

TENTATIVE RULINGS

FOR: July 11, 2017

The Court may exercise its discretion to **disregard** a late filed paper in law and motion matters. (Cal. Rules of Court, rule 3.1300(d).)

Unlawful Detainer Cases – Pursuant to the restrictions in Code of Civil Procedure section 1161.2, no tentative rulings are posted for unlawful detainer cases and appearances are required.

Court Reporting Services – The Court does not provide official court reporters in proceedings for which such services are not legally mandated. These proceedings include civil law and motion hearings. If counsel want their civil law and motion hearing reported, they must arrange for a private court reporter to be present. Go to <http://napacountybar.org/court-reporting-services/> for information about local private court reporters. Attorneys or parties must confer with each other to avoid having more than one court reporter present for the same hearing.

PROBATE CALENDAR – Hon. Rodney Stone, Dept. C (Historic Courthouse)

Estate of Millicent Schwegman

16PR000038

FIRST AND FINAL ACCOUNT AND REPORT OF ADMINISTRATOR AND PETITION FOR ITS SETTLEMENT AND FINAL DISTRIBUTION, FOR ALLOWANCE OF COMPENSATION TO ATTORNEYS FOR ORDINARY SERVICES

TENTATIVE RULING: GRANT petition, including fees as prayed.

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In the Matter of the Charles K. Marshall Revocable Trust

17PR000070

PETITION CONFIRMING PROPERTY IS AN ASSET OF TRUST

TENTATIVE RULING: GRANT petition.

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In the Matter of Kay Pearson

17PR000071

TRUST CONTEST AND PETITION FOR DETERMINATION OF INVALIDITY OF TRUST, AND FOR ORDER FOR JOAN STURGES TO RETURN ASSETS BACK TO TRUST

APPEARANCE REQUIRED
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In the Matter of the Garry C Rees and Barbara J Rees Trust

17PR000108

PETITION TO DETERMINE VALIDITY OF TRUST AMENDMENT, AND FOR DETERMINATION OF IDENTITY OF TRUSTEE

TENTATIVE RULING: Pursuant to stipulation of the parties, the case is transferred to Solano County Superior Court. Petitioner is instructed to contact the Civil Filing Division at the Napa County Superior Court to pay, subject to any applicable fee waiver, the: (1) transfer fees from the Napa County Superior Court; and (2) the filing fee for the Solano County Superior Court. The clerk is directed to transmit to the clerk of the court in Solano County all papers in the proceeding. The case is set for a transfer review hearing on August 29, at 8:30 a.m. in Dept. C, at the Napa County Superior Court. The hearing is to confirm receipt of the notification from the Solano County Superior Court that it has received the transferred case. If the receipt is received, the hearing will be taken off-calendar

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Estate of John F Gratz, Jr.

17PR000122

PETITION FOR PROBATE OF WILL AND FOR LETTERS TESTAMENTARY AND AUTHORIZATION TO ADMINISTER UNDER THE INDEPENDENT ADMINISTRATION OF ESTATES ACT

TENTATIVE RULING: The Court construes the petition as seeking authorization to administer under the Independent Administration of Estates Act since the appropriate box at the beginning of the petition was not checked. The petition is GRANTED.

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In the Matter of the Bouillon Marital QTIP Trust

26-18519

PETITION FOR APPROVAL OF ACCOUNT AND REPORT OF TRUSTEE AND FOR TRUSTEE AND ATTORNEY'S FEES

TENTATIVE RULING: GRANT petition, including fees as prayed. Petitioner's attorney shall file a declaration supporting the attorney's fees claimed with future petitions.

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Conservatorship of Steven Alexander Evanoff

PR17375

PETITION FOR RENEWAL OF APPOINTMENT OF LPS CONSERVATOR

APPEARANCE REQUIRED

CIVIL LAW & MOTION CALENDAR – Hon. Rodney Stone, Dept. C (Historic Courthouse)

Cynthia Pawlcyn, et al. v. Encompass Insurance Co., et al.

