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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ESSEX INSURANCE CO., Plaintiff, Cross-defendant, and Appellant, v. FIVE STAR DYE HOUSE, INC., Defendant, Cross-complainant, and Respondent.	B167295 (Los Angeles County Super. Ct. No. BC156517)

APPEAL from a judgment of the Superior Court for Los Angeles County, Kenneth R. Freeman, Judge. Affirmed in part and reversed in part.

Carroll, Burdick & McDonough, David M. Rice, Don Willenburg, John D. Boyle, and Donna P. Arlow for Plaintiff, Cross-defendant, and Appellant.

Dodell Law Corporation, Herbert Dodell, and Gerald J. Miller for Defendant, Cross-complainant, and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, the only parts of this opinion certified for publication are the Introduction, Procedural Background, part C and the Disposition.

INTRODUCTION

In the published portion of this opinion, we reverse the trial court's order denying attorney fees and hold that an insured may assign its right, established in *Brandt v. Superior Court* (1995) 37 Cal.3d 813 (*Brandt*), to recover as damages attorney fees incurred in obtaining the benefits of an insurance policy that were denied as a result of the insurer's bad faith (*Brandt* fees). In the unpublished portion of this opinion, we discuss why we affirm the trial court's determination that there was insurance coverage and a bad faith denial of coverage for a claim arising out of the operation of a commercial trucking business. Also, in the unpublished portion of the opinion, we discuss why we affirm the trial court's decisions that the damages do not have to be reduced to the amount of the policy limit or to take into account prior settlement amounts and affirm the trial court's award of costs.

PROCEDURAL BACKGROUND

This case is before us for the second time. It emanates from a dispute over insurance coverage by Five Star Dye House, Inc.'s (Five Star) lawsuit (the underlying action) against L.A. Machinery Moving (L.A. Machinery), among others, for damages Five Star suffered when a commercial dryer L.A. Machinery was transporting fell while on L.A. Machinery's truck, and L.A. Machinery failed promptly to repair the dryer. L.A. Machinery tendered the claim to its insurer, Essex Insurance Co. (Essex), and Essex denied coverage. Essex brought the instant action for declaratory relief against Five Star, Luis Sanchez (Sanchez), and Sanchez doing business as L.A. Machinery. L.A. Machinery had assigned to Five Star its claims against Essex.

In its complaint, Essex sought a declaration that (1) it was not obligated to defend or indemnify L.A. Machinery in the underlying action, (2) the underlying action did not seek recovery for "property damage," (3) the damage claims in the underlying action did not fall within the coverage of the policy, and (4) the policy excluded the damages claimed in the underlying action. Five Star, Sanchez, and L.A. Machinery cross-

complained against Essex for breach of the insurance contract and bad faith arising from Essex's refusal to defend Sanchez and L.A. Machinery in the underlying action. Sanchez and L.A. Machinery ultimately were dismissed from the present action as a result of Essex's demurrer to the cross-complaint and Essex's voluntary dismissal of them from the declaratory relief action.

In the first appeal (Case No. B128725), we reversed a judgment in favor of Essex and against Five Star, Sanchez, and L.A. Machinery, holding there were disputed issues of fact regarding the contents of the insurance policy L.A. Machinery purchased from Essex. Following a jury trial on the contents of the insurance policy and a court trial on coverage, bad faith, and damages issues, the trial court found that the policy provided coverage for the underlying claim, that Essex acted in bad faith by denying L.A. Machinery's claim and violating its duty to defend, and that Five Star was not entitled to *Brandt* fees. Judgment in the amount of $2,242,776.69 was entered in favor of Five Star, and the trial court awarded Five Star costs in the amount of $47,760.35 after the court granted in part Essex's motion to tax costs. Essex appeals from the judgment, and Five Star cross-appeals from the judgment to the extent the trial court ruled that Five Star was not entitled to *Brandt* fees.

[The portions of this opinion that follow (Factual Background, Discussion, part A and part B) are deleted from publication.]

FACTUAL BACKGROUND[1]

In 1993, Sanchez was doing business as L.A. Machinery, a trucking company that hauled heavy machinery within Los Angeles County. In late 1993, L.A. Machinery, through its agent Wenger Day Insurance Services (Wenger Day), applied to Sovereign

[1] We view the evidence in a light most favorable to the judgment. (*People v. Osband* (1996) 13 Cal.4th 622, 690.)

General Insurance Services (Sovereign General), Essex's managing general agent in California, for a commercial general liability policy offered by Essex through its "truckman general liability program." Essex was the only insurer with which Sovereign General worked that wrote commercial general liability coverage for truckmen. Sovereign General sent a quote for the coverage to Sheryl Ridling of Wenger Day, L.A. Machinery's agent. Ms. Ridling asked Sovereign General to bind the quote. According to a representative of Sovereign General, the policy for which Wenger Day applied was a commercial general liability policy and was rated for the truckmen class of general liability.

