Tentative Rulings for July 12, 2022
Department 06

To request oral argument, you must notify Judicial Secretary Charmaine Vital at (760) 904-5722 and inform all other counsel no later than 4:30 p.m.

This court follows California Rules of Court, Rule 3.1308 (a) (1) for tentative rulings (see Riverside Superior Court Local Rule 3316). Tentative Rulings for each law & motion matter are posted on the Internet by 3:00 p.m. on the court day immediately before the hearing at https://www.riverside.courts.ca.gov/OnlineServices/TentativeRulings/tentative-rulings.php. If you do not have Internet access, you may obtain the tentative ruling by telephone at (760) 904-5722.

To request oral argument, no later than 4:30 p.m. on the court day before the hearing you must (1) notify the judicial secretary for Department 6 at (760) 904-5722 and (2) inform all other parties of the request and of their need to appear telephonically, as stated below. If no request for oral argument is made by 4:30 p.m., the tentative ruling **will become the final ruling** on the matter effective the date of the hearing. **UNLESS OTHERWISE NOTED, THE PREVAILING PARTY IS TO GIVE NOTICE OF THE RULING.**

IN LIGHT OF THE CORONAVIRUS PANDEMIC; AND UNTIL FURTHER NOTICE, COUNSEL AND SELF-REPRESENTED PARTIES ARE ENCOURAGED TO APPEAR AT ANY LAW AND MOTION DEPARTMENT TELEPHONICALLY WHEN REQUESTING ORAL ARGUMENTS.

TELEPHONIC APPEARANCES: On the day of the hearing, call into one of the below listed phone numbers, and input the meeting number:

- Call-in Numbers: 1 (833) 568-8864 (Toll Free), 1 (669) 254-5252 ,
  1 (669) 216-1590, 1 (551) 285-1373, or
  1 (646) 828-7666
- Meeting Number: 161 830 3643

Please **MUTE** your phone until your case is called and it is your turn to speak. It is important to note that you must call fifteen (15) minutes prior to the scheduled hearing time to check in or there may be a delay in your case being heard.

For additional information and instructions on telephonic appearances, visit the court's website at https://www.riverside.courts.ca.gov/PublicNotices/remote-appearances.php.

Effective May 3, 2021, official court reporters will not be available in unlimited civil for any pretrial proceedings, law and motion matters, case management hearings, civil restraining orders, and civil petitions. (See General Administrative Order No. 2021-19-1)

1.

CVRI2000324	L. vs MENIFEE UNION SCHOOL DISTRICT	Demurrer on 2nd Amended Complaint for Other Personal Injury/Property Damage/Wrongful Death Tort (Over $25,000) of P. R. L. by MENIFEE UNION SCHOOL DISTRICT, JANET PAO, LILY PENA

Tentative Ruling:

The Court sustains the demurrer as to the 2nd cause of action without leave to amend.

Factual / Procedural Context:

Plaintiff, P.R.L, a minor, by and through his Guardian ad Litem, Yenny Linares, who attended Quail Valley Elementary School, alleges he was physically bullied and assaulted several times by other classmates. One incident that occurred on 2/12/19, resulted in Plaintiff seeking emergency medical attention, which Plaintiff reported to Lily Pena, the school principal. On 12/8/19, Plaintiff was beaten twice in one day. Defendant, Janet Pao, Plaintiff's teacher, witnessed the first incident, perpetrated by six classmates, that occurred in her classroom, but she did not rescue Plaintiff, report it to administrators, nor to Plaintiff's parents. The second incident, perpetrated by six classmates and two other students, occurred during lunch and was witnessed by Pena, classmates, and a school supervisor. Plaintiff's mother allegedly reached out to Pao, Pena and school administrators, who refused to do anything resulting in Plaintiff's mother filing a police report.

Plaintiff filed this action on 11/20/20. Plaintiff filed his Second Amended Complaint (SAC) on 3/17/22, which contains four causes of action: 1) negligent supervision; 2) negligent hiring, training, and/or retaining; 3) negligent supervision of school premises; and (4) negligent infliction of emotional distress.

