AMADOR SUPERIOR COURT LAW AND MOTION TENTATIVE RULINGS

Thursday, August 19, 2021

TO REQUEST A HEARING ON ANY MATTER ON THIS CALENDAR, YOU MUST CALL THE COURT AT (209) 257-2692 BY 4:00 P.M. ON THE DAY PRECEDING THE HEARING. NOTICE OF THE INTENTION TO APPEAR MUST ALSO BE GIVEN TO ALL OTHER PARTIES.

IF THE CLERK IS NOT NOTIFIED OF A PARTY'S INTENTION TO APPEAR, THERE WILL BE NO HEARING AND THE TENTATIVE RULING WILL BECOME THE ORDER OF THE COURT. NO FURTHER NOTICE OF THE COURT'S RULING WILL BE PROVIDED.

17-CVC-10162 PRASAD, DEVI VS. CALIFORNIA DEPARTMENT OF TRANSPORTATION A GOVERNME

CIVIL MISCELLANEOUS MOTION - PLAINTIFF

TENTATIVE RULING:
The following tentative ruling is issued by Judge James LaPorte (ret), assigned for all purposes.

Prasad, et. al vs Department of Transportation (DOT, Caltrans) Case Number. 17 CV 10162

Discovery Hearings Tentatively Scheduled for August 19, 2021:

The court declines to give a Tentative Ruling on the three motions to compel by plaintiff:

1. Motion to Compel the Deposition of Caltrans Person Most Qualified Regarding the History of Centerline Rumble Strips on State Route 16
2. Motion to Compel the Deposition of Caltrans Person Most Qualified Regarding the Roadway Departure Safety Implementation Plan and Centerline Rumble Strips
3. Motion to Compel the Deposition of Caltrans Custodian of Records

These matters need to be discussed at the hearing on August 19, 2021.

In reviewing the three motions, the defendant Department of Transportation through its attorney Paul Brown submitted a declaration, but not under penalty of perjury. He however expressed a willingness to competently testify about the contents of his declaration which were responsive to the three motions. His declaration, in summary, states with few exceptions that all the documents the plaintiff has requested to be produced have been provided, or they don't exist, or they have been responded to in answers previously given in depositions.

The two exceptions the court found are regarding the first motion and the third motion.
In the first Motion to Compel the Deposition of Caltrans Person Most Qualified Regarding the History of Centerline Rumble Strips on State Route 16, the court was unable to locate a direct response by Defendant to the Wendy C. York Declaration set forth in paragraph 9 on Page 3, Request number 13 regarding the Speed Study relating to SR 16. Defendant may have made a response to this Request number 13 in another response of defendant.

In the third, Motion to Compel the Deposition of Caltrans Custodian of Records, defendant's counsel's declaration states that they will produce a response on August 19, 2021 as they do not have a single individual who is the Custodian of Record for all 83 categories requested by plaintiffs. At a prior meet and confer the parties each suggested a resolution to this custodian of records issue.

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Tentative Ruling regarding Plaintiffs' Motions for Sanctions pursuant to Code of Civil Procedure section 128.5 and 128.7.

The court denies, in large part, the Plaintiffs' Motions for Sanctions pursuant to Code of Civil Procedure section 128.5 and 128.7. The court does grant limited sanctions against Defendant State of California Dept of Transportation sufficient to deter future improper conduct for use of a possible "underground regulation" or for failure to provide an Evidence Code Section 452 regulation in the MJOP proceeding.

The law regarding Code of Civil Procedure section 128.5/128.7 Code of Civil Procedure section 128.5 sanctions:

"A Trial Court may order a party, the parties' attorney, or both to pay the reasonable expenses including attorneys' fees, incurred by the other party as a result of bad-faith actions or tactics that were frivolous or solely intended to cause unnecessary delay". (Code of Civil Procedure section 128.5(a).)

