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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LEONEL ARELLANO,

Plaintiff,

v.

PROGRESSIVE WEST INSURANCE  
COMPANY,

Defendant and Respondent;

BUN BUN TRAN,

Intervener and Appellant.

G045674

(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.

Angelo & Di Monda, Christopher E. Angelo and Joseph Di Monda for Intervener and Appellant.

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

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Intervener and appellant Bun Bun Tran intervened in Leonel Arellano's lawsuit against his insurer, defendant and respondent Progressive West Insurance Company (Progressive), for bad faith in handling Tran's claim for the catastrophic injuries he suffered when Arellano ran a stop sign and collided with Tran's vehicle. Tran intervened based on an assignment of bad faith rights Arellano executed during Tran's underlying personal injury action against Arellano, but without the knowledge or consent of the attorney Progressive hired to represent Arellano.

Arellano and Tran allege 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 and Tran contend Progressive's bad faith renders it liable for the entire \$23 million judgment entered against Arellano in Tran's personal injury action despite Progressive's \$15,000 policy limits.

Arellano moved for summary adjudication against Progressive on eight issues and Tran joined in that motion. At the same time, Progressive sought summary adjudication against Arellano and Tran 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 personal injury action. Progressive's motion asked the court to summarily adjudicate that Arellano's and Tran'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 granted Progressive’s motion on its third issue. 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.” The court denied Progressive’s motion on all other issues.

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.<sup>1</sup>

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 his personal injury action.

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

In addition to the trial court's rulings on Arellano's and Progressive's summary adjudication issues, Tran also challenges the court's rulings on several motions he filed. Specifically, Tran argues the trial court erred in denying (1) his motion to compel the deposition of a Progressive claims attorney; (2) his two summary adjudication motions challenging Progressive's affirmative defense that Tran cannot sue Progressive based on Arellano's assignment because the attorneys for Tran and Arellano colluded to obtain the assignment; (3) his motion to strike Progressive's answer as a terminating sanction for Progressive's attorneys wrongfully obtaining privileged information from an employee of Tran's attorneys and using that information to support the collusion defense; and (4) his motion to disqualify Progressive's attorneys for that same conduct. We affirm the trial court's ruling denying each of these motions because Tran failed to show the court abused its discretion or otherwise committed any error.

## 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 investigating police officer. Progressive assigned claims adjuster Tiara Foster to 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 her 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 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 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 could not reach the investigating detective because 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 contract 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.

During 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 stated 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.

Based on Arellano's clear liability and Tran's significant damages, the attorney Progressive hired for Arellano attempted to settle Tran's lawsuit for an assignment of any bad faith rights Arellano had against Progressive. To protect Arellano from personal liability, his attorney insisted the assignment include a covenant not to execute on the judgment that would be entered against Arellano in Tran's lawsuit. Tran's attorneys refused to provide the requested covenant not to execute, but continued to seek an assignment of Arellano's bad faith rights.

When those discussions proved unsuccessful, a representative from the Mexican Consulate visited Arellano in prison without the consent or knowledge of Arellano's attorney. The representative convinced Arellano to assign his bad faith rights to Tran without a covenant not to execute. Arellano signed a document giving 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 . . . .” The document also stated Arellano retained the right to sue Progressive for “[his] own emotional distress and punitive damages.”

On a second prison visit to Arellano, the Mexican Consulate representative was accompanied by Anthony Kornarens, the attorney who represents Arellano in the current action against Progressive. Kornarens convinced Arellano to hire him to pursue a malpractice action against the attorney Progressive hired to represent Arellano in Tran’s lawsuit. The same attorneys who represented Tran in his lawsuit against Arellano also represent Tran in this action against Progressive. The parties hotly contest whether these lawyers had any role in the Mexican Consulate’s visits to Arellano and the assignment.

Upon learning about the assignment and Kornarens’ contact with Arellano in prison, Arellano’s attorney sought to set aside Arellano’s assignment and disqualify Tran’s attorneys. Arellano’s attorney argued Tran’s attorneys violated Rules of Professional Conduct, rule 2-100 (Rule 2-100) by contacting Arellano through the Mexican Consulate and Kornarens. The trial court denied the motion to disqualify Tran’s attorneys because, although “there were some strange things that happened in [the] case,” there was no evidence of “direct action” by Tran’s attorneys that violated Rule 2-100. The court also refused to set aside the assignment because “there’s no standing to bring that motion in this case.” The court explained it found any challenge to the assignment of bad faith rights was inappropriate in the personal injury action and should be raised in any later lawsuit against Progressive based on the assignment.

Tran’s case against Arellano proceeded to trial in August 2009.<sup>2</sup> The jury returned a verdict against Arellano for more than \$23 million.

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

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.

As an affirmative defense, Progressive's answer to Tran's complaint in intervention alleged Tran could not sue Progressive based on Arellano's assignment because Tran obtained the assignment through collusion. According to Progressive, Tran's attorneys and Kornarens, the attorney representing Arellano in this action, improperly colluded to contact and convince Arellano to make the assignment before trial in the personal injury action and without the knowledge or consent of the attorney Progressive hired to represent Arellano in that action.

