

Tentative Rulings for July 1, 2009
Departments 97A, 97B, 97C & 97D

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).)

08CECG01233 *Berry v. Village Garden Owners* (Dept. 97D)

09CECG01773 Provident Savings v. Khoun (Dept. 97D)

08CECG03516 *Andrews v. Kerman Unified School District*
(Dept. 97A)

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

07CECG01886 *Moua v. Atlantic Mutual* – the hearing is continued to July 16, 2009 at 3:30 p.m. in Dept. 97A.

07CECG03937 *Kennedy v. Pacific Gas and Electric* (Dept. 97B) – the hearing is continued to July 15, 2009 at 3:30 in Dept. 97B.

(Tentative Rulings begin at the next page)

Tentative Ruling

Re: ***Esteban M. Martinez v. Public Defender Office, et al.***
Superior Court No. 08CECG04380

Hearing Date: July 1, 2009 (**Dept. 97B**)

Motion: Defendant Public Defender Office's Motion for Order
Requiring Plaintiff to Post Security as a Vexatious Litigant

Tentative Ruling:

To grant. Plaintiff Esteban Martinez is required to post a bond in the amount of \$10,000.00 within 30 days of service of this order. This matter is stayed until 10 days after such a bond has been posted. (Code Civ. Proc. § 391.6.)

Explanation:

Code of Civil Procedure § 391.1 provides:

In any litigation pending in any court of this state, at any time until final judgment is entered, a defendant may move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security. The motion must be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant.

Plaintiff has been previously declared to be a vexatious litigant by the Fifth District Court of Appeal in ***In re Finding of Esteban Martinez as a Vexatious Litigant***, on February 17, 2009. Defendant seeks judicial notice of the Fifth District's unpublished decision. This court judicially notices that opinion.

There is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant. The Court has read the lengthy complaint and has determined that none of the allegations and none of the causes of action alleged state a cause of action or claim against the moving defendant.

If the Court determines that the Plaintiff is a vexatious litigant and that there is no reasonable probability that the Plaintiff will prevail, the Court "shall order the plaintiff to furnish, for the benefit of the moving defendant, security in such amount and within such time as the court shall fix." (Code Civ. Proc. § 391.3.)

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary.

Tentative Ruling

Re: ***Cha v. Granville Homes, Inc.***
Case No. 09 CECG 00333

Hearing Date: July 1st, 2009 (Dept. 97A)

Motion: Defendant's Motion to Strike Portions of First Amended
Complaint

Tentative Ruling:

To grant the defendant's motion to strike in part and deny in part. The court intends to strike the language of paragraph 17 of the first amended complaint on page 5, line 15, alleging a "violation of Civil Code section 896" as to all plaintiffs except Olivia Matsuyama without leave to amend. (CCP §§ 435 and 436.) However, the court intends to deny the motion to strike the other portions of paragraph 17, including all of the subparagraphs, since they do not contain any improper references to Civil Code § 896.

Defendant is ordered to file its answer within 10 days of the date of service of this order.

Explanation:

As defendant correctly points out, Civil Code § 896 only applies to new homes that were originally purchased on or after January 1st, 2003. (Civil Code § 938.) Here, defendant has offered evidence showing that all of the plaintiffs' homes except for the home of Olivia Matsuyama were purchased before January 1st, 2003. (See Request for Judicial Notice, Exhibits B – R. The court hereby takes judicial notice of the certified grant deeds under Evidence Code § 452(h).) Therefore, paragraph 17 is improper to the extent that it attempts to allege a violation of Civil Code § 896. As a result, the court intends to strike the allegation that the alleged defects are violations of Civil Code § 896. (CCP § 435, 436.)

However, since the facts alleged in the subparagraphs can still be used to support other causes of action, including negligence or strict products liability, the court declines to strike those allegations.

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.

Tentative Ruling

Issued By: _____ **AMC** _____ on _____ **June 26, 2009** _____.
(Judge's Initials) (Date)

(23)

Tentative Ruling

Re: ***WinCo Foods, LLC v. Mitch Qualls, et al.***
Superior Court Case No. 08 CECG 00830

Hearing Date: Wednesday, July 1, 2009 (**Dept. 97D**)

Motion: Plaintiff WinCo Foods, LLC's Motion for Summary Judgment,
or, in the alternative, Motion for Summary Adjudication

Tentative Ruling:

To DENY Plaintiff's motion for summary judgment. (Code of Civil Procedure § 437c.)

To GRANT Plaintiff's motion for summary adjudication of Plaintiff's first and fourth causes of action.

To DENY Plaintiff's motion for summary adjudication of Plaintiff's second and third causes of action.

Explanation:

1. Summary Judgment/Adjudication Standard

Plaintiff WinCo Foods, LLC brings this motion for summary judgment, or, in the alternative, for summary adjudication. "Under summary judgment law, any party to an action, whether plaintiff or defendant, 'may move' the court 'for summary judgment' in his favor on a claim of action (i.e., claim) or a defense. The court must 'grant[]' the 'motion' 'if all the papers submitted show' that 'there is no triable issue as to any material fact' – that is, there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately, the law – and that 'the moving party is entitled to a judgment as a matter of law.' (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 843.)

Code of Civil Procedure § 437c(p)(1) states, in relevant part:

A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a

triable issues of one or more material facts exists as to that cause of action or a defense thereto.

“Thus, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would *require* a reasonable trier of fact to find any underlying material fact more likely than not – otherwise, he would not be entitled to judgment *as a matter of law*, but would have to present his evidence to a trier of fact.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 851.)

2. Procedural Defects in the Defendants’ Opposition

Defendants Mitchell Qualls’ and David Josephine’s Opposition is procedurally deficient because the Defendants failed to file a separate statement that responds to the Plaintiff’s separate statement. Code of Civil Procedure § 437c(b)(3) provides that:

The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court’s discretion, for granting the motion.

However, the Court, in an exercise of its discretion, declines to grant the Plaintiff’s motion for summary judgment solely on the ground that the Defendants failed to file an opposing separate statement. However, because the Defendants have failed to file an opposing separate statement, the Defendants have failed to dispute any of the Plaintiff’s undisputed material facts, and the Defendants have failed to provide any evidence to support their contention that any particular material fact is disputed.

3. Merits of the Defendants’ Motion for Summary Judgment

A. Plaintiff’s Second Cause of Action: Intentional Interference with Existing and Prospective Business Relations

The Plaintiff moves for summary judgment and/or summary adjudication of this cause of action. The elements of a cause of action for intentional

interference with prospective economic relations are: (1) that Plaintiff and third party were in an economic relationship that probably would have resulted in an economic benefit to Plaintiff; (2) that Defendant knew of the relationship; (3) that Defendant intended to disrupt the relationship; (4) that Defendant engaged in wrongful conduct; (5) that the relationship was disrupted; (6) that Plaintiff was harmed; and (7) that Defendant's wrongful conduct was a substantial factor in causing Plaintiff's harm. (CACI 2202).

