Appellate Reports and Cases in Brief

Amis v. Greenberg Traurig LLP *confirms that all communications during mediation are subject to the mediation privilege*

By Jeffrey I. Ehrlich

Amis v. Greenberg Traurig LLP

(2015) _ Cal.App.4th _ (2d Dist., Div. 3.)

Who needs to know about this case: Lawyers dealing with claims that depend on proof of what is occurring during the mediation process

Why it's important: Confirms that all communications during the mediation process are subject to the mediation privilege, even if that means denying a client the means to prove a malpractice claim against counsel based on what occurred during the mediation process.

Synopsis: Amis was a minority shareholder in Pacific, a clothing exporter. Pacific sued Path for breach of contract, and Path counter-claimed against Pacific and its shareholders (the Path litigation). While the Path litigation was pending, Sojitz Corp. made a proposal to acquire Pacific. One of the terms of the proposal was a favorable resolution of the Path litigation. Greenberg Traurig (GT) represented Sojitz, and later came to represent Pacific and its shareholders in the Path litigation after obtaining a conflict waiver. During GT's representation, Pacific and Path attended a mediation and settled their dispute, with the Pacific parties jointly and severally agreeing to pay Path $2.4 million on a payment schedule. Sojitz ultimately did not acquire Pacific, leaving it and its shareholders without funds to pay the scheduled payments to Path. Path's efforts to enforce the settlement forced the Pacific parties, including Amis, into bankruptcy.

Amis sued GT for malpractice, alleging that it failed to advise him of the risks of his personal liability in the transaction, structured the transaction so that corporate obligations of Pacific became his personal obligations, and failed to make the settlement contingent on Sojitz's purchase of Pacific's assets. In his deposition, Amis admitted that all "discussions," "explanations," and "recommendations" that he had with or received from GT regarding the settlement agreement occurred during the mediation, and that all his claimed damages resulted from executing the settlement agreement at the mediation.

GT obtained summary judgment, with the trial court finding that Amis could not establish an essential element of his claims because it was undisputed that any act or omission by GT that purportedly caused Amis to execute the settlement agreement occurred during the mediation. Affirmed.

Mediation confidentiality is codified in Evidence Code section 1115 et seq. "With specified statutory exceptions, neither evidence of anything said, nor any writing, is discoverable or admissible in any civil action if the statement was made, or the writing was prepared, for the purpose of, in the course of, or pursuant to, a mediation. (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 117.) Even after mediation ends, communications and writings protected by the statutes are to remain confidential. (§ 1126.)

The Court of Appeal explained that, "Our Supreme Court has broadly applied the mediation confidentiality statutes and all but categorically prohibited judicially crafted exceptions, even in situations where justice seems to call for a different result." In *Cassel*, the Supreme Court explained that, "Judicial construction, and judicially crafted exceptions, are permitted only where due process is implicated, or where literal construction would produce absurd results, thus clearly violating the Legislature's presumed intent. Otherwise, the mediation confidentiality statutes must be applied in strict accordance with their plain terms. Where competing policy concerns are present, it is for the Legislature to resolve them."

The *Cassel* court recognized that its holding might hinder a client's ability to prove a legal malpractice claim against his or her lawyers. "Be that as it may, the court stated, 'if an exception is to be made for legal misconduct, it is for the Legislature to do, and not the courts.'"

Applying *Cassel*, GT was entitled to summary judgment because Amis cannot prove that any act or omission by GT caused him to enter the settlement agreement and, hence, to suffer his alleged injuries, because all communications he had with GT regarding the settlement agreement occurred in the context of mediation.

The Court of Appeal also rejected Amis's claim that he could prove his claim by inference, without relying on what occurred at the mediation.

He argued that, "it is reasonable to infer from the fact that GT advised Amis regarding the terms of the settlement documents, that GT consented to Amis signing those documents at mediation." The court rejected this approach. It explained that, "Amis contends the trier of fact should be permitted to draw the inference that the 'oral advice he was given, or not given, by GT during the mediation' caused him to execute the settlement agreement. But this . . . would turn mediation confidentiality into a sword by which Amis could claim he received negligent legal advice during mediation, while precluding GT from rebutting the inference by explaining the context and content of the advice that was actually given."

In addition, a reference during trial to mediation and mediation-related communications constitutes an "irregularity in the proceedings of the trial" for the purposes of the new-trial statute, section 657 of the Code of Civil Procedure.

Short(er) takes

Bus. & Prof. Code, § 16600, void contracts; contracts in restraint of engaging in a lawful profession: *Golden v. California Emergency Physicians Medical Group*, __ F.3d. __ (9th Cir.)

Golden is an emergency-room doctor formerly affiliated with the California Emergency Physicians Medical Group (CEP). CEP is a large consortium of over 1000 physicians that manages or staffs many emergency rooms, inpatient clinics, and other facilities in California and other, mostly Western states. In May 2008, Golden sued CEP regarding the loss of his staff membership at a CEP-managed facility. Before trial, the parties agreed to settle in open court. In return for a substantial monetary amount, Golden agreed to relinquish his current suit and release all claims against CEP, and to agree never to work for CEP or at any facility that CEP may own or with which it may contract in the future (the "no-employment provision"). After the agreement was reduced to writing, Golden refused to sign it and attempted to have it set aside. The district court enforced the agreement and Golden appealed. Reversed.

