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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

LAUREN KATTUAH, Plaintiff and Appellant, v. YUHL, CARR, LLP et al., Defendants and Respondents.	B276879 (Los Angeles County Super. Ct. No. BC570537)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Johnson, Judge. Affirmed.

The Gilleon Law Firm and James C. Mitchell for Plaintiff and Appellant.

Nemecek & Cole, Jonathan B. Cole, Mark Schaeffer and Marshall R. Cole for Defendants and Respondents.

Plaintiff Lauren Kattuah appeals from a judgment in favor of a law firm, defendant Yuhl, Carr, LLP; a member of that firm, defendant James P. Carr; and an associate, defendant Tyler J. Barnett. The judgment followed an order granting defendants' motion for summary judgment of plaintiff's malpractice complaint. Plaintiff contends summary judgment was improper for two principal reasons: (1) defendants provided only inadmissible evidence in support of their motion for summary judgment; and (2) plaintiff provided an expert witness declaration that raised a triable issue of material fact as to whether defendants had satisfied their professional duty to preserve evidence. We find no basis for reversal, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 19, 2011, plaintiff was driving her 2010 Toyota Prius when it was struck by a vehicle driven by Brian Meissenger.[1] Plaintiff suffered a serious spinal injury as a result of the accident. Two days later, on March 21, 2011, plaintiff retained defendants to represent her in connection with her personal injury claims arising from the accident.

Plaintiff's Prius was insured through California State Automobile Association Interinsurance Bureau (referred to in the briefing and here as AAA). On March 29, 2011, ten days after the accident, Barnett notified AAA by mail and email that his firm was representing plaintiff's interests with respect to the auto accident. Barnett asked that the Prius "not be altered or repaired or damaged in any way without giving this office reasonable notice so that we can perform a proper inspection. It

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[1] "Meissenger" is the spelling used in the briefing, but an alternative spelling, "Messinger," appears in the record.

is potentially a critical piece of evidence in Ms. Kattuah's third party claim for bodily injuries and we will need to photograph and examine it before it is disposed of." AAA emailed a copy of the preservation letter to plaintiff on March 29, 2011, and placed the letter in plaintiff's claims file.

Less than one week later, on April 5, 2011, AAA sent plaintiff a proposed settlement letter in which it declared the Prius a total loss. Based on the vehicle's actual pre-accident cash value of $23,907, AAA offered a net property damage settlement of $25,337.40. From this sum, $22,047.69 would be payable to the lienholder, and $3,289.71 would be payable to the registered owner. Enclosed with the April 5, 2011 letter was a form, "Proof of Loss Receipt and Release," which stated that "[t]he vehicle will be retained by" AAA.

Without discussing the April 5, 2011 letter with defendants, plaintiff accepted the property damage settlement offer from AAA. In mid-April 2011, plaintiff's mother signed and returned the "Proof of Loss Receipt and Release" to AAA, and delivered a copy of the signed documents to defendants' office. A short while later, AAA "sold the Prius to a third party in Northern California, Rancho Cordova for salvage" on April 29, 2011. Despite its acknowledgment of receipt of the preservation letter—which requested that defendants be notified before AAA disposed of the Prius—AAA sold the Prius without notifying defendants.

Several months after the car had been sold, in July or August 2011, Barnett and Carr met with plaintiff to discuss litigation strategy, the scope of the firm's representation, and plaintiff's desire to bring an additional claim against Meissenger's parents. Barnett told plaintiff that he did not

believe an additional claim against Meissenger's parents would be fruitful. Plaintiff decided to terminate the attorney-client relationship, stating that because defendants were not "willing to do more . . . it was time to move on."

After defendants ceased their representation of plaintiff in September 2011, plaintiff retained new counsel, The Law Offices of Ian Herzog.

The Personal Injury and Product Liability Action

In December 2011, plaintiff's new counsel filed a complaint for personal injury and property damages against Meissenger and his parents. The complaint included a product liability claim against Toyota Motor Corporation and related entities (collectively, Toyota). (*Kattuah v. Messinger et al.* (L.A. County Super. Ct., SC115405).) When Toyota moved for summary judgment on the product liability claim, plaintiff filed a notice of non-opposition, stating that she could not prove her claim against Toyota because the Prius had been sold before it could be tested for defects. Toyota's motion for summary judgment was granted and judgment was entered for Toyota based on the summary judgment ruling in April 2014.

