RAQUEL WELCH an individual, and RAQUEL WELCH PRODUCTIONS, INC., Plaintiffs and Appellants, v. METRO-GOLDWYN-MAYER FILM CO. et al., Defendants and Appellants.

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No. B022873.

Court of Appeal of California, Second Appellate District, Division Four.

207 Cal. App. 3d 164; 254 Cal. Rptr. 645; 1988 Cal. App. LEXIS 1202; 121 Lab. Cas. (CCH) P56,863

December 23, 1988

NOTICE: NOT CITABLE - SUPERSEDED BY GRANT OF REVIEW

SUBSEQUENT HISTORY: [**1] As modified January 13, 1989; Review granted March 2, 1989 (S008779).
Trans. November 22, 1989 to Ct. App., 2d Dist., Div. 4, with directions to vacate its opn. and reconsider in light of Newman v. Emerson Radio Corp. (1989) 48 Cal. 3d 973.
Appellant's petition for review DENIED May 2, 1990.
Mosk, J. did not participate.

PRIOR HISTORY: Superior Court of Los Angeles County, No. C354661, Earl F. Riley, Judge.

COUNSEL: Latham & Watkins, Max L. Gillam, Milton A. Miller and Reba W. Thomas for Defendants and Appellants.

Slaff, Mosk & Rudman, Edward Mosk and Valerie V. Flugge for Plaintiffs and Appellants.

OPINIONBY: WOODS (A.M.)

OPINION: [*647] WOODS (A.M.), P. J.

This lawsuit arises from the firing of the motion picture actress Raquel Welch from her starring role in the film "Cannery Row." The jury found in favor of Welch and Raquel Welch Productions, Inc. (hereinafter sometimes collectively referred to as Welch) on counts of breach of contract, conspiracy to induce breach of contract, slander, and breach of the implied covenant of good faith and fair dealing (bad faith). Welch recovered $2 million in compensatory damages and over $8 million in punitive damages from appellants Metro-Goldwyn-Mayer Film Co. (MGM), several successor corporations to MGM (TBS Entertainment Co., Production, Inc., Lab, Inc., and Lot, Inc.), David Begelman (the president of MGM), and Michael Phillips (the producer of the film).

Welch filed a cross-appeal from the trial court's granting of summary judgment on a count of intentional infliction of emotional distress, but has abandoned [**2] the cross-appeal in her briefing.

Appellants raise numerous issues on appeal, including that (1) there is no basis for a conspiracy between Phillips and MGM because Phillips's actions were privileged as a matter of law; (2) Welch as an individual lacked standing to sue for conspiracy to induce breach of contract or bad faith because the contract for her services was between MGM and Raquel Welch Productions, Inc.; (3) the trial court should not have permitted the bad faith count to be added at the close of Welch's case-in-chief as an amendment to conform to proof; (4) the bad faith cause of action cannot stand because there was no evidence of a special relationship between Welch and MGM similar to that of an insured to an

insurer, and/or because the jury was not instructed on that issue; (5) there was insufficient evidence to show either a conspiracy to induce breach of contract or a bad faith breach of contract; (6) there was insufficient evidence of slander; (7) Welch's counsel committed misconduct in his closing argument; (8) the successor corporations cannot be held liable for the wrongful acts of MGM; and (9) various errors occurred in the jury's award of compensatory and punitive [**3] damages.

We find no error, and affirm.

The evidence showed that Welch appeared in about 30 films between 1965 and 1980 and had a reputation as a strong willed professional actress who sometimes clashed with directors. She was considered a sex symbol, and the only serious dramatic role was as a roller derby queen in "Kansas City Bomber." She turned down all film offers between 1977 and 1980, concentrating during that period on a television special and a television drama about an American Indian woman, for which she served as producer as well as actress.

Prior to 1980, Michael Phillips and David Ward had collaborated on two films, one of [*648] which was the Academy Award winner, "The Sting." Over several years, Phillips and Ward developed a film package based on the John Steinbeck novellas "Cannery Row" and "Sweet Thursday." Ward wrote the screenplay and was to be the director, although he had never directed a commercial film before. Phillips was to be the producer. An actor named Nick Nolte was to portray the leading male character.

Phillips and Ward had difficulty finding financing for the film. In early 1980, the project was finally accepted by David Begelman, who had just become president [**4] of MGM. Phillips and Ward signed contracts with MGM which gave the studio the right to replace either of them if their service proved unsatisfactory.

Begelman insisted that an actress with a recognizable name be selected for the leading female character, a prostitute named Suzy. Numerous actresses were considered, among whom were Welch and Debra Winger.

At 40 years old, Welch relished the chance to direct her career towards more serious roles. She agreed to audition for the part, which was not customary for an established actress, and to perform nude scenes, which she had previously refused to do in any film.

When Welch first met with Ward and Phillips, they asked her about rumors of problems with the director of the television drama. She assured them the problems had concerned her dual role as both producer and actress, not temperament. She agreed with them that Suzy should be a nonglamorous, natural-looking girl with little or no makeup. Ward and Phillips were impressed with Welch's enthusiasm and her reading of the role. They decided they wanted her for the film.

On October 8, 1980, Raquel Welch Productions, Inc. (RWPI), a "loan-out" company utilized by Welch for tax purposes, [**5] entered into a contract with MGM to provide Welch's services on the film. Welch was promised $250,000, with payment divided into weekly increments during filming. She agreed to participate in nine weeks of actual filming, and to be available for rehearsals and wardrobe fittings for two weeks before shooting began.

The contract included a standard "pay or play" clause, under which the studio could terminate Welch from the film at any time, but was obligated to pay her the full contract price, unless she failed to fulfill her contractual

obligations. It further required that Welch be provided a fully equipped, "star-type" trailer for makeup purposes; her choice of hairdresser and makeup artist, on first call to her; and a wardrobe assistant.

Before filming began, Welch participated in all but one and one-half days of the two-week rehearsal period. She also prepared for her role by going to vintage clothing shops with the costume designer, talking to Ward about her character, and studying historical pictures. She told Begelman that she was delighted to be working on the film, and that if Ward, as a first-time director, was nervous about discussing her performance with her, Begelman [**6] could call her directly.

The production company gave the performers a call sheet at the end of each day of filming, indicating which scenes to prepare for and what time to report for makeup and for shooting on the set the next day. Shooting began at 8 or 8:30 a.m. each day. In general, the other actors had makeup calls of 7 or 7:30 a.m., and set calls of 8 or 8:30 a.m. Welch had requested, and was given, three hours in which to makeup. She actually needed only two hours for makeup and hair, but had a preparatory routine which included yoga and exercise. The call sheets gave her makeup times of 6, 6:30 or 7 a.m., and set times three hours later, except for one day on which the makeup period was two and one-half hours.

Welch was initially provided a trailer which lacked enough room for a makeup chair in front of the mirror. She asked Kurt Neumann, the production manager, for a larger trailer. She was given a larger, attractive trailer in which a makeup mirror and chair were installed. In her opinion, the new trailer still did not meet her needs. Its narrowness meant that it [*649] became very crowded when her assistants were preparing her, and the makeup artist could not move around the [**7] makeup chair without climbing over her or the television set. The television set was eventually removed at Welch's request. She also had dark tinting taken off the windows so that natural light could be used. She asked for, and received, a small empty trailer for exercise purposes.

Principal photography began on December 1, 1980. Welch was first called for shooting on Thursday, December 4. The picture was already behind schedule and $84,000 over budget. Welch arrived at her trailer for her scheduled makeup call at 7 a.m., was ready for her 10 a.m. set call, and waited until 5 p.m. before she was used. She had only a long shot and no lines that day.

Welch had no acting call for the next day, December 5. She came into the studio for some publicity photographs, again making up at her trailer.

Welch's next scheduled call was on Monday, December 8. She arrived at the studio early for her 7 a.m. makeup call, was on time for her 10 a.m. set call, and was not asked to perform a scene until after lunch.

The next day, December 9, she was at the studio early for makeup, but her makeup artist arrived late. As they began their preparations, the director, David Ward, came in and asked if she [**8] could be ready for an over-the-shoulder shot in about 45 minutes. She agreed, and told him that she was willing to waive the 12-hour period the Screen Actors Guild normally required between performances. Her work that day involved only a few lines of dialogue.

On the next day of filming, December 10, Welch awoke with severe cramps. She had the hairdresser come to her home that morning. She put on her own makeup there with an MGM makeup mirror which Kurt Neumann had had delivered to her home. She arrived at the studio at 9 a.m., one hour before her set call. She

told Neumann that she had been able to get ready much faster at home, and that she would like to speed up her makeup time by doing it at home until the trailer problem was sorted out. Neumann said it was "okay" for her to make up at home. Neither Phillips nor Ward told her anything to the contrary. footnote 1

footnote 1 Various MGM employees gave versions of the events which were dramatically different from Welch's witnesses. The jury's verdict shows it found Welch's witnesses to be more credible. Some of the conflicting testimony by MGM's witnesses is set out in footnotes in this opinion, as it is relevant to the jury's findings of conspiracy and bad faith.