In December 2010, Tran brought a motion to compel Progressive to produce Sean Allen for deposition. Allen was an in-house claims attorney with Progressive who took over Tran's claim after Tran filed suit against Arellano. Allen communicated with the attorney Progressive hired to represent Arellano in Tran's lawsuit and the attorneys representing Progressive in this action. Tran argued Allen acted as a claims adjuster regarding Tran's claim and therefore he had a right to depose Allen. The trial court denied the motion, finding Tran failed to adequately meet and confer with Progressive before bringing the motion.

A month later, the trial court heard Tran's first summary adjudication motion challenging Progressive's collusion affirmative defense. Tran argued collateral estoppel barred the defense based on the ruling denying Arellano's motion to disqualify Tran's attorneys in the personal injury action. According to Tran, the prior ruling determined Tran's attorneys had no improper contact with Arellano regarding the assignment and defeated the collusion defense as a matter of law because Progressive was in privity with Arellano. Tran's motion also argued Progressive had no evidence to support the affirmative defense. The trial court denied the motion because it found (1) Tran failed to show collateral estoppel applied, and (2) Progressive "show[ed] that facts essential to justify opposition may exist but cannot now be presented."

At the same time it heard Tran's first summary adjudication motion, the trial court also heard Arellano's motion to strike Progressive's answer based on "extreme unethical conduct." Tran filed a lengthy joinder in Arellano's motion asking the court to strike Progressive's answer to his complaint in intervention. Tran argued Progressive engaged in unethical conduct because the attorneys it hired to represent Arellano in the personal injury action repeatedly met with an employee of the attorneys representing Tran. According to Tran, the employee shared privileged information regarding the personal injury action with Arellano's attorneys and they used that information to bring the unsuccessful motion to disqualify Tran's attorneys. Tran argued Progressive was

again relying on that illegally-obtained information to support its collusion defense in this action. The trial court denied the motion.

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 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.

In July 2011, the trial court heard Tran's second summary adjudication motion challenging Progressive's collusion affirmative defense. This motion argued Tran's attorneys and Kornarens did not collude to convince Arellano to assign his bad faith rights to Tran and Progressive had no evidence to show they did. The trial court denied the motion because it found Progressive presented evidence establishing triable issues on this defense.

At the same time it heard Tran's second summary adjudication motion, the trial court also heard Tran's motion to disqualify the attorneys representing Progressive. As on the motion to strike Progressive's answer, Tran argued Progressive's attorneys received privileged information from an employee of the attorneys representing Tran and Progressive was using that information to support its collusion defense. The court denied the motion, finding Tran failed to establish Progressive's attorneys "possess[] or

possessed privileged information” allegedly received from an employee of Tran’s attorneys. The court also found Tran unreasonably delayed in bringing the motion.

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. *The Trial Court Properly Denied Arellano’s Summary Adjudication Motion Concerning Progressive’s Duties*<sup>3</sup>

##### 1. 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).)

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<sup>3</sup> We refer to the motion as Arellano’s motion because Tran merely filed a one-sentence joinder, stating he “hereby joins in Leonel Arellano’s Motion for Summary Adjudication.” He did not file his own motion, separate statement, or evidence. A party may not obtain summary judgment or adjudication without timely requesting relief in his or her own name and filing a separate statement to support the request. (*Village Nurseries v. Greenbaum* (2002) 101 Cal.App.4th 26, 46-47; *Frazee v. Seely* (2002) 95 Cal.App.4th 627, 636.) The trial court therefore erred in granting Tran’s joinder. The ultimate result is nonetheless the same because the trial court properly denied Arellano’s motion for the reasons we discuss in the body and a proper joinder or separate motion by Tran seeking the same relief would have failed for the same reasons.

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, subs. (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’”].)

2. 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 Tran 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.<sup>4</sup> 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”].)

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<sup>4</sup> 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.

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 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 Tran 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 Tran’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*).) Because he simply joined in Arellano’s motion, Tran is bound by and limited to the issues Arellano 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.

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

Arellano’s eighth issue 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. Tran contends Progressive owed a duty to pay the full amount of his 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.<sup>5</sup> We affirm the trial court’s decision denying Arellano and Tran

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<sup>5</sup> Stating Tran’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).

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.<sup>6</sup>

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*).)

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<sup>6</sup> Because Tran filed a joinder in Arellano's motion without filing his own request for relief, separate statement, or evidence, we focus on Arellano's complaint and whether its allegations support Tran's argument. But we note Tran's complaint in intervention likewise failed to allege 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.

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,<sup>7</sup> but other 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.<sup>8</sup> 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

Tran 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 Tran,

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<sup>7</sup> 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].

<sup>8</sup> 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].

his 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.

“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.<sup>9</sup>

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

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<sup>9</sup> Tran's complaint in intervention similarly alleges Progressive “first waive[d]” its policy limits by failing to accept Nguyen's \$15,000 policy limits demand.

granting Arellano summary adjudication on Progressive's purported duty to pay the full amount of Tran's claim. On remand, Arellano and Tran may seek leave to amend their complaints 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

Tran 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. Tran 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, Tran contends Progressive breached its duty to investigate his claim by failing to locate Arellano and obtain his statement regarding the accident, including whether Chili's provided him alcohol. Tran claims if Progressive had contacted Arellano it would have learned that Chili's did not provide him with alcohol. Tran 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.<sup>10</sup>

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*

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<sup>10</sup> We emphasize Tran 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 did not argue Progressive breached its duty to settle by failing to accept Nguyen's conditional demand, we need not decide whether it qualified as a policy limits demand that Progressive had a duty to accept.