Even assuming *arguendo* that the Plaintiff has established all of the other elements for the cause of action for intentional interference with prospective economic relations, the Plaintiff has failed to establish the third element of the cause of action – that Defendant intended to disrupt the relationship. In order to prove this element, the Plaintiff has to establish that the Defendants knew that interference with the relationship was certain or substantially certain to occur as a result of the Defendants' actions. (See *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal. 4th 1134, 1156-57.) All that the Plaintiff has established is that Defendants were talking to WinCo customers who were entering and exiting the Store and asking them to sign a petition. (UF Nos. 30 and 63.) The Plaintiff has not proven that the Defendants knew that their actions in talking to WinCo customers and asking them to sign a petition were certain or substantially certain to interfere with the relationship between Plaintiff and its customers.

Therefore, the Plaintiff has failed to establish each element of the cause of action for intentional interference with prospective business relations. Consequently, the burden never shifts to the Defendants to establish a triable issue of material fact. Accordingly, Plaintiff's motion for summary judgment should be denied, and summary adjudication of the second cause of action in favor of the Plaintiff is denied.

4. Merits of the Defendants' Motion for Summary Adjudication

A. Plaintiff's First Cause of Action: Trespass

Plaintiff moves for summary judgment and/or summary adjudication of this cause of action. The elements of a cause of action for trespass are: (1) that Plaintiff owned/leased/occupied/controlled the property; (2) that Defendant intentionally, recklessly, or negligently entered Plaintiff's property; (3) that Plaintiff did not give permission for the entry (or that Defendant exceeded Plaintiff's permission); (4) that Plaintiff was actually harmed; and (5) that Defendant's entry or conduct was a substantial factor in causing Plaintiff's harm. (CACI 2000).

Plaintiff has established the first element – that Plaintiff owned, leased, occupied, or controlled the property. Undisputed Fact ("UF") No. 2 establishes that WinCo invites the general public into the Store for the sole purpose of shopping for products. UF No. 16 establishes that WinCo has been the sole user of the property since the Store was built and that there are no plans to add any

additional stores to the site. UF No. 18 establishes that WinCo's parking lot is exclusively for the use of WinCo customers.

Plaintiff has established the second element – that Defendants intentionally, recklessly, or negligently entered Plaintiff's property. UF No. 29 establishes that Defendants were sitting down at a booth that they had put up with signage all around them at the front of the store. UF No. 56 establishes that Defendants returned to the Store property and resumed their petitioning activities on March 7, 2008. UF No. 58 establishes that Defendants again returned to the Store property and resumed petitioning signatures from WinCo customers.

Plaintiff has established the third element – that Plaintiff did not give permission for the entry. UF No. 23 establishes that WinCo has a no solicitation policy at the store. UF No. 39 establishes that WinCo never gave permission to Defendants to be on the property, and Defendants knew it. UF No. 40 states that Ralph Anaforian, the manager of the property, spoke to Corporal Benham and informed her that Defendants had never asked for permission to be on the property.

Plaintiff has established the fourth and fifth elements – that Plaintiff was actually harmed and that Defendant's entry or conduct was a substantial factor in causing the Plaintiff's harm. UF No. 65 establishes that Defendants' presence at the only entrance and exit to the Store has had a negative effect on WinCo's business. UF No. 66 proves that, while Defendants were positioned at the entrance to the Store, WinCo received numerous complaints from its customers about Defendants' presence at the Store.

Plaintiff has established each element of the cause of action for trespass. Therefore, the burden shifts to Defendants Mitch Qualls and David Josephine to show that a triable issue of material fact exists. However, since Defendants failed to file a separate statement disputing the Plaintiff's undisputed facts and evidence supporting their disputed facts, the Defendants cannot satisfy their burden. Consequently, summary adjudication of the first cause of action for trespass in favor of the Plaintiff is granted.

B. Plaintiff's Third Cause of Action: Unfair Business Practices

The Plaintiff moves for summary judgment and/or summary adjudication of this cause of action. California's Unfair Competition Law ("UCL") (Business and Professions Code § 17200 et seq.) authorizes civil suits for "unfair competition" (Business and Professions Code § 17204), which it defines to "include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising" (Business and Professions Code § 17200). "Unfair competition" means "any unlawful, unfair or fraudulent business act or practice ..." Only one type of unfair competition need be alleged. A business practice need not be "unlawful" in order to violate the UCL; a practice that is

“unfair” also violates the UCL. (*State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1103.) Here, the Plaintiff alleges that the Defendants have violated the UCL by committing an unlawful business practice – specifically, by violating Penal Code § 602(k) when the Defendants enter onto Plaintiff’s property to ask Plaintiff’s customers to sign petitions.

The Court finds that the Plaintiff has not established all of the elements of a cause of action for unfair business practices because the Plaintiff has not established that the Defendants’ actions violated Penal Code § 602(k). Penal Code § 602(k) defines a misdemeanor trespass as: “[e]ntering any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner’s agent or of the person in lawful possession.” However, first, the Plaintiff has not established that the Defendants entered onto any land for the purpose of injuring any property or property rights. Second, all that the Plaintiff has established is that Defendants were talking to WinCo customers who were entering and exiting the Store and asking them to sign a petition. (UF Nos. 30 and 63.) The Plaintiff has failed to establish that the Defendants entered any land with the intent to interfere with, obstruct, or injure Plaintiff’s lawful business or occupation.

Therefore, the Plaintiff has failed to establish its cause of action for unfair business practices. Consequently, the burden never shifts to the Defendants to establish a triable issue of material fact. Accordingly, Plaintiff’s motion for summary adjudication of the third cause of action in favor of the Plaintiff is denied.

C. Plaintiff’s Fourth Cause of Action: Declaratory Relief

The Plaintiff moves for summary judgment and/or summary adjudication of this cause of action. The elements of a cause of action for declaratory relief are: (1) a proper subject of declaratory relief within the scope of Code of Civil Procedure § 1060, and (2) an actual controversy involving justiciable questions relating to the rights or obligations of a party. (5 Witkin, California Procedure (4th ed.) § 809.)

The Plaintiff has established the first element – a proper subject of declaratory relief within the scope of Code of Civil Procedure § 1060. Code of Civil Procedure § 1060 provides that: “Any person ... who desires a declaration of his or her rights or duties with respect to another...may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action ... in the superior court...” Here, the Plaintiff seeks a declaration regarding its abilities and right to be able to exclude the Defendants from coming onto Plaintiff’s property and asking WinCo’s customers to sign petitions. (See UF Nos. 30-33, 41, 46-50, 57, 59, and 63.)

The Plaintiff has established the second element – an actual controversy involving justiciable questions relating to the rights and obligations of a party. The Plaintiff has established that it believes that it has the right to exclude Defendants from soliciting signatures to petitions on its property and the Defendants disagree with the Plaintiff’s position. (See UF Nos. 32-34, 38-39, 41, 46-50, and 56-59.)

