SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: September 26, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

Scheduling motion hearings: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion *before* you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

Recording is prohibited: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

Court reporters: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV415418	McManis Faulkner, APC v. Melvin Cooper	Motion to permit financial discovery: based on the parties' stipulation, the hearing on this motion is CONTINUED to January 23, 2025 at 9:00 a.m.
LINE 2	23CV417765	Lynley Kerr Hogan v. Brian Bernasconi	Click on LINE 2 or scroll down for ruling.
LINE 3	20CV366736	Peak Health Center, Inc. et al. v. James Peters	Motion to be relieved as counsel: parties to appear.
LINE 4	21CV390666	Eric F. Hartman v. Koshy P. George et al.	Click on LINE 4 or scroll down for ruling.
LINE 5	21CV391798	Al Nievas v. County of Santa Clara	Click on LINE 5 or scroll down for ruling.
LINE 6	22CV393671	Tamara Williams v. Gilroy Garlic Festival Association, Inc. et al.	Motion to stay: in light of the stipulation of the parties, this matter is OFF CALENDAR.
LINE 7	22CV402515	Cynthia Nunez et al. v. Loreto Blas	Motion to be relieved as counsel: parties to appear.
LINE 8	24CV432798	Michael Karavastev v. Andrean Karavastev	Click on LINE 8 or scroll down for ruling.
LINE 9	24CV440916	Melesio Cenobio Sebastian v. Joshua Ethan Sharon et al.	Motion for leave to intervene by Falls Lake Fire and Casualty Company: notice is proper, and the motion is unopposed. Good cause appearing, the court GRANTS the motion. Intervenor shall separately file its proposed complaint in intervention within 10 days of this order.

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Calendar Line 2
Case Name: *Lynley Kerr Hogan v. Brian Bernasconi*
Case No.: 23CV417765

This is a motion for entry of a protective order. Defendant Brian Bernasconi argues that such an order is necessary to protect potentially proprietary and confidential information that he will produce in discovery—specifically, an electronic recording of an interview between himself, plaintiff Lynley Hogan, and Catherine Somers (Bernasconi's "podcast partner") that occurred on June 7, 2023. Although Bernasconi indicates that he will produce the recording to Hogan, he expresses concern that Hogan will disseminate the recording publicly, before the court determines what rights each party has to the recording. For her part, Hogan freely concedes that her intention is to "us[e] the interview as it was intended" and disseminate it publicly. (Opposition, p. 7:12.)

The court concludes that a protective order is necessary and appropriate to restrict the use of the recording *while a final decision in this case remains pending*. Although Hogan argues that she has the right to use the recorded interview without restriction, based on the parties' written agreement, it is premature for the court to decide the parties' respective rights to the recording at this time, as that issue is the entire point of this lawsuit. Hogan is correct that the court already expressed some disagreement with Bernasconi's interpretation of the contract in its March 7, 2024 order on Bernasconi's demurrer, but that disagreement was not a final decision on the merits of the case. The only issue the court conclusively decided on March 7, 2024 was the sufficiency of Hogan's pleading.

Until such time as a final decision is made regarding the merits of this lawsuit, the court finds that it is appropriate to restrict the parties' use of information disclosed in discovery that *at least one side* contends is proprietary or confidential. The proposed protective order submitted by Bernasconi is reasonable in scope, and so the court instructs Bernasconi to e-file the proposed protective order as a standalone document for the court's signature. Once the court signs the protective order, it expects Bernasconi to produce a copy of the recording to Hogan forthwith—*i.e.*, within 10 days thereafter or less.

The motion is GRANTED. Hogan's request for monetary sanctions is DENIED.

