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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

CYNTHIA BECK, Plaintiff and Appellant, v. MORRIS, POLICH & PURDY LLP et al., Defendants and Respondents.	B270067 (Los Angeles County Super. Ct. No. BC453938)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jessner, Samantha P., Judge. Affirmed.

Moskovitz Appellate Team, Myron Moskovitz, James A. Ardaiz and George P. Schiavelli; Gwire Law Offices, William Gwire and Bruce M. Glassner for Plaintiff and Appellant.

Thompson Coe & O'Meara, Stephen M. Caine, Frances M. O'Meara and Kenny C. Brooks for Defendants and Respondents.

Plaintiff Cynthia Beck brought this malpractice action against the attorneys who defended her in a case in which she was found liable for $2 million in compensatory damages and $4 million in punitive damages. The defendant attorneys initially prevailed on a motion to strike from Beck's complaint any claim to recover the punitive damages which had been awarded against her, on the basis that California public policy prevents shifting an award of punitive damages to a party who was merely negligent. Thereafter, the defendant attorneys sought summary judgment on the basis that none of their alleged breaches of duty caused Beck any damages. The trial court agreed, with respect to several of the purported breaches of duty, and granted summary adjudication accordingly. Beck then dismissed the remainder of her complaint, and appeals. In her opening brief, she challenged the trial court's rulings with respect to the motion to strike punitive damages and the summary adjudication of three specific breaches of defendants' duty. In her reply brief, she disclaims any argument with respect to two breaches of duty, reducing her appeal to two simple questions: (1) can a legal malpractice plaintiff, who alleges the defendant attorneys' negligence caused an award of punitive damages to be entered against her, recover the amount of the punitive damages from the negligent attorneys as compensatory damages? and (2) is there a triable issue of fact that the defendant attorneys' failure to raise an advice of counsel defense in the underlying action caused punitive damages to be awarded in that action against Beck? As we resolve the second question against Beck, there is no need to consider the first, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Underlying Action*

The underlying action, in which punitive damages were awarded against Beck, is a case the parties refer to as *Goldstein II*. It resulted in an appellate opinion in which the judgment against Beck was affirmed. (*Goldstein v. Beck* (Dec. 23, 2009, B204904 [nonpub. opn.].) Our discussion of the facts comes largely from that opinion.

The Goldsteins and Beck are next-door neighbors; when the Goldsteins bought the property next door to Beck, there was a 10-foot high brick wall separating the properties. The Goldsteins renovated a reflecting pool in their backyard, which approached the wall. Beck commissioned a survey which showed that the wall encroached on her property by five feet and the pool by less than two feet. In June 2001, she "advised the Goldsteins by letter that she claimed a portion of the wall and the Goldsteins' reflecting pool was on her property. She demanded that the encroachments be removed within 24 hours." In November 2001, the Goldsteins filed a complaint against Beck, seeking to quiet title to the disputed property; Beck cross-complained.

On September 17, 2002, the parties participated in a mediation before a retired judge, which resulted in a handwritten settlement agreement. The settlement agreement provided that Beck would pay the Goldsteins $75,000; the Goldsteins would convey title to the disputed land to Beck; Beck would demolish the existing wall and build a new wall on her side of the boundary line; and the Goldsteins would remove or fill in the pool on the boundary line, subject to Beck's approval of the Goldsteins' engineer's plans.

Thereafter, the parties repeatedly returned to the mediator for resolution of their disputes regarding the terms of the

settlement agreement, resulting in several mediator's reports which were ultimately held to have been part of the settlement agreement. For example, one such report concluded that the Goldsteins could not satisfy the agreement by filling in the pool alone, but had to both remove the pool and fill the hole.

Beck removed the wall and the Goldsteins removed the pool. However, Beck did not construct a new wall. Because of the grade difference between the properties, the city required the wall to be a retaining wall, but Beck "refused to build a retaining wall." Moreover, the Goldsteins had been unable to fill in the hole left by the pool removal. As a portion of the hole was on Beck's property, the Goldsteins needed "to fill and grade a portion of Beck's property and therefore required a consent letter from her pursuant to the Los Angeles Municipal Code." "After the Goldsteins and Beck exchanged several proposed drafts of the consent letter, Beck refused to sign a consent letter."

