Tentative Rulings for February 27, 2024
Department 403

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.

23CECG00643 ***Debbie Aguilar v. Ink Projects*** **is continued to Tuesday, April 16, 2024, at 3:30 p.m. in Department 403**

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Tentative Rulings for Department 403

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Tentative Ruling

Re: ***Onishi v. American Honda Motor Co., Inc.***
Superior Court Case No. 22CECG00883

Hearing Date: February 27, 2024 (Dept. 403)

Motion: by Plaintiff for Order Compelling Attendance at Deposition

Tentative Ruling:

To order the motion off calendar owing to plaintiff Noriko Onishi's failure to comply with Fresno Superior Court Local Rules, rule 2.1.17, respecting Pretrial Discovery Conferences.

If oral argument is timely requested, such argument will be entertained in Department 501 at 3:30 p.m. on February 27, 2024.

Explanation:

Fresno County Superior Court Local Rules, rule 2.1.17, requires that before filing, among other things, a motion under Code of Civil Procedure sections 2016.010 through 2036.050, inclusive, the party desiring to file such a motion must first request an informal Pretrial Discovery Conference with the court, and wait until either the court denies that request and gives permission to file the motion, or the conference is held and the dispute is not resolved at the conference. Forms for requesting the conference and opposing the request are available on the court's website. The parties are referred to Rule 2.1.17 for further particulars.

Plaintiff failed to obtain leave prior to filing the present motion. Motions to compel the deposition of a duly noticed party are exempt from Rule 2.1.17 only where timely objections have not been served. Here, objections were served, and therefore the motion is subject to Rule 2.1.17. As the parties acknowledge, the informal Pretrial Discovery Conference request was denied due to a finding of insufficient meet and

confer efforts by the parties. Leave to file the instant motion was not given in that order. Accordingly, the motion will not be heard, and is ordered off calendar.[1]

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

Tentative Ruling
Issued By: DTT on 2/23/2024.
(Judge's initials) (Date)

[1] The court further notes that in defendant American Honda Motor Company, Inc.'s opposition, a date has been agreed upon by the parties for the deposition in question, further demonstrating the need for sufficient meet and confer efforts.

(41)

Tentative Ruling

Re: ***Stephanie Norgard v. Dzung Trinh, Medical Doctor***
Superior Court Case No. 22CECG01730

Hearing Date: February 27, 2024 (Dept. 403)

Motion: by Defendant Dzung Trinh, M.D. for Summary Judgment or, in the Alternative, Summary Adjudication

Tentative Ruling:

To grant summary judgment in favor of defendant Dzung Trinh, M.D. Dr. Trinh is directed to submit to this court, within five days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

If oral argument is timely requested, such argument will be entertained in Department 501 at 3:30 p.m. on February 27, 2024.

Explanation:

The Material Undisputed Facts

The plaintiffs in this action, Stephanie Norgard and Edward Priest, are the parents of Varonica Priest ("Decedent"). On January 31, 2021, Decedent presented to the hospital emergency department for respiratory dyspnea. She was 35 years old with a history of mitochondrial disease. (Fact No. 4.) She was admitted to the medical floor with concerns for altered mental status due to hepatic and metabolic encephalopathy, respiratory failure due to hypercapnia, congestive heart failure, cardiomyopathy, metabolic acidosis, liver failure due to hepatic congestion, anemia, and left lower lung infiltrate. (*Ibid.*) During her hospital stay, Decedent was intubated beginning on February 13, 2021, and extubated on February 24, 2021, with intermittent BIPAP. (Fact No. 6.) On February 27, 2021, Decedent was fully off the ventilator. (Fact No. 7.) As the plaintiffs admit, Decedent "was extremely ill[.]" (Pltfs.' mem., p. 2:20.) Before the hospitalization, Decedent was active, lived independently, was employed full time, and operated her own vehicle. (*Id.* at p. 2:14-16; see Fact No. 5.) Even in the hospital, she had a history of taking oral medications without incident. (Fact Nos. 8-12.)

