

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA DIVISION**

TENTATIVE RULINGS

EVENT DATE: 10/16/2020 EVENT TIME: 08:20:00 AM DEPT.: 20
JUDICIAL OFFICER: Matthew P. Guasco

CASE NUM: 56-2018-00513957-CU-MM-VTA
CASE TITLE: BRAZIER VS. FREY MD

CASE CATEGORY: Civil - Unlimited CASE TYPE: Medical Malpractice

EVENT TYPE: Demurrer (CLM) - to First Amended Complaint by Def Pacific Pain Mgmt Inc and Robert Frey, M.D.
CAUSAL DOCUMENT/DATE FILED: Demurrer, 02/18/2020

Notice Regarding Courtroom 20 Law & Motion Procedures: The law and motion calendar in Courtroom 20 before Judge Matthew P. Guasco starts promptly at 8:30 a.m. Ex parte applications will be heard at the same time as matters on the law and motion calendar. Parties appearing by Court Call must check in with the Judicial Assistant by 8:20 a.m. No notice of intent to appear is required. Parties wishing to submit on the tentative decision must so notify the Court by e-mail at Courtroom20@ventura.courts.ca.gov or by fax to Judge Guasco's secretary, Lori Jacques at (805) 477-5892. **Do not call in lieu of sending an e-mail or fax.** If a party submits on the tentative decision without appearing, but another party appears, the hearing will be conducted in the absence of the non-appearing party. Effective February 13, 2018, all cases assigned to Courtroom 20 are assigned for all purposes (including trial) to Judge Guasco.

COVID-19 NOTICE: Pursuant to the administrative orders of the Presiding Judge and the Civil Reopening Plan, effective June 10, 2020, and until further notice, all attorneys and self-represented parties in law and motion hearings must appear telephonically via Court Call; there shall be no personal appearances in the courtroom without the prior express approval of Judge Guasco. You may contact Court Call as follows: www.courtcall.com or call 888-882-6878.

The following is the Court's tentative decision concerning the demurrer of defendants, Robert Joseph Frey, M.D., and Pacific Pain Management, Inc. ("defendants"), as to the First-Amended Complaint ("FAC") of plaintiff, plaintiff, Nicole Brazier ("plaintiff"):

Meet & Confer

The Court is satisfied that defendants fulfilled their obligation to meet and confer with plaintiffs prior to filing the demurrer. (Code of Civ. Proc., §430.41, subd. (a).)

Legal Principles

In ruling on a demurrer, the Court treats all properly pleaded facts in the complaint as admitted. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318, 216 Cal.Rptr. 718, 703 P.2d 58.) The demurrer is limited to the four corners of the complaint and any additional facts which are properly the subject of judicial notice. (Code of Civ. Proc., § 430.30, subd.(a).) If there is a reasonable possibility that a pleading deficiency can be cured, it is an abuse of discretion for the Court to deny leave to amend. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318, 216 Cal.Rptr. 718, 703 P.2d 58.)

Demurrers on the ground of uncertainty are disfavored and should only be sustained in the event the complaint is so vaguely and deficiently pleaded that the demurring defendant reasonably cannot intelligently respond to the complaint. (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616, 17 Cal.Rptr.2d 708.)

Complaints must allege facts, not merely conclusions, supporting each cause of action. (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1509, 85 Cal.Rptr.3d 268.)

Ruling on Demurrer

(1) The Court OVERRULES the demurrer to the Third, Fourth and Fifth Causes of Action on the ground of uncertainty. There is nothing uncertain, or vague or ambiguous about these causes of action. Any further clarification may be achieved by discovery.

(2) The Court OVERRULES the general demurrer to the Third Cause of Action for battery. The FAC alleges sufficient facts to state a claim for medical battery arising from a shoulder rhizotomy which allegedly constituted a spinal rhizotomy as to which plaintiff did not consent. (See Judicial Council of California, *Civil Jury Instructions* ("CACI"), No. 530A.) While the issue of accidental injury to the spine arising from the shoulder rhizotomy also involves the issue of informed consent, that circumstance does not preclude plaintiff from alleging a medical battery cause of action. The two are not mutually exclusive.

(3) The Court SUSTAINS the general demurrer to the Fourth Cause of Action for general negligence WITHOUT LEAVE TO AMEND. The FAC alleges a cause of action for medical negligence. A liberal reading of the FAC leads to the inescapable conclusion that plaintiff's claims are all based upon the care and treatment she received from defendants who are health care professionals. There is no act of negligence alleged which is not related directly to that care and treatment. Accordingly, plaintiff cannot assert a legally viable cause of action for general negligence against defendants under any theory. (See *Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, 201 Cal.Rptr.3d 449, 369 P.3d 229.) This defect cannot be cured by amendment.

(4) The Court SUSTAINS the general demurrer to the Fifth Cause of Action for fraudulent concealment WITH LEAVE TO AMEND. The allegations in the FAC fall far short of the specificity required to state a cause of action for fraud as opposed to a failure to obtain plaintiff's informed consent to the rhizotomy procedure. (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 72-73, 269 Cal.Rptr. 337.) This defect theoretically can be cured by amendment, so the Court permits plaintiff leave to amend accordingly.

The Court ORDERS plaintiff to serve and file a Second-Amended Complaint consistent with the above and in conformity with the Code of Civil Procedure and the California Rules of Court by no later than **November 11, 2020**.

Counsel for defendants shall serve and file a notice of ruling and proposed order consistent with the above and in conformity with the Code of Civil Procedure and the Rules of Court. A copy of this tentative decision (if adopted by the Court as its final ruling) may be attached to any such proposed order in lieu of copying the same verbatim in the body of the document.