4th Civil No. G011755

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ROBERT ROGALSKI,

Plaintiff and Respondent,

vs.

NABERS CADILLAC, INC. and
RICHARD NABERS,

Defendants and Appellants.

Appeal from the Superior Court of Orange County
The Honorable David C. Velasquez, Judge Presiding

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Other Authorities

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INTRODUCTION

Defendants Nabers Cadillac, Inc. and Richard Nabers appeal a default judgment for $500,000.00 in compensatory damages and $58,299.90 in attorney's fees and costs. Defendants' motion for relief from default was denied despite the fact that until minutes before their default was taken they reasonably believed they were being provided a defense.

The facts may be briefly summarized. Plaintiff Robert Rogalski lost employment with Nabers Cadillac, Inc., when his middle-level management position was eliminated as part of a restructuring due to depressed car sales. Plaintiff sued Nabers Cadillac and its owner, Richard Nabers, for alleged age discrimination, breach of contract, breach of the covenant of good faith and fair dealing, and wrongful termination. Plaintiff's complaint prayed for "compensatory damages in the amount of $500,000 or such greater amount as may be proven at trial" and for attorney's fees in an unspecified amount.

Plaintiff served his complaint on May 20, 1991. The defendants immediately informed their insurance broker. The broker in turn informed defendants' liability insurer, Golden Eagle Insurance Company. Defendants were assured by letter from Golden Eagle and by discussions with their broker that Golden Eagle would defend their interests. On June 25, 1991, defendants learned no answer had been filed. Defendants were again assured Golden Eagle would answer for them. On July 2, 1991, plaintiff's counsel told Golden Eagle that defendants' default would be taken if no answer were filed by noon the next day. Golden Eagle did not notify defendants of this deadline. Instead, on July 3, 1991, Golden Eagle simply informed defendants it would not be providing a defense. Defendants immediately retained their own counsel. Minutes later, defendants' counsel contacted plaintiff's counsel, only to be told that within the previous half hour default papers had been filed. Curiously, however, the default papers showed proof of service on

defendants' counsel, who first called plaintiff's counsel after default papers were supposedly filed.

Defendants promptly moved for relief from default on grounds of mistake, inadvertence, surprise and excusable neglect. Nevertheless, before their motion could be heard, plaintiff obtained a default judgment against them for $866,050.00 in lost earnings plus $25,000.00 in emotional distress damages. Later, the trial court denied defendants' motion to set aside their defaults. However, the court vacated the judgment and entered a new judgment for $500,000.00 plus costs of $3,354.90 and attorney's fees of $54,945.00.

Defendants will contend as follows in this brief:

1. The trial court abused its discretion in refusing to set aside the defaults. Defendants reasonably relied on their insurer to defend as promised, and they were taken by surprise when the insurer failed to defend. Defendants acted promptly on discovery that they had been abandoned by their insurer. They should not be held responsible for this unanticipated turn of events. In addition, there would be no undue prejudice to plaintiff in permitting a trial on the merits. Defendants missed their first real opportunity to avoid default by just minutes, if at all. Furthermore, defendants genuinely dispute both liability and damages.

2. The default judgment against defendants is void. Plaintiff failed to serve a statement of special and general damages as required by Code of Civil Procedure section 425.11 in an action, such as this one, for personal injury.

Moreover, plaintiff's complaint did not give adequate notice of the nature and amount of damages claimed.

3. In any event, the award of $54,945.00 as attorney's fees and $3,354.90 as costs must be set aside. In a default proceeding, the court may not grant more relief, in kind or in amount, than pleaded in the complaint. Plaintiff's complaint pleaded no specific amount of costs and attorney's fees. Furthermore, the award of compensatory damages was $500,000, the maximum amount pleaded anywhere in the complaint. A judgment for more than $500,000 was in excess of the court's default jurisdiction.

Defendants will now review the factual background of this case in detail and then demonstrate why their defaults and the default judgment should be set aside.

STATEMENT OF THE CASE

B. Plaintiff's Complaint.

On April 19, 1991, plaintiff Robert Rogalski filed a complaint for damages against defendants Nabers Cadillac, Inc., Richard Nabers, and Sam Snead.[1/] (CT 1.) Plaintiff's first cause of action, for "age discrimination" under Government Code section 12941, alleged the following damages:

1/ Sam Snead was a vice president at Nabers Cadillac. Plaintiff dismissed his action against him after obtaining the default judgment. (CT 395.)

"16. Plaintiff has been damaged by the termination of his employment based on his age in an amount to be proven at trial, which amount exceeds $500,000. Such damages consist of lost compensation and benefits, emotional distress, damage to reputation, and diminished prospects for future employment.

"17. Plaintiff is entitled to recover his attorneys' fees and costs incurred in bringing this action, pursuant to California Government Code § 12965(b)." (CT 5.)

Plaintiff's second, third and fourth causes of action, for breach of contract, breach of the covenant of good faith and fair dealing, and wrongful termination, alleged summarily that plaintiff had been damaged in an amount which "exceeds $500,000." (CT 7, 8, 9.)

Plaintiff's prayer for damages for each of his four causes of action was the same:

"[F]or compensatory damages in the amount of $500,000 or such greater amount as may be proven at trial, together with interest thereon as provided by law." (CT 9-10.)

Plaintiff also prayed:

"On the First Cause of Action, for attorneys' fees.

"On all causes of action, for costs of suit and such further relief as the court may deem appropriate." (CT 10.)

C. Defendant's Reliance On Their Insurer To Defend.

Plaintiff served his complaint on each of the named defendants on May 20, 1991. (CT 20-22.)

