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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

BRENT FERGUSON et al., Plaintiffs and Appellants, v. MICHAEL D. MEADOWS et al., Defendants and Respondents.	A094750, A095475 (San Francisco County Super. Ct. No. 996044)

Appellants[1] were personal injury plaintiffs and objectors to a proposed class action settlement in the *In re Unocal Refinery Litigation* (Super. Ct. Contra Costa County, No. C94-04141) stemming from a chemical release at the Unocal refinery in Rodeo. Shortly after securing awards in an arbitration proceeding established to allocate the settlement fund, appellants sued their retained counsel, respondents Michael D. Meadows and his firm, Casper, Meadows & Schwartz (collectively, Casper Meadows) as well as class counsel, Lieff Cabraser, Heimann & Bernstein (Lieff Cabraser). We affirm the summary judgment granted in favor of Casper Meadows.

I. BACKGROUND

A. *Appellants Retain Casper Meadows*

In August 1994, a processing tower at the Unocal refinery in Rodeo developed a leak, resulting in release into the atmosphere of the toxic chemical compound

[1] Appellants herein are Brent Ferguson and Florencia Prieto.

known as "Catacarb." Thousands of residents from neighboring communities were affected.

Casper Meadows represented numerous clients on an individual basis. Appellants were among those who signed contingent fee contracts with the firm. Casper Meadows specially designed the contract for potential clients with claims against Unocal arising from the Catacarb disaster. The agreement contained several references to the possibility that the client's claim might be part of a class action. The contingent fee was 33-1/3 percent if claims were resolved before trial or arbitration, and before trial setting, pretrial and settlement conferences, but 40 percent if claims were resolved after one of those events.

As well, the agreement treated the issue of conflicts of interest: "Attorneys may represent other persons damaged by the releases mentioned herein and Client understands that such multiple representation has advantages, but also may give rise to potential conflicts of interest of which Client is hereby advised. Each person's recovery may depend on factors such as age, severity of injury, extent of medical treatment, amount and duration of exposure, pre-existing health condition. Despite such potential conflicts of interest Client believes that the advantages of multiple representation outweigh any potential disadvantage and hereby waives any and all conflicts of interest that may arise from such multiple representation. Client acknowledges that Client has had the opportunity to discuss the question of conflict of interest with Attorneys and that this waiver is made after all questions have been fully answered." Both appellants read this provision.

The agreement also noted that in the event of an aggregate lump sum settlement, there would be conflicts between clients represented by Casper Meadows as to the size of their share, and that clients could consult with or hire another attorney in such event.

B. *The Underlying Litigation*

Pursuant to an August 1995 pretrial order, the trial court consolidated nine related actions, including the action filed by Casper Meadow on behalf of appellants

and multiple other individual plaintiffs, and designated them "complex litigation." The court vested primary responsibility for managing the litigation with a steering committee of plaintiffs' counsel, with Lieff Cabraser appointed as co-lead class counsel and Casper Meadows appointed as co-lead direct action counsel, and both firms also appointed as co-liaison counsel.

In February 1996, Lieff Cabraser submitted the first amended model complaint identifying four potential classes: personal injury, property damage, medical monitoring and punitive damages. Four months later, class counsel and Unocal entered into a stipulation and proposed order concerning class certification, subject to court approval. They agreed that plaintiffs would withdraw allegations of personal injury and property damage and the parties would stipulate to certification of a mandatory, non-opt-out punitive damages class, defined as all persons entitled to compensatory damages as a result of the "Catacarb" release. The court approved the stipulation after a hearing attended by Michael Meadows.

Casper Meadows did not object to the stipulated mandatory class. The order required publication of notice of withdrawal of the personal injury and property damage class allegations but not of certification of the mandatory punitive damages class, nor were appellants informed of this development.

Meanwhile, discovery was conducted, with over 100 depositions taken. The court appointed Judge Daniel H. Weinstein (ret.) as settlement master and referee who oversaw extensive settlement negotiations. Negotiations culminated in April 1997, with a tentative $80 million global settlement of the consolidated class and individual actions. The settlement called for dismissal of the punitive damage allegations.

