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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

K. ARLENE GRIFFIN AND ROBERT SNEDIKER, Plaintiffs and Appellants, v. ALLSTATE INSURANCE COMPANY, Defendant and Respondent.	A097183 (Alameda County Super. Ct. No. 819451-8)

This case comes to us after the trial court granted respondent Allstate Insurance Company's motion for summary judgment. Appellants K. Arlene Griffin and Robert Snediker had alleged that Allstate breached its duty to defend them in a lawsuit filed against them. However, the undisputed evidence shows that Allstate did not act improperly when it agreed to defend appellants under a reservation of rights; and accordingly, we affirm.

I. FACTS

On September 11, 1997, appellants' neighbors, Cathy and Scott Kuhne, filed a lawsuit against appellants. The suit alleged various causes of action, including trespass, encroachment of structure, and nuisance. The complaint sought damages, declaratory relief, and to quiet title.

Appellants had a homeowner's policy with Allstate Insurance Company (Allstate). Through their attorney, Cary Dictor, appellants tendered the defense of the Kuhnes' lawsuit to Allstate on September 17, 1997. Allstate's claims agent informed appellants

Allstate was seeking advice on coverage from Michael Barnes of Sonnenschein Nath & Rosenthal, and that if it determined to defend the action, it would pay the reasonable costs of appellants' defense from the date they tendered the defense to Allstate. On October 29, 1997, Mr. Barnes wrote to Mr. Dictor, informing him that Allstate agreed to defend appellants, telling him the name of the attorney Allstate had chosen for their defense, Michael Ney, and telling Mr. Dictor he would shortly receive a statement of the terms and conditions of the defense.[1]

Allstate's claims agent, Case Plooy, sent a letter to appellants on November 12, 1997, that stated in part: "In this letter, we explain what allegations the third-party (liability) coverage of [the] policy does and does not cover and we set forth the terms and conditions under which Allstate agrees to defend you in this matter." The letter discussed the allegations in the complaint and the coverage provided in appellants' insurance policy, and explained Allstate's position that many of the claims in the Kuhnes' complaint were not covered under the policy. The letter continued: "Allstate wants you to know that by continuing with its investigation, by paying for lawyers to defend you and by doing anything Allstate feels is necessary to minimize your liability, Allstate is not saying its policy covers this suit. To the contrary, Allstate believes many of the complaint's allegations are noncovered for the reasons set forth above."

The letter then explained that Allstate was reserving certain legal rights: "First, Allstate reserves its right to withdraw from your defense at any time we conclude the plaintiffs are not seeking covered damages. In addition, Allstate reserves its right [to] recover from you any legal fees, court costs or other litigation expenses we incur on your behalf in this matter which are attributable to noncovered allegations . . . . [¶] Moreover, any activity we undertake to settle or indemnify you in this lawsuit does not waive our rights to deny that our policy covers the allegations of this suit. Allstate reserves the right to seek reimbursement from you of any judgment we pay or any settlement contribution

[1] Appellants point out the sarcastic and hostile tenor of some of Mr. Barnes's correspondence. While we agree that the tone of the correspondence was, unfortunately, less than civil, that does not change the fact that Allstate agreed to defend appellants.

we make on your behalf. [¶] Moreover, you should understand that Allstate and you may be on opposite sides of a coverage lawsuit. Allstate reserves the right to file a declaratory relief action to determine whether this suit (in whole or in part) is covered by our policy." (Emphasis omitted.) After these recitations, the letter confirmed that Allstate would defend the entire action, not just the covered allegations. The letter concluded: "The foregoing constitute the terms and conditions under which Allstate agrees to defend you in this case, and your acceptance of a defense from Allstate constitutes an agreement to abide by these terms and conditions."

Mr. Dictor wrote to Mr. Barnes stating that Allstate's November 12, 1997, letter was "unacceptable" and that appellants "rejected" it. Additionally, Mr. Dictor sent Mr. Barnes the association of attorneys form, provided by Mr. Ney, with a line across it and the word "refused" written on it. Mr. Dictor followed up with a letter telling Mr. Barnes, "please be advised that Allstate's insureds have refused the 'defense' provided to them pursuant to Mr. Plooy's letter to them dated November 12, 1997. If Allstate contends that anything further remains to be done by the insureds at this time pursuant to the provisions of their policy of insurance, please advise me." He enclosed a recent billing statement. In a later letter, appellants' attorney claimed that Allstate's "threat" to seek reimbursement for all costs of defense was unconscionable, and stated that because of the terms Allstate had imposed on the defense, appellants were entitled to independent counsel under Civil Code section 2860.

