SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20, Honorable Socrates Peter Manoukian, Presiding

Courtroom Clerk: Hien-Trang Tran-Thien

191 North First Street, San Jose, CA 95113

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Department20@scscourt.org

"Every case is important" . . . . . "No case is more important than any other."—United States District Judge Edward Weinfeld (https://www.nytimes.com/1988/01/18/obituaries/judge-edward-weinfeld-86-dies-on-us-bench-nearly-4-decades.html)

"The Opposing Counsel on the Second-Biggest Case of Your Life Will Be the Trial Judge on the Biggest Case of Your Life."—Common Wisdom.

As Shakespeare observed, it is not uncommon for legal adversaries to "strive mightily, but eat and drink as friends." (Shakespeare, The Taming of the Shrew, act I, scene ii.)" (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 309.)

Counsel is duty-bound to know the rules of civil procedure. (See *Ten Eyck v. Industrial Forklifts Co.* (1989) 216 Cal.App.3d 540, 545.) The rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. (*McClain v. Kissler* (2019) 39 Cal.App.5th 399.)

By Standing Order of this Court, all parties appearing in this Court are expected to comply with the Code of Professionalism adopted by the Santa Clara County Bar Association: https://www.sccba.com/code-of-professional-conduct/

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Thursday, March 14, 2024

Department 20 Notice

Matters on today's 9:00 Law & Motion and 1:30 Contempt calendars will be reset.

Notice will be mailed to the parties. Continuances will also be posted on the case portal.

We apologize for any inconvenience.

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SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 21CV386407 Chipongolo Mulenga vs County of Santa Clara; Evelyn Mendez
DATE: 07 March 2024 TIME: 9:00 am LINE NUMBER: 09

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 06 March 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order on Motion of Plaintiff
for a Protective Order
Concerning Mental Health Examination.

I. Statement of Facts.

The facts of this important matter are well known to this Court and counsel.

II. Motion Of Plaintiff for a Protective Order re: Mental Examination.

By order of this Court filed on 04 December 2023, this Court granted the motion of Defendants to conduct a mental examination of plaintiff. This Court noted that "[i]nformation concerning extrinsic causes of emotional distress is directly relevant because they bear directly on the nexus between Plaintiff's claims and the conduct of the Defendants."

This Court incorporates that order as part of the decision-making in this motion.

Shortly before Christmas of last year, plaintiff suffered domestic violence at the hands of a partner in the home that they shared which not only harmed her but endangered their infant son. Her partner and infant son's father, Chasen Gonzalez, was arrested and criminally charged for domestic battery. The couple is now engaged in a family law dispute over custody of the son.

This Court notes that plaintiff asserts the privacy rights of her infant son and Mr. Gonzales. Plaintiff, however, has made no attempt to treat this information as confidential, such as by filing a motion under seal.

On the day after the first interim order in the Family Court, defense counsel wrote to counsel for plaintiff that "we have learned that there may be recent domestic violence issues involving Plaintiff." Apparently the County now is demanding all of plaintiff's documents and communications concerning all aspects of the active criminal in child custody cases.[1]

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[1] ""All DOCUMENTS, including but not limited to text message, iMessage, email, and social media communications, between YOU and any other person . . . relating to" the family law or domestic violence criminal matters, including "all such DOCUMENTS regarding the proceedings themselves, the underlying subject matter of the proceedings, and the emotional impact the proceedings have had or are having on YOU."

In the current motion, plaintiff now seeks a protective order concerning the examination, arguing that it should be limited to assessing the causes of plaintiff's severe emotional distress caused by the county in and around January 2021, as well as when that severe distress abated, and should not be allowed to probe into plaintiff's recent familial issues, which occurred three years later.

Plaintiff also seeks protection from defendants' numerous discovery requests that relate solely to the family violence issue.

Plaintiff argues that her severe emotional distress caused by the County began in the summer of 2020 and continued no later than June 2023. That severe emotional distress ended long before the domestic violence incident and thus the letter cannot have any connection with causing the former.[2]

The defense, on the other hand, directs the attention of this Court to the statement in plaintiff's moving papers that the incident of domestic violence caused plaintiff to suffer severe emotional distress.[3]

As a side note, it appears that somehow the County attempted to purchase the plaintiff's personal injury case in the Bankruptcy Court.

The parties also inject issues concerning settlement discussions which this Court has declined to read.[4]

III. Analysis.

The pertinent sections of ***Code of Civil Procedure***, § 2032.320(a, b, c,) are as follows:

"(a) The court shall grant a motion for a physical or mental examination under Section 2032.310 only for good cause shown.

