Dept. 4 Civil Law & Motion Tentative Rulings for Friday, September 15, 2023, at 8:30 a.m.

If you wish to appear for oral argument, you must so notify the Court at (209) 533-6633 and (209) 588-2315, and all other parties by 4:00 p.m. on the court day preceding the hearing, consistent with CRC 3.1308. The tentative ruling will become the ruling of the Court if notice for oral argument has not been provided.

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1. **CV63114** **Alameda v. City of Sonora**
   Hearing on: Motion to Approve Settlement and Release (Continued)
   Moving Party: Plaintiff
   Tentative Ruling: Matter is Under Submission

This is a personal injury action, stemming from a vehicular accident on SR-108 in an unincorporated portion of Tuolumne County. Before the Court this day is the continued hearing on an ex parte request by plaintiff to allow non-party Rockport Legal Funding an opportunity to brief this Court on an issue raised at a prior hearing, to wit:

> *For reasons not at all clear, and despite having a lien in hand, counsel invited Rockport Legal Funding to insert itself into this case and buy the existing lien from Centre for Neuro Skills for $883,523.08. Rockport has then turned around and demanded $1,700,000.00 from plaintiff as reimbursement for taking care of the lien. There is nothing in the written medical lien or in the declaration provided by Nicholas Ashley (on behalf of Centre for Neuro Skills) suggesting any urgency on the part of Centre of Neuro Skills to get paid, and no reason this Court can see to bring in Rockport Legal Funding to cover a bill for services already rendered and secured by a lien. Rockport is looking to be enriched in the amount of $816,456.92, which represents a 93% return on its investment. That savings should have been realized by plaintiff, not a third-party who had no business being involved here in the first place. Counsel is free to work with Rockport to figure this out, but even permitting a reasonable return to Rockport for absorbing the lien when it did, plaintiff's obligation to Rockport shall not exceed $950,000.00.* See Minute Order dated 07/14/23.

The judge to whom this case is assigned remains unavailable this day; however, this Court accepts the Declaration of Robert Chambers as Rockport's response thereto – rendering the ex parte application MOOT. The matter shall be under submission. The Court will issue a final ruling within 30 days. No further briefing is permitted.

2. **CV64659** **Konigsreiter v. PG&E, et al.**
   Hearing on: Demurrer to FAC
   Moving Party: Defendants
   Tentative Ruling: Sustained in Part, Overruled in Part

This is a personal injury and property damage case, involving rather curious facts. While the operative pleading is still no beacon of clarity, this is the general gist:

Co-plaintiff Daniel Myers ("Myers") serves as a personal assistant for co-plaintiff Adolf Konigsreiter ("Konigsreiter"). On 07/14/20, Myers called Nate's Tree Service ("Nate's") to

schedule tree trimming services at a residence in Soulsbyville. Myers recalled that Nate's agreed to perform the service on 07/16/20 (when Myers would be present), but for reasons unknown Nate's actually arrived on 07/15/20. Only Konigsreiter was home, and he let the tree trimmers in through a locked gate. According to Myers, the "surprise" of this early visit, coupled with some confused "verbal abuse" by the tree trimmers, caused Konigsreiter to "forget to turn off a silent engine heater under [his vintage W7] tractor which ignited diesel fuel drippings" causing an explosion and fire.

A demurrer presents an issue of law regarding the sufficiency of the allegations set forth in the complaint. The challenge is limited to the "four corners" of the pleading (which includes exhibits attached and incorporated therein), or from matters outside the pleading which are judicially noticeable. The complaint is read as a whole. Material facts properly pleaded are assumed true, but contentions, deductions or conclusions of fact/law are not. In general, a pleading is adequate if it contains a reasonably precise statement of the ultimate facts, in ordinary and concise language, and with sufficient detail to acquaint a defendant with the nature, source and extent of the claim. CCP §§ 425.10(a), 459; in accord, *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gray v. Dignity Health* (2021) 70 Cal.App.5th 225, 236 n.10.