16CV000196

DEFENDANT GFJ, INC.'S (DBA JAFFE INSURANCE AGENCY) MOTION FOR SUMMARY JUDGMENT

TENTATIVE RULING: This matter is continued to July 21, 2017, at 8:30 a.m. in Dept. C.

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James Vaughn v. St. Pierre Center for Massage, Inc.

16CV000942

MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

TENTATIVE RULING: Plaintiff James Vaughn's motion is GRANTED. The Court will sign and adopt the submitted proposed order. Under paragraph 11 of the proposed order, plaintiff shall file his motion for final approval and judgment on or before October 11, 2017. Under paragraph 14 of the proposed order, the next hearing date will be November 14, 2017, at 8:30 a.m. in Dept. F to determine the amount of attorney's fees and costs, and to determine whether the settlement is fair, reasonable, and adequate.

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In the Matter of Allena Daneele de la Paz Rivera

17CV000644

PETITION FOR CHANGE OF NAME AND GENDER

TENTATIVE RULING: The petition is GRANTED without need for appearance. Petitioner shall file a certified copy of the Court's decree within 30 calendar days with the California Secretary of State and since a new birth certificate is requested, with the State Registrar. (Health & Safety Code, § 103435.) Upon its receipt, the State Registrar shall establish a new birth certificate as provided in the Health & Safety Code.

CIVIL LAW & MOTION CALENDAR – Hon. Diane Price, Dept. F (Criminal Courts Bldg.-1111 Third St.)

Casaundra Bruner v. Rebecca L. Jackson, et al.

26-67477

MOTION FOR COSTS OF PROOF SANCTIONS

TENTATIVE RULING:

Plaintiff Casaundra Bruner moves for cost-of-proof sanctions against defendant Napa Valley Plastic Surgery for its denials of request for admission (“RFA”) (set one) numbers 4-6, 12, 14, and 16-17 pursuant to Code of Civil Procedure section 2033.420.¹ Bruner served the RFAs on August 5, 2016. (Montgomery Decl., Ex. 1.) Defendant served responses on August 31, 2016. (*Id.*, ¶ 10, Ex. 3.) Defendant’s responses to these requests were a litany of objections followed by, “[d]eny based on lack of information in the form of medical opinion by this Defendant on the matter at issue.”

Section 2033.420 provides the standard for costs and attorney’s fees incurred in proving the truth of a denied request for admission, as follows: “(a) If a party fails to admit . . . the truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves . . . the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney’s fees.” The court is required to impose a sanction for the unreasonable denial of a request for admission unless the court finds any of the following: (1) an objection to the request was sustained or a response to it was waived under Code of Civil Procedure section 2033.290; (2) the admission sought was of no substantial importance; (3) the party failing to make the admission had reasonable ground to believe that party would prevail on the matter; or (4) there was other good reason for the failure to admit. (Code Civ. Proc., § 2033.420, subd. (b); see also *Garcia v. Hyster Co.* (1994) 28 Cal.App.4th 724, 735-36.) Defendant invokes the first, third, and fourth exceptions.

A. Waiver of Responses as to all the RFAs

Defendant argues the Court cannot award the cost-of-proof sanctions because the responses were waived under § 2033.290. (Code Civ. Proc., § 2033.420, subd. (b)(1).) If a requesting party deems an objection to a particular request is without merit or too general, it may move to compel further responses. (*Id.*, § 2033.290.) If the requesting party fails to move to compel further responses within 45 days of the service of the verified response, it waives any right to compel further responses, and under the exception to § 2033.420, may not recover cost-of-proof expenses. (*Id.*, § 2033.420, subd. (b)(1).) However, where a responding party objects to a request for admission but then denies it, the requesting party is not required to move to

