THE BOTTOM LINE

Case Title: Carrie Castillo v. Peter Hellwig, DDS

Case Number: GIE 033519

Judge: Honorable Lillian Lim

Plaintiff's Counsel: Dane Levy, Esq. of Law Office of Dane Levy

Defendant's Counsel: Joseph Kutyla, Esq. of Law Offices of Joseph T. Kutyla

Type of Incident/Causes of Action: Dental Malpractice

Settlement Demand: $250,000

Settlement Offer: $45,000

Trial Type: Jury

Trial Length: 3 weeks

Verdict: Defense

Case Title: Julia Barrientos v. Barry Katzman, M.D., et al.

Case Number: GIC876334

Judge: Honorable Charles R. Hayes

Plaintiff's Counsel: Richard A. Williams, Esq. of Law Offices of Richard A. Williams; David T. Achord, Esq. of San Diego Injury Law Center

Defendant's Counsel: James D. Boley, Esq. of Neil, Dymott, Frank, McFall & Trexler APLC

Type of Incident/Causes of Action: Medical Malpractice (alleged failure to diagnose endophthalmitis post-operative day one following cataract surgery

Settlement Demand: C.C.P. 998 $250,000

Settlement Offer: None

Trial Type: Jury

Trial Length: 8 Days

Verdict: Defense (9/3 Causation)

INSURANCE LAW

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The California Court of Appeal has been busy indeed. Decisions have been handed down which discuss competing "other insurance clauses;" legal malpractice claims against assigned insurance defense counsel; when coverage under the "use of a covered auto" provision does not exist; when the proration provision in an automobile policy takes precedence over the excess provision for uninsured motorist coverage; when cleanup costs pursuant to settlement are not "damages" subject to indemnification: and when an intentional act of self-defense could be an "accident," which triggers a duty to defend and possibly indemnify.

WHERE TWO INSURANCE POLICIES WHICH INSURED DIFFERENT INSUREDS AND APPLIED TO THE SAME RISK, THE RELATIVE APPLICATION OF THE POLICY IS GENERALLY DETERMINED BY THE EXPLICIT PROVISIONS OF THE RESPECTIVE "OTHER INSURANCE" CLAUSES. In Burns v. California Fair Plan (2007) 152 Cal.App.4th 646, 61 Cal.Rptr.3d 809, the Second District Court of Appeal Appellate District held that a life tenant and trust which held remainder interest in residence destroyed by fire could each only recover on a pro rata basis under their separate fire insurance policies, which each contained "other insurance" provisions. Ann Burns held a life estate on a residence and the Kent Burns Trust held the remainder interest. Both separately purchased fire insurance policies on the home from different insurance companies. A fire destroyed the home. Burns and the Trust brought an action each seeking to obtain the full value of the residence under their respective insurance policies, a total amount in excess of the damage to the residence. The court found that the pro rata payments under the separate fire insurance policies of $279,410 to Ms. Burns destroyed by fire and $198,792.99 to the Trust which held the remainder interest fully compensated them for the loss of the residence, which had estimate cash value of $474,000. Ms. Burn's "other insurance" provision only required her insurer to pay covered losses in excess of the amount due from other insurance, the Trust's "other insurance" provision limited liability to the 41% proportion of the insurance policy limit to the total coverage between the two policies. The combined payment, noted the court, was more than the actual cash value of the property and more than the reconstruction estimate.

