TENTATIVE RULINGS

FOR: May 5, 2021

If you do not see a tentative ruling for a scheduled matter, then attendance at the hearing is required.

Remote appearances via Zoom are mandatory to prevent the spread of COVID-19. Please use Zoom at the links listed below. COURTCALL IS NO LONGER AVAILABLE.

If you have cases scheduled in both courtrooms at the same time, first log-in to the Zoom session for the department that has your quickest matter(s), and upon check-in, ask the clerk to email the clerk in the other department to advise that you will be late to the other Zoom session.

Dept. A Zoom
Join by Video (Preferred)
https://us02web.zoom.us/j/85897874559?pwd=Nk1VTnNQZmIzNXQwbVNiUk1iQTNCZz09
Join by Phone: 877 853 5247 or 888 788 0099 **Meeting ID:** 858 9787 4559 **Password:** 704959

Dept. B Zoom
Join by Video (Preferred)
https://us02web.zoom.us/j/89902611018?pwd=OXJRM2FFWHZ4YXJ4b2szZWs1UFJYZz09
Join by Phone: 877 853 5247 or 888 788 0099 **Meeting ID:** 899 0261 1018 **Password:** 776773

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.

PROBATE CALENDAR – Hon. Victoria Wood, Dept. A (Historic Courthouse) at 8:30 a.m.

In the Matter of Yoselin Camila Macias Jovel, a minor **20PR000218**

[1] OSC RE: FAILURE TO APPEAR

[2] REVIEW HEARING TO CONFIRM FILING OF THE RECEIPT AND ACKNOWLEDGEMENT OF ORDER FOR THE DEPOSIT OF MONEY INTO BLOCKED ACCOUNT

APPEARANCE REQUIRED. The Court has received proof that the minor's money has been transferred to mother in a custodial capacity and deposited into a credit union for the minor's benefit pursuant to the California Uniform Transfer to Minor's Act in compliance with Probate Code section 3413, subsection (b). Exercising its discretion, the Court finds this to be a satisfactory substitute for a blocked account and finds that Petitioner has therefore substantially

complied with the Court's previous order that the money be deposited into a blocked account. The OSC Re: Failure to Appear and Review Hearing are now dropped from calendar.

In the Matter of Hugo Alejandro Macias Jovel, a minor **20PR000219**

[1] OSC RE: FAILURE TO APPEAR

[2] REVIEW HEARING TO CONFIRM FILING OF THE RECEIPT AND ACKNOWLEDGEMENT OF ORDER FOR THE DEPOSIT OF MONEY INTO BLOCKED ACCOUNT

APPEARANCE REQUIRED. The Court has received proof that the minor's money has been transferred to mother in a custodial capacity and deposited into a credit union for the minor's benefit pursuant to the California Uniform Transfer to Minor's Act in compliance with Probate Code section 3413, subsection (b). Exercising its discretion, the Court finds this to be a satisfactory substitute for a blocked account and finds that Petitioner has therefore substantially complied with the Court's previous order that the money be deposited into a blocked account. The OSC Re: Failure to Appear and Review Hearing are now dropped from calendar.

CIVIL LAW & MOTION CALENDAR – Hon. Victoria Wood, Dept. A (Historic Courthouse) at 8:30 a.m.

Taneya Cook v. Karen Kin Yan Chung, MD, *et al*. **20CV000462**

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TENTATIVE RULING: Defendants' motion for summary judgment is GRANTED. The Court orders the matter set for an OSC: re Dismissal on August 11, 2021, 8:30 a.m., in Dept. A.

Defendants Scott Perryman, M.D. (Dr. Perryman) and Whole Health Weight Loss Institute, Inc. (Whole Health, and collectively Defendants) move, pursuant to Code of Civil Procedure section 437c, for summary judgment on Plaintiff's First Amended Complaint (FAC). Defendants assert that they are entitled to summary judgment because Plaintiff is unable to produce evidence sufficient to create a triable question of fact as to three material issues: (1) whether Dr. Perryman breached the appropriate standard of care; (2) whether any negligent action by Dr. Perryman contributed to Plaintiff's alleged injuries; and (3) whether Whole Health is liable to Plaintiff, under a vicarious liability theory, in light of the foregoing. The Court addresses each in turn.

A. LEGAL ANALYSIS

1. *Motion for Summary Judgment*

The party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) A defendant meets this burden by showing that one or more elements of plaintiff's cause of action cannot be established, or that there is a complete defense thereto. (*Ibid*.) The moving party also bears an initial burden of production to make a *prima facie* showing of the nonexistence of any triable issue of material fact. (*Id.* at p. 850-51.) If the party carries this burden, there is a shift and the opposing party is then subjected to a burden of production to make a *prima facie* showing. (*Ibid*.) "In ruling on the motion, the trial court views the evidence and inferences therefrom in the light most favorable to the opposing party." (*Collin v. CalPortland Co.* (2014) 228 Cal.App.4th 582, 588.)

