Tentative Rulings for January 23, 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

(20) **Tentative Ruling**

Re: ***Ballance v. Gordon Industrial Supply Company***
Superior Court Case No. 24CECG01526

Hearing Date: January 23, 2025 (Dept. 502)

Motion: Motion to Strike

Tentative Ruling:

To grant and strike from the Second Amended Complaint ("SAC") the punitive damages allegations at SAC 9:13-22, 11:5-14, 12:14-2314:8-1715:13-1717:6-7, 17:8-9. To deny the remainder of the motion. (Code Civ. Proc., § 436.) Plaintiff is granted 10 days' leave to file a third amended complaint, to run from service of the order by the clerk. All new allegations shall be in **boldface** type.

Explanation:

"The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading, (b) Strike out all or any part of any pleading 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.) A motion to strike may be used to remove a claim for punitive damages that is not adequately supported by the facts alleged in the complaint. (*Cryolife, Inc. v. Superior Court* (2003) 110 CalApp.4th 1145; *Kaiser Foundation Health Plan, Inc. v. Superior Court* (2012) 203 Cal.App.4th 696.)

Civil Code section 3294, subdivision (a) provides:

> In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

Civil Code section 3294 was amended in 1987 to require a showing of despicable conduct as a predicate to the recovery of punitive damages. "Despicable conduct" is defined as conduct that is so vile, base or contemptible that it would be looked down on and despised by reasonable people."

> Used in its ordinary sense, the adjective "despicable" is a powerful term that refers to circumstances that are "base," "vile," or "contemptible." (4 Oxford English Diet. (2d ed. 1989) p. 529.) As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, "malice" requires more than a "willful and conscious" disregard of the plaintiffs' interests. The additional component of "despicable conduct" must be found. (Accord, BAJJ No. 14.72.1 (1992 Re-Rev.)); *Mock v. Michigan Miliers Mutual ins. Co.* (1992) 4 Cal.App.4th 306, 331.)

(*College Hospital, Inc., v. Superior Court of Orange County* (1994) 8 Cal.4th 704, 725.)

The addition of the criterial adjective "despicable" was a significant substantive limitation on the recovery of punitive damages (along with the elevation of the burden of proof), as it is a "powerful term." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725.) On the continuum of conduct, it is toward the extreme, eliciting adjectives such as vile or base and rousing the contempt or outrage of reasonable people. (*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1050-1051.)

Not every case of alleged FEHA retaliation or wrongful termination demonstrates fraud, oppression, or malice giving rise to a punitive damages claim. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 620.) Accordingly, merely pleading a statutory violation sufficient to support a cause of action under FEHA, for wrongful termination in violation of public policy, or for an intentional tort is not sufficient to show malice or oppression for punitive damages. (*Ibid.*; *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166.)

In *Fisher*, a defendant hospital retaliated against a doctor because he filed a FEHA complaint reporting sexual harassment. (*Id*. at p. 601-602, 617.) Shortly after engaging in those protected activities, the hospital refused to renew the plaintiff's lease, leaving the office vacant for an extended period. (*Id*. at pp. 601-602.) The court held that punitive damages were unavailable to the plaintiff because the hospital's conduct did not amount to oppression or malice. (*Id*. at p. 620.) It reasoned that the facts pled fell short of showing systemic behaviors demonstrating an evil motive. (*Ibid*.; cf., *Mange v. Superior Court* (1986) 176 Cal.App.3d 503, [where a plaintiff's pleading of facts demonstrating systemic retaliation and sexual harassment resulting in hospitalization was sufficient to overcome a motion to strike punitive damages].)