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Defendants bring this demurrer to the 2nd cause of action for negligent hiring, training, and/or retaining in the SAC for failure to state facts sufficient to constitute a cause of action. (CCP § 430.10(e).) Defendants argue that Plaintiff's government tort claim does not encompass the allegations in the 2nd cause of action, which means the SAC impermissibly varies from the scope of the government claim; that the time to file a government claim has expired; and that the SAC does not contain sufficient facts to show Defendants' knowledge of the alleged unfitness or incompetency of its staff, employees, or teachers.

Plaintiff opposes arguing that on 3/17/22, when the Court granted Plaintiff's motion for leave to amend, it already evaluated Defendants' argument that the government tort claim fails to incorporate the failure to hire, train, and/or retain and determined the claim "was broad enough to encompass a negligent supervision of staff"; that the government tort claim does not require allegations to be as specific as in a civil action; and, that the SAC alleges sufficient facts to support the 2nd cause of action.

Analysis

A general demurrer lies where the pleading does not state facts sufficient to constitute a cause of action. (CCP § 430.10(e).) In evaluating a demurrer, the court gives the pleading a reasonable interpretation by reading it as a whole and all of its parts in their context. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) The court assumes the truth of all material facts which have been properly pleaded, of facts which may be inferred from those expressly pleaded, and of any material facts of which judicial notice has been requested and may be taken. (*Crowley v. Katleman* (1994) 8 Cal. 4th 666, 672.) However, a demurrer does not admit

contentions, deductions or conclusions of fact or law. (*Daar v. Yellow Cab Company* (1967) 67 Cal.2d 695, 713.) Facts appearing in exhibits attached to the pleading will also be accepted as true and, if contrary allegations appear in the pleading, will be given precedence. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 606.) If the pleading fails to state a cause of action, the court must grant the leave to amend if there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Presentation of an Adequate Government Tort Claim

Respondeat superior, or vicarious liability, is a form of strict liability: The employer is responsible for the employee's wrongful acts (whether negligent or intentional) notwithstanding the exercise of due care in hiring the employee or supervising his or her conduct. (*Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 960.)

By contrast, negligent hiring, supervision, training and retention of an employee is one of direct liability for negligence, not vicarious liability. (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815.) An employer may be liable for its own direct negligence in hiring, retaining or failing to oversee an incompetent or unfit employee whose characteristics might pose a danger to a person the employee is expected to come into contact within the employment relationship. (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139.) This distinction is important to the analysis of whether Plaintiffs' government tort claim includes the direct liability claim challenged here.

A plaintiff must file a claim against a local public entity before a plaintiff may file an action for money or damages against the entity. (Govt. Code §§ 905, 905.2, 945.4.) To be timely, a government claim for damages for personal injury or personal property must be presented to the public entity within six months of the date the cause of action accrued; all other claims are within one year. (Govt. Code §§ 901, 911.2.) The failure to present a timely claim and allege facts demonstrating or excusing compliance with the claim presentation requirement subjects a complaint to a general demurrer. (*State v Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1239.) Thus, presentation of the claim is not merely a procedural requirement; it is a condition precedent to a claim against the entity. (*Bodde, supra.* at 1240.)

In this case, it is undisputed that Plaintiff filed a government tort claim. However, Defendants argue that government tort claim fails to sufficiently include the requisite facts to support the 2nd cause of action in the FAC for negligent hiring, training and retention. Defendants assert that the factual allegations in the FAC impermissibly vary from the government tort claim, which cannot be cured because the time to file the claim has expired. Defendants argue that factual basis for the negligent hiring, training and retention claim in the FAC must be "fairly reflected" in the government tort claim. (*Gong v. City of Rosemead* (2014) 226 Cal.App.4th 363, 376; *Donahue v. State of California* (1986) 178 Cal.App.3d 795, 802-803.)