By letter of April 24, 1997, Casper Meadows apprised its clients of the aggregate amount of the proposed settlement. On May 29, Michael Meadows authorized class counsel to dismiss all his clients' claims with prejudice in exchange for the right to participate in allocation of the $80 million settlement. He did not seek client authorization to dismiss.

The court set the motion to dismiss the punitive damages class claims for hearing on June 27, 1997; ordered class counsel to send notice of the hearing by first class mail by June 6 to all known members of the punitive damages class and to publish notice; and directed class counsel to file the motion with supporting papers by June 12. Opposition was due June 20.

By letter of June 10, Casper Meadows advised its clients of the status of the allocation plan as well as the motion to dismiss the mandatory punitive damages class action. Ferguson was dissatisfied with the settlement and the prospect of dismissal of the punitive damages class. Meadows explained it was not in Ferguson's best interest to be excluded from the settlement. He refused to object on Ferguson's behalf, indicated Ferguson could get another opinion but that it would be difficult to find a competent attorney willing to take on his individual case.

Appellants tried, but could not locate, substitute counsel. Thus they prepared and filed their written objections, in pro. per.[2] Ferguson attended the hearing and personally spoke against the settlement and dismissal.

The court approved the settlement and dismissed the class action, remarking that it was satisfied that the concerns expressed by objectors had been fully considered by class counsel and that the settlement appeared to be fair and reasonable for all parties involved.

Appellants followed Casper Meadows' advice to participate in the global settlement rather than appealing dismissal of the punitive damages claims. The final plan of allocation established procedures for claimants to apply for individual awards of compensation. The plan provided that each award would "be based on the merits,

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[2] The objections stated: "It is apparent that unfair, inadequate, and unreasonable compensatory awards will come from the $80 million settlement fund, therefor, I ask to seek only a punitive award from the $80 million fund. [¶] I am certain that if all injured plaintiffs are made to understand Class Counsel's motion to dismiss punitive damages, we would request all $80 million be allocated to punitive damage awards. [¶] I've been told the magnitude of UNOCAL's criminal act gives Class Counsel the strongest case for punitive damages ever."

or lack thereof, of the individual case. The amount of available funds to be distributed will *not* be a factor in setting individual case awards. If the sum of all awards exceeds the available pool, all awards will be adjusted down proportionately." No downward adjustments were necessary, as the awards did not exceed available settlement funds.

The settlement referee issued an order awarding plaintiffs' steering committee 7 percent of the $80 million settlement as reasonable attorney fees. One-half of that amount went to direct action counsel, with 85 percent distributed in equal amounts to Casper Meadows and another firm.

The arbitration panel heard appellants' claims in November 1997. Ferguson acknowledged that Attorney Michael Meadows adequately described the extent of Ferguson's injuries to the arbitrators. The panel awarded Ferguson $125,000 and Prieto $100,000. Deducted from the awards were costs advanced by Casper Meadows and a one-third contingent fee. Ferguson allowed that the award was adequate to compensate for his bodily injuries.

C. *Present Litigation*

Almost two weeks after receiving notice of their arbitration awards, appellants filed this action against Lieff Cabraser and Casper Meadows. The third amended complaint alleged nine causes of action against Casper Meadows, including legal malpractice; breach of fiduciary duty; breach of contract; breach of the implied covenant of good faith and fair dealing; fraud; and conspiracy to commit fraud. Woven through each cause were repeated charges that appellants (1) suffered the loss of a potential award of punitive damages against Unocal, and (2) received a compensatory damages award far below what they could have received had their lawyers acted differently. Appellants also asserted entitlement to restitution of all fees received by Casper Meadows.

The trial court sustained a demurrer without leave to amend as to the tenth cause of action for conspiracy, and struck allegations of emotional distress damages.

Casper Meadows moved successfully for summary judgment on the remaining claims. This appeal followed.

