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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SAFECO INSURANCE COMPANY OF AMERICA, Plaintiff and Appellant, v. JAMEY LYNN PARKS, Defendant and Respondent.	2d Civil No. B199364 (Super. Ct. No. 1090510) (Santa Barbara County)
JAMEY LYNN PARKS, Plaintiff and Respondent, v. SAFECO INSURANCE COMPANY OF AMERICA, Defendant and Appellant.	2d Civil No. B200267 (Super. Ct. No. 1096761) (Santa Barbara County)

Respondent Jamey Lynn Parks obtained a personal injury judgment of $2,187,886 against 16-year old Michelle Miller. Safeco Insurance Company of America (Safeco) issued a homeowner's policy to Eddie Barnette, the man with whom Michelle's

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for partial publication. The portions of this opinion to be deleted from publication are identified as those portions between double brackets, e.g., [[/]].

mother lived and with whom Michelle periodically stayed. It issued a similar policy to Michelle's grandmother Evelyn Miller, with whom Michelle and her father Charles resided. Safeco declined to defend Michelle, to settle Parks' action against her, and to indemnify her under the policy it issued to Barnette. Michelle assigned her causes of action against Safeco to Parks. When Parks later made a claim under the belatedly-discovered policy issued to Evelyn Miller, Safeco paid Parks the $100,000 policy limits but refused to pay any part of the excess judgment.

A jury found that Safeco breached the covenant of good faith and fair dealing implied in the policy issued to Evelyn Miller when Safeco failed to settle the personal injury case or to defend or indemnify Michelle Miller. The trial court entered judgment in favor of Parks against Safeco for $3,245,333.76. It later awarded Parks costs of $70,104.23 and attorney fees of $426,208 as cost of proof sanctions for Safeco's failure to admit certain matters in response to Parks' requests for admission. (Code Civ. Proc, § 2033.420.)[1]

Safeco appeals from that judgment and from post-judgment orders entered in the related declaratory relief action. Parks cross-appeals in the bad faith action, contending the trial court improperly limited his recovery on a judgment creditor's claim.

We reverse the order awarding Parks his attorney fees as cost of proof sanctions. We affirm the judgments in all other respects.

Facts

We described the facts of the underlying accident in our prior published opinion, *Safeco Ins. Co. of America v. Parks* (2004) 122 Cal.App.4th 779 (*Safeco I*), and again, more briefly, in our subsequent unpublished opinion, *Safeco Ins. Co. of America v. Parks* (July 5, 2006, B185335) (*Safeco II*). In summary, during the early morning hours of February 28, 1999, Parks was walking on Highway 101 north of Santa Barbara when he was struck by a passing motorist. Parks suffered serious, permanent injuries in the collision including having his leg amputated. He was on the side of the freeway because

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[1] All statutory references are to the Code of Civil Procedure unless otherwise stated.

his then girlfriend, 16-year old Michelle Miller, and two of her friends left him there. Miller had been driving Parks, who was drunk, from Santa Barbara to his home in Santa Maria when the car got a flat tire. She called a friend, Teresa Cooney, to pick them up. Cooney arrived with her friend Isaiah Rivera and the group started back to Santa Maria in Cooney's car. Parks was soon forced out of the car because he was being violent toward Miller. Over one mile and more than 15 minutes later, Parks was struck by a car as he walked back to his own car.

At the time, Miller lived with her father, Charles Miller, and grandmother Evelyn Miller, in a condominium rented by the grandmother. Miller's parents were divorced. Her father, Charles, had sole legal and physical custody of Michelle. Her mother was living with Eddie Barnette whom she later married. Miller sometimes stayed with her mother at Barnette's house. Barnette had a homeowner's insurance policy issued by Safeco.

Parks sued Cooney, Rivera and Miller. Cooney's automobile insurer provided all three with a defense, retaining Richard Phillips to represent them. Cooney and Rivera settled with Parks for the policy limits of $30,000. Phillips tendered Miller's defense to Safeco under the homeowner's policy issued to Barnette. Safeco declined the defense. Miller and Parks submitted their claims to binding arbitration. The arbitrator, a retired superior court judge, James Slater, found in favor of Parks, awarding damages of $2,187,886 after a 50 percent reduction for comparative fault. A judgment in that amount was entered against Miller in January 2002. Miller settled with Parks by assigning to him any claims she might have against Safeco.

In July 2002, Parks sued Safeco to recover the judgment he obtained against Miller (the bad faith action). He alleged that Safeco breached the Barnette policy and its implied covenant of good faith and fair dealing by refusing, in bad faith, to defend Miller under the Barnette policy and to settle within the limits of that policy. In August, Safeco filed a separate action for declaratory relief against Miller and Parks, alleging that it had no duty to defend or indemnify Miller under the Barnette policy (the declaratory relief action). The two cases were consolidated.

