TENTATIVE RULINGS

FOR: July 31, 2018

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. Parties are responsible for either making the appropriate request in advance or arranging for their own private court reporter. 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.

CIVIL LAW & MOTION CALENDAR – Hon. Victoria Wood, Dept. C (Historic Courthouse) at 2:00 p.m.

Lonni Rayburn Hall v. Safeco Insurance Co., et al. **18CV000250**

DEMURRER TO THE COMPLAINT

TENTATIVE RULING: Defendants Safeco Insurance Company of America and Lisa Blumm's demurrer to the first cause of action for strict liability for rejection of settlement offer, second cause of action for negligence, third cause of action for breach of contract, fourth cause of action for breach of the covenant of good faith and fair dealing, and fifth cause of action for unfair claim settlement practices on the ground of failure to state sufficient facts, uncertainty, and failure to attach a copy of the contract or allege its terms is SUSTAINED WITHOUT LEAVE TO AMEND. The demurrer is unopposed and the complaint shows on its face that it is incapable of amendment based on the arguments defendants raised.

Defendants' amended request for judicial notice of the first amended complaint in Case No. 26-67992, the complaint in Case No. 26-67992, and Exhibits A-C to the complaint in this case is GRANTED IN PART. The request is granted to the extent these materials are court records, but not for the truth of the matters asserted therein.

The case management conference for August 7, 2018, is vacated. An OSC re: Dismissal is set for October 9, 2018, at 2:00 p.m. in Dept. C. Defendants shall prepare the order and provide notice to plaintiff.

In the Matter of Michael Nigel Blackdiamond **18CV000756**

PETITION FOR CHANGE OF NAME

TENTATIVE RULING: Notice has been properly published and no written objections have been filed. The petition is GRANTED without need for appearance.

PROBATE CALENDAR – Hon. Rodney Stone, Dept. I (Criminal Courts Bldg.-1111 Third St.) at 2:00 p.m.

In the Matter of The L. Meade Baldwin 2000 Revocable Trust **17PR000089**

SECOND ACCOUNT AND REPORT OF TRUSTEE AND PETITION FOR SETTLEMENT OF ACCOUNT, AND FOR APPROVAL OF TRUSTEE FEES

APPEARANCE REQUIRED

Conservatorship of Jeanne Marie Tarbox **17PR000243**

PETITION FOR ISSUANCE OF AMENDED LETTERS OF CONSERVATORSHIP TO REMAINING CONSERVATOR AND PETITION FOR ORDER TO TRANSFER FUNDS TO SPECIAL NEEDS TRUST FOR BENEFIT OF CONSERVATEE

TENTATIVE RULING: The Petition is GRANTED as prayed.

Estate of David F. Stevens **18PR000165**

SPOUSAL PROPERTY PETITION

TENTATIVE RULING: GRANT petition.

In the Matter of the Diane Brisebois Peterson 1999 Trust **18PR000166**

PETITION BY SUCCESSOR CO-TRUSTEES TO DETERMINE TITLE TO PERSONAL PROPERTY

TENTATIVE RULING: GRANT petition.

Estate of Shirley J. Barrett **18PR0000173**

SPOUSAL PROPERTY PETITION

TENTATIVE RULING: GRANT petition.

CIVIL LAW & MOTION CALENDAR – Hon. Rodney Stone, Dept. I (Criminal Courts Bldg.-1111 Third St.) at 2:00 p.m.

Emily Richer v. Travelers Commercial Insurance Co., et al. **17CV000777**

MOTION TO QUASH DEPOSITION SUBPOENA

TENTATIVE RULING: Plaintiff Emily Richer's motion to quash the deposition subpoena for production of business records pursuant to Code of Civil Procedure section 1987.1 is DENIED. Defendant Travelers Commercial Insurance Co. served a deposition subpoena for the production of business records on Airbnb. Richer seeks to quash the production of documents requested for Airbnb account activity beyond the loss date of February 21, 2017, when a large tree fell and damaged a guest cottage on her property. The production of documents from Airbnb after the date of loss are reasonably calculated to lead to the discovery of admissible evidence as set forth in defendant's opposition.