(b) If a party stipulates as provided in subdivision (c), the court shall not order a mental examination of a person for whose personal injuries a recovery is being sought except on a showing of exceptional circumstances.

(c) A stipulation by a party under this subdivision shall include both of the following:

(1) A stipulation that no claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed.

(2) A stipulation that no expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages.

> "For discovery purposes, information is relevant if it "might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement . . . ." (citation omitted.) Admissibility is not the test and information, unless privileged, is discoverable if it might reasonably lead to admissible evidence. (citation omitted.) These rules are applied liberally in favor of discovery (citation omitted) and (contrary to popular belief), fishing expeditions are permissible in some cases. (citation omitted.)[5] Although fishing may be improper or abused in some cases, that is not of itself

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[2] "But Defendant cannot do so here because those emotional injuries that are in controversy (i.e., the severe distress) did not exist in December 2023, so Defendants cannot do so on a theoretical level, let alone in actuality." (Plaintiff's moving papers, page 13, lines 18-20.)

[3] "In that email, and in the telephonic meet and confer that followed, we stated our analysis that the level of intrusion into Plaintiff's sensitive familial situation was not warranted given that—as defense counsel knew—"the emotional distress Ms. Mulenga[] suffered as a result of the allegation in her complaint have lessened to garden variety, not severe" and that, as a consequence, probing into this issue was not relevant given the latter severe emotional distress stemming from her familial trauma would have no bearing on the severe emotional distress Plaintiff suffered at the hands of Defendants. (Tolman Decl., ¶ 7.)" (Plaintiff's moving papers, page 7, lines 18-24.)

[4] If the parties are indeed "hesitant to disclose any substance of settlement communications without a compelling need," (Plaintiff's moving papers, page 9, fn.2), then don't.

[5] "[T]he claims that a party is engaged upon a fishing expedition is not, and under no circumstances can be, a valid objection to an otherwise proper attempt to utilize the provisions of the discovery statutes. Should the so-called fishing expedition be subject

an indictment of the fishing expedition per se. More specifically, the identity of witnesses must be disclosed if the witness has 'knowledge of any discoverable matter,' including fact, opinion and any information regarding the credibility of a witness (including bias and other grounds for impeachment). (citations omitted.) (***Gonzalez v. Superior Court***, 33 Cal.App.4th at 1546.)

A. Right to Privacy

Both physical and mental medical records are protected by a right to privacy. (***Board of Med. Quality Assurance v. Gherardini*** (1979) 93 Cal.App.3d 669, 679; see also ***Civil Code***, § 56.10 (health care providers may not disclose confidential medical information without either a court order or the permission of the patient) six.) Discovery of medical records requires a two-part test. Discovery must be directly relevant to a cause of action or defense. (***Britt v. Superior Court (San Diego Unified Port Dist.)*** (1978) 20 Cal.3d 844, 859-862.) Discovery is allowable only where the party seeking discovery has no other means of attaining the information. (***Palay v. Superior Court (County of Los Angeles)*** (1993) 18 Cal.App.4th 919, 933-934.[6])

Medical records are not discoverable for the lifetime of the patient, but only for periods of time where the records may relate to physical or mental injuries alleged in the lawsuit. (***Britt v. Superior Court****, supra,* (1978) 20 C.3d 844, 864.) If the request passes the two-part test, the court must 'carefully balance' the claimed right of privacy versus the public interest in obtaining just results in litigation. (***Valley Bank of Nevada v. Superior Court (Barkett)*** (1975) 15 Cal.3d 652, 657.)

B. Relevancy to Causes of Action.

Direct relevance is required in a case involving privacy issues. (see ***Boler v. Superior Court*** (1987) 201 Cal.App.3d 467, 472; see also ***Tylo v. Superior Court (Tylo)*** (1997) 55 Cal.App.4th 1379, 1387.)

Medical records are relevant to the issue of damages. Information concerning extrinsic causes of emotional distress is directly relevant because they bear directly on the nexus between Plaintiff's claims and the conduct of the Defendants. (see ***Tylo***, at 1388.)

In general, discovery requests for all physical and mental medical information about a plaintiff in a personal injury action may be impermissibly overbroad. (***Hallendorf v. Superior Court*** (1978) 85 Cal.App.3d 553, 555.) Some of the information requested might not be directly relevant to Plaintiff's claims.