Fact No. 7 describes a consultation during Decedent's hospitalization, which resulted in a determination that she had capacity to make medical decisions:

> On February 20, 2021, Decedent underwent a psychiatric consultation for evaluation related to Decedent's capacity to make medical decisions. Decedent was noted to have intact attention, comprehension, memory and ability to communicate by text. Fully oriented with no variation in sensorium. Decedent was aware of the medical issues and was considering positive and negative aspects or recommended treatments. The

> determination was that she had full competency to make medical decisions. There was no indication of any psychiatric co-morbidity and no mental retardation whatsoever.

In March, a physician and a speech language pathologist evaluated Decedent when she was in the hospital. Both made no recommendations to change Decedent's oral intake of medications. (Fact Nos. 13, 14.)

Decedent arrived at Horizon Health and Subacute Center ("Horizon") on March 5, 2021. A nursing assessment noted no swallowing problems. (Fact No. 16.) That same day, Decedent signed a Horizon consent form that expressly stated she had the right to consent to or refuse any proposed health care services. (Fact No. 19.)

Defendant Dr. Trinh assessed Decedent on March 6, 2021, and was able to converse with her. (Fact Nos. 24 and 25.) He noted Decedent's mitochondrial myopathy was progressing and she had a poor prognosis. (*Ibid*.) Dr. Trinh determined Decedent was competent to make her own medical decisions. (Fact No. 26.) He discussed with Decedent his recommendation that Decedent take nothing by mouth due to her mitochondrial myopathy, which put her at risk for choking on *anything*, but Decedent declined. (Fact No. 27.) On March 6, 2021, after successfully taking medications by mouth throughout the day, Decedent was unable to swallow a half tablet of Levaquin. and started coughing. (Fact Nos. 21, 22, 23, 35 and 36.) Thereafter, Decedent required emergency care. She was transferred to a hospital, where she passed away on March 14, 2021. (Fact Nos. 37-43.)

Dr. Trinh Carried His Initial Burden

As the party moving for summary judgment, Dr. Trinh bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. If he carries his burden, it causes a shift, and plaintiffs are then subject to their own burden of production to make a prima facie showing that a triable issue of material fact exists. A prima facie showing is one that is sufficient to support the position of the party in question. "No more is called for." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 861-862.)

The elements of a cause of action for medical malpractice by a physician are (1) the physician's duty to the patient to use such skill, prudence and diligence as other members of the physician's profession commonly possess and exercise; (2) a breach of that duty; (3) injury caused by the breach; and (4) actual damage or loss resulting from the negligence. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1077.)

The first element requires the plaintiffs to establish that Dr. Trinh's care and treatment fell below the legal "standard of care." A physician meets that standard when the physician exercises "that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of the medical profession under similar circumstances." (*Burgess v. Superior Court, supra,* 2 Cal.4th at p. 1081, citations and internal quotation marks omitted.)

Dr. Trinh explained the necessity for expert testimony as follows:

> Any violation of the standard of care must be premised upon competent expert testimony when issues are addressed that are not a matter of common knowledge. (*Munro v. Regents of University of California* (1989) 215 Cal. App.3d 977, 984.) In *Landeros v. Flood* (1976) 17 Cal. 3d 399, 410, the court held:
>
> > "The standard of care against which the acts of a physician are to be measured is a matter particularly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be provided by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of the layman."
>
> (*Id*., citing *Sinz v. Owens* (1949) 33 Cal. 2d 749, 753.)

(Dr. Trinh's mem., p. 6:13-21.)

To establish the standard of care, Dr. Trinh submitted the declaration of his expert, Dr. Dean Nickles, a licensed physician who is Board Certified in internal medicine. Dr. Nickles identified the documentary evidence he considered and reached an opinion, based on his review of the documents and his education, training and experience. He explained that Decedent's disease is a progressive type that "commonly results in a sudden aspiration event. The only way to prevent or reduce this risk is to cease all oral intake. Short of ceasing all oral intake, a sudden aspiration event was inevitable in Decedent's case." (Nickles decl., p. 7: 23-25.)