One such conflict is Neumann's testimony that he sent the makeup mirror to Welch's home only so she could get a head start on her makeup there, and never told her it was "okay" to make up at home. [**9]

Actually, Phillips and Ward were not happy about the making up at home, and agreed to it only to avoid a confrontation with Welch. Ward was also unhappy about Welch's late set calls, as he had to begin work each day on scenes which did not require her presence, tended to begin filming her scenes late in the day, and had to cut down on the number of takes of her scenes. According to him, but not Welch, Welch told him that the over-the-shoulder shot on December 9 was the only time she would ever agree to come out of makeup to rehearse or block scenes. Phillips thought that three hours for makeup was too long, and that Welch's late availability for shooting would cause problems when filming of her major scenes began. There was no question, however, that Welch was not forbidden to make up at home, received three hours for makeup in the call sheets, was always on the set in time for her set call, and was not the cause of the film's budget problems. Phillips even called Welch at home, early in the filming, to compliment her on how she looked in the dailies.

Welch was not involved in the next few days of shooting, which involved a big production sequence which went greatly over budget. [**10]

On Welch's next days of filming, Wednesday, December 17 and Thursday, December 18, the makeup artist and hairdresser reported to her home at the instruction [*651] of an assistant director of the film. She arrived ready at the studio long before her set call, and had to wait for filming. Shooting ran until around 7 p.m. on Thursday the 18th. Welch went home to prepare for the next day, which would involve her first major dramatic scene.

Meanwhile, about 5:30 p.m. on Thursday the 18th, Begelman met in his office with Phillips and David Chasman, MGM's head of film production. Begelman was dissatisfied with the dailies he had seen of the film, but not with Welch's performance. He called the meeting because of a memorandum he had received from MGM's chairman of the board, expressing concern that the film was over budget and was in the hands of a first-time director, and suggesting that Begelman pay special attention to the problem.

Begelman began the meeting by asking Phillips, "What the hell's going on?" He also said that Phillips's and Ward's jobs were in jeopardy if the problems continued. Phillips said that shooting was beginning late because of Welch's unusual three-hour makeup period, [**11] that she had told Ward she would not come out of makeup for rehearsal, and that she had been making up at home. He further stated that he had not confronted Welch about the problem because he hoped a new makeup room which would be available the following Monday would be

acceptable to her. He did not mention that Welch had made up at home for only three days.

Begelman and Chasman thought that Phillips and Ward had been intimidated by Welch. It was against studio policy for an actress to make up at home, both because it was an advantage to the production to have her available for rehearsal during the makeup period, and because of potential problems with liability and Teamster's Union drivers. Begelman ordered Phillips to tell Welch that she would be sent a letter declaring her in breach of contract, unless she made up at the studio the next morning. This was not to be deferred until Monday, and her makeup time was henceforth limited to two hours. footnote 2

footnote 2 Unlike Phillips, Begelman and Chasman testified that here was no discussion of sending a breach of contract letter at this meeting. Begelman also testified that it was Phillips who asked for the meeting.

After the meeting, Phillips [**12] immediately called Welch. He hysterically told her that Begelman was "a killer" who believed Welch was responsible for the production delays, was not going to work around her makeup call, and was sending out a letter stating that she was in breach of contract. Welch responded that somebody must have lied to Begelman, as Phillips knew she had always been ready early for shooting. She dissolved into tears and gave the telephone to her husband, Andre Weinfeld.

Phillips told Weinfeld that Begelman was a killer and a crazy man who had put a gun at Phillips's head. He said Begelman had just dictated a breach of contract letter which was being sent "right now," and had ordered that Welch appear for makeup at the studio the next morning and shorten her makeup time. Weinfeld answered that since Welch was extremely upset and was facing her first major scene, he did not know if she could comply. footnote 3 Later calls that evening among Weinfeld, Phillips, Welch's attorney (Marc Stein) and Chasman reiterated that Welch had to make up at the studio the following morning (Friday), and a breach of contract letter was "going out."

footnote 3 At trial, Phillips denied telling Welch or Weinfeld that the letter had been dictated or was being sent right away. He testified that he told them the letter would go out if Welch failed to comply with MGM's orders. Karla Davidson, MGM's general counsel, testified she drafted the letter the next day after talking to Begelman, Chasman and Phillips. [**13]

Around 8 p.m. that night, the assistant director ordered the makeup artist and hairdresser to report to the studio rather than to Welch's home as previously instructed.

Welch was ill and barely slept that night. She arose at 4 a.m. on Friday, December 19, to prepare for filming. She claimed that she did not understand that she had been ordered to make up at the studio that morning, and was surprised when the makeup artist and hairdresser did not arrive at 6:30 a.m. She got ready by herself and arrived at the studio with Weinfeld at 8:30 a.m., one hour earlier than her set call, and, as usual, without any delay to the company. She performed as an actress throughout that day.

Phillips reported to Chasman and Begelman at 9 a.m. that Welch had disobeyed the instruction to make up at the studio that morning. Begelman called Welch's

agent, Michael Levy, to say that the breach of contract letter might be sent. This was the studio's first contact with Levy, even though the usual first step in resolving a serious problem with an actress is to call her agent. Levy called Phillips, who said the studio was pressuring him and that Welch had caused no delays.

Chasman and Begelman met that morning [**14] with MGM's general counsel, Karla Davidson. They decided to immediately send out a letter stating that Welch was in substantial breach of her obligations under the October 8 agreement. The letter read: "Artist has failed to comply with our instructions in connection with her performance of her services in the Photoplay by continually refusing and failing to report to the MGM Studio at the hour designated by us for make-up for her role. . . . [P] This will notify you that if Artist continues to refuse to perform in accordance with our instructions, we intend to exercise any and all of our rights and remedies with respect to such breach, including our right to terminate the Agreement."

Welch learned of the breach letter around noon, but continued working. Levy called Begelman to complain that the letter was unnecessary. Begelman told Levy not to tell him how to run his business, and that he was not going to let Welch continue her past history of toughness with studio directors. He said the problem was curable if Welch would make up at the studio. Levy assured Begelman, and, later that day, Chasman, that he would make sure that Welch was at the studio at 6:30 a.m. on Monday morning [**15] for two hours of makeup. Levy thought the problem was resolved at that point.

At the end of the day's filming, Welch was shown a long-unused studio makeup room which she accepted. Weinfeld told Neumann that the room was satisfactory. footnote 4 Welch planned to report for makeup in that room on Monday morning at 6:30 a.m., for the two-hour period specified on that day's call sheet.

footnote 4 Neumann denied having this conversation with Weinfeld, and testified he was never told that the new room was acceptable.

Phillips did not discuss the makeup problem with Welch on Friday. According to Phillips, Welch avoided talking to him that day. According to Weinfeld, he told Phillips to speak directly to Welch, and Phillips made no such attempt. footnote 5

footnote 5 In written notes which Phillips made several days later, he wrote that it was he who avoided Welch.

The next day, Saturday the 20th, Phillips left an urgent message on Welch's answering machine that she should call him. Welch got the call at 2 p.m. As she had again not slept well and was upset, she had Levy return the call. A series of telephone calls ensued in which Phillips and Levy spoke over the telephone. Levy would then call Weinfeld to report [**16] what Phillips had said. Weinfeld in turn talked to Welch and relayed her responses to Levy, who relayed them to Phillips.

During these conversations, Phillips repeatedly asked to meet with Welch over the weekend. Welch promised, through Levy, to obey the studio's orders. She was willing to meet with Phillips at the studio at 6:30 a.m. Monday morning, but wanted to rest over the weekend. Phillips said he wanted Welch to be

upset, as they would be filming a tense scene on Monday. Finally, between 10 and 12 a.m. on Sunday the 21st, Levy told Phillips that Welch had agreed to Phillips's proposal of a meeting on Monday at 9 a.m. in Phillips's office. Welch and Levy thought the problem was resolved. footnote 6

footnote 6 Phillips gave a different version of these conversations. He testified he needed to talk to Welch, because no one ever told him that the new makeup room was acceptable or that Welch promised to comply with the studio's orders on Monday. He denied saying he wanted Welch to be tense, and testified that what he had said was that he needed to meet with her over the weekend because he did not want to upset her on Monday when she had difficult scenes to film. He further testified that he expected a final call from Levy to confirm the Monday meeting, and called Chasman when he received no such confirmation. [**17]

[*652] Chasman called Davidson later that Sunday morning and told her that neither Welch nor her agent had made an unequivocal commitment to follow the studio's orders.