C. Plaintiff's Allegations.

Defendants assert that in this particular case, plaintiff has made her mental health and issue in this case. Her first amended complaint filed on 22 March 2022 includes the allegations and prayer for relief noted above. (FAC ¶¶ 51, 73, 75 and Prayer for Relief ¶ 2.[7])

Plaintiff's June 3, 2022 written discovery responses include her assertions that she suffered "anxiety" and "severe depression, with symptoms including extreme loss of sleep, loss of appetite, frequent crying, withdrawal from family and friends and other social activities, and other similar symptoms." (Cormier Decl. ¶ 3 and Ex. A (Amended Response to Interrogatory 212.2).) She further stated that, while her condition had "improved over time, she still

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to other objections, it can be controlled." (***Greyhound Corp. v. Superior Court of Merced County*** (1961) 56 Cal.2d 355, 386). "[T]he court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs and expenses, including attorney's fees, as the court may deem reasonable." (***Greyhound Corp. v. Superior Court of Merced County***, supra at 370-371.)

[6] "[***Palay*** and other cited cases] are disapproved only to the extent they assume, without conducting the inquiry ***Hill v. National Collegiate Athletic Assn***. requires, that a compelling interest or compelling need automatically is required when a party seeks discovery of private information. (***Williams v. Superior Court*** (2017) 3 Cal.5th 531, 531.)"

[7] She alleges that she "continues to suffer emotional distress, humiliation, shame, anxiety, depression, and embarrassment" (First Amended Complaint (FAC) ¶ 51) and that she "suffered and continues to suffer severe and continuous humiliation, emotional distress, and physical and mental pain and anguish." (FAC ¶ 73.) Plaintiff seeks punitive damages against Defendant Mendez. (FAC ¶ 75 and Prayer for relief.)

suffers from mild anxiety and bouts of depression" relating to her former County employment. (Ibid.) At her deposition on 20 December 2022, Plaintiff testified that her alleged treatment "continues to affect every aspect of [her] life emotionally." (Cormier Decl. ¶ 4 and Ex. B (Mulenga Depo. at 678:9-24).)

Defendants have the right to evaluate the veracity of Plaintiff's claims. (***Vinson v. Superior Court*** (1987) 43 Cal.3d 833, 842.) Some of the documents requested albeit not all might be directly relevant. Defendant has a right to accumulate records that are relevant, and which might give reason to determine that a mental health examination is in order.

Accordingly, the Court finds that medical documents at least after the date of the accident would have direct relevance to Plaintiff's claims.

C. No Less Intrusive Means to Discover Relevant Information.

Defendants are entitled to seek medical information to ascertain whether there are extrinsic causes of emotional distress. (see ***Davis v. Superior Court*** (1992) 7 Cal.App.4th 1008, 1017-1018.[8]) Medical records are the only feasible way to probe the Plaintiff's physical and mental state over a period of time. (***Palay v. Superior Court*** (1993) 18 Cal.App.4th 919, 933–934.) There are no other less intrusive means of discovering extrinsic causes of emotional distress.

D. "Garden Variety" and "Severe" Mental Distress.

The parties again discuss the difference between "garden-variety emotional distress" and emotional distress which may justify allowing the defendants to obtain a mental health examination in this case.

As noted in the order of this court granting the motion of the defense for a psychiatric examination of the plaintiff, the difference has not been very clearly explained in the cases.

For starters, plaintiff has not explained the difference between the two forms of mental distress or how counsel was able to distinguish one type from another in this case.

As previously noted, this Court has obtained some guidance from ***Pringle v. Wheeler*** (2021) U.S.Dist.LEXIS 92441 which has attempted to quantify what the statute might mean:

> "Garden variety emotional distress has been described as "ordinary or commonplace emotional distress, that which is simple or usual***." Fitzgerald v. Cassil***, 216 F.R.D. 632, 637 (N.D. Cal. 2003) (internal quotation marks and citation omitted). "In contrast, emotional distress that is not garden variety 'may be complex, such as that resulting in a specific psychiatric disorder.'" Id. (citation omitted). Courts have found the following allegations go beyond "garden variety" emotional distresses and are specific enough to place a plaintiff's mental state in controversy. See, e.g., ***Mandujano v. Geithner***, No. C 10-01226 LB, 2011 WL 825728, at *2 (N.D. Cal. Mar. 7, 2011) ("loss of sleep, migraines, weight loss, fear, growing a beard to hide, and other severe anxiety"); ***Greenhorn v. Marriott Int'l, Inc.***, 216 F.R.D. 649, 651 (D. Kan. 2003) ("emotional trauma causing insomnia, severe depression, avoidance, withdrawal, suicidal [*9] ideation, suspiciousness, social discomfort, low self-esteem, [and] resentfulness") (internal quotation marks omitted); ***Dornell v. City of San Mateo***, No. 12-cv-06065 CRB (KAW), 2013 WL 5443036, at *4 al. Sept. 30, 2013) (anxiety, high blood pressure, chest pain, sleeplessness, weight gain, inability to focus and loss of interest in daily life activities and hobbies***); K. Oliver v. Microsoft Corp.***, No. 12-cv-00943 RS (LB), 2013 WL 3855651, at *2 (N.D. Cal. July 24, 2013) (extreme anguish, humiliation, emotional

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[8] "Petitioner here has clearly limited her claim to pain and suffering associated with the injuries to her body. Nothing prevents real party from seeking records directly relevant to such claim by a narrowly drawn discovery request. If such a request were made, the trial court could then evaluate the respective interests of the parties and the necessity and appropriate extent of disclosure according to the standards set forth hereinabove."