Parks served Safeco with requests for production of documents that asked Safeco to produce all "applicable insurance policy or polices providing coverage for the nature and extent of the damages alleged . . . [,]" and all "applicable umbrella insurance policy or policies providing coverage for the nature and extent of the damages alleged . . . ." Safeco objected that the document requests were vague, ambiguous, overbroad, burdensome and oppressive and that the documents they sought were not relevant or reasonably calculated to lead to the discovery of admissible evidence. It declined to produce any documents in response to the requests. Parks did not move to compel further responses to the request for production of documents.

The bad faith action was stayed while the parties tried the declaratory relief action to the court sitting without a jury. Charles Miller testified at the trial. Afterwards, he went home and asked his mother Evelyn, apparently for the first time, whether she had any insurance on her condominium. Charles then discovered that Safeco had issued Evelyn a renter's insurance policy covering the condominium. He gave the policy to Michelle or to her lawyer.

In August 2003, the trial court entered a declaratory judgment in favor of Parks and against Safeco, finding that Safeco had a duty to defend and to indemnify Miller because she was an insured under the Barnette policy. The parties agreed to rescind the order consolidating the bad faith and declaratory relief actions and to stay the bad faith action "until further order of the court."

Safeco appealed the declaratory judgment in October 2003. In August 2004, we reversed, holding that Safeco had no duty to defend Miller under the Barnette policy because she was not an insured under that policy. (*Safeco I*, *supra*, 122 Cal.App.4th at pp. 792-794.)

In September 2004, Parks' counsel demanded that Safeco pay the policy limits under the policy issued to Evelyn Miller. Safeco assigned the claim to James Diley, an adjuster who had not participated in the prior coverage determination or the litigation between Safeco and Parks. Diley interviewed Charles Miller and reviewed portions of the transcripts of Charles and Michelle Miller's depositions in the personal

injury action. He purposefully did not review the claims file for the Barnette policy because he wanted to make an independent evaluation of the present claim. Diley also did not review the arbitrator's award in Parks *v.* Miller. Within one week of receiving the demand letter from Parks' counsel, Diley concluded that Michelle was an insured under the policy issued to her grandmother and its automobile exclusion did not preclude coverage. He forwarded a check for the policy limits of $100,000 to Parks on September 17, 2004. In May 2005, after receiving another demand from Parks, Safeco forwarded to him a check for the $1,000 medical payments coverage limits.

In February 2005, Parks amended his complaint in the bad faith action to allege for the first time that Safeco had a duty under the policy issued to Evelyn Miller (the "Miller policy") to pay the judgment and that it breached the implied covenant of good faith by refusing to defend or indemnify Miller under the Miller policy.

As required by our decision in *Safeco I*, the trial court, in June 2005, entered a declaratory judgment in favor of Safeco. It later reversed itself, however, denying Safeco's motions for costs and attorneys fees and eventually vacating the judgment entirely. The trial court reasoned that, although we held Safeco had no duty to defend Miller, we had not decided whether it had a duty to indemnify her. As a result, the trial court decided it had prematurely entered judgment in favor of Safeco.

Safeco appealed a second time. We reversed in *Safeco II*, holding that there could be no duty to indemnify without a duty to defend: "In the prior appeal, we considered only Safeco's potential duty to defend Miller under the Barnette policy. We held that it had no such duty. It follows that Safeco has no duty to indemnify Miller under that policy." (*Safeco II, supra*, at p. 9.) Our opinion noted that, while the holding in *Safeco I,* foreclosed continued litigation with respect to the Barnette policy, the declaratory judgment had no "res judicata or collateral estoppel effect on the question of whether Safeco owes a duty to defend or indemnify Miller" under the policy issued to her grandmother. (*Id.*)

On remand, the declaratory relief action was transferred to another department of the superior court and another trial court judge. That judge entered a

judgment declaring that Safeco "had no duty to defend or indemnify defendant Michelle Miller" under the Barnette policy. The court reserved for future determination the question of whether Safeco was entitled to recover its costs as a prevailing party.

Meanwhile, the bad faith action proceeded to trial. The jury found in favor of Parks on both his judgment creditor's claim alleging breach of the Miller policy and his cause of action for breach of the covenant of good faith implied in that policy. The trial court entered judgment in favor of Parks, awarding damages of $3,245,333.76 and reserved the question of costs for a future hearing.[2]

In the declaratory relief action, Safeco sought a cost award of $234,986.00, which included a claim for $215,432 in attorneys fees. Safeco contended it was entitled to attorneys fees as cost of proof sanctions, because Parks failed to admit, in response to a request for admission propounded by Safeco, "that Michelle Miller was not an insured" under the Barnette policy. (§ 2033.420) Parks moved to tax all of Safeco's costs on the grounds that Safeco could not be declared the prevailing party unless it also prevailed in the bad faith action. He opposed the award of cost of proof sanctions because he contended that he had a reasonable ground for believing he would prevail on the issue of Miller's status as an insured under the Barnette policy. (§ 2033.420, subd. (b)(3).) The trial court continued the hearing until after the jury returned its verdict in the bad faith action. It then found that Safeco was not entitled to recover costs because, on balance, it was not the prevailing party. It further found that Safeco was not entitled to cost of proof sanctions because Parks reasonably believed he would prevail on the question of Miller's status as an insured.

