

Tentative Rulings for October 20, 2016
Departments 402, 403, 501, 502, 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).)

16CECG00804 *Estrada v. Lowery* (Dept. 501)

15CECG03104 *Casas v. Hemphill et al.* (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.

14CECG01317 *Moffett v. California Cancer Associates for Research and Excellence, Inc.* all motions are continued to Thursday, November 17, 2016, at 3:30 p.m. in Dept. 503.

14CECG01277 *Yslas v. Fresno Unified* is continued to Wednesday, October 26, 2016 at 3:30pm in Dept. 502.

14CECG02313 *Miller v. Cocal California, Inc.* is continued to November 3, 2016, at 3:30 p.m. in Dept. 501.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(29)

Tentative Ruling

Re: Paul Beckley, et al. v. Fresno Surgery Center, LP, et al.
Case No. 15CECG01196

Hearing Date: October 20, 2016 (Dept. 402)

Motion: Defendant Fresno Surgical Hospital's unopposed motion for summary judgment

Tentative Ruling:

To grant.

Explanation:

A trial court shall grant summary judgment where there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc. §437c(c); Schacter v. Citigroup (2009) 47 Cal.4th 610, 618.) The moving party bears the initial burden of production to make a prima facie showing of the "nonexistence of any triable issue of material fact[.]" (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850.) "[A]ll a defendant needs to do is to show that the plaintiff cannot establish at least one element of the cause of action." (Id. at p. 853.) Where a defendant meets this initial burden, the burden of production then shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact, by producing admissible evidence. (Code Civ. Proc. §437(c)(p)(2); Christina C. v. County of Orange (2013) 220 Cal.App.4th 1371, 1379.) In reviewing a grant of summary judgment, an appellate court accepts as undisputed facts those portions of the moving party's evidence that are not contradicted by the opposing party's evidence. (A-H Plating, Inc. v. American National Fire Ins. Co. (1997) 57 Cal.App.4th 427; see Code Civ. Proc. §437c(c).)

When a defendant in a medical malpractice action moves for summary judgment and supports the motion with expert declarations that defendant's conduct fell within the community standard of care, the defendant is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence. (Powell v. Kleinman (2007) 151 Cal.App.4th 112; Hanson v. Grode (1999) 76 Cal.App.4th 601, 607; Munro v. Regents of University of California (1989) 215 Cal.App.3d 977, 984-985; see Code Civ. Proc. § 437c(c).)

However, summary judgment should not be granted merely because defendant provides an unopposed expert declaration, where such declaration is conclusory, i.e., simply states the opinion that no malpractice has occurred, and does not set forth the basis on which the opinion is based. (Powell, supra, 151 Cal.App.4th at p. 123.) Such an opinion does not establish the absence of a material fact issue for trial as is required for summary judgment. (Id. at p. 124.)

In the case at bar, Defendant has met its initial burden. Dr. Audell's declaration sets forth the facts on which her opinion is based, reflects a sufficient analysis of the course of treatment received by Plaintiff Paul Beckley from Defendant, and concludes that Defendant complied with the standard of care, and that the care provided by Defendant did not cause or contribute to Plaintiff Paul Beckley's alleged injury. Defendant's burden having been met, the burden shifts to Plaintiffs to make a prima facie showing of the existence of a triable issue of material fact. No opposition has been filed; Plaintiffs have thus failed to meet their burden. Accordingly, Defendant's motion is granted.

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: JYH **on** 10/19/16
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Riddle v. Community Medical Centers***
Court Case No. 16CECG00791

Hearing Date: **October 20, 2016 (Dept. 402)**

Motion: 1) Demurrer and Motion to Strike by Pervaiz Chaudhry, M.D., Valley Cardiac Surgery Medical Group, and Chaudhry Medical, Inc. ("Chaudhry Defendants")
2) Demurrer and Motion to Strike by Fresno Community Hospital And Medical Center dba Community Regional Medical Center and Community Medical Centers ("Hospital Defendants");
3) Demurrer of Defendant Larry Cohler, M.D.

Tentative Ruling:

To sustain the special demurrers based on "another action pending" (pleas in abatement) as to the wrongful death causes of action; to overrule them as to the survival causes of action. (Code Civ. Proc. § 430.10, subd. (c).) To sustain all general demurrers to each cause of action, without leave to amend. (Code Civ. Proc. § 430.10, subd. (e).) To order the motions to strike off calendar, as moot.

Defendants are directed to submit to this court, within 7 days of service of the minute order, a proposed judgment dismissing the action as to the demurring defendants.

Explanation:

Special Demurrer—Plea in Abatement

The Hospital and Chaudhry defendants argue that the entire First Amended Complaint ("FAC") and each cause of action therein, are subject to demurrer because there is another action pending between the same parties on the same cause of action, that being Case #14CECG02360. (Code Civ. Proc. § 430.10, subd. (c).) This is a statutory "plea in abatement." Properly analyzing these motions requires clarity as to the distinctions between a wrongful death claim and a "survival" claim, and the roles of plaintiffs as between the two. Defendants do not properly acknowledge those distinctions in arguing the parties are the "same."

A wrongful death claim allows the specified heirs of the decedent to recover damages *on their own behalf* for the loss they have sustained by reason of the bodily injury victim's death. (Code Civ. Proc. § 377.60; *Corder v. Corder* (2007) 41 Cal.4th 644, 651.) Therefore, the "wrongful death claimants" bring the action in their own individual capacities.

But decedent's own cause(s) of action which "survive(s)" to the estate under CCP §377.20 (a "survival action") are separate and distinct from a wrongful death action. (*Castaneda v. Department of Corrections and Rehabilitation* (2013) 212

Cal.App.4th 1051, 1059, 1062.)¹ A survival action may be brought either by the executor or administrator for the decedent's estate, or if none, by the decedent's "successors in interest." (Code Civ. Proc. § 377.30.)

While the two actions are frequently brought in the same action, they need not be. (Code Civ. Proc. § 377.62—the two actions may be joined.) Damages recovered in a survival action belong to the decedent's estate, whereas damages in a wrongful death action belong to the plaintiffs (wrongful death claimants) personally. (Code Civ. Proc. § 377.61.) Thus, "plaintiffs as wrongful death claimants" and "plaintiffs as successors in interest to decedent's estate" are in different roles, *whether the two actions are brought in the same case, or in separate cases.*^{2,3}

The court takes judicial notice of the complaint filed in Case #14CECG02360 (also referred to herein as the "2014 action") and the complaint and first amended complaint filed in this action (also referred to herein as the "2016 action"). The 2014 action appears to have been filed by plaintiffs as *wrongful death claimants, only*. Plaintiffs' opposition argument concedes that action did not include "the estate" as a party.⁴

As for the 2016 action, the FAC makes it quite clear that plaintiffs are now attempting to join the wrongful death and survival claims, i.e., to file this action in their joint roles as wrongful death claimants and as decedent's successors in interest. All but the Second cause of action in the FAC attempt to state the survival claims (i.e., decedent's surviving causes of action). The Second cause of action states plaintiffs' wrongful death claim, and the Fourth, Fifth and Sixth causes of action represent the plaintiffs joining both roles to raise these causes of action (for corporate negligence, breach of fiduciary duty, and battery, respectively). The Seventh "cause of action," as mentioned in footnote 1, is not an actual cause of action.

- *Analysis of Merits of the Pleas in Abatement:*

A demurrer under Code of Civil Procedures Section 430.10, Subdivision (c) is a special demurrer on the grounds that there is "another action pending between the same parties on the same causes of action." A statutory plea in abatement requires

¹ Defendants correctly observe that there is no cause of action for "survival." Rather, the statutes dealing with survival of a decedent's claims merely provide that the decedent's causes of action do not abate. (Code Civ. Proc. §§ 366.1, 377.20.)

² There are also distinctions in the damages available under each type of action, and while these are without doubt of ultimate importance to all parties, they are not essential for purposes of ruling on demurrer.

³ There are certainly factors which make joinder of wrongful death and survival claims advisable, which is why a defendant may move for consolidation pursuant to Code of Civil Procedure section 1048, subdivision (a).

⁴ Defendants have pointed out that plaintiffs' usage of the term "estate" as if it is a party incorrect. For purposes of this discussion, the court understands plaintiffs' use of this term to mean plaintiffs in their role as successors in interest to decedent's survival action.

absolute identity of parties, causes of action, and remedies sought in the initial and subsequent action. (*Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 Cal.App.3d 781, 789.) "It is indispensable to such a plea that the same person should appear to be the plaintiff in both actions. (*Felch v. Beaudry* (1871) 40 Cal. 439, 445.) The parties must be more than "substantially identical." The cases cited by the Hospital defendants, *Caiafa Prof. Law Corp. v. State Farm Fire & Cas. Co.* (1993) 15 Cal.App.4th 800, 807, *fn* 5, and *Gregg v. Superior Court* (1987) 194 Cal.App.3d 134, 137), are not persuasive. Both cases considered the propriety of discretionary stays, and the *Greg* opinion dealt only tangentially with a plea in abatement. (*People v. Gilbert* (1969) 1 Cal.3d 475, 482—it is "axiomatic that cases are not authority for propositions not considered.")

Identical causes of action must also be involved, so that a judgment in the first action would be *res judicata* on the claim in the present lawsuit. (*Bush v. Superior Court* (1992) 10 Cal.App.4th 1374, 1384.) A plea in abatement is designed to prevent a plaintiff from improperly "splitting" a single cause of action into separate lawsuits. (*Hamilton v. Asbestos Corp., Ltd.* (2000) 22 Cal.4th 1127, 1145. The theory of this demurrer is that the first action (here, Case #14CECG02360) will supply ample remedy, so the second action (here, Case #16CECG00791) is therefore unnecessary and vexatious. (*Wulfjen v. Dolton* (1944) 24 Cal.2d 891, 896.)

The pleas in abatement do not lie as to the portion of the FAC that represents the decedent's survival action, since the 2014 action does not state this claim (i.e., does not raise the causes of action constituting decedent's surviving causes of action). As established above, plaintiffs are in two distinct and separate capacities: 1) as wrongful death claimants and 2) as successors in interest to the decedent's survival action. The plaintiffs as *successors in interest to the survival action* are not the "same parties" as the plaintiffs in their role as *wrongful death claimants* in the 2014 action.

The question is whether the FAC's causes of action raising plaintiffs' wrongful death claims are subject to this special demurrer. The court concludes that they are. First, there is absolute party identity as to *plaintiffs in their role as wrongful death claimants*. Plaintiffs filed the 2014 action in that capacity, and the Second, Fourth, Fifth and Sixth causes of action here also raise claims in this same role. The only issue in determining whether this special demurrer lies is whether these raise the "same" cause of action, and the court concludes that they do.