The Breach of Contract Action Against AAA

In March 2013, plaintiff sued AAA for negligence, breach of contract and breach of the implied covenant of good faith and fair dealing, alleging that because AAA had failed to preserve and store the Prius as requested by her attorney, she was unable to have the Prius tested by an expert "for a potential crashworthiness action against Toyota." The action against AAA was dismissed in August 2013. (*Kattuah v. California State*

Automobile Association Interinsurance Bureau (L.A. County Super. Ct., No. SC120391).)

The Present Action for Legal Malpractice

Plaintiff filed the present action for legal malpractice against defendants in January 2015. The complaint alleged that "[a]round March 29, 2011, the defendants were notified by AAA, Kattuah's insurer, the Prius was being 'totaled' due to the extent of damage and AAA would not pay to repair it. Barnett knew the Prius was potentially a critical piece of evidence in Kattuah's claims against third parties to recover damages for the personal injuries suffered in the March 19, 2011 automobile accident. These potential third party claimants included the driver of the automobile in the accident, Brian Messinger, his parents and owners of the other vehicle, Peter and Lisanne Messinger, as well as the manufacturer, dealer and lessor of the Prius, Toyota Motor Corporation [and related Toyota defendants]."

Plaintiff alleged that under the retainer agreement, defendants owed a duty of care to "take reasonable steps necessary to preserve the Prius as evidence in potential claims" against third parties, including Toyota. She alleged that defendants had breached their duty of care to her by their failure to: (1) investigate whether she had viable product liability claims against Toyota; (2) retain experts to examine the Prius for defective or malfunctioning parts that may have caused or contributed to the accident and plaintiff's injuries; and (3) take "reasonable and necessary action to preserve the Prius as evidence to be used in third party claims by Kattuah for personal injuries." As a result of defendants' various breaches of the duty of care, plaintiff allegedly was deprived of evidence she needed in

her case against Toyota to prove there were defective or malfunctioning parts that may have caused the accident or contributed to her injuries.

Summary Judgment Motion by Defendants

Defendants moved for summary judgment of the malpractice complaint, arguing they did not breach their duty of care to plaintiff. They asserted that under the terms of the retainer agreement, the scope of their representation of plaintiff was limited to her personal injury action against Meissenger. They did not agree to represent her in a potential product liability action against Toyota, nor were they informed by plaintiff of a mechanical defect in the Prius or that she was interested in bringing a product liability action against Toyota. Even at the meeting that resulted in the termination of their relationship, plaintiff did not express a desire to "bring any kind of product defect claim. Rather, Plaintiff was focused on going after [Meissenger's parents], which was not recommended by the firm."

Barnett Declaration

Barnett provided a declaration that summarized the firm's investigation of plaintiff's accident.[2] He acknowledged that

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[2] Plaintiff objected to Barnett's declaration on the grounds that it contained improper legal opinions on the interpretation of the written retainer agreement, violated the parole evidence rule, and contradicted the terms of an agreement intended by the parties to be complete and exclusive. In addition, plaintiff objected to the declaration on the grounds that it contained inadmissible hearsay, lacked personal knowledge, contained improper opinions beyond the knowledge, skill, experience, education and expertise of the witness, and contained improper

although the scope of the retainer was limited to the personal injury claim against Meissenger, the firm was obligated to conduct a reasonable inquiry into all potentially viable "claims which could be pursued, whether or not the Firm would have agreed to handle them." To this end, the firm conducted "a detailed investigation of all pertinent issues and facts relating to the Accident, which it routinely does as a matter of custom and practice when the matter involves serious bodily injury."

Defendants reviewed the police accident report "to gain a full understanding of what transpired and what the potential causes of Plaintiff's injuries could have been." They compared the site of the accident against the police report to determine "that there was no defect in the roadway which would have caused the accident, thus eliminating any claims against the City of Los Angeles or the County of Los Angeles." Finally, they considered whether "there was a potential product defect which could have been a cause of Plaintiff's injuries." To this end, Barnett reexamined the police report, which did not mention any potential product defect issues. He also researched the National Highway Traffic Safety Administration ('NHTSA') website "for all possible recalls or known defects which could have contributed to Plaintiff's injuries." Barnett "was unable to find any recall or known defect which could have been a potential cause of Plaintiff's injuries."