Stanley Mashita, chief financial officer of Nabers Cadillac since 1969, was responsible for all insurance and litigation matters involving the company. (CT 104.) Immediately upon learning of service of the summons and complaint, Mashita telephoned Terry Cressman, the insurance broker for Nabers Cadillac. Mashita and Cressman reviewed the allegations of the complaint. Cressman said the lawsuit would be a covered loss under Nabers Cadillac's insurance policy with Golden Eagle Insurance Company and Golden Eagle would handle the defense. (CT 104.) Mashita sent a copy of the summons and complaint to Cressman. (CT 118.)

On May 28, 1991, Cressman's office sent a copy of the summons and complaint to Golden Eagle. The accompanying letter to Golden Eagle stated that the defendants had been served on May 20, 1991. The letter concludes: "Please provide proper defense for our Insured and advise defense counsel as soon as possible." A copy of this letter was sent to Nabers Cadillac. (CT 120.)

On June 6, 1991, Mashita received a letter from Chris Kazarian, litigation examiner for Golden Eagle. Kazarian stated:

> "We wish to acknowledge receipt of the captioned matter for coverage pursuant to the provisions of your Golden Eagle Insurance policy referenced above.
>
> "A claim file has been established, and we have commenced an investigation. I will initially be responsible for this file.
>
> "You will be contacted shortly. Thank you for your cooperation." (CT 122.)

Based on this letter and his previous telephone conversation with Cressman, Mashita understood that Golden Eagle would appoint defense counsel and timely file a response to the complaint on behalf of all defendants. (CT 104-105.)

Mashita informed defendant Richard Nabers that Golden Eagle would be handling the lawsuit. (CT 111-113.)

On June 15, 1991, Kazarian telephoned Mashita and said Golden Eagle was questioning whether coverage could be afforded. Mashita said he relied on his insurance broker to deal with coverage matters as he was not an expert in that field. Mashita directed Kazarian to contact the broker, Cressman. Kazarian did not say or imply that Golden Eagle was not handling the defense. (CT 105.)

On June 25, 1991, one of plaintiff's attorneys, James A. Odlum, sent letters to each of the defendants stating that no response to the complaint had been filed.

Odlum warned that plaintiff would seek at least $750,000 in punitive damages. His letter concluded:

> "Please be advised that we will have your default entered and apply for a default judgment against you unless you file and serve an answer to the Complaint within five (5) days of the date of this letter." (CT 158-160.)

Mashita received the letter from plaintiff's counsel on June 27, 1991. The next day Mashita met with the insurance broker, Cressman, showed him plaintiff's letter, and asked whether Golden Eagle was handling the defense. Cressman reiterated that the lawsuit was covered by the Golden Eagle policy, and he would make certain that Golden Eagle handled the matter in timely fashion. Mashita therefore assumed Cressman had arranged for Golden Eagle to file a response to the lawsuit. (CT 105.)

According to Thomas Mundell, another of plaintiff's attorneys, at approximately noon on July 2, 1991, he received a telephone call from Kazarian at Golden Eagle. Kazarian said that Nabers Cadillac had tendered the defense of plaintiff's suit, that Golden Eagle was looking into whether coverage was available under the policy, and that Golden Eagle had not retained counsel to answer the complaint. Kazarian asked for a ten-day extension. (CT 215.) Mundell told Kazarian that his partner, Odlum, was in charge of the matter, that default papers already may have been filed, and that he would check upon Odlum's return to the

office and call Kazarian back. Odlum returned shortly after 3:30 p.m. Odlum told Mundell that default papers had been prepared but not yet filed. Together they called Kazarian and said they could not grant a ten-day extension. (CT 216.) However, they said they would give Golden Eagle until noon of the next day, July 3, 1991, to file an answer.[2/] (CT 217.)

On the morning of July 3, 1991, Cressman learned that Golden Eagle was taking the position that it was not obligated to defend or indemnify Nabers Cadillac. Cressman called Kazarian at Golden Eagle, who said he had called to plaintiff's attorney to obtain an extension of time for the defendants to file responsive pleadings. Cressman immediately called Mashita and told him Golden Eagle was refusing to provide a defense and that defendants would have to immediately retain counsel to respond to the complaint. (CT 103-104.)

Kazarian also informed Mashita that Golden Eagle had not arranged for a responsive pleading to be filed and would not be providing a defense. (CT 105.) Kazarian did not tell Mashita that he had spoken to plaintiff's lawyers, or that defendants had only until noon to respond to the complaint. (CT 220, 224.)

D. The Curious Circumstances Of The Filing Of Plaintiff's Requests For Entry Of Default.

2/ Under Orange County Superior Court Rule 1109, the parties could stipulate to a 15-day extension of time for filing responsive pleadings. Since the complaint was served on May 20, 1991, plaintiff could have stipulated to an extension to July 4, 1991, which would have permitted defendants to file a timely pleading on July 5, 1991.

According to plaintiff's attorneys, Mundell and Odlum, a messenger arrived at their office sometime after noon on July 3, 1991, and took the default papers to file in Superior Court in Santa Ana. The messenger called at 2:00 p.m. to say he had filed the default papers. (CT 51-52, 217.)

The requests for entry of default were originally dated July 5, 1991, but changed by hand to indicate July 3, 1991. (CT 26-34.) The "Declaration of Mailing (CCP 587)" on the back of each request for entry of default indicated that a copy of the request was mailed to:

> "William J. Rohr, Rudolph & Rohr, 2600 Michelson, #1450, Irvine CA 92715." (CT 27, 30, 33.)

In addition, there was attached to each request a "declaration of mailing (CCP 585.1 and 587)" dated two days later, July 5, 1991, again indicating a copy of the request for entry of default was mailed to Rohr. (CT 28, 31, 34.)[3/]

3/ This additional proof of service would have been necessitated by former Code of Civil Procedure section 585.1 which provided in pertinent part:

> "When a party claimed to be in default is known by the party requesting the entry of default to be represented by an attorney, whether or not that attorney has formally appeared, a copy of the application shall also be sent to the attorney for the party claimed to be in default. Nothing in this section shall be construed to create any obligation to undertake any affirmative effort to determine the existence or identity of counsel representing the party claimed to be in default.
>
> " . . .
>
> "A default takes effect 10 days after the filing of the application for entry of default." (Stats. 1990, ch. 207, § 2.)