The court in Marriage of Sahafzadeh-Tach (2009) 39 Cal.App.5th 124, opined that "whether an action is frivolous is governed by an objective standard: any reasonable attorney would agree it is totally and completely without merit". (Citations omitted.) There must also be a showing of an improper purpose, i.e. subjective bad faith on the part of the attorney or party to be sanctioned. Levy (infra) 92 Cal. App.4th at page 635. (Citations omitted.) {Party seeking section 128.5 sanctions must show action was "meritless or frivolous, and that it was pursued in bad faith" (Marriage of Sahafzadeh-Taeh at 135.) The ultimate burden establishing sanctionable conduct is with the moving party. (San Diegan for Open Government v. City of San Diego (2016) 247 Cal.App.4th. 1306, 1320.) It is an error to award sanctions if: (1) it is not unreasonable for the moving parties attorney to think the issues raised were arguable; and (2) there is no evidence of subjective bad faith or improper motive. (Garcia v. Sterling (1985) 176 Cal.App.3d 17, 20.) In evaluating whether a motion is frivolous, courts must not construe the sanctions statute in a manner that would conflict with the primary duty of an attorney to represent his or her client zealously" (Guillemin v. Stein (2002)104 Cal.App.4th 156,168); Bus. & Prof. Code 6068(c).

Code of Civil Procedure section 128.7 sections:

Under Code of Civil Procedure section 128.7 the signature of attorney on a pleading filed with the court reflects his or her certification that the pleading is not being presented for an improper purpose; the legal contentions are warranted by law; and the allegations and factual contentions have evidentiary support or are likely to have such support after a reasonable opportunity to further investigate. (Levy v. Slum (2001) 92 Cal.App.4th 625, 636.) A claim is factually frivolous if it is not well grounded in fact and it is legally frivolous if it is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. (Guilermin (supra) 104 Cal. App.4th at page 167.) The moving party must show the parties conduct in asserting the "claim was objectively unreasonable". The claim is objectively unreasonable if "any reasonable attorney would agree that it is totally and completely without merit". (Marriage of Flaherty 31 Cal.3d 637, 650.) Frivolous means either (1) "Totally and completely without merit; or, (2) For the sole purpose of harassing an opposing party". Any sanction shall be limited to what is sufficient to deter repetition of improper conduct or comparable conduct to others similarly situated. Code of Civil Procedure section 128.7(d): In determining whether to impose sanctions the court must resolve all doubts in favor of the pleadings signor. (Calloway v. Marvel Entertainment Group (2d Cir 1988) 854 F2d 1452.); A party moving for sanctions against an opposing party bears a heavy burden proving that 128.7 has been violated. (Bockrath v. Aldrith Chemical 21 Cal.4th 71 at 83.)

Weil and Brown Civil Procedure Before Trial Section 9.1211 and Section 9.1214 note that "Applicable law on sanctions makes it clear that sanctions are discretionary". The Court is not required to impose a monetary sanction or any sanction at all. (CCP section 128.7(c); Kojababian vs Genuine Home Loans Inc. (2009) 174 Cal.4th 408, 421.) "Section 128.7 is not designed as a fee shifting provision or to compensate innocent litigants. Its primary purpose is to deter sanctionable conduct". Sanctions imposed for violations…shall be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated. (Code of Civil procedure section 128.7(d); Trans Action Commercial Investors v Jelinck (1997) 60 Cal.App. 4th 352.)
Weil and Brown at Section 9:1231/1232 note, "In evaluated the amount of sanctions, the court must consider" whether a party seeking sanctions has exercised due diligence. (CCP 128.7(c).) The effect: this apparently permits the court to consider to what extent the fees incurred by the party seeking sanctions we're self inflicted due to the failure to mitigate or resulted from his or her own misconduct.