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Calendar Line 4
Case Name: *Eric F. Hartman v. Koshy P. George et al.*
Case No.: 21CV390666

This is a petition to confirm an arbitration award, filed by plaintiff and petitioner Eric F. Hartman. Defendants and respondents Koshy P. George and Sheeba George oppose the petition, arguing that the evidentiary hearing in the arbitration has not yet been completed and the award is not yet final. It does appear that the Georges are correct: although the arbitrator issued an interim award on October 16, 2023, he then issued an order on March 15, 2024 determining that the evidentiary hearing should be reopened, and he issued a further order on May 21, 2024 confirming the reopening of the arbitration hearing. In view of these circumstances, this court *cannot* confirm the October 16, 2023 interim award as a matter of law, because it does not constitute a final determination of all necessary issues. (See Code Civ. Proc., § 1283.4 [an "award" must "include a determination of all the questions submitted to the arbitrator[] the decision of which is necessary in order to determine the controversy"]; *Kaiser Foundation Health Plan, Inc. v. Superior Court* (2017) 13 Cal.App.5th 1125, 1142-1143 ["If the 'award' does not qualify as an award under section 1283.4, then the court is deprived of jurisdiction to confirm or vacate it."]; cf. Code Civ. Proc., § 1288.6 ["If an application is made to the arbitrator[] for correction of the award, a petition [to confirm] may not be served and filed under this chapter until the determination of that application."].)

It appears that the arbitration has not yet proceeded to the reopened evidentiary hearing, because after the arbitrator issued his May 21, 2024 order, Hartman filed papers on June 4, 2024 seeking to disqualify the arbitrator from hearing the matter further. If this is the current status of the arbitration—the court is not clear as to the current status, based on the parties' papers—then that is even more reason why the October 16, 2023 interim award cannot be confirmed.

The Georges make additional arguments in opposition to the petition. First, they contend that Hartman has failed to provide notice of this petition to all parties to the arbitration under Code of Civil Procedure section 1285. It does appear that there were originally other parties to the arbitration (*e.g.*, Xuan Bui, Thao P. Bui, Edward Ji, and Klarissa Marenitch), but the parties' papers are not entirely clear as to whether they are still parties to the ongoing arbitration. If they are still parties, then that is another reason why the petition must be denied, as they do not appear on the proof of service for this petition.

Second, the Georges argue that because the nature of Hartman's arbitration claim "has changed," the arbitration in this case should be "dismissed" and "vacated." (Opposition, pp. 8:5-11:20.) There is no basis for the court to grant such relief at this time. This is a petition to confirm an arbitration award, not a motion to dismiss an ongoing arbitration (or a motion to vacate any previous order compelling arbitration). The Georges' arguments as to the arbitrability of Hartman's claims have no place here on the present petition.

The petition is DENIED.

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Calendar Line 5
Case Name: *Al Nievas v. County of Santa Clara*
Case No.: 21CV391798

Defendant County of Santa Clara (the "County") contests the good faith of the settlement in this case between plaintiff Al Nievas and cross-defendant Roberto Garcia. Both Nievas and Garcia have filed separate oppositions to the County's motion. For the reasons that follow, the court DENIES the motion.

As the court has previously noted, this is a wrongful death case filed by Al Nievas, the father of Philip and Precious Nievas, who were both killed in an automobile collision with Garcia. Nievas alleges that the County's employee, Deputy Sheriff Ryan Vesey, negligently caused the crash when he initiated a high-speed pursuit of Garcia on a busy expressway at approximately 9:55 p.m. on April 26, 2021. Nievas also alleges that Vesey failed to activate his siren or other audible warning during the pursuit, and that there was no valid reason for Vesey to attempt a traffic stop of Garcia, as "the Garcia vehicle was using its turn signal and was at all times driven at a reasonable speed before Deputy Vesey initiated pursuit." (February 9, 2023 Order, pp. 1:23-2:5.)[1]

Garcia has now reached a settlement directly with Nievas for $30,000, which represents the limits of his insurance policy with Progressive Insurance. He is presently incarcerated, serving a felony sentence in Valley State Prison in Chowchilla, California for his role in this accident, and his earliest possible release date is in May 2031. (Declaration of Roberto Joseph Garcia, p. 2:5-9.)[2] He is unmarried, owns no real property, is currently earning no money, has no money in a bank account, has no stocks or bonds, and has no known inheritance; the only personal property he owns "at this time are the clothes I have with me in prison, a tv, a fan and a hot pot." (*Id.* at p. 2:10-15.)