The pleadings contour the scope of issues on a motion for summary judgment. (See *Orange County Air Pollution Control Dist. v. Super. Ct.* (1972) 27 Cal.App.3d 109, 112.) "'First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond by establishing a complete defense or otherwise showing there is no factual basis for relief on any theory reasonably contemplated by the opponent's pleading. [Citations.] Secondly, we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in movant's favor. [Citations.] . . . When a summary judgment motion *prima facie* justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of [a] triable, material factual issue. [Citation.]' [Citation.]" (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662-64.)

2. *There is a Triable Issue of Material Fact as to Whether Dr. Perryman's Actions Breached the Standard of Care*

"The physician's duty is to possess 'the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality and [to] use ordinary care and diligence in applying that learning and skill to the treatment of his patient.' [Citations.]" (*Mercado v. Leong* (1996) 43 Cal.App.4th 317, 326.)

Defendant argues, and presents evidence in the form of expert opinion, tending to show that "Dr. Perryman's care and treatment of Plaintiff was reasonable, appropriate, and complied with the standard of care." (Support Memo at 6:26-27; see also Separate Statement of Undisputed Facts at Undisputed Material Fact 26, 10:1-10, Declaration of Matthew Lin, M.D. (Lin Decl.) (which is attached as Exhibit I to the Declaration of Andrew Goldman (Goldman Decl.)) at ¶¶ 5, 7-8.) The Court finds that the evidence presented satisfies Defendants initial burden of making a *prima facie* showing of a lack of triable issue regarding whether Dr. Perryman breached the standard of care. (See *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at 850-851.)

Plaintiff presents evidence, also in the form of expert opinion, that Dr. Perryman's actions did fall below the appropriate level of care. (See Declaration of Milton Owens, M.D.

(Owens Decl.), attached as Exh. 7 to the Declaration of Caroline E. Gegg (Gegg Decl.), at ¶ 8(b).) Moreover, Plaintiff presents evidence that creates a triable issue of material fact regarding the validity of the waiver upon which Defendant's expert's opinion is, in part, expressly based – particularly with regard to the waiver's statement that "I do not wish to have my urine tested for pregnancy." (See Declaration of Lashonda Miles, attached as Exh. 6 to the Gegg Decl., at ¶¶ 8-12; see also Transcript of Deposition of Taneya Cook, attached as Exhibit 1 to the Gegg Decl., at 149:15-150:15, 150:20-151:3, 181:21-24, 186:20-22, 187:6-12, 188:7-189:15 (Plaintiff Deposition Transcript).)

Based on the foregoing, the Court finds that Plaintiff has presented evidence sufficient to create a triable question of material fact regarding whether Dr. Perryman's actions breached the appropriate standard of care for medical malpractice negligence.

3. *Plaintiff Fails to Produce Evidence That Any Act or Omission by Dr. Perryman Was a Substantial Factor in Bringing About an Injury, Damage, Loss, or Harm*

In order to prevail on a claim for negligence, a Plaintiff must prove causation. "'The elements of a cause of action for negligence are well established. They are '(a) a legal duty to use due care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the resulting injury.'' (Citation.)" *Ladd v. Co. of San Mateo* (1996) 12 Cal.4th 913, 917-18.)

"In cases alleging negligence, the proper test for proving causation is the one set out in BAJI No. 3.76 (8th ed. 1994 bound vol.): 'The law defines cause in its own particular way. A cause of injury, damage, loss or harm is something that is a substantial factor in bringing about an injury, damage, loss or harm.' [Citation.]" (*Espinosa v. Little Co. of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1313-14.)

Defendants present evidence that none of the allegedly negligent acts or omissions committed by Dr. Perryman caused any injury, damage, loss, or harm to Plaintiff or to Plaintiff's unborn baby. (See Declaration of Ashley Weinert, M.D., attached as Exh. J to the Goldman Decl.) Based on the foregoing, Defendants have satisfied their initial burden of making a *prima facie* showing that Plaintiff cannot establish the element of causation in support of her claim for medical malpractice negligence. (See *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at 850.)

Plaintiff asserts that "Dr. Weinert has no knowledge or evidence of whether there was any harm to Plaintiff or her unborn baby and can only proffer unacceptable and inadmissible speculations."[1] (Opposition at 19:9-11.) But that is *precisely* the crux of Dr. Weinert's declaration – that there is no evidence of whether there was any harm to Plaintiff or her unborn baby at the time Plaintiff elected to terminate her pregnancy. As Defendants have thus met their burden of showing that Plaintiff cannot establish causation, the burden shifts to Plaintiff.