A PLAINTIFF ALLEGING LEGAL MALPRACTICE AGAINST ITS ASSIGNED INSURANCE DEFENSE COUNSEL IN THE DEFENSE OF A LAWSUIT MUST PROVE THAT, BUT FOR THE NEGLIGENCE OF THE ATTORNEY, A BETTER RESULT COULD HAVE BEEN OBTAINED IN THE UNDERLYING ACTION. In Lazy Acres Market, Inc. v. Tseng (2007) 152 Cal.App.4th 1431, 62 Cal.Rptr.3d 378, the Second District Court of Appeal held that the insured market owner failed to state a valid cause of action against its attorney for legal malpractice and breach of fiduciary duty, after the attorney was assigned by the insurer to represent the insured and others with regard to the underlying litigation but failed to disclose or advise the insured of any potential and actual conflicts of interest and obtain written waivers. Lazy Acres Market, Inc., hired Premier Protective Services ("Premier") to apprehend shoplifters in its market. The contract required Premier to defend and indemnify Lazy Acres Market Inc., its shareholders and employees (hereinafter collectively "Lazy Acres") for any claims arising out of Premier's loss prevention activities. Premier obtained a policy of insurance from Western Heritage Insurance Company ("Western Heritage"), naming Lazy Acres as an additional insured. Premier employee, Johnny Lopez, arrested Scott Courts for shoplifting an item from Lazy Acres Market. Courts sued Premier, Lazy Acres and others, alleging intentional and negligent torts. The complaint demanded punitive as well as compensatory damages. Western Heritage agreed to defend Lazy Acres. It did not reserve any rights to deny coverage. Instead, Western Heritage accepted full responsibility to defend and indemnify Lazy Acres pursuant to the insurance policy. Western Heritage selected Jennifer Tseng to represent Lazy Acres and Premier. On August 7, 2003, Tseng wrote Lazy Acres stating she had been retained to defend it, but Tseng disclosed no actual or potential conflict of interest. Earlier that day, Cappello & Noël, Lazy Acres's personal counsel, had obtained an extension of time to respond to Courts's complaint. On August 13, 2003, Terrence Bonham wrote to Tseng advising her that he had been retained by Lazy Acres's own insurance carrier to represent Lazy Acres's interest in the suit. Bonham stated that because Western Heritage had accepted defense and indemnity, he would monitor the case. Tseng represented Lazy Acres, Premier and Lopez in the lawsuit until July of 2004.

During this time, Tseng spoke to, advised, and corresponded with all defendants. Bonham monitored the case on behalf of Lazy Acres's carrier, and Cappello & Noël played no role in the litigation. Tseng failed to assert defenses that would benefit Lazy Acres; she failed to advise Lazy Acres of her conflict of interest in representing Lazy Acres and Premier; and she failed to advise Lazy Acres that Lazy Acres could be entitled to have Western Heritage assign independent, conflict-free counsel at Western Heritage's expense. In July of 2004, Lazy Acres contacted Cappello & Noël regarding the status of the Courts case. Cappello & Noël advised Lazy Acres that Tseng had an actual, or at least potential, conflict of interest in representing both Premier and Lazy Acres. Cappello & Noël told Tseng they were replacing her as Lazy Acres's counsel. By the time Cappello & Noël began representing Lazy Acres in July of 2004, crucial trial deadlines were looming. Lazy Acres requested documents retained by Tseng. Tseng responded only after repeated phone calls and letters. She refused to allow her former clients to remove the legal file from her office. Instead, she required Lazy Acres to come to her office to copy the file. This prejudiced Lazy Acres in its ability to prepare for trial. Lazy Acres requested Tseng to recuse herself from representing Premier because of a continuing conflict of interest. Tseng refused, and Lazy Acres moved to disqualify her. Tseng submitted opposition and the trial court denied the motion. Nevertheless, Tseng called Cappello & Noël the next day and acknowledged a conflict of interest existed, and expressed the view that the trial court was wrong in denying the motion. Tseng resigned from the case, and Western Heritage appointed new counsel for Premier and Lopez. Lazy Acres was forced to pay for its own defense beginning in July of 2004. Western Heritage did not respond to Lazy Acres's requests for payment of its fees and costs. However, Western Heritage paid $100,000 to Courts to settle the case before trial. For purposes of its analysis, the appellate court assumed that attorney Tseng breached her duties to Lazy Acres. However, the court concluded that from the record before it, the insured failed to state a valid cause of action against its insurance defense attorney for legal malpractice and breach of fiduciary duty because there were no facts plead to show that the insured would have achieved a better result but for Tseng's breaches, nor any evidence to show that anything Tseng did influenced the insurer not to pay the insured's legal fees.

NO COVERAGE UNDER THE "USE OF A COVERED AUTO" PROVISION FOR THE CLAIMS BY A SHUTTLE SERVICE PASSENGER FROM THE SEXUAL ASSAULT BY THE SHUTTLE DRIVER WHEN THE USE OF THE VEHICLE WAS NOT THE PREDOMINATING CAUSE OR A SUBSTANTIAL FACTOR IN THE PASSENGER'S INJURIES. In R. A. Stuchbery Others Syndicate 1096 v. Redland Insurance Company (2007) 154 Cal.App.4th 796, 66 Cal.Rptr.3d 80, the First District Court of Appeal held that the alleged injuries of a shuttle service passenger from the sexual assault by the shuttle driver did not result from "use of a covered auto" within the coverage of the shuttle service's business automobile insurance, since the use of the vehicle was not the predominating cause or a substantial factor in the passenger's injuries; rather, the shuttle was used merely to drive the passenger to the driver's apartment where the alleged assault took place. In its analysis, the appellate court explained that under the "predominating cause/substantial factor test" for determining whether an injury resulted from the use of a vehicle, and thus is covered by auto insurance, a mere "but for" connection between the use of the vehicle and the alleged injuries is insufficient to bring the claim within the scope of coverage. The court concluded that the shuttle was merely used to transport the victim to the locale of the assault. Her injury resulted from the driver's conduct and not from the "use" of the shuttle.