*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, *supra*, ¶ 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].) "[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 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.<sup>11</sup>

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

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<sup>11</sup> The record does not support Tran'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. Moreover, Turner phoned Nguyen on March 21, 2007, and left a voicemail explaining the March 2 letter addressed the property damage claim only.

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”].)

Tran contends Progressive’s failure to find Arellano was unreasonable as a matter of law because Progressive had been told Arellano was in jail, where he remained after the police arrested him on the date of the accident. Tran argues Progressive would have found Arellano if it simply contacted his family, who told Arellano’s insurance agent he was in jail. Tran also argues Progressive would have located Arellano if it phoned or sent someone to the jail to inquire about Arellano’s status, or searched the jail Web site using the incorrect spelling for Arellano’s 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 Tran in hindsight can identify steps that offered better odds of locating Arellano does not establish Progressive acted unreasonably as a matter of law. Rather, it simply provides one of several factors a trier of fact may consider when evaluating the various efforts Progressive made to find Arellano.

Tran also contends Progressive breached its duty to investigate his claim because Progressive did not conduct an independent investigation to learn whether Chili’s provided Arellano with alcohol. Tran 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. Tran, however, fails to explain how a breach of these purported duties prevented Progressive from settling his 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.

B. *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.”<sup>12</sup> 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, 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

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<sup>12</sup> The trial court denied Progressive’s motion on all other issues and Progressive did not appeal that ruling.

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. (*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”].)

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.]”<sup>13</sup> (*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 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

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<sup>13</sup> 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.

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.

C. *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.

D. *Tran Failed to Show the Trial Court Abused Its Discretion in Denying His Motion to Compel Allen’s Deposition*

Tran contends the trial court erred by denying his motion to compel Allen’s deposition. Progressive assigned Tran’s claim to Allen after Tran filed suit against Arellano. Allen communicated with the attorneys Progressive hired to represent Arellano in Tran’s personal injury action and the attorneys who represented Progressive in this action. Although Allen is an attorney, Tran argues he acted as a claims adjuster and therefore Tran had a right to depose Allen. According to Tran, “The court denied [his]

motion without any reasons.” Not so. The trial court’s minute orders state it denied Tran’s motion without prejudice because the court found Tran failed to adequately meet and confer before bringing the motion.

“‘The Discovery Act requires that, prior to the initiation of a motion to compel, the moving party declare that he or she has made a serious attempt to obtain “an informal resolution of each issue.” [Citations.] . . .’ [Citation.]” (*Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1293 (*Clement*)). “‘[T]he statute requires that there be a serious effort at negotiation and informal resolution.’ [Citation.] . . . ‘[A]rgument is not the same as informal negotiation’ [citation]; . . . attempting informal resolution means more than the mere attempt by the discovery proponent ‘to persuade the objector of the error of his ways’ [citation]; and . . . ‘[a] reasonable and good faith attempt at informal resolution entails something more than bickering with [opposing] counsel . . . . Rather, the law requires that counsel attempt to talk the matter over, compare their views, consult, and deliberate’ [citation].” (*Id.* at p. 1294.)

Whether the moving party made a reasonable and good faith effort is entrusted to the trial court’s discretion (*Clement, supra*, 177 Cal.App.4th at p. 1294) and is subject to review under the abuse of discretion standard (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 957 (*Cahill*); *Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 430 (*Obregon*)). “The trial judge’s application of discretion in discovery matters is presumed correct, and the complaining party must show how and why the court’s action constitutes an abuse of discretion in light of the particular circumstances involved.” (*Obregon*, at p. 432.)

Here, Tran’s opening brief makes no attempt to show the trial court abused its discretion in finding Tran failed to make a reasonable and good faith attempt at an informal resolution. Indeed, Tran fails to even acknowledge the trial court denied his motion on that ground without reaching the merits. Instead, Tran focuses exclusively on his motion’s merits without addressing the trial court’s reason for denying the motion.

Accordingly, Tran forfeited his claim that the court abused its discretion by denying his motion on this ground.<sup>14</sup> (*Cahill, supra*, 194 Cal.App.4th at p. 956 [“The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived”]; *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368 [“This court is not inclined to . . . furnish a legal argument as to how the trial court’s ruling in this regard constituted an abuse of discretion”].)

Moreover, the record reveals the trial court did not abuse its discretion. Tran’s sole attempt to reach an informal resolution was a letter he sent to Progressive with a copy of Tran’s motion to compel that he intended to file. Tran’s letter warned he would file the motion within two days unless Progressive (1) agreed in writing to produce Allen for deposition, and (2) provided a date certain for the deposition to occur within two weeks. Progressive did not respond within the designated timeframe and therefore Tran filed the motion without any dialog between the parties. For its part, Progressive explains it never refused to produce Allen for deposition, but rather simply reserved the right to object to questions that may disclose information protected by the attorney-client and attorney work product privileges.