Background regarding the motion for judgment on the pleadings:

The motion for judgment on the pleadings was heard on May 13, 2021. The court partially granted the motion for judgment on the pleadings (MJOP), but only as to plaintiff Bernice Prasad; it left to a future hearing to determine if the motion for judgment on the pleadings would apply as to the other plaintiffs because "the court has no citation of authority under Evidence Code section 452 regarding the policy or practice of the Department of Gen. Services regarding the contention that a rejection letter, addressed to one plaintiff , with a single claim number, is a rejection letter to all plaintiffs."
As to the "disputed intrinsic evidence" the court overruled plaintiffs objections stating that there was no dispute as to the authenticity of the rejection letter to Bernice Prasad, and the government tort claim, only how the documents were being interpreted by Caltrans.
Plaintiff Bernice Prasad was given leave to amend. And the three plaintiffs were also invited to amend the complaint with leave to amend granted in the Courts Ruling. Following the court's Ruling on the Motion for judgment on the pleading hearing all plaintiffs have filed amended pre litigation element pleadings setting forth new facts regarding the Government tort claim allegations in this litigation.

Plaintiffs Contentions:

Plaintiff Arvin Prasad in his Consolidated Replying Memorandum assisted the court greatly in clarifying the issues in the plaintiffs' sanctions requests under Code of Civil Procedure sections 128.5/ 128.7. Plaintiffs contend that Caltrans attorneys committed "fibs" and sanctionable conduct in prosecuting the Motion for Judgment on the Pleadings. (1) They represent (without qualification in the moving papers) that plaintiffs filed a singular collective claim with the Department of Gen. Services (DGS) when they knew each plaintiff had filed separate claims, (2) they've represented DGS rejected one singular claim with one rejection letter which they said was intended to apply to each plaintiff when they knew that was not case, (3) they improperly used the streamlined restrictive judgment on the pleadings procedure as an artifice to cover their actions, and (4) they failed to withdraw the MJOP as to Arvin, Ram and Richard Prasad when the true facts came out showing DGS actually intended only to reject the claim of Bernice Prasad not the claims of any other plaintiffs.

Singular Collective Claim:

Although the court is not required to give any reason for the denial of a sanctions request, Weil & Brown Civil Procedure Before Trial Section 9:1238 pragmatically the court is going to largely deny the plaintiffs sanctions motion because of their factual errors in paragraph 8 of the original complaint. The MJOP and the sanctions requests arise out of former Paragraph 8 which all plaintiffs joined in alleging. It provided: "Prior to filing this complaint, plaintiffs **presented a claim** to Defendants California Department of Transportation and County of Amador pursuant to the provisions of government code section 911.2 On January 4, 2017 Defendants sent notice of rejection of plaintiffs' Government tort **claim** via mail. Plaintiffs now file this complaint pursuant to Government code section 945.6 within the allotted (6) six months from the date of rejection of **the claim." (Emphasis supplied.)**
The law is clear, failure to allege facts demonstrating or excusing noncompliance with the claims presentation requirement subjects a claim against a public entity to demurrer for failure to state a cause of action.(*State of California v. Superior Court* (Bodde) 32 Cal.4th. 1234, 1239.)
And California statutes or ordinances which condition the right to sue the sovereign upon timely filing claims and actions… are elements of plaintiffs' cause of action and condition precedent to the maintenance of the action. (*Williams v. Horvath* (1976) 16 Cal.3rd 834 at 839.) "Compliance with the claims presentation requirement is an element of a cause of action against a public entity." (Citations omitted.) Here, paragraph 8 was not mere boilerplate but carefully crafted pleading allegations demonstrating pre-litigation compliance and are the elements the plaintiff was required to prove. (*State of California (Bodde)* at page 1240.) These pleadings were admissions of material facts made in the opposing parties' pleadings and binding as "judicial admissions"; they are conclusive concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted by the party whose pleadings are used against him or her. (Weil & Brown (supra) Section10:147**;** *Ulrich v. State Farm Fire and Casualty Company* (2003) 109 Cal.4th 598, 613.)