Patricia Damery v. Francisco Diaz, et al. **17CV001097**

MOTION TO CONTINUE TRIAL DATE

TENTATIVE RULING: Plaintiff Patricia Damery's unopposed motion to continue the trial date is GRANTED. Good cause exists to continue the trial date due to the unavailability of a party and trial counsel. (Cal. Rules of Court, rule 3.1332(c).) The trial is continued to October 29, 2018, at 8:30 a.m. in Dept. I. The trial management conference is continued to October 25, 2018, at 2:00 p.m. in Dept. C. The mandatory settlement conference is continued to October 4, 2018, at 8:30 a.m. in Dept. O. The discovery cutoff is October 1, 2018, for non-expert discovery and October 15, 2018, for expert discovery.

Lisa Runyon v. Jennifer Kohl, et al. **17CV001125**

SUMMARY JUDGMENT/ADJUDICATION BY DEFENDANTS NAPA VALLEY UNIFIED SCHOOL DISTRICT AND JENNIFER KOHL

TENTATIVE RULING:

This is a wrongful termination case. The facts are relatively simple.

On 08/17/16, defendant Napa Valley Unified School District (hereinafter "District") hired Plaintiff Lisa Runyon ("plaintiff") to work as a Licensed Vocational Nurse at Silverado Middle School.

On 01/24/17, a student came to plaintiff's office to express concern over text messages she received from her mother's boyfriend. Plaintiff formed the opinion the text messages were a reportable offense, and made an informal report to Child Protective Services.

On 01/25/17, the student returned to plaintiff's office with further complaints of a sexual nature involving her mother's boyfriend. Plaintiff formed the opinion based on seeing the text messages and other information provided that reportable offenses were afoot. Plaintiff made another report to Child Protective Services. Plaintiff later reported her concerns to Lourdes Caravantes (Silverado Middle School counselor).

On 01/27/17, plaintiff informed co-defendant Jennifer Kohl (Silverado Middle School Principal) and Tristan Cline (Silverado Middle School Resource Officer) of her meetings with the student and calls to CPS. Plaintiff formed the opinion that Kohl was unhappy about not being informed sooner, or perhaps before CPS was called.

On 01/31/17, plaintiff sent an email to Kohl inquiring of any school safety plan for future reporting, and re-asserting her belief that she had properly complied with mandatory reporting requirements by going to CPS first.

On 02/08/17, District terminated plaintiff's employment.

A Brief Primer on Separate Statements

The purpose behind the separate statement requirement is to inform the court and the opposing parties of what issues and facts truly must be addressed on the motion. *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252; *Elcome v. Chin* (2003) 110 Cal.App.4th 310, 322. To this end, separate statements must follow the format set forth in CRC 3.1350: they must separately identify each supporting material fact, and do so "plainly and concisely." CCP §437c(b); CRC 3.1350(d); *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 472. There are several concerns with the parties' respective separate statements.

Regarding defendants' separate statement, for summary adjudication the statement must separately identify each cause of action and each supporting material fact relating thereto. CRC 3.1350(d). Defendants' separate statement does not address separate causes of action, and as such is not sufficient to adjudicate individual claims. Thus, this is an all-or-nothing motion for summary judgment.

Regarding plaintiff's separate statement, she identifies thirty-three (33) additional "undisputed" facts, but CCP §437c(b)(3) only provides for the submission of additional "disputed" facts. Likewise, CRC 3.1350(f)(2) limits the response to "the nature of the dispute and the evidence that supports the position that the fact is controverted," but plaintiff inserts

argument, caselaw, and unrelated facts. Finally, many of the additional facts are not in fact "material" because the facts do not "make a difference in the disposition of the motion." CRC 3.1350(a)(2).

Notwithstanding the aforementioned concerns, this Court elects to consider all of the evidence submitted by the parties in support of and in opposition to this motion since the issues herein are relatively narrow.

Evidentiary Objections

On 07/26/18, defendants caused to be filed and served a document entitled "evidentiary objections," but the filing is defective. The objections are OVERRULED. (CRC 3.1354.)

Defendants' Summary Judgment Motion

Summary judgment is no longer a disfavored remedy; instead, it is "now seen as a particularly suitable means to test the sufficiency of the plaintiff's case" to see if trial is really warranted. *Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542. A defendant moving for summary judgment may prevail on the motion in one of three ways: (1) by affirmatively negating at least one of plaintiff's essential elements; (2) by showing that plaintiff does not have, and cannot get, evidence to establish an essential element after fully exploring plaintiff's case through discovery; or (3) by presenting evidence as to each element of an affirmative defense upon which defendant bears the burden of proof at trial. To the extent adjudication turns on factual questions, the moving party's affidavits are strictly construed while those of the opposing party are liberally construed. Once the defendant's initial burden is met, the burden shifts to the plaintiff to show by substantial evidence that a triable issue of material fact exists as to the claim or defense. CCP §437c; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851, 854; *Rutledge v. Hewlett-Packard Company* (2015) 238 Cal.App.4th 1164, 1169-1170; *Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1050-1051.