In ***Davis***, the court held that "that the mere act of filing a personal injury action asking for general damages for pain and suffering does not tender the plaintiff's mental condition so as to make discoverable postinjury psychotherapeutic records." (***Davis v. Superior Court***, supra at 1011.)

distress, physical distress, increased risk of reoccurrence in breast cancer, and physical injuries resulting from stress); ***Tamburri v. SunTrust Mortgage Inc.***, No. 11-cv-02899 JST (DMR), 2013 WL 942499, at *3-4 (N.D. Cal. Mar. 11, 2013) (suicidal ideation, paranoia, chest pains, blinding and debilitating headaches that are "frightening in their intensity," multiple cracked teeth from jaw grinding, and loss of mental clarity); ***Varfolomeeva v. United States***, 2017 U.S. Dist. LEXIS 201100 (E.D. Cal. 2017) ("depression, post-traumatic stress disorder," "suicidal ideation, and a phobia of walking on the street"); ***Ayat v. Societe Air France***, No. C 06-1574 JSW JL, 2007 WL 1120358, at *4 (N.D. Cal. Apr. 16, 2007) ("Both depression and post-traumatic stress disorder constitute a specific mental or psychiatric injury or disorder.").

On the other hand, courts have found "humiliation, mental anguish, and emotional distress" are "garden variety" emotional distresses do not put a plaintiff's mental state in controversy. See ***Turner***, 161 F.R.D. at 97. For example, ***in Montez v. Stericycle, Inc.***, No. 1:12-CV-0502-AWI-BAM, 2013 WL 2150025, at *4 (E.D. Cal. May 16, 2013), the court found that "Plaintiff ha[d] not placed his mental injury in controversy as Plaintiff's mental anguish claims [were] those [*10] garden-variety emotional distress claims naturally flowing from an unlawful termination." The court further noted that "Plaintiff ha[d] not undergone mental health treatment for emotional or psychological reasons," "[did] not claim an ongoing mental injury," and there was "no indication that he will attempt to offer medical evidence to support his emotional distress damages." Id.; see also ***Rund v. Charter Commc'ns, Inc.***, No. CIV. S-05-0502 FCDGG, 2007 WL 312037, at *2 (E.D. Cal. Jan. 30, 2007) (finding an independent mental examination not appropriate given "plaintiff's abandonment of any claim for serious psychological/psychiatric injury," where '[s]uch a claim [was] not realistically possible in the absence of medical proof, i.e., records testified to by the appropriate medical personnel," and "[p]laintiff made it crystal clear that he has not sought medical treatment, and would not be presenting any medical evidence concerning emotional injury***"); Ford v. Contra Costa Cty.***, 179 F.R.D. 579, 580 (N.D. Cal. 1998) ("Because defendants have presented little more than Ford's prayer for emotional and mental distress damages, they have not met their burden under FRCP 35(a).").

Pringle's claim for general "mental and emotional distress," "pain and suffering," and "stress, internal turmoil, trauma, and anxiety" are akin to "garden variety" emotional distresses. Cases where mental condition was in controversy involved, in addition to general claims like anxiety, more specific mental injuries such as post-traumatic stress disorder, depression, insomnia, and suicidal ideation. As Regan acknowledges, Pringle "never sought mental health treatment or medication." (***Pringle v. Wheeler*** (N.D.Cal. Apr. 16, 2021, No. 19-cv-07432-WHO) 2021 U.S.Dist.LEXIS 92441, at *11.[9])

Both sides make very reasonable arguments in this interesting matter. It is this Court's responsibility to adequately protect the privacy rights of the Plaintiff while, at the same time, not to deprive the Defendants of an

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[9] Absent contrary precedent under state law, California courts have found federal decisions "persuasive" in interpreting similar provisions of the California Act. (See ***Greyhound Corp. v. Superior Court of Merced County*** (1961) 56 Cal.2d 355, 401; ***Nagle v. Superior Court*** (1994) 28 Cal.App.4th 1465, 1468; ***Vasquez v. California School of Culinary Arts, Inc.*** (2014) 230 Cal.App.4th 35, 42-43; Weil & Brown, ***Civil Procedure Before Trial*** (The Rutter Group 2019) § 8:19, p. 8A-10.)

