Tentative Rulings for January 22, 2025
Department 502

For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)

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

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

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 502

Begin at the next page

(03)

Tentative Ruling

Re: ***Castaneda v. General Motors, LLC***
Case No. 23CECG00786

Hearing Date: January 22, 2025 (Dept. 502)

Motion: Plaintiff's Motion for Leave to File First Amended Complaint

Tentative Ruling:

To grant plaintiff's motion for leave to file his first amended complaint. Plaintiff shall serve and file his first amended complaint within ten days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

Under Code of Civil Procedure section 473, subdivision (a)(1), "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code."

"'Code of Civil Procedure section 473, which gives the courts power to permit amendments in furtherance of justice, has received a very liberal interpretation by the courts of this state.... In spite of this policy of liberality, a court may deny a good amendment in proper form where there is unwarranted delay in presenting it.... On the other hand, where there is no prejudice to the adverse party, it may be an abuse of discretion to deny leave to amend.' 'In the furtherance of justice, trial courts may allow amendments to pleadings and if necessary, postpone trial.... Motions to amend are appropriately granted as late as the first day of trial ... or even during trial ... if the defendant is alerted to the charges by the factual allegations, no matter how framed ... and the defendant will not be prejudiced.'" (*Rickley v. Goodfriend* (2013) 212 Cal.App.4th 1136, 1159, citations omitted.) "Inexcusable delay in presenting a proposed amendment, however, constitutes grounds for denial of leave to amend." (*Young v. Berry Equipment Rentals, Inc.* (1976) 55 Cal.App.3d 35, 39, citations omitted.)

In the present case, plaintiff has shown good cause to allow him to amend his complaint, and there is not likely to be any prejudice to defendant if the amendment is permitted. Plaintiff, who purchased a used GM vehicle with a portion of the manufacturer's warranty intact, originally filed his complaint based on the Song-Beverly Act, relying on the holding of the Court of Appeal in *Jensen v. BMW of North America, Inc*. (1995) 35 Cal.App.4th 112. In *Jensen*, the Court of Appeal interpreted the Song-Beverly Act to apply to used motor vehicles sold with a portion of the original manufacturer's warranty intact. However, the California Supreme Court recently

handed down its decision in *Rodriguez v. FAC US, LLC* (2024) 17 Cal.5th 189, in which the Supreme Court disapproved *Jensen* and held that the Song-Beverly Act only applies to used motor vehicles where the manufacturer issues a new car express warranty with the sale of the used vehicle. (*Id*. at pp. 205-206.)

Thus, plaintiff's present causes of action under the Song-Beverly Act are apparently invalid under the Supreme Court's decision in *Rodriguez*, unless GM issued a new car warranty with the sale of plaintiff's vehicle. As a result, plaintiff needs to allege new facts and alternative theories of liability rather than relying on his Song-Beverly Act claims in order to avoid having his claims dismissed under *Rodriguez*. Plaintiff therefore seeks leave to amend to add new facts and causes of action based on other statutes and legal theories, including violation of the California Commercial Code regarding express and implied warranties, breach of the implied covenant of good faith and fair dealing, and violation of the Magnuson-Moss Act.

It appears that plaintiff has been diligent in seeking to amend his complaint, as the Supreme Court only recently announced its decision in *Rodriguez* at the end of October, and plaintiff filed his motion about six weeks later. Also, defendant has not filed any opposition or made any attempt to show that it would be prejudiced if the court grants leave to amend the complaint. While the proposed amendment does add new facts and causes of action, the new allegations and claims appear to be closely linked to the allegations that plaintiff has already made in the original complaint. Any new facts are also based on documents and other discovery that defendant itself produced, and thus defendant should not be prejudiced by having to complete additional discovery to learn the basis of the new claims. The court has also continued the trial date to June of 2025, so the parties should have enough time to complete any further discovery that might be needed to address plaintiff's new claims. Therefore, the court intends to grant the plaintiff's motion for leave to amend.

