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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SEAN TILLMAN, Plaintiff, v. RENEE TILLMAN, et al., Defendants.	Case No. CV 09-02017 VAP (RCx) **[Motion filed on June 28, 2010]** **ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

The Court has received and considered all papers filed in support of, and opposition to, Defendant Renee Tillman's ("Defendant") motion for summary judgment ("Motion"), and has considered the arguments of counsel at the hearing on the Motion held on August 23, 2010. For the reasons set forth below, the Court DENIES the Motion.

I. BACKGROUND

A. Uncontroverted Facts

The following material facts are supported adequately by admissible evidence and are uncontroverted. They are

"admitted to exist without controversy" for the purposes of this Motion. See Local Rule 56-3.

On January 19, 2002, Timmy Wayne Tillman ("Decedent") died in a single-vehicle accident in Riverside County when he became trapped inside his truck after it caught fire. (Second Am. Compl. ("SAC") ¶ 4; Answer ¶ 4; Second Am. Third Party Compl. ("SATPC") ¶ 10; Answer to SATPC ¶ 10.) Decedent was survived by his wife Renee Tillman ("Defendant"), as well as Sean Tillman, his son by a previous marriage, and his stepdaughters Brittani Melissa Rose and Briana Tucker.[1]

Defendant filed a lawsuit in 2002 in this Court, Case No. 5:03-cv-78 VAP (SGL), against Freightliner, LLC[2] for, inter alia, product liability and wrongful death (the "Underlying Action"). Defendant ultimately obtained a judgment of $8,010,000.00 against Freightliner, later reduced to $4,010,368.00 by the Ninth Circuit on appeal.

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[1]Although Third Party Defendants Panish, Shea & Boyle LLP (the "Panish Firm") and Kevin Boyle ("Third Party Defendants") dispute the existence of Decedent's child and stepchildren, arguing that Defendant has not provided sufficient evidence of their existence, (see Stmt. of Genuine Issues ("SGI") ¶ 1), the Court hereby takes judicial notice of the existence of Sean Tillman – who is also Plaintiff in this action – and Brittani Melissa Rose and Briana Tucker as facts not subject to reasonable dispute. See Fed. R. Evid. 201(b).

[2]Freightliner, LLC is now known as Daimler Trucks North America LLC ("Daimler").

No party to the Underlying Action joined Plaintiff Sean Tillman as a party.[3] Evidence concerning Plaintiff was presented to the jury in the Underlying Action. (Stmt. of Uncontroverted Facts ¶ 11; SGI ¶ 11.)

B. Procedural History

On March 24, 2009, Plaintiff filed his Original Complaint against Renee Tillman ("Defendant"); Rheingold, Valet, Rheingold, Shkolnik & McCartney, LLP (the "Rheingold Firm"); Paul Rheingold; Hunter J. Shkolnik; and Freightliner, LLC.

On September 14, 2009, Plaintiff filed his First Amended Complaint against the above-mentioned Defendants, as well as Defendant Terrence McCartney (together with the Rheingold Firm, Hunter J. Shkolnik, and Paul Rheingold, the "Rheingold Defendants"). On October 26, 2010, the Court granted the Rheingold Defendants' motion to dismiss the First Amended Complaint, and granted Plaintiff leave to file a Second Amended Complaint.

Plaintiff filed his Second Amended Complaint on November 6, 2009, asserting claims against Defendant for "fraud, deceit and/or concealment" and "intentional

[3]The identity of parties to the Underlying Action is a matter of public record, of which the Court can — and does — take judicial notice.

breach of duty," and against Daimler[4] for wrongful death, product liability, and negligence. On December 17, 2009, the Court granted Defendant's motion to dismiss Plaintiff's claim for "fraud, deceit, and/or concealment." On July 6, 2010, Plaintiff and Daimler filed a notice of settlement of Plaintiff's claims against Daimler, and on July 16, 2010, the Court approved a stipulation of dismissal of Plaintiff's claims against Daimler. On August 10, 2010, the Court granted the Panish Firm's motion for summary judgment and dismissed Plaintiff's sole remaining claim with prejudice.

Defendant separately filed a Third Party Complaint against her attorneys in the Underlying Action, the Rheingold Firm; the Panish Firm; Greene, Broillet, & Wheeler, LLP (the "Greene Firm"); and Kevin Boyle. Defendant filed a First Amended Third Party Complaint on February 9, 2010, and a Second Amended Third Party Complaint on May 24, 2010, asserting claims against these same third party defendants for (1) negligence - legal malpractice; (2) return of an unconscionable fee; and (3) fiduciary fraud. Defendant's claim for legal malpractice arises out of the failure to join Plaintiff as a party to the Underlying Action.

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[4]Plaintiff again named "Freightliner, LLC" in his Second Amended Complaint despite the change in that entity's name.