For purposes of a plea in abatement, the "same" cause of action refers not to the label(s) of the cause(s) of action brought by plaintiff, but rather to defendant's invasion of a single "primary right," which means the plaintiff's right to be free from the particular injury suffered. (*Crowley v. Kattelman* (1994) 8 Cal.4th 666, 680, *as modified* (Nov. 30, 1994).) Primary right is distinguished from the *different legal theories* (also termed "causes of action") plaintiff asserts. (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 794.) A plea in abatement is designed to prevent a plaintiff from improperly "splitting" a single cause of action (i.e., invasion of a single primary right) into separate lawsuits. (*Hamilton v. Asbestos Corp., Ltd.* (2000) 22 Cal.4th 1127, 1145.

At best, plaintiffs attempt to distinguish their battery claim as not being the "same" cause of action, by arguing that *Friedman Professional Management Co., Inc.*

v. *Norcal Mut. Ins. Co.* (2004) 120 Cal.App.4th 17, 29 established that a battery during surgery gives rise to different harms and thus involve different primary rights. However, this case is unpersuasive. First, the basis the court used for that decision does not urge the same result in this case. The court in *Friedman* found “different harms” between the two suits because the harm in the first (malpractice) action was “bodily injury resulting from an operation in which the wrong equipment and fluids were used,” whereas the harm from the second (battery and privacy claim) case was “harm to Hamel’s dignitary and privacy interests in being touched by a person *that she never consented to touch her*, even, as was the case here, for a good purpose.” (*Id.*, emphasis added.) Here, plaintiffs’ decedent consented to the touching (i.e., the surgery), and no dignitary and privacy interests are involved. Instead, in both actions plaintiffs allege the same harm: bodily injury.

More importantly, the language and discussion plaintiff relies on was *dicta* and thus is not binding or precedential. The issue under appeal was what constituted a “related” claim for purposes of malpractice insurance coverage. (*Friedman*, 120 Cal.App.4th at pp.21-22.) And while the court concluded the two cases involved common facts but different harms, its ultimate holding rested on contract principles: “We must remember that it is the actual language of the insurance contract and not the common law doctrine of res judicata which governs this case.” (*Id.* at p. 29, emphasis added.)

All of plaintiffs’ wrongful death claims as between the FAC and the complaint in the 2014 action are based on the same primary right and thus constitute the “same claim” for purposes of this special demurrer, and are raised by and against the “same parties.” This special demurrer must be sustained as to them. Normally, if a special demurrer for “another action pending” is sustained the court simply orders the second action stayed pending final determination of the earlier-filed action. (Code Civ. Proc. § 597.) However, given the court’s ruling on the statute of limitation issue, *infra*, which would apply equally to the wrongful death claimants, demurrer will be sustained without leave to amend.

Elder/Dependent Adult Abuse

The First, Second, and Third causes of action are premised on dependent adult abuse/neglect. A claim of “dependent adult abuse” is pursuant to the Elder Abuse and Dependent Adult Civil Protection Act (“Act”), codified at Welfare and Institutions (“W&I”) Code section 15600, *et seq.* To sustain a claim for dependent adult abuse, a plaintiff must plead facts establishing physical abuse or neglect, and plead facts establishing that the alleged abuse constituted an egregious form of abuse. (W&I Code §§ 15657, 15610.57; *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 779 (“*Covenant Care*”).) Facts must be pled with particularity. (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 407, *as modified* (Aug. 24, 2011) (“*Carter*”).)

Allegations generally levelled at “defendants” will not be sufficient; plaintiffs must state specific factual allegations as to each defendant alleged to be guilty of abuse or neglect. (*Carter, supra*, 198 Cal.App.4th at p. 408.) Dr. Cohler, in particular, argues that

there are no facts regarding the period of time decedent was under his care that would establish neglect or abuse. Furthermore, Dr. Cohler argues there are no facts alleged sufficient to support that he had the requisite “care and custody” of the decedent during the time he was hospitalized to impose liability under the Act; there are no specific acts as to how he allegedly neglected the decedent, or how any such neglect was reckless, fraudulent, oppressive or malicious. *Carter* clearly established that there must be specific factual allegations as to each defendant, which plaintiffs have failed to make. Plaintiffs’ opposition to Dr. Cohler’s demurrer does not address this issue.

In *Covenant Care* the California Supreme Court clearly established that neglect under the Act “not of the *undertaking* of medical services, but of the failure to *provide* medical care,” and likewise that other forms of abuse, i.e., physical abuse and fiduciary abuse “are forms of intentional wrongdoing also distinct from ‘professional negligence.’” (*Covenant Care, supra*, 32 Cal.4th at p. 783, emphasis in the original; citations omitted.)

In *Carter* the court found that plaintiff had alleged, at most, professional negligence, and had failed to allege acts constituting abuse as defined by the act. (*Carter, supra*, 198 Cal.App.4th at pp. 402, 408.) It held the following factors must be present to constitute “neglect” within the meaning of the Act: 1) the defendant “had responsibility for meeting the basic needs of the elder or dependent adult, such as nutrition, hydration, hygiene or medical care;” 2) defendant “knew of conditions that made the elder or dependent adult unable to provide for his or her own basic needs;” and 3) defendant “denied or withheld goods or services necessary to meet the elder or dependent adult’s basic needs, either with knowledge that injury was substantially certain to befall the elder or dependent adult (if the plaintiff alleges oppression, fraud or malice) or with conscious disregard of the high probability of such injury (if the plaintiff alleges recklessness).” (*Carter* at p. 406-407.) Plaintiffs have not alleged that defendants denied or withheld necessary goods or services, but instead allege substandard provision of services.

Also, in order to plead “neglect,” Plaintiffs would have to allege a “care or custody” relationship between Mr. Riddle and defendants, Defendant’s “failure to provide medical care,” and a causal link between the neglect and Plaintiff’s alleged injury. (See Welf. & Inst. Code § 15610.57; *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 156, 160.) In a recent unanimous California Supreme Court case, *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148 (“*Winn*”), plaintiffs alleged defendants were guilty of elder neglect due to the inadequate medical care they had provided to plaintiffs’ decedent on an outpatient basis over a five-year period, which led to her death. The Court held that since a claim for neglect under the Elder Abuse Act in the context of medical care fell under the definitional statute at W&I Code section 15610.57, subdivision (a)(1), a plaintiff alleging “neglect” necessarily must allege that the defendant had “care or custody” of the elder or dependent adult. (*Id.* at p. 156.)

In *Winn*, the Court examined what kind of caretaking or custodial relationship was required and held that there must be “a robust caretaking or custodial relationship—that is, a relationship where a certain party has assumed a significant

measure of responsibility for attending to one or more of an elder's basic needs that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance." (*Winn, supra*, at p. 158.) As used in section 15610.57 and throughout the Act, "the phrase 'care or custody' evokes a bond that contrasts with a casual or temporally limited affiliation" which was "best understood to denote a distinctive caretaking or custodial relationship." (*Id.* at p. 161, emphasis added.) The Court found that the mere fact the outpatient facility in question fit the definition of "care custodian" under W&I Code section 15610.17 was not dispositive, and that W&I Code section 15610.47 "requires a separate analysis to determine whether such a relationship exists." (*Id.* at p. 164.) Plaintiffs could not rely on simply asserting that they met that statutory definition; they must show how defendants' medical treatment "forged a caretaking or custodial relationship" such that plaintiff relied on defendants in a way that was "distinct from an able-bodied and fully competent adult's reliance on the advice and care of his or her medical providers." (*Id.* at p. 165.)

Plaintiffs try to distinguish and limit *Winn* on its facts, arguing that *Winn* applied to *neglect* (whereas here plaintiffs allege *physical abuse* as well), against an *elder* patient (not a *dependent adult* as plaintiffs here do), and it was regarding *outpatient* care (not inpatient care, as here). As for the first distinction, they argue they have alleged "physical abuse" as defined in W&I Code section 15610.63, and this does not require there to be a "care or custody" relationship between plaintiff and defendant. However, "physical abuse" under that section means various acts which are mostly criminal in nature, and it appears from FAC ¶ 36 that plaintiffs wish to allege criminal assault (Pen. Code § 242) and criminal battery (Pen. Code § 240). (Welf. & Inst. Code § 15610.63, subds (a)-(b).) However, plaintiffs fail to allege any acts that would satisfy the definition of physical abuse under the Act by alleging that Dr. Chaudhry "was under the influence of alcohol and/or controlled substances when performing surgery on Decedent that impaired his competency and surgical acumen." This does not allege criminal assault or battery.

As to the second attempt to limit *Winn*, plaintiffs point to the definition of "dependent adult" in section 15610.23, which states it means any person between ages 18 and 65 who is admitted as an inpatient to a 24-hour health facility which includes defendant Hospital here. They argue that since *Winn* didn't mention or cite this statute, the entire case is "superfluous and inapplicable." However, the Court's analysis repeatedly paired "dependent adult" with "elder," and the Court did not limit its holding only to elders. For instance, the Court summarized its holding as follows:

It is the nature of the elder or dependent adult's relationship with the defendant—not the defendant's professional standing—that makes the defendant potentially liable for neglect. Because defendants did not have a caretaking or custodial relationship with the decedent, we find that plaintiffs cannot adequately allege neglect under the Elder Abuse Act.

(*Winn, supra*, 63 Cal.4th at p. 152.)

Further, the Court summarized the scope of its analysis, and its conclusion, as follows:

We granted review to consider whether a claim of neglect under the Elder Abuse Act requires a caretaking or custodial relationship—where a person has assumed significant responsibility for attending to one or more of those basic needs of the elder or dependent adult that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance. Taking account of the statutory text, structure, and legislative history of the Elder Abuse Act, we conclude that it does.

(*Winn, supra*, 63 Cal.4th at p. 155.)

Winn is not “superfluous and inapplicable” simply because this case deals with a “dependent adult” and not an “elder.” The California Supreme Court clearly held that, *as to both*, Plaintiffs must sufficiently allege a “care or custody” relationship in order to state a claim for neglect under the Act.