Tran’s unilateral demand that Progressive immediately agree to produce Allen for deposition within two weeks does not constitute a reasonable and good faith attempt at an informal resolution, and Tran may not attempt to foist blame on Progressive for failing to respond given the unreasonable time limits he imposed. (See *Clement, supra*, 177 Cal.App.4th at p. 1294 [“the statute requires that there be serious effort at negotiation and informal resolution”]; *Obregon, supra*, 67 Cal.App.4th at p. 432 [a single brief letter with unreasonable time demands generally does not constitute a

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<sup>14</sup> Tran’s reply brief includes one paragraph regarding the trial court’s ruling that he failed to make a reasonable and good faith attempt at an informal resolution. But “an appellate court has the discretion to deem an alleged error to have been waived if asserted only in the reply brief and not the opening brief.” (*Stoll v. Shuff* (1994) 22 Cal.App.4th 22, 25, fn. 1.)

reasonable and good faith attempt at informal resolution].) We therefore affirm the trial court's decision denying Tran's motion to compel Allen's deposition.

E. *The Trial Court Properly Denied Tran's Two Summary Adjudication Motions Regarding Progressive's Collusion Defense*

1. The First Summary Adjudication Motion

Tran's first summary adjudication motion asserted Progressive was collaterally estopped from raising a collusion defense based on the denial of the motion to disqualify Tran's counsel in the earlier personal injury action. According to Tran, the court denied that motion based on its finding Tran's counsel did not engage in unethical conduct when obtaining Arellano's assignment of his bad faith rights and that ruling is binding on Progressive as Arellano's insurer. The trial court denied Tran's summary adjudication motion, finding collateral estoppel did not apply because the issues actually litigated and decided on the disqualification motion in the personal injury action were not identical to the issues Progressive's collusion defense presented in this action. We agree.

“Collateral estoppel precludes the relitigation of an issue only if (1) the issue is identical to an issue decided in a prior proceeding; (2) the issue was actually litigated; (3) the issue was necessarily decided; (4) the decision in the prior proceeding is final and on the merits; and (5) the party against whom collateral estoppel is asserted was a party to the prior proceeding or in privity with a party to the prior proceeding.

[Citation.] Even if the minimal requirements for application of collateral estoppel are satisfied, courts will not apply the doctrine if considerations of policy or fairness outweigh the doctrine's purposes as applied in a particular case [citation], or if the party to be estopped had no full and fair opportunity to litigate the issue in the prior proceeding. [Citations.]” (*Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 82 (*Zevnik*)).

“The party asserting collateral estoppel must prove the issue was raised, actually submitted for determination and determined and that contrary evidence on the issue was not restricted.” (*Schaefer/Karpf Productions v. CNA Ins. Companies* (1998) 64 Cal.App.4th 1306, 1314 (*Schaefer/Karpf*)). “No aspect of what was decided in the previous proceeding can be left to conjecture. [Citation.] “If, on the face of the record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel . . . .” [Citations.] [Citation.]” (*Silver v. Los Angeles County Metropolitan Transportation Authority* (2000) 79 Cal.App.4th 338, 357.)

“In determining what issues were ‘actually litigated’ in the underlying action the court in the subsequent action cannot rely exclusively on the findings in the underlying action but must ‘carefully scrutinize’ the pleadings and proof. [Citation.] This scrutiny includes looking behind the findings at the evidence presented to determine what was actually decided. [Citation.]” (*Schaefer/Karpf, supra*, 64 Cal.App.4th at p. 1314.)

In the personal injury action, the attorneys Progressive hired to represent Arellano moved to disqualify Tran’s attorneys on the ground they “engaged in improper and unethical contact with . . . [Arellano] contrary to Rule 2-100 of the Rules of Professional Conduct.” That rule provides, “While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.” (Rules Prof. Conduct, rule 2-100(A).) Arellano’s lawyers argued Tran’s attorneys improperly contacted Arellano by having a representative of the Mexican Consulate convince him to assign his bad faith rights to Tran and to hire Kornarens to file a malpractice action against the attorneys Progressive hired for Arellano. At the same time, the attorneys Progressive hired for Arellano also brought a separate motion to set aside the assignment, but the parties’ briefs do not cite that motion and we did not find it in the 43-volume joint appellants’ appendix.

The court in the personal injury action denied both motions. On the disqualification motion, the court found there was a “failure of proof of any . . . direct action by [Tran’s] counsel” to contact Arellano regarding issues presented in the personal injury action. The court explained, “the assignment has nothing to do with liability, causation, damages, the issues to be tried in [the personal injury] case” and therefore it found no “ethical breach.” On the motion to set aside the assignment, the court found the personal injury action “has nothing to do with the assignment; that there’s no standing to bring that motion in this case.” The court further explained it would not reach the question whether there was collusion or any other ground to set aside the assignment because that was not a material issue in the personal injury action: “If there’s no consideration, maybe the assignment’s no good. If there is deemed to be collusion, maybe that’s another defense for Progressive [in a later action based on the assignment] and maybe [Arellano] made a bad deal but none of those are, in my opinion, appropriate for a motion in this case, so the motion is denied.”