On June 28, 2010, Defendant filed this Motion for Summary Judgment ("Motion"), and noticed a hearing for August 23, 2010. The Greene and Panish Firms' Oppositions and Defendant's Reply were filed timely.[5]

II. LEGAL STANDARD

A motion for summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The moving party must show that "under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson, 477 U.S. at 250.

Generally, the burden is on the moving party to demonstrate that it is entitled to summary judgment. Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998); Retail Clerks Union Local 648 v. Hub Pharmacy, Inc., 707 F.2d 1030, 1033 (9th Cir. 1983). The moving party bears the initial burden of identifying the elements of the claim or defense and evidence that it believes demonstrates the absence of an issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

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[5]Defendant additionally filed objections to evidence submitted by the Panish Firm in opposition to Defendant's Motion. The Court does not rely on any such evidence in considering the Motion, however. Accordingly, Defendant's objections are moot.

Where the non-moving party has the burden at trial, however, the moving party need not produce evidence negating or disproving every essential element of the non-moving party's case. Id. at 325. Instead, the moving party's burden is met by pointing out that there is an absence of evidence supporting the non-moving party's case. Id. The burden then shifts to the non-moving party to show that there is a genuine issue of material fact that must be resolved at trial. Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 256. The non-moving party must make an affirmative showing on all matters placed in issue by the motion as to which it has the burden of proof at trial. Celotex, 477 U.S. at 322; Anderson, 477 U.S. at 252. See also William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, Federal Civil Procedure Before Trial § 14:144 (2010). A defendant has the burden of proof at trial with respect to any affirmative defense. Payan v. Aramark Mgmt. Servs. Ltd. P'ship, 495 F.3d 1119, 1122 (9th Cir. 2007).

A genuine issue of material fact will exist "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. In ruling on a motion for summary judgment, the Court construes the evidence in the light most favorable to the non-moving party. Barlow v. Ground, 943 F.2d

1132, 1135 (9th Cir. 1991); T.W. Elec. Serv. Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987).

III. DISCUSSION

Through this Motion, Defendant seeks (1) summary judgment of Plaintiff's claims against her; (2) summary adjudication of the question of whether the Green and Panish Firms breached their duty to her; and (3) summary adjudication of Daimler's "waiver of the one action rule." The Court already has dismissed Plaintiff's Second Amended Complaint with prejudice; accordingly, to the extent Defendant seeks summary judgment as to Plaintiff's claims against her, her Motion is moot. Furthermore, Defendant has not asserted any claims against Daimler, and the Court has already dismissed Daimler's cross-claims against her without leave to amend. (Docket No. 109.) Accordingly, no claims or defenses exist between Defendant and Daimler for the Court to adjudicate. Therefore, the only issue presented to the Court in this Motion is whether or not the Third Party Defendants were negligent in their representation of Defendant in the Underlying Action.

"A legal malpractice action is . . . composed of the same elements as any other negligence claim, i.e., 'duty, breach of duty, proximate cause, and damage.'" Osornio

v. Weingarten, 124 Cal. App. 4th 304, 319 (2004). "In negligence cases arising from the rendering of professional services, as a general rule the standard of care against which the professional's acts are measured remains a matter peculiarly within the knowledge of experts. Only their testimony can prove it, unless the lay person's common knowledge includes the conduct required by the particular circumstances." Unigard Ins. Group v. O'Flaherty & Belgum, 38 Cal. App. 4th 1229, 1239 (1995); see also Wilkinson v. Rives, 116 Cal. App. 3d 641, 648 (1981) (holding that where there was no expert testimony on the standard of care and an attorney's performance in relation to that standard, there was "no evidence from which the trier of fact could have found negligence").

Defendant has provided the Court with no expert testimony concerning either the standard of care or the Third Party Defendants' performance in relation to that standard. Accordingly, she fails to meet her burden of showing she is entitled to summary adjudication on the issue of whether or not these firms breached their duty of care in representing her in the Underlying Action.

Defendant's argument that she is not required to present expert testimony because the Third Party Defendants' breach of duty is so clear that as to be

easily understood by a lay person is unpersuasive. (See Reply at 7:15–8:16.) A lay person's common knowledge includes neither the duty to join all heirs in a single action for wrongful death, nor the steps that reasonably competent counsel should undertake in performing that duty. Accordingly, expert testimony is necessary as to both the standard of care and whether or not the Panish and Greene Firms' conduct breached that standard. See Unigard, 38 Cal. App. 4th at 1239; Wilkinson, 116 Cal. App. 3d at 648 .

IV. CONCLUSION

For the foregoing reasons, the Court DENIES the Motion.

Dated: September 2, 2010

Virginia A. Phillips

VIRGINIA A. PHILLIPS
United States District Judge