First, with regard to co-plaintiff Daniel Myers, this Court concludes that he has yet to state facts permitting any finding that he has legal standing to serve as a plaintiff in this action. CCP §367. A real party in interest is the person who has the right to sue under the substantive law. It is the person who owns or holds title to the claim or property involved, as opposed to others who may be interested or benefited by the litigation. That person must have a real interest in the ultimate adjudication, having suffered (or about to suffer) an injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented. See *Limon v. Circle K Stores Inc.* (2022) 84 Cal.App.5th 671, 697-700; *Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 991; *Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 1001. Daniel Myers describes himself as someone who has "known" and "understands" plaintiff Adolf and can assist with the litigation, but that is not the same as having standing to serve as a party. While it is true that where a contract creates a fiduciary relationship for the benefit of another person or group, the fiduciary may sue for the benefit of those parties without joining them (CCP §369(a)(3); *Brown v. Superior Court* (2018) 19 Cal.App.5th 1208, 1221-1222), no facts support the application of this limited rule here. This Court has permitted Daniel Myers leave to amend based on representations that those facts can be pled (i.e., actual injury), but to date he has not. The demurrer as to him is SUSTAINED without leave to amend.

Second, this Court notes there are still no facts or legal theories alleged regarding PG&E, save for the single averment that Nate's Tree Service was acting in the capacity as "subcontractor" for PG&E. In other words, plaintiffs contend that Nate's Tree Service is directly liability for damages caused by the spontaneous explosion, and that PG&E should be held vicariously liable as well. However, plaintiffs offer no facts showing an agreement between themselves and PG&E or facts bringing them within the status of third-party beneficiary of the contract between Nate's and PG&E. The demurrer as to PG&E is SUSTAINED without leave to amend.

Regarding the first cause of action for breach of oral agreement to come cut trees on a date certain, this claim is not adequately pled. Claims based on oral contracts require specific averments supporting consideration. See Civil Code §1614; *Stevenson v. San Francisco Housing Authority* (1994) 24 Cal.App.4th 269, 284; in accord, *Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 401-402. There are no consideration allegations included in the operative pleading, and as noted from the prior order plaintiffs are still missing the *Hadley v. Baxendale* connection. Did plaintiffs specially negotiate for the 07/16/20 date, and advise Nate's Tree Service that arriving a day prior could be catastrophic for Konigsreiter? What about the scheduling of this particular service would have put Nate's Tree Service on notice that this date was firm and nonnegotiable – and that harm could arise if ignored? What about plaintiff's confession that despite Nate's arriving early, he voluntarily opened the locked gate and allow them to enter the property? See Civil Code §3300; *Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 969; *Ash v. North American Title Co.* (2014) 223 Cal.App.4th 1258, 1268-1270; in accord, *Global Hawk Insurance Company (RRG) v. Wesco Insurance Company*, 424 F.Supp.3d 848, 854-855 (C.D. Cal. 2019). The fact that plaintiff let Nate's in a day early qualifies as an amendment to the oral contract, and negates breach (as well as damages). The demurrer to the first cause of action is SUSTAINED without leave to amend.

Plaintiffs' second cause of action is for negligence based on Nate's failure to clean up all the tree clippings when they left the property. The elements of a negligence claim are: a legal duty of care, breach of that duty, and proximate cause resulting in injury." *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158; *Castellon v. U.S. Bancorp* (2013) 220 Cal.App.4th 994, 998. Causation turns on whether defendant's conduct was a "substantial factor" in bringing about the injury. *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205. A "substantial factor" is a non-remote and non-trivial factor that a reasonable person would consider to have contributed to the harm, even if there are other factors at play. CACI 430. Conduct can be considered a "substantial factor" if it has created a force or series of forces which are in continuous and active operation up to the time of the harm. *Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 253. The facts pled demonstrate that plaintiff was confused and disoriented as a result of having to clean up Nate's mess, and in that confusion forgot to turn off the heaters. While proximate cause appears to a stretch, at the pleading stage this is sufficient. Where the demurrer is based on the pleading not stating facts sufficient to constitute a cause of action, the rule is that if, upon a consideration of all the facts stated, it appears that the plaintiff is entitled to any relief at the hands of the court against the defendants, the complaint will be held good, although the facts may not be clearly stated or may be intermingled with a statement of other facts irrelevant to the cause of action shown. *New Livable California v. Association of Bay Area Governments* (2020) 59 Cal.App.5th 709, 714; *Wittenberg v. Bornstein* (2020) 51 Cal.App.5th 556, 566. The demurrer to the second cause of action is OVERRULED.