On January 7, 1994, Sovereign General issued a binder to L.A. Machinery retroactive to January 5, 1994. The binder did not specify the type of coverage, but it provided the amount of the premium and other charges, set forth the policy limit—$1 million—and deductible, and specified that it excluded "fire legal, loading and unloading and contractual." It also required L.A. Machinery to provide the current motor vehicle records for each driver. Wenger Day received the binder and provided a copy to L.A. Machinery.

On March 15, 1994, Essex issued several commercial liability declarations retroactive to January 5, 1994. Immediately under the policy number listed on the declarations page were the words "TRUCKMEN GL PROGRAM," and the business description for L.A. Machinery was "TRUCKMEN." There was a space on the page where the form for the coverage part of the policy was supposed to be inserted. In that space was written, "REFER TO ITEM 6." Item 6 listed various forms and endorsements, none of which was a form containing a coverage part. The declarations page and the forms and endorsements listed in Item 6 were sent by Sovereign General to Wenger Day, and copies were provided to L.A. Machinery. One of the endorsements listed and provided to L.A. Machinery was "Endorsement #11." That endorsement stated in relevant part, "no coverage nor defense exists under this policy with regard to any loss, claim, suit, allegation or the like arising out of, or involving automobile liability." The

term “automobile liability” was not defined in that endorsement or in any other document provided to L.A. Machinery or Wenger Day in March 1994 as part of the policy. In July 1994, Essex cancelled the policy for reasons unrelated to this case.

In June 1994, L.A. Machinery was delivering a large commercial dryer to Five Star when a block holding the dryer broke, and the dryer fell onto the floor of the truck. The dryer was damaged and rendered inoperable for three months until it was repaired. Five Star, which used the dryer in its business of dying and stone-washing denim jeans for major manufacturers, commenced the underlying action by suing L.A. Machinery, among others, for damages resulting from its loss of use of the dryer. Five Star did not allege that L.A. Machinery was negligent in its operation of the truck. Instead, Five Star alleged that L.A. Machinery negligently operated its business by delaying for three months the repair of the dryer, which repair L.A. Machinery undertook to perform.

L.A. Machinery tendered its defense in the underlying action to Sovereign General in January 1996, while that action was pending. Sovereign General sent the claim to Essex, along with the declarations page, forms, and endorsements it had provided to Wenger Day. Howard Ellis (Ellis), the Essex claims adjuster assigned to the claim, noted that the documents Sovereign General provided to Essex did not contain a coverage part form, and requested Sovereign General to send him a copy of the form that was provided to Wenger Day. Ellis also interviewed Sanchez, who told him that the dryer fell off of the truck due to a broken block placed in the truck by the dryer manufacturer to keep the dryer from falling, and that he was being sued for damages for the time that Five Star did not have a working dryer.

Although Sovereign General initially informed Ellis that a certain standard Commercial General Liability (CGL) form had been issued with the policy, at some point Essex and Sovereign General determined that no CGL form or other coverage part had ever been sent to Wenger Day or L.A. Machinery. On February 8, 1996—almost two years after Essex had cancelled the policy—Essex issued an endorsement to the policy that provided, “IN CONSIDERATION OF THE PREMIUM CHARGED, IT IS

HEREBY UNDERSTOOD AND AGREED THAT FORM CG0001 (11/88) [i.e., the CGL form] IS ADDED TO THE POLICY." The endorsement stated that it was effective January 5, 1994. On February 16, 1996, Essex denied L.A. Machinery's tender and declined to provide a defense, based upon the language of the CGL form that Essex sent in 1996, Endorsement #11 that it sent in 1994, and Ellis' interview with Sanchez.

The underlying action by Five Star proceeded to trial, resulting in a judgment against L.A. Machinery in the amount of $1,350,000 plus costs. In its statement of decision filed June 5, 1996, the trial court in the underlying action found that L.A. Machinery's negligence caused the dryer to fall from the truck, and that Five Star suffered additional damages, i.e., lost revenue, caused by L.A. Machinery's unreasonable delay in having the dryer repaired. Following the entry of judgment, Sanchez and L.A. Machinery assigned to Five Star Sanchez's and L.A. Machinery's rights against Essex for breach of the insurance contract and bad faith denial of coverage and a defense. Essex filed the instant action for declaratory relief against Five Star, L.A. Machinery, and Sanchez in August 1996.