The pool had been removed in late 2003. As early as the mediator's third report, in early December 2003, Beck was ordered to sign a consent letter. Beck refused to build the wall or sign the consent letter. This led to a fourth report from the mediator, in June 2004. The mediator "ordered Beck to sign a consent letter in the form attached to his report." He "ordered the Goldsteins to submit a grading report to Beck, with Beck to object to any report within five days, at which time it would be deemed presumptively correct and Beck would be required to execute the consent letter."

Beck agreed that she received the Goldsteins' grading report on July 19, 2004, but did not inform the Goldsteins of her geologist's disapproval of the plan until July 26, 2004. "Beck contended that five days [after the receipt of the report], July 24,

2004, was a Saturday, and that her response was excused until Monday, July 26, 2004."

At this point, the Goldsteins attempted to obtain compliance by reviving their initial quiet title action against Beck. The court concluded that action had been resolved by the settlement agreement. Thereafter, in April 2005, the Goldsteins brought the *Goldstein II* suit against Beck for breach of the settlement agreement and nuisance – for refusing to sign the consent letter and build the wall.

The case proceeded to jury trial; the jury ruled in favor of the Goldsteins, and awarded $2 million in compensatory damages and $4 million in punitive damages. On Beck's appeal, Division Seven affirmed. The court rejected Beck's substantial evidence challenge. Specifically as to the nuisance judgment, the court held, "by failing to honor her obligations under the Settlement Agreement, Beck created a condition on the Goldsteins' property that interfered with their use and enjoyment of their property. They no longer had a reflecting pool, a wall on the southern boundary of their property, or use of their driveway due to the piles of dirt in it, and their property was in a continuous state of demolition and construction, with a large hole that they could not fill in."

The appellate court also rejected Beck's challenge to the evidence justifying punitive damages, stating, "substantial evidence supports the jury's findings of malice and oppression. Beck, without excuse or justification, refused to sign the consent letter ordered by [the mediator] pursuant to the Settlement Agreement and the subsequent Mediator's Reports and required by the Los Angeles Municipal Code; Beck received the Goldsteins' grading plans, yet refused to respond in a timely fashion; and Beck accepted the Settlement Agreement's terms by compelling

the Goldsteins to remove their pool and create a hole on their premises, yet later claimed there was no agreement and that she did not have to perform by building a wall or signing the consent letter."

2. *The Malpractice Complaint*

Beck had been represented in the underlying action by two different law firms, one of which is no longer a party to this action. The defendant attorneys who are party to this appeal are Morris, Polich & Purdy LLP, and its attorney Dean Olson. We refer to them collectively as MPP.

Beck alleges causes of action for professional negligence and breach of fiduciary duty against MPP. She alleges that MPP's negligent representation of her in the underlying action "resulted in" the $4 million punitive damage award against her. Specifically, and as limited on appeal, she argues that MPP's failure to raise the advice of counsel defense in the underlying action was the cause of the punitive damage award. During the ongoing proceedings before the mediator, Beck had been represented by David Marcus of Marcus, Watanabe, Snyder & Dave. Beck took the position that her delay in responding to the Goldsteins' grading plans, which was one of the bases relied on by the Court of Appeal in affirming the finding of malice, was, in fact, due to the advice of Attorney Marcus. Beck believed that MPP was negligent in not raising in the underlying case that Beck missed the mediator's five-day deadline because she was relying on her attorney's advice that she did not have to respond on Saturday (July 24, 2004), and could wait until the following Monday (July 26, 2004).

3. *Claim for Punitive Damages is Stricken*

MPP initially moved for summary adjudication of the issue of whether Beck could recover from it the punitive damages she

incurred in the underlying action. The court concluded that those damages could not be recovered, although, procedurally, the issue was not properly raised in a motion for summary adjudication. The trial court, in its discretion, construed the motion as a motion to strike, and granted it.