As for plaintiffs’ third attempt to limit *Winn* – that the holding was limited in application to patients undergoing outpatient care – this narrow limitation is not evident. The Court acknowledged that the caretaking and custody relationship might be found “in a variety of contexts and locations, including beyond the confines of a residential care facility” and that it was examining the “nature and substance of the relationship between an individual and an elder or a dependent adult” to determine if the “distinctive relationship contemplated by the Act” had been formed. (*Winn* at p. 158.) The holding was: “Plaintiffs cannot bring a claim of neglect under the Elder Abuse Act unless the defendant health care provider has a caretaking or custodial relationship with the elder or dependent adult.” (*Winn* at p. 165.) It found that plaintiffs relied “solely on defendants’ allegedly substandard provision of medical treatment, on an outpatient basis, to an elder,” and concluded this did not support a claim for neglect under the Act. (*Id.*) Nothing in this language serves to limit the holding as plaintiffs propose.

Finally, plaintiffs argue that if the holding in *Winn* applies, they have alleged the requisite care and custodial relationship because Mr. Riddle “was relying on Defendants to meet his basic needs, including any needs in relation to surgical care,” and that “when a patient is under anesthesia, he relies on the health care defendants to provide for all of his needs that he ordinarily would be capable of managing without assistance, including but not limited to breathing and the consumption of all necessary nutrients.” *However, this describes any patient, at any hospital, of any age, who undergoes major surgery.* It hardly describes the “robust caretaking or custodial relationship” the Supreme Court found was required, but rather describes the “circumscribed, intermittent, or episodic engagement” with “casual or temporarily limited affiliation” which the Court clearly found would not fit the rubric of “care and custody” sufficient to allege neglect under the Act. (*Winn* at p. 158 and 161.) It is fitting to conclude, as did the Supreme Court, that “[r]eading the act in such a manner would radically transform medical malpractice liability relative to the existing scheme.” (*Winn* at p. 163.)

Nor does plaintiffs' third cause of action, claiming regulatory violations receive any different treatment simply because regulations define a facility's duty of care and thus "define duties of care applicable to elder abuse of those residents." (*Fenimore v. Regents of the University of California* (2016) 245 Cal.App.4th 1339, 1348, review denied (June 29, 2016); *Norman v. Life Care Centers of America, Inc.* (2003) 107 Cal.App.4th 1233, 1246—violation of Title 22 of Cal. Code Regs. constitutes neglect under W&I § 15610.07.) Plaintiffs must still allege the requisite care and custody relationship. While the appellate court in *Fenimore* did not discuss this issue (the opinion was issued shortly before the High Court clearly established this standard in *Winn*), the facts nonetheless show plaintiffs in *Fenimore* alleged the required relationship. Decedent was both elderly and highly dependent: he suffered from dementia, Alzheimer's disease, coronary artery disease, congestive heart failure, hypertension, hyperlipidemia, diabetes, gout, a history of pancreatitis, a history of a cholecystectomy, and a history of wandering that led to numerous falls, and the hospital knew he "required special care and assistance, including 24-hour supervision, assistance with ambulation and transferring, the provision of safety devices to prevent accidents, interventions to prevent further falls, and assistance with other activities of daily living." (*Fenimore*, supra, at p. 1343.)

Plaintiffs cannot maintain their causes of action based on dependent adult abuse/neglect based on defendants' allegedly substandard provision of medical treatment to Mr. Riddle because they have not alleged any *withholding* of care and treatment, and they cannot allege the caretaking or custodial arrangement that is required. "To elide the distinction between neglect under the Act and objectionable conduct triggering conventional tort remedies—even in the absence of a care or custody relationship—risks undermining the Act's central premise." (*Winn* at p. 165.)

The general demurrers to the First, Second, and Third causes of action are sustained. The question of leave to amend hangs on consideration of the statute of limitations issue, below.

Statute of Limitations:

A complaint showing on its face the cause of action is barred by the statute of limitations is subject to general demurrer. (*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 995.)

It is the nature of the right sued upon or the principal purpose of the action, rather than the form of action or the relief demanded that determines the applicable statute of limitations. (*Davies v. Krasna* (1975) 14 Cal.3d 502, 515.) "What is significant for statute of limitations purposes is the *primary interest invaded* by defendant's wrongful conduct." (*Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1207.) The cause of action pled is not determinative of the nature of the right sued upon; nor is the form of the action or relief demanded in the complaint. (*Day v. Greene* (1963) 59 Cal.2d 404, 410; *Iverson, Yoakum, Papiano & Hatch v. Berwald*, supra, 76 Cal.App.4th at p. 995.) Therefore, plaintiffs' argument that the breach of fiduciary duty claim is subject to the four-year statute of limitations found in Code of Civil Procedure

section 343 (actions with no limitations period provided elsewhere) is incorrect, as it is based on the same set of facts as the other causes of action.

Given the ruling as to plaintiffs' dependent adult abuse theory, *supra*, the two-year limitations period applicable to such actions (i.e., Code Civ. Proc. § 335.1, as established in *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1266 and *Benun v. Superior Court* (2004) 123 Cal.App.4th 113, 126) will not apply. All causes of action allege professional negligence a health care providers, so the limitations period found in Code of Civil Procedure section 340.5, applies to all. The court assumes, *arguendo*, the FAC relates back to the filing of the original complaint filed in this action, which was March 14, 2016. (*Barrington v. A. H. Robins Co.* (1985) 39 Cal.3d 146, 150.)

Code of Civil Procedure section 340.5 provides that actions for personal injury or death caused by the professional negligence of a health care provider must be commenced within the earlier of: 1) 3 years after the date of injury; or 2) 1 year after plaintiff discovered or should have discovered the injury. The 3-year time limit provides an outside time limit, which bars a medical malpractice action not filed within that period even though plaintiff was not aware of the injury during that time. (*Brown v. Bleiberg* (1982) 32 Cal.3d 426, 437—bars the claim “regardless of the patient's belated discovery of the cause of action” (discussing the then-current 4-year outside time limit).)

However, the statute provides that the 3-year period (but not the 1-year period) is tolled for fraud, intentional concealment, or the presence of foreign bodies, and for these reasons only. (Code Civ. Proc. § 340.5—“In no event” shall limitation period exceed 3 years unless tolling for fraud, intentional concealment, or presence of foreign body applies; *Reyes v. County of Los Angeles* (1988) 197 Cal.App.3d 584, 595—tolling does not apply to 1-year period.) Plaintiffs have sufficiently alleged, for purposes of demurrer, that defendants intentionally concealed the tortious cause of Mr. Riddle's injury and death, and that they were not aware of this until contact from Todd Baker on March 19, 2014.

With regard to awareness of the tortious (negligent) cause of injury, it is enough that plaintiff suspects it was caused by wrongdoing. Plaintiff need not have learned of the “specific causal mechanism” by which he or she was injured. (*Knowles v. Superior Court* (2004) 118 Cal.App.4th 1290, 1295.) As applied here, this means plaintiffs' discovery in March 2016 of the alleged intoxication of Dr. Chaudhry during Mr. Riddle's surgery does not serve to “restart” the time period or provide for divergent calculation periods (i.e., one based on the March 19, 2014 contact by Mr. Baker, and one based on learning about the intoxication). Plaintiffs' filing of their first action in August 2014 provides sufficient basis to conclude that they were sufficiently put on notice by Mr. Baker's contact as of March 19, 2014, regarding the existence of their claims.

Of important note, section 340.5 provides the plaintiff with two hurdles to the timely maintenance of suit: even if the suit is commenced within 3 years from the date of injury, plaintiff must still satisfy the 1-year period or the action is time-barred. (*Hills v. Aronsohn* (1984) 152 Cal.App.3d 753, 757-759—plaintiff met the 1-year period but not the 3-year period, so her action was barred.) Thus, the one-year limitation period

applies, even if the three-year period has not passed since “time of the injury,” if plaintiff has discovered or should have discovered the injury. (*Id.*)

Here, Mr. Riddle died on August 13, 2011, and this can be considered the injury triggering the running of the 3-year statute. Plaintiffs have sufficiently alleged that tolling of that 3-year limitation period applies until March 19, 2014, when the statutory clock began counting. At that point, they were subject to the 1-year limitations period. Thus, plaintiffs had until **March 19, 2015**, to file their action, and the filing of their complaint on March 14, 2016, was untimely. The demurrers to each cause of action based on the relevant statute of limitation must be sustained, as to all defendants, without leave to amend.

Corporate Negligence (Elam) Cause of Action:

The Chaudhry defendants also demur generally, to the Fourth cause of action, which is the corporate negligence (*Elam*) claim, arguing that this cause of action applies only to hospitals and thus cannot apply. The court agrees. While plaintiffs point out that the *Elam* opinion “did not preclude the possibility that a physician or medical group could be liable” under an *Elam* theory, the more accurate observation is that the *Elam* court did not discuss or deal with this at all; there was simply no consideration of it. The court merely considered a hospital’s duty of care. (*Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 345. See also *Walker v. Sonora Regional Medical Center* (2012) 202 Cal.App.4th 948, 960, *fn* 9—“*Elam* explained that [t]he term ‘corporate negligence’ has been commonly used to describe hospital liability predicated not upon vicarious liability ..., but upon its violation of a duty—as a corporation—owed directly to the patient which resulted in injury.”) Plaintiff cited no authority for extending this theory of liability to non-hospital defendants such as moving defendants.

Battery:

Plaintiffs argue they are alleging a “common law battery” as set forth in *Perry v. Shaw* (2001) 88 Cal.App.4th 658, rather than a “medical battery.” As defendants point out, this is a distinction without a difference. The definition the court gave for “common law battery” in *Perry v. Shaw* was exactly the same as the definition of “battery” in the context of medical treatment set forth in *Cobbs v. Grant* (1972) 8 Cal.3d 229, 239: when a doctor obtains the patient’s consent to perform one type of treatment and then performs substantially different treatment for which no consent was obtained, “there is a clear case of battery.” (*Perry v. Shaw, supra* at p. 663, quoting *Cobbs v. Grant* at p. 239.) The issue, in both cases, was when the issue of informed consent could give rise to an *intentional* as opposed to a *negligent* tort (i.e., battery as opposed to medical malpractice). The court in *Perry v. Shaw* appended the phrase “common law” to the term “battery” to distinguish it from a “technical battery” in support of its holding that when the facts implicated an intentional deviation from the consent given, the claim would not be subject to MICRA limitations on jury awards. (*Id.* at pp. 661, 668-671.)

