Dept. 1 - Civil Law and Motion Tentative Ruling for Thurs., Sept. 29, 2022 @ 1:30 p.m.

If you wish to appear for oral argument, you must so notify the Court and all other parties by 4:00 p.m. one court day prior to the scheduled hearing, pursuant to California Rules of Court, rule 3.1308. The phone number for Department 1 is (209) 588-2383. The tentative ruling will become the ruling of the Court if the Court has not directed oral argument by its tentative ruling and notice of intent to appear has not been given.

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25. CV63114 Alameda v. City of Sonora
Hearing on: Motion for Summary Adjudication of Affirmative Defenses
Moving Party: Plaintiff
Tentative Ruling: MSA Granted

This is a personal injury action, stemming from a vehicular accident on SR-108 in an unincorporated portion of Tuolumne County. The accident occurred just after midnight on June 22, 2019. Trial in this matter is presently set to commence on January 30, 2023.

Before the Court this day is a motion by plaintiff to summarily adjudicate in his favor defendants' Sixth Affirmative Defense (Comparative Fault of Others), and Fifteenth Affirmative Defense (Noneconomic Loss Limitation) contained within defendants' First Amended Answer filed January 19, 2021. In order to knock out an opponent's affirmative defense at the summary adjudication stage, plaintiff must first make a prima facie showing sufficient to support his position (aka, burden of production) that: (1) there are no triable issues of material fact relating to the affirmative defense; and (2) the *entire* affirmative defense fails either because the affirmative defense cannot be established or because the affirmative defense has no bearing on the claims asserted. If plaintiff meets that burden of production, the burden then shifts to defendant to demonstrate the existence of a triable issue of material fact. Although the ultimate burden of persuasion for any affirmative defense rests with defendant at trial, on a motion for summary adjudication, that burden rests with plaintiff as the moving party. See CCP, § 437c(f)(1); *North Coast Women's Care Medical Group, Inc. v. Superior Court* (2008) 44 Cal.4th 1145, 1160-1161; *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 899-900; *Continental Insurance Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1195-1196.

Evidentiary Objections

On a motion for summary judgment, the trial court must consider all of the evidence submitted by the parties *except* that to which objections have been made and sustained. *Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 281. A party who wishes to exclude evidence from consideration must "quote or set forth the objectionable statement or material [and] state the grounds for each objection to that statement." CRC 3.1354(b). It is incumbent upon the party objecting to make clear the specific ground of the objection, and not rely on boilerplate generalities. See *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 764. Assuming objections are made in the proper format, the trial court need only rule on those evidentiary objections that it deems material to the disposition of the motion. CCP, § 437c(q). In this instance, although the objections filed by both sides relate to unfavorable evidence, the legal basis for excluding any of it is unclear (given to the use of string objections). Nevertheless, this Court is aware of the "adverse" evidence and has only given consideration to those objections

which are supported and result in the exclusion of material evidence. With those limits, the objections filed by both side – plaintiff and defendants – are OVERRULED.

Pertinent Background Facts

Plaintiff and Yesenia Lara met on an online dating website in June of 2017. They were, for all intents and purposes, boyfriend and girlfriend.

On December 4, 2017, plaintiff pled no contest to a charge of Vehicle Code, § 23103.5 (commonly referred to as a wet reckless). Although plaintiff was separately cited for driving without a license (12500), and he refused to provide a chemical test, the Court did not suspend his driving privileges. See Merced County Superior Court Minute Order dated December 4, 2017.

In or about the fall of 2018, Lara came to the conclusion that she wanted to get plaintiff a motorcycle as a gift, even though neither of them had ever owned a motorcycle before, and neither of them were licensed to operate a motorcycle.

On November 15, 2018, Lara met with the salesperson at Kawasaki KTM of Modesto and purchased a used 2009 Honda VT750C for $3,200.00 (plus tax/fees). She took advantage of a "nothing down, 100% financing" option from Lendmark Financial. Based on the terms of said loan, she was to pay $158.47/month for 36 months. The motorcycle was registered in her name.

The following day, on November 16, 2018, plaintiff completed an application for motorcycle insurance with Freeway Insurance Services, a brokerage offering many policy choices. Progressive West is one of those insurers who offered "non-owner" insurance to protect someone using an uninsured vehicle with the registered owner's permission (see Vehicle Code, §16452). Little is known about this particular application, except that it was accepted and Policy 925746937 was issued, effective November 16, 2018.

On March 4, 2019, Progressive cancelled Policy 925746937 due to nonpayment (plaintiff failed to timely pay the second quarterly installment).

