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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LEONEL ARELLANO,

Plaintiff and Appellant,

v.

PROGRESSIVE WEST INSURANCE
COMPANY,

Defendant and Respondent.

G045665

(Super. Ct. No. 30-2009-00309533)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Affirmed in part, reversed in part, and remanded.

Law Offices of Anthony Kornarens and Anthony Kornarens for Plaintiff and Appellant.

Robie & Matthai, Edith R. Matthai, Michael J. O'Neill and Natalie A. Kouyoumdjian for Defendant and Respondent.

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In this insurance bad faith action, plaintiff and appellant Leonel Arellano sued his insurer, defendant and respondent Progressive West Insurance Company (Progressive), for bad faith in handling Bun Bun Tran's claim for the catastrophic injuries he suffered when Arellano ran a stop sign and collided with Tran's vehicle. Arellano alleges Progressive committed bad faith by failing to settle Tran's claim within policy limits, failing to communicate with Arellano regarding a settlement demand by Tran's attorney, and failing to obtain information regarding other potentially responsible parties that Tran's attorney required in his settlement demand. Arellano contends Progressive's bad faith renders it liable for the entire \$23 million judgment Tran obtained against Arellano despite Progressive's \$15,000 policy limits.

Arellano moved for summary adjudication on eight issues, while Progressive sought summary adjudication on six issues. Arellano's first seven issues asked the trial court to adjudicate that Progressive "had and breached" seven different duties as Arellano's insurer. His eighth issue asked the court to adjudicate that Progressive had a duty to pay Tran's entire claim because Progressive unreasonably failed to settle Tran's earlier demand within policy limits before Tran filed the underlying action. Progressive's motion asked the court to summarily adjudicate that Arellano's causes of action lacked merit and Progressive did not owe or breach certain duties. In particular, Progressive's third issue asked the court to adjudicate that "Progressive did not breach a duty . . . to accept a reasonable settlement demand" when it failed to accept an offer from Tran's attorney, and therefore Progressive was not liable for the judgment in excess of the policy limits.

The trial court denied Arellano's motion in its entirety and further declared Progressive did not owe many of the duties on which Arellano sought summary adjudication. The court granted Progressive's motion on its third issue, but denied it on all other issues. In doing so, the court declared Progressive did not breach a duty to

accept the settlement demand from Tran’s attorney and “the amount of the judgment in excess of the policy limits is not a proper measure of damages in this case.”

We affirm the trial court’s decision denying Arellano’s motion, and we reverse the court’s decision granting Progressive summary adjudication on its third issue. Arellano’s request that the court adjudicate seven issues involving whether Progressive “had and breached” a duty, and Progressive’s request the court adjudicate it “did not breach a duty . . . to accept a reasonable settlement demand,” are not proper summary adjudication issues under Code of Civil Procedure section 437c.¹

Section 437c, subdivision (f)(1), authorizes a court to adjudicate an issue “only if it completely disposes of a cause of action, an affirmative defense, a claim for [punitive] damages, or an issue of duty.” The statute further specifies an issue of duty is whether “one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs.” Section 437c, subdivision (f)(1), does not authorize a court to determine whether a defendant breached a duty, and therefore the trial court lacked authority to reach these issues.

Arellano is not entitled to summary adjudication on his eighth issue for two reasons. First, Arellano failed to allege one of the two theories on which he relies as the basis for Progressive’s purported duty to pay Tran’s entire claim. Second, triable issues of fact exist on whether Progressive acted reasonably in seeking to settle Tran’s claim within policy limits before Tran filed the underlying action.

Finally, we find the trial court erred in affirmatively declaring Progressive did not owe the duties on which Arellano sought summary adjudication. In ruling on Arellano’s motion, the trial court’s only options were to either grant or deny the motion on each issue. Regardless of what the evidence may have shown, the court lacked

¹ All further statutory references are to the Code of Civil Procedure unless otherwise specified.

authority to grant Progressive any relief regarding the specific duties Arellano identified in his motion because Progressive's motion did not identify those duties as issues on which Progressive sought summary adjudication. The trial court exceeded its authority by declaring Progressive did not owe the several duties identified in Arellano's motion and those declarations are not binding on remand.

I

FACTS AND PROCEDURAL HISTORY

A. *The Accident and Efforts to Settle Tran's Claim*

On November 18, 2006, Arellano ran a stop sign in his truck and collided with Tran's vehicle in the City of San Diego (City). Arellano fled the accident scene and police later arrested him for driving while intoxicated and hit and run. Tran suffered life-threatening injuries in the accident. Paramedics transported him to University of California, San Diego Medical Center where he remained in a coma for several weeks.

At the time of the accident, Progressive insured Arellano under an automobile policy with a \$15,000 bodily injury liability limit and \$10,000 property damage liability limit. Progressive learned of the accident and Arellano's arrest four days later when it received a phone call from the police officer investigating the accident. Progressive assigned claims adjuster Tiara Foster to handle the bodily injury portion of the claim and Kimberly Feldwick as the adjuster for the property damage portion. The same day Progressive learned of the accident, Feldwick spoke by phone with Tran's friend, Jeff Spencer, who informed Feldwick he would handle "everything" while Tran was comatose.

On November 29, 2006, Foster spoke with Spencer, who informed her Tran remained in a coma, Tran had no wife or children, and Tran's mother had arrived from her Detroit home and was spending most of her time at the hospital. Spencer also told Foster he did not have authority to act on Tran's behalf, but Tran's mother was looking

for a lawyer to help her obtain power of attorney. After her conversation with Spencer, Foster promptly mailed a letter to “Bun Tran [¶] C/O Jeff Spencer” confirming Progressive needed copies of Tran’s medical bills and “Power of Attorney from the party representing Mr. Tran’s interest” to proceed with Tran’s bodily injury claim.

That same day, Foster initiated her efforts to locate and interview Arellano about the facts surrounding the accident. Specifically, Foster (1) attempted to phone Arellano at both the home and work numbers listed in Progressive’s file; (2) sent a letter to Arellano at the address listed in Progressive’s file asking him to contact her; (3) phoned the police detective investigating the accident; (4) checked the county jail Web site to see if it listed Arellano as an inmate; and (5) contacted the insurance agent who sold Arellano the Progressive policy to confirm Foster had all the available contact information for Arellano. None of these efforts proved successful.

The person who answered Arellano’s purported home phone told Foster she had the wrong number and Foster learned Arellano’s employer, Chili’s Restaurant, no longer employed him. The insurance agent informed Foster Arellano’s full name was Leonel Arellano Salmeron and a family member reported that Arellano was in jail. The agent, however, had no additional contact information for Arellano. Foster’s searches on the jail Web site did not identify an inmate named either Arellano or Salmeron. Foster attempted to contact the investigating detective, but he was on vacation and unavailable until Christmas.

After these efforts to locate Arellano failed, Foster contacted Progressive’s Special Investigations Unit and asked for assistance in finding Arellano. That unit performed a computer search regarding Arellano and a “drive by cold call” at his last known residence. Progressive still could not find Arellano.

Throughout this time Arellano remained in the county jail, but Progressive could not locate him on the jail Web site because the police misspelled Arellano’s name as “Arrellano.” Progressive did not search the Web site using the incorrectly spelled

name, although the police report used the same erroneous spelling. Progressive also did not contact the police or jail to locate Arellano.

