Editor-in-Chief
Jeffrey I. Ehrlich
THE EHRLICH LAW FIRM

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Appellate Reports

MAZIK v. GEICO AFFIRMS PUNITIVE DAMAGES FINDING A REGIONAL MANAGER QUALIFIED AS A "MANAGING AGENT"

Mazik v. Geico Gen. Ins. Co.

(2019)__ Cal.App.5th __ (Second Dist., Div. 2.)

Who needs to know about this case? Lawyers litigating punitive-damage claims against insurance companies; lawyers litigating UM and UIM claims

Why it's important: Affirms punitive-damage award against GEICO for bad-faith in handling a UIM claim, specifically finding that GEICO's regional liability administrator qualified as a "managing agent" for the purposes of a punitive-damage award. Holds that an insurer's reliance on an internal evaluation that "deliberately cherry-picked medical information and disregarded unfavorable findings" constituted oppressive conduct that warranted a punitive-damage award.

Synopsis: Mazik suffered a shattered heel bone in an automobile accident with an under-insured driver. The bone had shattered into so many pieces that it could not be surgically repaired. Rather, the only treatment option was to splint the foot until the fracture healed "in what ever deformed state" and consider a fusion in the future if Mazik "could not take the pain."

Mazik settled his claim against the other driver for $50,000 and proceeded against his $100,000 GEICO UIM coverage. Mazik demanded the $50,000 in available UIM coverage in light of the severity of damages he sustained.

GEICO adjuster Richard Burton prepared a Claim Evaluation Summary (Evaluation) that summarized the medical records included with Mazik's demand and assessed values for medical expenses, lost income, and "pain and suffering." It calculated a "negotiation range" for the full value of the claim (including the $50,000 that Mercury had already paid) from $47,047.86 to $52,597.86. Burton testified at trial that the evaluation omitted important information from the medical records that Mazik had provided.

After preparing the Evaluation, the adjuster obtained approval from GEICO's regional liability administrator, Lon Grothen, to reject Mazik's $50,000 claim. Accordingly, on January 22, 2010, GEICO offered Mazik a settlement of $1,000.

In September 2010, after a new claims adjuster began to work on the file but without receiving any additional information, GEICO increased its settlement offer to $13,800. Four months later, on January 22, 2011, GEICO increased its offer to $18,000. A note from Grothen approving the offer stated that he had "Increased The General Damage Range To Increase The Possibility of Settlement."

GEICO requested an independent medical evaluation of Mazik, which occurred on May 23, 2011. The examiner, Dr. Don Williams, summarized Mazik's prior medical records and then stated his brief conclusions. Dr. Williams reported that Mazik was "doing well two years after" the accident, and there was "no indication that he needs surgery." He concluded that Mazik's injury "does not restrict his occupation as a teacher" and that "[n]o further medical care is indicated." He opined that Mazik's "prognosis is good."

On February 16, 2012, GEICO served a statutory offer to compromise Mazik's claim for $18,887. Mazik rejected the offer and reasserted his demand for the policy limits. GEICO did not make any additional settlement offers. Grothen explained that GEICO declined to do so, even though he had authorized payment of more money, because "there was no negotiation from the other side. So they never came off their policy limit. We call that throwing good money after bad. If we can't get them to negotiate, he would have been — it's bidding against yourself."

On August 31, 2012, even after GEICO had received copies of Dr. Yee's treatment records reporting continuing medical issues three years after the accident, Grothen gave his "Ok To Move This Toward Arbitration. I Do Not See This As A Policy Limits Case."

The claim was arbitrated and Mazik was awarded the full $50,000 policy limit, which GEICO paid. Mazik then sued GEIGO for bad faith, and obtained an award of $300,000 for emotional distress, $13,508 for fees and costs to recover the policy benefits, and punitive damages of $4 million. The trial court reduced the punitive award to $1 million, and GEICO appealed, arguing that there was no showing that Grothen was a "managing agent" within the meaning of Civil Code § 3294, subd. (b) and that its conduct could not support a punitive-damage award as a matter of law. Affirmed.

On appeal, Mazik argued that Grothen was a "managing agent" because he had broad regional powers over a large number of claims. In *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563 (*White*), the Court explained that managing agents are employees who "exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy." (*Id.* at pp. 566-567.) The Court further explained that, under section 3294, subdivision (b), a "plaintiff seeking

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punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White*, at p. 577.) The court disapproved two prior cases holding or suggesting that a supervisor may be a managing agent merely because he or she has the ability to hire and fire workers. (*Id.* at p. 574, fn. 4.)

In *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 714-715, the Court explained, that, "[w]hen we spoke in *White* about persons having 'discretionary authority over . . . corporate policy' (*White, supra,* 21 Cal.4th at p. 577), we were referring to *formal* policies that affect a substantial portion of the company and that are the type likely to come to the attention of corporate leadership." On appeal, GEICO argued that there was no evidence that Grothen had the authority to make "formal" policies under this definition.