Dr. Nickles went on to note Dr. Trinh appropriately informed Decedent of the risks and recommended that she cease all oral intake. Decedent declined to proceed with tube feeding, which was her right as a patient. (Fact No. 51; Nickles decl., ¶ 5.) Dr. Nickles gave a reasoned explanation and concluded "to a reasonable degree of medical probability that Dr. TRINH was not the cause of or a substantial factor in Decedent's injuries or death. . . . Decedent's death was caused by her preexisting medical condition of mitochondrial myopathy." (*Id.,* at p. 7:17-22.) "There was nothing that Dr. TRINH could or should have done differently." (*Id.,* at p. 8:2-3.)

Dr. Trinh's evidence is sufficient to make a prima facie showing that there is no triable issue of material fact. He met his burden to produce competent expert testimony that his conduct was within the community standard of care and did not cause, nor was it a substantial factor in Decedent's death. The inability to prove either element is a bar to the plaintiffs' claims. The burden then shifts to the plaintiffs to raise a triable issue of fact.

Plaintiffs Failed to Meet Their Burden

As Dr. Trinh points out in his reply, plaintiffs have failed to produce any evidence that establishes a triable issue of fact. Their responses to the separate statement include no citations to evidence to dispute Dr. Trinh's facts. They make *only one attempt* to cite

to "evidence" to dispute any fact. They cite excerpts from Dr. Trinh's deposition in an attempt to dispute Fact No. 14, but the cited evidence does not contradict the fact that the speech language pathologist made no recommendations to change the ongoing oral intake of medications and noted no difficulties with swallowing. Thus, all of Dr. Trinh's proffered facts are undisputed.

Plaintiffs contend reliance on an expert is unnecessary, citing *Massey v. Mercy Medical Center Redding* (2009) 180 Cal.App.4th 690. But *Massey* is distinguishable because it applies the common knowledge exception to the standard of care for a nurse attending to a patient at risk for falling. As Dr. Trinh explains, the plaintiffs' argument shows expert testimony is required because plaintiffs fail to understand:

> [T]he issues of choking versus aspiration risk, the impact of swallow function, the medical impact of [Decedent]'s diagnosis of mitochondrial disease, patient rights, or the professional medical judgments that go into making a physician order. All of these items are beyond common knowledge.

(Dr. Trinh's rpy., p. 3:15-18.)

Furthermore, plaintiffs ignore as immaterial Dr. Trinh's undisputed evidence that Decedent was competent to make her own medical decisions. She had both the right and the capacity to consider the positive and negative aspects of recommended treatments and make her own decisions. It was reasonable for Dr. Trinh to allow Decedent to exercise her right to refuse the recommended medical advice to take nothing by mouth, not even water or crushed pills, even though anything taken by mouth involved the risk of sudden choking. The alternative would have required Decedent to proceed with tube feeding, which has its own set of risks and benefits.

Conclusion

The court finds defendant met his burden to show plaintiffs cannot prove an essential element of professional negligence. The burden then shifted to plaintiffs to raise a triable issue of material fact, which they failed to do. Therefore, the court grants Dr. Trinh's motion for summary judgment. In doing so, the court in no way intends to diminish the loss of plaintiffs' 35-year-old daughter.

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

Tentative Ruling
Issued By: DTT on 2/23/2024.
(Judge's initials) (Date)

(20)

Tentative Ruling

Re: ***Diaz v. Unlimited Technologies & Comms. Inc., et al.***
Superior Court Case No. 22CECG02930

Hearing Date: February 27, 2024 (Dept. 403)

Motion: by Cosco Fire Protection, Inc., for Summary Judgment

Tentative Ruling:

To deny.