Section 585.1 was repealed effective June 14, 1991, less than one month prior to the filing of the requests to enter default in this case. (Stats. 1991, ch. 57, §§ 2, 8.) Had section 585.1 been effective on July 3, 1991, defendants would have had ten days, to July 13, 1991, to

Plaintiff's attorneys thus demonstrated remarkable prescience in serving the requests for entry of defendants' defaults on defendants' attorney, who (as shown in the next section) first called them after the requests were supposedly filed.

E. Defendants' Immediate Action When Their Insurer Refused To Defend.

As soon as Mashita learned that Golden Eagle would not be providing a defense as promised, he contacted the law firm of Rudolph & Rohr to represent all the defendants. (CT 105.) Attorney William J. Rohr called plaintiff's attorneys at about 2:30 p.m. and said he had been retained by defendants just minutes earlier. Odlum replied that requests for entry of default had already been filed. (CT 115.)

Rohr requested that Odlum stipulate to set aside the defaults, and said that defendants were prepared to file answers without further delay. Odlum said he would talk to Mundell about it. (CT 115.)

On July 8, 1991, Odlum asked Rohr for the grounds upon which a motion to set aside the defaults would be made. (CT 124.) Rohr faxed a letter to Odlum explaining the circumstances of Golden Eagle's surprise refusal to defend. (CT 124-126.) Nevertheless, Odlum refused to stipulate to set aside the defaults. (CT 115-116.)

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file their answer, and this entire default proceeding would have been avoided.

F. Defendants' Motion To Set Aside Their Default.

On July 31, 1991, defendants filed their motion to set aside the defaults on the grounds of mistake, inadvertence, surprise and excusable neglect. (CT 96.) They submitted the declarations of Mashita, Cressman, Nabers, Snead and Rohr with regard to Golden Eagle's surprise failure to provide the promised defense. (CT 104-116.)

As to the merits of the lawsuit, Richard Nabers stated in his declaration that plaintiff's employment position had been eliminated in conjunction with an overall restructuring of the business to cut costs. Plaintiff's position as "Director of Services" was a middle level management position that had lost importance and the duties of which could be assumed by the general manager. Moreover, plaintiff had indicated he had intended to retire shortly. Plaintiff had not been terminated because of his age. (CT 110-111.)

Stanley Mashita also stated in his declaration that plaintiff was not terminated because of his age but because of a restructuring designed to significantly cut overhead in a severely depressed retail car market. (CT 106.)

Similarly, Sam Snead stated in his declaration that plaintiff's termination had nothing to do with plaintiff's age. (CT 113.)

Defendants submitted a proposed answer and affirmative defenses to the complaint along with a motion to set aside their defaults. (CT 136-139.) Among defendants' affirmative defenses were that plaintiff was an employee at will, subject

to termination at any time, with or without cause; that good and sufficient cause existed for termination of plaintiff's employment based upon defendant's legitimate economic interests; that defendants had acted in good faith; that plaintiff's claims for damages, if any, were barred by workers' compensation law, which provided plaintiff's exclusive remedy; and that plaintiff's contract claims were barred by the statute of frauds. (CT 137-138.)

G. The Default Prove-Up Hearing.

Despite the pending motion to set aside the defaults, the court conducted a default prove-up hearing on August 19, 1991. (CT 142.) Plaintiff presented two witnesses, himself and an accountant. (CT 142.)

Plaintiff testified that he was 55 years old when he lost his job. It had been the policy of Nabers Cadillac to treat employees fairly and equally. (Default RT 9[4/].) Plaintiff had given thought to retiring at the end of the year but doubted he could afford it. (Default RT 11.) According to plaintiff, he was asked his age and then told his position was being eliminated but he would be given a new position as service manager so he could train a younger man to run the service department. (Default RT 12-13.) Later, plaintiff was told there would be no job for him at all. (Default RT 14-15.) Plaintiff testified that Richard Nabers expressed concern that

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4/ The transcript of the default prove-up hearing was lodged with the trial court and considered in conjunction with defendants' motion for relief from default. The parties have stipulated that the record on appeal may be augmented to include the transcript. The transcript is referred to here as "Default RT."

plaintiff continue to have medical insurance and arranged for three months' severance pay and hospitalization coverage for 18 months. (Default RT 15-16.) Plaintiff also testified that he is under stress at home and very depressed not being able to get another job. (Default RT 34.)

Plaintiff argued to the court that his termination "hit him when he was most vulnerable" and "had an enormous impact on him." (Default RT 65.) In plaintiff's "Memorandum Re Default Prove-Up," he asked for an award of damages for emotional suffering of $500,000 (CT 152) and punitive damages of $500,000 against Nabers Cadillac and $250,000 against Richard Nabers. (CT 153-154.)

H. The First Default Judgment.

On August 23, 1991, the court issued a minute order for judgment. (CT 165.) On August 27, 1991, the court signed a "Judgment by Court after Default." This judgment awarded $891,050.00 in compensatory damages, consisting of $866,050.00 in lost earnings under plaintiff's second and third causes of action for breach of contract and breach of the covenant of good faith and fair dealing, and $25,000.00 in emotional distress damages under plaintiff's first and fourth causes of action for age discrimination and wrongful termination. (CT 207-208.)