Allstate paid appellants' attorney's invoices through the date that it hired Mr. Ney, but did not pay any later invoices. The Kuhne litigation was resolved in 1999.[2]

Appellants brought an action against Allstate, alleging causes of action for insurance bad faith and breach of insurance contract. After the trial court overruled its

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[2] Appellants' first amended complaint alleges they were forced to defend themselves in the Kuhne litigation at their own expense, including attorney fees, court costs, and litigation expenses. There is no allegation that appellants paid a monetary settlement in the underlying litigation.

demurrer, Allstate brought a motion for summary judgment, which the trial court granted.[3] This appeal ensued.

II. DISCUSSION

A. Standard of Review

We review de novo the trial court's action granting the motion for summary judgment. "After examining the facts before the trial judge on a summary judgment motion, an appellate court independently determines their effect as a matter of law." (*Diep v. California Fair Plan Assn.* (1993) 15 Cal.App.4th 1205, 1207.) In doing so, "the appellate court applies the same legal standard as did the trial court. Code of Civil Procedure section 437c, subdivision (c), requires the trial court to grant summary judgment if no triable issue exists as to a material fact, and if the papers entitle the moving party to a judgment as a matter of law. . . . [¶] . . . [W]e construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it." (*Ibid.*; accord, *PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 590.)

B. There is No Triable Issue of Material Fact

Appellants contend that Allstate breached its duty to defend them by attaching unacceptable conditions to its offer of a defense. Allstate contends that it did no such thing, but rather offered a defense while reserving its rights to seek reimbursement, as it was legally entitled to do.

We begin with the rules expressed in *Buss v. Superior Court* (1997) 16 Cal.4th 35. The Supreme Court there considered the duty of insurers to defend their insureds in

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[3] The court granted summary judgment on the cause of action for violation of Insurance Code section 790.03, subdivision (h) on the ground that appellants had no cause of action under that provision as a matter of law, citing *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 304-305. The trial court deemed the cause of action for breach of contract to consist of two separate causes of action: one for breach of contract and one for breach of the covenant of good faith and fair dealing. Appellants do not challenge the trial court's action in granting summary judgment on the Insurance Code cause of action and treating the breach of contract cause of action as consisting of two separate causes of action.

actions filed against them. An insurer has a duty both to indemnify the insured for any sum the insured is legally obligated to pay as damages for any covered claim and to defend the insured in an action seeking damages for a covered claim. (*Id.* at pp. 45-46.) The duty to indemnify runs to claims that are actually covered in light of the facts proved; however, the duty to defend is broader, running to claims that are merely *potentially* covered. (*Id.* at p. 46.) In a "mixed" action that contains both claims that are potentially covered and claims that are not, the insurer has a duty to defend the action in its entirety. (*Id.* at p. 48.)

The duty to defend mixed actions in their entirety is subject to a qualification. In such actions, the insurer may seek from the insured reimbursement for defense costs that can be allocated solely to claims that are not even potentially covered. (*Buss v. Superior Court*, *supra*, 16 Cal.4th at pp. 49-53.) This right is not contractual, but implied in law, as a counterbalance to the insured's implied-in-law right to a defense of the whole of the action. (*Id.* at pp. 51-52; *Prichard v. Liberty Mutual Ins. Co.* (2000) 84 Cal.App.4th 890, 904 & 907.)

In order to preserve its right to obtain reimbursement where the insurance policy does not provide for reimbursement, the insurer must make its agreement to defend a suit subject to a "reservation of rights." (*Buss v. Superior Court*, *supra*, 16 Cal.4th at p. 61, fn. 27; see also *Blue Ridge Ins. Co. v. Jacobsen* (2001) 25 Cal.4th 489, 497-498; *Truck Ins. Exchange v. Superior Court* (1996) 51 Cal.App.4th 985, 994.) The insurer may do this unilaterally; that is, because the right to reimbursement belongs to it alone, the insurer does not need the insured's consent. (*Buss v. Superior Court*, *supra*, 16 Cal.4th at p. 61, fn. 27.) Thus, "[a]n insurer can reserve its right to assert noncoverage unilaterally merely by giving notice to the insured. [Citation.] By accepting the insurer's defense under these circumstances, the insured is deemed to have accepted this condition." (*Blue Ridge Ins. Co. v. Jacobsen*, *supra*, 25 Cal.4th at p. 498.)

The question before us, then, is whether there is any triable issue of material fact as to the effect of the letters in which Allstate offered a defense and informed appellants of the terms and conditions of that defense. We conclude there is not. The October 29,

1997, letter stated: "By this letter, we notify you that Allstate agrees to defend the insureds in this matter," while indicating that Allstate would be attaching terms and conditions to that defense. The November 12 letter told appellants, "Allstate Insurance Company has agreed to defend you in the lawsuit filed by your neighbors, Cathy and Scott Kuhne." It then provided Allstate's analysis of the policy's coverage and, as discussed above, indicated that Allstate was reserving its rights both to bring a declaratory relief action to contest coverage and to receive reimbursement of the costs of defending the lawsuit. The letter stated in its final paragraph: "*The foregoing constitute the terms and conditions under which Allstate agrees to defend you in this case, and your acceptance of a defense from Allstate constitutes an agreement to abide by these terms and conditions*." (Italics added.)