Upon completing this research, Barnett concluded "there was nothing in particular about the Accident which indicated that the Prius performed any differently than it should have."

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expert opinion without establishing a foundation on Barnett's qualifications. The trial court overruled all objections to Barnett's declaration.

Had his investigation led "to a contrary conclusion, [he] would have advised Plaintiff of the additional facts, claims, or parties and would have provided Plaintiff with a referral to another attorney to handle those matters." However, because his research did not uncover a reasonable basis to advise plaintiff to pursue a further investigation of a product defect claim, he proceeded with the personal injury claim "and was able to secure a six figure settlement."

Duty to Preserve Evidence

As to their alleged negligence in failing to preserve the Prius, defendants argued they had complied with their duty of care by sending the preservation letter to AAA. The letter was acknowledged by AAA and placed in the claims file.

Defendants cited *Reid v. State Farm Mut. Auto. Ins. Co.* (1985) 173 Cal.App.3d 557, 580 (*Reid*) for the proposition that the preservation letter created an enforceable obligation against AAA. In addition to their lack of control over AAA's conduct in disposing of the Prius, defendants lacked "actual or constructive possession over the vehicle, especially since Plaintiff failed to provide the Firm with any of the documents AAA had sent Plaintiff in 2011."

Causation

Based on their theory that the preservation letter created an enforceable obligation against AAA, defendants argued they are not liable for plaintiff's loss of the vehicle and difficulty in proving her product liability claim.

Defendants also asserted that in her action against AAA, plaintiff had made a judicial admission in her pleading that AAA was liable in contract for failing to preserve the Prius. In her action against AAA, plaintiff alleged claims for breach of contract

and breach of the implied covenant of good faith and fair dealing based on AAA's failure to comply with the preservation letter. In the present lawsuit, plaintiff has taken the contradictory position: that defendants were negligent in failing to require AAA to preserve the Prius.

Plaintiff's Opposition to Summary Judgment

Plaintiff argued that because an insurer is obligated to preserve a damaged vehicle as evidence if it expressly agrees to do so (*Cooper v. State Farm Mutual Automobile Ins. Co.* (2009) 177 Cal.App.4th 876 [*Cooper*]), a reasonable attorney in defendants' position would have either secured an enforceable promise from AAA to preserve the Prius, or hired an expert to inspect the vehicle before it was disposed of by AAA.

Plaintiff adopted the theory that because AAA had not promised to preserve the Prius, AAA had no obligation to do so. She argued that defendants were relying on a comment in *Reid* that the insurer "had no duty to preserve the vehicle absent a specific request" (*Reid*, *supra*, 173 Cal.App.3d at p. 580).

In response to defendants' assertion that they were unaware she had released the Prius to AAA, plaintiff submitted a declaration by her mother. In it, her mother stated that she had delivered the signed vehicle release documents to defendants' office in mid-April 2011.

Plaintiff also provided a declaration by Manual Corrales, Jr., who qualified as an expert witness, on the standard of care of lawyers who handle automobile personal injury cases in Southern California. Corrales has represented plaintiffs and defendants in personal injury cases in California, including numerous automobile accident cases, since 1985. He stated that in a

serious personal injury case, at minimum, the plaintiff's attorney must have the vehicle inspected by an expert to determine if an equipment malfunction was a cause or a contributing factor in the accident or the plaintiff's injuries. Although Barnett had taken the first step by sending the preservation letter, he should have done more: he should have contacted AAA again and obtained written confirmation that AAA would not dispose of the vehicle. Barnett also should have inquired as to when the Prius would be sold, given that he knew the Prius was being stored in an auction house. If AAA did not comply, Barnett was required to employ an expert to examine the Prius as soon as reasonably possible before AAA disposed of it.