On appeal, GEICO attempted to rely on a definition of "managing agent" that was narrower than the definition presented to the jury in the standard CACI 3946 instruction, which tracks the language in *White* in explaining simply that "[a]n employee is a 'managing agent' if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy." GEICO did not argue that this instruction was erroneous. The court rejected GEICO's attempt to narrow the definition of "managing agent" beyond the instruction given to the jury, but noted that even under GEICO's definition, the jury could have found that Grothen was a managing agent. The court explained:

There is ample evidence in the record that Grothen met the definition of managing agent that the jury was given. Grothen had wide regional authority over the settlement of claims. He testified that he was a regional liability administrator for Orange County, Los Angeles, San Bernardino, and Alaska. Over 100 claims adjusters are "funneled up" to him for approval of settlements within the range of his authority, which included claims up to at least $50,000. This responsibility affects a large number of claims. Grothen testified that he typically has 18 to 20 meetings per day with claims adjusters seeking his approval or direction for handling particular claims.

Grothen's own testimony established that an important part of his job was to establish settlement standards within his region. He testified that it is "an extremely important part of [his] role" to "maintain consistency in settlement valuations." He further explained that "consistency is also important so we can be profitable." The jury reasonably could have concluded that this type of broad decisionmaking responsibility for establishing GEICO's settlement standards "ultimately determine[d] corporate policy."

The court added, in a footnote, "An employee's authority over the systematic *application* of policies in a claims manual or other formal corporate document might "determine corporate policy" as effectively as the formulation of the policies themselves. (*White, supra,* 21 Cal.4th at pp. 566-567.) It is doubtful that the court in *Roby* intended its reference to "formal" policies to exclude persons with such authority from its definition of a managing agent. Nevertheless, we need not address that question here.

The Court of Appeal also found that GEICO's internal summaries were deliberately misleading and omitted important medical information about Mazik's condition. GEICO conceded that a jury could conclude that its claims adjusters intentionally disregarded facts in the medical records when preparing the summaries and evaluations of the claim, but it argued that this conduct could not support a punitive award because Grothen himself was "not personally involved in reviewing Mazik's medical records or otherwise personally involved in investigating his claim."

The court rejected this argument, explaining, "There was sufficient evidence for the jury to conclude that Grothen engaged in oppressive conduct by ignoring information concerning the serious and permanent nature of Mazik's injuries for the purpose of saving the company money."

Malicious prosecution claims against attorneys; statute of limitations.

Connelly v. Bornstein (2019) __ Cal.App.5th __ (First Dist; Div. 5.)

Section 340.6 of the Code of Civil Procedure imposes a one-year statute of limitations for "[a]n action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services." Courts of Appeal have divided over whether this provision governs malicious prosecution claims against attorneys. In *Connelly*, the court held that it does.

California lacks a statute that prescribes a specific period of limitation for malicious prosecution. Instead, courts have long held the tort was encompassed by statutes governing claims for "'injury to'" a person "'caused by the wrongful act or neglect of another.'" Currently, this statute is section 335.1, which provides a two-year limitations period. The plaintiff in *Connelly* invoked this statute, because she filed her malicious-prosecution action after the one-year period in section 340.6 expired. In *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, 880, the court held, in a case of first impression, that malicious prosecution actions against attorneys were instead governed by section 340.6. The *Vafi* court reasoned that malicious-prosecution claims fell within the plain language of the statute, and "the more specific" statute of limitations under section

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340.6 overrides the general catch-all statute provided by section 335.1.

Vafi was followed by *Yee v. Cheung* (2013) 220 Cal.App.4th 184, 196. But *Rodger Cleveland Golf Co., Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, 667, declined to follow those cases.

Lee v. Hanley (2015) 61 Cal.4th 1225, focused on the statutory phrase "arising in the performance of professional services," in section 340.6, and concluded the phrase was ambiguous as to whether it "limits the scope of section 340.6(a) to legal malpractice claims or covers a broader range of wrongful acts or omissions that might arise during the attorney-client relationship. The Court ultimately concluded that for purposes of section 340.6(a), the question is not simply whether a claim alleges misconduct that entails the violation of a professional obligation. Rather, the question is whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation. The Court held that a claim against an attorney for conversion based on his failure to return unearned fees previously advanced by the client was not governed by section 340.6, because proof of that claim did not require the plaintiff to prove that the attorney violated a professional obligation.