Plaintiffs' third cause of action is for intention tort. Although this is not exactly a stand-alone cause of action, a review of the operative pleading reveals plaintiffs' intention to plead

something akin to willful misconduct. There is presently a dispute amongst courts and scholars as to whether "willful misconduct" is actually a cause of action (as opposed to a descriptor of conduct lying somewhere between negligence and intentional wrongdoing). This dispute, which was recently recognized in *Nalwa v. Cedar Fair, LP* (2012) 55 Cal.4th 1148 (at 1163 n.8), has its roots in pre-comparative fault jurisprudence. The Court in *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, concluded with apparent ease (at 526) that no such cause of action exists, yet still went on to discuss the essential elements of the claim. The Court in *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, presumed that a cause exists and set out to define its parameters (at 412). The Court in *New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, provided this apt discussion (at 689-690, in pertinent part): "The concept of willful misconduct has a well-established, well-defined meaning in California law. Willful or wanton misconduct is intentional wrongful conduct, done either with a knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results … Three essential elements must be present to raise a negligent act to the level of willful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril." Regardless of its theoretical underpinnings, the facts pled do not come close to showing gross negligence, willful misconduct, or anything akin to intentional wrongdoing. The demurrer to the third cause of action is SUSTAINED without leave to amend.

Plaintiff's fourth cause of action is for wrongful cutting of trees. Although it is not well-pled, this Court understands that the cause is based on Civil Code §3346 and CCP §733. Plaintiffs have alleged a lack of legal authority to cut certain trees, and intentionally did so, which is sufficient to state the cause of action. See *Scholes v. Lambirth Trucking Co.* (2020) 8 Cal.5th 1094, 1103; *Russell v. Man* (2020) 58 Cal.App.5th 530, 536; *Salazar v. Matejcek* (2016) 245 Cal.App.4th 634, 646. The demurrer to the fourth cause of action is OVERRULED.

Defendant Nate's to answer within 10 days. Defendants to each give notice for their respective motions.

3. CVL65145 Petition of Max (In re Mobilehome)

Hearing on:	Declare Property Abandoned
Moving Party:	Petitioners
Tentative Ruling:	Granted

This is a special proceeding to declare the subject mobilehome abandoned pursuant to Civil Code §798.61. To qualify as an abandoned mobilehome, petitioners must establish by a preponderance of the evidence the following essential elements:

1) The home is located in a mobilehome park on a site for which no rent has been paid to the management for the preceding 60 days;
2) The home is, or reasonably appears to be, unoccupied and unused;

3) The home has been, or reasonably appears to have been, abandoned by the registered owner, or is otherwise uninhabitable; and
4) The home is not permanently affixed to the land upon which it sits.

According to petitioners, the mobilehome currently occupying Space 67 at the Rawhide Mobile Home Park in Jamestown is abandoned. Petitioners do not own the mobilehome park, nor do they own Space 67 or the mobilehome parked thereon. As set forth in the petition, petitioners possess a "long-term lease of Space 67 and rent that space to third-parties," and have been "authorized" by the park owners to prosecute this action.

To address the standing issue first, since it permeates notice and all the related proceedings herein, an action to declare a mobilehome abandoned may be prosecuted by "management." Civil Code §798.61(c). The term "management" means (1) the owner of a mobilehome park or (2) an agent or representative authorized to act on his behalf in connection with matters relating to a tenancy in the park. Civil Code §798.2. This petition is not verified, and there is no declaration or admissible evidence supporting the barren contention that the owners of the Rawhide Mobile Home Park authorized petitioners to step into their shoes in terms of both the pre-commencement notices as well as the right to prosecute the action itself. However, the supplemental papers include a letter from management confirming the authority to act.