¹ RFA number 15 was included as a basis for the cost-of-proof motion. (Ntc. at pp. 1:27, 2:3, 2:8.) Bruner acknowledges in her reply this request is not at issue. (Reply at p. 4:28 n.3 [“Defendant claims it had a ‘reasonable basis’ to deny Plaintiff’s Request 15 as well. Plaintiff did not move for cost of proof with respect to Request 15 and so Request 15 is not addressed herein.”].)

compel further responses under § 2033.290 as a prerequisite to recovering cost-of-proof expenses under § 2033.420. (See *American Fed'n of State, Cnty. & Mun. Employees, Local 1902 v. Metropolitan Water Dist.* (2005) 126 Cal.App.4th 247, 298, 300 [where plaintiff objected to requests for admission but also responded by denying the requests, defendant did not waive right by failing to move to compel further responses, because plaintiff's admissions and/or denials provided complete responses to the requests, leaving nothing to be addressed by the court in a motion to compel further responses] (interpreting former Code Civ. Proc., § 2033(l), (o)). After objecting to the requests for admissions, defendant provided complete responses to the requests by denying them. Since defendant's responses left no aspect of the requests unresolved, no motion to compel further responses was necessary. The denials forced Bruner to prove the truth of the requested matters at trial.

B. Reasonable Ground for RFA Numbers 4-5

Defendant maintains it had reasonable grounds to believe it would prevail on the matters denied in RFA numbers 4-5. (Code Civ. Proc., § 2033.420, subd. (b)(3).) Defendant does not claim a reasonable ground for the other requests at issue. RFA number 4 asked defendant to admit Judith Cummings, R.N., violated the standard of care by failing to contact Dr. Jackson when Bruner requested readmission for evaluation after her surgery. RFA number 5 asked defendant to admit Cummings violated the standard of care by failing to notify Dr. Jackson that Bruner was having post-operative right arm pain.

Defendant must show that at the time of its denials, it held a reasonably entertained (i.e. based on admissible evidence) good faith belief it would prevail on the issue at trial. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1276.) "That means more than a hope or a roll of the dice." (*Grace v. Mansourian* (2015) 240 Cal.App.4th 523, 532.) A party's subjective belief alone is insufficient when there is substantial evidence of a defendant's fault. (*Id.*) However, anticipated testimony is a reasonable basis for denying a request for admission. (*Brooks v. Am. Broad. Co.* (1986) 179 Cal.App.3d 500, 513.)

Defendant asserts it had "more than a hope" it would prevail on issues of liability within the applicable standard of care after preliminary discussions with Dr. Kenneth M. Bermudez in July 2016. This assertion is based on the declaration from Kevin Smith. According to defendant, Dr. Bermudez believed Bruner experienced a rare post-operative complication which would not have progressed to the point of diagnosis or possible medical intervention at any time while she was under Dr. Jackson's care or remained at defendant's facility. (Smith Decl., ¶¶ 3-4.) Dr. Bermudez felt the last best chance for anyone to have acted to prevent Bruner's post-operative complication would have been the night of her surgery when Bruner and her care givers failed to notify Dr. Jackson or the surgery center that her post-operative pain was not being adequately addressed, managed, or controlled by her pain medication and to call Dr. Jackson as instructed in writing to do upon discharge. (*Id.*, ¶ 4.)

However, Dr. Bermudez had not yet seen Cummings' deposition transcripts when he offered this opinion to Smith in July 2016. (*Id.*, ¶¶ 2, 6.) Dr. Bermudez was sent the information on August 15, 2016. (*Id.*) Two days later, on August 17, 2016, defendant served its expert witness disclosure stating Dr. Bermudez was sufficiently versed in the case to give meaningful