II. DISCUSSION

A. *Standard of Review*

"Summary judgment in favor of a defendant is proper if (1) the defendant shows that one or more elements of a cause of action cannot be established or there is a complete defense to it; and (2) the plaintiff fails to meet his or her burden of showing the existence of a triable issue of material fact. ([Code Civ. Proc.,] § 437c, subd. (*o*)(2).) Because a summary judgment motion raises only questions of law, we independently review the trial court's grant of summary judgment." (*Gray v. Stewart* (2002) 97 Cal.App.4th 1394, 1397.)

B. *No Triable Issue Exists on Appellant Prieto's Fraud Claims*[3]

The trial court determined that appellant Prieto's fraud claims were barred because she did not testify to any misrepresentation or otherwise oppose Casper Meadows' motion for summary judgment on these matters. Specifically, Prieto testified that *she did not contend* that Michael Meadows lied to her and *did not think she had any reason to believe* he intentionally concealed information from her. Prieto contends this showing is wanting, citing *Scheiding v. Dinwiddie Construction Co*. (1999) 69 Cal.App.4th 64, 83-84.

There, defendant construction company moved for summary judgment on the ground that plaintiff's deposition responses to discovery propounded by other parties did not mention defendant as being present at any site where the injuries allegedly occurred. The reviewing court held that although the absence of evidence can be inferred from "factually devoid" discovery responses, the deposition and interrogatories in the instant case did not contain questions aimed specifically at the presence or absence of defendant at jobsites. Defendant's motion relied on argument

[3] Appellants' arguments on the fraud counts only relate to the trial court's finding concerning Prieto. We consider any other points waived.

rather than evidence and was insufficient to support a reasonable inference that plaintiffs could not produce further evidence to support a crucial element of their case. Here, we have a plaintiff's direct statement, in response to specific questions asked by defendants' attorney, directed to key elements of plaintiff's case. There is no similarity to *Scheiding*.

C. *Appellants Cannot Recover Any Damages from Casper Meadows*

Appellants sought to recover for loss of a "potential" award of punitive damages as well as an inadequate award of compensatory damages and restitution for fees received as a result of the underlying litigation against Unocal. None of these damages are available to appellants and thus their claims against the firm cannot survive summary judgment. (See *Nagy v. Nagy* (1989) 210 Cal.App.3d 1262, 1268-1269.)

1. *No Compensatory Damages*

The trial court found that appellants could not establish the essential element of damages because the undisputed evidence showed that "the settlement amount was not 'inadequate.' " Appellants' assertion of inadequate compensatory damages is premised on the notion that their recovery must have been diminished because the $80 million settlement fund was insufficient to pay all compensatory awards. However, under the process established by the final allocation plan, individual compensation awards were based solely on the merits. The amount of available funds was *not* a factor in setting individual case awards. It was undisputed that after paying nearly all the claims and setting aside a reserve for potential claims of minor class members, there was still an estimated $1 million to $1.75 million remaining in the settlement fund. Appellants offered no evidence that they would have received a greater compensatory recovery but for some act or omission on the part of Casper Meadows. The trial court correctly concluded that appellants could not raise a triable issue as to the adequacy of the settlement fund for compensatory damages.

The trial court also concluded that Ferguson's lost property damage claim was barred as a matter of law on undisputed facts. Moreover, he did not challenge Casper

Meadows' arguments or evidence on this particular claim. On appeal, Ferguson contends he did not have to address the issue because a moving defendant must show plaintiff is not entitled to *any* damages and summary adjudication on a single component of a damage claim is inappropriate, citing *DeCastro West Chodorow & Burns, Inc. v. Superior Court* (1996) 47 Cal.App.4th 410, 422. In fact, Casper Meadows moved for summary *judgment* on several fronts, urging, among other points, that appellants could not establish the essential element of damages with respect to *any* cause of action. *DeCastro* does not aid them. Here the trial court concurred that appellants could not, as a matter of law, establish the essential element of damages with respect to any of their claims and we agree.

