



Appellate Reports and cases in brief

Gulliver Schools, a cautionary tale about confidentiality clauses in settlement agreements

BY JEFFREY ISAAC EHRLICH

Gulliver Schools v. Snay

(2014 Fla. App.) __ So.3d __, 2014 WL 769030 (Fla. Ct. App., Third Dist.)

Who needs to know about this case:

Lawyers and clients who enter into settlement agreements containing confidentiality agreements.

Why it's important: A cautionary tale. Plaintiff forfeits proceeds of age-discrimination claim because his daughter disclosed the existence of the settlement on Facebook. Shows why plaintiffs should be wary of agreeing to keep "the existence" of a settlement confidential, and what can happen if this promise is breached.

Synopsis: Patrick Snay filed an age-discrimination lawsuit against his employer, the Gulliver School. The parties negotiated a settlement, which provided that Gulliver would make three payments to Snay: (1) \$10,000 for backpay; (2) \$80,000 in damages, and (3) \$60,000 in attorney's fees. The settlement agreement contained a detailed confidentiality agreement, which provided that both the existence and terms of the settlement were strictly confidential, and that if Snay or his wife directly or indirectly disclosed "any information" about the existence or terms of the agreement to anyone, other than their lawyers or other professionals, then the \$80,000 payment would be forfeited.

Moments after signing the agreement, Snay told his adult daughter, who had been a student at Gulliver, and who was aware of the lawsuit, that the case had been settled and that he was pleased with the outcome. Four days later, she posted the following on

her Facebook account: "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT." The post went out to 1,200 of Snay's daughter's Facebook friends.

Roughly a week later, Gulliver notified Snay's counsel that it would not tender the \$80,000 portion of the settlement because of Snay's breach of the confidentiality agreement. Snay moved to compel enforcement of the settlement agreement in the trial court. The trial court found that neither Snay's comments to his daughter, nor her Facebook posts constituted a breach of the confidentiality agreement. Reversed.

The Court of Appeal held that the plain terms of the agreement prohibited Snay and his wife from directly or indirectly disclosing any information about the existence or terms of the settlement to anyone, other than their lawyers or other professionals. In the court's view, Snay's disclosure to his daughter that he had settled the case violated the agreement. The court explained: "The fact that Snay testified that he knew he needed to tell his daughter something did not excuse this breach. There is no evidence that he made this need known to the school or to his or its attorneys so that the parties might hammer out a mutually acceptable course of action in the agreement. Rather, before the ink was dry on the agreement, and notwithstanding the clear language of section 13 mandating confidentiality, Snay violated the agreement by doing exactly what he had promised not to do. His daughter then did precisely what the confidentiality agreement was designed to prevent, advertising to the Gulliver community that Snay had been successful in his age

discrimination and retaliation case against the school.

Moral of the story: Be careful about the terms of any confidentiality provision in a settlement agreement, and once the agreement is in place, make sure your clients understand their obligations under it, and scrupulously adhere to those obligations.

Short(er) takes

Offers to compromise under Code Civ. Proc. § 998; insurer policy limits: *Aguilar v. Farmers Ins. Exch.* (2013) __ Cal.App.4th __ (2d Dist. Div. 8.)

Aguilar won a \$2.3 million jury verdict against Gostischef arising from a January 2004 auto accident. Gostischef had an auto policy with Farmers with a \$100,000 limit. A month after the accident, Aguilar's counsel wrote to Farmers requesting discovery of the policy limit. Farmers did not respond. Aguilar made two additional requests to Farmers to learn the policy limits, indicating that he needed the information to evaluate whether to make a policy-limits demand. Farmers never responded. In October 2004, Farmers offered to pay its \$100,000 policy limit. Aguilar's counsel advised Farmers that it could be held liable for the entire judgment because it had rejected the three prior attempts to settle within policy limits. In April 2005, Aguilar made a § 998 offer of \$700,000. Farmers responded by offering the \$100,000 policy limit.

After the judgment was entered in Aguilar's favor, he sought costs of \$1.6 million. The costs were so high because they included prejudgment interest from the time that Farmers rejected Aguilar's § 998 offer. Farmers sought to tax costs, arguing that the offer was not reasonable



APRIL 2014

in light of the \$100,000 policy limit. The trial court awarded the full costs, rejecting Farmers' argument. Affirmed.

A valid Section 998 offer must be made in good faith. To be made in good faith, there must be a reasonable prospect that the offer will be accepted. Whether the offer is reasonable depends on the information available to the parties at the time the offer is served.

Here, Aguilar made known to Farmers in the early months of the suit that he was

interested in discussing settlement within policy limits, but Farmers made no reply. It was accordingly not unreasonable for Aguilar to believe, at the time he made the offer, that Farmers might be liable for a judgment in excess of policy limits.

Jeffrey Isaac Ehrlich is the principal of the Ehrlich Law Firm, with offices in Encino and Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal

Specialization, and a member of the CAALA Board of Governors. His practice emphasizes appellate support for the Southern California trial bar and insurance bad-faith litigation. He is editor-in-chief of Advocate, the Journal of Consumer Attorneys Associations for So. California.



Ehrlich