An examination of paragraph 8 which the plaintiffs failed to amend after years of being tacitly suggested to do so by the court, in various motion hearings, shows clear factual errors. And no party has yet produced a rejection letter from the Dept of Transportation, nor DGS dated January 4, 2017. It was stated in paragraph 8 that **plaintiffs presented** "**a claim"**; defendants sent notice of rejection of plaintiffs government tort **claim; plaintiffs now file this complaint…six months from the date of rejection of the claim.** (Emphasis supplied.)

Plaintiffs can't complain about the MJOP where plaintiff failed over the years to amend their complaint until after the court's ruling. It was plaintiff's who alleged that "a claim" was filed by plaintiffs with DGS. It was plaintiffs that contended that **the claim** was rejected by the Department of Transportation on January 4, 2017. Defendants may have known that there were multiple claims but so did plaintiffs, yet plaintiffs stuck with the contention that there was only one claim rejection on January 4, 2017 by both entities. In the court's view such is not the basis for $250,080 sanctions against the defendants and/or their attorneys under CCP Sections 128.5/128.7.

Putting a finer point on this issue, plaintiffs, at a bifurcated proceeding, at the beginning of the trial before the jury, would have had the burden of proof on their un-amended complaint with the allegations in former paragraph 8. This was an element of the cause of action plaintiffs had to show the California Department of Transportation sent them a rejection letter on January 4, 2017. They filed **a claim** with DGS and they filed the complaint within six months of the date of rejection of **the claim**. Various contentions and claims by counsel that the January 4, 2017 rejection letter was unsent, lost or misplaced by plaintiffs', where plaintiffs would have had the burden of proof, wouldn't have likely been persuasive before the jury. Especially where the defendant Caltrans, as part of their Second Affirmative Defense, would have shown that they have no record that a letter of rejection was sent by the State on that January 4th, 2017 date but they did have a rejection letter that was sent to Bernice Prasad on December 15, 2016.

Plaintiffs contend that defendant should be sanctioned for not withdrawing the MJOP as to Arvin, Ram, and Richard and for a time, even Bernice Prasad after the depositions of Roth and Wagner. Yet plaintiffs failed to amend their pleading before the MJOP was heard with the contentions that plaintiff still had remaining in the complaint there was one plaintiff claim filed and it was rejected on January 4, 2017.

Fortunately, plaintiffs finally conducted the discovery that they should have conducted earlier after they filed the December 2016 claims and allegedly did not receive any response for months after December 2016. They were to conduct early informal inquiry with DGS to discover what the *Him's* case analysis states is the plaintiff's burden to investigate to determine what happened to their December 2016 claims. As the *Him v. City and County of San Francisco* (2005) 133 Cal. App.4th 437 court noted the statute of limitations period is triggered "**from the date the Notice is deposited in the mail by the public entity, not the date it is received by the claimant or counsel." (Citation omitted.) In fact, a claimant is required to comply with the six month statute of limitations associated with Government Tort Claims upon proof that the notice of rejection was served even if it was not actually received by the claimant. Thus, the legislature has placed upon the claimant the risk that a properly mailed notice of claim rejection is not delivered due to an error by the postal authorities,** and, the legislature has provided the corresponding opportunity for the claimant to protect itself from this risk.
Following presentation of a claim for personal injury or death (Government Code Section 911.2) the public entity must act within 45 days (Section 912.4(a)). If the entity fails to accept or reject the claim within that period, the claim is deemed to have been rejected (Section 912.4(c)). If the claim is rejected by the public entity expressly or by operation of law, notice must be sent to the claimant (Section 913). Thus, following a reasonable time after the expiration of the 45 days, a claimant should be aware the claim has been denied and the statutory notice of that denial has not been provided. **The claimant then has the opportunity to inquire about the denial and determine, thereby, the limitations period.** (Citations omitted.) **The claimant should not be permitted to forgo that opportunity and, then, rely on the fact no notice was delivered to extend the limitations period." (***Him* at 445.) (**Emphasis supplied)**

It was plaintiff duty to inform themselves about the Claim delays by DGS and amend their complaint early consistent with the information they obtained. Their failure to do so resulted in the plaintiffs claiming in their opposition to the MJOP that the plaintiffs need not amend their pleadings, even with its factual errors.