I. The Denial Of Relief From Default, And The Order For A New Judgment.

Meanwhile, in opposition to defendants' motion to set aside their defaults, plaintiff noted that Golden Eagle had now acknowledged a duty to defend. (CT 231.) Plaintiff argued that defendants' default was Golden Eagle's fault, and that under Don v. Cruz (1982) 131 Cal.App.3d 695, defendants were bound by the fault of their insurer. Furthermore, plaintiff argued he was prejudiced because (1) he had been required to go through the default prove-up hearing and had "revealed his case," (2) he was being delayed in getting his recovery, (3) he was expending effort to oppose the motion, (4) he had dismissed Doe defendants and therefore there would be statute of limitations problems with regard to a "subsequently discovered defendant," the Nabers Family Trust, which owns the property where Nabers Cadillac is located. (CT 246-248.)

In reply, defendants contended this was a personal injury action and that plaintiff had failed to serve a statement of damages as required by Code of Civil Procedure section 425.11 prior to taking defendants' default. (CT 365-367.)

In surreply, plaintiff asserted this was not a personal injury action and, even if it were, plaintiff's complaint gave defendants adequate notice of the damages claimed. (CT 377.)

At the oral argument on the motion to set aside the defaults on October 30, 1991, the court indicated it would deny the motion to set aside the default but

would vacate the judgment and enter a new judgment for $500,000 plus costs. The court believed section 425.11 was not applicable because this was not an action for personal injury, that the emotional distress damages were "merely incidental." The court indicated that section 425.11 need not be complied with in that there was adequate notice in the prayer for damages of $500,000. However, Code of Civil Procedure section 580 limits plaintiff to the amount of the prayer in a default action. The court also felt that Don v. Cruz, supra, was controlling, that an insured is bound by the conduct of its insurer, and that the insurer's conscious decision not to respond to the pleading must be attributed to the insured. (RT 1-2.)

Accordingly, in its minute order of October 30, 1992, the court denied the motion to set aside the defaults but vacated the judgment and directed that a new judgment be entered for $500,000 plus costs. The court directed plaintiff to submit a new proposed judgment within 10 days. (CT 392.)

J. The New Default Judgment And The Appeal.

Uncertain when the new judgment was or would be entered, and fearing an attempt to immediately execute on the judgment, on November 5, 1991, defendants filed notice of appeal from the August 27, 1991 judgment, from the October 30, 1991 order denying their motion to set aside the defaults, and from the new judgment. (CT 393.)

On November 13, 1991, plaintiff submitted a "Memorandum Re Entry of Judgment and Statutory Award of Attorney's Fees." (CT 401.) Plaintiff asked for an award of attorney's fees under his first cause of action for age discrimination pursuant to Government Code section 12965, subdivision (b), which authorizes an award of reasonable attorney's fees to a prevailing plaintiff in an age discrimination action. Plaintiff requested attorney's fees of $54,945.00 based upon an hourly fee of $185.00 for 297 lawyer hours, virtually all of the time devoted to the case from its start. (CT 403-404.)

On November 27, 1991, the court signed an order denying the motion to set aside the defaults, vacating the judgment and ordering entry of new judgment. (CT 453.)

On December 2, 1991, the court signed a new judgment for $500,000 plus costs of $58,299.90. (CT 455.)[5/]

5/ The judgment is appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a).

Defendants' notice of appeal filed after rendition but before entry of judgment became

LEGAL DISCUSSION

II.

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO SET ASIDE DEFENDANTS' DEFAULTS.

Defendants moved for relief from default under Code of Civil Procedure section 473. That section authorizes a court to "relieve a party . . . from a judgment, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." As this Court recently emphasized in Mink v. Superior Court (1992) No. G011930, 92 Los Angeles Daily Journal D.A.R. 1150, 1151:

> "While the motion lies within the sound discretion of the trial court, 'the trial court's discretion is not unlimited and must be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.' [Citation.] The law strongly favors trial and disposition on the merits. Therefore, any doubts in applying section 473 must be resolved in favor of the

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effective upon entry of judgment. (Cal. Rules of Court, Rule 2, subd. (c).)

The appeal from the judgment properly encompasses review of the trial court's order denying defendants' motion to set aside their defaults (Uva v. Evans (1978) 83 Cal.App.3d 356, 360) and of the trial court's determination of costs to be included in the judgment. (Grant v. List & Lathrop (1992) __ Cal.App.4th __, 3 Cal.Rptr.2d 654.)

party seeking relief. When the moving party promptly seeks relief and there is no prejudice to the opposing party, very slight evidence is required to justify relief. We will more carefully scrutinize an order denying relief than one which permits a trial on the merits. [Citation.]"

Defendants submit that in the circumstances of this case the trial court abused its discretion in denying their motion for relief from default.

A. Defendants Reasonably Relied On Their Insurer To Defend As Promised And Were Taken By Surprise When The Insurer Failed To Defend.

A defendant may rely on the assurances of a third party to provide a defense. Where a default results from the failure of the third party to defend, the question is whether the defendant's reliance was reasonable. (Crane v. Kampe (1964) 225 Cal.App.2d 200, 205.) This holds true whether the third party is the defendant's employer (Desper v. King (1967) 251 Cal.App.2d 659, 664), another defendant (Higley v. Bank of Downey (1968) 260 Cal.App.2d 640, 644-645), or the defendant's insurance company. (Pelegrinelli v. McCloud River, etc. Co. (1905) 1 Cal.App. 593, 596-597.) As the Supreme Court held in Weitz v. Yankowsky (1966) 63 Cal.2d 849, 855-856:

"Where a default is entered because the defendant has relied upon a codefendant or other interested party to defend, the question is whether the defendant was reasonably justified under the circumstances in his reliance or whether his neglect to attend to the matter was inexcusable. [Citations.] The rule has been held applicable where an insured relied upon his insurer to defend. [Citation.]"