As noted above, in the first appeal in this case, we reversed the judgment and remanded the matter for a jury trial on the contents of the policy sold to L.A. Machinery. On retrial, the trial court excluded evidence of Essex's undisclosed intent with regard to the terms of the policy. Therefore, because no CGL form or other coverage part was identified, provided to, or discussed with Sanchez, L.A. Machinery, or their agent Wenger Day during the time the policy was in effect in 1994, the court excluded all evidence regarding the CGL form that Essex sent to Wenger Day and L.A. Machinery in 1996. The jury on remand found that the policy issued to L.A. Machinery consisted of the binder issued January 7, 1994 and the declarations page, forms, and endorsements (including Endorsement #11) that were provided to L.A. Machinery in March 1994. Construing those documents, the trial court found that Five Star's claim for damages against L.A. Machinery was covered under L.A. Machinery's policy because Five Star sought damages caused by L.A. Machinery's delay in having the dryer repaired. The trial

court also found that Essex had acted in bad faith in denying coverage and in refusing a defense based upon a document that Essex knew had not been identified or provided to L.A. Machinery during the term of the policy. The trial court awarded Five Star damages in the amount of $2,242,776.69, which consisted of the amount of the judgment against L.A. Machinery in the underlying action, plus interest. The trial court denied Five Star's request to include *Brandt* fees in the judgment, finding that the right to those fees is not assignable.

DISCUSSION

In its appeal, Essex contests the trial court's finding that Five Star's claim was covered by the policy and contends that, even if there was coverage, the amount of the judgment must be reduced. In its cross-appeal, Five Star contends that the trial court erred when it found that Five Star was not entitled to *Brandt* fees as an element of damages.

A. Coverage Issues

1. Rules Governing Interpretation of Insurance Policies

The interpretation of an insurance policy is reviewed de novo. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) As a preliminary matter, the policy consists of the written documents that are provided to the insured or referred to in the provided documents and expressly made a part of the policy. (See *Allstate Ins. Co. v. Dean* (1969) 269 Cal.App.2d 1, 4 ["The idea of a policy as an instrument in written form, whose tangible shape protects both parties to the insurance contract and acts as a check against unwarranted demands and unwarranted rejections, has been well publicized, and most persons take the view that a policy consists of what is written in it, either directly or by reference"].) The written policy is then interpreted under the ordinary rules of contractual interpretation. (*Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198,

1204 (*Haynes*) [“‘“While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply”’”].)

“‘The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the “mutual intention” of the parties.’” (*E.M.M.I., Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 470 (*E.M.M.I.*).) It is the mutual intention of the parties at the time the contract is formed that governs the interpretation. (*Id.*, citing Civ. Code, § 1636.) When possible, the intent is to be inferred from the terms of the policy, giving the words their ordinary and popular sense, unless they are used by the parties in a technical or other special sense. (*Haynes*, at p. 1204; *E.M.M.I.*, at p. 470.) “The policy should be read as a layman would read it and not as it might be analyzed by an attorney or an insurance expert.” (*Crane v. State Farm Fire & Cas. Co.* (1971) 5 Cal.3d 112, 115; accord, *Fire Insurance Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 455.) “‘“Any ambiguous terms are resolved in the insureds’ favor, consistent with the insureds’ reasonable expectations.”’” (*E.M.M.I.*, at p. 471.) There are, however, certain statutory restrictions on insurance coverage that prohibit coverage of certain risks, regardless of the policy language or the intent of the parties. (See Croskey, et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2004) ¶¶ 3:25 to 3:32, pp. 3-4 to 3-6.)

2. Excluded Evidence

Essex contends that the trial court erred by excluding evidence regarding the CGL form it sent to L.A. Machinery in 1996. Essex is incorrect.

We review the trial court's decision to exclude evidence for an abuse of discretion. (*In re Marriage of Slayton & Biggums-Slayton* (2001) 86 Cal.App.4th 653, 661, 103 Cal.Rptr.2d 545 [“As a general matter, a trial court is vested with broad discretion in ruling on the admissibility of evidence. The [trial] court's ruling will be upset only if there is a clear showing of an abuse of discretion, i.e., that the court exceeded the bounds of reason”].) The Supreme Court has explained that because “only relevant evidence is

admissible [citation], . . . the trial court 'has broad discretion in determining the relevance of evidence [citations], but lacks discretion to admit irrelevant evidence.'" (*People v. Weaver* (2001) 26 Cal.4th 876, 933.) In the present case, the trial court did not abuse its discretion in determining that the evidence at issue was irrelevant and inadmissible.

As discussed above, the mutual intention of the parties at the time the insurance contract is formed governs the interpretation of the policy, and that intent should, if possible, be determined from the language of the policy. (*E.M.M.I.*, *supra*, 32 Cal.4th at p. 470.) Evidence that purports to show that the insurer "intended a coverage other than that defined on the face of the policy . . . reasonably ha[s] no probative value." (*City of Mill Valley v. Transamerica Ins. Co.* (1979) 98 Cal.App.3d 595, 602, italics omitted.) Given the rules of interpretation that must be applied to determine the terms of an insurance contract, "an undisclosed unilateral intent of the insurer of an insurance contract will be deemed 'immaterial,'" and evidence regarding that undisclosed intent is inadmissible to prove the terms of that contract. (*Id.*, *at p. 603*; see also *Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 690 ["The true, subjective, but unexpressed intent of a party is immaterial and irrelevant"].)