4. *Motion for Summary Judgment*

MPP next moved for summary judgment, arguing against each alleged act of wrongdoing raised by Beck. As to the failure to raise the advice of counsel defense, MPP argued that there is no triable issue of fact on the issue of causation. MPP asserted that Beck could not establish that she would have obtained a better result had MPP asserted the advice of counsel defense to the Goldsteins' claim for punitive damages arising out of the missed due date for her grading plan response. MPP based its argument on several grounds, including that an advice of counsel defense would not have been viable, because Beck attributed her failure to sign the consent form to advice of her geologist, not advice of counsel – an argument the jury clearly rejected. Moreover, MPP noted that Beck's interrogatory answers in this case indicate that the only documentary evidence establishing her claimed advice of counsel defense (in the underlying action) was a July 27, 2004 fax from Attorney Marcus purportedly advising her that it was acceptable to delay her objections to the grading plan to July 26, 2004.[1] Beck could not possibly have relied on a July 27 fax in deciding to delay to July 26.

In support of its argument that Beck attributed her failure to sign to the advice of her geologist, rather than the advice of counsel, MPP relied on, among other things, an excerpt from the

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[1] According to MPP, the fax was never produced.

deposition of Gerry Saenz – Beck's partner, agent, and litigation consultant – in which Saenz admitted that, in June 2007, he e-mailed MPP and told it that Beck could not sign the Goldsteins' consent to grade because her geologist advised her that the consent did not comply with the municipal code. The e-mail was attached as an exhibit. In it, Saenz informed MPP that "Ms. Beck would not sign the Consent to Grade certificate because her geologist, Mark Swiatek, advised her that it did not fulfill all of the requirements of the Los Angeles Municipal Code to be finalized as a grading plan. [¶] Ms. Beck recalls that Mr. Swiatek advised her the grading and drainage on her lot in the area of work was not shown on the plan and [it] therefore was incomplete."

MPP also relied on excerpts from the trial transcripts of the underlying action.[2] This included Beck's testimony that her

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[2] Beck would subsequently object to these transcripts as not properly authenticated, as the attorney who purported to authenticate them had not been admitted to the Bar at the time of the underlying trial, and therefore was not likely to have had personal knowledge sufficient to authenticate the transcripts. In response to this objection, MPP, in connection with its reply memorandum, sought judicial notice of the transcripts. The trial court sustained Beck's lack of personal knowledge objection and denied judicial notice of the transcripts, on the basis that "they are impermissibly introduced in reply." The court concluded that, as a matter of due process, Beck had a right to be fully advised of the evidence against her in connection with the moving papers. On appeal, MPP relies on some of its transcript evidence in its respondent's brief. In reply, Beck does not argue that her objections were sustained to the evidence; instead, she relies on some of the transcript evidence herself. We therefore conclude that Beck has abandoned her objections to this evidence. In any event, we conclude the trial court erred in denying judicial notice

"professionals" had concluded that the Goldsteins never submitted the "plan that they [the professionals] wanted." When asked to identify her "professionals," she agreed that it included her geologist, Mr. Swiatek, and "I don't know who else."

5. *Beck's Opposition*

In opposition to the summary judgment motion, Beck argued that the July 27 fax from Attorney Marcus was not the only evidence supporting her advice of counsel defense. Beck submitted her own declaration, recounting a telephone call from Attorney Marcus on which she relied in delaying her response to the Goldsteins' July 19, 2004 grading plan. She stated the following: "On or about July 22, 2004, David Marcus . . . called me and advised that he'd received the Goldsteins' grading plan on July 19, 2004. He'd had it reviewed by my geologist, Mark Swiatek, who found the plan defective and not in compliance with Los Angeles Code. Mr. Marcus told me that because [the mediator's] deadline for responding fell on a Saturday, the Code of Civil Procedure allowed him to respond the following Monday (July 26). He said that he would object to the grading report then, and subsequent events proved that he did. I relied upon Mr. Marcus' advice."

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on the basis that it was sought in connection with MPP's reply. MPP had presented the evidence in connection with its moving papers; Beck was well aware of it. The request for judicial notice came only in response to Beck's objection regarding authentication.

As to the issue of whether Beck had actually relied on her geologist rather than her attorney, Beck responded to three key facts in MPP's separate statement as follows:[3]

Fact 22: Beck "refused to sign the consent after being advised by her geologist, Mark Swiatek, that the form did not comply with Los Angeles Municipal [Code] requirements for grading." Beck responded, "**DISPUTED** on the basis that Beck also relied upon a July 22 or 23, 2004 telephone conversation with David Marcus in which he told her that he would object to the Goldsteins' grading plan the following Monday (July 26) because the Code of Civil Procedure extended the deadline to respond to the next business day following the July 24 deadline."