The FAC alleges that Plaintiff has timely complied with the government tort claims requirement by presenting a claim on 4/7/20. (FAC ¶ 11.) This allegation is incorporated into the 2nd cause of action. (*Id.* ¶ 50.) Defendants assert that the relevant portion of the government tort claim is that "[P.R.L.] was approached by 6 children on school grounds during class. Unprovoked, the 6 children physically assaulted [P.R.L.] During recess on the same day, the assault continued with 8 children involved." (Motion, p. 7:4-8, Ex. "1".) The claim then asserts that Defendants are liable for: "Lack of supervision and failure to provide a safe learning environment by the district and its employees allowed for [P.R.L.] to be assaulted twice on school grounds by students." (*Id.* at p. 7:8-10.) There is no question that this claim is already set forth in the 1st cause of action for negligent supervision, which albeit is not the same as a negligent hiring, training and retention cause of action.

Indeed, no facts were stated in the government tort claim that even suggest that MUSD's hiring, training and/or retention of its employees was inadequate, which led to Plaintiff's injuries. As set forth in the government tort claim, the 12/8/19 incidents are based on Defendants *negligent supervision* of students and failure to provide a safe learning environment on that day. But, a claim for negligent hiring, training and/or retention is necessarily based on other events or must show a connection between negligent hiring, training and/or retention and Plaintiff's injuries.

Plaintiff argues that the Court already determined on 3/17/22 that the government tort claim is "broad enough to encompass a negligent supervision of staff" and "this is not a complete change of theory." Plaintiff then concludes that the Court found Defendants' argument on this point lacked merit. However, the comments made by the Court on 3/17/22 addressed a different situation than presented here. The motion heard by the Court on 3/17/22 was a motion for leave to amend, which is not a motion addressing the sufficiency of the allegations in the pleading. It merely allows the filing of the pleading, and is not dispositive as to a subsequent demurrer.

More importantly, the "negligent supervision of staff" claim does not fairly reflect a separate negligent hiring, training and/or retention claim. While the extent of the detail required in the government tort claim does not have to be as detailed as a civil complaint would require, there must be sufficient detail to distinguish the two claims to provide the government entity with sufficient notice. Contrary to Plaintiff's argument, this is not a situation where "the complaint merely elaborates or adds further detail to a claim, but is predicated on the same fundamental actions or failures by the defendants." (Oppo. p. 5:1-3; *Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441, 447.) Plaintiff's government tort claim does not include sufficient facts to support a negligent hiring, training and/or retention claim.

In addition, as to the 2nd cause of action in the FAC, this defect cannot be cured because it is now time-barred. Based on the date of the 12/8/19 incident, the deadline to timely file a government tort claim was 6/8/20 (within six months of the incident.) The deadline to seek to file a late claim was 12/8/20 (within one year of the incident.) Plaintiff cannot now attempt to amend the government tort claim to add facts to support a new/additional claim for negligent hiring, training, and/or retention.

In short, the Court finds that "negligent supervision of staff" does not include a negligent hiring, training and/or retention claim. Therefore, the demurrer is sustained without leave to amend.

2.

CVRI2103226	GATSON vs CITY OF RIVERSIDE.	City of Riverside's Notice of Motion and Motion to Compel Responses from Plaintiff Jeanna Gatson to Request for Production of Documents, Set One

Tentative Ruling:

The Court grants the City's motion to compel Plaintiff Gatson to respond to the City's Request for Production of Documents, set one. The Court notes that Plaintiff filed a late opposition asking that no sanctions be imposed on counsel because Plaintiff's counsel has a motion to be relieved, set on August 1, 2022, and that Plaintiff's counsel has not been in touch with their client. Indeed, the declaration to be relieved also indicated that Plaintiff's counsel has had no contact with his client.

This point is moot, however, because the City did not request monetary sanctions against Plaintiff or counsel, only responses. Regardless of whether the City was seeking monetary sanctions, or merely compliance with Plaintiff's discovery obligations, the Court finds that this does not excuse or justify Plaintiff's failure to respond to the City's discovery requests.

As such, the Court grants the City's motion to compel. As for a compliance date, given that Plaintiff's counsel is seeking to be relieved on August 1, 2022, the Court shall order that Plaintiff provide verified responses, without objection, by August 30, 2022.

3.