In the present case, the evidence at trial was undisputed that before 1996 neither Sovereign General nor Essex provided the CGL form to Wenger Day or L.A. Machinery, identified that form as part of the policy, or expressly limited its coverage to the coverage set forth in the CGL form. The declarations page did not identify any form in the space provided to identify which standard CGL form, if any, was to be included in the policy. Because there was no evidence that Essex or Sovereign General ever disclosed to L.A. Machinery its alleged intent to include the CGL form as part of the policy, that form, and any evidence regarding the terms of that CGL form, were properly excluded from trial.

3. Insured Risks

Essex argues that Five Star had the burden to establish that its claim was within coverage and, because there was no "coverage part" included in the policy found by the

jury, Five Star could not establish that "delay" was a covered risk. In other words, Essex argues unpersuasively that, due to Essex's own failure to identify or include a coverage part, L.A. Machinery paid a premium for an insurance policy that, in effect, covered no risk.

An insured is entitled to rely upon, and an insurer is bound by, the documents provided by the insurer when it issues an insurance policy. (See *Allstate Ins. Co. v. Dean*, *supra*, 269 Cal.App.2d 1 [agreement signed by insured to exclude a driver from coverage, which was returned to insurer before policy was issued, was not part of policy because the documents provided to insured did not include or make reference to the exclusion].) There is no dispute that L.A. Machinery paid for, and Essex issued, an insurance policy. The jury found that the policy consisted of the documents that had been provided to Wenger Day and L.A. Machinery in 1994: the binder, the declarations page, and several forms and endorsements. These documents indicate that the policy was a "commercial general liability" policy for truckmen, with certain monetary limits, deductibles, and exclusions. The documents provide no definition of "commercial general liability" and no reference to any form that defines that term. Given the absence of any language in the policy that limits the scope of "general liability" coverage, and reading that term "as a layman would read it and not as it might be analyzed by an attorney or an insurance expert" (*Crane v. State Farm Fire & Cas. Co.*, *supra*, 5 Cal.3d at p. 115), the policy necessarily covers all risks arising out of the operation of L.A. Machinery's business, other than risks that are excluded by statute or specifically excluded in the policy documents furnished to L.A. Machinery.

4. "Automobile Liability" Exclusion

Essex contends that, even if Five Star's claim was covered under the coverage part, it is excluded from coverage under Endorsement #11, because it is a claim "arising

out of, or involving automobile liability."[2] The term "automobile liability" in the context of this policy does not apply as an exclusion in this case.

Although under California law an endorsement may modify an insurance policy by excluding coverage for certain risks, an endorsement that purports to set forth an exclusion to coverage, "'in a situation in which the public may reasonably expect coverage, must be conspicuous, plain and clear.'" (*Haynes*, *supra*, 32 Cal. 4th at p. 1208.) Moreover, the exclusionary language, like the coverage language, must be "judged from the perspective of an average layperson." (*Id.* at p. 1212.)

As the California Supreme Court has explained, "policy exclusions are strictly construed [citations]. . . . '"[A]n insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear. As we have declared time and again 'any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect.' [Citation.] Thus, 'the burden rests upon the insurer to phrase exceptions and exclusions in clear and unmistakable language.' [Citation.] The exclusionary clause 'must be *conspicuous, plain and clear*.'" [Citation.] This rule applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded.' [Citation.]" (*E.M.M.I.*, *supra*, 32 Cal.4th at p. 471.)

Essex contends that Endorsement #11 should be interpreted to exclude coverage for losses "arising out of or, involving" automobiles, including trucks. But the clause does not say that—it says "automobile liability." That phrase is at best ambiguous. It is not unreasonable for the average layperson purchasing a commercial general liability policy for its trucking business to conclude that the term "automobile liability" in an exclusion is limited to claims involving liability to third parties from automobile or truck

[2] Essex does not assert that any other exclusion contained in the policy as found by the jury applies in this case. Although Essex asserts that exclusions set forth in the CGL form supplied two years after the policy was cancelled would apply to exclude coverage, those exclusions are immaterial, as discussed in section A.2., *ante*.

accidents arising out of the negligent operation of the automobile or truck. That average layperson would not expect the exclusion to apply to damage to transported goods or failure to deliver goods in a timely fashion.