On March 16, 2019, after learning of Progressive's decision to cancel Policy 925746937, the DMV suspended plaintiff's driving privileges pursuant to Vehicle Code, §16484. As previously noted, it was unclear to this Court how plaintiff was burdened by an SR-22 requirement since a wet reckless does not carry that requirement, and the DMV here never pursued its own administrative suspension. See Vehicle Code, §§ 13351(a), 23013.5. Having now reviewed the additional DMV and Merced County records, this Court can now see that plaintiff's SR-22 requirement came as a result of his refusal to submit to a blood, breath or urine test. See Vehicle Code, §§ 13353, 16431(b).

On May 29, 2019, plaintiff completed a new application for motorcycle insurance with Freeway Insurance Services. Progressive West was again selected as the provider. Plaintiff faithfully disclosed the absence of a motorcycle endorsement, two prior accidents, and a wet reckless conviction. Plaintiff indicated that his license was "valid," although it was in fact suspended for want of an SR-22 (see Vehicle Code, §§ 13106, 16072, 16484). Plaintiff did not check the box indicating a need for an SR-22 (see Ex. AA, page 353), and there is no indication of any separate line item for an SR-22 on the payment receipt (see Ex. AA, pages 355-356). Progressive issued Policy 930080890, effective May 28, 2019. It remained effective through the date of the subject accident.

On or about June 1, 2019, Progressive reportedly informed the DMV about, and uploaded a copy of, the new Policy 930080890. However, Progressive did not separately file an SR-22 confirming minimum coverage. For that reason, plaintiff's DMV suspension was never lifted.

On June 22, 2019, the accident occurred.

On July 29, 2019, after declaring the motorcycle a total loss, Progressive issued a check in the amount of $2,563.70 to Lendmark as the lienholder on the motorcycle, to cover the balance of Lara's loan.

Defendants' Sixth Affirmative Defense – Summary Adjudication Granted

The pleading at issue forms the outer measure of materiality on a motion for summary adjudication. *Nieto v. Blue Shield* (2010) 181 Cal.App.4th 60, 73. When applying the "outer measure" rule, the pleading is to be broadly construed whenever possible, but without reading into the pleading new or different theories. See *Paduano v. American Honda Motor Co., Inc.* (2009) 169 Cal.App.4th 1453, 1496; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1257.

Defendants' Sixth Affirmative Defense is titled *Comparative Negligence of Third Parties*, but the title is a misnomer. The text of the averment, which controls, is as follows: "that the matters complained of in the plaintiff's complaint on file herein and the alleged causes of action, were ***solely caused*** by the actions or omissions of a third party or parties, other than these answering defendants." Emphasis is added to draw the readers' attention to the fact that, despite the label "comparative," this is not a Prop. 51 defense, but instead a functional duplicate of defendants' first affirmative defense for failure to state. By asserting that others are "solely" responsible for the accident, defendants effectively contend that they have zero responsibility (i.e., no duty, or no breach, or no cause). Plaintiff has negated the defense by presenting a prima facie case of "some" liability to defendants based on ordinary Vehicle Code sections and the contention that Officer Brickley was in the course and scope of work at the time of the accident. Defendants do not contend otherwise, nor do they identify other public entitles/employees responsible. While defendants present copious amounts of evidence showing transgressions by both Ms. Lara and

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Confie/Progressive, such averments do not, under any legal theory, completely exonerate defendants.

Since this Court envisions an immediate request by defendants for leave to amend the answer, and to avoid the risk of further delays, this Court observes that there would be no basis for summarily adjudicating a true Prop. 51 affirmative defense in plaintiff's favor since there are several triable issues of fact regarding Lara's entrustment of the motorcycle to plaintiff, and plaintiff would first have to negate any percentage of fault owing to himself. Unless defendants admit that plaintiff was entirely fault-free for the impact, the jury will have to sort that part out.

Defendants' Fifteenth Affirmative Defense – Summary Adjudication Granted

Defendants' Fifteenth Affirmative Defense is titled *Noneconomic loss Limitation: Civil Code § 3333.4*. This is commonly referred to as a Prop. 213 defense. This Court has been called upon several times to address the application of this defense in the context of the unique facts herein.

Civil Code § 3333.4(a) provides in pertinent part as follows:

> "In any action to recover damages arising out of the operation or use of a motor vehicle, a person shall not recover non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages if any of the following applies:
>
> (1) The injured person was at the time of the accident operating the vehicle in violation of Section 23152 or 23153 of the Vehicle Code, and was convicted of that offense.
>
> (2) The injured person was the owner of a vehicle involved in the accident and the vehicle was not insured as required by the financial responsibility laws of this state.
>
> (3) The injured person was the operator of a vehicle involved in the accident and the operator cannot establish his or her financial responsibility as required by the financial responsibility laws of this state."