oral depositions on his opinions. Defendant then denied RFA numbers 4-5 on August 31, 2016. (Montgomery Decl., ¶ 10, Ex. 3.) What is important here is the fact defendant offers no evidence as to Dr. Bermudez's opinion after reviewing Cumming's deposition transcript. The silence is telling. If Dr. Bermudez had reviewed the transcript, there would have been no basis to deny the RFAs. Indeed, Dr. Bermudez expressly testified at his deposition on April 25, 2017, that he had no opinion regarding the nursing standard of care except that Cummings should have notified Dr. Jackson of Bruner's pain and request for readmission to the surgery center. This opinion was based on evidence available to Dr. Bermudez before defendant denied RFA numbers 4-5 on August 31, 2016. Likewise, Dr. Bermudez testified at trial that Cummings did not check the box to clear Bruner for discharge from the facility, and conceded Cummings should have contacted Dr. Jackson since Bruner was experiencing right arm pain and wanted to come back into the facility.

Defendant, therefore, has not met its burden of showing it had a reasonable basis to deny RFA numbers 4-5 at the time of its denials.

C. Good Reason

Defendant contends it had good reason for denying RFA numbers 6, 12, 14, 16, and 17. (Code Civ. Proc., § 2033.420, subd. (b)(4).) Shifting of costs and expenses under § 2033.420 may be avoided by proving there was "other good reason" for failing to admit the RFAs. (*Id.*)

1. RFA Number 6

RFA number 6 asked defendant to admit Bruner sustained nerve damage. Defendant points out its denial of RFA number 6 indicated the discovery was premature in that there was insufficient facts or information available at the time the response was served. Defendant references the fact that Dr. Buncke was deposed on March 8, 2017, Dr. Dubin was deposed on April 13, 2017, Dr. Bermudez was deposed on April 25, 2017, Dr. Barakos was deposed on April 27, 2017, Dr. Bickel was deposed on May 2, 2017, and Dr. Bodor was deposed on May 5, 2017. Based on these later held depositions, defendant concludes the information called for in the RFA was not readily obtainable to defendant eight months earlier when the subject requests were propounded.

However, "[a] party responding to requests for admissions has a duty to make a reasonable investigation to ascertain the facts even though the party has no personal knowledge of the matter when the party has available sources of information as to the matters involved in such requests for admissions. [Citations]. Thus, if a party denies a request for admission (of substantial importance) in circumstances where the party lacked personal knowledge but had available sources of information and failed to make a reasonable investigation to ascertain the facts, such failure will justify an award of expenses" (*Brooks, supra*, 179 Cal.App.3d at p. 510.) Here, the fact Bruner sustained nerve damage was noted in her medical records from defendant. Dr. Jackson knew Bruner suffered nerve damage as she witnessed it herself. In fact, Dr. Jackson prescribed medication to Bruner for her nerve pain. Dr. Bodor also informed Dr. Jackson about the damage in early January 2015. Defendant should have known Bruner suffered

a nerve injury since the inception of this malpractice case as the information was available to it prior to the deposition of the various doctors.

2. RFA Number 12

RFA number 12 asked defendant to admit Bruner was unable to return to work as a result of the nerve damage she sustained from the surgery Dr. Jackson performed. Defendant avers Bruner's ability to return to work after surgery was controverted through trial based on eight return to work clearances given to Bruner by Dr. McAuliffe and Dr. Buncke. Defendant has provided a good reason for denying the RFA.

3. RFA Number 14

RFA number 14 asked defendant to admit it was legally responsible for Bruner's damages resulting from negligent follow-up care provided to her after the surgery. Defendant offers no good reason for denying the RFA other than arguing the request improperly called for a legal conclusion. Requests may be served asking for matters which, if admitted would result in the unconditional surrender of the party on whom they are served. (See *Demyer v. Costa Mesa Mobile Home Estates* (1995) 36 Cal.App.4th 393, 395-96 n.8, disapproved on other grounds in *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 983 n.12 ["Admit you have absolutely no grounds to prosecute (or defend) this case."].) RFA number 14 essentially is the entire case, and defendant's denial is the reason there was a trial. But requests of this type are usually not made with the expectation that an admission will be made. Rather, the purpose is to set the stage for a § 2033.420 motion, which is one of the unique advantages of this discovery tool.