While systemic violations and conduct is not necessarily needed, the mere existence of causes of action for FEHA violations does not support a punitive damages claim. Here, while plaintiff alleges that she suffered a prior "traumatic event" for which she needed occasional time off, she does not allege that she was not given all the time off she needed. The claim for punitive damages appears to arise solely from plaintiff's employer's response to plaintiff suing her co-worker. According to plaintiff, she borrowed the co-worker's car and got in an accident a result of "an unsafe vehicle's brake failure." (SAC ¶ 17.) It is not clear whether the co-worker's vehicle that plaintiff borrowed was the one with brake failure. In any case, plaintiff filed a personal injury suit against the co-worker in March of 2023, and after that her employer started acting aggressively towards plaintiff. (SAC ¶¶ 17, 18.) The claim for punitive damages appears to stem primarily from the 3/31/23 incident with defendant's owner "Mr. Hoffman", which plaintiff describes as malicious, horrific, and intimidating. (SAC ¶¶ 19, 20.) The punitive damages allegations are also based on plaintiff's 4/3/23 complaint by email about the 3/31/23 interaction, calling for an investigation. (SAC ¶ 20.) Mr. Hoffman responded by the email suggesting plaintiff cease her employment in exchange for severance. (SAC ¶ 20.) Also on 4/3/23 plaintiff informed Mr. Hoffman that her doctor placed her off work for three days "due to the March 31, 2023 incident exacerbating Plaintiff's pre-existing trauma." (SAC ¶ 21.) Mr. Hoffman approved this time off. Thus, the SAC's allegations show, as pointed out in the reply, that defendant at all times accommodated plaintiffs needs for time off. Then on

4/6/23 plaintiff informed Mr. Hoffman that her doctor extended her time off, and instead of responding to plaintiff's leave request, she was terminated. Mr. Hoffman stated she was being terminated "for cause," but plaintiff later "discovered that Mr. Hoffman falsely claimed that Plaintiff attempted to use a metal tool as a weapon against a co-worker as the cause for her termination." (SAC ¶ 22.)

What it comes down to is the employer's termination of plaintiff for suing a co-worker, an uncomfortable and intimidating conversation, the "false imprisonment" allegation (which is too vague to support the punitive damages claim), and pretextual termination.

The court finds these facts insufficient to claim punitive damages. Viable FEHA causes of action alone are not enough. The "false imprisonment" might tip the balance in plaintiff's favor, but the allegations in this regard are entirely vague. Plaintiff doesn't allege how long or in what manner the doorway was blocked. It could have been for half a second as he Mr. Hoffman walked in front of plaintiff.

Defendant next moves to strike the alter-ego allegations. (See SAC at ¶¶ 9-12.)

In *Leek v. Cooper* (2011) 194 Cal.App.4th 399, a complaint's alter-ego allegations were insufficient where the complaint alleged: "(1) that the plaintiffs were employed by Auburn Honda and Jay Cooper; (2) that Auburn Honda is a corporation; (3) that "Defendant Cooper is the sole owner of AUBURN HONDA, owning all of its stock and making all of its business decisions personally[;]" and (4) that all defendants were "the agents, servants and employees of their co-defendants, and in doing the things hereinafter alleged were acting within the scope and authority as such agents, servants and employees and with the permission and consent of their co-defendants. All of said acts of each of the Defendants were authorized by or ratified by their co-defendants." (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 415.) "These allegations neither specifically alleged alter ego liability, nor alleged facts showing a unity of interest and inequitable result from treatment of the corporation as the sole actor. Furthermore, although plaintiffs alleged Cooper was the employer, the complaint contains no allegations that he should be held liable for the corporation's wrongdoing. The essence of the alter ego doctrine is not that the individual shareholder becomes the corporation, but that the individual shareholder is liable for the actions of the corporation." (*Ibid.*)

What is alleged here is really no different than what is typically alleged and goes unchallenged in countless complaints. "It is not … essential … that the *alter ego* doctrine always be specifically pleaded in the complaint in order for it to be applied in appropriate circumstances." (*First Western Bank & Trust Co. v. Bookasta* (1968) 267 Cal.App.2d 910, 915.) "[T]he courts have followed a liberal policy of applying the alter ego doctrine where the equities and justice of the situation appear to call for it rather than restricting it to the technical niceties depending upon pleading and procedure." (*Ibid.*)