In this action, Progressive’s collusion affirmative defense alleges Arellano’s assignment of his bad faith rights to Tran “is the product of collusion and provides no basis for Tran to assert a claim against Progressive.” According to Progressive, the attorneys representing Tran in the personal injury case and this action have a preexisting relationship with Kornarens and convinced Arellano to hire him to sue Progressive in this action. Progressive alleges these attorneys colluded to convince Arellano to assign his bad faith rights to Tran so Tran could sue Progressive and collect the excess judgment.

The issues presented by the disqualification motion and Progressive’s collusion defense are related because they both generally involve the contacts with Arellano in prison to convince him to assign Tran his bad faith rights. But the issues actually litigated and decided on the disqualification motion are not identical to the issues raised in Progressive’s collusion defense. The court in the personal injury action merely

decided there was no evidence of “direct action by [Tran’s] counsel” and no ethical breach of Rules of Professional Conduct, rule 2-100. Tran fails to show Progressive’s collusion defense required conduct that violated rule 2-100. More importantly, the court in the personal injury action expressly refused to decide whether the assignment was the product of any collusion involving Tran’s counsel. Instead, the court concluded Progressive should raise the collusion issues and any other defense to the assignment in a subsequent action by Tran based on the assignment. That is what Progressive has done.

Accordingly, the trial court in the underlying personal injury case did not actually and necessarily decide whether the assignment was the product of collusion. To the contrary, Progressive (assuming Arellano acted as its privy) was denied a full and fair opportunity to litigate that issue and collateral estoppel therefore does not apply. (See *Zevnik, supra*, 159 Cal.App.4th at p. 82.)

## 2. The Second Summary Adjudication Motion

Tran’s second summary adjudication motion asserted Progressive lacked evidence to support its collusion defense. Tran submitted declarations from his attorneys and Kornarens denying they colluded to obtain the assignment for Tran or had any contact with Arellano until after he executed the assignment. Tran also submitted a declaration from the Mexican Consulate representative stating the Consulate initiated contact with Arellano. The trial court, however, denied this motion because it found Progressive presented sufficient evidence to establish triable issues on how Tran obtained the assignment and whether Tran’s attorneys and Kornarens colluded.

On appeal, Tran provides no explanation or authority to show why the evidence Progressive presented failed to create a triable issue on the collusion defense. Indeed, Tran fails to even address what must be shown to establish the collusion defense or why Progressive’s evidence failed to create a triable issue.<sup>15</sup> Instead, Tran argues a

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<sup>15</sup> Generally speaking, “collusion occurs when the insured and the third party claimant work together to manufacture a cause of action for bad faith against the insurer

host of procedural grounds for reversing the trial court's ruling. We conclude the trial court did not err, however, because Tran's procedural challenges lack merit and Tran's failure to address the substantive merits of the court's ruling forfeits any challenge to the ruling (*Cahill, supra*, 194 Cal.App.4th at p. 956 [““When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived””]).

First, Tran contends the trial court erred in denying his second summary adjudication motion under section 437c, subdivision (h). According to Tran, the court denied the motion to allow Progressive to conduct additional discovery because “facts essential to justify opposition may exist, but cannot now be presented.” Not so. The court denied this motion because it found triable issues existed on the collusion defense. Section 437c, subdivision (h), was an alternative ground for the trial court's ruling denying Tran's *first* summary adjudication motion regarding the collusion defense, but the court rested its ruling denying the *second* motion exclusively on the existence of triable issues. Tran argues at length that the court erred in denying his first motion on this ground because Progressive failed to make a sufficient showing to continue, but that argument is irrelevant to the second motion and Tran fails to show how any purported error in denying the first motion on that ground prejudiced him. After it denied the first motion, the trial court allowed Tran to bring the second motion and the court ruled on the merits. Accordingly, Tran's arguments based on section 437c, subdivision (h), fail.

Second, Tran argues the trial court erred because its ruling failed to specifically identify each triable issue the court relied upon to deny Tran's motion and the

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or to inflate the third party's recovery to artificially increase damages flowing from the insurer's breach.” (*Parks, supra*, 170 Cal.App.4th at p. 1013.) Because the parties fail to address whether these conditions exist, or whether a collusion defense may otherwise apply here, we do not address those issues and express no opinion regarding the viability of Progressive's collusion defense. Rather, we simply hold Tran failed to establish any error in the trial court's ruling.

conflicting evidence that created those issues as section 437c, subdivision (g), required. (See *Tera Pharmaceuticals, Inc. v. Superior Court* (1985) 170 Cal.App.3d 530, 532 [“to fulfill the statute’s purpose, the order must identify ‘a conflict in the evidence . . . by reference to the evidence in support of a particular asserted fact and the evidence in opposition to that fact’”].) Tran is mistaken. The court’s minute order denying Tran’s second summary adjudication motion lists 14 specific facts identified in the parties’ separate statements that raised triable issues. Tran provides no explanation why this fails to meet section 437c, subdivision (g)’s requirements. Instead, he deceptively quotes the court’s minute order without acknowledging the court identified specific triable issues of fact. Moreover, because Tran failed to seek greater specificity in the trial court, he waived any objection to the court’s order. (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1679.) Accordingly, we reject Tran’s challenge based on section 437c, subdivision (g).