If oral argument is timely requested, such argument will be entertained in Department 501 at 3:30 p.m. on February 27, 2024.

Explanation:

Plaintiff Roland Diaz was injured when attacked by Joseph Roy, and sues Cosco Fire Protection, Inc. ("Cosco"), among others, for failure to properly maintain the lock on the door through which Mr. Roy gained entry to the building. Cosco now moves for summary judgment, relying solely on the firefighter's rule. Cosco contends that the firefighter's rule applies because Mr. Diaz was working as a law enforcement officer in his office at the time of the attack, "and the injuries arose from an activity that was anticipated or expected in the line of duty."

However, as plaintiffs point out, "[t]he firefighter's rule precludes recovery for injuries suffered as a direct consequence of responding to calls in the line of duty." (*City of Oceanside v. Superior Court* (2000) 81 Cal.App.4th 269, 275, quoting *Tilley v. Schulte* (1999) 70 Cal.App.4th 79, 83.) Detective Diaz did *not*, however, respond to a call, though he was on duty at the time.

Though Detective Diaz identified himself as a police officer after Mr. Roy began assaulting him and responded to the attack by discharging his weapon to stop the assailant, it was not a situation to which Detective Diaz responded. He did not put himself in a position to be confronted by this danger. Detective Diaz appears to be in the exact position as any other ordinary citizen unfortunate enough to be the subject of this senseless attack. As the moving paper point out, before entering Detective Diaz's office, Mr. Roy repeatedly attempted to enter other peoples' cars and other building doors at random for unknown reasons. After that Mr. Roy attempted to enter the Fresno County Sherriff's Office Facility, and then managed to enter the City Hall Annex Building, utilized by the Fresno Police Department. Mr. Roy attempted to enter the Fresno Police Traffic Office, but was stopped by a security door. He then walked next door and entered Detective Diaz's office through an unlocked door. Mr. Roy proceeded to assault Detective Diaz.

In applying the firefighter's rule, the court must determine what "necessitated the summoning of a police officer to the location he was injured." (*Neighbarger v. Irwin*

Industries, Inc. (1994) 8 Cal.4th 532, 538.) Detective Diaz came to work to process paperwork. (AMF 12.) He was not there in his office to confront or subdue an intruder, or to address an issue with the unlocked security door. (AMF 15 and 16.) He was working in a private office located in a secure area where members of the public are generally not allowed to go unless they have been pre-approved as part of a scheduled appointment. (AMF 13.) And even then, that person would be escorted by Detective Diaz or another Fresno Police Department employee from outside of the security door to the area where the meeting was scheduled. (AMF 13.) No suspects or other dangerous individuals are processed in the building where Detective Diaz's office is located, meaning that there was no reasonable risk that Detective Diaz would be randomly attacked by a member of the public. (AMF 14.)

The firefighter's rule is applies quite narrowly in situations where a firefighter or police officer was injured as a result of conduct that was directly related to the hazard the firefighter or officer was summoned to confront. For example, in *Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658, a fire fighter was injured when he slipped coming down a set of wet, slick stairs during an unannounced safety inspection of the building's fire doors. (*Id.* at p. 661.) The defendant moved for summary judgment, arguing that the fireman was injured in the regular course of his duties as a fireman and that the hazard was one normally encountered as part of his job. (*Id.* at p. 663.) The Court of Appeal disagreed, reasoning, "Plaintiff was not summoned to the scene to inspect the slipperiness of the stairs, he was there to inspect for fire code violations. Since the injuries were not caused by an act of negligence which prompted plaintiff's presence in the building, the firefighter's rule does not bar the present claim." (*Id.* at p. 663.)