[1] Plaintiff further argues that Dr. Weinert's opinion should be disregarded because "she does not profess to have any knowledge of bariatric surgery or QVMC's hospital protocol requiring pregnancy tests which are relevant to Plaintiff's claims of negligence *per se*." (Opposition at 19:6-9.) This assertion appears to misapprehend the issue for which Defendants offer Dr. Weinert's opinion.

The Court finds that Plaintiff fails to present evidence that any action or omission by Dr. Perryman was a substantial factor in bringing about an injury, damage, loss or harm to Plaintiff or her unborn baby.

Plaintiff does not squarely address the issue in her brief. She does, however, allude to it in various sections. The most thorough of these is in the Statement of Facts. (See Opposition at 5:27-6:14.) Plaintiff contends that her pregnancy was diagnosed by a Dr. Steven M. Garcia, M.D., in the emergency room of NorthBay Medical Center, and that Dr. Garcia "expressed concerns about the effects of the surgery, anesthesia, and lack of nutrition on the unborn baby." (Opposition at 6:2-4.) Plaintiff next asserts that she "also did her own research regarding the risks to an unborn baby from aesthesia and surgery." (*Id.* at 6:4-5.) Finally, Plaintiff asserts that she "consulted with a nurse practitioner at Planned Parenthood who expressed concerns regarding the possible effects on the unborn baby from the anesthesia, other medication, and the lack of nutrition following the surgery." (*Id.* at 6:12-13.)

Through her Separate Statement, Plaintiff articulates her argument relating to causation. "Plaintiff suffered complications when Defendant Dr. Perryman performed surgery on her while she was pregnant. Plaintiff had received medical advice from the ER doctor at NorthBay Medical Center, and the nurse practitioner at Planned parenthood, and had done her own research all of which indicate risks of anesthesia and surgery to an unborn baby. QVMC's own Pregnancy Test Waiver warns of the risks to an unborn baby from anesthesia and surgery." (Plaintiff's Separate Statement at 7:1-9.)

But evidence of Plaintiff's *concern* about the *possibility* of harm does not constitute evidence of injury. Plaintiff points to no evidence tending to show that any of the risks to her unborn baby were realized in this case. Moreover, Plaintiff fails to cite to evidence of any other injury, damage, loss, or harm stemming from any act or omission by Dr. Perryman. Without such evidence, Plaintiff fails to create a triable question of fact as to causation: an essential element to her claim for medical malpractice negligence.

4. *Plaintiff Fails to Create a Triable Issue of Fact as to Any Element of Her Claim Against Whole Health*

Defendant argues that Plaintiff's claim against Whole Health is based on a theory that Whole Health is vicariously liable for the actions of Dr. Perryman. (Support Memo at 12:18-28.) Defendant then argues that because Plaintiff's claim against Dr. Perryman fails, her claim against Whole Health also fails. The Court finds, for the reasons set forth herein above, that Defendant has carried its burden of making a *prima facie* case that Plaintiff cannot establish the essential element of causation to support her claim against Dr. Perryman, and therefore against Whole Health under a derivative liability theory.

Plaintiff does not argue otherwise. However, in her Separate Statement, she states, "Defendant Whole Health Weight Loss Institute, Inc. is named as a defendant because it is the primary insured on a Claims Made Professional Liability Insurance Policy with Defendant Dr. Perryman named as an additional named insured." (Plaintiff's Separate Statement at 20:6-9.) Although not entirely clear, it appears, from this statement, that Plaintiff's claim against Whole

Health is derivative of, and dependent upon, establishing Dr. Perryman's liability. For the reasons set forth herein above, she fails to present evidence sufficient to do so.

B. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is GRANTED.

Caliber Home Loans, Inc. v. Myoka McElroy, et al. **20CV000490**

MOTION TO SET ASIDE DEFAULT JUDGMENT

TENTATIVE RULING: Defendants Myoka McElroy and Fred McElroy, Jr.'s motion to set aside default judgment based on excusable neglect under Code of Civil procedure section 473, subdivision (b), is GRANTED. Defendants explain they were confused by the filing of the complaint against them as they were current on their loan modification agreement, but later ascertained the litigation involved a previous lien on the property of which they were unaware. (Myoka McElroy Decl., ¶¶ 1-2.) This constitutes excusable neglect under the circumstances.