The Plaintiff contends that the WinCo store is a stand-alone retail store and that the Plaintiff has the right to prohibit expressive speech activities on its property and bar the Defendants from seeking petition signatures on its property. *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 910 [153 Cal. Rptr. 854, 592 P.2d 341], *affd. sub nom., Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74 [64 L. Ed. 2d 741, 100 S. Ct. 2035] (*Pruneyard*) held that the California Constitution protects expressive activity in the common areas of a large, privately owned shopping center. The *Pruneyard* holding does not apply to the area immediately surrounding the entrance of an individual retail store that does not itself possess the characteristics of a public forum, even when that store is part of a larger shopping center.

(*Van v. Target Corp.* (2007) 155 Cal. App. 4th 1375, 1377.)

Courts consider several factors in making [the] determination [whether or not private property serves as the functional equivalent of a public forum]: “Whether private property is to be considered quasi-public property subject to the exercise of constitutional rights of free speech and assembly depends in part on the nature, purpose, and primary use of the property; the extent and nature of the public invitation to use the property; and the relationship between the ideas sought to be presented and the purpose of the property’s occupants.”

(*Van v. Target Corp.* (2007) 155 Cal. App. 4th 1375, 1383-84 (citing *Albertson’s Inc. v. Young* (2003) 107 Cal. App. 4th 106, 119).) “Applying these factors, courts have consistently concluded that modest and individual commercial and retail establishments lack the characteristics of a public forum.” (*Van v. Target Corp.* (2007) 155 Cal. App. 4th 1375, 1384.) A “location will be considered a

quasi-public forum only when it is the functional equivalent of a traditional public forum as a place where people choose to come and meet and talk and spend time.” (*Van v. Target Corp.* (2007) 155 Cal. App. 4th 1375, 1383-84 (citing *Albertson’s Inc. v. Young* (2003) 107 Cal. App. 4th 106, 121).)

Here, the evidence is clear that the Plaintiff’s store is not a quasi-public forum and, thus, the Plaintiff has the right to exclude the Defendants from soliciting WinCo’s customers for signatures to petitions. First, the Court considers the nature, purpose, and primary use of the property. UF No. 1 establishes that WinCo is in the business of selling groceries and small household items to consumers. UF No. 3 proves that the Store is designed for customers to shop for groceries in an expeditious manner, without lingering. UF No. 9 establishes that the Store has a set of double doors marked “Entrance Only” next to a set of double doors marked “Exit Only” in the center of the front wall of the building and that these doors are the only public entrance and exit to and from the Store. UF No. 10 proves that the distance from the doors to the edge of the sidewalk (where it meets the parking lot) is approximately 15 feet. UF No. 11 establishes that the sidewalk in front of the Store entrance and exit was not designed to accommodate a gathering of people, and that WinCo has posted signs at the front of the building that there is to be no soliciting or loitering on the property. UF Nos. 20 and 21 prove that the Store does not contain a restaurant, and while there is a pizza department that sells pizza by the slice, there is no place for customers to congregate and eat. UF No. 22 establishes that the Store only has two benches inside for sitting – one near customer service and one by the meat department – and there are no tables or places to congregate in any manner. UF No. 26 proves that the Store does not contain any facilities that would be conducive to a public gathering. All of these undisputed facts demonstrate that the nature, purpose, and primary use of the property is private and that the Store is not an area designed to encourage the public to congregate together, spend time, or be entertained like in *Pruneyard*.

Second, the Court considers the extent and nature of the public invitation to use the property. UF No. 2 establishes that WinCo invites the general public into the Store for the sole purpose of shopping for WinCo’s products. UF No. 3 proves that the Store is designed for customers to shop for groceries in an expeditious manner, without lingering. UF Nos. 23-24 establish that WinCo maintains and strictly enforces a no-solicitation policy at the Store without bias. UF No. 25 proves that WinCo does not allow any sort of public gathering on its property for any purpose other than grocery shopping. Finally, UF No. 26 establishes that the Store does not contain any facilities that would be conducive to a public gathering. All of these undisputed facts demonstrate that the extent and nature of the public invitation to use WinCo’s property is to shop for WinCo’s products, not to gather together for some public or quasi-public purpose.

Third, the Court considers the relationship between the ideas sought to be presented and the purpose of the property’s occupants. UF Nos. 1-3 establish

that WinCo is in the business of selling groceries and small household items, that WinCo invites the public into its store in order to shop for WinCo's goods, and that the Store is designed for the public to shop for WinCo's goods without lingering. UF No. 9 establishes that the Store has a set of double doors marked "Entrance Only" next to a set of double doors marked "Exit Only" in the center of the front wall of the building and that these doors are the only public entrance and exit to and from the Store. UF No. 10 proves that the distance from the doors to the edge of the sidewalk (where it meets the parking lot) is approximately 15 feet. UF No. 11 establishes that the sidewalk in front of the Store entrance and exit was not designed to accommodate a gathering of people, and that WinCo has posted signs at the front of the building that there is to be no soliciting or loitering on the property. UF Nos. 12-15 and 29 establish that the Defendants had set up a booth with signage, which covered the no parking signs located in the white-striped area immediately in front of the Store's entrance and exit doors. UF Nos. 30 and 63 prove that Defendants were soliciting signatures from WinCo customers who were entering and exiting Plaintiff's store. UF Nos. 61-62 establish that the Defendants were soliciting signatures for financial gain, not to further a social cause, and the Defendants were paid between \$.30 and \$8.00 per signature by political groups. Here, there appears to be no relationship between the ideas sought to be presented and the purpose of the Plaintiff's store. Also, because the Defendants positioned themselves right around the only entrance and exit doors that the public could use, there is a serious danger that Plaintiff's customers will associate Plaintiff with the Defendants' message and that the Plaintiff's customers will be unable to avoid the Defendants when entering or exiting WinCo's store. (*Van v. Target Corp.* ((2007) 155 Cal. App. 4th 1375, 1389-90.) "The inability of respondents' patrons to avoid appellants at store entrances and exits creates the risk of appellants' interfering with respondents' normal business operations." (*Van v. Target Corp.* (2007) 155 Cal. App. 4th 1375, 1390.)

All three factors are in favor of determining that the Plaintiff's store is not a quasi-public forum. All of the Plaintiff's undisputed material facts establish that Plaintiff's store lacks any attributes of traditional public fora. Therefore, the burden shifts to Defendants Mitch Qualls and David Josephine to show that a triable issue of material fact exists. However, since Defendants failed to file a separate statement disputing the Plaintiff's undisputed facts and evidence supporting their disputed facts, the Defendants cannot satisfy their burden. Consequently, Plaintiff's motion for summary adjudication of the fourth cause of action in favor of the Plaintiff is granted.