Until recently, this Court understood that plaintiff was claiming to be a permissive user of Lara's motorcycle, and that the question of financial responsibility was controlled by subsection (a)(3). Never before has this Court been called upon to decide whether *the motorcycle* was "insured as required by the financial responsibility laws of this state" consistent with subsection (a)(2) because, as far as this Court understood, plaintiff never claimed to actually *own* the motorcycle. Is there a different evidentiary focus between subsection 2 (the vehicle being covered) and subsection 3 (the operator being covered)? The parties have not discussed the issue, but this case presents perhaps a perfect example of the difference. Defendants argue that the policy issued by Progressive was "bogus" because *plaintiff* was not eligible to be insured, but if plaintiff owned the motorcycle and the motorcycle was covered, financial responsibility has been satisfied.

Even though the motorcycle was a gift to plaintiff, he was the only one to operate it, and he took responsibility for having it insured, plaintiff does not qualify as an "owner" for purposes of Civil Code § 3333.4(a)(2). The Court of Appeal in *Savnik v. Hall* (1999) 74 Cal.App.4th 733, faced the same question. Although "vehicle ownership is a fact question for the jury to determine in light of all the circumstances," and that "registration is merely one incident of ownership," the Court held that for purposes of § 3333.4 ownership is established by reference to both Vehicle Code § 460 ["an owner is a person having all the incidents of ownership, including the legal title of a vehicle whether or not such person lends, rents, or creates a security interest in the vehicle"] and other incidents of ownership, such as dominion and control. *Id*. at 740-743. The Court observed that ownership under Civil Code § 3333.4(a)(2) required there to be evidence that the injured plaintiff enjoyed *both* legal ownership and actual dominion to qualify. In accord, Civil Code §§ 679, 680. There is no evidence that plaintiff met the first element – legal ownership.

As for legal ownership, defendants cite to *Coca Cola Bottling Co. v. Feliciano* (1939) 32 Cal.App.2d 351, for the proposition that plaintiff cannot be an "owner" of the motorcycle without at least a formal transfer and re-issuance by the DMV. *Id*. at 353. *Feliciano* was based on a predecessor to Vehicle Code § 5600, which provides in pertinent part as follows:

> "(a) No transfer of the title or any interest in or to a vehicle registered under this code shall pass, and any attempted transfer shall not be effective, until the parties thereto have fulfilled either of the following requirements:
>
> (1) The transferor has made proper endorsement and delivery of the certificate of ownership to the transferee as provided in this code and the transferee has delivered to the department [the certificate];
>
> (2) The transferor has delivered to the department the appropriate documents for the registration or transfer of registration of the vehicle pursuant to the sale or transfer.

The rule set forth in *Feliciano*, and codified at Vehicle Code § 5600(a), is not absolute. See *Suburban Motors, Inc. v. State Farm Mutual Automobile Insurance Co.* (1990) 218 Cal.App.3d 1354, 1363 n.4; *Davis v. Joseph* (1957) 148 Cal.App.2d 899, 904-905. For example, Vehicle Code § 5602 absolves the registered owner of civil responsibility if that person "has made a bona fide sale or transfer of a vehicle and has delivered possession of the vehicle to a purchaser [and] made proper endorsement and delivery of the certificate of ownership." In other words, someone like Lara might be the "registered owner" of the motorcycle without being liable as the "owner" if she took the required steps to distance herself from ownership. Consider *Talbott v. Csakany* (1988) 199 Cal.App.3d 700, 702. Had she signed over the pink slip and filed a release with the DMV, grounds for a finding of equitable ownership would exist. There being no evidence of her having done so, this Court is left with no alternative but to conclude that plaintiff was not the "owner" of the motorcycle (and Lara was). In MSA parlance, plaintiff failed to make a prima facie showing that Civil Code § 3333.4(a)(2) was applicable.