Phillips called Ward and told him that Welch might be replaced because Phillips had not been able to get in touch with her all weekend. Ward was displeased, as he had never suggested that Welch be terminated. footnote 7

footnote 7 Ward was a defendant on the conspiracy and slander counts, but was absolved by the jury.

Later on Sunday, Phillips telephoned Chasman, complaining that he still did not know if Welch agreed to comply with the studio's orders. Chasman called Begelman, who decided to terminate Welch because she had disobeyed the order to make up at the studio on Friday morning and had refused to talk to Phillips over the weekend. Welch's lawyer called her and told her she had been fired from the picture. She was devastated. About one-sixth of her role had been shot at that time.

A letter from MGM dated the next day, December 22, indicated that the employment agreement was terminated due to Welch's failure to comply with her contractual obligations. Welch responded with a letter threatening to sue unless MGM paid the balance [**18] of $194,444 which remained due under the agreement. MGM refused.

Welch was replaced by Debra Winger in the film. Winger received $150,000 for the role. It cost almost $200,000 to replace Welch with Winger and reshoot the scenes in which Welch had appeared.

Welch received numerous inquiries from the press regarding what had happened. Many people seemed to believe that she had failed to show up for work. Industry newspapers reported that she had been fired.

An article about the incident appeared in the April 2, 1981, issue of Rolling Stone, a magazine with a weekly circulation of over 700,000 and wide readership in the motion picture industry. According to the article, Ward said that Welch was a casting mistake who was not necessarily a bad actress but was not delivering a performance he could live with. footnote 8 Begelman was quoted as saying: "We had a general feeling she had not lived up to her

contract . . . . We had no alternative. It is up to the executives to tell the people in this business we will not stand for that. The producer gave her appropriate directions and she failed to obey.'"

footnote 8 Ward testified that what he meant was that Welch was not playing the character as they had agreed, and seemed to be "playing Raquel Welch and not Suzy." [**19]

Negative reviews of the film which appeared in Variety and the New York Times in February 1982 stated that Welch should feel happy she had been fired from it. The film was a major failure at the box office, and MGM lost almost $16 million on it.

The evidence established that an accusation of breaking a contract would be very damaging to an actress's reputation, as people in the industry would assume she was undependable. Welch never made another movie because of her firing from "Cannery Row." One deal fell through due to a lack of financing and the only other offers she received, to portray a Nazi and a vampire, were unacceptable. In contrast, she had made about six films between 1973 and 1980, with compensation ranging between $150,000 and $350,000. At the time of trial, in 1986, film actresses routinely received twice the 1980 level of compensation. Some stars were making from $2 million to $5 million per film.

Having no offers in Hollywood, Welch moved to New York City. For two weeks at the end of 1981 and six months in 1982, she had a very successful run in the Broadway musical "Woman of the Year," for [*653] which she earned $25,000 per week. She later signed two $1 million contracts, [**20] one for food commercials and the other for a concert tour. She also made hundreds of thousands of dollars from a best-selling health and beauty book and accompanying videotape. These activities would not have prevented her from accepting a film role.

Welch also presented evidence concerning secret meetings between MGM representatives and representatives of Debra Winger prior to Welch's firing.

On either December 17 or 18, David Chasman had called Arlyne Rothberg, Winger's personal manager, wanting to know if Winger was available to start a film. Rothberg said that Winger had just left for a vacation in New Mexico, and was available. She asked Chasman what project he had in mind. Chasman said he could not tell her, but would get back to her shortly. On Sunday the 21st, he called and told her that Welch had left the film and that the studio wanted Winger to return to Los Angeles as soon as possible. Rothberg reached Winger at her New Mexico cabin on Sunday the 21st. Winger accepted the offer.

On either Saturday the 20th or Sunday the 21st, Rothberg called Winger's attorney, Barry Hirsch, and asked him to negotiate the deal for Winger with Frank Davis, MGM's head of business affairs. [**21] Hirsch and Davis negotiated Winger's contract over the weekend. Almost all the details were resolved by Sunday. The deal closed on Monday the 22d.

On the night of Sunday the 21st, Winger called her agent, Gary Salt, from New Mexico to say that she was replacing Welch in the film. Initial contacts regarding a role are usually made with an actor's agent. Salt worked for the same agency that represented Welch.

Begelman, Chasman, Phillips, Ward, Davidson and Davis denied that there were

any discussions regarding Winger or contacts with her or her representatives prior to Monday, December 22.

I

Count II of the first amended complaint alleged that MGM, Phillips and Ward formed a conspiracy to induce MGM to breach the employment contract with RWPI, for the purported purposes of replacing Welch with another actress and making it appear that Welch, rather than Phillips and Ward, was responsible for the picture's budget problems. Welch and RWPI sought $194,444 in actual damages (the amount remaining under the contract), and $5 million in punitive damages. The jury awarded $194,444 in compensation against MGM and Phillips, $500,000 punitive damages against Phillips, and $3,750,000 punitive [**22] damages against MGM. Ward was exonerated.

Appellants maintain that there is no legal basis for the conspiracy count because Phillips had a privilege to induce breach of the contract as a matter of law, and there was no other party outside the contract with whom MGM could have conspired.

"While a party to a contract may not be held liable in tort for interfering with his own contract by breaching it, he may be held liable in tort for interference with his own contract if he conspires with a third party to breach it. [Citation.]" (Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal.App.3d 200, 225 [194 Cal.Rptr. 180], citing Wise v. Southern Pacific Co. (1963) 223 Cal.App.2d 50 [35 Cal.Rptr. 652], italics deleted.) The contracting party's liability is derived from the wrongful interference of the third-party coconspirator (Manor Investment Co. v. F. W. Woolworth Co. (1984) 159 Cal.App.3d 586, 596 [206 Cal.Rptr. 37]), and is based on "the principle that all who are involved in the common scheme are jointly and severally responsible for the ensuing wrong." (Wise v. Southern Pacific Co., supra, at pp. 71-72.)

Special rules govern whether the [**23] manager or agent of a contracting party can constitute the third party for the purpose of the conspiracy. footnote 9

footnote 9 No issue has been raised regarding the exact nature of Phillips's relationship to MGM. Under the agreement he signed, he was essentially an employee who agreed to produce the picture. He could be terminated for breach of contract and was entitled to profit sharing.

[*654] "One who is in a confidential relationship with a party to a contract is privileged to induce the breach of that contract. [Citations.]" (Lawless v. Brotherhood of Painters (1956) 143 Cal.App.2d 474, 478 [300 P.2d 159].)

"The privilege to induce an otherwise apparently tortious breach of contract is extended by law to further certain social interests deemed of sufficient importance to merit protection from liability. Thus, a manager or agent may, with impersonal or disinterested motive, properly endeavor to protect the interests of his principal by counseling the breach of a contract with a third party which he reasonably believes to be harmful to his employer's best interests." (See Prosser, Law of Torts (4th ed. 1971) § 129, pp. 943-944.) On the other hand, "[i]t is well established . . . that [**24] a person is not justified in inducing a breach of contract simply because he is in competition with one of the parties to the contract and seeks to further his own economic

advantage at the expense of the other. [Citations.]" (Imperial Ice Co. Rossier (1941) 18 Cal.2d 33, 36 [112 P.2d 631].) "Obviously, when a manager induces a breach in the hopes that he himself might fill the resultant economic void, he acts not as a servant, i.e., as one upholding his master's best interests, but rather as a naked competitor, devoid of the protections accorded those who labor under standards of fidelity, good faith and fiduciary responsibility." (Olivet v. Frischling (1980) 104 Cal.App.3d 831, 840-841 [164 Cal.Rptr. 87], fn. omitted.)

Under Olivet, the privilege applies where the manager acts solely in the employer's interest and does not apply where the manager acts solely in his or her own interest. Two federal cases interpreting California law, Los Angeles Airways, Inc. Davis (9th Cir. 1982) 687 F.2d 321, 328, and McCabe v. General Foods Corp. (9th Cir. 1987) 811 F.2d 1336, 1339, have further concluded that the privilege applies where the manager acts from [**25] the mixed motives of benefiting both the principal and himself.