Third, Tran contends the trial court erroneously allowed Progressive to rely on its own pleadings to create a triable issue. Again, Tran is mistaken and deceptively quotes the record. He asserts Progressive’s separate statement stated “Tran’s facts were ‘disputed on the basis that Progressive opposes this motion . . . .’” The record shows Progressive’s separate statement disputed each fact “on the basis that Progressive opposes this motion under Code Civ. Proc. § 437c(h).” Progressive’s separate statement also explained that each fact was “[f]urther disputed” based on specific evidence Progressive submitted in opposition to Tran’s motion. The separate statement then cited to evidence in response to each of Tran’s purported undisputed material facts. Accordingly, we reject this challenge.

Fourth, Tran asserts Progressive’s separate statement is defective because it cites to entire exhibits as purportedly creating triable issues without identifying specific page and line references. Tran is correct Progressive did not provide specific page and line references, but the trial court has discretion in determining whether the evidentiary

citations are sufficient. (See *Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1214-1215.) Progressive's opposition relied primarily on declarations that were just a few pages long and the trial court apparently had no trouble identifying the relevant portions. Tran provides no explanation how the trial court abused its discretion in this regard and we therefore reject Tran's challenge.

Finally, Tran contends Progressive's evidence contained inadmissible hearsay. According to Tran, Progressive's opposition relied on the same declarations Arellano's attorneys in the personal injury action submitted to support the motion to disqualify Tran's attorneys. Tran contends the court in the personal injury action sustained his hearsay objections to those declarations and therefore the trial court in this action erred by failing to sustain Tran's hearsay objections. Tran, however, fails to carry his burden to affirmatively show error in the trial court's ruling on the evidentiary objections. (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1074.) He asserts Progressive's declarations included inadmissible hearsay, but he fails to identify any particular statement in any particular declaration and does not explain why any statement is inadmissible hearsay. (*Ibid.* ["In arguing only generalities, plaintiffs' briefs do not contain 'argument and citations to authority as to why the trial court's evidentiary rulings were wrong.' [Citation.] . . . [¶] . . . [Plaintiffs therefore] forfeited their challenge to the exclusion of most of [the evidence]".])

F. *The Trial Court Did Not Abuse Its Discretion in Denying the Motion to Strike Progressive's Answer*

Tran argues the trial court erred in denying the motion to strike Progressive's answer based on "extreme unethical conduct" by the attorneys Progressive hired to represent Arellano in the personal injury action. According to Tran, those attorneys obtained privileged information regarding the personal injury action from a disgruntled employee of Tran's attorneys and then used that information to support their unsuccessful motion to disqualify Tran's lawyers. Tran contends the trial court erred in

failing to sanction Progressive and strike its answer because Progressive’s attorneys again used that information in this action to support Progressive’s collusion defense. We conclude the trial court did not abuse its discretion in denying the motion.

Tran’s reliance on *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736 (*Slesinger*) is misplaced. In *Slesinger*, the trial court granted a terminating sanction and dismissed the plaintiff’s complaint for the plaintiff’s pervasive litigation-related misconduct. Specifically, the plaintiff hired an investigator who over several years obtained the defendant’s privileged and confidential documents by breaking into the defendant’s office buildings and trespassing onto the secure facility of the company the defendant hired to destroy its confidential documents. The plaintiff used the confidential information in the pending litigation while concealing its source. (*Id.* at p. 740.) The *Slesinger* court affirmed the dismissal order, holding that “[w]hen a plaintiff’s deliberate and egregious misconduct in the course of the litigation renders any sanction short of dismissal inadequate to protect the fairness of the trial, California courts necessarily have the power to preserve their integrity by dismissing the action.” (*Id.* at p. 762.) The Court of Appeal further “emphasize[d] that dismissal is *always* a drastic remedy to be employed *only* in the rarest of circumstances.” (*Id.* at p. 764, original italics.) Tran compares Progressive’s conduct in this case to the conduct *Slesinger* found sanctionable and therefore “the result should have been the same.” This argument fails for two reasons.

First, Tran fails to appreciate how the standard of review limits our ability to overturn the trial court’s decision. *Slesinger* recognized trial courts have the inherent power to terminate litigation for deliberate and egregious misconduct when no other remedy can restore fairness and integrity to the case. (*Slesinger, supra*, 155 Cal.App.4th at pp. 761-762.) In deciding whether to exercise this inherent power, a trial court must consider all relevant circumstances, including the court’s ability to ensure a fair resolution in the face of the misconduct. (*Id.* at p. 764.) We review the trial court’s

decision for abuse of discretion and reverse “only ‘for manifest abuse exceeding the bounds of reason.’ [Citation.]” (*Id.* at p. 765.)