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

Tentative Ruling
Issued By: KCK on 01/21/25.
(Judge's initials) (Date)

(46)

Tentative Ruling

Re: ***Paula Ausherman v. City of Fresno***
Superior Court Case No. 24CECG03106

Hearing Date: January 22, 2025 (Dept. 502)

Motion: Demurrer by City of Fresno to Complaint of Paula Ausherman

Tentative Ruling:

To continue this motion to Wednesday, February 26, 2025, at 3:30 p.m. in Department 502. The parties are ordered to conduct a meet and confer session, in person or by telephone, at least 20 days prior to the hearing, since defendant has presented a declaration indicating that efforts to meet and confer have been insufficient. If the meet and confer resolves the issues, defendant shall call the calendar clerk to take the motions off calendar. If it does not resolve the issues, defendant shall file a declaration, on or before Wednesday, February 12, 2025 at 5:00 p.m. stating the efforts made.

Explanation:

The merits of the motion will not be dealt with at this time because the moving party did not sufficiently fulfill the meet and confer requirements for this type of motion prior to filing.

Code of Civil Procedure section 430.41 requires the party who is attacking the pleadings by way of demurrer to meet and confer in person or by telephone prior to filing the motions in order to determine if the parties can reach an agreement that would resolve the objections and avoid having to file the motion. Then, if these efforts do not result in reaching an agreement, the moving party must file a declaration, along with the moving papers, stating the means by which the parties met and conferred. The statute states that if the plaintiff failed to respond to the meet and confer request or failed to meet and confer in good faith, the declaration should state this, and this could excuse the defendant from the requirement. (Code Civ. Proc., § 430.41 subd. (a)(3).) Therefore, before the merits of demurrers are considered, the moving party must first have demonstrated that they fulfilled the meet and confer duties.

Here, defendant filed a declaration in which it is stated that defense counsel sent a "detailed meet and confer letter" to plaintiff's counsel via e-mail on September 13, 2024. (Tafarella Decl., ¶ 4.) Counsel states he concluded the letter by "requesting that counsel [for plaintiff] contact me or advise of his availability to discuss the matter." (*Ibid*.) Counsel received an e-mail response from plaintiff's counsel's firm indicating that plaintiff's counsel would be out of office until September 25, 2024. (*Id*., ¶ 5.) Defense counsel received no further response to his meet and confer letter. (*Id*., ¶ 6.)

These efforts were insufficient to satisfy the meet and confer requirement set out in section 430.41 of the Code of Civil Procedure. Counsel does not evidence any attempts to call plaintiff's counsel by phone, or follow up in any manner after September 25, 2024, the purported date of plaintiff's counsel's return to his office. The burden to meet and confer remains on the demurring party and does not transfer to the plaintiff by merely sending a letter requesting a response. Defense counsel has not demonstrated a good faith effort to meet and confer, and the efforts described are insufficient.

A determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer. (Code Civ. Proc., § 430.41 subd. (a)(4).) The failure to meet and confer is not a reason to overrule the demurrer, but also the failure to do so cannot then support that sustaining the demurrer is the correct decision. It is not a plaintiff's burden to meet and confer with a defendant prior to this motion, and the burden cannot be shifted to them if defendant's efforts are insufficient. It does not appear that defendant exerted sufficient efforts to meet and confer with plaintiff prior to filing its demurrer. The demurring party must comply with the meet and confer requirements prior to a ruling on the motion.

The court's normal practice in such instances is to take the motion off calendar, subject to being re-calendared once the parties have met and conferred. However, given the current congestion in the court's calendar, the court will instead continue the hearing to allow the parties to meet and confer, and only if efforts are truly unsuccessful will it rule on the merits. After such good faith attempts, defendant shall file a declaration specifically detailing the efforts made.

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

Tentative Ruling
Issued By: KCK on 01/21/25.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Amber Maxwell v. Community Regional Medical Center, et al.***
Superior Court Case No. 23CECG02776

Hearing Date: January 22, 2025 (Dept. 502)

Motion: by Defendant Joshua Joseph Jacober, M.D. for Summary Judgment

Tentative Ruling:

To grant defendant Joshua Joseph Jacober, M.D.'s motion for summary judgment as to the entire complaint. (Code Civ. Proc. § 437c.) Defendant shall submit a judgment consistent with the terms of this order within 10 days of service of the order.