Appellants claim this final language meant that, by accepting a defense, they would be agreeing not only that Allstate was defending under a reservation of rights, but would also be conceding "that the entirety of the complaint was outside coverage, and that the insureds must fully reimburse all fees, costs and expenses incurred." (Emphasis omitted.) In our view, the November 12 letter is not susceptible to this interpretation. The letter expressed *Allstate's* position on coverage and expressly contemplated not only that appellants would have a different position, but also that that difference of position might be the subject of future litigation. It did not require appellants to agree that the policy did not cover the underlying action as a condition of receiving a defense. Nor did it require them to agree that Allstate was entitled to reimbursement. Reading the letter as a whole, it is clear that the "terms and conditions" of coverage, which appellants would agree to abide by when they accepted a defense, meant that Allstate was reserving its rights to dispute coverage, to withdraw from the defense if it determined the action was not seeking covered damages, and to seek reimbursement. In reserving these rights, Allstate was doing only what it was entitled to do unilaterally. (See *Buss v. Superior Court*, *supra*, 16 Cal.4th at pp. 49-53; *Blue Ridge Ins. Co. v. Jacobsen*, *supra*, 25 Cal.4th at pp. 497-498.)

Appellants claim, however, that in the language of the final paragraph of the November 12 letter, Allstate wrongfully demanded a *bilateral* agreement to terms and conditions beyond those in the original insurance policy. Appellants' claim fails because Allstate did not impose new terms and conditions. Instead, Allstate did no more than restate the established rule that "[b]y accepting the insurer's defense under [a reservation of rights], the insured is deemed to have accepted this condition." (*Blue Ridge Ins. Co. v. Jacobsen*, *supra*, 25 Cal.4th at p. 498; see also *Prichard v. Liberty Mutual Ins. Co.*, *supra*, 84 Cal.App.4th at pp. 904-908 [right to reimbursement is implied in law, rather than contractual].)

In these circumstances, we conclude there is also no triable issue of fact as to whether Allstate breached its statutory duties to appellants. In *Prichard*, the court stated: "It was clear error for the trial court to have concluded that the insurer had breached its duty to defend by unilaterally reserving its rights. By the same token, it would be beyond the bounds of reason to give [plaintiff] a partial new trial on the bad faith claim when there was no breach and therefore no bad faith." (*Prichard v. Liberty Mutual Ins. Co., supra*, 84 Cal.App.4th at p. 908.) Similarly here, the undisputed evidence shows that Allstate did not breach its duty to defend; instead, it offered a defense subject to a reservation of rights, as it was legally entitled to do, and appellants refused that defense. Appellants cite several cases in which, despite the existence of a writing, courts reversed summary judgment because a triable issue of fact existed as to the intention of the parties. (See, e.g., *Vahle v. Barwick* (2001) 93 Cal.App.4th 1323; *Bert G. Gianelli Distributing Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020; *RCA Corp. v. Hunt* (1982) 133 Cal.App.3d 903.) Here, no factual question exists as to the intention of the parties. Allstate's correspondence unambiguously offers a defense subject to a reservation of rights. (See *Carlton v. St. Paul Mercury Ins. Co.* (1994) 30 Cal.App.4th 1450, 1456 ["While the reasonableness of an insurer's claims handling conduct is ordinarily a question of fact, it becomes a question of law where the evidence is undisputed and but one inference can be drawn from the evidence."]; *Stratton v. First Nat. Life Ins. Co.* (1989) 210 Cal.App.3d 1071, 1084 ["Where the meaning of writings is in dispute, 'in the

absence of conflicting evidence, the question is one of law, and . . . the reviewing court will give the writing its own independent interpretation. . . .' "].)[4]

Appellants also argue they were entitled to independent, or "*Cumis*" counsel. (*San Diego Federal Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358; Civ. Code, § 2860.) According to appellants, the reservation of rights created a conflict of interest between them and Allstate, and as a result, they were entitled to independent counsel in order to "prevent the insurer's counsel from manipulating the proceedings to its advantage under its various theories of coverage." In particular, appellants claim that the allegations of the complaint in the underlying action gave rise to alternative methods of assessing loss or damage for certain claims, and that one of these methods, diminution in value, would be excluded under Allstate's coverage analysis.