Accordingly, although circumstances comparable to those present in *Slesinger* would support a trial court’s decision to dismiss a case under this inherent power, those circumstances do not necessarily require it. As *Slesinger* makes clear, it is the trial court’s prerogative to decide whether a terminating sanction is required to protect the integrity of its own process and the appellate court’s role is limited to determining whether the trial court acted reasonably in exercising that prerogative. (*Slesinger, supra*, 155 Cal.App.4th at pp. 761-765; see also *In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 682 [“[W]here a trial court has discretionary power to decide an issue, an appellate court is not authorized to substitute its judgment of the proper decision for that of the trial judge. . . . “The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court””].)

In *Slesinger* the trial court granted the requested sanction, but here the trial court denied it. Consequently, it is the decision not to impose a terminating sanction to which we must defer in this case, and which Tran must affirmatively prove unreasonable. In other words, Tran bore the burden to show anything less than a terminating sanction was necessarily “inadequate to protect the fairness of the trial.” (*Slesinger, supra*, 155 Cal.App.4th at p. 762.) Tran did not meet that burden because he failed to show how the alleged misconduct by Arellano’s attorneys in the personal injury action compromised the integrity and fairness of this separate bad faith action so as to *require* the trial court to essentially enter Progressive’s default. (Cf. *Merritt, supra*, 34 Cal.App.3d at pp. 881-882 [“Having chosen competent independent counsel to represent the insured in litigation, the carrier may rely upon trial counsel to conduct the litigation, and the carrier does not become liable for trial counsel’s legal malpractice”];

see also Croskey et al., Cal. Practice Guide: Insurance Litigation, *supra*, ¶ 7:639, pp. 7B-48 to 7B-49 (rev. # 1, 2009).)

Second, Tran failed to show Progressive engaged in conduct comparable to the conduct at issue in *Slesinger*. Although Tran argues Progressive wrongfully obtained privileged information from Tran’s attorneys that it sought to use to support Progressive’s collusion defense, Tran failed to show Progressive or its attorneys actually received any specific privileged or confidential information belonging to Tran or his attorneys. The motion to strike explained the evidence establishing “the specifics of Progressive’s misconduct” is provided in the “Further Declaration of Anthony Kornarens that is being submitted concurrently with this motion under seal.” The record, however, does not include the “Further Declaration of Anthony Kornarens.”

As the appellant, Tran bore the burden to provide an adequate record establishing error and his failure to do so requires us to affirm the trial court’s ruling. (See *Oliveira v. Kiesler* (2012) 206 Cal.App.4th 1349, 1362 [“““[a] judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent. . . .’ [Citation.]” [Citations.]’ [Citation.] ‘The absence of a record concerning what actually occurred at the trial precludes a determination that the trial court [erred]’”].) Moreover, as explained below, the more extensive evidentiary showing Tran made on his later motion to disqualify Progressive’s attorneys still fell short of showing Progressive and its attorneys received any specific privileged information belonging to Tran or his attorneys. Accordingly, the trial court did not abuse its discretion in denying Tran’s motion to strike.

G. *Tran Failed to Show the Trial Court Erred in Denying His Motion to Disqualify Progressive’s Attorneys*

Tran argues disqualification of Progressive’s attorneys was mandatory because they received privileged information from an employee of Tran’s attorneys and used the information to support Progressive’s collusion defense. The trial court denied

Tran’s motion to disqualify Progressive’s attorneys because it found Tran “failed to demonstrate that [Progressive’s] counsel possesses or possessed privileged information allegedly obtained [from the employee of Tran’s attorneys] in relation to the underlying lawsuit.” We agree.

When an attorney receives an adversary’s privileged information, the trial court may disqualify the attorney from continuing to represent a party in the action to prevent the attorney from using the adversary’s privileged information. (*Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 47 (*Clark*) [“The power is frequently exercised on a showing that disqualification is required under professional standards governing . . . potential adverse use of confidential information”].) This disqualification extends not only to attorneys who knowingly acquire their adversary’s privileged information, but also attorneys who inadvertently receive such information and review the material for its substantive content rather than merely scanning it to determine if the documents are privileged. (*Id.* at pp. 48-49; see also *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 818-819; *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 654-656.)

“A trial court’s ruling on a disqualification motion is reviewed under the deferential abuse of discretion standard. [Citations.] . . . ‘The order is subject to reversal only when there is no reasonable basis for the trial court’s decision.’ [Citation.] [¶] . . . The trial court’s order is “presumed correct; all intendments and presumptions are indulged to support [it]; conflicts in the declarations must be resolved in favor of the prevailing party, and the trial court’s resolution of any factual disputes arising from the evidence is conclusive.” [Citations.]” (*Clark, supra*, 196 Cal.App.4th at pp. 46-47.)

Here, it is undisputed an employee of Tran’s attorneys in the personal injury action initiated contact with the attorneys Progressive hired to represent Arellano because the employee believed Tran’s attorneys were engaged in unethical or illegal conduct. It also is undisputed the employee had several conversations with an attorney

representing Arellano before the personal injury trial and provided the attorney a copy of the assignment Arellano signed. The employee admitted she removed files from Tran's attorneys' offices and copied computer files, but she denied providing any files to Arellano's attorneys, allowing Arellano's attorneys to review any files, or otherwise acting as an informant for Progressive. The employee also admitted she spoke with the Federal Bureau of Investigation about her concerns regarding Tran's attorneys.