As to causation, plaintiff argued that by failing to preserve the Prius as evidence, defendants made it difficult if not impossible to prove her product liability claim against Toyota. She argued that because defendants were responsible for the loss of critical evidence, they should bear the burden of proof as to causation, and must show that their negligence did not deprive her of a meritorious product defect claim. In support of her burden-shifting theory, she cited *Galanek v. Wismar* (1999) 68 Cal.App.4th 1417, 1426–1427 (*Galanek*).[3]

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[3] In *Galanek*, *supra*, 68 Cal.App.4th 1417, a legal malpractice action, the plaintiff's opening statement at trial established a prima facie case that the front seat in her vehicle was defective—during a collision, the front seat failed immediately upon impact and sent the plaintiff into the rear of the car, resulting in a sudden back and forth movement that caused the plaintiff's brain injury—and that the defendants (the plaintiff's former attorneys) were negligent in failing to preserve the vehicle as evidence to be used in her product liability action. (*Id.* at p. 1425.) Based on the plaintiff's inability to prove she

Finally, plaintiff argued that her action was not barred by the doctrine of judicial estoppel.[4] Given her lack of success in the first action—she failed to prove that AAA had a duty to comply with the preservation letter—she argued that the doctrine of judicial estoppel does not apply.

Defendants' Reply

Defendants denied that they had "agreed to investigate and to employ investigators or experts to determine" whether there was a viable product liability claim. However, they conceded they had a duty to conduct a reasonable investigation of other potential claims. They argued their investigation was reasonable, and because they did not discover a possible defect in the Prius, they did not advise plaintiff to pursue a product

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would have obtained a better outcome in the product liability action if the vehicle had been preserved, defendants successfully moved for nonsuit at the conclusion of the plaintiff's opening statement. (*Ibid.*) The appellate court reversed, finding that the burden of proof on causation should be shifted from the plaintiff to the defendants as a result of their negligent failure to preserve the vehicle. (*Id.* at pp. 1426–1427.)

[4] "The elements of judicial estoppel are '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.' [Citations.] Even if the necessary elements of judicial estoppel are satisfied, the trial court still has discretion to not apply the doctrine. [Citation.]" (*Owens v. County of Los Angeles* (2013) 220 Cal.App.4th 107, 121.)

liability claim. This was explained in the Barnett declaration, which was not rebutted.

Defendants argued that where there is no disputed issue of fact as to the reasonableness of a law firm's conduct, the standard of care may be decided as a matter of law. (*Unigard Ins. Group v. O'Flaherty & Belgum* (1995) 38 Cal.App.4th 1229, 1237.) Here, they argued, "the undisputed facts demonstrate that Plaintiff cannot prove beyond sheer speculation that she would have obtained a better result against Toyota, 'but for' the Firm's alleged conduct."

Defendants also argued against shifting the burden of proof under *Galanek*, *supra*, 68 Cal.App.4th 1417. In *Galanek*, the defendants were aware that a mechanical failure in the car seat had contributed to the plaintiff's injury. In this case, there was no indication that a defect in the Prius had contributed in any way to plaintiff's injury.

Finally, defendants distinguished between judicial estoppel, a theory they were not asserting, and judicial admission, which is the admission of a fact in a pleading. (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271.) The allegation in plaintiff's previous complaint that AAA was responsible for the loss of the Prius constituted a judicial admission, which "'may be commented on in argument and relied on as part of the case.' [Citation.]" (*Ibid.*) A judicial admission results in "'a *waiver of proof* of a fact by conceding its truth, and . . . has the effect of removing the matter from the issues.' [Citation.]" (*Ibid.*)

Trial Court's Ruling

The trial court's written order stated that upon

consideration of the papers and arguments of the parties, it was granting the summary judgment motion "on all grounds asserted by Defendants, as follows[.]" The order then discussed three of four elements—duty, breach, and causation—of a malicious prosecution claim.

Duty. The court found that defendants had agreed to represent plaintiff in connection with her personal injury claim against the other driver. The scope of the representation included the duty to "investigate and consider all pertinent claims, including a separate product liability action."

Breach. Although a breach of duty ordinarily presents a question of fact, it may be resolved as a matter of law "'if there is no reasonable doubt as to whether the attorney's conduct fell below the standard of care.' (*Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 396 [*Dawson*].)" The issue is whether defendants failed to exercise the skill, prudence, and diligence of an ordinary attorney in investigating a potential claim for product liability against Toyota and preserving evidence—the Prius—relevant to that potential claim.

Barnett's declaration showed the firm conducted a reasonable investigation of a potential product liability claim against Toyota. The declaration by Corrales did not create a triable issue of fact on the adequacy of that investigation.