Plaintiff was a mandated reporter for suspected child abuse and neglect. Penal Code §11165.7(a)(4), (21). Plaintiff reasonably suspected she heard directly from a potential victim evidence of general neglect and endangerment (Penal Code §§ 11165.2(b), 11165.3) – which are reportable offenses. Plaintiff was required to report upon risk of incarceration and/or loss of licensing/credentials. Penal Code §11166(c), Education Code §44421. Since there is no dispute regarding the reasonableness of plaintiff's suspicions, there is equally no dispute that plaintiff was required to make a report to a proper authority. So what's the problem? The evidence presented by plaintiff permits the reasonable inference that she was terminated for making a report to Child Protective Services only because she did so before addressing the concern with school administrators. However, school officials had no dog in the fight.

First, there is no Silverado Middle School Safety Plan in evidence, and no contention that said plan obligated plaintiff to address potential reportable incidents first to school administrators. See Education Code §32282(a)(2)(A). Although defendants could have established "internal procedures to facilitate reporting and apprise supervisors and administrators of reports" (see Penal Code §11166(i)(1)) as part of the Plan, they apparently did not. If defendants wanted plaintiff to address all reportable offense concerns to Kohl first, it was their

obligation to put that in the Plan and train her accordingly. Even still, defendants could not require plaintiff to name herself as the reporter. Penal Code §11166(i)(2). Of course, no policy would have relieved plaintiff of her obligation to timely report to a proper agency. See Penal Code §11166(i)(1).

Second, although plaintiff could have satisfied her mandatory reporting obligations by taking her concerns to a "any police department of sheriff's department" rather than Child Protective Services (see Penal Code §11165.9), defendants offer no explanation for why plaintiff's choice was the less-desirable one. Defendants point to the fact that plaintiff recently took an online certification course for mandated reporters, but do not provide any evidence from that training showing that plaintiff was told to report to someone other than CPS first. In fact, the training specifies that reporting to the school principal, or a school resource officer, is not good enough. Moreover, it makes sense for plaintiff to have gone directly to CPS since she was informed that CPS already had a file for this student (from a prior corporal injury). Nonetheless, she was required to report "as soon as is practically possible" – not when administrators decided it was proper. See Penal Code §11166(a).

Since the evidence permits the inference that plaintiff did her job properly, the question first presented by the pending motion is whether District was authorized to fire plaintiff under the circumstances. Defendants contend that plaintiff was fired because she was an at-will employee, and could be fired without cause at any time. Assuming this to be true (plaintiff contends she was a certified employee entitled to some mid-year protections), even at-will employees cannot be fired in violation of public policy. See *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 172; *Yau v. Santa Margarita Ford, Inc.* (2014) 229 Cal.App.4th 144, 154-155. However, to be actionable, there must be a clear nexus between termination and violation of a policy that is (1) delineated in either constitutional or statutory provisions; (2) public in the sense that it inures to the benefit of the public rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) substantial and fundamental. *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 901-902; *Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 921; *Carter v. Escondido Union High School Dist.* (2007) 148 Cal.App.4th 922, 929.

Here, plaintiff contends that she was fired for complying with her statutory obligations as a mandatory reporter. The Child Abuse and Neglect Reporting Act codifies a very strong, substantial, fundamental and well-established public policy to protect children:

> "The intent and purpose of this article is to protect children from abuse and neglect. In any investigation of suspected child abuse or neglect, all persons participating in the investigation of the case shall consider the needs of the child victim and shall do whatever is necessary to prevent psychological harm to the child victim." Penal Code §11164(b).

The public policy is so strong that not only may a delinquent mandated reporter find herself incarcerated, but so too may a supervisor or administrator who impedes or inhibits the reporting duties or who otherwise sanctions someone for making the report. This point bears highlighting: "no person making a report shall be subject to any sanction for making the report" and "any supervisor or administrator who violates [this] shall be punished by not more than six months in a county jail, by a fine of not more than one thousand dollars ($1,000), or by both that

fine and imprisonment." Penal Code §§ 11166(i)(1); Penal Code §11166.01(a). In other words, if plaintiff was indeed fired for making a report, those responsible for firing her might be criminally liable. Certainly if they could be criminally liable, they could be civilly liable for violating public policy.