An attorney who engages in malicious prosecution violates the obligation, embodied in the Rules of Professional Conduct, to not "bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person." (Cal. Rules Prof. Conduct, rule 3.1(a)(1).) This obligation is a near-perfect mirror of two of the three elements of malicious prosecution and implicates a lawyer's core professional duty to employ reasonable skill, prudence, and diligence in litigation. And, unlike its relationship to legal malpractice, a malicious-prosecution claim stands in sharp contrast to claims *Lee* identified as falling outside of the statute's scope: an attorney's "garden-variety theft" or "sexual battery," even when the conduct takes place during the legal representation.

The court ultimately concluded that malicious-prosecution claims against attorneys are governed by section 340.6 – which means that they are subject to a one-year limitations period, even though the same claim against litigants would be governed by a two-year limitations period.

Specific enforcement of settlement; Code Civ. Proc. § 664.6; requests to retain jurisdiction; signature by parties versus attorneys.

Mesa RHF Partners, L.P. v. City of Los Angeles (2019) __ Cal.App.5th __ (Second Dist., Div. 1.)

Plaintiffs filed a lawsuit against the City in 2012. challenging various provisions regarding the City's establishment of the Downtown Center Business Improvement District (DCBID) by ordinance of April 10, 2012. On January 13, 2013, counsel for plaintiffs filed a notice of settlement of entire case stating that the parties had settled the case on December 20, 2012. The parties' settlement agreement contained the following language: "The Court shall retain jurisdiction pursuant to Code of Civil Procedure section 664.6 to enforce the terms of the Settlement Agreement." On March 1, 2013, counsel for plaintiffs filed a request for dismissal on Judicial Council form CIV- 110 that contained the following language counsel inserted into the document: "Court shall retain jurisdiction to enforce settlement per C.C.P. § 664.6." A deputy clerk entered the dismissal "as requested" on the same day. The plaintiffs filed a similar action challenging a different Business Improvement District (the "SPBID") in November 2012, which the City also settled in 2013, which contained identical language and was dismissed using the same forms.

The DCBID and SPBID each expired on December 31, 2017. They were renewed pursuant to statute for a new term to begin on January 1, 2018. During the parties' discussions regarding the Business Improvement Districts' (BIDs) renewals, the City informed the plaintiffs that it believed the settlement agreements terminated with the BIDs' expiration. The City contended that the renewal discontinued each of the BIDs "in its current formulation," and that the City would therefore no longer be required to remit to plaintiffs the amounts the BIDs had assessed those entities.

On January 4, 2018, plaintiffs filed motions to enforce the settlement agreements under section 664.6. The trial court heard and denied the motions on January 31, 2018 on the merits. Plaintiffs appealed. Affirmed, on the ground that the trial court lacked jurisdiction to hear the motions.

Although the parties try to characterize the plaintiffs' requests for dismissal as requests to the trial court that it retain jurisdiction under section 664.6 to enforce the parties' settlement agreements, the court disagreed with that characterization. The requests for dismissal were not signed by the "parties" (or even a single "party") as that term in section 664.6 has been uniformly construed by California courts.

A request for the trial court to retain jurisdiction under section 664.6 "must conform to the same three requirements which the Legislature and the courts have deemed necessary for section 664.6 enforcement of the settlement itself: the request must be made (1) during the pendency of the case, not after the case has been dismissed in its entirety, (2) by the parties

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themselves, and (3) either in a writing signed by the parties or orally before the court." (*Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 440.) The "request must be express, not implied from other language, and it must be clear and unambiguous." (*Ibid.*)

The request to the court that it retain jurisdiction under section 664.6 must be made by the parties. "[A] request that jurisdiction be retained until the settlement has been fully performed must be made either in a writing signed by the parties themselves, or orally before the court by the parties themselves, not by their attorneys of record, their spouses, or other such agents." (*Wackeen*, *supra*, 97 Cal.App.4th at p. 440.) The Judicial Council form CIV-110 in each case was signed only by an attorney for plaintiffs; not by the plaintiffs.

The City contends that the settlement agreements (which were signed by the parties) but which were never presented to the trial court before the plaintiffs requested dismissal, were the request to retain jurisdiction and *that* request was then communicated to the trial court via the Judicial Council form CIV-110. The court disagreed. The settlement agreements were not attached to the Judicial Council form requests for dismissal or otherwise transmitted to the trial court before the cases were dismissed. The City's argument runs directly contrary to our Supreme Court's determination that "the term 'parties' as used in section 664.6 ... means the litigants themselves, and does not include their attorneys of record."

"In this case, the parties could have easily invoked section 664.6 by filing a stipulation and proposed order either attaching a copy of the settlement agreement and requesting that the trial court retain jurisdiction under section 664.6 or a stipulation and proposed order signed by the parties noting the settlement and requesting that the trial court retain jurisdiction under section 664.6. The process need not be complex. But strict compliance demands that the process be followed.

Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm, *in Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of* Advocate *magazine and a two-time recipient of the CAALA Appellate Attorney of the Year award.*