As to the duty to preserve the Prius, the court found that defendants had complied with the standard of care by sending a preservation letter. The letter informed "AAA that the vehicle was a critical piece of evidence and request[ed] that it not be altered or repaired or damaged without reasonable notice." The receipt of the letter was acknowledged by AAA, and the letter was placed in plaintiff's claims file. Under these circumstances,

the letter "imposed a legal duty upon AAA to preserve the vehicle. See *Reid*[, *supra*,] 173 Cal.App.3d [at pp.] 580–81."

The court found that Corrales's expert opinions as to what further steps defendants should have taken to preserve the vehicle were "insufficient to raise triable issues of fact as to whether Defendants breached the duty to preserve the vehicle." The court explained that the preservation letter "was included in Plaintiff's claim file and imposed a legal duty upon AAA to preserve the vehicle. Corrales' opinions as to what Defendants should have done are based on subsequent conduct by AAA that was not within the control of Defendants, and they ignore AAA's legal duty to preserve the vehicle."

Causation. The trial court stated that "[i]n order to prevail on the legal malpractice action, Plaintiff must prove that the underlying products liability action would have resulted in a better outcome but for Defendants' alleged legal malpractice. See *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1239; *Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514, 1518–1519. Therefore, Plaintiff must prove the underlying products liability action. See *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 833–34. Like breach of duty, causation is ordinarily a question of fact that may be resolved as a matter of law 'if reasonable minds could not differ as to whether there was causation.' See *Dawson*, *supra*, 109 Cal.App.4th at p. 396."

The court found that defendants had satisfied their initial burden of showing that plaintiff was incapable of proving the element of causation. Plaintiff, who bore the burden of showing a triable issue of material fact (Code Civ. Proc., § 437c, subd. (p)(2)), did not "submit any evidence of a meritorious products liability case."

The trial court distinguished *Galanek*, *supra*, 68 Cal.App.4th at pp. 1426–1427, an attorney malpractice action in which the burden of proof on causation was shifted from the plaintiff to the attorney defendants as a result of their negligent failure to preserve evidence critical to the plaintiff's underlying product liability action. The court found the rationale for shifting the burden of proof in *Galanek* did not apply in this case, given that the preservation letter "imposed a legal duty upon AAA to preserve the vehicle."

The trial court granted the motion for summary judgment and entered judgment for defendants. Plaintiff filed a timely notice of appeal from the judgment.

DISCUSSION

Plaintiff contends that summary judgment was improper because defendants did not present admissible evidence to negate any of the elements of a legal malpractice claim, and she presented sufficient evidence to establish a triable issue of material fact as to whether defendants were negligent in failing to preserve the Prius. We do not agree.

In reviewing a summary judgment ruling, we independently examine the record to determine whether there are triable issues of material fact. (*Saelzler v. Advanced Group* 400 (2001) 25 Cal.4th 763, 767.) "In performing our de novo review, we view the evidence in the light most favorable to plaintiffs as the losing parties. (*Saelzler*, *supra*, 25 Cal.4th at p. 768.)" (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) If the moving party defendants show that the plaintiff cannot establish one or more elements of the action,

the burden shifts to the plaintiff to establish a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).)

In order to establish a professional negligence claim against attorney defendants, a plaintiff must prove each of these elements: "'(1) the duty of the professional to use such skill, prudence, and diligence as other members of [the] profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence. [Citation.]' [Citation.]" (*Hecht, Solberg, Robinson, Goldberg & Bagley v. Superior Court* (2006) 137 Cal.App.4th 579, 590.)

A. Duty to Investigate Potential Claims

Notwithstanding the limited scope of their retainer agreement, defendants conceded, and the trial court found, they owed plaintiff a duty to conduct a reasonable investigation of other potential claims, including product liability.

B. No Expert Testimony Required For Standard of Care

Plaintiff challenges defendants' failure to present expert testimony to establish "the standard of care of a lawyer investigating an automobile products liability claim." She argues "there is no evidence that what Barnett says he did satisfied the standard of care of a lawyer as defined in CACI 600."[5] We find no error.

