CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 12
HEARING DATE: 03/29/19

GENERAL INSTRUCTIONS FOR CONTESTING TENTATIVE RULINGS IN DEPT. 12

NOTE PROCEDURE CAREFULLY

The tentative ruling will become the Court's ruling unless by 4:00 p.m. of the court day preceding the hearing, counsel or self-represented parties call the department rendering the decision to request argument and to specify the issues to be argued. Calling counsel or self-represented parties requesting argument must advise all other affected counsel and self-represented parties by no later than 4:00 p.m. of his or her decision to appear and of the issues to be argued. Failure to timely advise the Court and counsel or self-represented parties will preclude any party from arguing the matter. (*Local Rule* 3.43(2).)

Note: In order to minimize the risk of miscommunication, Dept. 12 prefers and encourages fax or email notification to the department of the request to argue and specification of issues to be argued – with a **STRONG PREFERENCE FOR EMAIL NOTIFICATION**. Dept. 12's Fax Number is: (925) 608-2693. Dept. 12's email address is: dept12@contracosta.courts.ca.gov. Warning: this email address is not be used for any communication with the department except as expressly and specifically authorized by the court. Any emails received in contravention of this order will be disregarded by the court and may subject the offending party to sanctions.

Submission of Orders After Hearing in Department 12 Cases

The prevailing party must prepare an order after hearing in accordance with CRC 3.1312. If the tentative ruling becomes the Court's ruling, a copy of the Court's tentative ruling **must be attached to the proposed order** when submitted to the Court for issuance of the order.

1. TIME: 9:00 CASE#: MSC16-02390
CASE NAME: CURZI VS. CAMPOS
HEARING ON MOTION TO COMPEL DEPOSITIONS
FILED BY CAESAR CURZI
**** TENTATIVE RULING: ****

This motion is taken off calendar as unnecessary. The Court was apprised at Monday's CMC that the parties are in agreement about taking these depositions and are simply arranging suitable dates.

2. TIME: 9:00 CASE#: MSC17-00412
CASE NAME: NARLOCH VS. NSH MANAGEMENT
HEARING ON MOTION FOR SUMMARY ADJUDICATION OF CLAIM 1 FOR DECLARATORY RELIEF / FILED BY DR. JOSEPH NARLOCH, et al.
**** TENTATIVE RULING: ****

This motion was continued by stipulation to August 30, pending settlement.

3. TIME: 9:00 CASE#: MSC17-00580
CASE NAME: ROE VS. MOUNT DIABLO U.S.D.
HEARING ON MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION FILED BY MT. DIABLO UNIFIED SCHOOL DISTRICT
**** TENTATIVE RULING: ****

The motion for summary judgment or summary adjudication, brought by defendant Mt. Diablo Unified School District, is **denied**. The trial setting conference on May 10 is confirmed. Counsel should be ready to discuss what additional forms of ADR might be helpful in this case.

Procedural And Evidentiary Issues. The Court rules on procedural and evidentiary issues as follows.

- **Summary Adjudication.** The District purports to seek summary adjudication as alternative relief. However, the District's papers are not organized with reference to individual causes of action as is required when seeking such relief. (CRC 3.1350(b) and (d).) Further, the District's attempt to seek summary adjudication is undercut by the District's own argument that the Complaint's three causes of action are redundant, and really comprise a single negligence cause of action:

  > As Plaintiff's three causes of action are redundant of one another, the defenses asserted herein apply equally to all asserted claims. Pursuant thereto and in hopes of promoting judicial efficiency, this Motion will address Plaintiff's three redundant claims jointly.

  (Opening Memorandum, p. 10, fn. 2.) Accordingly, the Court treats the District's motion as one for summary judgment only.

- **Continuance.** Plaintiff's request for a continuance to review the transcripts of recent depositions and to conduct additional depositions is moot, in light of the Court's ruling below on the merits of the District's motion.

- **The District's Evidentiary Objections.** The Court sustains the District's objection to the police report on the ground that the statements within the report constitute inadmissible hearsay. (See *Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1203-07.)