Where California discovery rules and cases do not expressly address a particular issue which has been addressed by federal courts, California courts may look to federal cases for guidance. Federal decisions have historically been considered persuasive because of the similarity of California and federal discovery law. (***Nagle v. Superior Court*** (1994) 28 Cal. App. 4th 1465, 1468***; Liberty Mut. Ins. Co. v. Superior Court*** (1992) 10 Cal. App. 4th 1282, 1288; *see also* 2-50 California Deposition and Discovery Practice § 50.04; Weil & Brown, ***Civil Procedure Before Trial*** (The Rutter Group 2007) P 8:19, p. 8A-15.)

Although the California and federal codes developed in different directions during the latter part of the 20th century, the 1986 Discovery Act brought California into closer alignment with the Federal Rules, indicating that "federal cases are likely to play an even more prominent role in the future." (***Liberty***, 10 Cal. App. 4th at 1288.) These federal cases are to be deemed "persuasive" authority, "and their reasoning is accepted where applicable in California." (***Greyhound Corp. v. Superior Court of Merced County*** (1961) 56 Cal. 2d 355, 401.)

opportunity to contest Plaintiff's claims of damages. (See ***Gonzalez v. Superior Court*** (1995) 33 Cal.App.4th 1539, 1542.

In support of the underlying motion to compel the mental examination, defendants have provided the Declaration of John M. Greene, MD, board certified in general and forensic psychiatry. Dr. Greene has summarized the parameters of his proposed evaluation consisting of an examination and administration of psychological testing. He opines that plaintiff's current presentation of emotional distress, even though alleged to be "garden-variety," is by her own report related to a prior level of "severe," and encompasses an alleged condition is characterized by periods of exacerbation and remission and that this should therefore be objectively assessed. (¶ 5.) He believes it is necessary to conduct the clinical examination 3 to 3 ½ hours hours. (¶ 7.) The psychological testing will take 2 to 3 hours (¶ 8.)

In support of the current motion, defendants have submitted a second declaration from Dr. Greene. He has provided expert testimony in court on 15 occasions concerning individuals who have suffered from domestic violence. He further states:

> "When individuals in a legal matter allege emotional distress, including garden-variety emotional distress as a consequence of the events underlying the legal issue, it is important for them to be examined, in order to obtain objective evidence that they have, in fact, experienced emotional distress as well as the predominant cause of their suffering. Unfortunately, individuals may also suffer from domestic violence while still experiencing emotional distress from the events underlying the legal issue. In these circumstances, it is imperative to determine, through examination and psychological testing, the potential extent of symptoms they have suffered as a result of domestic violence, and the potential extent of symptoms they have suffered as a result of events alleged in their legal case, in order to come to an objective understanding of the presentation of these potential issues."

(Declaration of John M. Greene, MD (filed on 23 February 2024) ¶ 4.)

Plaintiff has not provided any medical support in opposition to the motion.

E. Balancing Test.

"The mere initiation of a sexual harassment suit, even with the rather extreme mental and emotional damage plaintiff claims to have suffered, does not function to waive all of plaintiff's privacy interests, exposing her persona to the unfettered mental probing of defendants' expert. Plaintiff is not compelled, as a condition to entering the courtroom, to discard entirely her mantle of privacy. At the same time, plaintiff cannot be allowed to make her very serious allegations without affording defendants an opportunity to put their truth to the test. (***Vinson v. Superior Court*** (1987) 43 Cal.3d 833, 841-42.)" (***Zuckowich v. JP Morgan Chase Bank Imaged***, 2017 Cal.Super.LEXIS 35233, *1-2) (internal punctuation modified.)

> "***Schlagenhauf*** [***v. Holder*** (1964) 379 U.S. 104 [13 L. Ed. 2d 152, 85 S. Ct. 234] thus stands for the proposition that one party's unsubstantiated allegation cannot put the mental state of another in controversy. [¶] It is another matter entirely, however, when a party places his own mental state in controversy by alleging mental and emotional distress. Unlike the bus driver in ***Schlagenhauf***, who had a controversy thrust upon him, a party who chooses to allege that he has mental and emotional difficulties can hardly deny his mental state is in controversy. To the extent the decision in ***Cody v. Marriott Corp.***, 103 F.R.D. 421, is inconsistent with this conclusion, we decline to follow it. (See also ***Reuter v. Superior Court*** [1970] 93 Cal.App.3d 332, 340.)" (***Vinson v. Superior Court*** (1987) 43 Cal.3d 833, 839.)