In this case, defendants' reliance on their insurer was entirely reasonable and justified. Although defendants knew there might be a coverage issue, they were repeatedly assured by letter and by telephone that their insurer would provide a defense. It would have been wasteful and even counterproductive for defendants nevertheless to employ their own counsel to defend an action which their insurer was apparently going to defend for them. Insurance, after all, is supposed to provide peace of mind and confidence that legal defenses will be administered and paid for by the insurer, even if coverage is in doubt. (Gray v. Zurich Insurance Co. (1966) 65 Cal.2d 263, 279.) Defendants acted with all reasonable prudence in these circumstances. (Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal.App.3d 725, 740 [defendant not required to act as "hawklike inquisitor" to establish reasonable prudence].)

The trial court therefore should have set aside defendants' defaults. As the Supreme Court emphasized in Elston v. City of Turlock (1985) 38 Cal.3d 227, 235:

"Where, as here, the trial court denies the motion for relief from default, the strong policy in favor of trial on the merits conflicts with the general rule of deference to the trial court's exercise of discretion. [Citation.] Unless inexcusable neglect is clear, the policy favoring trial on the merits prevails. [Citation.] Doubts are resolved in favor of the application for relief from default [citation], and reversal of an order denying relief results [citation]."

B. The Trial Court Erroneously Relied On *Don v. Cruz* (1982) 131 Cal.App.3d 695.

In denying defendants' motion for relief from default, the trial court relied on Don v. Cruz, supra, 131 Cal.App.3d 695. Don was a per curiam decision from Division Two of this Court. The defendant in Don had notified his insurance carrier of the lawsuit and relied on the carrier to defend. For unexplained reasons, the carrier did not file a timely answer on defendant's behalf. Don upheld the trial court's denial of a motion in equity, filed more than six months later, to vacate a default judgment on grounds of extrinsic fraud or mistake. The appellate court concluded:

"[A] defendant seeking to vacate a default, either under section 473 or by appeal to the court's equitable powers, who alleges reasonable reliance on an insurance carrier must also establish

justification for the inaction of the carrier. As defendant concededly failed to make any showing that his carrier's action was excusable, the trial court's order denying relief from default was not an abuse of discretion." (Id. at p. 702.)

To reach this conclusion, the court in Don used the following logic. There are two categories of cases involving reliance by a defendant on a third party. The first category is where the defendant relies upon his own attorney to defend; in those cases, the attorney's inexcusable negligence is charged to the client. The second category is where the defendant relies on his codefendant or his employer to defend; in those cases, courts have generally required only a showing that the defendant's reliance was reasonable without inquiring into the conduct of the codefendant or employer. (Id. at p. 700.) The Don court believed that in a personal injury action, the defendant's insurer is in effect the real party in interest and should not be permitted to willfully ignore filing deadlines and shield itself behind the blamelessness of the insured. (Id. at p. 701.) The court also cited "authority for the proposition that a defendant's reliance on his or her insurance carrier is legally equivalent to reliance on an attorney." (Id. at pp. 701-702.)

For several good reasons, Don is not controlling in this case. First, the defendant in Don sought relief in equity due to extrinsic fraud or mistake, not under section 473 for relief due to intrinsic surprise, inadvertence, mistake or excusable neglect. A court's power to grant statutory relief is thus broader than its power to

grant equitable relief. (Jackson v. Bank of America (1986) 188 Cal.App.3d 375, 386; Weitz v. Yankowsky, supra, 63 Cal.2d 849, 857.) Whatever thoughts Don might have expressed concerning what a defendant's rights might be under section 473 were dicta, not binding authority. (Brown v. Kelly Broadcasting Co. (1989) 48 Cal.3d 711, 734-735.)

Second, the Legislature has undermined the reasoning of Don by subsequent amendment to section 473. In 1988, the Legislature added another ground for relief from default -- where the attorney for the moving party attests that the default resulted from "his or her mistake, inadvertence, surprise or neglect," the court shall vacate the resulting default. As explained in Beeman v. Burling (1990) 216 Cal.App.3d 1586:

> "The amendment changes the prior statute in two significant ways. . . . [W]hile the prior law was discretionary, the amendment is couched in mandatory terms. Whereas the prior statute only recognized excusable neglect, the amendment provides relief for defaults founded on an attorney's neglect, regardless whether it may be characterized as excusable." (Id. at p. 1604, original emphasis.)

Citing the legislative history of the 1988 amendment, Beeman explains that the amendment was intended to "ensure that a party 'who is truly not at fault will not be held vicariously liable for an attorney's indiscretion.'" (Id. at p. 1605, fn. 14.)

Thus, since Don treated a defendant's insurer as equivalent to the defendant's attorney[6/] and applied the principle that a party is bound by the neglect of his or her attorney, the reasoning of Don is no longer applicable. To obtain relief, a defendant should not be required to show excusable neglect of the third party, but instead, to show reasonable reliance by the defendant on the third party to provide a defense. Defendants made such a showing in this case.

Third, Jade K. v. Viguri (1989) 210 Cal.App.3d 1459, recently held it is an abuse of discretion to deny a motion by an insurer to step in and set aside a default judgment against the insured after the insured failed to inform the insurer that he was claiming coverage and the right to a defense. There is no fair or logical reason why an innocent insurer should have the right to step in and challenge a default caused by its insured, but an innocent insured should be bound by a default caused by his insurer.