On December 11, 2006, Foster received authority to raise Progressive's bodily injury reserves for Tran's claim to the \$15,000 policy limits because of Tran's severe injuries. Three days later, Foster, after reviewing the police report, concluded Arellano was "100%" at fault based on eyewitnesses who saw him run the stop sign, collide with Tran's vehicle, and flee the scene.

That same day Foster phoned Spencer to discuss Tran's claim. Spencer informed her Tran remained in a coma and "[Tran's] mother now has power of att[orne]y." Based on that representation, Foster asked Spencer to have Tran's mother forward her a copy of the power of attorney and about one week's worth of medical bills to document that Tran's claim exceeded the \$15,000 bodily injury policy limits. On December 15, 2006, Foster sent a letter to "Bun Tran [¶] C/O Jeff Spencer" confirming Progressive needed "Medical records/bills from the hospital" and a "copy of the power of attorney from the party representing Mr. Tran's interest" to resolve the bodily injury claim. On January 21, 2007, Foster noted in Progressive's claims file that she was still waiting for medical bills and a power of attorney to resolve Tran's bodily injury claim. Neither Spencer nor Tran's mother ever provided the requested documents.

Throughout this period, all contact with Tran's mother was through Spencer, who later testified he maintained almost daily contact with Tran's mother. Spencer provided her copies of Progressive's letters and communicated Progressive's request she contact its representative. Tran's mother testified she twice called and left recorded messages at Progressive, but Progressive had no record of those calls. Despite its regular contacts with Spencer, Progressive made no attempt to contact Tran's mother directly.

Tran's mother hired an attorney, Anh Quoc Duy Nguyen, on January 22, 2007, to represent her as Tran's guardian. On January 26, 2007, Nguyen sent Foster a

letter explaining he represented Tran and Tran also “is represented by his mother/guardian.” The letter further stated, “My client is hereby willing to be responsible for any and all medical and other liens so long as Progressive tenders all of its liability limits within 15 days from the date of this letter subject to the further condition precedent of convincing me that there are no other responsible parties, whether insured or not, causing this accident. If I am convinced, I will state as much in a letter. If I am not convinced, I will never state as much in a letter and there will be no settlement. Please also tell me, since it may bear on settlement, whether or not your insured received liquor at a Chili’s restaurant shortly before the accident, and if so, which Chili’s restaurant. We understand that Chili’s was your insured’s employer at the time of the accident.” Nguyen later testified this letter referred to Tran’s bodily injury claim only and he had no interest in pursuing a property damage claim on Tran’s behalf.

Progressive did not communicate Nguyen’s demand to Arellano because it still had not located him. Foster, however, immediately phoned Nguyen after receiving his demand and inquired whether he had any medical bills or records to document Tran’s damages. She asked Nguyen to send her one bill so she would have documentation to support her recommendation that Progressive make a policy limits settlement offer. On January 31, 2007, Foster requested permission to offer the \$15,000 policy limits without medical documentation because Tran’s damages clearly exceeded the policy limits. Progressive agreed and Foster tendered the \$15,000 bodily injury policy limits to Nguyen on February 2, 2007. She phoned Nguyen’s office to verbally communicate the offer and then faxed a letter making the offer. Foster’s letter also explained, “You requested information regarding our insured’s relationship with Chili’s Restaurant and if he was served alcohol at this location. Unfortunately, we have not been able to locate our insured; therefore, we do not have a recorded statement from our insured regarding the facts of this loss. [¶] Please convey this offer to your client(s) and advise me of the decision at your earliest convenience.” Because she had not received any response from

Nguyen, Foster phoned him on February 28, 2007, and left a message inquiring about the status of Progressive's offer.

On March 2, 2007, Kendra Turner, a new claims adjuster handling the property damage claim, phoned Nguyen's office and left a message explaining Progressive could not offer Tran the \$10,000 property damage policy limits because it anticipated receiving a claim from the City regarding a stop sign damaged in the accident. Turner sent Nguyen a letter confirming Progressive could not make a final determination on Tran's claim because it was waiting for the City's property damage claim.

Nguyen sent Turner a letter on March 14, 2007, "reject[ing her letter] in its entirety." Nguyen's letter criticized Progressive for failing to request an extension of his earlier policy limits demand before it expired, and further explained Nguyen would have dismissed all claims "had Progressive . . . only been prompt, timely and polite."

On March 15, 2007, Foster wrote Nguyen to ask about the status of the \$15,000 policy limits offer she made six weeks earlier to resolve Tran's bodily injury claim. A few days later, Turner phoned Nguyen's office to discuss his March 14th letter and clarify his apparent confusion regarding the difference between Tran's bodily injury claim and his property damage claim. She left a message explaining she was handling the property damage claim only and her March 2nd letter did not relate to Tran's bodily injury claim, which Foster was handling.

Foster again wrote Nguyen on April 3, 2007, to inquire regarding the status of Progressive's policy limits offer to resolve Tran's bodily injury claim. She explained Progressive could not accept or deny the claim until she received a response to the offer and a signed release, but she did not propose a specific release. Nguyen responded the next day with a letter rejecting the \$15,000 policy limits offer. He explained he was referring Tran's claim to another attorney to determine "when and what kind of lawsuit to file."

In June 2007, Arellano pleaded guilty to driving while intoxicated and leaving the accident scene. The court sentenced Arellano to six years and four months in prison, and ordered him to pay Tran and his mother restitution. Progressive had no contact with Arellano until after Tran filed suit against him.

B. *Tran's Personal Injury Lawsuit Against Arellano*

In April 2007, Tran's counsel filed the underlying lawsuit to recover Tran's substantial medical expenses and other damages he suffered. The complaint also named Chili's Restaurant, the owner of property adjacent to the intersection where the accident occurred, and the City as defendants who shared liability for Tran's damages. Tran's counsel also filed an ex parte application to appoint Tran's mother as his guardian ad litem. In May 2007, the trial court granted the application and for the first time provided Tran's mother with authority to pursue the claims against Arellano and others on Tran's behalf. Progressive hired counsel to defend Arellano in Tran's lawsuit.

Trial began in August 2009 and the jury returned a verdict against Arellano for more than \$23 million.² Before the trial, Arellano assigned to Tran his "insurance bad faith rights . . . to collect the entire judgment entered against [him] as a result of the November 18, 2006 accident, including all judgments in excess of [his] policy limits with Progressive" Arellano retained the right to sue Progressive for "[his] own emotional distress and punitive damages."³

² Chili's Restaurant obtained a summary judgment against Tran, while the City settled for \$1 million and the property owner settled for \$300,000.