Moving past the standing issue, there is a service concern regarding the posted notice. Pursuant to Civil Code §798.61(b), the mobilehome park management "shall deposit copies of the notice in the United States mail, postage prepaid, addressed to the homeowner at the last known address and to any known registered owner, if different from the homeowner, and to any known holder of a security interest in the abandoned mobilehome. This notice shall be mailed by registered or certified mail with a return receipt requested." The petition fails to attach copies of the proof of service, but petitioners concede that the registered mail was ineffective (see Para. 8). Petitioners have since confirmed that Ms. Martin is the only person entitled to notice.

There is a service concern regarding the petition itself. Pursuant to Civil Code §798.61(c), "copies of the petition shall be served upon the homeowner, any known registered owner, and any known person having a lien or security interest of record in the mobilehome by posting a copy on the mobilehome and mailing copies to those persons at their last known addresses by registered or certified mail with a return receipt requested in the United States mail, postage prepaid." The reference to "not knowing" where Ms. Martin moved to is insufficient to justify a lack of effective service if she has a true ownership interest in the mobilehome, and the service to the abandoned location (with no evidence of a skip trace) is ordinarily ineffective.

That being said, this Court's primary concern from the prior hearing was the lack of evidence of abandonment. The supplemental papers, and in particular the photographs, more than adequately demonstrate that the mobilehome is abandoned, that Ms. Martin has no interest in it or its contents, and that her failure to provide a forwarding address is evidence of purposeful abandonment.

Petition GRANTED. Petitioner to give notice and proceed according to law.

4. **CV64640** **McDermand v. Suntex Marina Investors**
   Hearing on: Motion to Compel: Deposition
   Moving Party: Plaintiff
   Tentative Ruling: N/A

This is a personal injury action involving an ATV rollover. Before the Court this day was to be plaintiff's motion to compel orders relating to a deposition. However, on 08/14/23, plaintiff caused to be filed a Notice of Settlement of Entire Case. Pursuant to CRC 3.1385, on the filing of the notice of settlement the court shall vacate all hearings and other proceedings requiring the appearance of a party. Although there is a local rule requiring the parties to affirmatively ask to take noticed motions off-calendar (see TCSC Local Rule 3.02.1), the notice filed is sufficient. The matter is dropped. Court sets an OSC re dismissal for October 20, 2023, at 9:30 AM in this department. Plaintiff to give notice.

5. **CV64645** **PG&E v. LaForge**
   Hearing on: Ex Parte Application to Continue Trial
   Moving Party: Defendant
   Tentative Ruling: N/A

This is a nuisance action filed by PG&E against a resident who refused to give PG&E access to its own electrical service facilities, which happen to be on that resident's private property. PG&E would like very much to service the equipment on defendant's property (a process PG&E calls "hardening" per Pub. Util. Code §8386), but after some bad blood from prior dealings, defendant was unwilling to permit access without some protections in place.

Before the Court this day is defendant's request to continue trial, which is currently set for 09/25/23. In civil cases, "continuances of trials are disfavored." CRC 3.1332(c). As a result, a trial court "may grant a continuance only on an affirmative showing of good cause requiring the continuance." Id. A motion for continuance is addressed to the sound discretion of the trial court. However, the trial judge must exercise his discretion with due regard to all interests involved, and the refusal of a continuance which has the practical effect of denying the applicant a fair hearing is reversible error. Judges are faced with opposing responsibilities when continuances are sought. On the one hand, they are mandated by the Trial Court Delay Reduction Act (Gov. Code, section 68600 et seq.) to actively assume and maintain control over the pace of litigation. On the other hand, they must abide by the guiding principle of deciding cases on their merits rather than on procedural deficiencies. Such decisions must be made in an atmosphere of substantial justice. When the two policies collide head-on, the strong public policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency." *Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1395; in accord, *Freeman v. Sullivant*

(2011) 192 Cal.App.4th 523, 527; *Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal.App.4th 1081, 1085. The factors to consider (CRC, rule 3.1332(d) include:

(1) The proximity of the current trial date (only two months away);
(2) Whether there were any previous continuances (no prior continuances);
(3) The length of the continuance requested (45 days);
(4) The availability of alternative means to address the problem that gave rise to the motion or application for a continuance (the parties could have worked on settlement long before this Court was called upon to resolve discovery motions);
(5) The prejudice that parties or witnesses will suffer as a result of the continuance (none shown);
(6) If the case is entitled to a preferential trial setting, the reasons for that status and whether the need for a continuance outweighs the need to avoid delay (plaintiff have already exceeded the presumptive Fast Track window – see TCSC Local Rule 2.06.0);
(7) The court's calendar and the impact of granting a continuance on other pending trials (unknown);
(8) Whether trial counsel is engaged in another trial (no contentions made);
(9) Whether all parties have stipulated to a continuance (essentially yes);
(10) Whether the interests of justice are best served by a continuance, by the trial of the matter, or by imposing conditions on the continuance (yes); and
(11) Any other fact or circumstance relevant to the fair determination of the motion or application (none apparent).

Defendant correctly notes that the case has been delayed quite a bit, and plaintiff further confessed in its CMC Statement of 04/28/23 that the parties expect "delays in litigation and discovery." This being the first date set for trial, this Court is amenable to a brief continuance but would like to hear from plaintiff's counsel on the matter.

6. CV63883 Pine Mountain Lake Association v. Chisolm
Hearing on: Ex Parte Application
Moving Party: N/A
Tentative Ruling: N/A

This is a nuisance action by an HOA against resident Jennette Chisolm. The HOA alleges that she has allowed the property to fall into disrepair. According to the HOA, defendant has since cleaned up her property. What remains of the dispute are unpaid fines, penalties and interest. Before the Court this day is the scheduled hearing on an *ex parte* application, but the papers in support thereof are not in the court file for review. This Court also notes that a trial continuance was previously granted (see Minute Order dated 06/16/23).

7. CV61952 Spills v. Adventist Health Sonora
Hearing on: Summary Judgment (Continued)
Moving Party: Defendant Daniel Tupy, M.D.
Tentative Ruling: Continued to 10/20/23

This is a medical malpractice, wrongful death action. Before the Court this day is the continued hearing on co-defendant Daniel Tupy's motion for summary judgment.

In general, plaintiff alleges that as a result of deficient medical care, her infant son lost his life. The medical details are heavy. The child was premature by nine weeks, and born with gastroschisis – a serious birth defect in which the child's intestines develop outside the body due to a hole in the abdominal wall. Despite multiple complex surgeries at UCSF, the child had continuing medical ailments and died before reaching his first birthday. As it pertains to Dr. Tupy, he was the child's treating physician in the local (Adventist) emergency room, and made arrangements for a medical flight from Adventist back to UCSF when the child went into respiratory distress. The child died in the emergency room.

This Court previously found as follows:

- Notice was sufficient (see CCP §§ 437c(a)(2), 1010.6(a), and *Cole v. Superior Court* (2022) 87 Cal.App.5th 84, 87-88.
- Plaintiff's failure to file opposition to the motion was intended and tactical, and alone permitted the granting of this motion (see CCP §437c(b)(3), and *Batarse v. Service Employees Int'l Union Local 1000* (2012) 209 Cal.App.4th 820, 831-833).
- Defendant met his initial burden by affirmatively negating one of plaintiff's essential elements (see *Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1166–1167, declarations of Drs. Prober and Tupy, and this Court's 09/13/22 order).

Nevertheless, since this Court was informed that plaintiff passed away, it was required to provide a temporary stay to permit plaintiff's estate time to decide whether a personal representative will be substituted in to carry on the portion of this case that survives plaintiff's passing, *if any*. See CCP §377.31. The hearing was continued to this day to determine whether the estate wished to proceed. Since the last hearing this Court has received notice that the estate does indeed request a brief stay to determine the propriety of carrying on with the action. That request is reasonable. The matter is continued to October 20, 2023, at 8:30 AM in this department. If there is no motion on file to substitute in the estate prior to that date, the motion shall be granted. Defendant is ordered to give notice and file proof of that at least 10 days prior to the next hearing.