  The Court sustains the District's objection to the declaration of Joseph Schwartzberg on the ground that plaintiff's expert does not identify the materials he reviewed; in paragraph 9 he refers to an attached list of materials, but no such list is in fact attached to the original in the Court's file. (See *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523-24 [expert declaration inadmissible because "it did not disclose the matter relied on in forming the opinion expressed"].) Further, the Court finds the unnumbered paragraphs of the opinion section unintelligible. In part 1, Mr. Schwartzberg characterizes the perpetrator's conduct as "bullying" under federal and state law, but this does not appear relevant to the negligence issues now before the Court. Part 2 consists of improper legal conclusions, and cursory expert opinions offered without a reasoned explanation.

(See *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510.) Part 3 addresses federal statutory schemes not referenced in the Complaint.

In the future, the District shall consecutively number any evidentiary objections for ease of reference. (CRC 3.1354(b).)

The Adequacy of The Complaint. A defendant's motion for summary adjudication "necessarily includes a test of the sufficiency of the complaint." (*American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1117-18.) In this context, the courts consider the motion under the same standards applicable to a motion for judgment on the pleadings. (*Id*. See also *Saltarelli & Steponovich v. Douglas* (1995) 40 Cal.App.4th 1, 5.) However, if summary judgment is granted on the ground that the complaint is legally insufficient, but it appears that the plaintiff might be able state a cause of action, the trial court should ordinarily give the plaintiff an opportunity to amend the complaint before entry of judgment. (See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719 n.5; *Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1067-70; *Williams v. Braslow* (1986) 179 Cal.App.3d 762, 774.)

The District's argument concerning the purported insufficiency of plaintiff's Complaint is not a model of clarity. The District appears to concede that the First Cause of Action adequately alleges a negligence cause of action, but contends that the Second and Third Causes of Action do not because they do not "reference any statutory liability of the District …." (Opening Memorandum, p. 10, lines 4-11.) This argument lacks merit for two reasons.

First, the viability of a single cause of action would preclude summary judgment, and as noted above, the District has not complied with the procedural rules for seeking summary adjudication. (Cf. *Shook v. Pearson* (1950) 99 Cal.App.2d 348, 351 [a challenge to an entire complaint should be denied if any cause of action within the complaint has merit].)

Second, the captions of all three causes of action reference the statutes governing a public entity's vicarious liability for the negligence of its employees. (Government Code §§ 815.2 and 820.) The District points out that the Complaint does not identify specific employees, but such detail is not required at the pleading stage. (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872 ["the District cites no statute or decision requiring a plaintiff to specify *at the pleading stage* which of the District's employees committed the negligent acts or omissions for which a public entity is allegedly liable under section 815.2"].)

Triable Issues Of Fact. The District argues that it did not owe plaintiff a duty to protect her from an "unforeseeable" harm. (Opening Memorandum, pp. 12-17.) However, the District has not offered supporting evidence demonstrating that the alleged harm to plaintiff was in fact unforeseeable. In making this ruling, the Court has focused on the District's separate statement of undisputed facts and the evidence cited there.

Several of the undisputed facts merely reference plaintiff's Complaint. (Fact Nos. 1-4, 9-10, and 22.) These references appear to be offered only in support of the District's argument that the Second and Third Causes of Action do not adequately allege public entity liability.

Obviously, such references are not helpful to the evidentiary question of whether the District has negated the existence of triable issues of fact.

The District relies heavily on the video of plaintiff's bus trip on November 5, 2015. (Fact Nos. 6-8 and 11-16.) This evidence is problematic for several reasons.

- First, in the Complaint plaintiff alleges repeated incidents occurring between September and November 2015. (Complaint, ¶ 9.) Even if the November 5 video demonstrated that none of the District's employees were negligent on November 5, the video does not bear on whether they were negligent with regard to the earlier incidents.