Pursuant to California Rules of Court, rule 3.1312(a) 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: DRF on 6-30-09 .
(Judge's initials) (Date)

Tentative Ruling

Re: ***McGough v. City of Fresno***
Superior Court Case No. 08CECG04152

Hearing Date: July 1, 2009 (Dept. 97A)

Motion: 1. Demurrer to first amended complaint
 2. Motion to compel response to form interrogatories, request
 for admission, request for statement of damages and
 request for collateral source payment information

Tentative Ruling:

To overrule demurrer to 1st cause of action; to sustain as to 2nd cause of action with leave to amend; to order plaintiff to respond without objection to all four discovery requests within 7 days of this order and, if no response is received within the 7 day period, to deem the matters described in the RFAs as “admitted.”

Explanation:

Demurrer

As noted in the court’s April 2nd order, a public entity cannot be liable for damages “except as provided by statute.” Govt. Code §815.2. This has been held to mean that the plaintiff must include each fact material to a statutorily authorized cause of action. See ***Susman v. City of Los Angeles*** (1969) 269 Cal.App.2d 803, 809; 4 Witkin ***California Procedure*** (5th Ed.) “Pleading” §§617, 623.

While plaintiff’s first amended complaint appears to have complied with the 7 procedural corrections listed in that prior order, he has not complied with the general directive in that order that he identify the statutes under which he is seeking to hold the City liable, nor has he alleged all facts necessary to hold it liable for the negligence of a City employee.

A public entity can be liable under either Govt. Code §815.2 for injuries caused by the negligence of a government employee acting in the scope of his employment, or under Civil Code §2100 for a public entity acting as a common carrier for the failure to use the utmost care and diligence for the safe carriage of passengers. However plaintiff hasn’t identified which of these statutes he is relying on.

Nor has he specifically described in what way the driver employed by the City was negligent. For example, while the 1st cause of action now alleges that the City owned and employed the operator of a motor vehicle and that the negligent operation of the motor vehicle caused him injury (thus adequately

stating a claim under Veh. Code §§17001 and 17002), he does not allege in the “general negligence” attachment what either the City or its employee did or didn’t do to cause his injury.

If he wants to hold it liable under Civil Code §2100 as a common carrier, he must allege that the City operated as a common carrier and then failed to exercise the necessary degree of skill to keep its passengers safe. That would need to include a description of what the City or its driver did or failed to do that caused his injury. See e.g. **Lopez v. Southern Cal. Rapid Transit Dist.** (1985) 40 Cal. 3d 780, 795-796.

Similarly if he wants to hold the City liable under Govt. Code §815.2 for the negligence of its bus driver employee, he must allege in that 2nd cause of action that the City employed the driver of the bus he was riding on and then describe what conduct of the driver was negligent and how it caused him injury.

In Weil & Brown, **Civil Procedure Before Trial** at 6:208, the authors note that some of the Judicial Council form cause of action attachments are intended to contain all of the allegations necessary to state a cause of action, and that in those cases, all the plaintiff need to is check the appropriate boxes and fill in descriptions, dates, places and names. They list the Motor Vehicle attachment as one of those forms at 6:209.

However the “General Negligence” form is described at 6:216 as one that requires additional allegations, including a description of the acts and omissions that negligently caused the damage and a description of the reasons for liability. See also **People ex rel. Dept. of Transportation v. Superior Court** (1992) 5 Cal. App. 4th 1480, which noted:

In some cases, merely checking a box on a Judicial Council form complaint will be sufficient. In other cases, such as this one, where specific allegations need be alleged, the form complaint is like a partially completed painting. It is up to the pleader to add the details that complete the picture. The form complaint here, standing alone, is no more immune to demurrer than any other complaint that fails to meet essential pleading requirements to state a cause of action.

People ex rel. Dept. of Transportation v. Superior Court, supra, 5 Cal. App. 4th at 1486.

Thus the court will overrule the demurrer to the 1st cause of action for motor vehicle negligence finding it sufficient to state a claim under Veh. Code §§17001 and 17002, but it will sustain the demurrer to the 2nd cause of action and *require plaintiff to both identify which statute or statutes he is relying on to hold the City liable for negligence, and what specific conduct he claims constituted negligence and how that conduct caused him injury.*

(6)

Tentative Ruling

Re: ***E. & J. Gallo Winery v. Pyle***
Superior Court Case No.: 08CECG04145

Hearing Date: July 1, 2009 (**Dept. 97C**)

Motion: Demurrer to and motion to strike the first amended cross complaint of Edwin Pyle by Cross Defendants Ermel Ray Moles and Ben Rastegar

Tentative Ruling:

To overrule the demurrer, but to grant the motion to strike, with Edwin Pyle granted 10 days' leave within which to file a signed first amended complaint in interpleader. Should Adele Pyle wish to proceed as a cross complainant, she must sign as well. The court did not consider Edwin Pyle's late-filed opposition. (Cal. Rules of Court, rule 3.1300(d).)

Explanation:

The first cause of action properly alleges a claim for abuse of process in that it alleges that Cross Defendants Ermel Ray Moles ("Moles") and Ben Rastegar ("Rastegar") filed U.C.C. financing statements with the California Secretary of State for the purpose of attempting to get Edwin Pyle ("Pyle") to accept back a lawfully terminated and evicted tenant on his farm property to profit both Moles and Rastegar; to force Pyle to settle with Moles concerning the crop proceeds; and to deprive Pyle of operating capital by forcing Plaintiff E. & J. Gallo ("Gallo") to file this interpleader action. (First amended cross complaint in interpleader of Edwin Pyle, ¶11, 30.) (*Barquis v. Merchants Collection Association* (1972) 7 Cal.3d 94, 103-104 [Plaintiffs' first amended complaint alleging that defendant knowingly and willfully instituted actions against consumers in the wrong county, under inadequate complaints, for the ulterior purpose of impairing these individuals' defenses of the actions and with the intent of securing default judgments by virtue of the inconvenience of the improper forum alleged a cause of action for abuse of process.])

Ramona Unified School District v. Tsiknas (2005) 135 Cal.App.4th 510, 520-521, held that amending a petition rather than appealing within the same lawsuit did not constitute abuse of process, and is thus distinguishable.

The "demurrer" to the request and prayer for attorneys fees on both general and special grounds is overruled. A motion to strike, not a demurrer, is

(18)

Tentative Ruling

Re: ***Luna v. Selma Unified School District et al.***
Case No. 08CECG00993

Hearing Date: July 1, 2009 (Dept. 97D)

Motion: Petition to compromise minor's claim

Tentative Ruling:

To grant. Order signed. Hearing off-calendar.

Pursuant to California Rules of Court, rule 3.1312, 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: _____ DRF _____ on **6-29-09** _____.
(Judge's initials) (Date)

(18)

Tentative Ruling

Re: ***Stephens v. Westside Ford***
Case No. 07CECG01815

Hearing Date: July 1, 2009 (Dept. 97A)

Motion: For leave to file a supplemental answer

Tentative Ruling:

To grant. The court grants defendant 10 days leave to file with the court its supplemental answer. The time in which the supplemental answer can be filed will run from service by the clerk of the minute order.