Explanation:

"'Summary judgment is granted when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" (*Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 713, quoting § 437c, subd. (c).) To prevail in a motion for summary judgment, it is defendant's burden to prove there is a complete defense or that plaintiff cannot establish one or more elements of each of his causes of action. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.) To show that plaintiff cannot establish their claims, defendant may either (1) affirmatively negate one or more elements of each claim, or (2) by relying on plaintiff's inadequate discovery responses, show that plaintiff does not possess and cannot reasonably obtain needed evidence. (*Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826, 855.)

Additionally, ' "[w]hile a plaintiff who has pleaded several causes of action based on the same set of facts need sustain its burden of proof only on one of the theories in order to prevail at trial, a defendant who seeks a summary judgment must define all of the theories alleged in the complaint and challenge each factually.'" (*Lopez*, *supra*, 45 Cal.App.4th 705, 714, quoting, *Nazar v. Rodeffer* (1986) 184 Cal.App.3d 546, 55, abrogated on another point in *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1103.)

The ultimate burden of persuasion rests on defendant, as the moving party. The initial burden of production is on defendant to show by a preponderance of the evidence, that it is more likely than not that a given element cannot be established or that a given defense can be established. (*Aguilar*, *supra*, 25 Cal.4th at 850.)

If defendant carries this initial burden of production, the burden of production shifts to plaintiff to show that a triable issue of material fact exists. Plaintiff does this if they can show, by a preponderance of the evidence, that it is more likely than not that a given element can be established or that a given defense cannot be established. (*Aguilar*, *supra*, 25 Cal.4th at 850, 852.)

In determining whether plaintiff has met their burden of production, the court must evaluate the plaintiff's evidence independently. That is, the court may not weigh the plaintiff's evidence or inferences against the defendant's, as if the court were sitting as a trier of fact. If the plaintiff meets their burden, then the court must deny summary judgment, even if defendants have presented conflicting evidence. If the plaintiff meets their burden, a reasonable trier of fact could find for plaintiff and a triable issue of fact does exist for the jury to consider. (*Aguilar, supra,* 25 Cal.4th at 856-857.)

In determining whether any triable issues of material fact exist, the court must strictly construe the moving papers and liberally construe the declarations of the party opposing summary judgment. Any doubts as to whether a triable issue of material fact exist are to be resolved in favor of the party opposing summary judgment. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.)

Lastly, "[f]ailure to file opposition including a separate statement of disputed material facts by not less than 14 days prior to the motion 'may constitute a sufficient ground, in the court's discretion, for granting the motion.'" (*Cravens v. State Bd. of Education* (1997) 52 Cal.App.4th 253, 257, quoting Code of Civil Procedure § 437c(c).)

Summary Judgment Requiring Expert Opinion

Where a summary judgment motion is supported by an expert opinion, "the opposing party's burden is to produce competent expert opinion declarations to the contrary." (Weil & Brown, Civil Procedure Before Trial (TRG, 10:205.5, citing *Ochoa v. Pacific Gas & Elec. Co.* (1998) 61 Cal.App.4th 1480, 1487.) Considering the liberal construction allowed to the party opposing a summary judgment motion, "a reasoned explanation required in an expert declaration filed in opposition to a summary judgment motion need not be as detailed or extensive as that required in expert testimony presented in support of a summary judgment motion or at trial." (*Garrett v. Howmedica Osteonics Corporation* (2013) 214 Cal.App.4th 173, 189.) Ultimately, where the party moving for summary judgment rests on expert opinion, the opposing party can only defeat the motion by presenting "conflicting expert evidence." (*Hanson v. Goode* (1999) 76 Cal.App.4th 601, 606-607.)