Fact 93: "On June 21, 2007, Beck, through her litigation consultant Saenz, advised MPP . . . that the reason she could not sign the Consent to Grade certificate was because her geologist, Mark Swiatek, advised her that it did not fulfill all of the requirements of the Los Angeles Municipal Code to be finalized as a grading plan." Beck responded, "**UNDISPUTED** that Mr. Swiatek's advice to [her attorneys] was the reason that Beck did not sign. [Citation.] But it was her attorney's advice that led her to not respond *timely*. [Citation.]"

Fact 94: "On June 26, 2007, Beck testified in trial in [the underlying action] that she was advised by her professionals, meaning Mark Swiatek, that she was never given a proper grading plan." Beck responded, "**UNDISPUTED**."

6. *MPP's Reply*

In reply, MPP argued that it was entitled to summary judgment on the issue of causation. It stated, "Beck fails to put

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[3] Beck also interposed objections prior to her responses. Her objections were either overruled or subsequently abandoned, as noted in footnote 2, *ante*.

forth *any* evidence addressing the . . . specific question as to why asserting an 'advice of counsel' defense (*i.e.,* legal counsel) would have garned a different result given that MPP did inform the jury that Beck's refusal to sign the consent order to fill the hole (the basis of the Goldsteins' entire action) was based on the advice of Beck's . . . retained geologist."

7. *Order Granting Summary Adjudication*

After a hearing, the court granted summary adjudication with regard to some issues of duty and denied it with respect to others. As to the failure to raise the advice of counsel defense, the court granted summary adjudication on the basis that the issue was moot, given that advice of counsel would have gone only to the punitive damages which had been awarded against Beck, and the court had previously stricken any claim for those damages.

8. *Subsequent Proceedings and Appeal*

Beck responded to the trial court's ruling by requesting to dismiss, without prejudice, her remaining claims. They were dismissed. Thereafter, the court entered judgment in favor of MPP. Beck filed a timely notice of appeal.

DISCUSSION

On appeal, Beck argues that she has a viable claim that MPP's failure to raise the advice of counsel defense to the claim for punitive damages in the underlying action resulted in punitive damages being imposed against her. This argument encompasses both (1) the legal issue that a legal malpractice plaintiff can recover, as compensatory damages, punitive damages which were allegedly incurred as a result of the attorney's malpractice; and (2) the factual issue that a triable issue of fact exists that the failure to raise the advice of counsel defense actually caused the imposition of punitive damages. As

we resolve the second issue against Beck, we have no need to address the complex web of policy interests raised by the first.

1. *Standard of Review*

" 'A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail.' [Citation.] The pleadings define the issues to be considered on a motion for summary judgment. [Citation.] As to each claim as framed by the complaint, the defendant must present facts to negate an essential element or to establish a defense. Only then will the burden shift to the plaintiff to demonstrate the existence of a triable, material issue of fact. [Citation.]" (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 252.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) We review orders granting or denying a summary judgment motion de novo. (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 72; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 579.)

We exercise "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.)

2. *Failure to Raise the Advice of Counsel Defense Did Not Cause the Imposition of Punitive Damages*

In a legal malpractice case, the plaintiff must establish causation under the but-for test. Specifically, she must show that

but for the alleged malpractice, it is more likely than not that she would have obtained a more favorable result. (*The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 851.)

Here, Beck asserts that MPP committed malpractice, and caused her punitive damages, by failing to raise the advice of counsel defense. To be sure, "[a]dvice of counsel may constitute a defense to the charge of malice . . . ." (*Templeton Feed & Grain v. Ralston Purina Co.* (1968) 69 Cal.2d 461, 472, fn. 7.)