In *Gurrola v. Great Southwest Ins. Co.* (1993) 17 Cal.App.4th 65, 67, the owner of a welding business was insured under a business liability policy that excluded coverage "arising out of the ownership, maintenance, operation, use, . . . of . . . any automobile . . . owned or operated by . . . any insured . . . ." The court held that the exclusion applied so that the policy did not cover personal injuries caused by a collision of the car he had rebuilt. But the clause in the instant case does not exclude coverage arising out of the ownership, maintenance, operation, or use of any automobile owned or operated by the trucker. Rather the exclusion here just uses the ambiguous term "automobile liability." (See also *State Farm Fire & Cas. Co. v. Camara* (1976) 63 Cal.App.3d 48, 53 [exclusion for coverage to "bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of: . . . (2) [any] motor vehicle owned or operated by, or rented, or loaned to any insured; . . ."].) Accordingly, employing the required rules of interpretation applicable to insurance policies, the "automobile liability" exclusion did not apply in this case.

In addition, an auto exclusion does not apply to occurrences with multiple causations, at least one of which was unrelated to the ownership or use of an automobile. (See *State Farm Mut. Auto. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94; *Glen Falls Ins. Co. v. Rich* (1975) 49 Cal.App.3d 390; *State Farm Fire & Cas. Co. v. Kohl* (1982) 131 Cal.App.3d 1031.) Here, the claim was for lost revenues caused by the negligence of L.A. Machinery, which, after undertaking to repair and deliver the dryer, failed to do so in a timely manner. Thus, even if the auto exclusion applied to the damage to the dryer, it is arguable that the loss was caused by two separate factors, only one of which would be covered by that exclusion, and therefore the auto exclusion did not apply in this case for this reason also.

5. Application of the Policy to the Claim in this Case

In the underlying action, Five Star alleged that the dryer L.A. Machinery was transporting was damaged during delivery, that L.A. Machinery's negligent business operation resulted in unreasonable delay in having the dryer repaired, and that that delay caused Five Star damages in the form of lost profits. Damage to an item being transported and the resulting loss of use of the damaged item caused by a delay in having the damage repaired are risks ordinarily arising from a commercial trucking business. Therefore, those risks are covered by the policy at issue, unless the exclusion set forth in Endorsement #11 applies. And as we have said, we interpret the exclusion not to apply in this case.

B. Reduction of Judgment Amount

Essex raises three issues regarding the amount of the judgment. First, it argues that it cannot be liable for more than the policy limit of $1 million. Second, it contends that the judgment should be reduced by settlements Five Star and Sanchez entered into with Sovereign General and Wenger Day. Finally, Essex argues that the trial court improperly awarded Five Star duplicative expert witness fees.

1. Liability in Excess of Policy Limit

Essex's argument that Five Star's damages must be limited to the policy limit of the insurance contract ignores that the trial court found bad faith in Essex's denial of coverage and refusal to defend, and found bad faith in Essex's failure to engage in settlement discussions. (See *Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, 1399 [insurer found to have acted in bad faith when it foreclosed settlement discussions by refusing to disclose policy limits].) Thus, Five Star is not limited to contract damages, but instead is entitled to tort damages under Civil Code section 3333, which provides that the measure of damages for the breach of an obligation not arising from contract is "the amount which will compensate for all the detriment proximately

caused thereby, whether it could have been anticipated or not." (See also *Brandt*, *supra*, 37 Cal.3d at p. 817 [insurer that violates covenant of good faith and fair dealing is ""liable for any damages which are the proximate result of that breach""]; *Amato v. Mercury Casualty Co.* (1997) 53 Cal.App.4th 825, 831 (*Amato*).)

The question in the present case is whether the judgment in the underlying action was proximately caused by Essex's tortious conduct. The California Supreme Court repeatedly has held that "an insurer that wrongfully refuses to defend is liable on the judgment against the insured." (*Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 279 (*Gray*); accord, *Samson v. Transamerica Ins. Co.* (1981) 30 Cal.3d 220, 237; *Metz v. Universal Underwriters Ins. Co.* (1973) 10 Cal.3d 45, 55 [109 Cal.Rptr. 698, 513 P.2d 922]; *Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co.* (1959) 51 Cal.2d 558, 561-562; *Arenson v. Nat. Automobile & Cas. Ins. Co.* (1955) 45 Cal.2d 81, 84; see also *Amato*, *supra*, 53 Cal.App.4th at p. 833.) But in each case in which the insurer was held liable for a judgment in excess of the policy limit, either the insurer refused a settlement offer within the policy limit with knowledge that the insured faced a possible judgment in excess of the policy limit, or the insured defaulted in the underlying case after the insurer declined to provide a defense. (See, e.g., *Samson v. Transamerica Ins. Co.*, *supra*, 30 Cal.3d at p. 237 [refusal of settlement offer within policy limit]; *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659-660 [same]; *Amato*, *supra*, 53 Cal.App.4th at p. 835 [default judgment].)