³ Arellano requested that we judicially notice the following documents from Tran's underlying lawsuit against Arellano: (1) an unpublished appellate decision regarding Progressive's refusal to post an appeal bond for the entire judgment; (2) an order granting a good faith settlement motion; and (3) a stipulation that a settlement was in good faith. We deny Arellano's request because the documents are irrelevant to the issues we decide on this appeal. (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 ["Although a court may judicially notice a variety of matters

C. *Arellano and Tran's Bad Faith Lawsuit Against Progressive*

In October 2009, Arellano sued Progressive for breach of contract and bad faith to recover on the emotional distress and punitive damages claims he did not assign to Tran. Arellano's complaint alleges Progressive breached its insurance contract and committed bad faith in several ways, including (1) failing to accept the settlement demand Nguyen made on January 26, 2007; (2) failing to timely communicate that offer to Arellano; (3) failing to properly investigate Tran's claim; (4) failing to settle Tran's lawsuit against Arellano for an assignment of any bad faith claim Arellano had against Progressive and a covenant by Tran not to execute on any judgment he obtained against Arellano; (5) filing a declaratory relief action against Arellano and seeking a default judgment that Progressive was not liable for any judgment in excess of its policy limits; and (6) hiring a defense attorney for Arellano who had a conflict of interest because he also sought to protect Progressive from any liability beyond its policy limits.

Tran filed a complaint in intervention in Arellano's lawsuit asserting the breach of contract and bad faith claims Arellano assigned to him. Based on the same misconduct alleged in Arellano's complaint, Tran sought to recover from Progressive the difference between the approximately \$23 million judgment Tran obtained against Arellano and Progressive's \$15,000 policy limits. Tran alleged Progressive's bad faith made it liable for all of Arellano's liability regardless of Progressive's policy limits.

Arellano filed a motion asking the trial court to summarily adjudicate eight issues relating to the duties he claimed Progressive owed as his insurer. Arellano asked the court in the first seven issues to adjudicate that "Progressive had and breached its duty" to (1) "tender the policy limits prior to the retention of Anh Nguyen on January 22, 2007"; (2) "investigate the claim"; (3) "communicate with its insured"; (4) "evaluate the policy limits demand"; (5) "seek clarification of any ambiguous offer"; (6) "request an

[citation], only *relevant* material may be noticed" (original italics)], overruled on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276.)

extension of time to respond to policy limits demand”; and (7) “resolve the claim at or within the policy limits.” The eighth issue asked the court to summarily adjudicate that “Progressive by no later than the filing of Tran’s personal injury lawsuit on April 18, 2007 owed a duty to pay the reasonable value of Tran’s bodily injury claim, irrespective of the limits contained in the insurance policy that Progressive issued to Arellano.” Tran filed a “Joinder in Arellano’s Motion for Summary Adjudication.”

Progressive filed its own motion seeking summary judgment or summary adjudication on six issues. Issues 1, 2, and 6 asked the trial court to adjudicate that Arellano’s and Tran’s breach of contract and bad faith claims and Arellano’s punitive damages claim had no merit. Progressive’s third issue asked the court to adjudicate that “Progressive did not breach a duty” to accept a reasonable settlement offer within policy limits when it failed to accept Nguyen’s January 26, 2007 demand, and therefore Progressive was not liable for the judgment in excess of the policy limits. Finally, issues 4 and 5 asked the court to adjudicate that Progressive did not breach its duty to defend Arellano and did not owe a duty to stipulate to an assignment of rights and covenant not to execute between Arellano and Tran.

The trial court heard both motions in March 2011. It denied Arellano’s motion on his second and third issues because it found triable issues existed on whether Progressive had and breached a duty to investigate Tran’s claim and communicate with Arellano. The court denied Arellano’s motion on issues 1 and 4 through 8 because it found as a matter of law that Progressive did not owe the duties identified in those issues. The court granted Tran’s joinder in Arellano’s motion.

The trial court granted summary adjudication on Progressive’s third issue, finding Progressive owed no duty to accept the policy limits settlement demand in Nguyen’s January 26, 2007 letter because the additional conditions Nguyen placed on the demand rendered it unreasonable. Based on its finding Progressive had no duty to accept Nguyen’s demand, the trial court declared “the amount of the judgment in excess of the

policy limits is not a proper measure of damages in this case.” The court further explained, “All parties are particularly interested in resolving whether Progressive can be liable for the judgment in excess of the limits under any legal theory supported by the facts, and all parties have specifically requested that the court rule on that issue. [¶] . . . The court concludes, without determining if there are questions of fact, that even if the facts most favorable to the plaintiff[s] are true, plaintiffs cannot recover the excess judgment.” The court denied Progressive’s motion on all other issues.

Based on the trial court’s ruling limiting Progressive’s liability to its \$15,000 policy limits, Progressive tendered that amount to Arellano and Tran and the parties stipulated to entry of judgment to facilitate an appeal on the critical issue whether Progressive could be held liable for Arellano’s liability in excess of the policy limits. The trial court entered judgment based on the parties’ stipulation in August 2011 and Arellano and Tran timely appealed. Progressive did not appeal the trial court’s ruling on its summary adjudication motion.

II

DISCUSSION

A. *Governing Summary Adjudication Standards*

A party may seek summary adjudication on whether a cause of action, affirmative defense, or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff. (§ 437c, subd. (f)(1).) “A motion for summary adjudication . . . shall proceed in all procedural respects as a motion for summary judgment.” (§ 437c, subd. (f)(2).)

The moving party “bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851 (*Aguilar*).) To meet that burden, the moving party must present evidence sufficient to show he or she is entitled to

summary adjudication as a matter of law. (§ 437c, subds. (c) & (f)(2); *Monticello Ins. Co. v. Essex Ins. Co.* (2008) 162 Cal.App.4th 1376, 1385.)

If the moving party carries that burden, “he [or she] causes a shift, and the opposing party is then subjected to a burden of production of his [or her] own to make a prima facie showing of the existence of a triable issue of material fact.” (*Aguilar, supra*, 25 Cal.4th at p. 850.) A triable issue of material fact exists “‘if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.’ [Citation.] Thus, a party ‘cannot avoid summary [adjudication] by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact. [Citation.]’ [Citation.]” (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1144-1145 (*Dollinger*).)

We review de novo a trial court’s ruling on a summary adjudication motion. (*Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 848.) “[I]n practical effect, we assume the role of a trial court and apply the same rules and standards that govern a trial court’s determination of a motion for summary [adjudication].’ [Citation.] ‘Regardless of how the trial court reached its decision, it falls to us to examine the record de novo and independently determine whether that decision is correct.’ [Citation.]” (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694; *Dollinger, supra*, 199 Cal.App.4th at p. 1144 [“the reviewing court ‘. . . reviews the trial court’s ruling, not its rationale’”].)

B. *The Trial Court Properly Denied Arellano’s Summary Adjudication Motion*

1. The Trial Court Lacked Authority to Summarily Adjudicate Whether Progressive “Had and Breached” Any Duties

Arellano’s first seven summary adjudication issues asked the trial court to determine that “Progressive had and breached” various duties relating to Tran’s claim

against Arellano. The trial court denied Arellano’s motion on each of these issues, finding triable issues existed on two of the issues and declaring Progressive did not owe the duties identified in the other five issues. We affirm the trial court’s decision to deny Arellano’s motion on these issues without reaching the substantive merits because the trial court lacked authority to summarily adjudicate whether “Progressive had *and breached*” a duty. (Italics added.)