Appellants separate statement of disputed material facts below (which included both appellants' responses to Allstate's separate statement of undisputed material facts and appellants' own additional statement of undisputed facts) contains no facts in support of its position that Allstate's reservation of rights created a conflict of interest. Indeed, it contains no reference at all either to such a conflict or a need for *Cumis* counsel.[5] As the court stated in *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 31, in affirming summary judgment for a defendant: "The required separate statement is 'not to satisfy some sadistic urge to torment lawyers' [citation], but serves an additional function: to aid the trial court in discharging its statutory duties. Our already overburdened trial courts are obliged to explain the reasons for rulings with specific reference to the evidence which indicates the existence or nonexistence of a

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[4] Appellants also rely on an expert's declaration purporting to demonstrate that Allstate's reservation of rights letter fell "well beneath the applicable standard of care" by conditioning the insureds' right to a defense "on a further agreement from the insureds" and by failing to accept the tender of defense without condition. However, appellants have sued Allstate for breach of contract and breach of statutory duties, not for negligence. Moreover, the expert's "opinion" is merely a camouflaged legal conclusion that Allstate failed to comply with its contractual and legal duties; this is not the proper subject of an expert opinion. (*Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841-842.)

[5] For that matter, the complaint contains no such reference.

triable issue of fact. ([Code Civ. Proc.,] § 437c, subd. (g).) As recognized in *Young v. Superior Court* (1986) 179 Cal.App.3d 28 . . . , '[t]he burdens imposed upon the trial court . . . will be eased considerably if the court insists, as it should, on strict compliance with [the required separate statement],' because the court's ability to focus on and articulate the evidentiary basis for its ruling will be found in the separate statement. (*Id*. at pp. 31-32.)" This point was recently reiterated in *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 112, which stated: "Facts not contained in the separate statements do not exist." (Citing *North Coast Business Park v. Nielsen Construction Co.*, *supra*, 17 Cal.App.4th at p. 31; accord, *Pacific Indemnity Co. v. Bellefonte Ins. Co.* (2000) 80 Cal.App.4th 1226, 1238, fn. 6; *Williams v. California Physicians' Service* (1999) 72 Cal.App.4th 722, 737-738 [declining to consider issue briefed at motion for summary judgment but not found either in separate statement or in complaint].) We also note the statutory requirement that, once a defendant has shown that one or more elements of a cause of action cannot be established or that there is a complete defense to the cause of action, the burden shifts to plaintiff to set forth *specific facts* showing that a triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (*o*)(2).)

With these principles in mind, we consider whether appellants have established a triable issue of fact regarding their entitlement to *Cumis* counsel. *Dynamic Concepts, Inc. v. Truck Ins. Exchange* (1998) 61 Cal.App.4th 999, 1006, establishes that, while "[a]n insurer's reservation of rights may create a disqualifying conflict of interest requiring the insurer to pay the cost of *Cumis* counsel to represent the insured in the underlying action . . . [,] not every reservation of rights entitles an insured to select *Cumis* counsel." In order to require *Cumis* counsel, "[t]he conflict must be significant, not merely theoretical, actual, not merely potential." (*Id.* at p. 1007, citing *Lehto v. Allstate Ins. Co.* (1994) 31 Cal.App.4th 60, 71.) Even when an insurer reserves its right to seek reimbursement for defense costs for uncovered claims, "[t]he potential for conflict requires a careful analysis of the parties' respective interests to determine whether they can be reconciled (such as by a defense based on total nonliability) or whether an actual conflict of interest precludes insurer-appointed defense counsel from presenting a quality

defense for the insured." (*Dynamic Concepts, Inc. v. Truck Ins. Exchange, supra*, 61 Cal.App.4th at pp. 1007-1008.) Similarly, the court in *Blanchard v. State Farm Fire & Casualty Co.* (1991) 2 Cal.App.4th 345, 350, stated that "[a] conflict of interest does not arise unless the outcome of the coverage issue can be controlled by counsel first retained by the insurer for the defense of the underlying claim," and held that there was no need for *Cumis* counsel in that case, where the plaintiff had "produced no evidence to show in what specific way the defense attorney could have controlled the outcome of the damage issue to [plaintiff's] detriment, or had incentive to do so."

Appellants here did not include in their separate statement any facts suggesting that the claimed conflict of interest meets these standards. In particular, they did not present any facts indicating how the actions and strategy of independent counsel might differ from those of an attorney retained by Allstate. In the absence of any specific facts showing a conflict of interest, summary judgment for Allstate was proper.[6]

DISPOSITION

The judgment of the trial court is affirmed.

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RIVERA, J.

We concur:

_____
REARDON, Acting P.J.

_____
SEPULVEDA, J.

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[6] At oral argument, citing the case of *Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, appellants' counsel contended it was *Allstate's* burden in the first instance to present evidence that appellants would be unable to establish a conflict of interest requiring the retention of *Cumis* counsel. But in *Gafcon* the plaintiff alleged in its complaint that the insurer had operated under a conflict requiring it to pay for independent counsel (*id.* at p. 1396), while in this case, appellants' first amended complaint contained no such allegations. Accordingly, Allstate was not required to disprove that theory in its moving papers.