In *Vasquez v. North County Transit Dist*. (9th Cir. 2002) 292 F.3d 1049, police officer Kenneth Vasquez was summoned to a railroad crossing because the crossing-gate arm got stuck in the "down" position, causing traffic to backup. While Officer Vasquez was directing traffic, another officer manually lifted the crossing-gate arm, causing it to break, fall off, and hit Officer Vasquez on the head. (*Id.* at p. 1052-1053.) The defendant Transit District filed a motion for summary judgment arguing Officer Vasquez was summoned to the scene to deal with the very thing (the crossing-gate arm) that caused his injury. (*Id.* at p. 1056.) The court disagreed – there was evidence of a material disputed fact that two bolts had come loose on the crossing arm, which is what caused the arm to fall off and hit Officer in the head. This was different from the faulty lifting mechanism, which was the thing that Officer Vasquez was summoned to address. (*Id.* at pp. 1056 and 1060.) As a result, there were facts from which a jury could conclude that Officer Vasquez was not injured by the "very risk" that he was called to confront. (*Id.* at p. 1060.)

Cosco cites to *Hodges v. Yarian* (1997) 53 Cal.App.4th 973, where the plaintiff, an off-duty police officer, arrived home and saw evidence that someone had broken into his house. (*Id.* at p. 977.) The officer retrieved his service revolver and decided to confront the intruder. (*Id.* at p. 977.) The court found that it was at that point that "[Officer] Hodges was aware that the intruder could be armed, and that a confrontation could result in injury to himself or to the intruder." (*Id.* at p. 977.) And in fact, it was soon after that decision was made that the officer was injured and the intruder killed as the officer struggled to subdue the intruder. (*Id.* at p. 977.)

The court barred the officer's lawsuit against the owner of the building based on negligent building security pursuant to the firefighter's rule. The court held that even though the off-duty officer's initial reason for being at his home was unrelated to dealing with an intruder, "the firefighter's rule was triggered **because the officer reacted as a police officer to the disturbance, and deliberately encountered the danger posed**." (*Hodges v. Yarian* (1997) 53 Cal.App.4th at 984, emphasis added.) The injuries the officer sustained ***after* his decision to confront the intruder was the very risk he undertook**. (*Id.* at p. 984.)

Here, Detective Diaz did react to the threat and shot the intruder with his service weapon. But Mr. Roy had already attacked Detective Diaz before Detective Diaz acted to defend himself and arguably assumed the risk of subduing the attacker. Detective Diaz was injured prior to taking any action against the intruder, and thus, never assumed a risk that a police officer might take when called to respond to a violent intruder. (AMF 18.)

Cosco disputes plaintiff's statement that "[i]t was not until after Mr. Roy injured me that I identified myself as a police officer and attempted to subdue him." (Diaz Decl., ¶ 4.) Cosco contends that the video that plaintiff produced in discovery shows that plaintiff "first approached Mr. Roy to ask if he needed help. Plaintiff was stabbed *after* identifying himself as a police officer. It is a misstatement to claim that Detective Diaz performed *no* actions prior to being attacked." However, the transcription of the video provided by Cosco's counsel states that plaintiff was attacked, *then* he identified himself as a police officer, and then the attack continued. (Cosco's Exh. D.) Detective Diaz's declaration is not inconsistent with the evidence presented by Cosco.

Because Detective Diaz did not react to the disturbance and deliberately encounter the danger posed by Mr. Roy, the firefighter's rule does not apply.

In reply, Cosco points to authorities providing that the firefighter's rule does not require that Detective Diaz be summoned or that there was an emergency. Rather, the officer's presence can be merely fortuitous. (See *Hodges v. Yarian* (1997) 53 Cal.App.4th 973; *Kelhi v. Fitzpatrick* (1994) 25 Cal. App. 4th 1149.)