Section 437c, subdivision (f)(1), authorizes a trial court to grant a party’s summary adjudication motion “only if it completely disposes of a cause of action, an affirmative defense, a claim for [punitive] damages, or an issue of duty.” A trial court lacks authority to summarily adjudicate any other issue. (*Roos v. Kimmel* (1997) 55 Cal.App.4th 573, 593-594; see also *McCaskey v. California State Automobile Assn.* (2010) 189 Cal.App.4th 947, 975 [“there can be no summary adjudication of less than an entire cause of action. . . . If a cause of action is not shown to be barred in its entirety, no order for summary judgment — or adjudication — can be entered”]; *Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 323 [the legislative purpose behind section 437c, subdivision (f)(1), is “to stop the practice of adjudication of facts or adjudication of issues that do not completely dispose of a cause of action or defense”].)

For example, in *DeCastro West Chodorow & Burns, Inc. v. Superior Court* (1996) 47 Cal.App.4th 410 (*DeCastro*), the plaintiffs sued their former attorneys for legal malpractice seeking \$100 million in lost profit damages and several other lesser items of compensatory damages. Because the lost profit damages comprised the vast majority of the plaintiffs’ damages, the attorneys moved for summary adjudication on whether the plaintiffs could recover lost profit damages on a legal malpractice claim. (*Id.* at p. 415.) The Court of Appeal upheld the trial court’s denial of the motion because an item of compensatory damages is not an issue on which section 437c, subdivision (f)(1), permits a trial court to grant summary adjudication. (*DeCastro*, at p. 422 [“section 437c, subdivision (f)(1), does not permit summary adjudication of a single item of

compensatory damage which does not dispose of an entire cause of action”]; see also *Hindin v. Rust* (2004) 118 Cal.App.4th 1247, 1259 [in a malicious prosecution action, “a motion for summary adjudication purporting to establish that some but not all of the multiple grounds for liability asserted in the prior action were brought with probable cause is improper for failure to completely dispose of an entire cause of action as required under subdivision (f)(1) of section 437c”].)

Similarly, whether Progressive “breached” duties it purportedly owed Arellano is not an issue on which section 437c, subdivision (f)(1), authorizes summary adjudication. Both Arellano and Progressive argue the trial court had authority to summarily adjudicate Arellano’s first seven issues because the phrase “issues of duty” in section 437c, subdivision (f)(1), necessarily includes whether a defendant breached a duty it owed to the plaintiff.⁴ The parties are mistaken and cite no authority to support their interpretation of the statute.

In authorizing summary adjudication on “issue[s] of duty,” section 437c, subdivision (f)(1), does not permit a trial court to summarily adjudicate any question relating to duty other than whether a defendant owes a duty to a plaintiff. (Cf. *Linden Partners v. Wilshire Linden Associates* (1998) 62 Cal.App.4th 508, 522 (*Linden Partners*) [“The language of the statute is clear and unequivocal, a plaintiff may seek a determination of whether a defendant or defendants owed a duty to the plaintiff”].) Indeed, the statute expressly authorizes a party to seek summary adjudication on “one or more issues of duty” only “if that party contends . . . one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs.” (§ 437c, subd. (f)(1).) Nothing in the

⁴ In the trial court, Progressive argued Arellano’s first seven issues were not proper summary adjudication issues because they asked the court to decide whether Progressive breached various duties. Progressive now takes the opposite view after the trial court ruled in its favor.

statute's plain language authorizes summary adjudication on whether a defendant breached a duty.

The Legislature authorized a trial court to summarily adjudicate whether a defendant owes a duty because “[t]he question of whether a duty exists under certain circumstances is generally a question of law [citation]” (*Linden Partners, supra*, 62 Cal.App.4th at p. 522.) Accordingly, the existence of a duty can often be resolved on a summary adjudication motion. The question whether a defendant breached a duty, however, is generally a question of fact for the jury (see, e.g., *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1599; *Piscitelli v. Friedenber*g (2001) 87 Cal.App.4th 953, 983), and therefore is not amenable to summary adjudication unless it completely disposes of a cause of action. Neither Arellano nor Progressive contends the breach issues Arellano identified in his motion completely disposed of a cause of action.

The fact Arellano's first seven summary adjudication issues each included the question whether Progressive owed a duty does not make the issues proper under section 437c, subdivision (f)(1). Each issue asked the trial court to adjudicate that Progressive had *and* breached a particular duty, and therefore the court could not grant summary adjudication on any issue Arellano identified unless it found Progressive both had the duty in question *and* breached that duty. As explained above, the trial court lacked authority to summarily adjudicate Progressive breached a duty. Moreover, the court could not summarily adjudicate as one issue that Progressive had and breached a duty because that adjudication would not completely dispose of a cause of action as section 437c, subdivision (f)(1), requires. A plaintiff seeking summary adjudication on a cause of action must present evidence establishing every element of that claim. (§ 437c, subd. (p)(1); *S.B.C.C., Inc. v. St. Paul Fire & Marine Ins. Co.* (2010) 186 Cal.App.4th 383, 388.) Whether Progressive had and breached a duty, however, would not establish every element of either Arellano's breach of contract cause of action or his bad faith

cause of action because that adjudication would not establish the requisite causation or damages elements on those claims.

The trial court also could not overlook Arellano's defective summary adjudication issues by simply ignoring that each issue improperly asked the court to summarily adjudicate breach of a duty. Ignoring Arellano's defective presentation of issues to summarily adjudicate breach of duty would be equivalent to granting summary adjudication on the court's own motion because it would resolve an issue other than the one Arellano noticed. California courts lack authority to grant summary adjudication on their own motion. (*Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 108 (*Schubert*)). Arellano is bound by and limited to the issues he identified in his notice of motion. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶ 9:38, p. 9(I)-23 (rev. # 1, 2012) ["The court cannot grant different relief, or relief on different grounds, than stated in the notice of motion"]; *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 333 ["the manner in which an issue is framed is critical" on a summary adjudication motion].)

"Section 437c is a complicated statute. There is little flexibility in the procedural imperatives of the section, and the issues raised by a motion for summary judgment (or summary adjudication) are pure questions of law. As a result, section 437c is unforgiving; a failure to comply with any one of its myriad requirements is likely to be fatal to the offending party. [¶] Section 437c thus does not furnish the trial courts with a convenient procedural means, to which only 'lip service' need be given, by which to clear the trial calendar of what may appear to be meritless or weak cases. [Citation.] Any arbitrary disregard of the statutory commands in order to bring about a particular outcome raises procedural due process concerns." (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1607.)

In sum, the trial court lacked authority under section 437c, subdivision (f)(1), to grant Arellano's summary adjudication motion on the first seven issues it identified.