Insofar as the discovery requests for documents is concerned, this Court has not been able to arrive at a conclusion concerning good cause for the issuance of a protective order to preclude discovery based on the insufficiency of the scope of the question presented, the burden involved in producing these requests, what privileges if any might apply. No separate statement has been provided for this Court to analyze.

Good cause appearing, this Court rules as follows:

The motion of plaintiff for a protective order to preclude Dr. Greene from questioning plaintiff about the recent domestic violence events is DENIED.

The motion of plaintiff for a protective order to preclude discovery of documents pertaining to domestic violence issues is DENIED WITHOUT PREJUDICE to a proper showing as discussed above.

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

The trial date and settlement conference date will REMAIN AS SET.

VI. Conclusion.

The motion of plaintiff for a protective order to preclude Dr. Greene from questioning plaintiff about the recent domestic violence events is DENIED.

The motion of plaintiff for a protective order to preclude discovery of documents pertaining to domestic violence issues is DENIED WITHOUT PREJUDICE to a proper showing as discussed above.

_____ _____

DATED: **HON. SOCRATES PETER MANOUKIAN**
Judge of the Superior Court
County of Santa Clara

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SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 23CV420051 **Christel Richey et al vs Deborah Gonzales et al**
DATE: 07 March 2024 **TIME: 9:00 am** **LINE NUMBER: 19**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 06 March 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order on Motion of Plaintiff
For Preferential Trial Setting.

I. Statement of Facts.

Plaintiff filed this complaint for damages and equitable relief on 28 July 2023.[10]

The complaint generally alleges that plaintiff is currently 88 years old and is suffering declining health do to her advanced age and medical conditions. Counsel for plaintiff is informed and believes that plaintiff has a medical diagnosis of advanced fibrosis/cirrhosis of the liver.

Counsel for plaintiff further believes that plaintiff's husband who was admitted to the facility on 23 December 2022 for rehabilitation after a short hospitalization for abdominal pain and liver issues. The decedent's family spoke to the staff on his admission and insisted that someone had to be with him at all times when he was up because of limited strength in his arms and legs and was at risk for falling.

On 01 January 2023, the gentleman was escorted to the bathroom by a caregiver who left the decedent alone inside the bathroom. He fell hard onto the floor, landing on his right leg and hitting his head. He began yelling for help and was found with the said partially in the shower and his body on the floor. He had a right comminuted hip fracture and closed fractures of his right femur in eight places.

Decedent underwent surgery on 03 January 2023. He eventually died at El Camino Hospital on 29 March 2023 allegedly a result of neglect at the defendants' facility. Plaintiffs alleged that there was chronic shortage of staff at the hospital, especially for the short term acute care patients following a surgery or hospitalization. The short staffing was the cause of the decedent being left alone in the bathroom.

Plaintiff's overall condition and prognosis continues to steadily decline, compounded by the fact that she has been experiencing depression due to her husband's untimely death.

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[10] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California **Rules of Court** state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil **Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C).

Plaintiff filed the current motion on 03 October 2023. The Humangood defendants answered the complaint on 11 October 2023.

II. Motion For Preferential Trial Setting.

Plaintiff now moves for an order granting her a preferential trial setting pursuant to ***Code of Civil Procedure***, §§ 36(a). Defendants oppose the motion on the grounds that the claims of plaintiff are unsupported by competent medical evidence.[11]

III. Analysis.

A full resolution of this motion requires this Court to consider the intended and unintended consequences of a motion for trial preference.

A. The Right of a Plaintiff to Preference.

The plaintiffs who bring preference motions generally argue that "***Code of Civil Procedure***, § 36 is a legislative recognition of the maximum that "justice delayed is justice denied." (***Warren v. Schecter*** (1997) 57 Cal.App.4th 1189, 1199.)

Code of Civil Procedure, § 36(a)(1, 2) state: "A party to a civil action who is over 70 years of age may petition the court for a preference, which the court shall grant if the court makes both of the following findings: (1) The party has a substantial interest in the action as a whole. (2) The health of the party[12] is such that a preference is necessary to prevent prejudicing the party's interest in the litigation."

The intent of the legislature behind ***Code of Civil Procedure***, § 36(a) is to safeguard litigants who qualify against the acknowledged risk that death or incapacity might deprive them of the opportunity to have their case effectively tried and to obtain the appropriate recovery. (See ***Switcher v. Superior Court*** (1989) 212 Cal.App.3d 1082, 1085; see also ***Miller v. Superior Court*** (1990) 221 Cal.App.3d 1200, 1203.) An elderly plaintiff does not need to be terminally ill in order to qualify for preference under Section 36(a). (Id.)