Defendants respond that they have a valid reason for terminating plaintiff unrelated to her CPS report, but the evidence of that is tenuous at best. According to defendants, they terminating plaintiff during her probationary period because plaintiff (1) did not promptly advise administrators of the reportable offenses, (2) "may not" have timely filed a written report with CPS, and (3) "investigated" the matter herself. Mansuy Decl 2:10-14; Kohl Decl 2:6-9. To the extent these are distinct from punishing plaintiff for complying with her reporting obligations, there is enough here to permit a jury to decide if these are pretextual. As noted, there was no internal express obligation for plaintiff to report to administrators, and any such obligation may have run afoul of Penal Code §11166(i)(2) ["internal procedures shall not require any employee required to make reports pursuant to this article to disclose his or her identity to the employer"]. As for the written report to CPS, plaintiff had 36 hours to complete the report – but there is no evidence that plaintiff failed to do that. Penal Code §11166(a). As for any investigation, it is not clear what defendants mean by that, but to be clear plaintiff was required to elicit enough information to satisfy the objectively reasonable suspicion standard set forth in Penal Code §11166(a)(1). This would naturally require some scrutiny (which plaintiff did when she met with the student to actually view text messages).

There are clear triable issues of fact regarding the pretext for termination and a violation of public policy. Defendants are not entitled to judgment in their favor on the first cause of action for wrongful termination, and since defendants failed to perfect this as a motion for summary adjudication (see discussion *supra*), there is no need to address the remaining causes of action. That being said however:

- There is an identical triable issue relating to plaintiff's **second** cause of action for retaliation since Labor Code §1102.5(b) prohibits retaliation against an employee for disclosing to a government agency a violation of state law (which in this case is both the laws regarding reporting and the laws prohibiting child abuse). The violation does not have to relate to the employer's work. See *Cardenas v. M. Fanaian DDS Inc.* (2015) 240 Cal.App.4th 1167, 1175.
- Plaintiff's **third** cause of action for breach of the implied covenant of good faith and fair dealing also survives because every contract includes an implied covenant not to interfere with the contracting party's ability to perform, and plaintiff offers evidence that defendants ordered her to cease interacting with the student. See *Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 400; *Pasadena Live, LLC v. Pasadena* (2004) 114 Cal.App.4th 1089, 1093; *Torelli v. J.P. Enterprises* (1997) 52 Cal.App.4th 1250, 1257.
- Plaintiff's **fourth** cause of action for intentional infliction of emotional distress must also reach the jury because "whether conduct is outrageous is usually a question of fact." *So v. Shin* (2013) 212 Cal.App.4th 652, 671-672. IIED stemming from a public policy violation is not necessarily barred by workers' compensation exclusivity. See *Light v. Department of Parks & Recreation (2017)* 14 Cal.App.5th 75, 95-98; *Cabesuela v.*

Browning-Ferris Indus. of Cal., Inc. (1998) 68 Cal.App.4th 101, 113; in accord, *Tone v. Wal-Mart Stores, Inc.*, WL4658564 at *2-3 (S.D. Cal. 2015).

- Plaintiff's **fifth** cause of action is really just a prayer for enhanced PAGA remedies, but Labor Code §2699.5 specifies that a violation of Labor Code §1102.5 can support augmented penalties, and plaintiff has supported a claim thereunder.

Request for judicial notice GRANTED.

Motion DENIED.

Nancy L. Ryan v. Delta Consulting & Engineering, et al **18CV000509**

DEMURRER TO VARIOUS CAUSES OF ACTION IN THE COMPLAINT BY DEFENDANTS BRUCE TUCKER CONSTRUCTION AND DELTA CONSULTING & ENGINEERING OF ST. HELENA

TENTATIVE RULING:

This is a professional negligence and construction defect case. Plaintiff Nancy Ryan is the effective owner of certain property located near Hess Winery at 3255 Redwood Road. In 2014, an earthquake caused significant geological instability to portions of the property, most notably along the northern boundary. Plaintiff retained various experts to assess the condition, and ultimately caused to be constructed upon the property a retaining wall with accompanying drainage system. In early 2017, torrential rains caused a landslide at the property. Plaintiff contends that the various experts employed to advise, design and construct the retaining wall and drainage system breached their respective agreements and performed below the applicable standards of care.

Before the Court this day are two pleading attacks. Defendant Bruce Tucker Construction ("BTC") demurs to the 1st, 2nd, 3rd, 4th, 5th and 7th causes of action in the Complaint. Defendant Delta Consulting & Engineering of St. Helena ("Delta") demurs to the 2nd, 3rd, 5th and 7th causes of action.