CVRI2104355	AVILA vs TSUTSUMI D.P.M.	Motion for Preferential Trial Setting by MARIA AVILA

Tentative Ruling:

The Court denies the motion for trial preference.

Factual / Procedural Context

Plaintiff filed the operative Complaint for Professional Negligence – Medical Malpractice on September 24, 2021 against Defendant Roger Y. Tsutsumi D.P.M. At the time the Complaint was filed, Plaintiff was 66 years old (Comp. ¶7) and diagnosed with metastatic stage four melanoma. Defendant is a podiatry specialist working in Corona, California. (¶8.) Plaintiff was experiencing pain and blistering on the outside of her left foot and sought Defendant's medical advice in January 2019. (¶9.) Defendant diagnosed Plaintiff with painful Taylor's bunion deformity and recommended surgery. (¶9.) Plaintiff saw Defendant several times over the ensuing months relating to the care and treatment of her foot. On July 29, 2019, Defendant advised Plaintiff to move forward with surgery. 9¶14.) Plaintiff had surgery on September 6, 2019. (¶15.)

A tissue sample was collected during the surgery and was sent out for testing. Diagnostic laboratory work revealed the tissue sample was a melanoma. (¶16.) During a follow up visit with Defendant on September 9, 2019, Plaintiff alleges Defendant did not review the tissue sample findings with her and did not inform her of the melanoma. (¶17.) Plaintiff alleges she had numerous additional follow up visits with Defendant and Defendant did not tell her about the melanoma during any of those visits. (¶19.) Plaintiff alleges her health significantly declined and by March 2020 she was unable to speak or walk. Plaintiff was placed on a ventilator and in July 2020 she was officially diagnosed with a metastatic stage four melanoma. (¶21.)

Plaintiff brings the instant suit against Defendant alleging medical malpractice for knowing about the melanoma and failing to tell Plaintiff.

Plaintiff brings the instant motion for trial setting preference under CCP §36(e). The motion contends Plaintiff is currently in a "nearly vegetative state" and she has lost "all of her motor skills and requires around the clock 24-hour care." (Mot. p.3:22-23.) Plaintiff is paralyzed and bedridden. (Mot. p.4:1.) The motion asserts Plaintiff has a substantial interest in this litigation and given her serious medical condition, preference is needed to prevent prejudice to Plaintiff's interest in the litigation. Plaintiff asks the court to use its discretion under CCP §36(e) to find the interest of justice will be served by granting the motion for preference. The motion is supported by the declaration of attorney Sam Nordean, who describes Plaintiff's current medical condition. (Nordean Decl. ¶3.)

Defendant opposes the motion. Defendant notes Plaintiff did not request preference at the initial case management conference. (Berger Decl. ¶5.) Defendant argues the motion should be denied because the facts do not show necessity and grounds for preference. Defendant notes Plaintiff is not over 70 years of age, she is not terminal, and her medical condition is continuing to improve. Defendant argues Plaintiff does not meet the requirements of CCP §36(a) or (d). Defendant asserts that Plaintiff's medical records indicate her condition is now "cured" and improving. (Berger Decl. ¶11a-e and Exhibits A-E.) Additionally, Defendant argues this case is still in its infancy as discovery has barely begun. For this reason, Defendant argues granting preference would prejudice Defendant.

Analysis

The court has general discretionary power to grant priority to any case upon a showing of good cause: i.e., "that the interests of justice will be served by granting this preference." (CCP §36(e).) If a notice motion is used, it must be accompanied by declarations showing why the "interests of justice" will be served by granting the preference request. (CCP §36(e).) The decision to grant or deny a preferential trial setting under CCP §36(e) "rests at all times in the sound discretion of the trial court in light of the totality of the circumstances." (*Salas v. Sears, Roebuck & Co.* (1986) 42 Cal.3d 342, 344.) Even though an illness is not "terminal" within the meaning of CCP §36(d), a party's advancing senility or enfeeblement may impair his or her ability to participate in the litigation. (Rutter, Civil Procedure Before Trial: Case Management and Trial Setting, Ch. 12(I)-C:12:257.1.)