Appellants maintain that the evidence here established that phillips was acting from mixed motives, so his actions were privileged as a matter of law. We disagree. The evidence contained several possible explanations for Phillips's behavior. Welch's evidence suggested that Phillips reacted to the threat of losing his job, and consequent damage to his career, by making Welch the scapegoat for the film's budget problems. Phillips maintained that Welch was creating a problem for him and MGM which could potentially damage the film. MGM's covert contacts with Winger, and Ward's statement to Rolling Stone Magazine that he was dissatisfied with Welch's portrayal of the role, suggested other possible motives for replacing her. footnote 10 Resolution of the existence of the privilege was "peculiarly a question for determination by the trier of fact. [Citation.]" (Rosenfeld, Meyer & Susmann, supra, 46 Cal.App.3d at p. 230.)

footnote 10 Appellants correctly point out, however, that there was no evidence that the reason they suddenly wanted Winger was that she had had a big success in a just released picture, "Urban Cowboy." Ward testified that he had no idea when "Urban Cowboy" was released. [**26]

The jury was specially instructed that if Phillips gave MGM "truthful information or honest advice within the scope of a request for the advice, or if [he was] materially motivated by a desire to benefit MGM," then he was [*633] not liable for conspiracy to induce breach of contract. The jury's finding against Phillips necessarily means that it determined that he was not acting in a privileged capacity. Given the jury's resolution of the conflicting evidence, we cannot find, as a matter of law, that the privilege existed.

II

Appellants next maintain that Welch lacked standing to sue for either conspiracy to induce breach of contract or bad faith, as MGM contracted with Welch's [*655] loan-out company, RWPI, rather than with Welch as an individual. The argument lacks merit.

Appellants did not raise this issue below. They maintained in their trial brief that Welch and RWPI had "indistinguishable" interests, and repeatedly argued to the jury that the contract was between "Miss Welch" and MGM.

The contract defined Ms. Welch, individually, as the "artist," and contained

numerous specific obligations owed by MGM to the "artist." There was no significant difference between the company Welch utilized [**27] for tax purposes and Welch herself. (See Pasadena Hospital Assn. Superior Court (1988) 204 Cal.App.3d 1031, 1036 [251 Cal.Rptr. 686].)

Moreover, the signature page of the contract shows that Welch signed twice, both as the president of RWPI and as an individual who "ACCEPTED AND AGREED" to the terms. She therefore is presumed to have joint and several liability under the contract. (Civ. Code, § 1660; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 675.)

MGM's reliance on C & H Foods Co. v. Hartford Ins. Co. (1984) 163 Cal.App.3d 1055 [211 Cal.Rptr. 765], and Hatchwell v. Blue Shield of California (1988) 198 Cal.App.3d 1027, 1034 [244 Cal.Rptr. 249], is misplaced. We held in C & H Foods that individuals who were the shareholders and employees of a corporation were not proper plaintiffs in the corporation's bad faith action against its insurance company, as they were not named insureds, additional insureds or beneficiaries under the insurance policy. Similarly, Hatchwell held that a spouse who was neither a party nor an express third-party beneficiary to the insurance contract between her husband and his insurance company lacked standing [**28] to sue for bad faith denial of her husband's benefits. Here, in contrast, Welch signed the employment contract, and it detailed the mutual obligations which she and MGM owed to each other. We therefore conclude that a contractual relationship existed between MGM and Welch which gave Welch standing to sue to enforce her contractual rights.

III

The count of breach of the implied covenant of good faith and fair dealing (bad faith) was alleged solely against MGM. The jury awarded Welch $400,000 in lost contract benefits, $1 million in lost professional income, $750,000 in damages to reputation, nothing for emotional distress, and $3,750,000 in punitive damages.

Appellants complain that the trial court should not have permitted this count to be added at the close of Welch's evidence as an amendment to conform to proof.

Due to the policy that cases should be decided on their merits, amendments to conform to proof are liberally allowed where the "same general set of facts" are involved. (Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal.2d 596, 601 [15 Cal.Rptr. 817, 364 P.2d 681]; Grudt v. City of Los Angeles (1970) 2 Cal.3d 575, 585 [86 Cal.Rptr. [**29] 465, 468 P.2d 825].) A trial court's decision to permit such an amendment will be affirmed on appeal unless an abuse of discretion is shown. (Godfrey v. Steinpress (1982) 128 Cal.App.3d 154, 174 [180 Cal.Rptr. 95].) Here, no abuse has been shown.

Appellants complain they were prejudiced by the amendment, as they would have prepared and tried the case differently had they known it included a bad faith count. Welch stated at the time of the December 1984 settlement conference, however, that she would seek leave of the trial court to amend the breach of contract count to seek punitive damages. She cited Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal.3d 752 [206 Cal.Rptr. 354, 686 P.2d 1158], which had been decided several months earlier, and held that punitive damages were possible where the party who breached a contract adopted a "stonewall," "see you in court" attitude with no real belief in the existence of a defense. While no such amendment had been added by the time the trial started, appellants knew that evidence of emotional [*656] damage and lost earnings would be admitted on the conspiracy count, which included a

claim for punitive damages. [**30] The evidence which supported the bad faith count was introduced without objection throughout Welch's case-in-chief, as it also proved the conspiracy count. Appellants have simply failed to establish that there is anything they would have done differently had they known they faced an allegation of bad faith as well as punitive damages arising from conspiracy. The only possible prejudice was in the possibility of duplicative damages, which we discuss and reject in section X, infra .

IV

Appellants contend that the award on the bad faith count must be reversed because one of the essential elements of bad faith, a "special relationship" similar to the relationship between an insurance company and an insured, was lacking as a matter of law. Alternatively, they maintain that, if there was a trial issue as to the existence of a special relationship, the trial court should not have refused their requested instruction on the necessary criteria for the relationship. Welch maintains that because her contract made her an employee of MGM, a special relationship existed as a matter of law.

The record shows that the trial court gave a series of instructions based on existing law involving [**31] bad faith termination of employment contracts. (Koehrer v. Superior Court (1986) 181 Cal.App.3d 1155 [226 Cal.Rptr. 820].) The jury was told that appellants were guilty of bad faith breach of contract if they sought "to avoid all liability on a meritorious contract claim by denying that liability without probable cause and with no good faith belief in the existence of a defense, . . ." The trial court refused to instruct that a prerequisite to a finding of bad faith was the existence of the factors which make the contractual relationship a special relationship as set forth in Wallis v. Superior Court (1984) 160 Cal.App.3d 1109, 1118 [207 Cal.Rptr. 123]. We must decide whether there were unique features of the employment relationship here which justify an exception to the usual rule that only bad faith and lack of probable cause need be shown in the employment context.

The employment contract for Welch's services was arrived at through careful negotiations between MGM's representatives on one side and Welch's agent and attorney on the other. In addition to compensation, the contract provided for a series of conditions negotiated on behalf of Welch, such as billing; [**32] approval of nude scenes and nude stills; effect of changes in the screenplay; effect of replacement of Nolte, Ward, or Phillips; approval, as discussed, of dressing room, hairdresser and makeup artist; a wardrobe assistant and double (actress); and no makeup call earlier than 6 a.m. The contract otherwise incorporated all of MGM's standard terms, including the "pay or play" clause, and the basic agreement of the screen actors guild.

While our Supreme Court has not directly addressed the issue of bad faith termination of employment contracts, some guidance can be found in Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167 [164 Cal.Rptr. 839, 610 P.2d 1330, 9 A.L.R.4th 314], and Seaman's Direct Buying Service, Inc. v. Standard Oil Co., supra, 36 Cal.3d 752.

In Tameny Atlantic Richfield Co., supra, 27 Cal.3d 167, the plaintiff maintained that he was discharged after 15 years of employment because he refused to participate in an illegal price-fixing scheme. Although the employment contract was of indefinite duration and therefore was terminable at the will of either party, Tameny held that the plaintiff properly stated a cause of action in tort for [**33] wrongful discharge, since a discharge cannot be based on reasons which contravene public policy. (Id., at pp. 172, 178.) That conclusion made it unnecessary to decide whether the employee could

also maintain an action for bad faith breach of the employment contract. The court went on to say: "We do note in this regard, however, that authorities in other jurisdictions [*657] have on occasion found an employer's discharge of an at-will employee violative of the employer's 'good faith and fair dealing' obligations [citations], and past California cases [in the insurance realm] have held that a breach of this implied-at-law covenant sounds in tort as well as in contract. [Citations.] Since neither plaintiff nor defendants suggest that the elements of a cause of action for breach of the implied covenant in this context would differ from the elements of an ordinary wrongful discharge action, however, we believe that a separate discussion of the 'good faith and fair dealing' covenant in this case is unnecessary." (Id., at p. 179, fn. 12.)

In Seaman's Direct Buying Service, Inc. Standard Oil Co., supra, 36 Cal.3d 752, the Supreme court again suggested, without directly deciding [**34] the issue, that breach of an employment contract could justify a bad faith action.