Fourth, even if the reasoning of Don were applicable, the facts of this case differ significantly from those of Don. In Don, there was no explanation why the insurer did not file a timely response to the lawsuit. Here, there is an explanation: the insurer unilaterally decided there was no coverage and, without warning that it might not, much less would not, defend, completely abandoned the defendants until it was too late for the defendants to avoid the taking of their defaults. This was not

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6/ One of a liability insurer's principal duties is to provide a legal defense for the insured. (CNA Casualty of California v. Seaboard Surety Co. (1986) 176 Cal.App.3d 598, 606.) Indeed, the insured's communications with the insurer in this context is protected by the attorney-client privilege even if an attorney has not yet been retained. (Soltani-Rastegar v. Superior Court (1989) 208 Cal.App.3d 424, 428.)

a matter of mere neglect, either excused or unexcused, by the insurer. Defendants' insurer abandoned them. Even though, prior to the 1988 amendment to section 473, courts held a defendant vicariously responsible for the neglect of an attorney in failing to defend, they still did not hold the client responsible when the attorney completely abandoned the client. (Buckert v. Briggs (1971) 15 Cal.App.3d 296, 301; Orange Empire Nat. Bank v. Kirk (1968) 259 Cal.App.2d 347, 353; Daley v. County of Butte (1964) 227 Cal.App.2d 380, 391-395.) The courts should not hold the insured responsible when the insurer abandons the insured, either.

Finally, even if Don were on point for this case (it is not), Don reflects bad public policy and need not and should not be followed here. (People v. Yeats (1977) 66 Cal.App.3d 874, 879.) The principal reason Don held the insured responsible for the insurer's neglect was that to hold otherwise would permit insurers to willfully ignore filing deadlines, hide behind the innocence of the insured, and make "a shambles of orderly procedure." (131 Cal.App.3d at p. 701.) Don does not consider the full equation, however. There is, at best, only the slightest possibility that an insurer would intentionally run the risk of a bad faith lawsuit and payment of an excess default judgment against its insured solely to delay trial court proceedings a few days. That possibility is far outweighed by the adverse consequences of such a rule to innocent insureds. Under the reasoning in Don, to obtain relief from default, an insured would have to investigate and prove excusable neglect by the insurer. If the insured failed to prove excusable neglect, then the insured would be relegated to a bad faith lawsuit against the insurer, further

burdening the already overcrowded court system. In that second suit, the insurer could defend on the ground that the insured had previously claimed the insurer's conduct was excusable, not in bad faith. This potential for conflicting positions could require the appointment of Cumis counsel in the default proceeding. In the end, the underlying case against the insured would never be resolved on its merits in a contested trial, litigation and the participation of counsel would multiply, and the insured could be saddled with a default judgment which, even if ultimately paid by the insurer, may have irremediable collateral consequences for the insured. (Ivy v. Pacific Automobile Ins. Co. (1958) 156 Cal.App.2d 652, 662; Critz v. Farmers Ins. Group (1964) 230 Cal.App.2d 788, 803.) If the rule in Don has any remaining vitality at all, it is the wrong rule to apply in this case.

In short, notwithstanding Don v. Cruz, defendants demonstrated that they were entitled to relief from default.

C. There Would Be No Undue Prejudice To Plaintiff In Requiring A Trial On The Merits.

1. Defendants Dispute Both Liability And The Damages.

Defendants' sworn declarations presented in support of their motion for relief from default demonstrate that they would have valid defenses if the case were tried on the merits. Contrary to plaintiff's assertion, he was not laid off because of his

age. His middle-level administrative position of Director of Services was eliminated due to a restructuring of the company necessitated by a severe downturn in sales in the automobile industry. His duties, which had become less significant as sales dropped, were reassigned to the General Manager. (CT 106-113.) An employer's interest in operating his business efficiently and profitably may constitute good cause to terminate a contract of employment. (Pugh v. See's Candies, Inc. (1988) 203 Cal.App.3d 743, 769.)

Furthermore, there was evidence plaintiff was planning to retire shortly. (CT 110-111.) Even if he had been wrongfully terminated (he was not), he could not legitimately claim loss of substantial future earnings. Plaintiff's total damages, if any, should have been in low five figures, not the high six figures.

A trial on the merits, therefore, is fully warranted by the evidence before the court.

2. Defendants Acted Promptly -- Within Minutes -- On Discovery That They Had Been Abandoned By Their Insurer.

Plaintiff knew of defendants' plight even before defendants knew. On July 2, 1991, defendants' insurer told plaintiff's counsel it was still considering whether to defend. Defendants were not told until July 3, 1991. In the meantime, plaintiff's attorneys demanded that the insurer file a responsive pleading by noon on July 3,

1991, even though the insurer said it was still investigating whether there was coverage. Plaintiff could hardly have been surprised that defendants would challenge the defaults plaintiff obtained shortly after noon on July 3, 1991.

Once defendants did learn their insurer had failed to defend and would not defend, they immediately, that same day, retained their own counsel. Defendants' counsel contacted plaintiff's attorneys within minutes after he was retained, only to be told that the default papers had filed within the last half hour.[7/] After unsuccessfully trying to negotiate a stipulation to set aside the default, defendants promptly filed the anticipated motion for relief from the defaults. Defendants thus acted prudently and with due diligence to protect their interests when they finally learned that their insurer had not and would not defend those interests.

Contrary to his contention (CT 246-248), plaintiff would not be unduly prejudiced by having to prosecute his claim in a contested proceeding. He has been put through some additional proceedings, but that is true for virtually every plaintiff who erroneously obtains a default judgment that is later set aside. Plaintiff has already taken the depositions of all the pertinent parties and has even had the opportunity to examine the defendants' insurance adjuster and the claim file. Plaintiff complains that he has "revealed his case" at the default prove-up hearing, but he would have had to do that anyway when defendants are finally permitted to

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7/ As noted above, the timing of the filing of the default papers is curious. The papers were originally dated July 5, 1991, then changed to July 3, 1991, before they were filed. Plaintiffs' counsel told defendants' counsel that the papers had been filed before defendants' counsel telephoned to say he had just been retained, yet the default papers shows proof of service on defendants' attorney. (CT 27, 30, 33.)

engage in their own discovery. And, while plaintiff complains that he dismissed all fictitiously-named defendants at the default prove-up proceeding, he was not required to do so (Code Civ. Proc., § 579), and there is no danger whatsoever that plaintiff will be without a solvent defendant in the event he can obtain a judgment after a contested trial on the merits.