The County, applying the factors set forth in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499, argues that the $30,000 settlement between Garcia and Nievas "is greatly disproportionate to Roberto Garcia's true exposure in the case which is in the millions range." (Memorandum, p. 1:25-26.) In addition, the County insinuates that the settlement is the product of collusion, because Progressive did not need to pay the policy limits: instead, it "settled to protect its own business interests – avoidance of a bad faith lawsuit brought by Garcia and/or his assigns." (*Id.* at p. 2:1-2.)

The court rejects the County's arguments. First, the court agrees with Garcia that the case of *Schmid v. Superior Court* (1988) 205 Cal.App.3d 1244, 1245-1249 is directly on point. In *Schmid*, the Court of Appeal, applying *Tech-Bilt*, held that "a settlement of a personal injury lawsuit is in 'good faith,' for purposes of sections 877 and 877.6 of the Code of Civil Procedure, where a defendant pays the plaintiff the limits of the defendant's insurance policy and has no other assets, even though the amount paid in settlement is far less than the likely amount of a judgment against the defendant were the case to go to trial." (*Id.* at pp. 1245-1246.) The Court determined that any contrary rule "'would unduly discourage settlements,'" and that even if the settling defendant bears the greater share of responsibility for damages, "'a disproportionately low settlement figure is often reasonable in the case of a relatively

[1] The court takes judicial notice of its own February 9, 2023 Order on Nievas's motion to compel.
[2] The Garcia declaration contains no paragraph numbers, and so the court cites page and line numbers instead.

insolvent, and uninsured, or underinsured, joint tortfeasor.'" (*Id.* at p. 1248 [quoting *Tech-Bilt*, 38 Cal.3d at p. 499; italics removed].) That situation is exactly what we have here: an insolvent and underinsured tortfeasor, a settlement for that tortfeasor's insurance policy limits, and a "disproportionately low settlement figure" for that tortfeasor that is nevertheless "reasonable" under the circumstances.

Second, the court discerns zero logic in the County's contention that this settlement was somehow "collusive" because it "worked in Progressive's favor by avoiding the risk of a much larger exposure." (Memorandum, p. 6:11-14.) That is the whole purpose of a settlement—to avoid a larger exposure at trial or a claim of insurance "bad faith." As *Tech-Bilt* and *Schmid* make clear, such settlements should be encouraged, not discouraged. In addition, the County's argument that Progressive should have denied coverage to Garcia, based on "ironclad" policy exclusions, makes no sense at all. If Progressive had taken a hard-line position against coverage, then that means instead of contributing the policy limits of $30,000 to plaintiff's damages claim, Garcia would merely be contributing $0, which does not help the County in any way. The court finds nothing that remotely supports the County's evidence-free claim of collusion in Progressive's payment of the policy limits.

The motion is denied. The court finds no lack of good faith in the settlement between Nievas and Garcia.

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Calendar Line 8
Case Name: *Michael Karavastev v. Andrean Karavastev*
Case No.: 24CV432798

This is a motion for reconsideration of a decision by another judge of this court (Judge Pennypacker), dated July 31, 2024. For the reasons that follow, the court DENIES the motion.

1. Background

This case has seen a significant amount of filing activity since that July 31, 2024 order, which granted defendant Andrean Karavastev's ("Andrean's") motion to stay this case in light of concurrent family court proceedings involving some of the same disputed property. After filing and service of Judge Pennypacker's order on August 1, 2024, plaintiff Michael Karavastev ("Michael") filed an ex parte application to "reschedule" the hearing on the motion for reconsideration (which Michael had not yet filed). Judge Pennypacker denied the ex parte application on August 23, 2024, keeping the motion for reconsideration on the previously reserved date of September 26, 2024.