A plaintiff is "required to allege only 'ultimate rather than evidentiary facts.'" (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 236, quoting *Doe v. City of Los Angeles (*2007) 42 Cal.4th 531, 550.) As plaintiff points out, "the 'less particularity [of pleading] is required where the defendant may be assumed to possess

knowledge of the facts at least equal, if not superior, to that possessed by the plaintiff, which certainly is the case" in the context of alter-ego allegations in a complaint. (*Id.* at p. 236, quoting *Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463, 474.)

Here, the SAC pleads ultimate facts, that DOES 1-50 dominated and controlled Defendant, that a unity of interest and ownership existed between all defendants; that Defendant is a mere shell and conduit for DOES 1-50's affairs; that Defendant failed to abide by the formalities of corporate existence; that DOES 1-50 used Defendant's assets as their own; that Defendant and DOES 1-50's were segregated to appear as though separate for purposes of perpetrating a fraud, circumventing a statute, or accomplishing some other wrongful or equitable purpose; that DOES 1-50 personally direct and participate in the fraudulent and unlawful conduct, and hide behind Defendant to insulate themselves from liability for the fraudulent and unlawful conduct; and that the assets and debts of all DOES 1-50 and Defendant are intermingled and cannot be segregated. (SAC at ¶¶ 9-12.) This is sufficient at the pleading stage.

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)

(20) **Tentative Ruling**

Re: ***Torres v. UAG Clovis, Inc.***
Superior Court Case No. 24CECG01226

Hearing Date: January 23, 2025 (Dept. 502)

Motion: By Defendants to Compel Arbitration

Tentative Ruling:

To grant and compel plaintiff to arbitrate his claims through National Arbitration and Mediation. The action is stayed pending completion of arbitration.

Explanation:

Defendants move to compel arbitration of plaintiff's claims in this action alleging fraud and violations of the Consumers Legal Remedies Act, Unfair Competition Law, and the Vehicle Code.

A trial court is required to grant a motion to compel arbitration "if it determines that an agreement to arbitrate the controversy exists." (Code Civ. Proc., § 1281.2) However, there is "no public policy in favor of forcing arbitration of issues the parties have not agreed to arbitrate." (*Garlach v. Sports Club Co.* (2012) 209 Cal.App.4th 1497, 1505.) Thus, when a motion to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine: (1) whether the agreement exists, and (2) if any defense to its enforcement is raised, whether it is enforceable. The moving party bears the burden of proving the existence of an arbitration agreement by a preponderance of the evidence. The party claiming a defense bears the same burden as to the defense. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413-414.)

It is undisputed that an agreement to arbitrate exists in this case. While plaintiff argues that arbitration through the American Arbitration Association ("AAA") would be unconscionable due to AAA's limitations on discovery, plaintiff does not seek denial of the motion on this ground. Rather, plaintiff requests that the court order the arbitration to proceed through JAMS.

Regarding the arbitration forum, the arbitration agreement provides, "You or we may choose the American Arbitration Association (www.adr.org) or National Arbitration and Mediation (www.namadr.com) as the organization to conduct the arbitration. If you and we agree, you or we may choose a different arbitration organization. You may get a copy of the rules of an arbitration organization by contacting the organization or visiting its website."

The entire basis of plaintiff's unconscionability argument is that AAA does not provide adequate discovery. Plaintiff may not, however, insist on arbitration through JAMS, as pursuant to the agreement, arbitration must be through AAA or National Arbitration and Mediation ("NAM") unless the parties agree on a different organization.

In light of the fact that neither party has expressed any objection to arbitrating through NAM (and it would be improper and untimely for plaintiff to raise any such objection at this point), the court will order the parties to arbitrate through NAM.

Plaintiff also argues that defendants waived the right to seek to compel arbitration by virtue of their delay in filing the motion. This argument clearly lacks merit.