4. RFA Number 16

RFA number 16 asked defendant to admit Bruner would require future medical care to address the nerve damage as a result of the overly tight closure of her right arm. Defendant offers it did not know at the time it denied the request that Bruner would need future medical care. According to defendant, it was not until Dr. Buncke's deposition on March 8, 2017, that defendant learned Bruner would benefit from future surgery. Defendant has not offered a good reason. (See *Brooks, supra*, 179 Cal.App.3d at pp. 510-11 ["Sometimes a party justifiably denies a request for admission based upon the information available at the time of the denial, but later learns of additional facts or acquires information which would have called for the request to be admitted if the information had been known at the time of the denial. If such a party thereafter advises the party that propounded the request for admission that the denial was in error or should be modified, a court should consider this factor in assessing whether there were no good reasons for the denial. [Citation]. On the other hand, if a party in such circumstances stands on the initial denial and then fails to contest the issue at trial, a court would be well justified in finding that there had been no good reasons for the denial, thus mandating the imposition of sanctions."].) "Obviously, a defendant 'cannot be forced to admit the fact prior to trial despite its obvious truth. [Citation.]'" (*Grace, supra*, 240 Cal.App.4th at p. 532.) "But the failure to do so comes with consequences, exposure to a costs of proof award." (*Id.*)

5. RFA Number 17

RFA number 17 asked defendant to admit Dr. Jackson caused nerve injury to Bruner by suturing the right arm closure too tight. Defendant has shown a good reason based on the evidence noted above regarding Dr. Bermudez's opinion. (Smith Decl., ¶¶ 3-4.)

D. Fees and Expenses

Having determined Bruner is entitled to recover expenses and attorney's fees incurred for proving the truth of the requests, except for RFA numbers 12 and 17, the Court turns to the reasonableness of the fees requested.

1. Attorney's Fees

RFA numbers 4-6, 12, 14, and 16-17 covered the significant issues ultimately tried in this case. The Court finds the hourly rates for Bruner's attorneys, Michael Green (\$475 per hour) and Scott Montgomery (\$350 per hour), are reasonable. Defendant does not argue the hourly rates are unreasonable.

Green spent 146.6 hours and Montgomery spent 95.6 hours preparing to prove the issues defendant denied from August 31, 2016, until trial began. Green spent 159.5 hours and Montgomery spent 136.4 hours preparing and presenting the case at trial with respect to the issues defendant denied. This amount represents \$226,597.50 (\$69,635 + \$33,460 + \$75,762.50 + \$47,740) in attorney's fees. This amount is unreasonable since fees are not appropriate relating to RFA numbers 12 and 17. Since there are seven RFAs at issue in this motion, and fees are not appropriate as to two RFAs, the Court reduces the amount claimed by 2/7 (28.6%) or \$64,806.89. The reasonable amount of attorney's fees after the reduction is \$161,790.61 (\$226,597.50 - \$64,806.89).

2. Expert Witness Fees and Costs

Bruner seeks \$54,607.67 for expert witness fees and costs. The fees are reasonable except for the \$2,250 for Dr. McAuliffe who provided evidence as to Bruner's time off work arising from the injury. The excluded amount relates to RFA number 12. Thus, fees in the amount of \$52,357.67 are appropriate.

E. Conclusion

Bruner's motion for cost-of-proof sanctions against defendant for its denials of RFA numbers 4-6, 12, 14, and 16-17 pursuant to Code of Civil Procedure section 2033.420 is **GRANTED IN PART AND DENIED IN PART**. The motion is granted in the amount of \$214,148.28 (\$161,790.61 + \$52,357.67) as to RFA numbers 4-6, 14, and 16. The motion is denied in the amount of \$67,056.89 (\$64,806.89 + \$2,250) as to RFA numbers 12 and 17.