THE PRORATION PROVISION IN AN AUTOMOBILE POLICY TAKES PRECEDENCE OVER THE EXCESS PROVISION FOR UNINSURED MOTORIST COVERAGE. In Allstate Ins. Co. v. Mercury Ins. Co. (2007) 154 Cal.App.4th 1253, 65 Cal. Rptr.3d 451, the Second District Court of Appeal held that the proration provision in an automobile policy takes precedence over the excess provision for uninsured motorist coverage. This case concerned a dispute between two insurance companies regarding which of two competing clauses in their respective uninsured motorist insurance policies apply to compensate a passenger injured in an automobile collision with an uninsured motorist. The Mercury insurance policy contained the following pro-rata provision: "[I]f the insured has insurance available to the insured under more than one uninsured motorist coverage provision, any damages shall not be deemed to exceed the higher of the applicable limits of the respective coverages, and such damages shall be prorated between the applicable coverages as the limit of each coverage bears to the total of such limits." The Allstate insurance policy contained this following excess coverage provision: "If the insured person was in ... a vehicle you do not own which is insured for this coverage under another policy, this coverage will be excess. This means that when the insured person is legally entitled to recover damages in excess of the other policy limit, we will only pay the amount by which the limit of liability of this policy exceeds the limit of liability of that policy." Mercury and Allstate disagreed regarding the respective amounts that each was required to pay to settle the passenger's claims. Mercury claimed that Allstate must contribute a pro-rata share; Allstate claimed that its insurance was excess coverage to Mercury's UM $30,000 damages limitation. The appellate court noted that California Insurance Code § 11580.2(d) provides that an insurance policy may require that uninsured motorist coverage be prorated when an insured has coverage under more than one UM policy. That section, explained the court, was designed to "avoid endless squabbles" engendered by claims made under multiple policies." The court held that the statute is clear and the policy with the proration provision takes preference over the policy with the excess coverage provision.

INSURED'S CLEANUP COSTS PURSUANT TO SETTLEMENT WERE NOT "DAMAGES" SUBJECT TO INDEMNIFICATION. In Aerojet-General Corp. v. Commercial Union Ins. Co. (2004) 155 Cal. App.4th 132, 65 Cal.Rptr.3d 803, the Third District Court of Appeal held that the insured's cleanup costs pursuant to settlement were not "damages" subject to indemnification. This case concerned whether the sums agreed to be paid as a settlement of litigation were subject to indemnification as "damages" under excess liability insurance policies. The insured sued for breach of contract and declaratory relief against its excess liability insurance carriers due to their refusal to indemnify their joint insured for the costs it incurred to remediate polluted real property pursuant to a settlement agreement from another legal action. In affirming the trial court's grant of summary judgment to the excess carriers, the appellate court explained that the costs incurred to remediate polluted real property pursuant to settlement agreement in court suit were not "damages" subject to indemnification under insured's excess liability insurance policies; in light of judicial interpretation

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Gattuso v. Harte-Hanks Shoppers (2007) 42 Cal. 4th 554. In November 2007 the Supreme Court held that an employer can satisfy its statutory reimbursement obligations under Labor Code §2802 by paying outside sales persons an increased base salary (or increased commissions) as compared to inside sales persons. However, there must be some method to apportion the increased compensation so that it can be determined what is paid for labor and what is paid for reimbursement of business expenses.

In Gattuso, Plaintiffs filed a class action lawsuit against their employer alleging the employer failed to reimburse them for their business related expenses in violation of Labor Code §2802. Plaintiffs were "outside sales representatives." Outside sales reps must drive their own cars to potential customers. Other sales persons who worked in employer's offices contacted potential client with employer-owned telephones. Labor Code 2802 provides that "an employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties. . ."

Apparently the parties agreed that the employer must fully reimburse its outside sales force for the automobile expenses they "actually and necessarily incur in performing their employment tasks." However, they disagreed as to whether the employer can do this by increasing the base salary or whether the employer must separately identify a reimbursement payment. Both parties even agreed that 2802 permits the employer to use the IRS mileage rate to calculate auto expense reimbursement. However, using this method allows for the employee to challenge the reimbursement if he or she can show that the reimbursement is less than his or her actual expenses. The court also acknowledged that while the parties could negotiate a mileage rate for reimbursement, Labor Code §2804 makes any agreement with an employee null and void if it waives the employee's right to full reimbursement.