A party may waive the right to compel arbitration by engaging in conduct indicating an intentional relinquishment or abandonment of a known right.'" (*Morgan v. Sundance, Inc*. (2022) 142 S. Ct. 1708, 1713.) The law favors arbitration, and waiver will not be "lightly inferred." The party claiming the other waived the right to arbitrate "bears a heavy burden of proof." (*Saint Agnes Med. Ctr. v. PacifiCare of Calif*. (2003) 31 Cal.4th 1187, 1195.)

It appears that where the waiver is based on litigation-related activity, the judge and not the arbitrator decides the waiver issue. (See Cal. Prac. Guide Alt. Disp. Res. (TRG 2022) ¶ 5:169.) Under the FAA, waiver does not include a prejudice requirement. (*Morgan, supra,* at p. 1714.)

The simple fact that defendants were served in June of 2024 and filed the motion to compel arbitration in October of 2024 is entirely inadequate to show waiver. While defendants filed an answer on 6/13/24, plaintiff filed a First Amended Complaint on 8/12/24. Defendants filed their answer to the FAC on 9/19/24. They then promptly filed the motion to compel arbitration on 10/15/24, which is an entirely reasonable timeframe. Plaintiff does not show or argue that defendants engaged in any litigation activity taking advantage of this judicial forum prior to seeking to compel arbitration. There are no facts supporting a finding of waiver.

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)

(37)

Tentative Ruling

Re: ***Tracy Harmon v. Ron Lichtenstein, M.D.***
Superior Court Case No. 23CECG01106

Hearing Date: January 23, 2025 (Dept. 502)

Motion: By Defendant Fresno Community Hospital and Medical Center for Summary Judgment, or in the Alternative, Adjudication

Tentative Ruling:

To grant defendant Fresno Community Hospital and Medical Center's Motion for Summary Judgment. (Code Civ. Proc., § 437c(c).) Moving party is 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.

Explanation:

As the moving party, defendant bears the initial burden of proof to show that plaintiffs cannot establish one or more elements of their cause of action or to show that there is a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2).) Only after the moving party has carried this burden of proof does the burden of proof shift to the other party to show that a triable issue of one or more material facts exists – and this must be shown via specific facts and not mere allegations. (*Id.*)

Where the moving party produces competent expert opinion declarations showing that there is no triable issue of fact on an essential element of the opposing party's claim (e.g. that a medical defendant's treatment fell within the applicable standard of care), the opposing party's burden is to produce competent expert opinion declarations to the contrary. (*Ochoa v. Pacific Gas & Elec. Co.* (1998) 61 Cal.App.4th 1480, 1487.)

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. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.) Any doubts as to whether a triable issue of material fact exists are to be resolved in favor of the party opposing summary judgment. (*Ibid*.)

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).)

Here, defendant relies on the declaration of Scott P. Serden, M.D., a board certified doctor of Obstetrics and Gynecology. (Serden Decl., ¶ 1.) Dr. Serden opined that defendant's nurses and non-physician staff met the standard of care. (Id. at ¶ 11.)

Also, based on his education, training, experience, and review of the medical records, Dr. Serden opines that nothing defendant's nurses and non-physician staff did or failed to do was a substantial factor in causing plaintiff's injuries or baby Natalie's death. (Id. at ¶ 12.)

Here, each cause of action is based on a theory of medical negligence. Dr. Serden's opinion is sufficient to shift the burden as to the existence of a triable issue of fact to the plaintiffs, as to each cause of action. Additionally, defendant has presented sufficient evidence that defendant cannot be found vicariously liable for the actions of Dr. Lichtenstein and Dr. Agrawal. Notably, the court has previously entered judgment in favor of both of these doctors. (See Judgment Entered June 27, 2024; Judgment Entered December 4, 2024.) Plaintiffs, however, neither filed an opposition nor an opposing statement of material fact, thus tacitly affirming the merits of defendants' 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)