Defendant's contention that the rejection of one claim applied to all at the plaintiff's claims/Duplicate Claims:

The plaintiffs discovered that DGS is a large bureaucratic Department that does not know what its various claims analysts are doing. And they evidently discovered that no claims rejection letters were ever sent to Arvin, Ram nor Richard Prasad. But that one rejection letter was sent to Bernice Prasad.
Nick Wagner is not an employee of the Dept of Transportation. He is the manager of an independent Agency, the Department of Risk and Insurance Management within the Department of General Services that handles all types of claims against the State of California not merely Caltrans claims. His Department is large enough to have its own attorneys. And he claimed in his declaration, his Memo to His DGS "Team' of October 4, 2016 and Deposition that DGS has a policy regarding his contention that a rejection of one claim is the rejection of all related or duplicate claims. **(Exhibit G Supplemental Declaration of Paul Brown in Support of Defendants Omnibus Sur – Reply.)** The court is not persuaded that Caltrans attorneys can or did dictate policy to DGS or its Manager, nor have the plaintiffs shown they did. Despite the fact that Laurie Roth contended, and the court believed that she sent out a rejection letter only to Bernice Prasad on December 15, 2016, her former manager holds a different position. Using the "any reasonable attorney would agree that it is completely without merit" standard Caltrans attorneys were not completely unreasonable in light of the DGS manager's position in his Memo, Declaration and even in his Deposition. But the court ruled against Defendant Caltrans on that issue having done it own research to determine that the policies and practices of the Agency manager Nick Wagner in his declaration was not cognizable as a regulation under Evidence Code Section 452, (and may have been an Underground Regulation.) There has been no citation in the defendant's MJOP or Sanctions pleadings to any Title or Section of the California Code of Regulations on the DGS contention.
There may have been evidentiary disputes regarding the Government Tort claims of Arvin, Ram and Richard Prasad as noted by the plaintiffs in their Opposition to the MJOP but the court did not decide the MJOP matter on that issue but on the issue that defendant Caltrans' submitted declaration by Nick Wagner was not cognizable under Evidence Code 452 as an Administrate Rule or Regulation. And that the Claim rejection only applied to Bernice Prasad. Plaintiffs pleadings in the MJOP focused on other issues of disputed facts contained in the Depositions but not on the issue of Evidence Code Section 452 regarding the procedure of a MJOP. Plaintiffs could have amended their pleadings from what they learned from the Depositions thus allowing the MJOP to be taken off calendar. The court would have favorably entertained any such request and taken the matter off calendar, by analogy to demurrers. **(***People ex. rel. Strathman vs. Acacia Research Corp.* (2012) 210 Cal.4th 487, 506.) The court would have allowed the plaintiffs to cure their defects in Paragraph 8 before the MJOP hearing even as they have done after the MJOP hearing. But plaintiffs failed to so, thus requiring the court to conduct the MJOP hearing and draft a ruling. The plaintiffs, instead of amending, filed the sanctions motions. Plaintiff contended at the MJOP in their opposition that paragraph 8 was factually true or that it did not matter as it was sufficient to state a Cause of action, yet all subsequently amended their pleadings regarding the Government Tort claims prefiling element issues. The court does find that sanctions are largely inappropriate under CCP 128.5 and 128.7 in such circumstances. Plaintiffs are in part suffering from their own self inflicted harm. But the court will grant limited sanctions regarding the MJOP and intends to impose them as noted infra.

Underground regulation/ Use of MJOP Procedure:

"No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." (Government Code Section 11340.5 (a).) "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agencies to implement, interpret, or make specific laws enforced or administered by it or to govern its procedure". (Government Code Section 11342.600.)