Turning back now to Civil Code § 3333.4(a)(3), it remains defendants' contention that plaintiff has failed to establish "financial responsibility" as required by law because (1) even though plaintiff had a policy of insurance in place at the time of the accident, that policy was "bogus" given plaintiff's material omissions/misrepresentations, and (2) even if the policy were valid, "financial responsibility" also includes having an SR-22 on file with the DMV. Each argument will be addressed in turn, but not before this Court points out that the express purpose behind Proposition 213 is "to punish scofflaws and reform an unfair system that allowed lawbreakers to recover substantial noneconomic damages." *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 282; *Savnik v. Hall* (1999) 74 Cal.App.4th 733, 742 ["concept of deterring willful defiance of the mandatory insurance requirement imports a scienter requirement, i.e., that the penalty on recovery is meted out to those who knowingly break the law"]; *Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 991. As noted in the Findings and Declaration of Purpose for Proposition 213, in pertinent part, "uninsured motorists are law breakers, and should not be rewarded for their irresponsibility and law breaking … Californians must change the system that rewards individuals who fail to take essential personal responsibility to prevent them from seeking unreasonable damages or from suing law-abiding citizens." See also *Quackenbush v. Superior Court* (1997) 60 Cal.App.4th 454, 466 n.7 ["Proposition 213 targeted uninsured motorists because of the group's conduct in receiving the benefits of the insurance system without paying its admission price."]

In this instance, plaintiff applied for insurance prior to the date of the accident, paid the requisite quarterly premium to bind that insurance, and had a policy of insurance in place covering his use of the motorcycle on the date in question. The policy included the required minimum amounts of coverage. See Vehicle Code §§ 16000.7, 16056, 16430; Policy 930080890 declaration of coverage. These facts are not in dispute. Plaintiff did exactly what Prop. 213 hoped people would do – have insurance in place when accidents happen. Moreover, plaintiff's insurance did what it was supposed to do after an accident, to wit: pay benefits to an injured party (in this case, the lienholder). Given that Prop. 213 was designed to punish those who knowingly fail to get insurance, it seems that § 3333.4(a)(3) has no place in a case where the injured driver actually had insurance. Nevertheless, defendants contend otherwise.

"Policy 930080890 was Bogus"

Despite having a proper insurance policy, defendants contend that the policy is "bogus" because (1) the application was procured by plaintiff's material omissions/misrepresentations, and (2) Progressive was supposed to do more to ensure that plaintiff was eligible to be insured.

As for plaintiff's alleged omissions/misrepresentations, the right to declare an insurance policy "invalid" is a right which belongs solely with the insurance company, and not a stranger to that contract. See *Landeros v. Torres* (2012) 206 Cal.App.4th 398, 413. Progressive has already

confirmed that, despite learning of these omissions/misrepresentations, it has no intention of rescinding the policy. Defendants offer no legal theory upon which to find that defendants can step into Progressive's shoes and equitably rescind the policy. Although defendants correctly point out that the panel in *Honsickle v. Superior Court* (1999) 69 Cal.App.4th 756 thought issuance of a policy to an unlicensed driver was "an absurdity on its face" (*id*. at 766), this statement was offered to explain why there is no basis for creating a good-faith exception to Civil Code § 3333.4 for those who thought they had insurance. *Honsickle* says nothing of the driver who actually succeeds in securing insurance despite a plethora of red flags. In *Landeros,* the panel had occasion to consider *Honsickle*, and concluded that (1) unlicensed drivers can be permissible users, and (2) even if a policy covering an otherwise ineligible driver was procured by fraud, the driver still has evidence of financial responsibility for purposes of Civil Code § 3333.4. In addition, there is nothing in the Legislative history or pamphlet/ballot materials suggesting that lying on an insurance application was one of the evils Proposition 213 was aimed at eradicating. Quite the contrary, if a driver has to lie on an application to secure insurance, and the insurance company does not thereafter rescind the policy, reasonable minds might argue that the means justified the ends. In other words, it makes little sense to find that duping an insurance company in order to comply with Prop. 213 is itself a violation Prop. 213. Were that the intent, the electorate would have included in the definition of *establishing financial responsibility* that the application used to secure insurance contain only truths.

Regarding Progressive's behavior, there is no legal basis upon which to find that a policy improvidently issued should somehow not count. Defendants contend that an extension of the rule set forth in *Barrera v. State Farm Mut. Automobile Ins. Co.* (1969) 71 Cal.2d 659, is warranted. In *Barrera*, the Supreme Court held that "an automobile liability insurer must undertake a reasonable investigation of the insured's insurability within a reasonable period of time from the acceptance of the application and the issuance of a policy," (*id* at 663), but its holding was more limited than defendants might like. *Barrera* did not create a general duty of care on the part of insurance agents/companies to make sure only eligible drivers got insurance policies. The real holding of *Barrera* is this:

> "an automobile liability insurer must undertake a reasonable investigation of the insured's insurability within a reasonable period of time from the acceptance of the application and the issuance of a policy. This duty directly inures to the benefit of third persons injured by the insured. Such an injured party, ***who has obtained an unsatisfied judgment against the insured***, may properly proceed against the insurer; the insurer cannot then successfully defend upon the ground of its own failure reasonably to investigate the application … The purpose of the imposition of the duty cannot be the avoidance of death or injury to a third person; rather, it is

> to avoid the possibility that the third person will be unable to obtain compensation for the loss." 663, 679-680. [Emphasis added.]