On August 27, 2024, Michael filed the present motion for reconsideration. On August 28, 2024, the following day, he filed and served a "peremptory challenge to disqualify Judge Pennypacker, [or] alternatively, [a] challenge for cause." On September 2, 2024, Judge Pennypacker filed an order striking the challenge for cause under Code of Civil Procedure section 170.1, as well as a verified answer in the alternative. Judge Pennypacker also filed an order accepting the peremptory challenge under Code of Civil Procedure section 170.6.

The case was reassigned to the undersigned in early September 2024. In the meantime, Michael filed a notice of appeal of Judge Pennypacker's order on September 9, 2024. In addition, on September 16, 2024, Michael filed an ex parte application to have the September 26, 2024 hearing address not only the pending motion for reconsideration of the stay order, but also the already-decided motion to stay that was the subject of the motion for reconsideration. In other words, Michael requested that the undersigned rehear *de novo* the motion to stay that Judge Pennypacker had previously granted. The undersigned denied the ex parte application, explaining that "[a] trial court judge has no ability to vacate and undo an order issued by another trial court judge. [¶] The only motion that is on calendar for September 26, 2024 in Department 10 is the motion for reconsideration."

2. Threshold Issues

The unusual procedural history of this case raises two threshold issues. First, should the undersigned be deciding a motion for reconsideration of an order issued by another trial court judge? Logically, the answer should be "no." There is no "reconsideration" if the new judge was not the one to engage in the original "consideration." In addition, allowing litigants an opportunity to "judge shop" by filing a motion for reconsideration immediately followed by a peremptory challenge creates perverse incentives for parties in law-and-motion hearings. Nevertheless, it does appear that the Court of Appeal in *Geddes v. Superior Court* (2005) 126 Cal.App.4th 417, 425-427 expressly set forth the view that a motion for reconsideration should not be heard by the original judge who issued an order, once a section 170.6 challenge is accepted. According to *Geddes*, the original judge is no longer "available" to hear the motion for reconsideration after a section 170.6 challenge. (*Ibid.*) This discussion from the Court of

Appeal was, strictly speaking, *dictum*, as it was not essential to the holding of the case. Still, this court must follow the express pronouncements of the Court of Appeal in the absence of any authority to the contrary, and so the undersigned will proceed on the basis of the notion that Judge Pennypacker is no longer "available" to hear the motion for reconsideration.

Second, as noted above, Michael has filed a notice of appeal of the July 31, 2024 order, the same order as to which he has filed this motion for reconsideration. Ordinarily, once an appeal is perfected, the trial court loses jurisdiction over the orders being challenged, and the trial court cannot make any ruling that might potentially interfere with the Court of Appeal's jurisdiction. In this instance, however, no *judgment* has been entered in this case, and the July 31, 2024 order staying the case does *not* appear to be one of the enumerated appealable orders listed in Code of Civil Procedure section 904.1. Thus, it appears that Michael's notice of appeal is premature, and the trial court has not (yet) been divested of jurisdiction.

For these reasons, the court will proceed to a decision on the merits.

3. Motion for Reconsideration

Under Code of Civil Procedure section 1008, a moving party must show "new or different facts, circumstances, or law" to be entitled to reconsideration. (Code Civ. Proc., § 1008, subd. (a).) Here, Michael does not show any new or different facts, circumstances, or law. In fact, his motion is based entirely on the notion that Judge Pennypacker "was flatly wrong" in issuing the July 31, 2024 order. (Motion, p. 3:3.) This is not a proper basis for reconsideration. Indeed, the motion does not even explain how Judge Pennypacker was supposedly wrong, other than speculating without any foundation that she is "likely" biased against pro se litigants. (*Id.* at pp. 3:13-4:3.) This is plainly inadequate.

Because the motion is devoid of any basis for reconsideration under section 1008, it is denied.

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