The district court found that the no-employment agreement was not a prohibited covenant not to compete, and that under it, Golden was allowed to work for CEP's competitors. Golden argued that given CEP's dominance of emergency medicine within the State and its aggressive plans to expand its geographical footprint, the agreement, if enforced, will substantially limit his opportunities to practice. CEP not only will refuse to employ him, but also will terminate him if it subsequently acquires an interest in a facility where he would be working.

By its terms, section 16600 is not limited to covenants not to compete. It does not even use that term, or refer to competition. Rather, it voids "*every* contract" that "restrain[s]" someone "from engaging in a lawful profession, trade, or business." The California Supreme Court has held that the statute "evinces a settled legislative policy in favor of open competition and employee mobility." The district court erred in construing the statute merely to forbid covenants not to compete. Since this premise was incorrect, the case is remanded to the district court to determine in the first instance whether the no-employment provision constitutes a restraint of a substantial character to Golden's medical practice.

Civil rights; summary judgment; adequacy of "self-serving" declarations: *Nigro v. Sears, Roebuck & Co*. (2015) 778 F.3d 1096.

Nigro sued his former employer, Sears, under the FEHA for disability discrimination. Sears moved for summary judgment, and Nigro opposed the motion, submitting a declaration that repeated what he claimed his manager had told him – that he would not be accommodated and would be terminated. The district court (the Hon. Michael M. Anello, S.D. Cal.) disregarded the evidence proffered by Nigro, on the basis that "the source of this evidence is Nigro's own self-serving testimony." The district court also refused to credit deposition testimony from another Sears employee about what the district manager had said as "hearsay." Reversed.

The testimony about the statements of the district manager was admissible as party admissions. And the District Court had no basis to disregard Nigro's testimony. "We have previously acknowledged that declarations are often self-serving, and this is properly so because the party submitting it would use the declaration to support his or her position. The source of the evidence may have some bearing on its credibility, and thus on the weight it may be given by a trier of fact. But that evidence is to a degree self-serving is not a basis for the district court to disregard the evidence at the summary judgment stage . . . . Here, Nigro's declaration and deposition testimony, albeit uncorroborated and self-serving, were sufficient to establish a genuine dispute of material fact on Sears's discriminatory animus.

"It is, moreover, entirely besides the point that some of Nigro's evidence was self-serving, as it will often be the case in a discrimination case that an employee has something to say about what company representatives said to him or her. Such testimony is admissible, though absent corroboration, it may have limited weight. But again, the weight is to be assessed by the trier of fact at trial, not to be a basis to disregard the evidence at the summary judgment stage."

"We have previously held in several cases that it should not take much for plaintiff in a discrimination case to overcome a summary judgment motion . . . . Here, Nigro presented several state law claims that deserved trial. It should not take a whole lot of evidence to

establish a genuine issue of material fact in a disability discrimination case, at least where the fact issue on discrimination is genuine and the disability would not preclude gainful employment of a person working with accommodation."

Attorney's fees provisions; premises liability; actions "arising out" of a lease: *Hemphill v. Wright Family, LLC* (2015) 234 Cal.App.4th 911 (4th Dist., Div. 1)

Wright Family LLC owns and operates a 200-acre mobile home park (the Club) consisting of home sites, a golf course, common areas, and a green belt. Hemphill purchased a mobile home from Wright, and leased a space at the Club. The Club is required to maintain the common areas, which are open to the Club residents 24-hours a day, every day. While on the lawn area near his home, Hemphill stepped into a sunken and uncovered drainage hole, causing him to fall and suffer serious injuries. Hemphill sued the Club on a premises-liability theory and obtained a judgment of $311,899. After trial, he moved for an award of attorneys' fees under his lease with the Club, which contained a provision stating that the prevailing party would recover fees if the action arose out of, *inter alia*, the homeowner's tenancy. The trial court denied fees. Reversed.

The term "homeowner's tenancy" in the fee provision is not defined. Since the Club presented the lease on a pre-printed form with blanks to input tenant information, to the extent that the term is ambiguous, the court will construe the agreement against the drafter who caused the ambiguity to exist. Since Hemphill was a tenant of the Club, and the jury found that he suffered injuries while crossing a common area of the lawn as a result of the Club's negligence, the court concludes that his action "arose out of the homeowner's tenancy." Hence, the trial court erred in denying fees to Hemphill.

Insurance policies; exclusions; vandalism and malicious mischief: *Ong v. Fire Insurance Exchange* (2015) _ Cal.Rptr. _ (2d Dist., Div 1.)

Ong owned a vacant dwelling, which was insured by Farmers. The policy included a vacancy provision in which losses caused by vandalism or malicious mischief were excluded. The property was damaged by a fire that appeared to have been started by a squatter for warmth, which got out of control. Farmers denied coverage. Ong sued, and the trial court granted summary judgment for Farmers. Reversed.

Vandalism refers to willful or malicious destruction of property. The Supreme Court has noted that "malice" has two meanings. In the popular sense it is understood as malice-in-fact; that is, ill will toward a person. In contrast, it also has a "legal sense," which means a wrongful act, done intentionally, without just cause or excuse. The trial court relied on the legal sense of "malice" to grant summary judgment for Farmers. But insurance policies are construed in the way that a layperson would understand them, and therefore a lay person would not understand that an intentionally set warming fire would necessarily constitute vandalism.


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