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[5] CACI No. 600 contains optional language regarding expert testimony that may be given in cases where expert testimony is required: "[You must determine the level of skill and care that other reasonably careful [*insert type of professional*]

"'The formulation of the standard of care is a question of law for the court. [Citations.] Once the court has formulated the standard, its application to the facts of the case is a task for the trier of fact if reasonable minds might differ as to whether the defendants' conduct has conformed to the standard. [Citations.]' [Citation.] Only if the circumstances permit no reasonable doubt about whether the attorney's conduct did or did not violate the standard of care, may the court as a matter of law resolve the question whether an attorney breached a duty to clients. [Citation.]" (*Unigard Ins. Group v. O'Flaherty & Belgum*, *supra*, 38 Cal.App.4th at p. 1237.)

The Barnett declaration explained the factual basis for the firm's decision against advising that plaintiff pursue a product liability action against Toyota: it found no factual basis to support a viable product liability claim. The trial court admitted the declaration over plaintiff's objections that it contained inadmissible hearsay; improper opinions beyond the knowledge, skill, experience, education and expertise of the witness; and improper expert opinions that Barnett was not qualified to provide. Based on the percipient information contained in the Barnett declaration, the court found defendants had satisfied their initial burden of showing the steps taken to investigate any other potential claims. The burden of proof had shifted to plaintiff to create a triable issue of fact. Because plaintiff did not present any evidence on the inadequacy of the investigation, the court concluded she had failed to meet her burden of proof. We

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would use in similar circumstances based only on the testimony of the expert witnesses[, including [*name of defendant*],] who have testified in this case.]"

find no legal error in the trial court's analysis, nor abuse of discretion in its admission of the Barnett declaration.

At trial, expert testimony is required to establish the standard of care in malpractice cases "unless the circumstances are such that the required conduct is within the layperson's common knowledge. [Citations.]" (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968 [medical malpractice action]; *Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 716 [legal malpractice action].) "While California law holds that expert testimony is admissible to establish the standard of care applicable to a lawyer in the performance of an engagement and whether he has performed to the standard [citation], it by no means clearly establishes the parameters of the necessity of expert testimony to the plaintiff's burden of proof. In some situations, at least, expert testimony is not required. [Citations.]" (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 810.)

Plaintiff argues that without the guidance of expert testimony, a jury in a legal malpractice action will be unable to determine the parameters of a competent investigation and will have no basis to evaluate the adequacy of the particular investigation conducted by the attorney defendants. The difficulty with this contention is that even assuming the police accident report, photographs of the vehicles, and NHTSA website failed to rule out a possible mechanical defect, plaintiff's inability to have the Prius examined by a mechanical expert was due to the sale of the vehicle by AAA. As discussed below, AAA's failure to preserve the Prius was a superseding cause that rendered this alleged inadequacy in defendants' investigation irrelevant.

C. AAA's Duty to Preserve Evidence

The trial court concluded that because the preservation letter imposed a legal duty on AAA to preserve the Prius, defendants had fulfilled their duty of care to plaintiff. In reaching this conclusion, the court relied on the following language in *Reid*: "Accordingly, we hold as a matter of law that, in the absence of a specific request by either Galloway [the insured] or Reid [the permissive driver], State Farm [the insurer] had no duty to preserve the 1978 Honda vehicle for plaintiff Reid." (*Reid*, *supra*, 173 Cal.App.3d at p. 581.)

The Reid Decision

Reid involved a single-car accident resulting in property damage to the vehicle, a Honda Accord, and personal injuries to the driver (plaintiff Reid, a permissive user) and a passenger (Tiller). (*Reid*, *supra*, 173 Cal.App.3d at pp. 567.) After declaring the Accord a total loss, the insurer (State Farm) reached a property damage settlement with the owner (Galloway, the policy holder), and Galloway transferred ownership of the car to State Farm. (*Ibid.*) State Farm paid Reid's medical expenses (up to policy limits), and settled Tiller's claims against Galloway and Reid. (*Ibid.*)

Later, after State Farm had disposed of the Accord, Reid sued State Farm for failing to preserve the car as evidence for his product liability action against the manufacturer. (*Reid*, *supra*, 173 Cal.App.3d at p. 563.) In its motion for summary judgment of Reid's claims for breach of the implied covenant of good faith and fair dealing, and willful and intentional destruction of evidence, State Farm established that no one had brought to its attention the existence of a possible defect in the Accord or requested that the car be preserved. (*Id.* at pp. 563, 567–568.)