2. Progressive's Liability for the Excess Judgment Could Not Be Summarily Adjudicated on the Current Record

Arellano's eighth asked the trial court to summarily adjudicate that Progressive had a duty to pay the full amount of Tran's claim by the time Tran filed the personal injury lawsuit in April 2007, regardless of Arellano's policy limits. In other words, he asked the court to adjudicate that Progressive had "opened up" or waived its policy limits. Arellano contends Progressive owed a duty to pay the full amount of Tran's claim for two reasons: (1) Progressive breached its duty to settle Tran's claim within the policy limits by failing to tender those limits to Tran's mother before she hired Nguyen; and (2) Progressive prevented a settlement within policy limits by breaching its duty to communicate with Arellano regarding Nguyen's settlement demand and its duty to investigate Tran's claim. We affirm the trial court's decision denying Arellano summary adjudication on this issue because Arellano failed to plead in his complaint the basis for the first reason and triable issues exist on the second reason.⁵

⁵ Stating Arellano's argument reveals issue 8 also is not a proper summary adjudication issue because it required the trial court to determine whether Progressive breached a separate duty before the court could determine whether Progressive had the duty the issue identified. As we explain below, Progressive had a duty to pay the full amount of Tran's claim only if Progressive either (1) breached its duty to settle the claim within policy limits or (2) prevented a settlement within the policy limits by breaching a duty other than the duty to settle. Consequently, the trial court had to determine whether Progressive breached a duty to Arellano before it could determine whether Progressive has a duty to pay the full amount of Tran's claim. As discussed above, whether Progressive breached a duty is not an issue subject to summary adjudication under section 437c, subdivision (f)(1).

a. Governing Principles Regarding When an Insurer Must Pay a Judgment in Excess of Policy Limits

The covenant of good faith and fair dealing implied in every insurance policy imposes a duty on insurers to make reasonable efforts to settle claims against their insureds within policy limits when there is a substantial likelihood the claimant may obtain a judgment in excess of the insured's policy limits. (*Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 401 (*Kransco*); *Lehto v. Allstate Ins. Co.* (1994) 31 Cal.App.4th 60, 67-68.) This duty arises because the insurer's and the insured's interests conflict when there is a substantial risk the insured's liability will exceed the policy limits. Under those circumstances, an insurer could choose not to settle a claim within the policy limits and instead insist on a trial with the hope of obtaining a more favorable judgment, but knowing it faced only limited liability because the insured would be responsible for any judgment exceeding the policy limits. (*Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 869-870, 873-874 (*Merritt*); see also *Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 941.) To address this conflict, the implied covenant "requires the [insurer] to consider in good faith the interests of the [insured] equally with its own and evaluate settlement offers within policy limits as though it alone carried the entire risk of loss." (*Merritt*, at p. 871; see also *Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 724-725 (*Hamilton*).)

An insurer that unreasonably fails to accept a settlement demand within policy limits acts in bad faith and is liable for any damages proximately caused by its breach of the duty to settle, including the full amount of any judgment against the insured that exceeds the policy limits. (*Hamilton, supra*, 27 Cal.4th at p. 725; *Kransco, supra*, 23 Cal.4th at p. 401.) Moreover, an insurer also may be liable for the full amount of an excess judgment entered against its insured when the insurer breaches any other duty it owed to the insured, such as the duty to investigate or the duty to communicate, and that breach prevented the insurer from settling the claim within policy limits. (*Safeco Ins. Co.*

of America v. Parks (2009) 170 Cal.App.4th 992, 1008-1009 (*Parks*) [insurer’s unreasonable failure to investigate whether it issued other policies that would provide coverage prevented a settlement within policy limits and may subject insurer to liability for excess judgment]; *Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, 1392, 1399-1400 (*Boicourt*) [insurer’s failure to communicate with insured prevented a possible settlement within policy limits and therefore subjected insurer to potential liability for excess judgment].) This latter rule prevents an insurer from relying on a breach of some other duty to shield itself from liability for breach of the duty to accept a reasonable settlement demand. (*Parks*, at p. 1009.)

The duty to settle requires an insurer to *accept* a reasonable demand to resolve a claim against its insured within policy limits or face potential liability for bad faith. (*Hamilton, supra*, 27 Cal.4th at pp. 724-725; *Kransco, supra*, 23 Cal.4th at p. 401.) California law, however, has yet to resolve whether the duty to settle also requires an insurer to initiate settlement discussions with a third party claimant or make a settlement offer in the absence of a demand from the claimant. (*Boicourt, supra*, 78 Cal.App.4th at p. 1400; Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2012) ¶ 12:289, p. 12B-17 (rev. # 1, 2011); *Du v. Allstate Ins. Co.* (9th Cir. 2012) 697 F.3d 753, 757-758.) Some authorities suggest the duty to settle arises only when a third party claimant makes a settlement demand within policy limits,⁶ but other

⁶ See, e.g., *Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 996 [“actionable ‘bad faith’ arises, not from an insurance carrier’s obligation ‘to settle,’ but from unwarranted *failure to accept a reasonable settlement offer*” (original italics)]; *Merritt, supra*, 34 Cal.App.3d at p. 877 [“While much remains obscure in this field of the law it is apparent . . . the legal rules relating to bad faith come into effect only when a conflict of interest develops between the [insurer] and its insured . . . [and] a conflict of interest only develops when an offer to settle an excess claim is made within policy limits”]; but see *Boicourt, supra*, 78 Cal.App.4th 1395-1397 [refusing to follow this portion of the *Merritt* decision and finding it to be “improvident” and “gratuitous[.]” dicta].

authorities imply the duty to settle requires an insurer to initiate settlement negotiations and make settlement offers even in the absence of a settlement demand from the claimant.⁷ We need not resolve this issue, however, because Arellano did not allege Progressive breached its duty to settle before Nguyen made his settlement demand.

b. Arellano Failed to Plead Progressive’s Failure to Tender the Policy Limits to Tran’s Mother as a Breach of the Duty to Settle

Arellano asserts Progressive owed a duty to pay all the damages he suffered based on Progressive’s failure to tender the policy limits to Tran’s mother once Arellano’s liability became reasonably clear by mid-December 2006. According to Arellano, Tran’s mother would have accepted the policy limits at any time before she hired Nguyen on January 22, 2007, and therefore Progressive breached the duty to settle by failing to tender this offer before that date because Progressive already knew the claim would exceed the policy limits. We need not reach the substantive merits of this issue because Arellano’s complaint failed to allege the duty to settle required Progressive to tender the policy limits to Tran’s mother.

⁷ See, e.g., *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 906 (*Shade Foods*) [“the duty to accept reasonable settlements, included within the implied covenant of good faith and fair dealing [citations], would indeed be meaningless if it did not entail a duty to negotiate toward a reasonable settlement”]; *Garner v. American Mut. Liability Ins. Co.* (1973) 31 Cal.App.3d 843, 848 (*Garner*) [“If in failing to consider, accept, or make a reasonable settlement offer there has been actual bad faith on the part of the insurer, there is an obvious breach of duty to the insured”]; see also Ins. Code, § 790.03, subd. (h)(5) [unfair claims settlement practices include “[n]ot attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear”]; *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1078 [violation of Insurance Code section 790.03, subdivision (h)(5), does not give rise to a private right of action, but is admissible evidence on a common law bad faith claim to show the insurer acted unreasonably]; CACI No. 2337 [defining what factors a jury may consider in evaluating insurer’s conduct on a common law bad faith claim].

“It is well established that the pleadings determine the scope of relevant issues on a summary [adjudication] motion.” (*Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74 (*Nieto*); see also *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258 [“The complaint limits the issues to be addressed at the motion for summary [adjudication]”].) A summary adjudication motion may *not* be granted or denied based on an issue the pleadings do not raise. (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663; see also *Kaye v. Board of Trustees of San Diego County Public Law Library* (2009) 179 Cal.App.4th 48, 61 [in ruling on a summary adjudication motion, the court need not consider purported statutory violations the plaintiff failed to allege].) If a party wants the court to consider an unpleaded claim or issue, the party must seek leave to amend before the hearing on the summary adjudication motion. (*Bostrom*, at pp. 1663-1664.)