Tran fails to identify any specific privileged information or documents the employee purportedly shared with the attorneys representing Arellano in the personal injury action. He also fails to identify what, if any, information the employee or the attorneys representing Arellano in the personal injury action shared with the attorneys representing Progressive in this action. Indeed, there is no evidence Progressive's attorneys in this action had any contact with the employee and Progressive denies it received any privileged information. The only specific document Tran identifies that the employee provided to Arellano's attorneys in the personal injury action is the assignment. As an agreement between litigation opponents, the assignment can hardly be considered privileged and Tran's attorneys deny any role in drafting or obtaining the assignment. On this record, the deference we owe the trial court's ruling and factual findings requires us to affirm the decision denying Tran's motion.

Citing *Flatt v. Superior Court* (1994) 9 Cal.4th 275, Tran argues we should presume Arellano's attorneys received privileged information. (*Id.* at p. 283.) *Flatt*, however, does not support Tran's position. *Flatt* concluded the court must presume an attorney who sought to successively represent two clients with potentially adverse interests had access to confidential information during the first representation that mandates his or her disqualification from representing the second client, if there is a substantial relationship between the two representations. (*Ibid.*) The presumption the attorney had access to confidential information arises from the attorney's relationship with the first client and the attorney's continuing duty to maintain the first client's

confidences even after the representation ends. (*Ibid.*; *Styles v. Mumbert* (2008) 164 Cal.App.4th 1163, 1167 [“an attorney is forever forbidden from using, against the former client, any information acquired during such relationship, or from acting in a way which will injure the former client in matters involving such former representation”].)

We do not presume Progressive’s attorneys received privileged information regarding Tran because Progressive’s attorneys never represented Tran. Tran fails to cite a single case involving an attorney who was disqualified because the court presumed information the attorney received about an adversary was privileged regardless of whether the attorney had a previous attorney-client relationship with the adversary. To the contrary, the principal case on which Tran relies required the party seeking to disqualify the opposing attorney to affirmatively show the opposing attorney received privileged information that belonged to the party. (*Clark, supra*, 196 Cal.App.4th at pp. 49-50.) As explained above, Tran failed to make that showing.

Tran also argues Progressive bore the burden to show the information it received from the employee was not privileged. Again, Tran is mistaken. “[T]he party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., *a communication made in the course of an attorney-client relationship*. [Citations.] Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply.’ [Citation.]” (*Clark, supra*, 196 Cal.App.4th at p. 49, original italics.) Here, Tran failed to identify any particular documents or information Progressive’s attorney received, let alone that Progressive’s attorneys received a communication made in the course of an attorney-client relationship or subject to any other privilege.

Tran further contends Progressive’s counsel admitted the employee was Progressive’s informant and a whistleblower, and Progressive unethically placed a spy in

the office of Tran's attorneys. These contentions, however, misrepresent the record and take statements out of context. Progressive's attorneys never stated the employee was Progressive's informant, but rather that the employee acted as a whistleblower who raised concerns about potentially unethical and illegal activities occurring at the offices of Tran's attorneys. Progressive's attorneys stated they needed to talk with the employee to obtain information necessary to support their collusion defense and, in fact, opposed both of Tran's summary adjudication motions regarding the defense on the ground they needed to depose the employee to obtain information. Moreover, the employee initiated the contact with the attorneys representing Tran in the personal injury action. The record does not support Tran's suggestion that Progressive placed the employee in the offices of Tran's attorneys as a spy or informant.

Finally, Tran filed two requests that we judicially notice numerous documents filed in *Angelo v. Winet* (Super. Ct. San Diego County, No. 37-2011-00096151-CU-NP-CTL), which is an action Tran's attorneys filed against the attorneys who represented Arellano in the personal injury action to recover the documents the employee provided to Arellano's attorneys. Tran contends the documents show Progressive and its attorneys received privileged documents belonging to Tran's attorneys. We deny both requests because none of the documents identified in the requests were submitted to the trial court. Indeed, Tran could not have submitted any of the documents to the trial court because they all postdate the entry of judgment in this action. Moreover, Tran did not file either of the judicial notice requests until after Progressive filed its brief on this appeal, thereby depriving Progressive of the opportunity to respond to the documents identified in the request.

“Reviewing courts generally do not take judicial notice of evidence not presented to the trial court. Rather, normally ‘when reviewing the correctness of a trial court’s judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered.’ [Citation.]” (*Vons Companies, Inc. v.*

*Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) “[Tran’s] effort to submit new evidence for our review in the first instance is improper.” (*Hahn v. Diaz-Barba* (2011) 194 Cal.App.4th 1177, 1194.) On remand, Tran may seek to present any newly discovered evidence to the trial court, but we will not consider that evidence for the first time on appeal.

### III

#### DISPOSITION

We reverse the trial court’s summary adjudication in Progressive’s favor, but affirm the trial court’s orders denying Arellano’s summary adjudication motion, Tran’s motion to compel Allen’s deposition, Tran’s two summary adjudication motions, the motion to strike Progressive’s answer, and the motion to disqualify Progressive’s counsel. We remand the matter for further proceedings consistent with this opinion. Progressive shall recover its costs on appeal.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.