Defendants were not injured by plaintiff, and Progressive never denied coverage. As such, the rule in *Barrera* has no application to the case bar. Moreover, there is ample authority refusing to extend *Barrera* to ordinary negligence cases where insurance coverage is not being denied. See *Nipper v. California Automobile Assigned Risk Plan* (1977) 19 Cal.3d 35, 46-47 [insurance company does not stand in a special relationship with the applicant or his potential victims, and does not owe any affirmative duty of inquiry or disclosure regarding the applicant, unless the insurance company is attempting to rescind a policy]; *USAA v. Pegos* (2003) 107 Cal.App.4th 392, 397-398 [*Barrera* duty triggered whenever substantive change made to policy, but only relevant when insured seeks to avoid coverage]; *Dodge Center v. Superior Court* (1988) 199 Cal.App.3d 332, 336 [seller of car to an unlicensed driver not liable]; *Fireman's Fund Ins. Co. v. Superior Court* (1977) 75 Cal.App.3d 627, 637 ["no duty is breached by an automobile insurer's failure to investigate the qualifications of prospective insureds before issuance of liability policies [because] liability insurance may be issued to one unqualified to drive"]; *Vice v. Automobile Club of Southern California* (1966) 241 Cal.App.2d 759, 767; in accord, *Skerlec v. Wells Fargo Bank* (1971) 18 Cal.App.3d 1003, 1006 [no duty owed by bank which financed loan on vehicle used by unlicensed driver]. In fact, the *Barrera* duty does not even come into play when the applicant has a facially-valid driver's license which is only known to be suspended via a search of DMV records, and the license was examined by a third-party. See *Philadelphia Indemnity Ins. Co. v. Montes-Harris* (2006) 40 Cal.4th 151, 160-161. Either way, the dispute would have to be resolved by a claim between the injured party and the insurance company, not the injured party and the insured.

Although defendants' expert witness Paul Burkett identifies "red flags" that Progressive should have picked up on, and issuing the policy in question here might have been a risky business decision by Progressive, defendants cannot bootstrap Progressive's shortcomings into a legal basis for avoided noneconomic damages.

"Plaintiff Cannot Establish Financial Responsibility Without an SR-22 On File With the DMV"

Plaintiff is entitled to recover noneconomic damages so long as he can "establish his financial responsibility as required by the financial responsibility laws of this state." Civil Code § 3333.4(a)(3). The "financial responsibility laws" are specifically codified in Division 7 of the Vehicle Code. The term *financial responsibility* means, in pertinent part, "the name of the insurance company and the number of an insurance policy that was in effect at the time of the accident, if that information is contained in the vehicle registration records of the department."

See Vehicle Code § 16020. Nancy Moore Allingham provides unrefuted evidence that the policy was indeed uploaded to the DMV. The driver of a vehicle involved in an accident resulting in bodily injury can *establish* financial responsibility by being "an insured under a form of insurance or bond that complies with the requirements of this division and that covers the driver for the vehicle involved in the accident." Vehicle Code § 16021.

It would appear that establishing "financial responsibility" might require the addition of an SR-22 for all motor vehicles registered to a person "whose driver's license has been revoked, suspended, or restricted under Section 13350, 13351, 13352, 13353, 13353.2, 13353.3, 13353.7, or 16370." See Vehicle Code § 16431(b). Is not necessary to decide this because (1) there were no motor vehicles registered to plaintiff, and (2) plaintiff's suspension of driving privileges on March 16, 2019 was, as stated in the Notice of Suspension, pursuant to Vehicle Code § 16484 and not one of the enumerated sections. Even though plaintiff was required to have an SR-22 on file with the DMV in order to lift the suspension of his driving privileges, there is no basis to read into Civil Code § 3333.4(a)(2) the further requirement that he also have an SR-22 on file with the DMV to qualify for recovery of noneconomic damages. Although reasonable minds might argue both sides with equal fervor, as a question of law, this Court is limited to the language of the statute and the purpose of Prop. 213. As noted, plaintiff satisfied the purpose of Prop. 213 by having insurance at the time of the accident, and there is nothing in the background of Prop. 213 suggesting any grounds for punishing plaintiff just because he failed to lift the suspension on his driving privileges. For that reason, plaintiff is entitled to summary adjudication of the Prop. 213 affirmative defense in his favor.

Plaintiff to prepare the order hereon.