If a party opposes preferential setting, that party must present competent evidence. (See Well & Brown, Cal. Practice Guide: ***Civil Procedure Before Trial*** (The Rutter Group 2022) ¶ 9:102.10.) But even if the Court finds that Defendants did present admissible evidence, that evidence does not support denying Diego's motion in light of the plain nature of his age and apparently declining health condition.

"An affidavit submitted in support of a motion for preference under subdivision (a) of Section 36 may be signed by the attorney for the party seeking preference based upon information and belief as to the medical diagnosis and prognosis of any party. The affidavit is not admissible for any purpose other than a motion for preference under subdivision (a) of Section 36."

"A civil action shall be entitled to preference, if the action is one in which the plaintiff is seeking damages which were alleged to have been caused by the defendant during the commission of a felony offense for which the defendant has been criminally convicted." (***Code of Civil Procedure***, § 37(a).) "The court shall endeavor to try the action within 120 days of the grant of preference." (***Code of Civil Procedure***, § 37(b).)

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[11] "There is absolutely no concrete showing that an accelerated trial date is necessary to prevent prejudice to Plaintiff and that her ability to participate in trial will differ if the trial was held later rather than sooner. There is no evidence indicating that Plaintiff is near death or incapacity. Although Plaintiff may be over 70 years old and have health issues (controllable through monitoring), it does not automatically entitle her to an accelerated trial date above all other litigants. It is also important to note that there is no evidence that her physical condition is deteriorating." (Opposition papers, page 3, lines 15-21.)

[12] "An affidavit submitted in support of a motion for preference under subdivision (a) of Section 36 may be signed by the attorney for the party seeking preference based upon information and belief as to the medical diagnosis and prognosis of any party. The affidavit is not admissible for any purpose other than a motion for preference under subdivision (a) of Section 36."

"Upon the granting of such a motion for preference, the court shall set the matter for trial not more than 120 days from that date and there shall be no continuance beyond 120 days from the granting of the motion for preference except for physical disability of a party or a party's attorney, or upon a showing of good cause stated in the record. Any continuance shall be for no more than 15 days and no more than one continuance for physical disability may be granted to any party." (***Code of Civil Procedure***, § 36(f).)

"'The Legislature intended [section 36(a)] to be mandatory. [Citation.]" (***Miller v. Superior Court*** (1990) 221 Cal.App.3d 1200, 1204 [holding that trial setting preference under ***Code of Civil Procedure***, § 36 prevails over the Trial Court Delay Reduction Act of 1986.].

"The trial court has no power to balance the differing interests of opposing litigants in applying the provision. The express legislative mandate for trial preference is a substantive public policy concern which supersedes such considerations. [Citation] Accordingly, subdivision (a) of section 36 is mandatory and absolute in its application in civil cases " [Citation]. (***Miller v. Superior Court*** (1990) 221 Cal.App.3d 1200, 1205.)

"The Legislature intended section 36 to be mandatory in circumstances that appear to be present here. (§ 36, subds. (a) & (f) [court "shall set the matter for trial" (italics added) where party to civil action is over 70, has substantial interest in action, and preference is necessary because of party's health]; ***Fox v. Superior Court*** (2018) 21 Cal.App.5th 529, 535 ["preference must be granted" where party meets standard and "[n]o weighing of interests is involved"]; ***Miller v. Superior Court*** (1990) 221 Cal.App.3d 1200, 1204 [statute "grants a mandatory and absolute right to trial preference"]; ***Swaithes v. Superior Court*** (1989) 212 Cal.App.3d 1082, 1085[13] [trial court "has no power to balance the differing interests of opposing litigants in applying the provision"]; ***Koch-Ash v. Superior Court*** (1986) 180 Cal.App.3d 689, 694 [§ 36 "must be deemed to be mandatory and absolute" and "no discretion is left to trial courts"]; ***Rice v. Superior Court*** (1982) 136 Cal.App.3d 81, 86–87.)" (***Isaak v. Superior Court*** (2022) 73 Cal.App.5th 792, 798.[14])

B. Due Process Concerns of a Defendant.

"The term 'due process of law' asserts a fundamental principle of justice which is not subject to any precise definition but deals essentially with the denial of fundamental fairness, shocking to the universal sense of justice." (***Gray v. Whitmore*** (1971) 17 Cal.App.3d 1, 20.) "Substantive due process. . . . . deals with protection from arbitrary legislative action, even though the person whom it is sought to deprive of his right to life, liberty or property is afforded the fairest of procedural safeguards. (*Id.* at 21.)