Arellano’s operative complaint nowhere alleges Progressive breached its duty to settle by failing to tender the policy limits to Tran’s mother or take any other action before she hired Nguyen. To the contrary, Arellano’s complaint alleges Progressive “first waive[d]” the policy limits and breached the duty to settle when it failed to accept the settlement demand Nguyen made on January 26, 2007.

Arellano contends paragraph 77 of his complaint adequately alleged Progressive’s failure to tender the policy limits to Tran’s mother by alleging Progressive breached its duties to Arellano by “unreasonably failing to settle,” “unreasonably failing to explore the possibility of settlement,” “failing to reasonably adjust the claim,” “breaching its duty to communicate,” and “other acts in breach of its duties.” He is mistaken. Paragraph 77 is a conclusory list of Progressive’s purported breaches of a wide variety of duties, but does not mention Progressive’s failure to tender its policy limits to Tran’s mother. Moreover, paragraph 77 states all breaches it alleges occurred “after undertaking a defense.”

Accordingly, Arellano's failure to allege Progressive breached the duty to settle by not tendering the policy limits to Tran's mother precluded the trial court from granting Arellano summary adjudication on Progressive's purported duty to pay the full amount of Tran's claim. On remand, Arellano may seek leave to amend his complaint to allege Progressive breached its duty to settle by failing to tender the policy limits directly to Tran's mother.

c. Triable Issues Exist on Whether Progressive Breached Its Duties to Communicate With Arellano and Investigate Tran's Claim

Arellano asserts a second reason for Progressive's duty to pay Tran's entire claim: Progressive's failure to communicate with Arellano and to investigate Tran's claim. Arellano contends Progressive breached its duty to inform Arellano about Nguyen's settlement demand and to ask him for the information Nguyen demanded regarding whether Arellano's employer, Chili's Restaurant, provided him with alcohol on the night the accident occurred. Similarly, Arellano contends Progressive breached its duty to investigate Tran's claim by failing to locate Arellano and obtain his statement regarding the accident, including whether Chili's provided him alcohol. Arellano claims if Progressive had contacted him it would have learned that Chili's did not provide him with alcohol. Arellano claims the parties would have settled within the policy limits because Progressive would have satisfied the conditions Nguyen placed on his demand. Progressive's failure to contact Arellano, however, does not establish as a matter of law that Progressive breached its duty to communicate with Arellano or its duty to investigate Tran's claim.⁸

⁸ We emphasize Arellano does *not* contend Progressive's failure to accept Nguyen's demand breached the duty to settle and made Progressive liable for the full amount of Tran's claim. At oral argument in the trial court, Arellano's counsel explained he "carefully stayed away from" seeking summary adjudication on that issue because the conditions Nguyen placed on the demand created several questions regarding whether Progressive had a duty to accept it. Because Arellano does not argue Progressive breached its duty to settle by failing to accept Nguyen's conditional demand, we need not

It is undisputed the implied covenant of good faith and fair dealing imposed on Progressive a duty to communicate to Arellano Nguyen's settlement demand (*Heredia v. Farmers Ins. Exchange* (1991) 228 Cal.App.3d 1345, 1360) and a duty to investigate Tran's claim against Arellano (*Shade Foods, supra*, 78 Cal.App.4th at pp. 879-880; *Parks, supra*, 170 Cal.App.4th at p. 1003). But Progressive would breach these duties only if it acted unreasonably. (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2012) ¶ 12:203, p. 12B-1 (rev. # 1, 2010) ["As a general rule, breach of the insurer's implied covenant of good faith and fair dealing requires proof of *unreasonable* conduct by the insurer" (original italics)]; *Nieto, supra*, 181 Cal.App.4th at p. 86 ["The ultimate test is whether the insurer's conduct was unreasonable"]; *Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 206 [reasonableness is the governing standard for bad faith liability in both first party and third party cases].) As Arellano concedes, "[Progressive's] good or bad faith must be evaluated in light of the totality of the circumstances surrounding its actions." (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 723.)

Progressive presented evidence it did not contact Arellano because Progressive could not locate him despite numerous attempts. After learning about the accident, Progressive attempted to contact Arellano at his last known residence and place of employment. It also contacted the insurance agent who sold Arellano his policy and who also had occasional contact with Arellano. When the agent informed Progressive one of Arellano's family members said he was in jail, Progressive searched the jail Web site for Arellano under the proper spelling for his name and an alternative name the insurance agent provided. Progressive also phoned a police detective investigating the

decide whether it qualified as a policy limits demand that Progressive had a duty to accept.

accident and sent an investigator to Arellano's last known address to speak with the property manager. None of these efforts, however, located Arellano.

Progressive received no response at Arellano's last known address and his last known phone number was incorrect. Arellano's employer told Progressive he no longer worked there and the insurance agent told Progressive she had the same contact information as Progressive. Finally, the jail Web site did not list an inmate with Arellano's name or the alternative name the insurance agent provided, and the police detective Progressive phoned was on vacation.

Although it could not find Arellano, Progressive continued to investigate Tran's claim and it timely responded to Nguyen's settlement demand. On February 2, 2007, Progressive offered to pay the \$15,000 bodily injury policy limits to settle Tran's claim, and explained Progressive could not provide the additional information Nguyen sought because Progressive had not been able to locate Arellano. In the following weeks, Progressive repeatedly attempted to contact Nguyen about its offer, but Nguyen failed to respond. He never told Progressive (1) Tran's claim could not be settled without the requested information regarding Chili's; (2) why that information was essential to a settlement for Arellano policy's limits; or (3) Arellano remained in jail and Progressive could obtain the information by simply sending someone to the jail to speak with Arellano. Instead, Nguyen remained silent about the offer until April 4, 2007, when he rejected it and informed Progressive another attorney would decide when to file suit against Arellano.⁹

⁹ The record does not support Arellano's contention a Progressive claims adjuster's letter revoked Progressive's \$15,000 policy limits offer. On March 2, 2007, Turner sent Nguyen a letter confirming a voicemail message she left to explain Progressive could not resolve Tran's property damage claim until it received the City's claim regarding a pole damaged in the accident. The letter did not refer to Tran's bodily injury claim and Foster furthermore sent Nguyen two additional letters on March 15 and April 3, 2007, reiterating the \$15,000 offer to settle Tran's bodily injury claim.

When considered together, these facts establish triable issues on whether Progressive reasonably sought to communicate with Arellano, investigate Tran's claim, and otherwise respond to Nguyen's settlement demand. (See *Garner, supra*, 31 Cal.App.3d at pp. 847-848 ["it is a factual question whether or not the insurer has acted in good faith and has made a reasonable effort on behalf of the insured in its negotiating toward a settlement"]; *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 346 (*Chateau Chamberay*) [whether an insurer acted reasonably is a question of fact unless "the evidence is undisputed and only one reasonable inference can be drawn from the evidence"].)