2. *No "Lost" Punitive Damages*

Among other points, appellants' third amended complaint attacked Casper Meadows' conduct in negotiating and recommending the $80 million settlement which denied them the ability to seek punitive damages against Unocal and then refusing to object to the settlement on their behalf. We conclude as a matter of law that lost punitive damages are not recoverable as compensatory damages for legal malpractice. (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 981-982 (*Piscitelli*).)[4]

In *Piscitelli*, the plaintiff sued his attorney for professional malpractice after the attorney failed to opt him out of a separate class action against his employer. This resulted in release of claims that would have been presented to an arbitration panel. The jury award included an amount representing punitive damages that would have been awarded in the underlying arbitration proceeding.

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[4] We will affirm a judgment if it is correct on any theory. (*Davey v. Southern Pacific Co*. (1897) 116 Cal. 325, 329.) The decision in *Piscitelli* was issued after judgment in this case. However, its application here involves only a question of law on undisputed facts, and thus no harm comes to appellants by relying on the theory of *Piscitelli* to affirm the judgment. (*In re Marriage of Moschetta* (1994) 25 Cal.App.4th 1218, 1227 & fn. 12.)

Reversing, the reviewing court reasoned that the measure of damages in a legal malpractice action is the value of the lost claim. (*Piscitelli*, *supra*, 87 Cal.App.4th at p. 979.) This measure comports with the general rule of tort damages that the injured party may recover the amount that will compensate for all detriment proximately caused whether or not it could have been anticipated. (Civ. Code, § 3333.) "Detriment" is defined in the general damages provisions of the Civil Code as "a loss or harm suffered in person or property." (*Id*., § 3282.)

However, punitive damages are not compensation for loss; rather, their sole purpose is to punish and deter. Imposition of punitive damages is triggered by the state of mind and conduct of the tortfeasor, not by the nature of plaintiff's loss. (*Piscitelli*, *supra*, 87 Cal.App.4th at pp. 979-981 [taking issue with *Merenda v. Superior Court* (1992) 3 Cal.App.4th 1, 12, 14, which characterized unrecovered punitive damages as compensatory damages on the theory that such damages represented a loss or harm suffered by plaintiff].) In the underlying action, an award of punitive damages does not relate to the "detriment" suffered by the legal malpractice plaintiff, as that term is used in Civil Code sections 3282 and 3333, because punitive damages are not compensation for injury.

Whatever the plaintiff's injury, he or she will be made whole by the award of compensatory damages. Indeed, punitive damages are awarded *in addition to* the actual damages (Civ. Code, § 3294, subd. (a)) and as to the plaintiff, represent a "boon." (*Piscitelli*, *supra*, 87 Cal.App.4th at p. 981.)

Moreover, while attorney negligence may indeed be a "but for" cause of lost punitive damages, it is not a proximate cause. Tort damages are concerned with "detriment *proximately* caused" by the tortious behavior. (Civ. Code § 3333, italics added.) Proximate cause ordinarily involves not the fact of causation but " 'the various considerations of policy that limit an actor's responsibility for the consequences of his conduct.' " (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 316, quoting *Mosley v. Arden Farms Co.* (1945) 26 Cal.2d 213, 221 (conc. opn. of Traynor, J.); *Piscitelli*, *supra*, 87 Cal.App.4th at p. 982.)