Additionally, the court does not weigh competing expert testimony. (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 39.) Essentially, "the court cannot disregard [an expert] opinion solely because other, more qualified experts opine to the contrary." (Weil & Brown, Civil Procedure Before Trial (TRG, 2007) 10:272, citing *Mann*, *supra*, 38 Cal.3d at 39.)

Generally, "[t]he qualification of expert witnesses, including foundational requirements, rests in the sound discretion of the trial court." (*People v. Ramos* (1997) 15 Cal.4th 1133, 1175 citing *Huffman v. Lindquist* (1951) 37 Cal.2d 465, 476; cf. Evid. Code, § 802.) Essentially, "the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (Evidence Code § 801(b), 802; *Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 771-772.) This is consistent with the traditional

principle that an expert opinion, founded entirely on incompetent matter, can be rejected. (*Young v. Bates Valve Bag Corp*. (1942) 52 Cal.App.2d 86, 96; *County of Los Angeles v. King* (1972) 22 Cal.App.3d 916, 923.)

The trial court, however, must not weigh the probative value of the expert opinion. (*Sargon*, *supra*, 55 Cal.4th at 772; *Garrett v. Howmedica Osteonics Corporation* (2013) 214 Cal.App.4th 173, 186.) Accordingly, the court determines whether the expert is sufficiently qualified to proffer their opinion. (*Salasguevara v. Wyeth Labrotories, Inc*. (1990) 222 Cal.App.3d 379, 386 [the evidence failed to show whether expert based his opinion on his training, experience or skill].) Similarly, an expert opinion based on medical records not before the court does not support summary judgment. (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 742-743, see also *Petrou v. South Coast Emergency Group* (2004) 119 Cal.App.4th 1090, 1095 [an expert, though possessing 20 years of actual experience, but only six months of experience as measured by the date of trial, was unqualified to render an opinion under the 5 year "substantial professional experience" requirement of Health & Safety Code § 1799.110(c).)

Medical Malpractice

> The elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage.

(*Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 305 citing *Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606.)

In this case, Dr. Andrew Wittenberg, a board certified emergency medicine physician with extensive experience, relied upon the plaintiff's medical records and various discovery items to opine that Dr. Jacober, in his single encounter with decedent on May 19, 2022, neither breached the applicable standard of care nor caused injury to the decedent. (UMF Nos. 7, 14; Decl. of Andrew Wittenberg, M.D., ¶¶ 8-9.) Dr. Wittenberg's opinion is sufficient to shift the burden as to the existence of a triable issue to the plaintiffs. Plaintiffs, however, neither filed an opposition nor an opposing statement of material fact thus tacitly affirming the merits of defendant's motion. (*Cravens v. State Bd. of Education* (1997) 52 Cal.App.4th 253, 257.)

Therefore, the motion for summary judgment is granted.

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

Tentative Ruling
Issued By: KCK on 01/21/25.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Johnny Saldate v. David Wright***
Superior Court Case No. 23CECG05105

Hearing Date: January 22, 2025 (Dept. 502)

Motion: by Plaintiff to Allocate Policy Limits Settlement

Tentative Ruling:

To deny.

Explanation:

Plaintiff Johnny Saldate moves the court for an order allocating the policy limit settlement offered by defendant David Wright. The policy limit settlement appears intended to settle his claims as well as those of nominal defendant Christopher Garcia ("Garcia"). Plaintiff asserts the settlement should be allocated entirely to him as Garcia has failed to appear in this action, is in default, and the statute of limitations would otherwise bar his claim. (Burchfield Decl., ¶¶ 8-9.)

A party who is joined in a wrongful death action as a defendant under section 382 is only nominally a defendant. In reality, they are a plaintiff (*Watkins v. Nutting* (1941) 17 Cal.2d 490, 498; *Estate of Kuebler v. Superior Court* (1978) 81 Cal.App.3d 500, 503.) An heir named as a nominal defendant under section 382 but not served with a summons and complaint is not properly joined in the action, and accordingly is not a party to the action. (*Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 804.) It is improper to enter a default against a nominal defendant joined under section 382. (*Watkins v. Nutting* (1941) 17 Cal.2d at pp. 498-499.)