Explanation:

On November 13, 2008 plaintiff filed a companion action in 08CECG03970 against defendant Westside Ford and Messrs. Michael and Marion Santos, alleging causes of action in intention and negligent infliction of emotional distress based on the same events alleged in the complaint in the present case. On February 27, 2009 plaintiff filed with the court a request for dismissal with prejudice of the action in 08CECG03970, and on that date the court dismissed the action with prejudice. Defendant seeks to file a supplemental answer to permit the pleading of the defense of res judicata. Under California Code of Civil Procedure (CCP) section 464(a) a supplemental pleading is used to allege relevant facts occurring after the original pleading was filed. In the present case, the relevant facts occurred after defendant filed its answer on September 6, 2007. A trial court should exercise liberality in permitting the filing of supplemental pleadings when the alleged after-occurring facts are pertinent. (See, e.g., *People v. Douglas* (1971) 15 Cal.App.3d 814, 818.)

Pursuant to California Rules of Court, rule 3.1312, and CCP 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: _____ **AMC** _____ on **June 29, 2009** _____.
(Judge's initials) (Date)

(21)

Tentative Ruling

Re: ***Garcia v. Clovis Unified School District, et al.***
Superior Court Case No. 08 CECG 03844

Hearing Date: Wednesday, July 1, 2009 (**Dept. 97D**)

Motion: Defendant CUSD's Demurrer to the Complaint

Tentative Ruling:

To SUSTAIN, with leave to amend. (Code Civ. Proc. § 430.10, subd. (e).)

To GRANT judicial notice of Request for Judicial Notice, Exhibit A. (Evid. Code § 452, subd. (d).)

To grant Plaintiff 10 days leave to file an amended complaint. (Cal. Rules of Court, rule 3.1320(g).) The time in which the complaint may be amended shall run from service by the clerk of the minute order. All new allegations in the amended complaint are to be set in **boldface** type.

Explanation:

Notwithstanding Defendant Clovis Unified School District's (hereinafter "Defendant") failure to timely file the demurrer, Plaintiff has not pleaded facts sufficient to constitute a cause of action under Civil Code section 51.9 with the requisite specificity. (Code Civ. Proc. § 430.90. *Lopez v. S. Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795.) The court finds that the allegation that Plaintiff was unable to easily end the relationship is conclusory. (Complaint, ¶ 57.) The court finds that Plaintiff has pleaded all other facts sufficient to constitute a cause of action under Civil Code section 51.9. (*Hughes v. Pair* (2007) 154 Cal.App.4th 1469, 1479.)

Whether the Title IX standard applies to the liability of a school district for the violation of Civil Code section 51.9 appears to be a case of first impression. The court refrains from deciding this issue on demurrer.

Assuming *in arguendo* that Title IX applies in the instant case, Plaintiff has pleaded facts sufficient to allege actual knowledge and deliberate indifference on the part of Defendant. Plaintiff alleges that she reported the incident to Ms. Woods in November 2008. Whether Ms. Woods is an "appropriate person" under the statutory scheme is a question of fact. (*Gebser v. Lago Vista Indep. Sch. Dist.* (1998) 524 U.S. 274, 290.) Similarly, "deliberate indifference will often be a fact-based question, for which bright line rules are ill-suited." (*Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App. 4th 567, 611.)

Defendant may not assert collateral estoppel on the issues decided by the U.S. District Court for the Eastern District of California (hereinafter "U.S. District Court"). Defendant has not obtained a final judgment on the merits of the issues. (See *People v. Barragan* (2004) 32 Cal.4th 236, 253.) The U.S. District Court granted, *inter alia*, Plaintiff leave to amend on the theory of ratification. (Judicial Notice, Exhibit A, p. 30:18-19.)

Pursuant to California Rules of Court, rule 3.1312 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: DRF on 6-30-09.
(Judge's initials) (Date)

Tentative Ruling

(17)

Re: ***Townsel v. Old Republic Life Ins. Co.***
Superior Court Case No. 06 CECG 02951

Hearing Date: July 1, 2009 (Dept. 97C)

Motion: Motion for Summary Judgment/Adjudication

Tentative Ruling:

To deny.

Explanation:

In ruling on a motion for summary judgment or summary adjudication, the court must "consider all of the evidence' and all of the 'inferences' reasonably drawn there from and must view such evidence and such inferences 'in the light most favorable to the opposing party.'" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) In making this determination, courts usually follow a three-prong analysis: identifying the issues as framed by the pleadings; determining whether the moving party has established facts negating the opposing party's claims and justifying judgment in the movant's favor; and determining whether the opposition demonstrates the existence of a triable issue of material fact. (*Lease & Rental Management Corp. v. Arrowhead Central Credit Union* (2005) 126 Cal.App.4th 1052, 1057-1058.)

The court's sole function on a motion for summary judgment is issue-finding, not issue-determination. The court must determine from the evidence submitted whether there is a 'triable issue as to any material fact.' (Code Civ. Proc. § 437c(c); *Zavala v. Arce* (1997) 58 Cal.App.4th 915, 926.) The moving party bears the burden of showing the court that the plaintiff 'has not established, and cannot reasonably expect to establish, a prima facie case' [Citation.]" (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.)

A defendant who seeks a summary judgment must define all of the theories of liability alleged in the complaint and challenge each factually. (*Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 714.)

First Cause of Action for Breach of Contract

The mistaken or erroneous withholding of policy benefits, if reasonable or if based on a legitimate dispute as to the insurer's liability under California law, is a breach of contract. (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 346.) "A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3)

defendant's breach, and (4) the resulting damages to plaintiff." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.)

Old Republic claims it did not breach the contract of insurance as neither excess medical benefits nor disability benefits are due under the policy because 1) plaintiff was not "on route" when the accident occurred and 2) the alleged disability did not start within 10 days of the accident. Note that the cause of action for breach of contract contains both allegations of failure to pay the excess medical benefits and the disability benefits. (See Complaint ¶ 9.) To obtain summary judgment and/or summary adjudication of the first cause of action, Old Republic must establish that no benefit was due under either policy provision.

Excess Medical Benefits

The rules of interpretation of a contract of insurance were described by the appellate court in *Cooper Companies v. Transcontinental Ins. Co.* (1995) 31 Cal.App.4th 1094, 1101: "First, the . . . primary goal of interpreting an insurance policy, like any contract, is to give effect to the mutual intent of the parties at the time they formed the contract. [Citation.] This intent is inferred, if possible, solely from the written provisions of the contract. [Citation.] 'The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" [citation], controls judicial interpretation. [Citation.]' [Citation.] [P] Second, if the court is faced with ambiguous policy language, the ambiguity is resolved by interpreting the ambiguous provision in the sense in which the promisor (insurer) reasonably believed, at the time of making it, that the promisee (insured) understood it. [Citation.] [P] Third, if the ambiguity is not eliminated through application of the above rule, then the ambiguous language is construed against the party who caused the uncertainty to exist. [Citation.] In most circumstances, the ambiguous language therefore is construed in favor of the insured. [Citations.]"