In *Amato*, *supra*, 53 Cal.App.4th 825, the court of appeal held that an insurer that wrongfully denied a defense was liable for the entire amount of a default judgment in excess of the policy limit even though the claim against the insured ultimately was found not to be covered by the insurance policy. Relying upon *Gray*, *supra*, 65 Cal.2d at p. 280, the appellate court explained the rationale for the result it reached: "There [in *Gray*] the court rejected imposing on the insured '"the impossible burden" of proving the extent of the loss caused by the insurer's breach.' It added, 'As this court said in an analogous situation in *Arenson v. National Auto. & Cas. Ins. Co.* (1957) 48 Cal.2d 528, 539, 310

P.2d 961 . . . : "Having defaulted . . . the company is manifestly bound to reimburse its insured for the full amount of any obligation reasonably incurred by him. It will not be allowed to defeat or whittle down its obligation on the theory that plaintiff himself was of such limited financial ability that he could not afford to employ able counsel, or to present every reasonable defense, or to carry his cause to the highest court having jurisdiction. . . . Sustaining such a theory . . . would tend . . . to encourage insurance companies to similar disavowels of responsibility with everything to gain and nothing to lose."'" (*Amato*, *supra*, 53 Cal.App.4th at p. 839.)

Although the underlying judgment in the present case was not a default judgment, Essex has cited to—and we have found—no case law in California that holds that recovery of an excess judgment by an insured is *limited* to cases in which the underlying judgment was a default judgment or the insurer wrongfully refused a settlement offer within policy limits in the underlying lawsuit. Indeed, the rationale for holding Essex liable for the entire underlying judgment applies more forcefully in this case than in *Amato*, *supra*, 53 Cal.App.4th 825. In this case, unlike *Amato*, the trial court found that the underlying claim was covered by the policy at issue, and that Essex acted in bad faith when it denied coverage and a defense. Moreover, although there had been no specific offer to settle the underlying action for a specific sum, Essex turned down multiple requests by Five Star while the underlying action was pending to engage in settlement negotiations, which negotiations Five Star's counsel explained to Essex "may result in substantial savings."

Having been denied both a defense and coverage—and the possibility of a settlement within the policy limits—due to Essex's bad faith conduct, L.A. Machinery, through its assignee Five Star, should not now have to bear "'the impossible burden' of proving the extent of the loss caused by the insurer's breach." (*Gray*, *supra*, 65 Cal.2d at p. 280; accord, *Amato*, *supra*, 53 Cal.App.4th at p. 839.) Therefore, we hold that under the circumstances of this case, Essex is liable for the entire amount of the underlying judgment.

2. Offset for Prior Settlements

The trial court properly denied Essex's request to reduce the amount of the judgment by the sums paid by Sovereign General and Wenger Day in settlement of the claims alleged against them. The settlement agreements provide that the payments were made to Sanchez, but not to Five Star, for Sanchez's emotional distress claims. Under Code of Civil Procedure section 877, a payment made in settlement of a claim against one joint tortfeasor reduces the claims against the remaining joint tortfeasors for the same tort in the amount of the payment. (Code Civ. Proc., § 877, subd. (a).) The judgment in this case was in favor only of Five Star, rather than Sanchez or L.A. Machinery, for claims other than emotional distress claims, which were not and could not have been assigned by Sanchez to Five Star. (*Bush v. Superior Court* (1992) 10 Cal.App.4th 1374; see 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 940, p. 839.) Therefore, the payments at issue were for claims in which Essex was not a joint tortfeasor with Sovereign General and Wenger Day, and no offset is required.

3. Award of Expert Witness Fees as Costs

Essex challenges the award of expert fees notwithstanding that the award of a party's expert witness fees as costs under Code of Civil Procedure section 998 is at the trial court's discretion. (*Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 804.) As the court in *Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102 explained, "'On the issue of whether the costs were exorbitant and unreasonable, the courts have consistently held that where a trial court has been vested with discretion to perform an act, and it so acts, its actions can only be set aside for an abuse of discretion. [Citations.] . . . "The trial court has discretion under Code of Civil Procedure section 998 to allow a prevailing party (as defined in the section) a reasonable sum to cover the costs of the services of expert witnesses. [Citation.] *The trial court was in a far better position, having heard the entire case and observed the demeanor of witnesses, to*

exercise this discretion and determine what was a reasonable amount and what was reasonably necessary." . . . [W]e should not substitute our judgment over the judgment of the trial court in the absence of a clear showing of an abuse of discretion.'" (*Id.* at p. 121.) Under the abuse of discretion standard of review, the party seeking reversal must "clearly show that the [trial court's] decision was irrational or arbitrary." (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

In the present case, the trial court determined that Five Star was entitled to recover the fees it incurred and paid to the expert witness it retained for the original trial in this case in 1998, as well as the fees it incurred and paid to a different expert witness it retained for the trial following our reversal of the judgment from the original trial. The trial court's award of fees for both experts under these circumstances was neither irrational nor arbitrary and therefore not an abuse of discretion.