For all these reasons, the trial court abused its discretion in denying defendants' motion for relief from default. The defaults and the default judgment should be set aside and defendants permitted to defend on the merits.

III.

THE DEFAULT JUDGMENT WAS VOID BECAUSE PLAINTIFF FAILED TO GIVE ADEQUATE NOTICE OF THE NATURE AND AMOUNT OF DAMAGES CLAIMED.

"A judgment by default in excess of the amount of the relief demanded by the prayer denies the defaulting defendant a fair hearing and is an act in excess of jurisdiction." (Petty v. Manpower, Inc. (1979) 94 Cal.App.3d 794, 798.) As the Supreme Court held in Greenup v. Rodman (1986) 42 Cal.3d 822:

> "[D]ue process requires notice to defendants . . . of the potential consequences of a refusal to pursue their defense. Such notice enables a defendant to exercise his right to choose . . . between (1) giving up

his right to defend in exchange for the certainty that he cannot be held liable for more than a known amount, and (2) exercising his right to defend at the cost of exposing himself to greater liability. . . . 'The rules governing default judgment provide the safeguards which ensure that defendant's choice is a fair and informed one.'" (Id. at p. 829.)

The notice required is more than a vague statement of damages "in excess of the jurisdiction of the court." In Schwab v. Rondel Homes, Inc. (1991) 53 Cal.3d 428, the Supreme Court specified that due notice should include the nature and kind of damages sought, and especially an itemization of special and general damages:

> "Accordingly, we disapprove Morgan [v. Southern Cal. Rapid Transit Dist. (1987)] 192 Cal.App.3d 976, to the extent that it suggests that a default judgment may be entered in the absence of notice in the complaint or a 'statement of damages' of the special and general damages sought." (53 Cal.3d at p. 434.)

Defendants submit that as a matter of due process of law, as well as under the express requirements of Code of Civil Procedure section 425.11, they were denied adequate notice of the nature and amount of damages which could be awarded against them in a default proceeding.

A. Plaintiff Failed To Serve A Statement Of Special And General Damages As Required By Code Of Civil Procedure Section 425.11.

Code of Civil Procedure section 425.10 provides that in an action for personal injury brought in superior court, the complaint shall not state the amount of money or damages demanded. Instead, the plaintiff must follow procedures provided in Code of Civil Procedure section 425.11:

> "When a complaint or cross-complaint is filed in an action in the superior court to recover damages for personal injury or wrongful death, the party against whom the action is brought may at any time request a statement setting forth the nature and amount of damages being sought. The request shall be served upon the plaintiff or cross-complainant, who shall serve a responsive statement as to the damages within 15 days thereafter. In the event that a response is not served, the party, on notice to the plaintiff or cross-complainant, may petition the court in which the action is pending to order the plaintiff or cross-complainant to serve a responsive statement. If no request is made for such a statement setting forth the nature and amount of damages being sought, the plaintiff shall give notice to the defendant of the amount of special and general damages sought to be recovered (1) before a

default may be taken; or (2) in the event an answer is filed, at least 60 days prior to date set for the trial."

Defendants submit that plaintiff's lawsuit is for personal injury within the meaning of section 425.11. The gist of plaintiff's lawsuit was that he was wrongfully terminated on the basis of his age. Besides awarding damages measured by future lost income, the court awarded damages for emotional distress and attorney's fees under provisions of state law prohibiting age discrimination in employment.

Two recent Supreme Court decisions have considered what constitutes an action for "personal injury." In Gourley v. State Farm Mut. Auto. Ins. Co. (1991) 53 Cal.3d 121, the issue was whether an action against an insurer for violation of the covenant of good faith and fair dealing in an insurance policy was an action for "personal injury" within the meaning of Code of Civil Procedure section 998 and for purposes of awarding prejudgment interest under Civil Code section 3291. The Supreme Court concluded that even though damages for emotional distress may be awarded as incident to a bad faith claim, "the nature of an insurance bad faith action is one seeking recovery of a property right, not personal injury." (53 Cal.3d at p. 127, original emphasis.)

On the other hand, in Schwab v. Rondel Homes, Inc., supra, 53 Cal.3d 428, the Supreme Court held that for purposes of Code of Civil Procedure section 425.11, requiring service of notice of special and general damages prior to taking a

default of the defendant, an action for housing discrimination under Civil Code section 54.1, subdivision (b)(5) is an action for personal injury.

There are no published decisions regarding whether an action for wrongful termination is one for "personal injury" within the meaning of section 425.11. However, this action for age discrimination is most similar in substance and in spirit to Schwab, holding that an action for housing discrimination is for personal injury. Unlawful discrimination of any sort is a tort which results in personal injury. Plaintiff here testified to the personal harm and emotional distress he suffered on losing his job and being unable to find a new one.

In analogous contexts, the courts have consistently held that an action for age discrimination is an action on account of personal injuries. For example, in interpreting the definition of gross income within the meaning of the Internal Revenue Code, Title 26, United States Code, section 104, subdivision (a)(2), which provides that "gross income does not include . . . the amount of any damages received . . . on account of personal injuries or sickness," the courts have held that a judgment received in a wrongful termination case based on age discrimination constitutes damages received on account of personal injuries. (Refield v. Insurance Co. of North America (9th Cir. 1991) 940 F.2d 542, 545-548.) As the court explained in Rickel v. Commissioner (3rd Cir. 1990) 900 F.2d 655:

> "[T]he duty of an employer to refrain from discriminating against employees on the basis of their age arises by operation of a statute. Society has made the moral and economic determination that

as a matter of law it will not abide such discrimination. Such a duty arises even in the absence of a written employment contract and despite the existence of either contrary terms in such a contract or conflicting common law employment-at-will principles." (Id. at p. 662, emphasis added.)