The "Excess Medical Expense Benefits For On Route and Trip Injury Rider for Insured Adult Carriers" states: "In consideration of the premium as stated in the Policy Schedule of Benefits page to which this Rider is attached, it is agreed that if an Insured Carrier, who has attained the age of 18, shall sustain an injury, as defined in the policy, while delivering newspapers to subscribers or while collecting from subscribers or while soliciting non-subscribers on the Insured's established route (Injury sustained while engaged in activities not connected with route work are excepted)..." (See Exhibit H to Bozarth Decl.) This is perfectly clear.

"Route" is not a technical term. A dictionary definition is one proper way to construe words in an insurance policy in their "ordinary and popular" sense. (*Stamm Theaters, Inc. v. Hartford Cas. Ins. Co.* (2001) 93 Cal.App.4th 531, 543.) Merriam Webster On-Line gives the following alternate definitions: "an established or selected course of travel or action, or an assigned territory to be

systematically covered <a newspaper *route*.>" (Merriam Webster On-Line Dictionary 2009, italics in original.) Being "on route" would mean being in one's assigned territory performing the duties of a newspaper carrier. Driving to the Fresno Bee to pick up one's papers before driving to one's assigned territory would not be "on route."

However, driving through one's territory to deliver a late paper would be. Plaintiff raises a triable issue of material fact as to whether he was "on route" at the time of the accident by alleging that he had a paper from the day before that he was delivering at the time of the accident. Although the declaration could be interpreted in two ways: 1) that he was on his way to the Bee to pick up the day's paper's and then to his assigned territory to deliver that day's papers and the late paper (in which case plaintiff would not be on route); and 2) that he was on his way to deliver the late paper before going to the Bee to obtain the day's papers (in which case plaintiff would be on route), we are bound liberally construe the evidence in favor of plaintiff. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.)

Even if the phrase "on route" was ambiguous, and the court was to reach the second stage of analysis of the contract, the result would be the same – summary judgment must be denied. The second step is to determine the sense in which the insurer reasonably believed the insured to understand the policy provisions. "This requires a consideration of the policy as a whole, the circumstances of the case in which the claim arises and 'common sense.' [Citation.]" (*Nissel v. Certain Underwriters at Lloyds of London* (1998) 62 Cal.App.4th 1103, 1112.) "The express provisions of the insurance contract must be considered in light of the insured's normal expectations of the extent of the coverage of the policy" (*Gyler v. Mission Ins. Co.* (1973) 10 Cal.3d 216, 220.) As discussed in the Rutter Group Practice Guide on Insurance Litigation, in this phase, courts may consider such disparate things as "the amount of premiums paid"; the "existence of other insurance; "the insurance company's advertising copy and brochures"; "oral and documentary evidence reflecting communications between the insurer and insured (or their agents) at the time the policy was procured"; and the "drafter's testimony" (Croskey et al., *Cal. Practice Guide: Insurance Litigation* (The Rutter Group 2008) 4:325-4:355.) A party's reasonable expectation of coverage is a question of law not a question of fact. (*Oliver Machinery Co. v. United States Fid. & Guar. Co.* (1986) 187 Cal.App.3d 1510, 1518.)

Plaintiff paid \$8.50 per month for the coverage at issue. Rationally, he could not have expected much for this sum. However price is not dispositive of whether driving to the location where the papers were to be picked up before driving to the route was a covered activity.

The court may properly consider advertising copy and brochures issued by the insurance company describing the coverage in determining a purchaser's

“reasonable expectations.” (*Silberg v. Calif. Life Ins. Co.* (1973) 11 Cal.3d 452, 113 CR 711.) This is because most persons do not read their insurance policies carefully. Their decision to purchase and their expectations as to coverage are usually based on advertising or brochures prepared by the insurer. The insurer should be bound by the expectations it has created. Thus, it may be required to provide coverage according to its advertising, despite more restrictive provisions in the insurance contract itself. (*Suarez v. Life Ins. Co. of North America* (1988) 206 Cal.App.3d 1396, 1405-1406.) Here, the brochure states “Excess Medical Expense Benefit On Route Accidents Only” and “If a covered accident occurs while you are actively performing your route duties, we will pay ...” Again, if the ordinary and customary definition of route is used, the meaning of a covered territory will control and thus picking up papers prior to traveling to one’s territory would not be part of “route duties.”

Old Republic’s problem lies not so much with the language of the policy but with plaintiff’s claim that his employer told him that he would be covered “going and coming.” Plaintiff’s deposition testimony at 171:12-172:2 asserts that his manager Patricia Schaeffer told him that he was so covered. Her deposition testimony denies this. (See Exhibit C to Bozarth Decl. at 10:11-16, 12:10-16.) This is a material disputed fact as plaintiff’s employer’s representations as to coverage can create coverage by estoppel. California has long held that fraud or misrepresentation as to coverage under a policy estops the insurer from reliance on the coverage as stated in the issued policy. (*Hartford Fire Ins. Co. v. Spartan Realty Int’l.* (1987) 196 Cal.App.3d 1320, 1325 [insured relied upon an insurance agent’s misrepresentations regarding coverage].) Moreover, estoppel can be created by the employer’s actions as the employer is the insurer’s agent. (*Bass v. John Hancock Life Insurance Company* (1974) 10 Cal.3d 792, 795.)

“Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.” (Evid. Code, § 623.) An insurer may be estopped to deny that coverage exists where the “insurer’s conduct [has] caused either (1) a ‘reasonable’ belief that [the] insurer was providing coverage or (2) any detrimental reliance on such conduct, both of which are essential to an estoppel claim.” (*State Farm Fire & Casualty Co. v. Jioras* (1994) 24 Cal.App.4th 1619, 1627–1628.) An affirmative representation that carriers were covered on their way to and from the paper drop off sites would engender a reasonable expectation of coverage. Moreover, plaintiff relied on this expansive definition of coverage, as he apparently cancelled his own medical accident coverage in reliance on it. (See Deposition of Plaintiff, Exhibit A to Janov Decl. at 132:10-133:9.) Accordingly, there are triable issues as to whether Old Republic is estopped from claiming there is no coverage for excess medical benefits.

Second Cause of Action – Bad Faith

The law implies in every contract, including insurance policies, a covenant of good faith and fair dealing. “The implied promise requires each contracting party to refrain from doing anything to injure the right of the other to receive the agreement’s benefits. To fulfill its implied obligation, an insurer must give at least as much consideration to the interests of the insured as it gives to its own interests. When the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort.” (*Frommoethelydo v. Fire Ins. Exchange* (1986) 42 Cal.3d 208, 214–215.)