However, even the cases cited by Cosco are not entirely supportive of applying the firefighter's rule in this case. In *Kelhi*, for example, a police officer on his way to work saw the wheels of a truck, which was several hundred feet in front of him, come off the truck's axle. This is the fortuitousness that Cosco refers to. He just happened to be driving there. However, the officer immediately created a "traffic break" with his motorcycle so that other cars would not be struck by the rolling tires, but he was injured by the tires while doing so. (*Id.*) Accordingly, the officer did put himself in harm's way when he might have otherwise been able to avoid the danger. The court refused to apply the independent cause exception to the firefighter's rule because the officer was injured by the very hazard to which he was responding, namely, the detached tires in the street: "The facts establish, as a matter of law, that [the officer] was **injured by the very risk *to which he responded*** in the line of duty to protect the public." (*Id.* at p. 187, emphasis added.)

Here, evidence does support plaintiffs' position that Detective Diaz was attacked and injured before he ever responded to or took action to confront the situation. He

appears to have simply been victim of a random act of violence. Detective Diaz did not put himself in harm's way or assume any risk in interacting with Mr. Roy.

The reply relies on *Seibert Security Services, Inc. v. Superior Court,* (1993) 18 Cal.App.4th 394, where the court declined to apply the exception in Civil Code § 1714.9(a)(1) to a case where a police officer sued a hospital and its security employees when they negligently released a dangerous person from handcuffs who then assaulted the nearby police officer as he was completing paperwork. The officer in *Seibert* was completing paperwork unrelated to the assailant that attacked him and his presence at the hospital had nothing to do with that assailant. (*Id.*) Thus, Cosco contends, the fact that Detective Diaz was at the office to fill out paperwork rather than to respond to a broken security door or deal with an intruder is irrelevant for purposes of the application of the firefighter's rule.

However, *Seibert* is distinguishable. The officer in *Seibert* brought an arrestee to a hospital for examination of possible injuries. (*Id*. at p. 402.) While the officer was still at the hospital, a Seibert employee negligently removed handcuffs worn by a mental patient who had previously engaged in abusive and aggressive behavior. (*Ibid*.) When the uncuffed patient attacked the Seibert employee, the employee cried for help. (*Id*. at p. 403.) The police officer, who was nearby filling out paperwork relating to the injured arrestee, **responded to the Seibert employee's cry for help and attempted to subdue the mental patient, who injured the officer in the ensuing struggle**. (Id. at p. 411.) Thus, the officer took action to respond to the situation with and confront the mental patient. Moreover, the court was applying the independent cause exception[2] to the firefighter's rule, which is not an issue in this case,

Here, there is at the very least a triable issue as to whether Detective Diaz assumed the risk through his actions before the assault took place. Simply being a law enforcement officer on duty at the time of an injury does not render the firefighter's exception applicable.

Cosco contends that public policy considerations favor application of the firefighter's rule because plaintiff received workers' compensation benefits as a result of his injury. "[O]ne who has voluntarily confronted a known risk cannot recover for injuries, [and] there is a public policy to preclude tort recovery by firemen or policemen who are presumably adequately compensated (in special salary, retirement, and disability benefits) for undertaking their hazardous work." (*Neighbarger, supra*, 8 Cal.4th at p. 540.) However, *Neighbarger* does not stand for the proposition, and Cosco produces no authority to the effect that, the firefighter's rule applies simply because the officer received workers' compensation benefits.

Accordingly, the court intends to deny the motion.

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[2] Civil Code section 1714.9, subdivision (a)(2) imposes liability for "conduct causing ... injury" to emergency responders when that conduct "[1] violates a statute, ordinance, or regulation, and the conduct causing injury [2] was itself not the event that precipitated either the response or presence of the peace officer, firefighter, or emergency medical personnel."

Finally, the court notes the ruling on the parties' objections. Plaintiffs' objections, and Cosco's objection no. 3, are overruled because they are not directed at the evidence. Evidentiary objections can only be made to the underlying evidence, not the facts contained within the separate statement. (See Cal. Rules of Court, rules 3.1352 and 3.1354.) Objections to statements in the separate statement or points and authorities are misdirected. Cosco's objection no. 2 is overruled, and objection no. 3 is sustained.

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

Tentative Ruling
Issued By: DTT on 2/23/2024 .
(Judge's initials) (Date)