The Clerk of the Court is directed to file forthwith the Answer of Defendants Myoka McElroy and Fred McElroy, Jr., received by the Court as a proposed answer on March 19, 2021, to serve as their operative answer to the complaint. The May 26, 2021 case management conference is continued to June 25, 2021, at 8:30 a.m. in Dept. A.

ANSWER OF DEFENDANTS MYOKA MCELROY AND FRED MCELROY, JR.

PROBATE CALENDAR – Hon. Monique Langhorne, Dept. B (Historic Courthouse) at 8:30 a.m.

In the Matter of the Jane J. Campbell Surviving Grantor's Trust **19PR000051**

MOTION TO QUASH DEPOSITION NOTICES AND STAY DEPOSITIONS AND MOTION FOR PROTECTIVE ORDER AND TO SET ORDER OF DISCOVERY; REQUEST FOR MONETARY SANCTIONS

TENTATIVE RULING: Respondent Todd H. Anderson's motion to quash deposition notices and stay depositions, motion for a protective order, and request to set the order of discovery is DENIED. Respondent brings his motion under Code of Civil Procedure section 2025.410. Respondent argues petitioner Scott K. Andersen served deposition notices containing an "error or irregularity" in that the notices set the depositions of seven percipient witnesses to be taken before petitioner produced his designated expert witness, Dr. Glenn Hammel, for deposition pursuant to Code of Civil Procedure section 2034.410, creating a likelihood that

petitioner's designated expert witness will form new or additional opinions prior to the time his deposition can be taken related to opinions he formed and expressed in October 2020.[2]

Respondent's position is not well-taken. Having Dr. Hammel appear for a deposition now is premature as he likely will need to be deposed again after the other witness depositions are completed. The Court understands respondent wants to investigate the basis for Dr. Hammel's opinion that supported his declaration for the summary judgment/adjudication motion, but that motion is no longer pending. Respondent can still question Dr. Hammel about his opinion with directed deposition questions after other witnesses are deposed. As is standard practice, Dr. Hammel shall be deposed immediately prior to trial after other witness depositions are completed. Petitioner has not shown good cause to alter this sequence and timing of discovery. (Code Civ. Proc., § 2019.020, subd. (b).)

Petitioner's request for judicial notice is GRANTED as to the December 8, 2020 Order Re: Motion for Summary Judgment or, in the Alternative, Summary Adjudication and the February 11, 2020 Minute Order.

Respondent's request for monetary sanctions for bringing his motion is DENIED. Respondent did not successfully bring his motion.

Petitioner's request for monetary sanctions for opposing the motion is GRANTED IN PART against respondent's counsel in the amount of $2,475, payable to petitioner's counsel within 20 calendar days of service of notice of entry of order. (Code Civ. Proc., § 2025.410, subd. (d).) Respondent was not substantially justified in bringing his motion, and no other circumstances make the imposition of sanctions unjust against his counsel. Monetary sanctions would be unjust, however, against respondent as his counsel dictated the litigation strategy behind the motion. The amount awarded is based on $2,475 for attorney David Knitter's 5 hours of work at $495 per hour. (Knitter Decl., ¶ 18, Ex. AA.) Attorney Kelsey I. Knitter and paralegal Heather Pearce also claim hours, but there is no explanation why these individuals needed to spend over 40 hours working on the opposition or why this amount of work was reasonable. There also is no evidence to support the hourly rates ($350 and $275) claimed for these individuals other than a conclusory statement in the supporting declaration. Nor does the Court award for anticipated time.

In the Matter of the 1985 Russell Living Trust **26-50835**

PETITION FOR ORDER APPROVING TWELFTH TRUST ACCOUNT AND ELEVENTH REPORT OF TRUSTEE, APPROVING TRUSTEE'S FEES, AND AUTHORIZING PAYMENT OF TRUSTEE'S FEE

TENTATIVE RULING: GRANT petition, including fees as prayed. (Cal. Rules of Court, rule 7.776.)

[2] The Court questions the underlying premise that noticing other depositions before Dr. Hammel's deposition can take place qualifies as an "error or irregularity" in the notices under Code of Civil Procedure section 2025.410. But petitioner has not opposed on this basis.

Conservatorship of Tatsumi Matsumoto **PR20209**

REVIEW HEARING TO CONFIRM NOTIFICATION OF RECEIPT OF TRANSFER

TENTATIVE RULING: The conservator filed a fee waiver application with a proposed order on April 27, 2021, which the Court has signed. The Court now is in the process of transferring the matter. The case is set for a review hearing on June 25, 2021, at 8:30 a.m. in Dept. B, at the Napa County Superior Court. The hearing is to confirm receipt of the notification from the Sonoma County Superior Court that it has received the transferred case. If the notification has not been made, this Court will make a reasonable inquiry into the status of the matter.