Defendants in addition to the insufficiency of the showing that plaintiff has a dire medical condition that justifies trial preferential setting, defendants claimed that scheduling the trial date within 120 days does not allow the parties sufficient time to complete the meaningful and legitimate discovery required for the defense of such a lawsuit.

> "We are aware that the provisions of ***Code of Civil Procedure*** section 36 are mandatory. (***Swaithes v. Superior Court*** (1989) 212 Cal.App.3d 1082.) We are also aware that ***Swaithes*** briefly indicates that this preference can operate to truncate the discovery rights of other parties. (Id., at p. 1085.) However, we are also aware that the due process implications of this approach have not yet been decided. (See ***Peters v. Superior Court*** (1989) 212 Cal.App.3d 218, 227.) In this case, we recognize that it may not be possible to bring the matter to trial within the technical limits of ***Code of Civil Procedure*** section 36, subdivision (f). However, defendant Esepenth has

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[13] "The application of section 36, subdivision (a), does not violate the power of trial courts to regulate the order of their business. Mere inconvenience to the court or to other litigants is irrelevant. (citation omitted.) Failure to complete discovery or other pretrial matters does not affect the absolute substantive right to trial preference for those litigants who qualify for preference under subdivision (a) of section 36. The trial court has no power to balance the differing interests of opposing litigants in applying the provision. The express legislative mandate for trial preference is a substantive public policy concern which supersedes such considerations. (citation omitted.) Accordingly, subdivision (a) of section 36 is mandatory and absolute in its application in civil cases whenever the litigants are 70 years old. (citation omitted.)
(***Swaithes v. Superior Court*** (1989) 212 Cal.App.3d 1082, 1085-1086.)

[14] ***Izaak*** discussed the ability of the trial courts to deny the preference statutes in the context of coordinated cases pursuant to California Rules of Court, rule 3.504.

not appeared before this court to argue the matter." (***Roe v. Superior Court*** (1990) 224 Cal.App.3d 642, 643, fn. 2.)

This Court recognizes the argument that the causes of action alleged here (elder abuse, negligence, violation of resident rights, wrongful death, survivorship) are complex and multifaceted. The due process arguments raised by the defendants are well taken by this Court.

C. The Right of the Defense to Bring a Motion for Summary Judgment.

The defense also argues that setting the matter within 120 days does not allow sufficient time for the filing and hearing on a motion for summary judgment. This Court finds it interesting that the defense believes it has a good motion for summary judgment while apparently not having completed discovery. This Court is further aware that by far and away, most summary judgment motions are denied.

Nevertheless, case law holds that the court is required to hear a timely motion for summary judgment notwithstanding the Court's motion reservation system. (***Wells Fargo Bank v. Superior Court*** (1989) 206 Cal.App.3d 918 (trial court may not "refuse to hear a summary judgment motion filed within the time limits of ***Code of Civil Procedure***, §437c); ***Sentry Insurance Co. v. Superior Court*** (1989) 207 Cal.App.3d 526, 529: trial court's refusal to hear timely motion for summary judgment overturned.)

If the defense were to file a motion for summary judgment today, the setting of a trial date could adversely affect the rights of the defendants to file a motion, whether meritorious or not.

It appears that at the present time no motion for summary judgment has been filed. Hopefully by now that defense is in a position to advise this Court on how their future motion for summary judgment is proceeding and when it will be filed.

D. Other Concerns.

The parties have not informed the Court about the status of discovery, what depositions have been taken, what depositions remain, whether there is going to be a request for a physical examination of anyone,[15] and the readiness of experts to complete work and be properly deposed.

All too often, this Court has granted a motion for preference and set a trial date, only to have the moving party and the defense to agree that more time is needed to conduct discovery.

C. Conclusion.

The motion of plaintiff for preferential trial setting is GRANTED. The parties should meet and confer and agree on a trial date on four months from today or thereabouts.

IV. Tentative Ruling and Hearing.

The Tentative Ruling was duly posted.

V. Case Management.

This hearing was continued to this date, 07 March 2023 at 9:00 AM in this Department, for further hearing on the motion. No party has filed supplemental papers.

A Case Management Conference is set for today at 10:00 AM and will be heard immediately following this motion.this Court would appreciate on an update concerning the status of discovery.

VI. Conclusion and Order.

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[15] This Court raises this point only because it has seen motions filed by defendants to examine a plaintiff in other preference motions.

The motion of plaintiff for preferential trial setting is GRANTED.

DATED:	**HON. SOCRATES PETER MANOUKIAN** ***Judge of the Superior Court*** ***County of Santa Clara***

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