was chronically understaffed, and did not adequately train the staff it did have, as well as allegations that the facility was aware that the decedent had a history of falling, and failed to have the proper staffing in place to prevent decedent's fall, so that decedent suffered a fall that resulted in a broken arm and a re-break of her right hip, the allegations were insufficient to render the facility's conduct in failing to provide adequate staffing anything more than professional negligence because the allegations, if true, demonstrated the facility's negligence in the undertaking of medical services, not



(6)

**Tentative Ruling**

Re: **Amador v. Bank of America, N.A.**  
Superior Court Case No.: 16CECG01657

Hearing Date: October 18, 2016 (**Dept. 502**)

Motion: By Defendant Nationstar Mortgage LLC for judgment on the pleadings

**Tentative Ruling:**

To grant, with Plaintiff granted 10 days' leave to amend, to allege any valid cause of action he can for conduct which occurred post-judgment. The time in which the complaint can be amended will run from service by the clerk of the minute order. All new allegations in the first amended complaint are to be set in boldface type.

**Explanation:**

At the outset, the Court notes that in California, the courts have established and adhere to the principle that a litigant appearing in propria persona is held to the same restrictive rules and procedures as an attorney. (*Kabbe v. Miller* (1990) 226 Cal.App.3d 93, 98.)

Defendant Nationstar Mortgage LLC has shown that the allegations concerning the invalidity of the deed of trust are barred by the judgment in the consolidated mass action, *Timothy Aghaji v. Bank of America, N.A.*, Los Angeles County Cases Nos. BC498852 and BC534708 (Request for judicial notice, exhibits 7-15 ; complaint, ¶¶ 14-20; *Aerojet-General Corporation v. American Excess Insurance Co.* (2002) 96 Cal.App.4th 664.) Res judicata serves as a bar both to issues that were raised as well as to issues which might have been raised and litigated in the first action. (*Olwell v. Hopkins* (1946) 28 Cal.2d 147, 152.)

The Court notes that the cause of action for the Homeowner's Bill of Rights does not otherwise state a valid cause of action because the Homeowner's Bill of Rights did not become effective until January 1, 2015. (See *Giordano v. MGC Mortgage, Inc.* (D. N.J. 2016) 106 F.Supp.3d 778.) The conduct complained of that occurred after the judgment mentioned above and the effective date of the Homeowner's Bill of Rights is not cognizable under the Homeowner's Bill of Rights. (Civ. Code, § 2924.17.)

The second cause of action for declaratory relief fails to state facts sufficient to constitute a cause of action because the trustee's deed upon sale, recorded on May 27, 2016, shows that the foreclosure sale of the property has already taken place, and is now moot. (Request for judicial notice, exhibit six.)



# Tentative Rulings for Department 503

(28)

## Tentative Ruling

Re: **Rodems v. Chico's Fas, Inc.**

Case No. 16CECG01909

Hearing Date: October 18, 2016 (Dept. 503)

Motion: By Plaintiff to Lift Stay of Action.  
By Plaintiff for Leave to File Amended Complaint.

### **Tentative Ruling:**

To deny each motion without prejudice.

### **Explanation:**

The stay in this action was entered pursuant to a stipulation between the parties. The stipulation states that the stay would remain in effect until "any preliminary and final approval hearings and entry of any final approval orders and judgments (if applicable) in the *Ackerman* settlement and, if applicable, the orders affirming final approval if appeals or requests for review have been taken, which shall hereafter be referred to as 'the effective date of the *Ackerman* settlement.'" This is because the parallel action in Los Angeles Superior Court, *Ackerman v. Chico's FAS, Inc.*, LASC Case No. BC586078, filed on June 24, 2015 (the "Los Angeles Action") involves many of the same parties and legal and factual claims as the present action resolution of which may result in the danger of inconsistent verdicts. (*Leadford v. Leadford* (1992) 6 Cal.App.4th 571, 574 (pendency of another action arising out of the same transaction is grounds for mandatory abatement of the second action).) The parties further agreed that there would be no need for Defendant to file an answer in the present case until 15 days after the effective date of the *Ackerman* settlement.

In the papers, Defendant appears to concede that, if Plaintiff opts out of the *Ackerman* settlement, retaining the stay would be futile and there would be nothing prohibiting Plaintiff from continuing with the present matter. However, as Defendant points out, Plaintiff has yet to formally "opt out." The form attached to the Reply brief as Exhibit A is unsigned and there is no proof before the Court at this time that any completed form was sent to the Los Angeles Court. Moreover, there is no proof before the Court as to when the final approval orders or judgments are expected to be issued by the Los Angeles Court. Therefore, because there is nothing before this Court to show that continuing the stay would be futile, the motion for relief is denied without prejudice.

Relief from the stay can happen either upon Plaintiff's affirmative opting out from the Los Angeles Action or upon stipulation of the parties.

As a result, the motion for leave to amend is also denied without prejudice.

Pursuant to California Rules of Court, rule 3.1312, subdivision (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:**     **A.M. Simpson**     **on**     **10/17/16**      
(Judge's initials)                      (Date)

(5)

**Tentative Ruling**

Re: **Miller v. Benner**  
Superior Court Case No. 16 CECG 00040

Hearing Date: October 18, 2016 (**Dept. 503**)

Motion: By Plaintiff to permit the discovery of financial evidence

**Tentative Ruling:**

To deny the motion without prejudice.