The trial court granted State Farm's motion and entered judgment in its favor. (*Reid*, *supra*, 173 Cal.App.3d at p. 564.) On appeal, Reid argued that as a permissive user of the Accord, he was owed a duty of good faith and fair dealing by State Farm. (*Id.* at p. 562.) State Farm conceded this to be true (*id.* at p. 569), but argued it properly disposed of the Accord, which it had declared a total loss and purchased from the insured. (*Id.* at p. 576.) State Farm argued the duty to preserve a vehicle does not exist in the absence of a request by either the insured or permissive user, or an indication that the car is needed as evidence. (*Id.* at pp. 569, 580–581.)

In adopting State Farm's analysis, the appellate court stated, "we hold as a matter of law that, in the absence of a specific request by either Galloway or Reid, State Farm had no duty to preserve the 1978 Honda vehicle for plaintiff Reid." (*Id.* at p. 581.)

Plaintiff contends that because this language was not necessary to the court's decision in *Reid*—the insurer in that case had not been asked to preserve evidence—it is dictum. (See *Areso v. CarMax*, *Inc.* (2011) 195 Cal.App.4th 996, 1005–1006.) Defendants argue that because this language is part of the court's holding in *Reid*, it is not dictum. We conclude defendants are correct. Because language which comprises a court's holding is necessary to the court's decision, it is not dictum.

Contract Remedy for Spoliation

The holding in *Reid* is consistent with California law: when an insurer breaches a contractual obligation to its insured to preserve evidence, the insurer is subject to contract damages, whether for breach of contract, breach of the implied covenant of

good faith,[6] or promissory estoppel. (See *Coprich v. Superior Court* (2000) 80 Cal.App.4th 1081, 1089–1090 & p. 1090, fn. 5 (*Coprich*)[7]; see *Farmers Ins. Exchange v. Superior Court* (2000) 79 Cal.App.4th 1400, 1407, fn. 5 (*Farmers*).)

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[6] "It has long been recognized in California that '[t]here is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.' (*Comunale v. Traders & General Ins. Co*. (1958) 50 Cal.2d 654, 658.) This principle applies equally to insurance policies, which are a category of contracts. (*Ibid*.) Because the covenant is a contract term, in most cases compensation for its breach is limited to contract rather than tort remedies. (*Foley v. Interactive Data Corp*. (1988) 47 Cal.3d 654, 684.)" (*Kransco v. American Empire Surplus Lines Ins. Co*. (2000) 23 Cal.4th 390, 400.)

[7] In *Coprich*, the plaintiffs—Chantal Coprich and her minor son—were injured while riding in a rental car leased from the defendant (Board Ford). Two of the plaintiffs' family members were killed in the collision. Following the accident, Chantal Coprich "asked Board Ford and its insurer, Liberty Mutual, to preserve the vehicle for use as evidence. Her attorney then sought to examine the car and tires in July 1997, but a claims agent for Liberty Mutual informed him that they no longer existed or had been sold." (*Coprich*, *supra*, 80 Cal.App.4th at p. 1083.) The plaintiffs sued Board Ford and Liberty Mutual for negligent spoliation of evidence and other causes of action. The trial court granted a defense motion for judgment on the pleadings on the negligent spoliation cause of action. In overturning the trial court's order, the appellate court directed that the plaintiffs be allowed to amend their complaint to allege a claim for breach of contract. (*Id.* at p. 1092.)

For reasons of public policy, California does not permit a tort remedy for intentional or negligent spoliation of evidence. (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1 [no tort remedy for intentional spoliation committed by party to litigation (so-called first-party spoliation)]; *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464, 466 [no tort remedy for intentional spoliation committed by non-party to litigation (so-called third-party spoliation)]; *Farmers*, *supra*, 79 Cal.App.4th 1400 [no tort damages for negligent spoliation of evidence].) However, this "does not does not preclude the existence of a duty [to preserve evidence] based on contract. (See *Temple Community*, *supra*, 20 Cal.4th at p. 477.) While the existence of a tort duty in certain circumstances depends on policy considerations (*Cedars–Sinai*, *supra*, 18 Cal.4th at p. 8 . . .), those policy considerations do not negate the existence of a contractual obligation created by mutual agreement or promissory estoppel. A contractual remedy may give rise to some of the same burdens and costs as would a spoliation tort remedy, but we cannot negate a contractual obligation based on policy considerations other than specific grounds such as illegality (Civ.Code, §§ 1598, 1599, 1608, 1667) and unconscionability (Civ.Code, § 1670.5)." (*Coprich*, *supra*, 80 Cal.App.4th at pp. 1091–1092); *Temple Community*, at p. 477 ["[t]o the extent third parties may have a contractual obligation to preserve evidence, contract remedies, including agreed-upon liquidated damages, may be available for breach of the contractual duty"].)