Seaman's involved a small company (Seaman's) which signed a letter agreement with Standard Oil detailing the terms of a 10-year dealership. The dealership agreement contemplated in the letter was never signed, however, and Standard Oil later took the position that no binding agreement had ever been reached. When Seaman's told Standard Oil that it could not continue in operation without a stipulation to the existence of a contract, a Standard Oil representative laughed and said, "See you in court.'" (Id., at p. 762.) Seaman's subsequently obtained a jury verdict on a variety of causes of action, including tortious breach of the implied covenant of good faith and fair dealing.

On appeal, Standard Oil maintained that a tort action for breach of the implied covenant should be limited to cases where the underlying contract was an insurance contract. (Id., at p. 767.) The Supreme Court disagreed. It explained that, while the law implies a covenant of good faith and fair dealing in every contract, it is "not so clear" that a breach of the covenant always gives rise to a tort action. "In [**35] holding that a tort action is available for breach of the covenant in an insurance contract, we have emphasized the 'special relationship' between insurer and insured, characterized by elements of public interest, adhesion, and fiduciary responsibility. [Citation.] No doubt there are other relationships with similar characteristics and deserving of similar legal treatment." (Italics added.) (Id., at pp. 768-769; fn. omitted.)

The Seaman's opinion went on to express caution about applying the tort remedy to commercial contracts shaped by parties of relatively equal bargaining power. It found it unnecessary to decide the scope of the tort, holding instead that a party may not deny the existence of a contract in bad faith and without probable cause, and that reversal was necessary in Seaman's because the jury had not been asked to resolve the critical question of bad faith. (Id., at pp. 768-774.)

At the point of its discussion of contexts similar to insurance contracts, Seaman's added this footnote: "In Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167, 179, footnote 12, this court intimated that breach of the covenant of good faith and [**36] fair dealing in the employment relationship might give rise to tort remedies. That relationship has some of the same characteristics as the relationship between insurer and insured. (See Louderback & Jurika, Standards for Limiting the Tort of Bad Faith Breach of Contract (1981) 16 U.S.F. L.Rev. 187, 220-226.)" (Seaman's, supra, 36 Cal.3d at p. 769, fn. 6.)

The law review article cited in the Seaman's footnote recommended extension of the tort of bad faith breach of contract to contracts bearing the characteristics of insurance contracts, such as unequal bargaining power, a motive by [*658] the weaker party to secure peace of mind rather than profit, justifiable reliance by the weaker party on the stronger, and conduct by the stronger party evidencing an intent to frustrate the weaker party's enjoyment of contractual rights.

Chief Justice Bird's dissent in Seaman's further recognized the propriety of a bad faith cause of action in the employment context, as such a breach could severely harm an employee's reputation and ability to find new employment. (36 Cal.3d at p. 780.)

Thus, while the Supreme Court has not directly decided the issue, both Tameny and Seaman's [**37] provide strong support for permitting a bad faith action in the context of an employment contract. A series of decisions by the Courts of Appeal have so held, without drawing any distinction with regard to the type of employment involved.

In Cleary v. American Airlines, Inc. (1980) 111 Cal.App.3d 443, 454-456 [168 Cal.Rptr. 722], a post-Tameny, pre-Seaman's case, the appellate court cited the Tameny footnote and insurance bad faith cases in holding that an at-will employee who alleged that he was fired from his long-term employment due to union organizing activities would be entitled to tort damages if he could show that he was unjustly terminated in bad faith. The combination of the employee's longevity of service and the employer's express policy regarding the adjudication of employee disputes operated "as a form of estoppel, precluding any discharge of such an employee by the employer without good cause." (Cleary, supra, at p. 456.)

In Pugh v. See's Candies, Inc. (1981) 116 Cal.App.3d 311, 329 [171 Cal.Rptr. 917], the court found it unnecessary to decide whether a long-term employee had stated a tort cause of action for bad faith breach, [**38] as its facts showed a breach of an implied-in-fact promise by the employer not to deal arbitrarily with its employees. That promise was implied from factors like the employer's personnel policies, the employee's longevity of service, the employer's assurances to the employee that the employment would continue, and the practices of the industry. (Ibid.)

Crosier v. United Parcel Service, Inc., supra, 150 Cal.App.3d 1132, held that a 25-year managerial employee who was discharged for violating a company rule against fraternization with nonmanagement employees had made an inadequate showing of bad faith under Cleary and Pugh, as the grounds for dismissal were based on legitimate concerns and good faith. (Id., at p. 1140.)

Shapiro v. Wells Fargo Realty Advisors (1984) 152 Cal.App.3d 467 [199 Cal.Rptr. 613], held that an officer of a company who had three years of employment had not stated facts sufficient to support a bad faith discharge cause of action, as he had not shown the Cleary factors of longevity of employment or failure by the employer to follow its own procedures for adjudicating employee disputes. Shapiro also found no [**39] bad faith under an alternative definition of bad faith bad faith action extraneous to the contract, combined with the obligor's intent to frustrate the obligee's enjoyment of contract rights which was set forth in Sawyer v. Bank of America (1978) 83 Cal.App.3d 135, 139 [145 Cal.Rptr. 623], in the context of a relationship between a bank and its customer. (Shapiro, supra, at pp. 478-479.)

In Rulon-Miller v. International Business Machines Corp. (1984) 162 Cal.App.3d

241 [208 Cal.Rptr. 524], the court affirmed an award of punitive damages to a low-level managerial employee who maintained that she had been wrongfully discharged for maintaining a romantic relationship with the manager of a rival firm. Rulon-Miller held that the jury properly found, from conflicting evidence, that the company's policies prohibited a conflict of interest rather than a romantic relationship, and that no conflict of interest existed. Based on Seaman's, the jury was properly instructed to consider whether the discharge was motivated by legitimate business reasons or a pretext, and whether the employer had acted in good faith. (Rulon-Miller, supra, at pp. 252-253.) [**40]

In Khanna v. Microdata Corp. (1985) 170 Cal.App.3d 250 [215 Cal.Rptr. 860], the court upheld a jury verdict for wrongful [*659] discharge based on a breach of the implied covenant of good faith and fair dealing, where the employer induced the employee to come to work for it based on a letter agreement it subsequently dishonored, and then fired the employee when he sued to compel compliance with the agreement. The true reasons for the employee's dismissal were evidentiary questions for the trier of fact, and the record supported an implied jury finding of bad faith action, extraneous to the contract, motivated by an intention to frustrate the employee's enjoyment of his contract rights.

Finally, in Koehrer v. Superior Court, supra, 181 Cal.App.3d 1155, plaintiffs who had signed an employment agreement to manage apartment buildings for a period of one year, were terminated several months later, and filed an action for tortious discharge and bad faith discharge. Justice Kaufman's opinion first concluded that the plaintiffs had failed to state a cause of action for tortious discharge, as they had not met the requirement of Tameny v. Atlantic Richfield Co., supra, [**41] 27 Cal.3d 167, that the discharge contravene fundamental principles of public policy. (Koehrer, supra, at p. 1167.) The plaintiffs had, however, properly stated a cause of action for bad faith discharge. "[I]t appears to be now well established that in appropriate circumstances an action for 'bad faith' discharge based on breach of the implied covenant of good faith and fair dealing will lie in the employment context. [Citations.]" (Id., at p. 1168.) Relying on Seaman's, Koehrer identified bad faith as the factor in the employment discharge cases which distinguishes a mere breach of contract from a breach of the covenant of good faith and fair dealing. "If the employer merely disputes his liability under the contract by asserting in good faith and with probable cause that good cause existed for discharge, the implied covenant is not violated and the employer is not liable in tort. (Seaman's, supra, 36 Cal.3d at p. 770.) If, however, the existence of good cause for discharge is asserted by the employer without probable cause and in bad faith, that is, without a good faith belief that good cause for discharge in fact exists, the employer has tortiously attempted [**42] to deprive the employee of the benefits of the agreement, and an action for breach of the implied covenant of good faith and fair dealing will lie. (Seaman's, supra, 36 Cal.3d at pp. 769-770; . . .)" (Koehrer v . Superior Court, supra, 181 Cal.App.3d at p. 1171.)