An "underground regulation" is where policies made by officers do not constitute "regulations as they were not adopted in accordance with APA requirements." "Underground rules technically are illegal and cannot be enforced unless and until there is compliance with the Administrative Procedure Act Government code section 11342.1". (*Union of America Physicians and Dentists v. Kizer* (1990) 238 Cal. App.3d 490, 496; 1 CCR section 250(a), defining underground regulation.) Any interested person can request a determination whether a policy is an underground regulation by filing with the Office of Administrative Law. An OAL determination about whether a policy is an underground regulation can be challenged by filing a Petition in the state courts. (Government Code Section 11340.5(a).)

Defendant Caltrans chose to file a MJOP as against all plaintiffs and not a Summary Judgment on the issue of the plaintiff's prelitigation Government tort claims. The law allows the court in a MJOP procedure to utilize judicial notice to admit "Regulations…of any public entity in United States Evidence Code Section 452(b)" or "Official Acts of the Executive… of any State" Evidence Code Section 452(c), to consider the rejection of Government Claims by administrative agencies. (Weil & Brown (supra) 8:885.Gong vs. City of Rosemead (2014) 226CA4th 363,376{If the public records do not reflect compliance with the claims presentation requirement the governmental agency can request the Court to take judicial notice under Evidence Code Section 452 that the entity records do not show compliance}) However, the defendants failed in their motion for judgment on the pleadings to provide the court with a Title and Section number of the California Code of Regulations or Official Acts of the Executive which supported the General Manager/ supervisor Nick Wagner's policy of the DGS Office of Risk and Insurance Management regarding a single rejection letter being applicable to multiple claims or the alleged duplicate claims determination that affected the plaintiffs Arvin, Ram and Richard Prasad.

It is not the court's responsibility to determine whether the policy or practice of Nick Wagner the Manager/Supervisor in his October 4, 2016 memo to his staff needed to comply with the Administrative Procedure Act under Government Code Section 11340.5 and 11342.600 (or the then, new, "duplicate" policy was exempt under Government Code Section 11340.9.)
The court believes that defendants Caltrans attorney's can rely upon the assertion by a separate state agency regarding its policy utilizing the sanctions standard for attorneys. However, the court does not believe that the State of California can assert policies that have not been legally adopted or are so ill defined and have not been widely published. (Government Code Section 11340.1.) Unless Caltrans can show otherwise, it appears the DGS policy was either internal or only made known within the Agencies of the State of California. It was also unclear when the policy became effective, as it appears that claims analyst Laurie Roth was either unaware of the policy or did not deem it applicable to any claim but that of Bernice Prasad. Caltrans has failed to show that DGS policy is a valid regulation, nor was it argued as a citable regulation in the Defendants MJOP. However, as noted, the court finds fault with the Defendant State of California as an entity and not the individual Caltrans attorneys. DGS and its attorneys should have validated the policy under 1 CCR Section 260(a) that has such a wide impact on claimants with claims against the State of California. The Manager of the Agency within DGS should not have tried to impose if it was not validated.
Further the Wagner memo does not define "duplicate" claims. Any non vague regulation would define "duplicate" so the claimant public can know what it means.

Finally, the court has discretion not to impose sanctions against counsel. As it exercised its discretion to not sanction the York firm for the ethical violation it does not intend to sanction the Caltrans attorneys individually.

Based on the forgoing the court sanctions Defendant Caltrans as an entity in the amount of $7,500 for each plaintiff. Although the plaintiffs' claims greatly exceed the sanctions amounts (Arvin Prasad $59,090, Ram Prasad $34,415 and Richard Prasad $127,302.34) the court has already expressed its conclusions about the plaintiffs actions. The court finds the sanctions amounts are sufficient to deter the repetition of the conduct or comparable conduct by others similarly situated.

For all of the foregoing reasons the court accordingly, imposes sanctions in the sum of $22,500 against Defendant Department of Transportation.