- Second, the District's logic with regard to the November 5 video is hard to follow. The District appears to be suggesting that, because plaintiff and the perpetrator were sitting directly behind the bus driver where it was difficult for the bus driver to see them, and because the perpetrator stopped his conduct when the bus slowed for a stop, the driver could not have been negligent. The Court does not find this to be self-evident: It may well have been negligent to allow the male and female special education students to sit next to each other in the first place, or to allow them to sit in a place where they could not be monitored. (See *Jennifer C. v. Los Angeles Unified School Dist.* (2008) 168 Cal.App.4th 1320, 1329 ["[w]e hold that maintenance of a hiding place where a 'special needs' child can be victimized satisfies the foreseeability factor of the duty analysis even in the absence of prior similar occurrences"].)

  Thus, the District acknowledges as follows in its reply memorandum: "the vast majority of the inappropriate conduct occurred below the school bus seat partitions, concealed from District personnel." (Reply, p. 6, lines 10-12.) The District appears to believe that this fact absolves the District from liability, but it actually strengthens plaintiff's argument that the *Jennifer C.* decision is analogous to the case at bar.

  The District also cites plaintiff's discovery responses concerning plaintiff's theories of negligence liability. In these responses, plaintiff asserted that the District was negligent in part because the District (1) should have reviewed the surveillance videos more often, and (2) should not have allowed plaintiff to sit next to other children unless another adult was present and supervising the students' interactions. (See Fact No. 23 and discovery responses there cited.) Yet the District does not submit evidence with the opening papers tending to rebut these negligence theories.

- Finally, even if the opening evidence on the foreseeability of the November 5 incident were sufficient to shift the burden of coming forward with opposition evidence, plaintiff has submitted the opposition declaration of an expert witness who alleges, in pertinent part, as follows: "It is my opinion that the numerous instances of sexual battery could have been mitigated with normal driver vigilance and intervention, or driver vigilance and the requesting of assistance

from the aid to intervene." (Anderson Dec., ¶ 12.) The District has not objected to this declaration.

The District's last assertion is that, before November 6, 2015, the District was not on notice that plaintiff had been assaulted. (Fact Nos. 18-21.) Again, there is a gap in logic here. Simply because the District did not timely discover repeated incidents of assault on a vulnerable and inarticulate special needs child, it does not follow that the District's employees met the standard of care. (See *Jennifer C*., 168 Cal.App.4th at 1329.) An equally reasonable inference, and perhaps a more persuasive inference under the circumstances, is that the bus drivers, transportation aids, or other District employees should have discovered the perpetrator's assaults earlier than they did; those assaults were brazenly aggressive, occurred in the immediate presence of District employees, and were recorded on the District's own video cameras.

Further, the District does not dispute that it was on notice of the perpetrator's conduct as of November 4, 2015, when a transportation aid was required to intervene twice to separate plaintiff and the perpetrator. (Additional Fact Nos. 15-16; plaintiff's Exhibit 6 [video of a.m. ride on 11-4-15].) Yet additional misconduct was allowed to occur on November 5 and 6, 2015. (Additional Fact Nos. 17-22; plaintiff's Exhibits 7-9.)

Expert Testimony. Neither side has briefed the issue of what role expert witness testimony should play in determining the negligence of District employees. The District tacitly assumes that such testimony is not necessary; it seeks summary judgment without providing the declaration of an expert witness. Plaintiff assumes that such testimony is necessary, or at least appropriate; she supplies the declarations of two expert witnesses with her opposition papers. Both sides should be prepared to address in future proceedings the appropriateness of expert witness testimony, and if it is appropriate, the proper scope of such testimony. (See *Thompson v. Sacramento City Unified School Dist.* (2003) 107 Cal.App.4th 1352, 1373 ["[a] party cannot rely upon an expert's opinion to establish duty, which is a question of law for the court"].)

4. TIME: 9:00 CASE#: MSC18-02259
CASE NAME: ROBINSON VS. LBG HILLTOP
HEARING ON MOTION FOR CONSOLIDATION W/RS18-0864
FILED BY PATRICK MARK ROBINSON
**** TENTATIVE RULING: ****

Counsel to appear (CourtCall OK) to discuss timing.