To allege this tort in the context of medical care, plaintiffs must adequately allege the doctor performed a different surgery than the one consented to. They have attempted to do so by alleging that decedent never consented to surgery being

performed by someone under the influence of alcohol, and to the extent defendants obtained consent for the surgery performed, their conduct went beyond the scope of consent. (FAC, ¶¶ 89-90.) This fails to allege that a *different surgery than the one consented to* was performed, unless it is by implication that defendants were under a duty to inform decedent about the potential that the operation might be performed by someone under the influence of alcohol. (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517—on demurrer the court assumes the truth of all material facts pleaded and “those that arise by reasonable implication.”) However, a physician’s duty to inform the patient and receive informed consent about hazards applies to routine procedures and surgeries. (*Cobbs v. Grant* (1972) 8 Cal.3d 229.) No California court has ever held that this duty also requires the health care provider to disclose hazards relating to the provider’s person or character that might create an unreasonable risk (e.g., to disclose that they are an alcoholic). (See, e.g., 1 Cal. Med. Malprac. L. & Prac. § 2:11 (2016 ed.) making this observation.) If this is not part of the duty of disclosure, then plaintiffs cannot adequately allege defendants’ conduct exceeded the scope of their consent. The general demurrers to this cause of action must be sustained.

Motions to Strike:

Given that the ruling on demurrer deals with the entire complaint and leave to amend is not granted, the motions to strike are rendered moot.

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.

Tentative Ruling

Issued By: JYH on 10/19/16
 (Judge’s initials) (Date)

Tentative Rulings for Department 403

(20)

Tentative Ruling

Re: Castaneda v. Westco Equities, Inc., Superior Court Case No. 14CECG02471

Hearing Date: October 20, 2016 (Dept. 403)

Motion: Petition to Compel Arbitration

Tentative Ruling:

To grant and sign the proposed order confirming defendant Westco Equities, Inc.'s petition to confirm arbitration award. To take off calendar the petition to vacate the arbitration award set for October 25, 2016.

Explanation:

Code of Civil Procedure section 1285.4 requires that a petition to confirm an arbitration award set forth: (a) the substance or have attached a copy of the agreement to arbitrate unless the petitioner denies the existence of such an agreement; (b) the names of the arbitrators; and (c) set forth or have attached a copy of the award and the written opinion of the arbitrators, if any.

Westco complies with these requirements. Thus, unless respondent timely moves to vacate, correct or dismiss the petition, the court must confirm the arbitration award and enter judgment thereon. (Code Civ. Proc. §§ 1286; 1287.4; Eternity Investments, Inc. v. Brown (2007) 151 Cal.App.4th 739, 744-45.) Castaneda seeks to vacate the award, but his petition is untimely.

On 8/23/16 Westco filed and served by mail the petition to confirm. The hearing was initially set for 9/29/16. On 9/13/16 Westco filed an amended notice changing the hearing date to 10/20/16.

If a petition to confirm the award is filed within the 100-day period, any response seeking to vacate or correct the award must be filed within the period for responses generally (10 days after service of the petition; Code Civ. Proc. § 1290.6). (DeMello v. Souza (1973) 36 Cal.App.3d 79, 83.) If a petition to confirm an award is filed after the 100-day time limit, a response to the petition that asserts grounds to vacate the award must be disregarded. (Eternity Investments, Inc. v. Brown (2007) 151 Cal.App.4th 739, 742.)

The time to move to vacate the award runs from the filing of the award, not the hearing date. Accordingly, the amended notice of petition did not alter the deadline

for filing a response or petition to vacate, which was 9/7/16. The response and petition to vacate were filed on 9/15/16, clearly untimely.

Unless a petition to correct or vacate the award has been timely filed, the court must render a judgment confirming the arbitrator's award. (See Code Civ. Proc. § 1286 ["the court shall confirm the award as made ..."; see also Valsan Partners Limited Partnership v. Calcor Space Facility, Inc. (1994) 25 Cal.App.4th 809, 818 [no authority to alter terms of award absent petition to correct].)

The filing and service deadline for a petition to vacate is jurisdictional; noncompliance deprives a court of the power to vacate an award unless the party has timely requested vacation in response to a petition to confirm. (Code Civ. Proc., § 1286.4, subds. (a) & (b); Abers v. Rohrs (2013) 217 Cal.App.4th 1199, 1205–1208, 1210–1212 (Abers); [Oaktree Capital Management, L.P. v. Bernard (2010) 182 Cal.App.4th 60, 66], 64–65.) (Santa Monica College Faculty Association v. Santa Monica Community College District (2015) 243 Cal.App.4th 538, 544-545.)

Relief under Code of Civil Procedure section 473 is unavailable. (Ibid.)

If the trial court does not dismiss the petition to correct or vacate an award and also does not dismiss the petition, "it must confirm the award." (See Law Offices of David S. Karton v. Segreto (2009) 176 Cal.App.4th 1, 9-10.) Since the opposition only raises grounds for vacating the award, the award will be confirmed, and the hearing on the petition to vacate taken off calendar.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(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: KCK **on 10/19/16**
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Kenco Investments, Inc. v. Martha Marsh***
Court Case No. 15CECG02521

Hearing Date: **October 20, 2016 (Dept. 403)**

Motion: 1) Defendant Martha Marsh's Motion for Judgment on the Pleadings
2) Defendant Martha Marsh's Motion to Appoint Receiver

Tentative Ruling:

To continue the hearing on both motions to Thursday, November 3, 2016. Plaintiff is ordered to file either a Substitution of Attorney if he has changed attorneys, pursuant to Code of Civil Procedure section 285, or a document clearly indicating the association of counsel who appears on the opposition to the Motion to Appoint Receiver, as well as a Designation of Counsel pursuant to Local Rule 2.1.16. The court will consider the opposition to that motion, despite plaintiff's failure to timely serve it on defendant, as defendant was not prejudiced by this.

Explanation:

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.

Tentative Ruling

Issued By: KCK on 10/19/16
 (Judge's initials) (Date)

Tentative Rulings for Department 501

(30)

Tentative Ruling

Re: *Gerica Ramos v. Saint Agnes Medical Center*

Superior Court No. 16CECG01445

Hearing Date: Thursday, October 20, 2016 (Dept. 501)

Motion: (1) Defendant Lisa Golik's Demurrer
(2) Defendant Wade Dickenson's Demurrer
(3) Defendant Saint Agnes' Demurrer
(4) Defendant OMNI Women's Health Medical Grp Inc.'s Demurrer

Tentative Ruling:

To sustain all demurrers to causes of action: 1, 2, 4, 7, and 8 based on Code of Civil Procedure sections 430(e) and (f).

To sustain demurrers to causes of action: 3 and 5 based on Code of Civil Procedure sections 430(e).

To overrule demurrer based on cause of action 6.

To overrule demurrers based on statute of limitations.

Plaintiffs are granted 10 days leave to amend. (Cal. Rules of Court, rule 3.1320(g).) In all future pleadings, Plaintiffs must apply material facts to the elements. The time in which an amended complaint may be filed will run from service by the clerk of the minute order. (Code Civ. Proc., § 472b.)

Explanation:

Codes of Civil Procedure section 430(e) and (f)
Complaints must plead material facts. (Code Civ. Proc., § 425.10.) If material facts are pleaded in an improper manner, e.g., as conclusions of law, or by evidentiary recitals, argument, or inference, or in the alternative, the facts thus improperly pleaded may be disregarded and the pleading will be fatally defective. The defect may be reached by either a general demurrer or a special demurrer for uncertainty. (For general demurrer, see *McCaughey v. Schuette* (1897) 117 Cal. 223; *Metropolis Trust & Savings Bank v. Monnier* (1915) 169 Cal. 592, 596; *Clement v. Dunn* (1931) 114 Cal.App. 60, 63; *Thompson v. Purdy* (1931) 117 Cal.App. 565, 567; *Foerst v. Hobro* (1932) 125 Cal.App. 476; *Smith v. Bentson* (1932) 127 Cal.App.Supp. 789; *Callaway v. Novotny* (1932) 128 Cal.App. 166, 169; *Sklar v. Franchise Tax Bd.* (1986) 185 Cal.App.3d 616, 621. For special demurrer, see *Ankeny v. Lockheed Missiles and Space Co.* (1979) 88 Cal.App.3d 531, 537; *Penrose v. Winter* (1901) 135 Cal. 289; *Christensen v. Cram* (1909) 156 Cal. 633, 636;

Campbell v. Genshea (1919) 180 Cal. 213, 217; Fleischmann v. Lotito (1936) 6 Cal.2d 365, 367.)

COA 1: Negligence on behalf of Gerica Ramos

Here, Plaintiff alleges negligence, which does not require specificity. (McMillan v. Western Pac. R.R. Co. (1960) 54 Cal.2d 841, 845; Brooks v. E.J. Willig Truck Transp. Co. (1953) 40 Cal.2d 669, 680; Guilliams v. Hollywood Hospital (1941) 18 Cal.2d 97.) However, material facts are still required. And here, Plaintiff fails to allege any facts to establish the elements of negligence. Plaintiff does allege legal conclusions, but these are ambiguous (and therefore uncertain). Demurrers for failure to state a cause of action and uncertainty sustained.

COA 2: Negligence on behalf of Zariah Florez

Here Plaintiff fails to allege any material facts to establish the elements of negligence. Her conclusory allegations are uncertain and inadequate. Demurrers sustained.

COA 4: Loss of Consortium on behalf of Abrian Florez

Here Plaintiff fails to allege any material facts to establish the elements of loss of consortium. His conclusory allegations are uncertain and inadequate. Demurrers sustained.

COA 6: Corporate negligence against Saint Agnes Medical Center on behalf of all Plaintiffs

Negligence may be alleged in general terms; that is, it is sufficient to allege an act was negligently done without stating the particular omission which rendered it negligent. (McMillan v. Western Pac. R.R. Co. (1960) 54 Cal.2d 841, 845; Brooks v. E.J. Willig Truck Transp. Co. (1953) 40 Cal.2d 669, 680.) "[T]here is no requirement that [the plaintiff] identify and allege the precise moment of the injury, or the exact nature of the wrongful act." (Guilliams v. Hollywood Hospital (1941) 18 Cal.2d 97.)

Here, Plaintiffs allege that Defendant Saint Agnes was negligent in their care and treatment of Plaintiffs Gerica Ramos and Zariah Florez because they did not properly screen Defendant Golik or implement proper protocols. (Complaint, ¶¶ 38-41.) As a result, Plaintiffs were injured. These allegations are adequate; they include basic material facts. Demurrers overruled.

COA 7: Negligent hiring against OMNI Women's Health on behalf of all Plaintiffs

Here, Plaintiffs fail to allege any material facts to establish the elements of negligent hiring. Plaintiffs' conclusory allegations are uncertain and inadequate. Demurrers sustained.