Beck's declaration regarding the July 22 phone call received from Attorney Marcus, as relied upon in her response to MPP's separate statement of undisputed facts, raises, at most, a triable issue of fact that she relied on her attorney's advice in delaying her response to the Goldsteins' grading plan for two days – from July 24 to July 26, 2004. It does not raise a triable issue of fact that she relied on his advice for her decision never to sign a consent to grade. (She never signed the consent.) As Beck explained in response to Fact 93, it was undisputed that her geologist's advice was the reason she did not sign; her attorney's advice was the reason she did not respond timely.

Even if MPP had been negligent in not putting before the jury Beck's reliance on counsel's advice for delaying her response from July 24 to July 26, there is simply no likelihood that Beck would have obtained a more favorable result. The jury did not impose $4 million in punitive damages because Beck missed a deadline over a weekend; the jury imposed $4 million in punitive damages because Beck's obstreperousness interfered with the Goldsteins' right to use and enjoy their property for *years*. Beck's complaint about a less-than-two-foot encroachment caused the Goldsteins to remove their pool in late 2003, but Beck's adamant refusal to consent to a grading plan left an unfilled pool-sized hole in their yard up through the time of trial in 2007. Nor did

Beck ever build a wall to replace the one she had removed, even though she had agreed to do so in the 2002 settlement agreement.

Beck cannot reasonably argue that the two-day delay was responsible for any part of the $4 million punitive damage award. The mediator had first ordered Beck to sign a consent letter in December 2003. It was only after a further six months of legal wrangling and delay that the mediator drafted a consent letter and directed Beck to sign it or object within five days of receiving the Goldsteins' grading plan. After Beck blew the five-day deadline (by two days), it was more than seven months before the Goldsteins filed the underlying action for breach of contract, during which time Beck still refused to sign the consent to grade.

In short, while an unexcused two-day delay might conceivably have been seen by the jury as some evidence of malice and oppression, under no circumstance could it have been seen as a significant factor supporting an award of $4 million in punitive damages. Neither the entire award of punitive damages, nor any identifiable fraction thereof, can be shown to have arisen from it. Beck was not punished for a two-day delay in July 2004; she was punished because she *never* signed the consent or built the wall.

In recognition of this problem, Beck attempts to argue, for the first time in her reply brief on appeal, that the evidence shows that she relied on advice of counsel not just for the weekend delay, but for her decision to not sign at all. Beck's argument relies on a construction of her declaration not supported by that document. She argues that her declaration shows that Attorney "Marcus advised Beck that the Goldsteins' grading plan was 'not in compliance with Los Angeles Code'. Non-compliance with the law was *legal* advice given to Beck by

her lawyer – the lawyer she had retained for exactly that purpose." The argument continues, "Beck trusted *Marcus* to assess the value of Swiatek's opinion. She relied on Swiatek's opinion not directly but only as screened and confirmed by her attorney Marcus." We return to the language of Beck's declaration, in which she stated that Marcus told her that "he'd had [the Goldsteins' grading plan] reviewed by [Beck's] geologist, Mark Swiatek, who found the plan defective and not in compliance with Los Angeles Code." In other words, Beck declared that Attorney Marcus told her only that *Swiatek had found* the plan not in compliance with the code; she did not declare that Marcus in any way legally reviewed or confirmed that conclusion. This is consistent with Beck's response to MPP's separate statement, in which she said it was undisputed that "Mr. Swiatek's advice to her attorneys . . . was the reason that Beck did not sign," and added only that it was "her attorney's advice that led her to not respond *timely*." Having admitted that her geologist's advice, not her attorney's, was the reason she did not sign, she cannot reasonably argue that the failure to raise the advice of counsel defense had any effect on the damages imposed.[4]

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[4] In her reply brief on appeal, Beck also suggested for the first time that MPP had been negligent in not competently presenting her "advice of geologist" defense in the underlying action. This was not raised before the trial court, and cannot be raised for the first time in reply. In any event, it is belied by the record. Beck agreed that it was undisputed that she had testified in the underlying action that she was advised by her geologist that the Goldsteins' grading plan was improper. Division Seven's appellate opinion confirms that Beck argued, in the underlying action, that she had not breached any obligation to the Goldsteins on the basis that her engineer had timely communicated her

DISPOSITION

The judgment is affirmed. Beck shall pay MPP's costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.

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objections to the Goldsteins' plans, and the Goldsteins never responded to those objections.