[The remainder of this opinion is to be published]

C. Brandt Fees

In its cross-complaint, Five Star, as assignee of Sanchez's and L.A. Machinery's claims against Essex, sought to recover the attorney fees it incurred in bringing its claim for breach of the insurance contract. As the California Supreme Court explained in *Brandt v. Superior Court*, *supra*, 37 Cal.3d 813, such fees are recoverable as damages in an action for breach of the implied covenant of good faith and fair dealing if it is found that the insurer acted in bad faith. (*Id.* at p. 817; see also *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 806 (*Cassim*).) Although the trial court in this case found that Essex had acted in bad faith, it denied Five Star's request, citing *Xebec Development Partners, Ltd. v. National Union Fire Ins. Co.* (1993) 12 Cal.App.4th 501 (*Xebec*), on the ground that the right to *Brandt* fees is not assignable. Five Star challenges this ruling in its cross-appeal.

In *Xebec*, *supra*, 12 Cal.App.4th 501, after reversing a judgment against the insurer because of an erroneous instruction, the court suggested in dictum that although an insured may assign its claims against an insurer for breach of contract and bad faith, the insured cannot assign the right to recover as tort damages the attorney fees incurred in prosecuting the breach of contract claim. (*Id.* at p. 571.) The court reasoned that because the *insured* did not incur those fees, the assignee cannot recover them as damages because they are not damages incurred by the insured and such fees cannot be deemed tort damages to the assignee. (*Ibid.*) Respectfully, we disagree with *Xebec*.

Civil Code sections 953 and 954 "establish the policy of the state, the "'assignability of things [in action] is now the rule; nonassignability, the exception; and this exception is confined to wrongs done to the person, the reputation, or the feelings of the injured party. . . .'" (*Webb v. Pillsbury* (1943) 23 Cal.2d 324, 327.)" (*Bush v. Superior Court*, *supra*, 10 Cal.App.4th at p. 1381; see also *McLaughlin v. National Union Fire Ins. Co.* (1994) 23 Cal.App.4th 1132, 1146 [only exception to general rule of assignability is for purely personal torts, i.e., "those involving wrongs done to the person, reputation or feelings of the injured party"].) As the California Supreme Court explained in *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, "We have said that the 'statutes in this state clearly manifest a policy in favor of the free transferability of all types of property, including rights under contracts.' [Citation.] As a general proposition it can be said 'that the only causes or rights of action which are not transferable or assignable in any sense are those which are founded upon wrongs of a purely personal nature, such as slander, assault and battery, negligent personal injuries, criminal conversation, seduction, breach of marriage promise, malicious prosecution, and others of like nature. All other demands, claims and rights of action whatever are generally held to be transferable.' [Citations.]" (*Id.* at p. 834.) Thus, an insured may assign a cause of action against an insurer for breach of the implied covenant of good faith and fair dealing. (*Smith v. State Farm Mut. Auto. Ins. Co.* (1992) 5 Cal.App.4th 1104, 1110-1111 (*Smith*).) The assignee "'stands in [the] shoes'" of the insured, "possessing the rights which the insured had

against the insurer." (*Id.* at p. 1111; see also 1 Witkin, *supra*, Contracts, § 947, p. 843 [an assignment "carries with it all rights of the assignor"].)

It appears that the court in *Xebec, supra*, 12 Cal.App.4th 501, concluded that *Brandt* fees represent a purely personal loss to the insured. The case the *Xebec* court cites in support of its statement that *Brandt* fees may not be assignable stands for the proposition that damages arising from "the personal tort aspect of the bad faith cause of action"—such as emotional distress damages and punitive damages—are not assignable. (See *Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 942 (*Murphy*), cited in *Xebec, supra*, 12 Cal.App.4th at p. 572.) But *Brandt* fees are not founded upon a wrong of a purely personal nature or, as stated in *Murphy*, a "personal tort aspect of the bad faith cause of action" (*Murphy, supra*, 17 Cal.3d at p. 942). Instead, they are "an economic loss" caused by an insurer's bad faith denial of coverage under an insurance policy. (*Brandt, supra*, 37 Cal.3d at p. 817.) The purpose of allowing an insured to recover *Brandt* fees—i.e., the attorney fees incurred to vindicate the insured's rights under the insurance policy—is to make the insured whole by allowing the insured to recover the policy benefits in full, undiminished by the costs involved in bringing an action to enforce the contract. (*Burnaby v. Standard Fire Ins. Co.* (1995) 40 Cal.App.4th 787, 795; *May v. Miller* (1991) 228 Cal.App.3d 404, 408.)