Pre-Filing Requirement to Meet and Confer

Before reaching an of the substantive arguments, this Court notes that neither BTC nor Delta adequately discharged the pre-filing obligation to meet and confer. Pursuant to CCP §430.41(a):

> "before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer … the demurring party shall identify all of the specific causes of action that it believes are subject to demurrer and identify with legal support the basis of the deficiencies … the demurring party shall file and serve

with the demurrer a declaration stating [the] means by which the demurring party met and conferred with the party who filed the pleading subject to demurrer, and that the parties did not reach an agreement resolving the objections raised in the demurrer."

Defendant BTC did not include any meet and confer declaration with the demurrer, and according to plaintiff's counsel no meet and confer effort ever took place. See Webster Decl Para 9-10. Defense counsel admits that he failed to comply with the meet and confer requirement, but contends the requirement is "form over substance." See Reply Brief 4:25-5:7. Defendant Delta included a declaration with the demurrer. Therein, defense counsel indicates that the only meet and confer effort consisted of a single letter written to plaintiff's counsel – with no follow-up. See Edington Decl Para 3-4; Webster Decl Para 3-4. This too is noncompliant, for the statute specifically calls for a live conference (phone or in person) and counsel's "good faith attempt" to make that happen. See §430.41(a)(2). The letter does not request a live conference; instead, it merely states that a demurrer will be filed unless plaintiff acquiesces. Defense counsel should have done more.

In the end, failure to comply does not impact the merits, and a continuance for a compliant meet and confer would not – in this Court's opinion – be fruitful. The parties closely addressed the issues pre-litigation, and have fully briefed the issues for resolution here. Although this Court does not promote lip service to §430.41, in this present matter it makes the most sense to simply reach the merits. Of course, for any future pleading attacks compliance with 430.41 will be expected.

Repair Act Preemption

BTC is the general contractor responsible for constructing the retaining wall and drainage system which, according to plaintiff, failed to perform during the February 2017 rains. BTC's demurrer is anchored principally to the contention that California's Right to Repair Act preempts plaintiff's common law causes of action. Defendant is partially correct: the Right to Repair Act (Civil Code §896 *et seq*) does indeed preempt common law causes of action for negligence, strict liability, nuisance, and implied warranties when there is only economic/property loss. See *McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 247-249; *Gillotti v. Stewart* (2017) 11 Cal.App.5th 875, 893; *Elliott Homes, Inc. v. Superior Court* (2016) 6 Cal.App.5th 333, 341. However, it not clear whether the Right to Repair Act applies at all, an issue neither side has adequately briefed.

Pursuant to Civil Code §896, the Right to Repair Act "applies to original construction intended to be sold as an individual dwelling unit." Civil Code §938 further provides that the Right to Repair Act "applies only to new residential units where the purchase agreement with the buyer was signed by the seller on or after January 1, 2003." Finally, the Right to Repair Act only applies to builders – defined as someone in the business of selling residential units – and contractors who work underneath the builder. See Civil Code §§ 911(a), 936. Taken together, these statutes make plain that the Right to Repair Act was not intended to cover remodeling projects or works of improvement for existing properties. Even though plaintiff's 6th cause of action is based on the Right to Repair Act, there are no allegations within that cause of action

explaining how the subject project qualifies as "new construction" or a "new residential unit" rather than a remodeling or work of improvement. Plaintiff's operative pleading describes a flawed retaining wall – which is arguably nothing more than a work of improvement to an existing residence. It does appear true that plaintiff contracted with BTC to also "demolish the existing home and garage on the Property and construct new home and pool on the Property" (Complaint Para 141), but what does that have to do with the retaining wall and drainage system? Plaintiff is only complaining about the retaining wall and drainage system. See Complaint Para 81, 104, 127, 148, 168, 174, 176, 185.

Because the preemption issue is both pervasive and applicable to both demurring parties, this Court will sustain BTC's demurrer with leave to amend, and find Delta's demurrer (which did not raise this issue but may be impacted by it) moot by virtue of the order to plaintiff to file an amended pleading. Unless the parties can simply reach agreement on this, the amended pleading must make plain how the Right to Repair Act applies or does not apply. If Plaintiff elects to do so, she shall file a first amended complaint within 10 calendar days of service of notice of entry of order. The parties are ordered per CCP §430.41(c) to participate in a live conference before the First Amended Complaint is filed.