Bad faith employment discharge cases since Koehrer have continued to require the elements of bad faith and lack of probable cause which were the basis of the instructions given the jury in the case before us. (See, e.g., Gray v. Superior Court (1986) 181 Cal.App.3d 813, 820-821 [226 Cal.Rptr. 570] [computer programmer who was fired for insubordination after 14 months of employment stated cause of action for bad faith discharge based on conduct extraneous to the contract combined with an intent to frustrate his employment rights]; Prevost v. First Western Bank (1987) 193 Cal.App.3d 1492, 1502-1503 [239 Cal.Rptr. 161] [triable issue of fact whether bank loan officer was

discharged in bad faith under the Koehrer standard]; Clutterham v. Coachmen Industries, Inc. (1985) 169 Cal.App.3d 1223 [215 Cal.Rptr. 795] [no bad faith discharge where no evidence of bad faith and employer [**43] had good cause for discharge as plant was closing]; Burton v. Security Pacific Nat. Bank (1988) 197 Cal.App.3d 972, 978-979 [243 Cal.Rptr. 277] [bank employee who was discharged for reading confidential material failed to show bad faith or lack of probable cause]; Huber v. Standard Ins. Co. (9th Cir. 1988) 841 F.2d 980 [triable issue of fact on bad faith discharge under Khanna and Koehrer; employee was manager of insurance agency].) footnote 11

footnote 11 As the foregoing cases show, some confusion has existed regarding whether the elements of a bad faith discharge cause of action are simply bad faith and lack of probable cause (Koehrer; Prevost; Burton; Clutterham) or bad faith acts extraneous to the contract, combined with an intent to frustrate employment rights (Sawyer; Shapiro; Gray; Khanna) . We need not resolve that issue here, but note that appellants unsuccessfully requested an instruction on the Sawyer standard as well as the Wallis standard.

[*660] Appellants maintain that the nature of the employment relationship between Welch and MGM differed from the other employment cases which have heretofore been litigated. Appellants contend that [**44] the "special relationship" test, which has evolved since Seaman's to determine whether a bad faith cause of action is justified in cases which involve neither insurance nor discharge from employment, should be applied here. We disagree.

The "special relationship" test set forth in Wallis v. Superior Court (1984) 160 Cal.App.3d 1109 [207 Cal.Rptr. 123], is derived from language in Seaman's that bad faith rules should be utilized in unspecified noninsurance contexts where the relationship of the contracting parties is similar to that of an insured to an insurer. (Seaman's, supra, 36 Cal.3d at pp. 768-769.)

The plaintiff in Wallis had worked 32 years at a manufacturing plant and was 55 years old when he learned that the plant was closing. He entered into a written agreement with the company under which he was promised monthly payment to age 65 in exchange for a promise not to compete with the company. Several years later, the company advised him that it did not consider the agreement to be binding, and was discontinuing the payments. He sued. In determining whether the pleaded facts supported a cause of action for bad faith breach of contract, the Wallis [**45] court carefully analyzed the special features of the insurance contract which distinguish it from the ordinary commercial contract. It held that an action for tortious breach of a noninsurance contract can be maintained only if the following characteristics similar to an insurance contract are present: "(1) [T]he contract must be such that the parties are in inherently unequal bargaining positions; (2) the motivation for entering the contract must be a nonprofit motivation, i.e., to secure peace of mind, security, future protection; (3) ordinary contract damages are not adequate, because (a) they do not require the party in the superior position to account for its actions, and (b) they do not make the inferior party 'whole'; (4) one party is especially vulnerable because of the type of harm it may suffer and of necessity places trust in the other party to perform; and (5) the other party is aware of this vulnerability." (Id., at p. 1118.) The court concluded that since the plaintiff's complaint alleged facts which showed those similarities, he had properly pleaded a bad faith cause of action. (Id., at p. 1119.)

The Wallis criteria have since been applied in a [**46] variety of contexts,

such as Rogoff v. Grabowski (1988) 200 Cal.App.3d 624 [246 Cal.Rptr. 185] (no bad faith cause of action where lessees of limousine company sued limousine company after the limousine's driver drove off with their valuables, leaving them stranded); Okun v. Morton (1988) 203 Cal.App.3d 805, 826-827 (no bad faith cause of action, despite evidence of bad faith, as no special relationship under Wallis; contracting parties were both sophisticated investors who were represented by counsel and consulted with their advisers before executing the agreement); Commercial Cotton Co. v. United California Bank (1985) 163 Cal.App.3d 511, 516 [209 Cal.Rptr. 551, 55 A.L.R.4th 1017] (bank and depositor found to have relationship similar to insurer and insured); Quigley v. Pet, Inc. (1984) 162 Cal.App.3d 877, 893 [208 Cal.Rptr. 394] (no special relationship between hauling business and large agricultural company); Martin U-Haul Co. of Fresno (1988) 204 Cal.App.3d 396, 411 [251 Cal.Rptr. 17] (no special relationship between independent equipment dealer and rental company); Multiplex Ins. Agency, Inc. v. California Life Ins. Co. [**47] (1987) 189 Cal.App.3d 925, 938 [235 Cal.Rptr. 12] (no special relationship between two corporations who entered contract to make profit).

The Wallis criteria are not applicable to the case before us. Wallis was not a bad faith discharge case. The employment ended there because the plant was closing. [*661] The breach was of an agreement to provide benefits after the employment relationship had ended. It is for this reason that the Wallis criteria were not utilized in Koehrer, supra, an employment discharge case from the same court which wrote the Wallis opinion, footnote 12 nor have those criteria been applied in the other employment discharge cases discussed in this opinion.

footnote 12 Justice Kaufman, who authored Koehrer, was on the panel in Wallis .

We agree with appellants that the nature of the relationship between Welch and MGM would be subject to challenge under the factors identified by Seaman's as justifying extension of bad faith principles outside the realm of insurance contracts. Indeed, the Wallis court noted in a footnote that "the characteristics of the insurance contract which give rise to an action sounding in tort are also present [**48] in most [not all] employer-employee relationships." (160 Cal.App.3d at p. 1116, fn. 2, italics added.) We have declined to apply the Seaman's-Wallis criteria to the case before us because this is a bad faith discharge case and the trial court followed well established law that no special relationship beyond the employer-employee relationship is necessary in a bad faith discharge case. Permitting distinctions to be drawn based upon perceived relative bargaining power in an employment relationship would create whole new areas of litigation in the already confused bad faith area.

V

Appellants further contend that there was insufficient evidence to establish either a conspiracy to induce breach of contract or a breach of the implied covenant of good faith and fair dealing. We disagree.

The record suggests that the defendants may have had different underlying motivations. Phillips wanted to protect himself from removal from the film, Begelman needed to protect his new position at MGM and show his strength in dealing with stars, and MGM wanted a different actress for the role. The end result was the same: a conspiracy to falsely blame Welch for the production's

problems and [**49] to create a pretext for firing her which would provide a basis for not paying her under her contract. That conspiracy explained the studio's insistence on Welch's making up at the studio on Friday morning rather than the following Monday, even though she had previously had permission to make up at home, had never been late for filming, was upset by the talk of breach, and was facing her first major dialogue scene. The conspiracy and bad faith counts were further supported by: (1) the repudiation by Winger's manager and attorney of the testimony of numerous MGM witnesses regarding when the negotiations for Winger began; (2) Phillips's statements to Welch, Weinfeld and Stein on Thursday night that a breach letter was going out, even though Welch had not yet disobeyed the studio's make up order for Friday morning; (3) the failure to contact Levy before threatening the breach letter, when even MGM's expert testified that problems with a star are usually handled through her agent; (4) Phillips's and Neumann's insistence, contrary to the testimony of Weinfeld and Levy, that they were never told that Welch would use the new make up room on Monday; (5) Phillips's emphasis on Welch's refusal [**50] to meet with him over the weekend, when she had repeatedly communicated with him through Levy, and had agreed to a Monday meeting; and (6) the abrupt firing of Welch on Sunday, without waiting to see if she would fulfill her promises regarding Monday, and at a time when 98 percent of the details of Winger's contract had been agreed upon.

VI

The slander cause of action was based upon Begelman's statement to the Rolling Stone reporter that, "We had a general feeling she had not lived up to her contract, . . . We had no alternative. It's up to the executives to tell the people in this business we will not stand for that. The producer gave her appropriate directions and she failed to obey.'"

[*662] On this cause of action, the jury returned $300,000 in compensatory damages against MGM, $25,000 in compensatory damages against Begelman, $150,000 in punitive damages against MGM, and $2,500 in punitive damages against Begelman.

Appellants maintain that there were errors in the trial court's instructions on slander and that there was insufficient evidence of slander because (1) Begelman's statement was one of opinion rather than fact and (2) there was no evidence of malice. The contentions [**51] lack merit.

The jury was instructed that slander is a false and unprivileged publication which tends to cause injury; if the statement is not slanderous on its face, all the surrounding circumstances should be considered in determining whether it would have a defamatory effect on the average reader; since Welch was a public figure, a published statement about her was absolutely privileged, even if false, unless made with knowledge of falsity or reckless disregard for the truth; there was no privilege if the statement was motivated by ill will or without a good faith belief in its truth; truth was a defense. They were further instructed that to be slanderous, the statement had to be one of fact rather than opinion; and, in determining whether the statement was one of fact or opinion, the jury should consider whether the average reader would consider it to be fact or opinion in the context of all the circumstances shown by the evidence.