Essentially what is at issue here is whether the employer can use a "lump sum" method for reimbursement. The Supreme Court held that the employer can use this method. HOWEVER, the amount paid must be "sufficient to provide full reimbursement for actual expenses necessarily incurred." Again, as with anything other than the actual cost method, the employee must be permitted to challenge the amount of the payment. To do this, the employee must be able to compare the lump sum paid with the actual cost. Furthermore, the amount cannot be less than the amount necessary to provide full reimbursement.

Finding that "lump sum" is an appropriate method by which to reimburse employees for business expenses, the Court next considered whether the "lump sum" must be segregated from other compensation, or whether the "lump sum" may be in the form of an increase in base salary. The Court concluded that the reimbursement may be in the form of an increased base salary. HOWEVER, the employer (1) must establish "some means to identify the portion of overall compensation that is intended as expense reimbursement"; and (2) "the amounts so identified are sufficient to fully reimburse the employees for all expenses actually and necessarily incurred." In footnote 6, the Court admonished employers who use this method to "separately identify the amounts that represent payment for labor performed and the amounts that represent reimbursement for business expense" on their pay statements. The Court seemed to say that although Labor Code §2802 does not specifically require this, there must be some way for employees and "officials charged with enforcing the labor laws" be able to distinguish between the two.

Another issue on appeal was whether the trial court abused its discretion in denying class certification finding the claims lacked commonality. The trial court and the Court of Appeal had framed the class issues as: (1) whether each outside sales person had an agreement about the manner in which they were reimbursed for business expenses; or (2) whether the compensation paid to each employee was reasonable to pay them for their business expenses. Both the trial court and the Court of Appeal found that answers to these questions would involve individualized inquiry.

The Supreme Court concluded the appropriate class would be those employees who were not "separately" reimbursed for their business expenses. The Supreme Court then opined that the validity of Plaintiffs' claims turned on the answers to three questions: (1) whether the employer adopted a policy or practice of reimbursing outside sales persons by paying them higher base salaries and commission than inside sales persons; (2) If so, did the employer establish a method to apportion the compensation from the reimbursement; and (3) If so, was the amount paid for reimbursement sufficient to fully reimburse the employees for their business expenses. The case was remanded for a consideration of whether these inquiries were amenable to class treatment.

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"damages" unambiguously meant money ordered by court to be paid, and settlement was agreement negotiated by insured and complaining water entities, which did not involve court order or judgment.

AN INTENTIONAL ACT OF SELF-DEFENSE COULD BE AN "ACCIDENT," WHICH TRIGGERS A DUTY TO DEFEND AND POSSIBLY INDEMNIFY. In Jafari v. EMC Insurance Companies (2007) 155 Cal. App.4th 885, 66 Cal.Rptr.3d 359, the Second District held that in assault and battery cases, it is the unexpected conduct of a third-party that prompts the insured to act in self-defense that gives rise to coverage since the conduct of the third-party is an unexpected and unforeseen event. On August 30, 2003 Farhad Nazemzadeh came to pick up his car from Glendora Tire & Brake Center the business of the insured, Davar Jafari. Mark Mitchell, the manager of Jafari's business, told Nazemzadeh his car was not ready for pickup. Apparently, Nazemzadeh became verbally abusive by yelling at Mitchell, who told Nazemzadeh to leave and to "get out of his face." Nazemzadeh apparently did not leave but continued his verbal assault, telling Mitchell he would kill him. Mitchell punched Nazemzadeh at least twice in the face. Nazemzadeh sustained a cut over his right eye which required three stitches. Unsurprisingly, Nazemzadeh filed suit against both Jafari and Mitchell, alleging causes of action for assault, battery, negligence, intentional and negligent infliction of emotional distress, premises liability and negligent hiring. Jafari tendered defense and indemnification of the action to EMC, which rejected Jafari's tender, explaining that Nazemzadeh's suit was the result of Mitchell's intentional acts, which are not "accidents," and hence do not fall within the coverage provision of the policy. In concluding that Mitchell's intentional act of hitting a customer in self-defense in an altercation with that customer on the business premises could be considered "accident" within meaning of policy under governing case law, thereby triggering liability insurer's duty to defend, the appellate court explained that in assessing a liability insurer's duty to defend an assault and battery case against the insured, the insurer must take a broad view of any incident raising the question of self-defense when determining whether there has been an unexpected and unintended force, or "happening," in the causal chain of events creating the covered "accident."