While an insurance company has no obligation under the implied covenant of good faith and fair dealing to pay every claim its insured makes, the insurer cannot deny the claim “without fully investigating the grounds for its denial.” (*Frommoethelydo v. Fire Ins. Exchange, supra*, 42 Cal.3d at p. 215.) To protect its insured’s contractual interest in security and peace of mind, “it is essential that an insurer fully inquire into possible bases that might support the insured’s claim” before denying it. (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 819.) Where an insurer denies coverage but a reasonable investigation would have disclosed facts showing the claim was covered, the insurer’s failure to investigate breaches its implied covenant. (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1074; see also *Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 846 “[t]he covenant of good faith and fair dealing ... places the burden on the insurer to seek information relevant to the claim.”.)

Old Republic contends its investigation was reasonable because it relied on the claims form in denying the claim. However, it never contacted its insured, the plaintiff, to see if he might also have been engaged in a covered activity such as delivering a late paper or whether the accident occurred inside his route territory. Because Old Republic failed to take this simple, most basic step, the court cannot say that, as a matter of law there is no liability for bad faith.

The fact that Old Republic performed after-denial investigation as to what the Bee thought “on route” meant does not mitigate this initial failure to investigate the facts of the accident. As the Supreme Court cautioned in *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, an insurer’s duty of good faith and fair dealing does not evaporate after litigation has commenced. To hold otherwise would effectively “encourage insurers to induce the early filing of suits, and to delay serious investigation and negotiation until after suit was filed when its conduct would be unencumbered by any duty to deal fairly and in good faith. ... The policy of encouraging prompt investigation and payment of insurance claims would be undermined” (*Id.* at p. 886; see also *Old Republic Ins. Co. v. FSR Brokerage, Inc.* (2000) 80 Cal.App.4th 666, 685.) To the extent that Old Republic failed to clarify in plaintiff’s lengthy deposition exactly where the accident took place in regards to his route territory and thus whether he was on route or not at the time of the accident, could be taken as a sign of bad faith, precluding summary judgment at this time.

(21)

Tentative Ruling

Re: ***Martinez v. Paradise Inn Motel, et al.***
Superior Court Case No: 09 CECG 00221

Hearing Date: Wed., July 1, 2009 (**Dept. 97C**)

Motion: Plaintiff's Application for Writ of Attachment
Motion for Admissions Deemed Admitted

Tentative Ruling:

To DENY application for writ of attachment. (Code Civ. Proc. §§ 482.020, 484.090.)

To DENY motion for admissions deemed admitted.

Explanation:

1. Application for Writ of Attachment

Plaintiff has not timely filed an application or supporting papers. (Code Civ. Proc. § 484.020.) Plaintiff has not met his burden of proof. (Code Civ. Proc. § 484.090.)

2. Motion for Admissions Deemed Admitted

No moving papers have been filed. In addition, City of Fresno is not a named Defendant. (Code Civ. Proc. § 422.40.) There is no evidence that City of Fresno has been served as a defendant with the summons and complaint. (*Cal. Shellfish v. United Shellfish Co.* (1997) 56 Cal.App.4th 16, 22.)

Pursuant to California Rules of Court, rule 3.1312 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 A.M. Simpson 6-30-09
Issued By: _____ **on** _____
(Judge's initials) (Date)

Tentative Ruling

Re: ***City of Fresno v. Folgar, et al.***
Case No. 09CECG01274

Hearing Date: July 1, 2009 (Dept. 97D)

Motion: By Esteban M. Martinez: “plaintiff’s notice of motion and motion for order that failure to join a party under rule 19 operates as an adjudication on the merits; points and authorities in support thereof; judgment by the court.”

Tentative Ruling:

To refrain from ruling on the present motion due to the court being divested of jurisdiction, or in the alternative, should the court retain jurisdiction, to deny the motion.

Explanation:

Plaintiff City of Fresno named Esteban M. Martinez as a defendant in this action. On April 14, 2009 this court issued a minute order on the ex parte application for a temporary restraining order and order to show cause on the preliminary injunction in this case. Plaintiff dismissed Mr. Martinez as a defendant on May 1, 2009. This court issued the preliminary injunction in this case pursuant to a stipulation of all parties on May 12, 2009. On June 1, 2009 Mr. Martinez filed the “notice of motion and motion for order that failure to join a party under rule 19 operates as an adjudication on the merits; points and authorities in support thereof; judgment by the court” that is presently before the court. Mr. Martinez filed in this court on June 25, 2009 a notice of appeal to the Fifth District Court of Appeal. The appeal is from the “ex parte temporary restraining order/order to show cause” dated April 14, 2009 that Mr. Martinez identifies as a “judgment.”

The court interprets the notice of appeal dated June 25, 2009 as one from the preliminary injunction issued on May 12, 2009. Pursuant to California Code of Civil Procedure (CCP) section 904.1(a)(6), an order granting or denying a preliminary injunction is an appealable order. CCP sections 916-923 govern staying enforcement and other trial court proceedings while an appeal is pending. Under CCP section 916(a) a stay means that, upon timely filing of a notice of appeal, the trial court is divested of power to act on matters embraced in or affected by the appealed order; jurisdiction over the appealed matters shifts to the court of appeal and is terminated in the trial court; the trial court’s power to enforce, vacate or modify the appealed order is suspended while the appeal is pending. (*Varian Med. Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 196-198.)

This court finds that the matters in the June 1, 2009 motion are embraced in or affected by the appealed order. Therefore, the court is divested of power to act on the June 1, 2009 order.

Assuming, *arguendo*, that this court retained jurisdiction or the power to act, this court rules as follows. On February 17, 2009 the Fifth District Court of Appeal previously declared Mr. Martinez to be a vexatious litigant through *In re Finding of Esteban Martinez as a Vexatious Litigant*. Based on CCP section 391(b)(1) Mr. Martinez is a vexatious litigant. Notwithstanding Mr. Martinez' vexatious litigant status he would have the right to defend himself as any other defendant if he remained a defendant in this action. (*Mahdavi v. Superior Court* (2008) 166 Cal. App. 4th 32, 41-42.) But, Mr. Martinez was dismissed as a defendant in this action before he filed the June 1, 2009 motion presently on the court's calendar. Based on Mr. Martinez being a vexatious litigant, the court denies the motion.

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

Tentative Ruling

Issued By: DRF on **6-29-09**.
(Judge's initials) (Date)

Tentative Ruling

Re: **Mid-Cal Investments Inc. v. Salcido**
Superior Court Case No. 08 CECG 04446 AMC

Hearing Date: Wed., July 1, 2009 (Dept. 97 A)

Motion: Defendants' Motion to Quash Service of Summons and
Complaint.

Tentative Ruling:

To GRANT. (CCP 418.10 (a)(1).)