There is no proof of service of the summons and complaint on Garcia filed with the court. Thus, he has not yet been joined as a party to this action. Moreover, although named a "nominal defendant" he is considered a plaintiff and cannot be in default. (*Watkins v. Nutting*, *supra*, 17 Cal.2d at pp. 498-499.) Garcia also was not given notice of the motion at bench. As there is no evidence that Garcia has notice of this action or this motion seeking to affect his rights to a settlement fund, the motion is denied.

Moreover, the motion is premised as though defendant has reached a settlement with all heirs named in the action and the heirs have not agreed on the apportionment of the funds. The plaintiff has presented authority to support the court apportioning the settlement in such circumstances. However, these are not the factual circumstances of this action. The defendant has offered his policy limits to plaintiff and plaintiff appears to have accepted. The release included nominal defendant Garcia as a signatory and he has not signed. (Burchfield Decl., ¶ 2.) Garcia is not a participant in the settlement reached between plaintiff and defendant. Accordingly, the court does not have jurisdiction to allocate the settlement funds as requested.

Where a plaintiff and defendant(s) who are joined under section 382 participate in a lump sum settlement, the court has jurisdiction to apportion the settlement proceeds. (*Changaris v. Marvel* (1964) 231 Cal.App.2d 308, 313, disapproved of on other grounds by Corder v. Corder (2007) 41 Cal.4th 644.) Alternatively, a defendant in a wrongful death case can settle the case with fewer than all the claimants, as appears to have been done here. (*Smith v. Premier Alliance Ins. Co.* (1995) 41 Cal.App.4th 691,698.) Such a settlement will not terminate the action: the nonsettling claimants (i.e., including nominal defendants) have no right to share in the settlement proceeds, but they may continue to pursue the action against defendant. "By settling with less than all of the known heirs, the defendant waives the right to face only a single wrongful death action and the nonsettling heirs may continue to pursue the action against the defendant. *This remains true even if the non-settling heirs are nominally defendants in the case*." (*Ibid*, emphasis added, citations omitted; see also *Estate of Kuebler v. Superior Court*, *supra*, 81 Cal.App.3d 500, 504-505.)

Defendant can settle the action with plaintiff alone and the action would proceed as to nominal defendant Garcia alone if he is joined as a party to this action. (*Smith v. Premier Alliance Ins. Co., supra,* 41 Cal.App.4th 691, 698.)

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

Tentative Ruling
Issued By: KCK on 01/21/25.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Joey Vargas v. Ann Greene***
Superior Court Case No. 24CECG00165

Hearing Date: January 22, 2025 (Dept. 502)

Motion: Defendant's Motion to Strike the First Amended Complaint

Tentative Ruling:

To grant the motion to strike the first amended complaint, with leave to amend. Should plaintiff desire to amend, a Second Amended Complaint may be filed within ten (10) days from the date of this order. The new amendments shall be in **bold print**.

Explanation:

This court's ruling on defendant's demurrer specified that the original complaint "fail[ed] to specify the exact alleged defamatory statements and thus fail[ed] to inform defendant of the claims she must defend." (See Ruling, Sept. 18, 2024.) At no point did plaintiff request, nor did the court grant, leave to expand the scope of plaintiff's claim beyond defamation. Yet, plaintiff's first amended complaint neither contains a cause of action for defamation nor does it remotely allege false publications. Consequently, because it appears to impermissibly exceed the scope of amendment, the first amended complaint is "not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (Code Civ. Proc., § 436, subd. (b).) Therefore, the motion to strike the first amended complaint is granted.

Once a pleading is stricken, the court must proceed to determine whether leave to amend should be granted. (*Vaccaro v. Kaiman* (1998) 63 Cal.App.4th 761, 767.) "When the defect which justifies striking a complaint is capable of cure, the court should allow leave to amend." (*Ibid*.) In this case, assuming plaintiff can succinctly frame the allegations into a viable cause of action, amendment should be permitted.

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

Tentative Ruling
Issued By: KCK on 01/21/25.
(Judge's initials) (Date)