The foregoing instructions accurately stated the applicable law. (Baker v. Los Angeles Herald Examiner (1986) 42 Cal.3d 254, 259-269 [228 Cal.Rptr. 206, 721 P.2d 87]; Good Government Group of Seal Beach, Inc. v. Superior Court (1978) [**52] 22 Cal.3d 672, 679-684 [150 Cal.Rptr. 258, 586 P.2d 572]; Gregory v. McDonnell Douglas Corp. (1976) 17 Cal.3d 596, 600-604 [131

Cal.Rptr. 641, 552 P.2d 425]; New York Times Co. v. Sullivan (1964) 376 U.S. 254 [11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412].)

Begelman's statement included words which sounded like an expression of opinion ("We had a general feeling") and words which sounded like a description of facts ("she failed to obey") which were communicated to him, the head of the studio, by the film's producer. It therefore was appropriate under the foregoing cases to leave it to the jury to decide whether the statement was one of opinion or fact.

There was sufficient evidence of malice through Welch's evidence, which the jury believed, that Begelman knew that Welch had complied with her obligations, manufactured a pretext to fire her, and therefore must have known that his statement to the Rolling Stone reporter was false.

VII

Appellants also maintain that three statements by Welch's counsel in closing argument constituted improper references to inadmissible settlement negotiations. The statements were that MGM knew for the six years which preceded [**53] the trial that Welch had been wrongly fired and still did not pay her. The argument lacks merit. First, there was no objection to any of the statements appellants now contend were improper (Whitfield v. Roth (1974) 10 Cal.3d 874, 892 [112 Cal.Rptr. 540, 519 P.2d 588]), and the references were not so extreme that an admonition would have been insufficient. Second, as the trial court recognized at the hearing on the motion for new trial, counsel's argument was not improper when taken in context. The references were to a failure to pay the contract price and not an alleged refusal to negotiate. We cannot consider declarations from the jurors regarding how they construed counsel's argument, as evidence of jurors' subjective reasoning processes is inadmissible. (People v. Hutchinson (1969) 71 Cal.2d 342, 349 [78 Cal.Rptr. 196, 455 P.2d 132]; Evid. Code, § 1150.)

VIII

MGM further contends that the successor corporations to MGM cannot be held liable for punitive damages because they did not perform the alleged wrongful acts and MGM ceased to exist five months before the trial. There is no merit to the argument. MGM's attorney and some of [*663] its witnesses represented [**54] at trial that they were employed by MGM. There was no mention of the fact that MGM no longer existed until after the trial. A successor corporation may not avoid liability for punitive damages when the issue was not raised before the trier of fact. (Moe v. Transamerica Title Ins. Co. (1971) 21 Cal.App.3d 289, 303-304 [98 Cal.Rptr. 547]; In re Related Asbestos Cases (N.D.Cal. 1983) 566 F.Supp. 818, 823.)

IX

We next consider appellants' claims of error in the awards of compensatory damages.

Appellants raise a variety of relatively minor issues regarding the wording of some of the instructions. We see no error in the instructions as a whole.

Appellants maintain that there was insufficient evidence to support an award of $1 million for loss of professional income on the bad faith count, as Welch did not have a reasonably certain future career as a serious film actress. We disagree. The lost income award was supported by the amount of money Welch had made from previous film work, the absence of film offers subsequent to

"Cannery Row," the expert testimony that she would have obtained additional film roles but for the "Cannery Row" firing, and the amount of money film [**55] stars were making at the time of trial. The $1 million the jury awarded for lost income was considerably less than the $3,200,000 for which her counsel argued.

We similarly reject appellant's argument that there was insufficient evidence to support damages of $750,000 for loss of reputation on the bad faith count. Appellants ignore the difference between Welch's pre-"Cannery Row" reputation as a somewhat difficult but professional actress and her post-"Cannery Row" reputation as a contract breaker who had been fired for cause.

Appellants also maintain that MGM cannot be liable for $300,000 of compensatory damages for slander when Begelman, who made the slanderous statement, was found liable for only $25,000 of such damages. We disagree. The jury was instructed that MGM's liability depended upon whether Begelman was speaking solely as an individual or was expressing MGM's official corporate position. The verdict shows that the jury believed that Begelman was speaking on behalf of the studio and that the statement caused more damage coming from the studio than from an individual.

Appellants further complain that the various categories of compensatory damages which were awarded on [**56] the bad faith count were duplicative of each other or duplicated the compensatory damages which were awarded on other counts.

On the bad faith count, the jury was instructed to consider: (1) lost contract benefits, including the agreed compensation and loss of value of appearing in the film; (2) loss of professional income; (3) damage to reputation; and (4) emotional distress. The jury verdict form on the bad faith count mirrored the factors in that instruction. As to the other counts, the jury was simply asked to determine the amount of compensatory damages which applied, without specification of the source of the damages.

Appellants never objected to the form of the verdicts, and never contended at the trial court level that there were duplications within the damages on the bad faith count. After the verdicts were returned, they raised some, but not all, of the contentions of duplication which they now make before us. By acquiescing in the measure of damages which was presented to the jury, appellants waived the right to raise this issue on appeal. (Durkee v. Chino Land and Water Co. (1907) 151 Cal. 561, 570-571 [91 P. 389]; Kantlehner v. Bisceglia (1951) [**57] 102 Cal.App.2d l, 6 [226 P.2d 636]; Delos v. Farmers Insurance Group (1979) 93 Cal.App.3d 642, 661 [155 Cal.Rptr. 843]; Hopping v. City of Redwood City (1936) 14 Cal.App.2d 360, 362 [58 P.2d 379].) Moreover, as to those issues of duplication which the trial court was asked to consider, the record supports the trial [*664] court's determinations that the only duplication was in the $194,000 awarded both for breach of contract and conspiracy to induce breach of contract; the other damages compensated for different types of losses. The $194,000 duplication was corrected at the trial court level.

X

Finally, we consider appellants' contentions that the punitive damages are excessive or duplicative as a matter of law.

As previously indicated, the jury awarded $3,750,000 against MGM and $500,000 against Phillips as punitive damages on count II (conspiracy to induce breach of contract); $150,000 against MGM and $2,500 against Begelman as punitive

damages on count III (slander); and $3,750,000 against MGM as punitive damages against MGM on count IV (breach of the implied covenant of good faith and fair dealing.

An award of punitive damages will be found excessive on appeal [**58] only if the record shows that it was so grossly disproportionate that it resulted from passion or prejudice. (Neal v. Farmers Ins. Exchange (1978) 21 Cal.3d 910, 927-928 [148 Cal.Rptr. 389, 582 P.2d 980].) Among the pertinent factors are the reprehensibility of the conduct, the relationship between the amounts of compensatory and punitive damages, and the wealth of the particular defendant. (Id., at p. 928.) Great weight is given to the determination of a trial court on motion for new trial that the damages were not excessive. (Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc. (1984) 155 Cal.App.3d 381, 388 [202 Cal.Rptr. 204].) Such a ruling was made here. footnote 13

footnote 13 The trial court stated: "As far as the punitives are concerned, let's put it this way: If everybody waived a jury and let me try this case, they wouldn't have been that high, but I would still have given them punitive damages. But that's my, what has often been termed, conservative nature. But she still would have gotten punitive damages. I can't say that they shocked me. I can't say that I think they shocked the conscience of the system, and I don't think they were grossly excessive to the point where I have any particular right to set it aside." [**59]

The punitive damages the jury awarded were substantially less than Welch requested. As to MGM, her counsel asked the jury for $7.5 million on the slander count and that same amount on the bad faith count. The $500,000 awarded against Phillips for bad faith was exactly what counsel requested. Counsel argued for $700,000 on the slander count, based on one dollar for each Rolling Stone subscriber.

It was stipulated below that MGM had a net worth of $215 million and Phillips of $5 million. The punitive damages thus represented 3.6 percent of MGM's net worth and 10 percent of Phillips's net worth as an individual. As to MGM, the ratio of punitive damages to compensatory damages was 2.8:1. The same ratio as to Phillips was 2.1:1.

As shown by the cases summarized in Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc., supra, 155 Cal.App.3d 381, the size of the punitive damage awards here were not inconsistent with or disproportionate to awards which have been affirmed in the past. (See also Goshgarian v. George (1984) 161 Cal.App.3d 1214, 1228 [208 Cal.Rptr. 321].) We realize that MGM lost money on the film, and Phillips's salary for producing it was $200,000. Still, given [**60] the net worths of the defendants, their complete disregard of the likelihood that the unjustified firing would ruin Welch's film career, and the relatively high actual damages, the jury could properly conclude that appellants' conduct justified the amount of punitive damages which was awarded.