In the present case, L.A. Machinery assigned to Five Star its claims against Essex—including its claims for breach of the insurance contract and breach of the implied covenant of good faith and fair dealing. Thus, L.A. Machinery assigned its right to recover the policy benefits *in full*, undiminished by the attorney fees incurred in bringing the action to recover those benefits. The identity of the party incurring attorney fees to vindicate the insured's rights under the insurance policy is irrelevant—the right that is assigned is the right to recover the policy benefits in full. This right to recover the policy benefits in full is not the kind of personal right that is not assignable. Therefore, the trial court erred when it found that Five Star was not entitled to *Brandt* fees. We remand the matter to the trial court to determine the amount of attorney fees to which

Five Star is entitled in accordance with the procedure set forth in *Cassim*, *supra*, 33 Cal.4th at page 812.

DISPOSITION

The judgment is reversed to the extent it does not include damages to which Five Star is entitled under *Brandt v. Superior Court*, *supra*, 37 Cal.3d 813, and the matter is remanded to the trial court to determine under *Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th 780, the amount of *Brandt* fees to which Five Star is entitled. In all other respects, the judgment is affirmed. Five Star shall recover its costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

MOSK, J.

I concur:

ARMSTRONG, J.

CERTIFIED FOR PARTIAL PUBLICATION*

Turner, P.J.

I concur in the published portion of the majority opinion.

[The remainder of this opinion is not to be published.]

I write separately to emphasize additional factual and legal matters which support the implied finding that a comprehensive general liability policy was issued; a necessary predicate to a finding that plaintiff, Essex Insurance Co., unreasonably refused to defend the underlying suit and indemnify its insured, L.A. Machinery Moving. In the absence of a complete policy, the controlling authority is *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1071-1072: "Thus, the claimant has the burden of proving (1) the fact that he or she was insured under the lost policy during the period in issue, and (2) the substance of each policy provision essential to the claim for relief, i.e., essential to the particular coverage that the insured claims. Which provisions those are will vary from case to case; the decisions often refer to them simply as the material terms of the lost policy. (See, e.g., *Nat. American Ins. Co. of Cal. v. Underwriters* (9th Cir. 1996) 93 F.3d 529, 534; *Servants of Paraclete, Inc. v. Great American Ins.* (D.N.M. 1994) 857 F.Supp. 822, 827.) In turn, the insurer has the burden of proving the substance of any policy provision 'essential to the . . . defense' (Evid. Code, § 500), i.e., any

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception as indicated on page 1 of this concurring opinion.

provision that functions to defeat the insured's claim. (See, e.g., *Burroughs Wellcome Co. v. Commercial Union Ins. Co.* (S.D.N.Y. 1986) 632 F.Supp. 1213, 1223; *Emons Industries v. Liberty Mut. Fire Ins. Co.* (S.D.N.Y. 1982) 545 F.Supp. 185, 189.) Those provisions, too, will be case-specific." (Fns. omitted.)

There is substantial evidence, apart from the documents identified by my colleagues, the anticipated insurance agreement was a comprehensive general liability policy. Sheryl Ridling, the salesperson who worked for Wegner-Day Insurance, testified the application for the insurance was for "commercial general liability." On December 7, 1993, Ms. Ridling gave a quote for "general liability [insurance] coverage" through plaintiff. The letter to the insured from Ms. Ridling dated January 12, 1994, states that it is purchasing "general liability coverage."

According to Connie Michel, the employee for Sovereign General Insurance Services who secured the policy for Ms. Ridling, the insured was seeking a "commercial general liability" policy. Ms. Michel also described the type of policy at issue as a "truckman general liability" policy. According to Ms. Michel, the term "truckman" referred to the business operations of the insured, L.A. Machinery Moving. Ms. Michel testified, "All general liability policies are rated based upon the class of business, the exposures vary from class to class." Ms. Michel testified that Ms. Ridling, the Wegner-Day Insurance salesperson, was seeking the "truckman class" of general liability. For example, according to Ms. Michel, a "truckman" policy would provide coverage limits "for instance, products."

As to the relevant coverage provisions, the form comprehensive general liability policy in effect on January 7, 1994, is the current form which was adopted in 1993. (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2004) ¶ 7:25, p. 7A-8 (rev. #1, 2004).) The current comprehensive general liability policy provides coverage for property damage, which was in effect in 1994, is as follows, "Physical injury to tangible property, including all resulting loss of use of that property . . . ." (*Id.*, ¶ 7:132, p. 7A-43.) Beyond doubt, substantial evidence supports the

conclusion there was coverage for the damage to the dryers and the resulting loss of use under a comprehensive general liability policy.

TURNER, P.J.