

Tentative Rulings – July 7, 2005

To request a hearing on any matter on this calendar, you must call the Court at (209) 223-6360 by 4:30 p.m. today. 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 becomes the order of the court.

Anthony Cabri v. Krissman – 03CV3149 – Cross-Defendant's Motion for Summary Judgment

The motion of cross-defendant, Carrier Corporation, for summary judgment is denied.

The court finds that the evidence in support of the motion was sufficient to negate an essential element of the cause of action based on strict liability for product defect. The declarations of Mr. Holt and Mr. Falk established that there was no defect in the air conditioner manufactured by Carrier. The absence of a defect negates an essential element of cross-complainants' claim for strict products liability and entitles Carrier to judgment as a matter of law. The burden of proof then shifts to the cross-complainants to raise a triable issue of fact regarding the existence of a defect. (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826.)

In opposition to the motion the cross-complainants submitted the declaration of Kenneth William Mason-Lais. Mr. Mason-Lais' declaration raises a triable issue of fact as to whether a defect existed in the air conditioner in the cross-complainants". At paragraphs 3 through 7 Mr. Mason declares that the water did not drain properly from the unit causing water to accumulate. This evidence creates a triable issue of fact of whether there was a defect in the air conditioner.

While the moving party argued that there was no evidence of causation between the claimed defect and the cross-complainants' alleged injuries, Carrier did not meet its initial burden on this issue. To establish it was entitled to judgment as a matter of law, Carrier was required to negate the element of causation through the production of admissible evidence or affirmatively establish that cross-complainants lacked any evidence to prove this element. In its separate statement Carrier failed to produce evidence to establish that the alleged injuries were not caused by the alleged defect or that the cross-complainants would be unable to establish a causal relationship between the defect and their injuries. Because Carrier failed to establish it was entitled to judgment as a matter of law, cross-complainants do not have the burden of raising a triable issue of fact.

The Court notes Carrier's objections to the cross-complainants' evidence in support of the opposition. The only evidence the court relied upon in ruling on this motion was the declaration of Kenneth William Mason-Lais. Carrier's

objections to the declaration are overruled, with the exception of the objection to the statement that the assembler did not enclose the insulation at the location of the air plenum. This statement lacks evidentiary foundation and is speculation.

Unless a hearing is requested, this minute order is effective immediately. No formal order per California Rules of Court, Rule 391 is needed, nor is further notice of this ruling required.

**National Credit Card Acceptance, Inc. v. Linda Phelps – 04CV3552
Plaintiff's Motion for Summary Judgment**

Based on the undisputed evidence, the plaintiff's unopposed motion for summary judgment is granted.

Plaintiff to provide formal notice of this ruling.

Paula Ditty v. Terrence Turpen - 04CV3515 – Defendant's (Terrance Turpen) Motion for Summary Judgment

The motion for summary judgment of defendant, Terrance Turpen, is tentatively granted. In support of his motion, Turpen presented the declaration of Corinna Kozelle, P.A. In this declaration Ms. Kozelle states that after reviewing the relevant charts and records, defendant Turpen met the applicable standard of care in providing follow up care and treatment. This evidence negates an essential element of the plaintiff's claim.

Therefore, the burden shifts to the plaintiff to come forward with evidence that Mr. Turpen failed to meet the standard of care. In professional negligence cases the standard of care must be established by expert testimony. (Howard v. Owens Corning (1999) 72 Cal.App.4th 621, 631-632.) To raise a triable issue of material fact, the plaintiff must present competent evidence in the form of an expert declaration that Mr. Turpen was negligent, or failed to meet the standard of care in his treatment of the plaintiff.

The plaintiff failed to present any expert testimony in support of her opposition and therefore, failed to raise a triable issue of fact. The Court, on its own motion, is continuing the hearing in this matter to August 4, 2005, at 3:15 p.m. The purpose of the continuance is to provide the plaintiff with additional time to obtain and file a declaration of competent expert witness to raise a dispute issue of fact. The declaration shall be made part of a supplemental opposition that must be filed and served no later than July 22, 2005. The supplemental opposition must comply with Code of Civil Procedure Section 437c and California Rules of Court, Rule 342 and include a response to the defendant's separate statement of undisputed material facts.

The defendant may file a reply to the supplemental opposition on or before July 29, 2005. If no supplemental opposition is filed, this tentative ruling will be come the ruling of the court.

Unless a hearing is requested, this minute order is effective immediately. No formal order per California Rules of Court, Rule 391 is needed, nor is further notice of this ruling required.