Citing *Cooper*, *supra*, 177 Cal.App.4th 876, plaintiff argues that because AAA did not promise to preserve the Prius, the preservation letter was insufficient to impose a legal duty on AAA to preserve the vehicle. We do not agree. *Cooper*, which is

consistent with the trial court's ruling that the preservation letter created an obligation on the part of AAA to preserve the Prius, stated: "Whether based on a contract principle of promissory estoppel or a tort theory of a voluntary assumption of a duty, plaintiff relied to his detriment on State Farm's promise to preserve the tire and/or voluntary assumption of a duty. As a result, State Farm owed a duty to plaintiff. (See, e.g., *Coprich*[, *supra*,] 80 Cal.App.4th 1081, 1091–1092 . . . .)" (*Cooper*, at p. 892, fn. omitted.)

Plaintiff argues the Corrales declaration created a triable issue of material fact as to the additional steps a reasonable attorney would have taken to obtain a promise from AAA to comply with the preservation letter. However, the preservation letter had already created an obligation on the part of AAA to preserve the Prius (or, at minimum, to provide reasonable notice before disposing of it). Hence, Corrales's assumption that additional steps were required to create an enforceable obligation is not supported.

We may decide as a matter of law whether a breach has occurred if there is no "reasonable doubt about whether the attorney's conduct did or did not violate the standard of care . . . ." (*Unigard Ins. Group v. O'Flaherty & Belgum*, *supra*, 38 Cal.App.4th at p. 1237.) In light of our determination that defendants satisfied the standard of care by sending the preservation letter to AAA, we find there is no triable issue of material fact. The authorities cited by plaintiff—*Cooper*, *supra*, 177 Cal.App.4th at pp. 892, 895, 896, and *Farmers*, *supra*, 79 Cal.App.4th at pp. 1401, 1406, 1407—do not compel a different result, as they did not address whether an insurer would be

bound to comply with a preservation letter that it had acknowledged and placed in the insured's claims file.

E. No Triable Issue of Material Fact as to Causation

Plaintiff contends defendants should have known that AAA was on the verge of disposing of the Prius by early to mid-April 2011. She cites the declaration by her mother regarding the delivery of transfer of title documents to defendants' office, and defendants' knowledge that the Prius had been declared a total loss and was being stored at an auction house. Based on this evidence, plaintiff argues there is a triable issue of fact as to "whether defendants' negligence resulted in AAA disposing of the vehicle and Kattuah losing it as evidence."[8]

As previously discussed, plaintiff's principal complaint is with AAA, whose conduct constituted an independent intervening cause of her alleged harm. (See *Zalta v. Billips* (1978) 81 Cal.App.3d 183, 191.) Notwithstanding Corrales's opinions regarding the additional steps that defendants should have taken to preserve the Prius, defendants are not liable for the acts of a third party. (See *ibid.*) Thus we agree with the trial court's determination that because Corrales's opinions were "based on

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[8] In order to prevail at trial on her malpractice cause of action, plaintiff must show that the preservation of the Prius would have resulted in a favorable judgment in her product liability case. "California follows the majority rule that a malpractice plaintiff must prove not only negligence on the part of his or her attorney but that careful management of the case-within-a-case would have resulted in a favorable judgment '*and collection of same* . . . .' [Citation.]" (*Garretson v. Harold I. Miller* (2002) 99 Cal.App.4th 563, 568–569.)

subsequent conduct by AAA that was not within the control of defendants," his declaration failed to create a triable issue of material fact as to causation.

Plaintiff challenges the denial of her request to apply *Galanek's* burden-shifting analysis. (*Galanek*, *supra*, 68 Cal.App.4th at pp. 1427–1428.) We find no error. The trial court correctly distinguished *Galanek* based on the failure of the defendant in that case to establish the satisfaction of the duty of care to the plaintiff.

DISPOSITION

The judgment is affirmed. Defendants are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.