5. TIME: 9:00 CASE#: MSC18-02259
CASE NAME: ROBINSON VS. LBG HILLTOP
HEARING ON DEMURRER TO COMPLAINT
FILED BY LBG HILLTOP, LLC
**** TENTATIVE RULING: ****

Counsel to appear (CourtCall OK) to discuss timing.

6. TIME: 9:00 CASE#: MSC18-02290
CASE NAME: SEARLES VS. ROUND TABLE PIZZA,
HEARING ON MOTION FOR LEAVE TO FILE AMENDED COMPLAINT
FILED BY DONALD SEARLES
**** TENTATIVE RULING: ****

Plaintiff seeks leave to amend the complaint to name the proper entity or entities as defendants. The present named defendant (which stands to be dropped from the lawsuit as a result) naturally has no objection, but suggests that the proposed FAC still doesn't get it right.

Plaintiff is granted leave to amend to name corrected defendants, within 30 days. Counsel are to meet and confer as to who the proper defendant(s) may be.

The Court must observe that this should have been handled by meet-and-confer, followed by stipulation. It's a waste of both counsels' time to proceed by noticed motion on something like this.

7. TIME: 9:00 CASE#: MSN19-0097
CASE NAME: CCC DEPUTY SHERIFFS VS. CCC
HEARING ON MOTION TO STRIKE CLAIMS FROM INTERVENOR THE MEDIA GROUP
FILED BY CONTRA COSTA COUNTY DEPUTY SHERIFFS' ASSOCIATION
**** TENTATIVE RULING: ****

These motions were withdrawn by the moving party. The Unions must file and serve answers to the cross-complaints by April 5.

The Court also notes that the Unions' supporting documents do not comply with CRC 3.1110(f) and Local Rule 3.42 concerning tabbing of exhibits. Counsel is directed to review these rules and comply with them as to any future filings. Failure to do so may result in rejection or disregard of nonconforming papers.

8. TIME: 9:00 CASE#: MSN19-0097
CASE NAME: CCC DEPUTY SHERIFFS VS. CCC
HEARING ON MOTION TO STRIKE CLAIMS FROM INTERVENOR ACLU
FILED BY CONTRA COSTA COUNTY DEPUTY SHERIFFS' ASSOCIATION
**** TENTATIVE RULING: ****

This motion has been withdrawn by stipulation.

9. TIME: 9:00 CASE#: MSN19-0109
CASE NAME: WALNUT CREEK P.O.A VS. CITY OF WALNUT CREEK
HEARING ON MOTION TO STRIKE CLAIMS FROM INTERVENOR ACLU
FILED BY WALNUT CREEK POLICE OFFICERS' ASSOCIATION
**** TENTATIVE RULING: ****

This motion has been withdrawn by stipulation.

10. TIME: 9:00 CASE#: MSN19-0109
CASE NAME: WALNUT CREEK P.O.A VS. CITY OF WALNUT CREEK
HEARING ON MOTION TO STRIKE CLAIMS OF INTERVENOR THE MEDIA GROUP
FILED BY WALNUT CREEK POLICE OFFICERS' ASSOCIATION
**** TENTATIVE RULING: ****

See Line 7.

11. TIME: 9:00 CASE#: MSN19-0166
CASE NAME: CONCORD POLICE VS. CITY OF CONCORD
HEARING ON MOTION TO STRIKE CLAIMS OF INTERVENOR THE MEDIA GROUP
FILED BY CONCORD POLICE ASSOCIATION
**** TENTATIVE RULING: ****

See Line 7.

12. TIME: 9:00 CASE#: MSN19-0166
CASE NAME: CONCORD POLICE VS. CITY OF CONCORD
HEARING ON MOTION TO STRIKE CLAIMS OF INTERVENOR ACLU
FILED BY CONCORD POLICE ASSOCIATION
**** TENTATIVE RULING: ****

This motion has been withdrawn by stipulation.