COA 8: Administrative Negligence against OMNI on behalf of all Plaintiffs

Here, Plaintiffs fail to allege any material facts to establish the elements of administrative negligence. Plaintiffs' conclusory allegations are uncertain and inadequate. Demurrers sustained.

Code of Civil Procedure section 430(e)

COA 3: Negligent Infliction of Emotional Distress on behalf of Abrian Florez

"[A] plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress..." (Thing v. La Chusa (1989) 48 Cal.3d 644, 667-668.) And except in the most obvious medical malpractice cases, assertions by lay-bystanders cannot satisfy the second element, as a misdiagnosis is beyond their awareness. (Bird v. Saenz (2002) 28 Cal.4th 910, 917; Morton v. Thousand Oaks Surgical Hosp., (2010) 187 Cal.App.4th 926.)

In Bird, plaintiffs saw [plaintiffs' mother] in distress being rushed by numerous medical personnel to another room and they stated that they believed that their mother was bleeding to death. The Bird Court ruled against Plaintiffs because, "they had no reason to know that the care she was receiving to diagnose and correct the cause of the problem was inadequate." (Bird, supra, 28 Cal.4th at p. 917.) Morton affirmed the Bird ruling, adding only that an objective layperson standard applies in cases where a plaintiff seeks recovery for medical malpractice without expert testimony. (Morton, supra, 187 Cal.App.4th 926.)

Here, Plaintiff makes similar assertions to those made by the Plaintiffs in Bird and Morton. Plaintiff, "understood that his daughter was... being asphyxiated." (FAC, ¶25.) And he "watched his wife struggling and in distress... he saw copious bleeding." (Ibid.) But like in Bird and Morton, Plaintiff had no reason to know that the care his wife or daughter was receiving was inadequate because he is a lay person. Further, Plaintiff admits that he was ignorant of any injury until he examined medical records on April 1, 2016. (FAC, ¶ 10.) Therefore, Plaintiff fails to meet the second element of Thing. Demurrers sustained.

COA 5: Negligent Infliction of emotional distress on behalf of Lisa Florez

Relating to Zariah Florez: Demurrer sustained (see explanation for COA 3 above).

Relating to Gerica Ramos: (again, see explanation for COA 3 above) Also, in-laws cannot recover as bystander plaintiffs (Moon v. Guardian Postacute Services, Inc. (2002) 95 Cal.App.4th 1005, 1012-1013.) Here, Plaintiff concedes that Gerica Ramos is her daughter-in-law. (FAC, ¶¶ 32-33.) Therefore, Plaintiff lacks standing. Demurrers sustained.

Statute of Limitations

California Code of Civil Procedure section 340.5 is the provision of the Medical Injury Compensation Reform Act of 1975 (MICRA) that governs the statute of limitations against a health care provider. The period is the earlier of three years from the date of injury or one year from the date plaintiff discovers or should have discovered the injury (Code Civ. Proc., § 340.5). The one-year statute begins to run when the plaintiff became aware, or reasonably should have become aware, of both the physical manifestation of the injury and its tortious cause. (Arroyo v. Plosay (2014) 225 Cal.App.4th 279, 291-292.) The three-year provision is "an outer limit that terminates all malpractice liability; it commences to run when the patient is aware of physical

Tentative Ruling

Re: **Suarez v. Beverly Healthcare-California, Inc.**
Case No. 16 CE CG 00473

Hearing Date: **October 20th, 2016 (Dept. 501)**

Motion: Plaintiff's Motions to (1) Appoint an Arbitrator and (2) to Apportion Arbitration Costs to Defendants

Tentative Ruling:

To deny plaintiff's motion to appoint an arbitrator. (Code Civ. Proc. § 1281.6.) Instead, the court intends to order the parties to follow the JAMS rules regarding appointing an arbitrator, which are incorporated into the arbitration agreement.

To grant plaintiff's motion to require defendants to either pay plaintiff's share of the arbitration costs, or in the alternative defendants will be deemed to have waived the right to arbitrate the dispute. (Roldan v. Callahan & Blaine (2013) 219 Cal.App.4th 87, 96.)

Explanation:

Motion to Appoint Arbitrator: Plaintiff moves to appoint an arbitrator under Code of Civil Procedure section 1281.6, contending that the parties have been unable to agree on an arbitrator. Section 1281.6 provides, in pertinent part,

If the arbitration agreement provides a method of appointing an arbitrator, that method shall be followed... In the absence of an agreed method, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act and his or her successor has not been appointed, the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator. (Code Civ. Proc., § 1281.6.)

Here, the parties' arbitration agreement states on page 2, Article 4,

The arbitration shall be administered by JAMS pursuant to its Streamlined Arbitration Rules and Procedures in cases where no disputed claim or counterclaim exceeds \$259,000, not including interest or attorneys' fees, and by its Comprehensive Arbitration Rules and Procedures In all other cases. In the event that JAMS refuses or is unable to serve in that role, the parties shall apply to a court of competent jurisdiction for the appointment of an arbitrator who shall, to the extent that the arbitrator deems practical, follow the JAMS rules and procedures. (Alternative Dispute Resolution Agreement, p. 2, Art. 4.)

Thus, the parties' agreement expressly provides that they will follow the JAMS rules and procedures, and only if JAMS is unable to provide an arbitrator shall the parties apply to the court for appointment of an arbitrator.

The court intends to take judicial notice of the JAMS rules under Evidence Code section 452, subdivision (h). The JAMS rules have detailed procedures for selection of an arbitrator. JAMS Rule 15 provides a detailed procedure for selection of an arbitrator. However, in the present case, plaintiff has not shown that she made any attempt to select an arbitrator under the JAMS rules. Her counsel merely sent a list of two potential arbitrators to defense counsel and requested that defendants select one of arbitrators from the list. Defense counsel refused, and instead offered to have another potential arbitrator, Justice Vartebedian, serve as the arbitrator. However, neither party ever suggested using the JAMS procedures for selecting an arbitrator, which requires the parties to select from a list of five potential arbitrators.

Therefore, the parties have not attempted to follow their own agreement's provisions for selecting an arbitrator, which requires the parties to use the JAMS rules. As a result, the court intends to deny the plaintiff's motion to appoint an arbitrator and instruct the parties to contact JAMS for a list of potential arbitrators from which to choose. Only if JAMS cannot or will not help them select an arbitrator may they move for appointment of an arbitrator with the Superior Court.⁵

Motion to Apportion Arbitration Costs: First, while defendants have argued that there is a delegation clause in the arbitration agreement that precludes the court from ruling on the issue of apportionment of arbitration fees, the court has already found that the delegation clause is uncertain and unenforceable in its ruling on the petition to compel arbitration. (See Court's Tentative Ruling of August 25th, 2016, pp. 2-3.) Therefore, the court will not refuse to rule on the apportionment motion based on the fact that there is a delegation clause in the agreement.

Plaintiff moves to have the court apportion the costs of arbitration to defendants, as she claims that she does not have the ability to pay the anticipated cost of arbitration. Plaintiff cites to *Roldan v. Callahan & Blaine* (2013) in support of her request.

In *Roldan*, the Court of Appeal held that, if the plaintiffs are unable to pay the costs of arbitration despite the fact that they signed an agreement requiring them to pay their pro rata share of the arbitration costs, then the trial court must either require defendant to pay the entire cost of the arbitration, or waive its right to arbitrate the dispute. (*Id.* at p. 96.)

Here, the JAMS rules under which the arbitration will be conducted require each party to bear their pro rata share of the arbitration costs. (JAMS Rule 31.) However, plaintiff Sonia Hernandez claims that she has a very low income, and that she is unable

⁵ Defendants have also objected that plaintiff did not serve the motion at least 16 court days before the hearing, as required under Code of Civil Procedure section 1005, subd. (b). However, defendants have not shown any prejudice from the delay in service, and in fact they have filed substantive opposition to the motion, so the objection is waived.

to pay her pro rata share of the arbitration costs. In fact, she is barely able to cover her current household expenses on her present income. (Hernandez decl., ¶¶ 4-11.) Her father had no significant assets at the time of his death. (Id. at ¶ 3.) Arbitration is expected to cost several thousand dollars. (Id. at ¶ 2.) In fact, plaintiff's counsel, who has arbitrated several other similar claims, estimates that the arbitration will take seven to eight days and cost thousands of dollars. (Movroydis decl., ¶¶ 2.) Other cases arbitrated by counsel have cost the plaintiffs between \$15,000 and \$19,000. (Id. at ¶¶ 3, 4.)⁶

Thus, plaintiff has made an adequate showing that her share of the arbitration costs will likely be thousands of dollars, if not tens of thousands of dollars. She has also presented evidence that her income is too low to afford the cost of arbitration, and that she has no assets with which to pay arbitration costs. As a result, the court intends to order defendant to either pay plaintiff's share of the arbitration costs or waive its right to arbitrate the dispute. (Roldan, *supra*, at p. 96.)

In their opposition, defendants attempt to distinguish Roldan, arguing that the plaintiffs in Roldan had received fee waivers in the civil action, whereas the plaintiff here never applied for a fee waiver. They also speculate that plaintiff's counsel is paying the costs of litigation up front for plaintiff as part of a contingency fee agreement, and therefore the real issue is whether counsel can afford to front the costs of arbitration, not plaintiff herself. Since plaintiff has not offered any evidence as to her counsel's ability to pay for such costs, defendants argue that the motion for apportionment should be denied.

However, while the plaintiffs in Roldan did receive fee waivers in the underlying court action, there is nothing in the Roldan decision that requires a plaintiff moving for apportionment of arbitration costs to show that he or she has applied for and received a fee waiver. Indeed, the fact that the plaintiffs received fee waivers was barely mentioned in the decision. The court's primary concern was with the plaintiffs' inability to pay thousands of dollars in arbitration fees, not whether they were able to pay for court fees. (Id. at pp. 95-97.) Even a relatively poor plaintiff might be able to afford the cost of a court filing fee, but the same plaintiff might not be able to afford to pay tens of thousands in arbitration costs.

Also, there is nothing in Roldan that allows the court to engage in an examination of a privileged retainer agreement between the plaintiff and her counsel, or that would require plaintiff's counsel to disclose its finances and ability to pay plaintiff's arbitration costs up front. The focus of Roldan was on the plaintiff's ability to pay arbitration costs, not the attorney's ability to pay such fees. (Id. at pp. 95-76.) Indeed, it would be improper to require the plaintiff's counsel to disclose the privileged retainer agreement with their client or to disclose their own finances.