Arellano contends Progressive's failure to find him was unreasonable as a matter of law because Progressive had been told he was in jail, where he remained after the police arrested him on the date of the accident. Arellano argues Progressive would have found him if it simply contacted his family, who told Arellano's insurance agent he was in jail. Arellano also argues Progressive would have located him if it phoned or sent someone to the jail to inquire about his status, or searched the jail Web site using the incorrect spelling for his name the police used throughout their accident report. This argument, however, fails to show Progressive acted unreasonably as a matter of law.

Whether Progressive took reasonable steps to locate Arellano turns on the totality of the existing circumstances when Progressive attempted to find him. (*Chateau Chamberay, supra*, 90 Cal.App.4th at p. 347 ["the reasonableness of the insurer's decisions and actions must be evaluated as of the time that they were made"].) Whether Arellano in hindsight can identify steps that offered better odds of locating him does not establish Progressive acted unreasonably as a matter of law. Rather, it simply provides

Moreover, Turner phoned Nguyen on March 21, 2007, and left a voicemail explaining the March 2 letter addressed the property damage claim only.

one of several factors a trier of fact may consider when evaluating the various efforts Progressive made to find him.

Arellano also contends Progressive breached its duty to investigate Tran's claim because Progressive did not conduct an independent investigation to learn whether Chili's provided Arellano with alcohol. Arellano contends that had Progressive investigated the matter, it would have learned Chili's did not furnish Arellano with alcohol and sharing that information with Nguyen would have led to a settlement. This argument also fails to establish as a matter of law that Progressive had a duty to pay the full amount of Tran's claim.

An insurer's duty to investigate a claim requires the insurer to perform a reasonable investigation under the circumstances. (*Parks, supra*, 170 Cal.App.4th at pp. 1006-1007; *Shade Foods, supra*, 78 Cal.App.4th at pp. 879-880; *American Internat. Bank v. Fidelity & Deposit Co.* (1996) 49 Cal.App.4th 1558, 1570-1571.) Here, before Nguyen or anyone else raised the possibility that Chili's might share liability for Tran's injuries, Progressive completed its initial investigation, determined Arellano was at fault, and concluded it would try to settle Tran's claim for Arellano's policy limits. At a minimum, these facts establish a triable issue on whether Progressive's duty to conduct a reasonable investigation required it to independently investigate whether Chili's provided Arellano with alcohol and therefore shared liability for Tran's injuries. (See *Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452, 470-471 [whether insurer performed a reasonable investigation is ordinarily a question of fact]; *Chateau Chamberay, supra*, 90 Cal.App.4th at p. 346.)

Arellano's motion also argued Progressive breached several other duties it purportedly owed to Arellano, including the duties to (1) timely and accurately evaluate Tran's claim; (2) timely and accurately evaluate Nguyen's settlement demand; (3) seek clarification regarding any ambiguities in Nguyen's offer; and (4) seek an extension of time to respond to Nguyen's offer. Arellano, however, fails to explain how a breach of

these purported duties prevented Progressive from settling Tran's claim within policy limits. Moreover, as explained above, section 437c, subdivision (f)(1), does not authorize courts to summarily adjudicate whether a party breached a duty. Consequently, whether Progressive breached these duties is a question of fact for the jury.

C. *The Trial Court Erred in Granting Progressive Summary Adjudication*

Progressive's third summary adjudication issue asked the court to determine that "Progressive did not breach a duty" to accept a reasonable settlement offer within policy limits when it failed to accept Nguyen's January 26, 2007 demand, and therefore Progressive was not liable for the excess policy limits judgment. The trial court granted Progressive summary adjudication on this issue and declared, "[T]he amount of the judgment in excess of the policy limits is not a proper measure of damages in this case."¹⁰ Whether Progressive "breached a duty," however, is not an issue subject to summary adjudication.

Progressive acknowledges its third issue asked the court to summarily adjudicate whether Progressive breached a duty, but nonetheless argues the trial court properly granted the motion because the court could have interpreted Progressive's request as an issue of duty under section 437c, subdivision (f)(1). According to Progressive, its motion actually sought an adjudication that Progressive had no duty to accept Nguyen's settlement demand. We disagree.

As phrased, Progressive's third issue does not ask the trial court to determine whether Progressive owed a particular duty to its insured. To the contrary, its plain language assumes Progressive had a duty, but asks the trial court to summarily adjudicate that Progressive did not breach its duty. As explained above, a moving party is bound by and limited to the issues it identifies in its notice of motion. Here,

¹⁰ The trial court denied Progressive's motion on all other issues and Progressive did not appeal that ruling.

Progressive identified an issue that could not be summarily adjudicated under section 437c, subdivision (f)(1), and Progressive may not change the issue after the fact to avoid that conclusion.

Moreover, the trial court also exceeded its authority under section 437c, subdivision (f)(1), by declaring “the amount of the judgment in excess of the policy limits is not a proper measure of damages in this case.” As explained above, Progressive could be liable for the amount of the judgment that exceeded the policy limits only if it breached the duty to settle within policy limits or breached some other duty that prevented a settlement within policy limits. (See *Hamilton, supra*, 27 Cal.4th at p. 725; *Kransco, supra*, 23 Cal.4th at p. 401; *Parks, supra*, 170 Cal.App.4th at pp. 1008-1009; *Boicourt, supra*, 78 Cal.App.4th at pp. 1392, 1399-1400.) Accordingly, to declare the excess judgment was not a proper measure of damages, the trial court first had to conclude Progressive did not breach the duty to settle or some other duty that prevented a settlement. Whether Progressive breached a duty, however, is not a proper summary adjudication issue under section 437c, subdivision (f)(1), and the measure of damages is not an issue that completely disposes of a cause of action.¹¹ (*DeCastro, supra*, 47 Cal.App.4th at p. 422 [“section 437c, subdivision (f)(1), does not permit summary adjudication of a single item of compensatory damage which does not dispose of an entire cause of action”].)

¹¹ In challenging the trial court’s ruling regarding the proper measure of damages, Arellano argues Progressive’s liability exceeds the policy limits based on several acts of bad faith Progressive purportedly committed after Tran filed the underlying lawsuit. Specifically, Arellano argues Progressive committed bad faith by (1) refusing to agree to Arellano’s assignment of his bad faith rights to Tran; (2) refusing to provide an appeal bond for the full amount of Tran’s judgment against Arellano; (3) filing a declaratory relief action regarding Progressive’s liability for the excess judgment; and (4) challenging Arellano’s assignment of his bad faith rights to Tran. Because we conclude the proper measure of damages for Tran’s bad faith claim is not a proper summary adjudication issue, we need not decide whether these acts amount to bad faith.