Explanation:

Defendants move to quash service of the summons and complaint on the ground that they were not properly served. (CCP 418.10.) Without proper service of summons, the court lacks jurisdiction over defendant. A defendant is under no duty to respond in any way to a defectively served summons. It makes no difference that defendant had actual knowledge of the action. Such knowledge does not dispense with the statutory requirements for service of summons. (**Kappel v. Bartlett** (1988) 200 Cal.App. 3d 1457, 1466; **Ruttenberg v. Ruttenberg** (1997) 53 Cal.App.4th 801, 808.)

Even though Defendants are the moving party, the burden of proving valid service is always on Plaintiff as Plaintiff must show that the court has jurisdiction. (**Dill v. Berquist Construction Co.** (1994) 24 Cal.App.4th 1426, 1439-1440.)

Plaintiff has filed facially valid proofs of service showing personal service on the husband Salvador on 4/8/09, and substituted service on the wife Theresa initiated on 4/8/09. Filing a proof of service that complies with statutory standards creates a REBUTTABLE PRESUMPTION that service was proper. (**Dill v. Berquist Construction Co.** (1994) 24 Cal.App.4th 1426, 1441-1442; **Floveyor International Ltd. V. Superior Court** (1997) 59 Cal.App.4th 789, 795.)

Defendants have filed the joint declaration of Salvador and Theresa Salcido which states that they were never personally served with the summons and complaint, but that it was left in their courtyard inside a locked gate while no one was home to receive it. The papers were found by their son. Furthermore, they never received a copy in the mail, so that substituted service was not completed. This evidence is sufficient to rebut the presumption created by the proofs of service. The burden shifts to Plaintiff to prove proper service was accomplished.

Tentative Ruling

Re: ***Harbin v. Vadadoa***
Superior Court Case No. 09 CECG 01363 DRF

Hearing Date: Wed., July 1, 2009 (**Dept. 97 D**)

Motion: Petition to Compromise Minor's Claim for Kylie Harbin

Tentative Ruling:

To GRANT. Order Approving Compromise and Order to Deposit Money signed. Hearing off calendar. No appearances necessary.

Counsel is ordered to forward to the depository a Receipt and Acknowledgment on Judicial Council form MC-356, along with a signed copy of the Order to Deposit. Once the depository has signed the Receipt, counsel shall file the completed Receipt with the court, within 30 calendar days of the clerk's service of the minute order.

Explanation:

Pursuant to CRC 3.1312(a) 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.

Tentative Ruling

Issued By: DRF on 6-30-09.
(Judge's initials) (Date)

Tentative Ruling

(17)

Re: ***Riojas v. Fresno Community Hospital and Medical Center et al.***

Superior Court Case No. 08 CECG 04280

Hearing Date: July 1, 2009 (Dept. 97B)

Motion: Dr. Sheikh's Motion to Compel Responses to Discovery

Tentative Ruling:

To grant the Motion to Compel Responses to Form Interrogatories, Set One, Special Interrogatories, Set One, Requests for Production, Set One and Request for Statement of Damages. Plaintiff Kevin Riojas by and through his guardian ad litem Elizabeth Valdivia will provide verified responses to the Form Interrogatories, Set One; Special Interrogatories, Set One, Requests for Production, Set One and Statement of Damages served by Dr. Sheikh without objection within 15 days after service of this order. Elizabeth Valdivia as guardian ad litem shall pay the law firm of Weis Martin Salinas & Hearst the sum of \$410 in sanctions within 30 days of service of this order.

Explanation:

Form & Special Interrogatories & Request for Production of Documents

Form Interrogatories, Special Interrogatories and a Request for Production of Documents were served by mail January 21, 2009. (Canepa Decl. ¶ 2; Exhibit "A.") Responses were due February 25, 2009. No responses have been received. (Canepa Decl. ¶ 6.)

The motion to compel the initial responses to the form interrogatories and motion to compel the production of documents are granted. (Code Civ. Proc. §§2030.260, subd. (a), 2030.290, subd. (b), §2031.300, subd. (b).)

Statement of Damages

When a complaint is filed in an action in the superior court to recover damages for personal injury or wrongful death, the defendant may request a statement setting forth the nature and amount of the damages being sought. (Code Civ. Proc. § 425.11, subd. (b).) The request shall be served on the plaintiff, who shall serve a responsive statement as to damages within 15 days. In the event that a response is not served, the party, on notice to the plaintiff, may petition the court in which the action is pending to order the plaintiff to serve a responsive statement. (Code Civ. Proc. § 425.11, subd. (b).)

Tentative Ruling

(17)

Re: ***Turnbull v. Ritter Chiropractic et al.***
Superior Court Case No. 09 CECG 00281

Hearing Date: July 1, 2009 (Dept. 97C)

Motion: Demurrer

Tentative Ruling:
To overrule.

Explanation:

A demurrer is made under Code of Civil Procedure section 430.10, and is used to test the legal sufficiency of the complaint or other pleading. (Weil & Brown, *Civil Procedure Before Trial* (Rutter Group 2008) "Attacking the Pleadings" § 7:5.) The demurrer admits the truth all material facts properly pleaded, but not mere contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

On general demurrer, the court determines if the essential facts of any valid cause of action have been stated. (Weil & Brown, *supra*, § 7:39; *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 572; Code Civ. Proc. § 430.10(e).)

The complaint alleges that plaintiff did not discover the negligence of defendants "until on or after October 30, 2007." (Complaint ¶ 15.) Plaintiff served a Notice of Intention to Commence Action pursuant to Code of Civil Procedure section 364 on October 27, 2008. (Complaint ¶ 19; Exhibit A.) The Notice indicates that the negligence was discovered "on or about October 30, 2007." (Exhibit A.)

Code of Civil Procedure section 340.5 provides, in relevant part: "In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first."

The limitations period prescribed by section 340.5 may be extended by 90 days under Code of Civil Procedure section 364, which provides in pertinent part: "(a) No action based upon the health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days' prior notice of the intention to commence the action. [¶] ... [¶] (d) If the notice is served within 90 days of the expiration of the applicable statute of limitations, the time for

Tentative Ruling

Re: ***Tony Martin and Mary McGonigle-Martin, individually and as guardians ad litem for Chris Martin, a minor v. Organic Pastures Dairy Company, LLC, Sprouts Natural Market, Inc., and Does 1-20, inclusive***
Superior Court Case No. **08CECG00408**

Hearing Date: July 1, 2009 (Dept. 97D)

Motion: Petition to Compromise a Minor's Personal Injury Claim

Tentative Ruling:

To approve, subject to compliance with the special needs trust, as outlined below. Counsel to appear via Court Call.

Explanation:

Due to the fact that a proposed special needs trust is involved in this disputed claim, the parties must first acquire approval of their proposed trust from the Probate Court. The Probate Court must make a determination regarding the claimant's competency and make sure that the money to be paid to the trust does not exceed the amount that appears reasonably necessary to meet the special needs of the claimant pursuant to Probate Code § 3604 (b) (1)-(3).

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.

Tentative Ruling

Issued By: _____ **DRF** _____ **on** **6-30-09** _____
(Judge's initials) (Date)