As to duplication, appellants maintain that punitive damages could be assessed either on the conspiracy/slander theory of counts II and III, or on the bad faith theory of count IV, but not on both, as they cannot be punished twice for the same conduct. They emphasize that the pleading allegations of count IV incorporated the paragraphs of counts II and III which described the alleged acts of conspiracy and slander, and that count IV was [*665] added in midtrial after Welch's counsel argued that it was based on the "identical set of facts" which had already been presented in support of counts II and III.

In denying the motion for new trial, the trial court did not expressly state why it saw no duplication problem. It apparently relied on the argument in Welch's opposition that the torts had different elements and were viewed separately by the jury, which reached a verdict on bad faith a day and a [**61] half before its verdict on conspiracy.

Appellants rely primarily on cases which preclude simultaneous imposition of a statutory penalty and punitive damages. (Marshall v. Brown (1983) 141 Cal.App.3d 408, 418-419 [190 Cal.Rptr. 392]; Troensegaard v. Silvercrest Industries, Inc. (1985) 175 Cal.App.3d 218, 228 [220 Cal.Rptr. 712]; Baker v. Ramirez (1987) 190 Cal.App.3d 1123, 1138-1139 [235 Cal.Rptr. 857].) California case law has, however, permitted dual awards of punitive damages from different causes of action arising from the same course of conduct. (Godfrey v. Steinpress, supra, 128 Cal.App.3d 154, 181-184 [punitive damages both for intentional infliction of emotional distress and fraudulent concealment]; Fletcher v. Western National Life Ins. Co. (1970) 10 Cal.App.3d 376, 402-404 [89 Cal.Rptr. 78, 47 A.L.R.3d 286] [punitive damages possible both for intentional infliction of emotional distress and tortious interference by an insurance company with a protected property interest of its insured].)

Since the various causes of action here had different elements and relied on different facts for their proof, the separate punitive damage [**62] awards were appropriate.

In any event, appellants waived this issue by permitting the case to go to the jury under a theory in which the punitive damages were to be added together.

The jury was instructed that punitive damages are designed for example and punishment. It was told there was no fixed standard for determining the appropriate amount, and that it should consider the reprehensibility of the conduct, deterrence in light of the defendant's financial condition, and a reasonable relationship between punitive damages and actual damages.

As indicated, Welch's counsel asked the jury to award $7.5 million punitive damages for conspiracy and the same amount for bad faith. The total damage request was for over $20 million. Appellants' counsel argued that $20 million was an "extraordinary amount of money" and that there was no basis for awarding any punitive damages at all, as Welch was fired without malice and in good faith. Appellants did not suggest until their post-iverdict motions that the punitive damage awards on the conspiracy and bad faith counts could not be added together.

In awarding $3.5 million separately on the conspiracy and bad faith counts, the jury determined that [**63] a total of $7 million, about half of what Welch had requested, was the appropriate figure to serve the underlying goals of punitive damages. If appellants had suggested prior to the verdict that the punitive damages on the two counts could not be aggregated, the trial court could have resolved that issue in a timely manner. If it ruled in appellants' favor, the jury would have been informed that the two awards could not be aggregated, and might well have awarded additional damages. Instead, appellants acquiesced in a measure of damages which permitted the punitive damages to be added together. They are now precluded from attacking that measure of damages. (Durkee v. Chino Land and Water Co., supra, 151 Cal. at pp. 569-570; Sill Properties, Inc. v. CMAG, Inc. (1963) 219 Cal.App.2d 42, 52 [33 Cal.Rptr. 155].)

Six days after our decision in this case was filed, the Supreme Court held in

Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654 [Cal.Rptr. , P.2d], that "tort remedies are not available for breach of the implied covenant [of good faith and fair dealing] in an employment contract to employees who allege they have been discharged [**64] in violation of the covenant." [*666] [Id., at p. 700.]

Chief Justice Lucas's majority opinion in Foley expressly left open the question of whether the decision is retroactive or prospective, that issue not having been briefed. (Fn. 43, p. 700.) The concurring and dissenting opinion by Justice Broussard noted that a similar pattern of past reliance had caused the Supreme Court to make prospective its holding in Moradi-Shalal v. Fireman's Fund Ins. Co. (1988) 46 Cal.3d 287, 305 [250 Cal.Rptr. 116, 758 P.2d 58], that section 790.03 of the California Insurance Code does not provide a private right of action against insurance companies. (Fn. 3, p. 706.)

Before our decision was final, we requested supplemental briefing on the question of whether Foley should be retroactive or prospective. We have concluded that, as occurred with Moradi-Shalal, Foley should not apply to cases filed prior to the date on which Foley became final.

In Moradi-Shalal, the Supreme Court reversed its previous holding in Royal Globe Ins. Co . v. Superior Court (1979) 23 Cal.3d 880 [153 Cal.Rptr. 842, 592 P.2d 329], which had created a private cause of action under section [**65] 790.03. On the question of retroactivity, Chief Justice Lucas's majority opinion stated: "The general rule is that 'a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation. [Fn. & citation omitted.] We have recognized exceptions to that rule when considerations of fairness and public policy preclude full retroactivity. [Citation.] For example, where a . . . statute has received a given construction by a court of last resort, and contracts have been made or property rights acquired in accordance with the prior decision, neither will the contracts be invalidated nor will vested rights be impaired by applying the new rule retroactively. [Citation.]' (Peterson v. Superior Court (1982) 31 Cal.3d 147, 151-152 [181 Cal.Rptr. 784, 642 P.2d 1305], fn. omitted.) [P] Without implying any broad exception to the general rule of retrospectivity described above, and in the interest of fairness to the substantial number of plaintiffs who have already initiated their suits in reliance on Royal Globe, we hold that our decision overruling that case will not apply to those cases seeking relief under section 790.03 filed before our decision [**66] here becomes final." (Moradi-Shalal v. Fireman's Fund Ins. Co., supra, 46 Cal.3d at p. 305; fns. omitted.) footnote 14

footnote 14 The Supreme Court utilized the same type of reasoning in analyzing the question of retroactivity in Peterson v. Superior Court (1982) 31 Cal.3d 147, 152 [181 Cal.Rptr. 784, 642 P.2d 1305]; Daly v. General Motors Corp. (1978) 20 Cal.3d 725, 743-744 [144 Cal.Rptr. 380, 575 P.2d 1162]; Li v. Yellow Cab Co. (1975) 13 Cal.3d 804, 829 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393].

Similarly here, the interest of fairness to the substantial number of plaintiffs who have already initiated their suits in reliance on the long-standing case law recognizing a tort cause of action for bad faith discharge requires that the Foley decision be prospective only. It is true that the Supreme Court had never previously expressly held that such a cause of action is available. Its dicta, however, in Tameny v. Atlantic Richfield Co., supra, 27 Cal.3d 167, 179, footnote 12, and Seaman's Direct Buying Service, Inc. v.

Standard Oil Co., supra, 36 Cal.3d 752, 769, footnote 6, strongly suggested that the similarities between [**67] the insurer/insured and employer/employee relationships justified extending the bad faith tort to the employment context. A long line of Court of Appeal decisions followed that dicta in recognizing the existence of a tort remedy for bad faith discharge. (Cleary v. American Airlines, supra, 111 Cal.App.3d 443; Crosier v. United Parcel Service, Inc., supra, 150 Cal.App.3d 1132; Shapiro v. Wells Fargo Realty Advisors, supra, 152 Cal.App.3d 467; Rulon-Miller v. International Business Machines Corp., supra, 162 Cal.App.3d 241; Khanna v. Microdata Corp., supra, 170 Cal.App.3d 250; Gray v. Superior Court, supra, (1986) 181 Cal.App.3d 813; [*667] Koehrer v. Superior Court, supra, 181 Cal.App.3d 1155; Huber v. Standard Ins. Co., supra, 841 F.2d 980.) Prior to Foley, there was disagreement regarding the ramifications of the tort cause of action for bad faith discharge, but unanimous agreement that the cause of action existed.

Foley</i>'s holding that the employer/employee relationship is too different from the insurer/insured relationship to justify applying the bad faith tort in the employment context thus constitutes [**68] a dramatic break from long-standing previous authority, including statements by the Supreme Court itself.

Based on the similarities between prior reliance on the existence of a Royal Globe cause of action and prior reliance on the existence of a tort cause of action for bad faith discharge, we follow the example of the Moradi-Shalal court in holding that Foley does not apply to tort actions for bad faith discharge which were filed prior to the finality of Foley. That holding means that Foley is inapplicable to the case at bench.

MGM's petition for rehearing raises a new issue, that the punitive damages awarded in this case violate the Eighth Amendment's prohibition against excessive fines. We do not reach that issue, as MGM has waived it by not asserting it earlier and no good cause to relieve it of that waiver has been shown.

The judgment is affirmed.

McClosky, J., and Goertzen, J., concurred.

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