Here, there appears to be no dispute that plaintiff herself has no ability to pay the potentially substantial costs of arbitration, which plaintiff estimates will run into the

⁶ Defendants have objected to plaintiff's attorney's declaration on several grounds, but the court intends to overrule the objections.

tens of thousands of dollars. Indeed, defendants make no effort to present their own evidence demonstrating either that plaintiff has the means to pay for arbitration costs, or that the costs will be so minimal as to require no apportionment. Defendants merely argue that plaintiff's evidence is insufficient and irrelevant, allegedly because it is too speculative to show the actual costs of the arbitration in this particular case. (*Green Tree Financial Corp.-Alabama v. Randolph* (2000) 531 U.S. 79, 91.)

However, in *Green Tree*, the plaintiff was attempting to invalidate the entire arbitration agreement based on the risk that she might have to pay her pro rata share of the arbitration costs, which she believed might be too high for her to pay. (*Id.* at p. 90.) The United States Supreme Court rejected this argument, finding that there was no evidence in the record before it as to whether the plaintiff would even have to pay her pro rata share of the arbitration costs, or what those costs might be. (*Id.* at pp. 90- 91.) The Court noted that the agreement itself was silent as to allocation of costs. (*Id.* at p. 90.) "As the Court of Appeals recognized, 'we lack ... information about how claimants fare under *Green Tree's* arbitration clause.' [Citation.] The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The 'risk' that *Randolph* will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." (*Ibid.*) Therefore, the Supreme Court found that the agreement was enforceable. (*Id.* at p. 92.)

Here, on the other hand, the plaintiff is not attempting to obtain an order finding that the agreement to arbitrate is unenforceable. The court has already granted the petition to compel arbitration, so that issue is no longer before the court. The agreement also is not silent as to arbitration costs, since it incorporates the JAMS rules, which provide that each party shall bear their pro rata share of the arbitration fees. (JAMS Rule 31.) Furthermore, there is evidence before the court as to the anticipated cost of arbitration, which plaintiff's counsel believes will be in the tens of thousands of dollars.⁷ Again, defendants have not offered any evidence to rebut this showing. Therefore, the court will not find that plaintiff's evidence is too speculative to support the apportionment motion. Instead, the court intends to grant the motion and require defendants to either pay plaintiff's share of the arbitration costs, or in the alternative find that defendants have waived their right to arbitrate the dispute.

Pursuant to CRC 3.1312 and CCP §1019.5(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.

⁷ Defendants have objected to counsel's declaration, contending that counsel only discusses the costs of arbitration before non-JAMS services, and that the costs of arbitration before other ADR services are not relevant to the cost of arbitrating before JAMS. However, the court intends to overrule the objection. While plaintiff's counsel has not submitted evidence of the cost of arbitrating claims before JAMS, the court can infer that the costs of such arbitration would be similar to the cost of arbitrating before other, similar services. Also, given plaintiff's lack of financial resources, even if the cost of a JAMS arbitration is substantially less than other services, it does not appear that plaintiff would be able to afford to pay such lower costs.

Tentative Ruling

Issued By: MWS on 10/19/16
 (Judge's initials) (Date)

(28)

Tentative Ruling

Re: *Christman v. Ness*

Case No. 14CECG03813

Hearing Date: October 20, 2016 (Dept. 501)

Motion: By Defendants to Enforce Acceptance of Offer to Compromise

Tentative Ruling:

To grant the motion. Defendants shall provide to the Court a judgment consistent with the settlement agreement within five court days of this hearing.

Explanation:

[The Court notes that as of October 18, 2016, no opposition to this motion appears in the Court's files.]

Code of Civil Procedure §998, subdivision (a) states, in pertinent part:

....any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time. The written offer shall include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. Any acceptance of the offer, whether made on the document containing the offer or on a separate document of acceptance, shall be in writing and shall be signed by counsel for the accepting party or, if not represented by counsel, by the accepting party.

- (1) If the offer is accepted, the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly. In the case of an arbitration, the offer with proof of acceptance shall be filed with the arbitrator or arbitrators who shall promptly render an award accordingly.

To trigger the procedural guarantees of section 998, an offer must be sufficiently certain to be capable of valuation. (*Chen v. Interinsurance Exch. of Auto. Club* (2008) 164 Cal.App.4th 117, 121.) The party extending the offer of compromise bears the burden of assuring the offer is drafted with sufficient precision to satisfy the requirements of section 998. (*Berg v. Darden* (2004) 120 Cal.App.4th 721, 727.) To that end "a section 998 offer is construed strictly in favor of the party sought to be subjected to its operation." (*Id.*)

Second, section 998 offers must be written with sufficient specificity because the trial court lacks authority to adjudicate the terms of a purported settlement. Section 998 was designed to encourage settlement of disputes through a straightforward and expedited procedure. Once the offer is accepted, the clerk or court performs the purely ministerial task of entering judgment according to the terms of the parties' agreement. (§ 998, subd. (b)(1) ["If the offer is accepted, the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly."].) Neither the clerk nor the court is authorized to adjudicate a dispute over the terms of section 998 agreements before entering judgment. (*Saba v. Crater* (1998) 62 Cal.App.4th 150, 153, 72 Cal.Rptr.2d 401 (*Saba*) ["[T]he clerk or judge merely enters judgment following the filing of a written acceptance of the offer."].) (*Berg*, supra, 120 Cal.App.4th at 727 (internal citations and quotations omitted))

On November 9, 2015, Defendant served an Offer to Compromise pursuant to Code of Civil Procedure §998 on Plaintiff.

The offer contained the following provisions:

Defendants would pay Plaintiff \$7,500, in exchange for "each of the following:"

1. The entry of a Request for Dismissal with prejudice of this action as to the above Defendants;
2. Execution of a General Release by Plaintiff in favor of Defendants and their "agents, insurers, and representatives";
3. All parties to bear their own costs and attorney's fees.

The offer was accepted by counsel for Plaintiff on December 11, 2015, as indicated by his signature on the "Acceptance" at the bottom of the Offer.

The terms of the agreement appear to be sufficiently definite for purposes of Code of Civil Procedure §998.

Because it appears that the terms of the settlement were sufficiently definite and because the Section 998 agreement was accepted, the Court will issue a judgment consistent with the terms of the agreement.

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: MWS on 10/19/16
 (Judge's initials) (Date)

Tentative Rulings for Department 502

(2)

Tentative Ruling

Re: **Woods et al v. Central Valley Real Estate et al.**
Case No. 13CECG03138 (consolidated with 15CECG03124)

Hearing Date: **October 20, 2016 (Dept. 502)**

Motion: CRP Properties, Inc.'s motion to deem request for admissions, set one admitted and sanctions

Tentative Ruling:

The motion to deem request for admissions, set one admitted as to plaintiff Anthony Smith is moot. He served verified response to the requests for admission that is in substantial compliance with Code of Civil Procedure sections 2033.210, 2033.220 and 2033.240 before the hearing.

To grant defendant CRP Properties, Inc.'s motion to deem request for admissions, set one admitted as to plaintiff Elaina Woods unless she serves, before the hearing, a proposed verified response to the requests for admission that is in substantial compliance with Code of Civil Procedure sections 2033.210, 2033.220 and 2033.240. Code of Civil Procedure §2033.280.

To grant defendant CRP Properties, Inc.'s motion to deem request for admissions, set one admitted as to plaintiff Helen Gant unless she serves, before the hearing, a proposed verified response to the requests for admission that is in substantial compliance with Code of Civil Procedure sections 2033.210, 2033.220 and 2033.240. Code of Civil Procedure §2033.280.

To grant defendant CRP Properties, Inc.'s motion for sanctions as to Chandra Gehri Spencer. Chandra Gehri Spencer is ordered to pay monetary sanctions to Lang, Richert & Patch in the amount of \$619.50 within 30 days after service of this order. CCP §§2030.280(c).

Explanation:

Prior to the hearing Anthony Smith, Elaina Woods and Helen Gant served responses to the request for admissions. The responses from Smith were in substantial compliance with Code of Civil Procedure sections 2030.210, 2030.220 and 2033.220. The responses from Woods and Gant were not, as they were not verified. Code of Civil Procedure §2033.240 requires the party to whom the requests for admission are directed to sign the response under oath, unless the response contains only objections. The responses provided by Gant and Woods are not signed under oath and they do not

contain only objections. See *Allen-Pacific, Ltd. v. Superior Court*, 57 Cal.App.4th 1546 (1997) - for purpose of determining the adequacy of a party's response to a request for admissions, unsworn responses are tantamount to no responses at all, disapproved of on other grounds by *Wilcox v. Birtwhistle*, 21 Cal.4th 973, 983 (Cal. Nov 22, 1999).

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 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: DSB **on 10/18/16**
(Judge's initials) (Date)

Tentative Rulings for Department 503

(20)

Tentative Ruling

Re: **Sailors v. City of Fresno et al., Superior Court Consolidated**
Lead Case No. 14CECG00069

Hearing Date: **October 20, 2016 (Dept. 503)**

Motion: (1) SMG Holdings, Inc.'s Motion for Summary Judgment, or in the Alternative for Summary Adjudication Against Timothy Sailors
(2) City of Fresno's Motion for Summary Judgment, or in the Alternative for Summary Adjudication
(3) Future Farmers of America's Motion for Summary Judgment as to Timothy Sailors' First Amended Complaint
(4) Future Farmers of America's Motion for Summary Judgment, or alternatively for Summary Adjudication, of SMG Holdings, Inc. and City of Fresno's First Amended Cross-Complaint

Tentative Ruling:

(1) SMG Holdings, Inc.'s Motion for Summary Judgment, or in the Alternative for Summary Adjudication – To grant summary judgment in favor of SMG and against plaintiff Timothy Sailors and Reef Sunset Unified School District on their respective complaints. (Code Civ. Proc. § 437c(c).)

(2) City of Fresno's Motion for Summary Judgment, or in the Alternative for Summary Adjudication – To grant summary judgment in favor of SMG and against plaintiff Timothy Sailors and Reef Unified School District on their respective complaints. (Code Civ. Proc. § 437c(c).)

(3) Future Farmers of America's Motion for Summary Judgment as to Timothy Sailors' First Amended Complaint – To grant. (Code Civ. Proc. § 437c(c).)

As to the first three motions, the prevailing parties are directed to submit to this court, within 5 days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

(4) Future Farmers of America's Motion for Summary Judgment, or alternatively for Summary Adjudication, of SMG and City of Fresno's First Amended Cross-Complaint – To continue to November 30, 2016, at 3:30 p.m. in Department 503.