Similarly, the court in Pistillo v. C.I.R. (6th Cir. 1990) 912 F.2d 145, states:

"Congress enacted the ADEA [the federal Age Discrimination in Employment Act] 'to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.' [Citation.] Just as the common law punishes tort-feasors, the ADEA punishes employers who practice age discrimination -- regardless of whether the discrimination manifests itself in express acts of ageism or through more subtle and evasive forms. To effectuate the purposes of both the ADEA and the IRC, we must make the victims of arbitrary age discrimination whole by providing equal recognition to the substantial indignities and personal injuries they have suffered." (Id. at p. 150, emphasis added.)

Age discrimination is therefore a tort which results in personal injury to the plaintiff. It is no less an action for personal injury because damages may be measured for the most part in terms of rights lost under contract or other financial circumstances. Emotional distress damages are also awarded because of the personal nature of the right violated. Plaintiff's action is therefore an action for personal injury within the meaning of Code of Civil Procedure section 425.11.

Plaintiff gave no notice to defendants under Code of Civil Procedure section 425.11. For this reason alone, the default judgment against them is void and their defaults must be set aside. (Hamm v. Elkin (1987) 196 Cal.App.3d 1343, 1346 [default cannot be entered until service of the statement].)

B. Plaintiff's Complaint Did Not Give Adequate Notice Of The Nature And Amount Of Damages Claimed.

Plaintiff's complaint also did not satisfy general due process requirements of adequate notice of the nature and amount of damages sought. There was no specification of special and general damages. The closest plaintiff came was to allege damages

> "in an amount to be proven at trial, which exceeds $500,000. Such damages consist of lost compensation and benefits, emotional distress, damage to reputation, and diminished prospects for future employment." (CT 5.)

However, plaintiff did not break down his claim into particular categories, special, general or anything else. He could have been claiming all economic loss, all emotional distress, or all loss of reputation.[8/]

"The distinction between general and special damages forms the basis of an important principle of pleading, that the defendant is entitled to notice of what damages are to be claimed at the trial, and should be given such notice in the complaint." (6 Witkin, Summary of California Law (9th Ed. 1988) § 1321, p. 779, original emphasis.) The requirement that damages be itemized, permits a defendant to ascertain the likely outcome of the lawsuit and the real, rather than theoretical, consequences of failing to defend. (Plotitsa v. Superior Court (1983) 140 Cal.App.3d 755, 761-762.) As explained in Jones v. Interstate Recovery Service (1984) 160 Cal.App.3d 925:

> "Given the correlative relationship between the amount of general damages awarded and the special damages proved, we conclude defendant is entitled to a statement of specials prior to the entry of default. A defendant might base a decision to defend on the amount of specials. In this instance the defendant had no knowledge of the alleged special damages and therefore could not make an informed decision concerning plaintiffs' claims." (Id. at 929.)

8/ Plaintiff wrote defendants asserting that he would claim $750,00 in punitive damages (CT 151-160), but specification of a claim for punitive damages does not meet the requirement of a specification of general and special compensatory damages. (Becker v. S.P.V. Construction Co. (1980) 27 Cal.3d 489, 494-495; Olvera v. Olvera (1991) 232 Cal.App.3d 32, 36, fn. 4.) Furthermore, the court awarded no punitive damages in its default judgment.

The lump-sum allegation of damages in this case gave defendants no adequate notice and opportunity to decide whether or not to defend.

For each of these reasons, the default judgment is void and must be set aside.

IV.

THE TRIAL COURT HAD NO JURISDICTION TO AWARD $54,945.00 FOR ATTORNEY'S FEES AND $3,354.90 FOR COSTS: PLAINTIFF FAILED TO PLEAD FOR ANY SPECIFIC AMOUNT OF FEES OR COSTS, AND THE DEFAULT JUDGMENT ALREADY AWARDED $500,000.00, THE MAXIMUM AMOUNT MENTIONED IN THE COMPLAINT.

Although plaintiff's complaint prayed for an award of costs and attorney's fees, no specific amount of attorney's fees or costs was ever asserted until after the trial court vacated the original default judgment and ordered that a new judgment be entered. Defendants thus had no prior notice and opportunity to meet this claim for attorney's fees. (Code Civ. Proc., § 580 [relief cannot exceed that demanded in complaint]; Hartke v. Abbott (1932) 119 Cal.App. 439, 442 [award of $301 for attorney's fees in default judgment improper where complaint sought only $200 as attorney's fees]; see also Petty v. Manpower, supra, 94 Cal.App.3d 794, 798 ["It

would appear that where no specific amount of damages is requested that any amount would be in excess of that demanded"].)

Moreover, since the new judgment awarded the largest amount mentioned in plaintiff's complaint as compensatory damages, $500,000.00, the additional award of $54,945.00 in attorney's fees and $3,354.90 as costs was in excess of the court's jurisdiction on a default judgment. (Lee v. Ski Run Apartments Associates (1967) 249 Cal.App.2d 293, 295 ["greater relief than that set forth in the prayer of the pleading is forbidden by law]; Landers v. Seaton (1991) 233 Cal.App.3d 632, 643 ["A judgment made in excess of the court's jurisdiction is void on its face and may be reviewed any time even on appeal"].)

Thus, even if the default judgment were otherwise valid (it is not), the award of attorney's fees and costs must be set aside as in excess of that pleaded in the complaint.

CONCLUSION

For each of these reasons, the default judgment and the order denying defendants' motion for relief from default should be reversed.

Respectfully submitted,

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