Progressive nonetheless argues the trial court properly decided Progressive was not liable for the excess judgment because, as the trial court found, the parties “specifically requested” that the court decide the issue. The trial court, however, lacked authority to decide Progressive’s liability for the excess judgment because it lacked the authority to summarily adjudicate the issue under section 437c, subdivision (f)(1). The parties cannot agree to invest the court with authority it did not have: “[C]ourts are not free to ignore the Legislature’s procedural requirements for the convenience of the parties: ‘Notwithstanding the parties’ express or tacit agreement, the court had a responsibility to act in accordance with the statutory procedures set out by the Legislature. [Citations.] Parties cannot stipulate to circumvent a legislatively designated code section as the exclusive statutory vehicle. [Citation.]’ . . . [¶] . . . [¶] ‘Summary [adjudication], although a very useful tool in litigation, is also a drastic remedy. Because of this, it is important that all of the procedural requirements for the granting of such a motion be satisfied before the trial court grants the remedy.’ [Citation.]”¹² (*Magaña Cathcart McCarthy v. CB Richard Ellis, Inc.* (2009) 174 Cal.App.4th 106, 116-117.)

Progressive also contends the court properly reached the issue because Arellano asked the court to summarily adjudicate whether Progressive was liable for the excess judgment. According to Progressive, in denying Arellano summary adjudication on the eight issues his motion presented, the trial court properly decided Progressive had no duty to pay the excess judgment. Not so. The trial court simply lacked the statutory

¹² Recognizing a trial court’s inability to deviate from section 437c, subdivision (f)(1)’s procedures, the Legislature recently enacted section 437c, subdivision (s), effective January 1, 2012. That subdivision establishes a procedure for parties to seek summary adjudication on issues not otherwise authorized by section 437c, subdivision (f)(1). The parties must stipulate to the procedure, provide declarations explaining why the court should deviate from section 437c, subdivision (f)(1)’s limitations on summary adjudication, and obtain the court’s approval *before* filing the motions. Section 437c, subdivision (s), was not in effect when the parties filed their summary adjudication motions in this case or when the court ruled on the motions.

authority to grant Progressive summary adjudication or otherwise adjudicate any issue in Progressive's favor based on the court's decision to deny Arellano's summary adjudication motion. (*Schubert, supra*, 95 Cal.App.4th at p. 108 [section 437c "does not enable the court to enter judgment in favor of the opposing party upon the denial of the moving party's motion"].)

On a summary adjudication motion, the trial court determines only whether the moving party is entitled to the requested adjudication. "A summary [adjudication] proceeding is not a trial on the merits" (*EHP Glendale, LLC v. County of Los Angeles* (2011) 193 Cal.App.4th 262, 275) and the court may not grant the opposing party relief regardless of what the undisputed facts show (*Schubert, supra*, 95 Cal.App.4th at p. 108). Accordingly, in ruling on Arellano's summary adjudication motion, the trial court's only two options were (1) grant Arellano summary adjudication on one or more of the issues he presented or (2) deny Arellano summary adjudication. The court could not grant Progressive any relief based on Arellano's motion.

Progressive acknowledges the rule against granting the opposing party relief on a summary adjudication motion, but contends the trial court had authority to grant Progressive summary adjudication regarding its liability for the excess judgment because Progressive was both an opposing party on Arellano's motion and a moving party on its own motion. Because the trial court heard the two motions at the same time, Progressive contends the court had authority to grant Progressive summary adjudication on any issue presented by either motion. To support this contention, Progressive cites *Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59 (*Juge*) for the proposition a "trial court has the inherent power to grant summary judgment on a ground not explicitly tendered by the moving party when the parties' separate statements of material facts and the evidence in support thereof demonstrate the absence of a triable issue . . . and negate the opponent's claim as a matter of law." (*Id.* at p. 70.) Progressive reads *Juge* too broadly.

Juge holds a trial court has discretion to grant summary judgment on a ground the moving party did not raise if the separate statements and supporting evidence establish that ground as a matter of law. *Juge*, however, does not hold a trial court has inherent power to grant summary adjudication on an issue that is not properly subject to summary adjudication under section 437c, subdivision (f)(1). As explained above, a trial court may only grant summary adjudication on an issue that completely disposes of a cause of action, affirmative defense, punitive damages claim, or issue of duty, and whether Progressive can be liable for the excess judgment entered against Arellano does not completely dispose of a cause of action or any other issue allowed under section 437c, subdivision (f)(1). Accordingly, *Juge* did not provide the trial court with authority to grant summary adjudication on Progressive's third issue.

Finally, Progressive contends we have authority to consider its liability for the excess judgment because this appeal is before us after the parties stipulated to entry of judgment to facilitate appellate review of a ruling on a critical issue, namely, Progressive's liability for the excess judgment. (See *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 400 [“Although a consent . . . judgment is not normally appealable, an exception is recognized when “consent was merely given to facilitate an appeal following adverse determination of a critical issue””].) Progressive is mistaken. Whether the parties may stipulate to entry of judgment to facilitate an appeal on what they consider a critical issue presents a question of appellate jurisdiction. It has nothing to do with whether a party properly invoked the summary adjudication procedure under section 437c, subdivision (f)(1). A stipulated judgment does not retroactively convert a procedurally defective summary adjudication issue into a substantive issue we may consider.

D. *The Trial Court Erred in Declaring Progressive Did Not Owe the Duties on Which Arellano Sought Summary Adjudication*

As explained above, Arellano's motion asked the trial court to adjudicate that Progressive had and breached several duties as Arellano's insurer. In denying Arellano's motion, the trial court not only ruled Arellano failed to establish Progressive owed the duties he identified, but the court also affirmatively declared Progressive did not owe several of those duties as a matter of law. In particular, the court's ruling denying Arellano's motion declared Progressive did not owe a duty to (1) tender policy limits before February 2007; (2) evaluate Nguyen's demand; (3) seek clarification of Nguyen's demand; (4) request an extension of time to respond to Nguyen's demand; (5) resolve Tran's claim within policy limits; and (6) pay the full amount of Tran's claim. The trial court exceeded its authority in reaching these issues.

As explained above, the trial court could only grant or deny Arellano's motion on each issue. Regardless of what the parties' evidence and authorities may have established, the trial court lacked authority to grant Progressive any relief on the specific duties Arellano identified in his motion. (*Schubert, supra*, 95 Cal.App.4th at p. 108.) Accordingly, regardless of whether Progressive actually owed any of the foregoing duties, the trial court erred in declaring Progressive did not owe those duties.

Progressive argues the trial court properly decided it did not owe these duties because its motion raised "the same general legal issues of duty" as Arellano's motion. Progressive is again mistaken. The only specific duties Progressive sought to summarily adjudicate were the following: (1) whether it breached a duty to accept a reasonable settlement demand; (2) whether it breached the duty to defend Arellano by hiring a defense attorney who had a conflict; and (3) whether it owed a duty "to stipulate to an assignment of rights and covenant not to execute between Arellano and Tran." These are not the same issues the trial court decided in Progressive's favor. Moreover, the trial court denied Progressive's motion on every issue except whether Progressive

breached a duty to accept a reasonable settlement demand. Progressive's motion did not provide a basis for the court to declare Progressive did not owe the duties listed above.

Accordingly, the Court's conclusions concerning Progressive's duties shall have no effect on remand. Simply put, the trial court lacked authority to reach these issues. We express no opinion on the substantive merits of these issues or whether Progressive actually owed any of these duties.

III

DISPOSITION

We affirm the trial court's order denying Arellano's summary adjudication motion, but reverse the trial court's summary adjudication in favor of Progressive. We remand the matter for further proceedings consistent with this opinion. In the interest of justice, each party shall bear their own costs on appeal.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.