Explanation:

SMG and City's Motions for Summary Judgment, or in the Alternative for Summary Adjudication

In his First Amended Complaint Plaintiff Timothy Sailors seeks to recover for personal injuries he sustained in a fall at the O Street parking lot of the Fresno Convention & Entertainment Center, owned by the City of Fresno ("the City") and operated by SMG Holdings, Inc. ("SMG"), while attending a Future Farmers of America ("FFA") convention. Sailors' claims are for negligence and premises liability. Sailors' employer Reef Sunset Unified School District ("Reef") asserts the same claims, seeking to recover from SMG and the City the money it has paid in workers' compensation benefits to Sailors. Reef has not filed any response to the motion.

The motions by SMG and the City are brought on the same grounds and are based on the same facts, and accordingly will be discussed together. They contend that the defect on which Sailors alleges he tripped was a trivial defect as a matter of law. The court agrees.

The elements of negligence are duty, breach, causation and damages. (McGarry v. Sax (2008) 158 Cal App 4th 983, 994.) Plaintiffs have the burden of proof as to each essential element. (Ortega v. Kmart Corp. (2001) 26 Cal.4th 1200, 1205.) Premises liability is a more particularized type of negligence, and requires plaintiffs offer evidence of a dangerous condition of property. (Stathoulis v. City of Montebello (2008) 164 Cal.App.4th 559, 566.) To sustain a cause of action for an unsafe condition of property California law requires that it be established that: (1) a condition of the property created an unreasonable risk of harm and (2) the owner or possessor of the land knew or should have known about that condition. (Ortega, supra, 26 Cal.4th 1200, 1206; Moore v. Wal-Mart Stores, Inc. (2003) 111 Cal.App.4th 472, 479.) This is an element of a claim against a public entity as well. (Stathoulis, supra, 164 Cal.App.4th at p. 566.)

The law imposes no duty on a landowner—including a public entity—to repair trivial defects, or "to maintain [its property] in an absolutely perfect condition." (Ursino v. Big Boy Restaurants (1987) 192 Cal.App.3d 394, 398–399, 237 Cal.Rptr. 413 (Ursino).) "[A] property owner is not liable for damages caused by a minor, trivial or insignificant defect in property." (Caloroso v. Hathaway (2004) 122 Cal.App.4th 922, 927, 19 Cal.Rptr.3d 254 (Caloroso).) Some defects are bound to exist even in the exercise of reasonable care in the maintenance of property and cannot reasonably be expected to cause accidents. (Johnson v. City of Palo Alto (1962) 199 Cal.App.2d 148, 151, 18 Cal.Rptr. 484 (Johnson), superseded on other grounds by statute as stated in Brown v. Poway Unified School Dist. (1993) 4 Cal.4th 820, 831, 15 Cal.Rptr.2d 679, 843 P.2d 624.) (Stathoulis v. City of Montebello (2008) 164 Cal.App.4th 559, 566, emphasis added.)

The trivial defect doctrine negates both the element of dangerousness of the defect and the element of notice. (Barone v. City of San Jose (1978) 79 Cal.App.3d 284, 289-290.) "Obviously a defect that is too 'minor, trivial or insignificant,' as a matter of law, to be dangerous could hardly impart notice of its dangerous character." (Id. at

pp. 290.) Whether a defect is trivial is a question of law if reasonable minds can reach only one conclusion. (*Zelig v. County of Los Angeles* (2002) 27 Cal.App.4th 1112, 1113.)

Cases involving trivial defects apply the same standards when dealing with parking lots or sidewalks, since they both involve pedestrians using foreseeable walkways. (See *Stathoulis*, supra, 164 Cal.App.4th 559 at fn.2.)

In cases involving no other contributing factors, defects of a magnitude greater than 1/2 inch were deemed trivial. (See *Barrett*, supra, 41 Cal.2d at pp. 74-75 [3/4 to 1-1/2 inch].) "... [W]here a sidewalk slab is raised in elevation by only about three-fourths of an inch, such a 'defect' is not dangerous as a matter of law. ... It is to be noted that when the size of the depression begins to stretch beyond one inch the courts have been reluctant to find that the defect is not dangerous as a matter of law." (*Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, emphasis added.)

Here, what plaintiffs allege to be a "large pothole" is irregular-shaped with dimensions of about 30 inches diagonally by 12.5 to 13 inches wide. Sailors' investigator Robert Hampson measured it to be 1/4 to 3/8 inch deep (plus or minus 1/8 to 1/16 inch). (UMF 15-18.) The professional engineer relied on by defendants measures it to be between 1/4 inch to no more than 1/2 inch deep. (UMF 19-24.) Michael Mayda, a human visibility and photogrammetry expert, measured it to be 1/8 inch to 3/16 inch deep. (UMF 25-27.) Based on these measurements, the descriptions of the defect, and the photographs of the defect submitted in support of an in opposition to the motion, the court finds that as a matter of law this defect is trivial. Sailors offers evidence of one measurement of 13/16 inch deep. (Plaintiff's Additional Material Fact ["AMF"] 56, 57.) This measurement appears to be of the deepest crevice of the defect (Moore Dec. Exh. B), which would largely be irrelevant because no could fit in such a crevice. But even viewing the evidence in the light most favorable to the plaintiffs and accepting the defect to be 13/16 inch deep at some point, a defect of such depth is still trivial as a matter of law.

However, Sailors also contends that the lighting of the parking lot was inadequate. If there are aggravating circumstances an otherwise trivial defect may be dangerous: "where the defect goes beyond a mere depression between two adjoining slabs and consists of potholes, jagged breaks and cracks or also contains the presence of foreign substances such as grease and oil, then it can not be said that the defect is trivial and minor as a matter of law." (*Felder*, supra, at p. 726.) While the shape is irregular and edges jagged, these characteristics are not sufficient to elevate the defect to a dangerous one due to the minor elevation difference at the edges.

Lighting and prior injuries to others are other factors that come into play. (*Kasparian v. AvalonBay Communities* (2007) 156 Cal.App.4th 11, 27.) There was one prior injury, but it involved a different defect in a different area of the parking lot farther away from the light pole. (UMF 55-61.)

The recommended lighting standard for the parking lot is 0.2 foot-candle. (*Newman* Dec. ¶ 39.) This is confirmed by the document relied on by Sailors' expert Moore. On page 22-22, chart 22-21 for "Recommended Maintained Illuminance Values

for Parking Lots" notes the "basic" level of lighting is 0.2 foot-candle "for typical conditions." For "Enhanced Security," it notes that minimum lighting should be 0.5 foot-candle where personal security or vandalism is likely to be a severe problem. Under the circumstances of this parking lot, the 0.2 foot-candle standard should apply. Moore also opines that the standard is 0.5 foot-candle because that is what is specified in the City of Fresno Parking Manual. But that manual was published in 1987, and the parking lot was constructed in the early 1960s. Per the declaration of Bruce Rudd, the City Manager, the manual does not apply to parking lots constructed before the manual was issued. (Rudd Dec. p. 2.)

Sailors infers from the fact that SMG has no documentation to prove when the lights were turned on, that they were not on when he fell. However, Sailors himself admitted that the light was on when he arrived in the parking lot. (See SMG/City Exh. 7, T. Sailors Depo. 230:10-24 [stating that the light "wasn't very bright"]; 238:9-12 [testifying that the light was on].) Sailors cannot now try to create a triable issue of facts by speculating that it was off. And no witness has testified that the lights were warming up when Sailors fell.

Moore observed at his test on August 3, 2016, that the lights took seven minutes to reach peak brightness. He inferred that the low illuminance foot-candle readings he obtained during his inspection might have existed under the circumstances of five bulbs warming up. But he never even measured with less than 10 bulbs working. Expert opinions based on assumptions of fact without evidentiary support have no evidentiary value. (Pacific Gas & Electric Co. v. Zuckerman (1987) 189 Cal.App.3d 1113, 1135.) Plaintiffs have the burden of producing admissible evidence that creates a triable issue of fact, but has not met this burden.

Sailors also contends that the ownership and operation of the lot fell below industry standards, based on the lack of testing and maintenance of the lighting conditions, lack of inspections, lack of policies on trip hazards. But if the defect is trivial as a matter of law, the degree of diligence of the defendants in preventing accidents is inconsequential.

Finally, the court will address the evidentiary objections. All of Sailors' objections to the evidence and the moving parties' separate statements are overruled. The court declines to rule on the 195 pages of objections submitted by SMG, and 198 pages submitted by the City. The objections are clearly excessive. (See Reid v. Google, Inc. (2010) 50 Cal.4th 512, 532.) The court did peruse the objections and saw none that have merit. Additionally, since the motion would be granting even without excluding any evidence, the ruling on the objections is not necessary. (Code Civ. Proc. § 437c(q).)

Future Farmers of America's Motion for Summary Judgment as to Sailors' First Amended Complaint

Future Farmers of America ("FFA") moves for summary judgment, not on the ground the defect was trivial, but on the ground that it did not own, possess or control

the property where the accident occurred. Summary judgment should be granted on this ground.

Whether a defendant is under a duty of care is a question of law. (Ballard v. Uribe (1986) 41 Cal.3d 564, 572-573, fn. 6.) "Proof of a legal duty of care is a necessary element for causes of action for premises liability." (Salinas v. Martin (2008) 166 Cal.App.4th 404, 411.) In order to establish premises liability on a negligence theory, plaintiff must prove: (1) duty; (2) breach; (3) causation; and (4) damages. (Ortega v. Kmart Corp. (2011) 26 Cal.4th 1200, 1205.) Summary judgment may properly be granted in a premises liability case where a defendant unequivocally establishes its lack of ownership, possession, or control of the property alleged to be in a dangerous or defective condition. (Gray v. America West Airlines, Inc. (1989) 209 Cal. App. 3d 76; Isaacs v. Huntington Memorial Hospital (1985) 38 Cal.3d 112.)

A landowner's duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or controlled by the landowner. Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury off-site.

(Barnes v. Black (1999) 71 Cal.App.4th 1473, 1478, emphasis added.)

It is undisputed that FFA did not own the parking lot. Nor is there any evidence that FFA possessed the parking lot. FFA entered into a Use License Agreement pursuant to which it paid for use of Selland Arena and Valdez Hall. It did not pay rent. (UMF 9, 11, 17.) A lease is a nonpossessory right to use property specified between the parties. (Qualls v. Lake Berryessa Enterprises, Inc. (1999) 76 Cal.App.4th 1277, 1283, 1284.)