**Explanation:**

Civil Code § 3295. Protective order; prima facie case of liability prerequisite to certain evidence; discovery limitations; evidence of profits or financial condition states in relevant part:

(c) No pretrial discovery by the plaintiff shall be permitted with respect to the evidence referred to in paragraphs (1) and (2) of subdivision (a) unless the court enters an order permitting such discovery pursuant to this subdivision. However, the plaintiff may subpoena documents or witnesses to be available at the trial for the purpose of establishing the profits or financial condition referred to in subdivision (a), and the defendant may be required to identify documents in the defendant's possession which are relevant and admissible for that purpose and the witnesses employed by or related to the defendant who would be most competent to testify to those facts. *Upon 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.* Such order shall not be considered to be a determination on the merits of the claim or any defense thereto and shall not be given in evidence or referred to at the trial.

To obtain such an order, plaintiff must file a motion supported by "appropriate affidavits" (i.e., affidavits sufficient to establish "oppression, fraud or malice" under Civ.C. § 3294). [Civ.C. § 3295(c)] Defendant must be given the opportunity to present opposing declarations. [Civ.C. § 3295(c)] The court has discretion whether to hold a formal hearing. (As a practical matter, such a hearing is almost always held.) [Civ.C. § 3295(c)]

To allow discovery of defendant's financial condition, the court must find "on the basis of the supporting and opposing affidavits" that plaintiff has "established a

substantial probability" of prevailing on the punitive damages claim. [Civ.C. § 3295(c)] Section 3295(c) has been interpreted to mean that the court **must** (1) *weigh the evidence presented by both sides* **and** (2) make a finding that it is *very likely* the plaintiff will prevail on his claim for punitive damages." [*Jabro v. Sup.Ct. (Hill)* (2002) 95 Cal.App.4th 754, 758 (emphasis added) — relying on legislative history] Under this interpretation, it is *not* enough for plaintiff merely to present evidence that would support a finding (prima facie proof) of "oppression, fraud or malice." [*Jabro v. Sup.Ct. (Hill)*, supra, 95 CA4th at 759]

In support of the motion, Miller relies upon *Taylor v. Superior Court* (1979) 24 Cal.3d 890. In *Taylor*, supra, the plaintiff, Cameron Charles Taylor was involved in an automobile collision with Clair William Stille. Taylor filed a complaint for personal injury and prayed for punitive damages. The complaint alleged that "Stille is, and for a substantial period of time had been, an alcoholic 'well aware of the serious nature of his alcoholism' and of his "tendency, habit, history, practice, proclivity, or inclination to drive a motor vehicle while under the influence of alcohol"; and that Stille was also aware of the dangerousness of his driving while intoxicated." *Taylor v. Superior Court*, supra, 24 Cal.3d at 893.

"The complaint further alleged that Stille had previously caused a serious automobile accident while driving under the influence of alcohol; that he had been arrested and convicted for drunken driving on numerous prior occasions; that at the time of the accident herein, Stille had recently completed a period of probation which followed a drunk driving conviction; that one of his probation conditions was that he refrain from driving for at least six hours after consuming any alcoholic beverage; and that at the time of the accident in question he was presently facing an additional pending criminal drunk driving charge. In addition, the complaint averred that notwithstanding his alcoholism, Stille accepted employment which required him both to call on various commercial establishments where alcoholic beverages were sold, and to deliver or transport such beverages in his car. Finally, it is alleged that at the time the accident occurred, Stille was transporting alcoholic beverages, "was simultaneously driving . . . while consuming an alcoholic beverage," and was "under the influence of intoxicants." *Id.* at 893.

Stille filed a demurrer to the complaint as to the claim for punitive damages. It was sustained without leave to amend. [Note: A motion to strike, not a general demurrer, is the procedure to attack an improper claim for punitive damages or other remedy demanded in the complaint. See *Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)* (2005) 134 Cal.App.4th 365, 385.] Plaintiff sought a writ of mandamus. The Supreme Court granted the writ. It held that sufficient facts were stated to withstand a demurrer. It issued a peremptory writ of mandate directing the trial court to overrule the demurrer. *Id.* at 900. Notably, the High Court upon addressing Stille's argument that as an alcoholic, he lacked sufficient volition to control his behavior and thus, not penalized, stated "the question of volitional control or wilfulness is a question of fact to be determined at trial." *Id.* at 899. Accordingly, *Taylor*, supra is not authority for the proposition that a mere showing that a defendant drove while under the influence is sufficient to permit the discovery of financial information. See Civil Code § 3295(c).

In the motion at bench, all the Plaintiff has shown is that Defendant blew 0.300% and 0.311% on two Breathalyzer tests administered by the investigating CHP Officer. Her blood test revealed that her blood alcohol content was 0.29%. Plaintiff has also shown that an empty bottle of wine was discovered in the car and at the hospital, the paramedics recovered a bag that the Defendant had thrown away. It contained three empty bottles of wine and an empty bottle of Fireball whiskey. See Exhibits C-E attached to the Declaration of Delja.

But, as a matter of law, there must be a recovery of actual damages to support an award of punitive damages. (*Mother Cobb's Chicken T., Inc. v. Fox* (1937) 10 Cal.2d 203, 205–206, 73 P.2d 1185.) In that case, the California Supreme Court relied upon an appellate case that held that a verdict for compensatory damages in the amount of “\$00” precludes an award of punitive damages. (*Id.* at p. 206, 73 P.2d 1185, citing *Haydel v. Morton* (1935) 8 Cal.App.2d 730, 736, 48 P.2d 709.) See also *Cheung v. Daley* (1995) 35 Cal.App.4th 1673 and *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 530.

Here, Plaintiff has not shown that Defendant was responsible for the accident. She only assumes this fact due to Defendant's level of intoxication. But, Civil Code § 3295(c) requires evidence not assumptions. Accordingly, Plaintiff has not “established a substantial probability” of prevailing on the punitive damages claim. [Civ.C. § 3295(c)] The motion must be denied. But, given that general state of discovery in the case, it will be denied without prejudice.

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:     A.M. Simpson     on 10/17/16  
                  (Judge's initials)        (Date)