In ruling on a preference request, the court considers the same issues as would be relevant on a motion to dismiss for delay in prosecution (CCP §583.410), including: condition of the court calendar; dilatory conduct by plaintiff; prejudice to defendant of an accelerated trial date; and the likelihood of eventual mandatory dismissal if the early trial date is denied. (*Salas v. Sears, Roebuck & Co.* (1986) 42 Cal.3d 342, 346; see also *Nye v. 20th Century Ins. Co.* (1990) 225 Cal.App.3d 1041, 1045.)

Plaintiff seeks trial preference under CCP §36(e), which provides: "Notwithstanding any other provision of law, the court may in its discretion grant a motion for preference that is supported by a showing that satisfies the court that the interests of justice will be served by granting this preference."

Defendant argues Plaintiff has not exercised reasonable diligence in prosecuting the instant case. Defendant notes the complaint was filed almost a year ago, but discovery is still in its infancy. Defendant contends Plaintiff only recently propounded a first set of written discovery and, as of June 1, 2022, no depositions have been taken. Defendant contends his counsel has worked to obtain a complete copy of Plaintiff's medical records but Plaintiff has not provided a copy and Defendant has been unable to obtain one via other means. Defendant argues it would be impossible for discovery to be completed within 120 days if the instant motion is granted, as there simply isn't enough time to obtain Plaintiff's medical records, review them, depose necessary witnesses, and have Plaintiff obtain a physical and/or mental examination. As a result, Defendant argues he would be prejudiced if the instant motion is granted.

The Court first notes that there is conflicting information about Plaintiff's current health and medical condition. Plaintiff's counsel's declaration indicates Plaintiff's condition is "deteriorating" (Nordean Decl. ¶7), her "prognosis is poor" and she "can no longer conduct any of her normal and daily activities." (Id. at ¶3.) No evidence is cited to support these claims. Defendant's counsel cites to Plaintiff's medical records in Opposition. On May 6, 2021, one of Plaintiff's doctors noted "her cancer is considered cured by Dr. Fruehoff." (Berger Decl. ¶11(a).) As of February 15, 2022, Plaintiff's doctor noted she was "attentive and fluent" and her "speech and language are normal." (Berger Decl. ¶11(e).) There is no information provided regarding Plaintiff's health or condition from any time after February 15, 2022, except for Plaintiff's counsel's unsupported declaration that she is deteriorating.

In order for the court to grant preference under CCP §36(d), the motion for preference must be accompanied by "clear and convincing medical documentation that concludes that one of the parties suffers from an illness or condition raising substantial medical doubt of survival of that party beyond six months." The same requirement is not necessary for relief under subsection (e), but to the extent Plaintiff's counsel is alleging she is terminally ill, the Court has not been provided sufficient information and documentation evidencing this fact. The evidence presented by Defendant shows Plaintiff was at least well enough to speak normally in February of this year and

Plaintiff has not provided any supported evidence to the contrary. Given this inconsistency, the Court shall not grant the requested relief on the basis that Plaintiff's health is deteriorating.

The court must also consider any dilatory conduct by Plaintiff. Defendant presents evidence that Plaintiff has yet to produce Plaintiff's entire medical records. (Berger Decl. ¶10.) Defendant presents evidence that Plaintiff did not request any trial preference at the March 23, 2022 CMC, and instead waited until months later to do so. (Berger Decl. ¶5.) There is no evidence that Plaintiff has been purposely delaying discovery or seeking trial preference. It appears, at most, that the discovery has simply been moving slowly, as discovery tends to do.

Finally, the court must consider prejudice to defendant of an accelerated trial date. Given the slow nature of discovery thus far, if the court were to grant the motion, Defendant would likely be unable to complete all discovery given how much is still outstanding. No depositions have been taken. Defendant has not yet responded to Plaintiff's first set of discovery. Defendant still does not have Plaintiff's complete medical records, which total thousands of pages. It seems unlikely discovery would be completed by any accelerated trial date, which would likely lead to prejudice against Defendant in not being able to mount a full defense against Plaintiff's claims.

As such, the Court shall in its discretion deny the motion.