FFA and Sailors disagree about whether the parking lot was an "Authorized Area" under the ULA. The court agrees with FFA. The Use License Agreement ("ULA") specifically identifies the "Authorized Areas" in Exhibit A thereto, and the parking lot is not one of them. The fact that the agreement allows FFA ingress and egress to the Authorized Areas does not mean that FFA had possession or control of areas through which patrons might pass to reach the Authorized Areas. The UCLA is clear that FFA held only a license to use Selland Arena and Valdez Hall under a non-possessory license for a limited period of time – about one week. Any member of the public could use the parking lot during the FFA convention. FFA had no right to exclude anyone from the parking lot. SMG staff controlled the parking lot kiosks and FFA had no right to interfere with that control. (UMF 20, 21, 23, 27.) FFA had no right to maintain the parking lot, make repairs, or deploy staff to the parking lot. Rather, those were all rights and responsibilities reserved to SMG.

The opposition relies heavily on the issuance of parking passes by FFA. However, FFA's only connection to the parking lot was the option for student advisors to pay in advance parking fees charged by SMG in advance of the conference, and issuance of a parking pass. (UMF 28.) SMG retained all moneys charged for the parking passes as required by the ULA. (UMF 29, 31.) The option to pre-pay for parking was offered to FFA attendees to assist SMG and the City of Fresno alleviate traffic problems. (UMF 30.)

The court finds *Firpo v. SMG* (E.D. Cal. 2012) 2012 WL 2994115, to be instructive. In that case the plaintiff was injured at a concert at Selland Arena put on by Outback Concerts of Tennessee, Inc. Like FFA here, Outback entered into a license agreement for use of certain areas of the FCEC for the concert. SMG was obligated to supply and did supply staff for the performance, including ticket takers, ushers and security. At no time prior to or during the Concert did anyone connected with or employed by Outback alter, modify or maintain the FCEC premises. Outback was not responsible at any time for the hiring, training, or supervision of employees of SMG, or the Center, all of whom were provided by SMG. Asserting negligence and premises liability claims, the plaintiff claimed that defendants, including Outback, negligently owned, maintained, managed and operated the Selland Arena where the Concert took place. (Id. at *1.)

The district court granted summary judgment in favor of Outback.

Here, it is undisputed that Outback did not own the Center. (Use License Agreement, p. 1, Doc. 53, Attach. 2, Ex. A.) It is undisputed that Outback was not authorized to exercise any control, including but not limited to maintenance, staffing or repairs over the Center on the night of the Concert. (Undisputed Fact No. 6–7, Doc. 53, Attach. 3.) No evidence has been presented the Outback contractually undertook to control the premises. No evidence has been presented demonstrating any degree of control by Outback over the Center on the night of the Concert. (Undisputed Fact No. 6–7, Doc. 53, Attach. 3.) See also, *Sassoon v. KLM Royal Dutch Airlines*, 91 F.3d 154 (9th Cir.1996) (“We ... continue the rule that control over premises is necessary before one owes a duty to protect those coming upon the premises. Because [plaintiff] failed to introduce evidence sufficient to create a genuine issue of material fact regarding control, the district court properly granted summary judgment in favor of [the defendant].”)

Arguably, Outback had a technical possessory interest in the Center on the night of the Concert under the terms of the Use License Agreement. However, “premises liability is predicated upon the concept that possession includes the attendant right to manage and control, justifying liability when one has failed to exercise due care in property management.” *Seaber v. Hotel Del Coronado*, 1 Cal.App.4th 481, 2 Cal.Rptr.2d 405 (1991). Here, the undisputed evidence before the Court demonstrates Outback lacked the “crucial element of control” over the Center and, as such, Outback had no duty to exercise reasonable care to prevent injury at the Center. Id. Plaintiff has failed to offer evidence indicating Outback had any degree of control over the Center. Accordingly, and as a matter of law, Outback had no duty to Plaintiff. Thus, there is no genuine issue of material fact with respect to Plaintiff's negligence claims against Outback.

(Id. at *3.)

Sailors' claim in this case is even weaker than that of the plaintiff in *Firpo*. In that case, the harm occurred within the licensed area. Here, the accident occurred outside the licenses area in a parking lot.

It is undisputed that FFA did not possess or control the parking lot. Rather, SMG had the obligation to maintain the parking lot, make repairs, or deploy staff to manage the parking lot. The printing and distribution of the parking passes does not change this. SMG retained all monies charged for the parking passes. There is no evidence that FFA had contractual or actual control over the parking lot or the parking lot lighting. Where there is no control over the premises, there is no duty to exercise reasonable care to prevent injury. (*Hamilton v. Gage Bowl, Inc.* (1992) 6 Cal.App.4th 1706, 1711.)

Sailors points out that a duty is properly imposed "where the defendant passively encourages its customers to use a parking lot, and where their business was itself the attraction" for customers. (*Southland Corp. v. Superior Court* (1998) 203 Cal.App.3d 656, 667.)

In *Southland*, the Court of Appeal concluded that there were triable issues of fact concerning whether a store owner, having an easement over adjacent land and allowed its customers to park on the land in order to gain access to the store, had a sufficient degree of control over that land, on which the plaintiff was criminally assaulted, in order to justify the imposition of a duty on the store owner to keep the premises safe for users of the property. The court noted that although the critical issue for imposition of a duty is control over premises, the concept of control as developed in case law has been somewhat elastic and "the exercise of control is not necessarily confined to those premises which are owned or possessed by the defendant." (*Id.* at p. 665, fn. 6.) Triable issues remained over the extent of the store owner's control over the adjacent lot, "so as to legally permit the imposition of a duty to those customers using the lot" (*id.* at p. 666), based on regular use of the adjacent lot for parking, authorization in the store lease for such parking, knowledge on the part of the store owner of the customers' regular use of the lot, and significant commercial benefit from the use of the lot. (*Id.* at p. 667.) In addition, the store owner was on notice that loitering and fighting went on both on the store premises and on the adjacent lot. (*Ibid.*)

Southland is distinguishable in a number of ways. There is no evidence that FFA had notice of the defect (which as noted above is trivial) of the parking lot, either as to the alleged "large pothole" or the lighting. The City owns the parking lot (UMF 3, 5), and SMG operates, inspects and maintains the parking lot in accord with its management agreement with the City. (UMF 6-8.) FFA was a licensee only of Selland Arena and Valedex Hall from 8 am to midnight for about one week (UMF 11), as opposed to the adjacent property owner in *Southland* with an easement for use of the parking lot on a permanent basis. Here, those who parked in the parking lot had to pay for the use, and the parking fees went to SMG, not FFA. (UMF 31.) And finally, SMG retained for itself control over the parking lot, including staffing, maintenance and repair.

The opposition's reference to section 3(a) of the ULA does not aid Sailors in creating a triable issue of fact. Again, that section provides: "Licensee acknowledges that Licensee has inspected the Facility and mat Licensee is satisfied with and has accepted the Facility in its present condition." (Use License Agreement § 3(a).) This does not impose any obligation or duty to inspect or ensure the condition of the premises. The agreement was effective 9/21/09, and the event where the injury occurred nearly four years later. The clause merely states that FFA inspected the facility at the time of execution of the lease agreement and in 2009 found it suitable for its use of the Authorized Areas (which did not include the parking lot) in at that time. The next subsection makes clear that SMG had the contractual obligation to maintain the facility in good order and repair. (Section 3(b).)

Note that with its reply FFA submitted objections to certain of the additional facts proffered by Sailors. These objection should be overruled, as evidentiary objections can only be made to the underlying evidence, not the facts contained within the separate statement. (See Cal. Rules of Court, Rule 3.1352, 3.1354.)

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(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** 10/18/16
(Judge's initials) (Date)

(28)

Tentative Ruling

Re: *Anzures v. Hunter*

Case No. 15CECG02640

Hearing Date: October 20, 2016 (Dept. 503)

Motion: By Plaintiff to Enforce Settlement Agreement.

Tentative Ruling:

To grant the motion to enter judgment against Defendant Robert Hunter. Counsel for Plaintiff shall provide a judgment consistent with the terms of the written settlement agreement within five court days of this hearing.

To deny the motion in all other respects.

Explanation:

[The Court notes that, as of October 18, 2016, no opposition to this motion appears in the Court's files.]

Plaintiffs seek to enforce a settlement agreement entered into on June 23, 2016 pursuant to Code of Civil Procedure §664.6. Under the terms of the written settlement agreement, the parties agreed that they would:

1. Sell the [subject] house.
2. Place the house on market forthwith.
- [¶¶]
8. All documents signed by all parties.
9. All parties will cooperate in effecting listing sale/other terms of this settlement.
10. Each party to bear own fees and cost and mediator fees.

According to the letter from the parties' broker, Ms. Caglia, Defendants have failed to vacate the premises as of the date of closing. (Exhibit B to Declaration of Russo.) Counsel for Plaintiff indicates that the premises are still not vacated. (Decl. of Russo, ¶18.)

Code of Civil Procedure §664.6 provides a summary procedure which allows, as relevant here, the Court to enter judgment pursuant to a written settlement agreement. If requested by the parties, in writing or otherwise, the Court can retain jurisdiction to enforce the agreement, but this does not appear to have been done here. There is a reference that the settlement is "pursuant" to Section 664.6, but enforcement and interpretation of the settlement agreement is reserved to the mediator via arbitration pursuant to Code of Civil Procedure §1280, et seq.

Therefore, the Court is limited to entering the judgment.

In order to have recourse to the summary entry of judgment procedures, the agreement must be signed by the parties. (Civ.Proc. §664.6.) However, a settlement must be signed by each party in order to be enforceable. Here, there is a signature by, apparently, Robert Hunter, who is signing on behalf of himself and his spouse, Ms. Amraiah Hunter. Mrs. Hunter's signature does not appear on the settlement agreement. A husband cannot sign a settlement agreement on behalf of their spouse. (Cortez v. Kenneally (1996) 44 Cal.App.4th 523, 529-30 (signature of husband "on behalf of" wife not enforceable against wife); Williams v. Saunders (1997) 55 Cal.app.4th 1158, 1163 (same).) Thus, the settlement is enforceable against Mr. Robert Hunter, but not against Mrs. Amraiah Hunter.

Further, in order to be enforceable, the writing must be sufficiently definite to enable courts to give the agreement an exact meaning. (Weddington Productions, Inc. v. Flick (1998) 60 Cal.App.4th 793, 810-812.) The terms of this settlement agreement appear to be sufficiently definite.

Therefore, the Court may enter judgment against Robert Hunter along the lines encompassed by the settlement agreement.

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 10/19/16**
(Judge's initials) (Date)