13. TIME: 9:00 CASE#: MSN19-0167
CASE NAME: MARTINEZ POLICE VS. CITY OF MARTINEZ
HEARING ON MOTION TO STRIKE CLAIMS FROM INTERVENORS THE MEDIA GROUP
FILED BY MARTINEZ POLICE OFFICERS' ASSOCIATION
**** TENTATIVE RULING: ****

See Line 7.

14. TIME: 9:00 CASE#: MSN19-0167
CASE NAME: MARTINEZ POLICE VS. CITY OF MARTINEZ
HEARING ON MOTION TO STRIKE CLAIMS FROM INTERVENOR ACLU
FILED BY MARTINEZ POLICE OFFICERS' ASSOCIATION
**** TENTATIVE RULING: ****

This motion has been withdrawn by stipulation.

15. TIME: 9:00 CASE#: MSN19-0169
CASE NAME: RICHMOND POLICE VS. CITY OF RICHMOND
HEARING ON MOTION TO STRIKE CLAIMS FROM THE MEDIA GROUP INTERVENOR
FILED BY RICHMOND POLICE OFFICERS' ASSOCIATION
**** TENTATIVE RULING: ****

See Line 7.

16. TIME: 9:00 CASE#: MSN19-0169
CASE NAME: RICHMOND POLICE VS. CITY OF RICHMOND
HEARING ON MOTION TO STRIKE CLAIMS FROM INTERVENOR ACLU
FILED BY RICHMOND POLICE OFFICERS' ASSOCIATION
**** TENTATIVE RULING: ****

This motion has been withdrawn by stipulation.

17. TIME: 9:00 CASE#: MSN19-0170
CASE NAME: ANTIOCH POLICE VS. CITY OF ANTIOCH
HEARING ON MOTION TO STRIKE CLAIMS OF INTERVENOR THE MEDIA GROUP
FILED BY ANTIOCH POLICE OFFICERS' ASSOCIATION
**** TENTATIVE RULING: ****

See Line 7.

18. TIME: 9:00 CASE#: MSN19-0170
CASE NAME: ANTIOCH POLICE VS. CITY OF ANTIOCH
HEARING ON MOTION TO STRIKE CLAIMS OF INTERVENOR ACLU
FILED BY ANTIOCH POLICE OFFICERS' ASSOCIATION
**** TENTATIVE RULING: ****

This motion has been withdrawn by stipulation.

19. TIME: 9:00 CASE#: MSN19-0180
CASE NAME: RE ERIC INGHAM
HEARING ON MINOR'S COMPROMISE
**** TENTATIVE RULING: ****

The proposed minor's compromise is **approved**.

20. TIME: 9:00 CASE#: MSN19-0259
CASE NAME: CTB DANVILLE VS. M GROUP CONSTRUCTION
HEARING ON PETITION FOR RELEASE OF PROPERTY FROM LIEN
FILED BY CTB DANVILLE, LLC
**** TENTATIVE RULING: ****

The petition for release of property lien is **granted**.

21. TIME: 9:00 CASE#: MSC18-02370
CASE NAME: TURNER VS. WEBER
HEARING ON DEMURRER TO COMPLAINT
FILED BY BEST PROPERTY MANAGEMENT, et al.
**** TENTATIVE RULING: ****

This case was dismissed without prejudice.

22. TIME: 9:00 CASE#: MSC18-02370
CASE NAME: TURNER VS. WEBER
HEARING ON MOTION TO STRIKE PORTIONS OF COMPLAINT
FILED BY BEST PROPERTY MANAGEMENT, et al.
**** TENTATIVE RULING: ****

This case was dismissed without prejudice.

CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 12
HEARING DATE: 03/29/19

23. TIME: 9:00 CASE#: MSC18-00520
CASE NAME: NELSON VS. ANDERSON
HEARING ON MOTION TO BE RELIEVED AS COUNSEL
FILED BY TIANNA NELSON
**** TENTATIVE RULING: ****

Counsel to appear in person for an in camera hearing as to grounds for withdrawal.
Ms. Nelson is invited to attend if she wishes.