Several policy considerations militate against holding the malpracticing attorney legally responsible for lost punitive damages notwithstanding that his or her conduct is a cause in fact of the lost claims. First, to saddle a defendant with damages intended to punish another for oppressive, malicious or fraudulent conduct punishes the wrong person and thwarts the twin goals of deterrence and punishment. (*Piscitelli*, *supra*, 87 Cal.App.4th at p. 981.) In order to make the award hurt and hopefully change future behavior, the amount of punitive damages should be proportionate to the tortfeasor's specific reprehensible conduct and net worth. (Civ. Code, §§ 3294, subd. (a), 3295, subd. (a).) Where is the sting and impetus to change when the lawyer pays instead of the underlying tortfeasor? Second, "there is the policy of not allowing liability for intentional wrongdoing to be offset or reduced by the negligence of another." (*PPG Industries, Inc. v. Transamerica Ins. Co., supra*, 20 Cal.4th at p. 316.) When responsibility for intentional wrongdoing is diluted by transferring it to another, the result is perceived injustice and consequent diminished respect for the law. Third, punitive damages are speculative enough to begin with. The potential for making a travesty of the civil justice system is huge. The task would be nothing less than trying to distill what a competent attorney might have convinced a hypothetical jury to impose as damages to punish a nonparty transgressor, complete with proof of the nonparty's underlying transgressions and net worth. This scenario does not make sense. On the other hand, there is scant prospect that in the absence of exposure attorneys will not do their best to obtain punitive damages awards when appropriate, or that the *Piscitelli* rule will discourage plaintiffs from seeking punitive damages in the first instance.

For all these reasons we conclude that appellants may not recover lost punitive damages against Casper Meadows. We reached this same conclusion in *Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2002) 95 Cal.App.4th 154, review granted May 1, 2002, S104444. We have not changed our minds as to the validity of this reasoning since the grant of review.

3. *No Damages for Unjust Enrichment*

Appellants' third amended complaint alleged that they were entitled to restitution for fees awarded to Casper Meadows pursuant to pretrial order, as well as the contractual contingency fee deducted from their settlement. On appeal, Casper Meadows first maintains that the trial court got it wrong in concluding that the court-awarded fees for their work as co-lead direct action counsel did not constitute a benefit at their expense. Appellants maintain that these fees "inherently reduced" the amount available for distribution from the settlement fund. Not so.

The final plan of allocation provided that funds remaining after paying all claimants, fees and administrative costs would be distributed on a substantially per capita basis to those claimants who lived or worked "within the area of the .01 plume." The plan also called for a reserve account to be disbursed at the special master's discretion.

As of December 22, 2000, it was anticipated that approximately $1 million to $1.75 million would remain unallocated from the settlement fund. The special master was working with a "Cy Pres" committee to evaluate proposals for donations of these funds to charitable organizations in the region. Appellants presented no evidence that any court-ordered fees awarded to Casper Meadows would have reverted to them rather than to charity even if there were a basis for divesting the firm of those fees. Therefore, their claim for restitution fails.

Appellants also attack the trial court's conclusion that Casper Meadows was not unjustly enriched with respect to fees it was provided pursuant to the contingent fee agreement. Specifically, the court found it undisputed that Casper Meadows "produced a substantial benefit" for appellants by its representation of them in the Unocal litigation.

Appellants charge that Casper Meadows should receive no fees because of a purported conflict of interest that led to their "abandonment" when Casper Meadows refused to oppose the settlement, the benefits of which appellants nonetheless accepted. The general rule is that an attorney who engages in conflicting

representation without obtaining informed consent is not entitled to a fee for the services. (*Cal Pak Delivery*, *Inc. v. United Parcel Service, Inc*. (1997) 52 Cal.App.4th 1, 14.) However, this rule "is not based on the premise that the attorney must pay a penalty so much as on the principle that 'payment is not due for services not properly performed.' " (*Id*. at p. 14, fn. 2.) Thus, courts have allowed recovery of some fees when the client's recovery was a direct result of the attorney's services. (*Id*. at p. 16; *Estate of Falco* (1987) 188 Cal.App.3d 1004, 1019.)

Here, the trial court found that Casper Meadows produced a recovery for plaintiffs. Appellants have not raised a triable issue that it would be unjust for Casper Meadows to retain the agreed fee under these circumstances. In effect, they want to punish Casper Meadows for "abandonment." Moreover, the fee agreement provided for a 40 percent contingency where, as here, the recovery comes after a settlement conference. A lesser fee of 33-1/3 percent was allowed.

III. DISPOSITION

We affirm the summary judgment.

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Reardon, J.

We concur:

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Kay, P.J.

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Sepulveda, J.