In the bad faith action, the trial court awarded Parks costs of $70,104.23. Parks moved for cost of proof sanctions under section 2033.420, based on Safeco's failure to admit, in response to requests for admission, that it "owed Michelle Miller a defense under Evelyn Miller's policy . . . [,]" and that it "breached the implied covenant of good

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[2] The damages award includes the amount of Parks' judgment against Miller ($2,187,886), interest on that judgment ($1,118,047.76), and attorney fees incurred to obtain policy benefits ($40,400). (*Brandt v. Superior Court* (1985) 37 Cal.3d 813.)

faith and fair dealing with regard to its claims handling of Parks *v.* Miller . . . ." The trial court awarded Parks attorney's fees of $426,208.

Contentions

Safeco appeals the judgment in the bad faith action. It contends: (1) Parks' cause of action for breach of the covenant of good faith implied in the Miller policy is barred by the applicable statute of limitations; (2) the trial court erred when it denied Safeco's motion for summary adjudication of that cause of action because: (a) Miller did not comply with the policy's notice provisions; (b) Miller received an adequate defense from another insurer; and (c) there is no substantial evidence that Safeco rejected a policy limits settlement demand; (3) Parks and Miller impermissibly "split" their causes of action under the Miller policy; (4) Safeco had no duty to settle the personal injury action because the automobile exclusion in the Miller policy precludes coverage for Parks' injuries; (5) Safeco was denied its right to a jury trial on the amount of Parks' damages; (6) the trial court erred in its instructions to the jury concerning (a) the duty to initiate settlement negotiations, (b) Safeco's contract defenses, and (c) the definition of reasonable conduct by an insurer; (7) the trial court erred in removing from the jury's consideration the question of whether the judgment in the underlying personal injury action was collusive; (8) the trial court made erroneous evidentiary rulings relating to testimony by Parks' counsel and Safeco's conduct during discovery; (9) Parks was not entitled to recover attorney's fees as damages pursuant to *Brandt v. Superior Court*, *supra*, 37 Cal.3d 813; (10) the amount of the judgment was incorrectly calculated; (11) the trial court erred in awarding Parks his attorney's fees as cost of proof sanctions; (12) the trial court erred in its cost award to Parks; and (13) the trial court erred in the declaratory relief action when it struck Safeco's memorandum of costs and refused to award Safeco its attorneys' fees as cost of proof sanctions.[3]

[3] Although not a contention of Safeco in connection with this judgment, Parks invites us to "disapprove" our decision in *Safeco I* because, he contends, the "factual predicate" for that decision has been proven untrue. We will decline the invitation. (See discussion, *infra*, at p. 38.)

On the cross-appeal Parks contends the trial court erred when it granted Safeco summary adjudication of his judgment creditor's claim (Ins. Code, § 15580, subd. (b)(2)), to collect the entire judgment in the personal injury case. He makes a similar contention with respect to his first cause of action and requests that we reverse the judgment on that count if we reverse the judgment as to the cause of action for bad faith alleged in count 3. Because we affirm the judgments, except for the order granting Parks' attorney's fees, we need not address the latter contention.

Discussion

[[1. Timeliness of Bad Faith Claim on Miller Policy.

As indicated above, the dispute between Parks and Safeco spawned two separate lawsuits, one by Parks against Safeco for bad faith and the other by Safeco against Parks and Miller for declaratory relief. The two cases were consolidated. In August 2003, the trial court entered an order severing the cases, to permit Safeco's appeal of the adverse declaratory judgment. The order states, in part, "Case No. 1096761 [the bad faith action] is stayed until further order of the court." In February 2005, after *Safeco I* had concluded, Parks amended his complaint in the bad faith case to allege causes of action as a judgment creditor and assignee of Miller's cause of action for breach of the covenant of good faith implied in the Miller policy.

The statute of limitations for a cause of action for breach of the implied covenant of good faith is two years. (Code Civ. Proc., § 339.) Safeco contends Parks' cause of action under the Miller policy is barred by the statute of limitations because it was filed more than two years after entry of the personal injury judgment. Parks contends his cause of action is timely because the litigation was stayed during Safeco's first appeal, because the cause of action relates back to the first bad faith complaint, and because the doctrine of equitable tolling applies. We conclude that the cause of action was timely because the litigation was stayed during Safeco's appeal. We need not, therefore, discuss the "relation back" doctrine.

Section 916, subdivision (a) provides that "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the

matters embraced therein or affected thereby . . . ." Related proceedings in the trial court are stayed by an appeal where those proceedings would "substantially interfere with the appellate court's ability to conduct the appeal[,]" or where the outcome on appeal could be inconsistent or irreconcilable with the possible results in the trial court. (*Varian Medical Systems Inc. v. Delfino* (2005) 35 Cal.4th 180, 189-190; see also *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1427-1428.)

Here, Safeco's appeal in the declaratory relief action could have led to a result inconsistent or irreconcilable with possible outcomes in the bad faith action. For example, the bad faith action could have yielded a judgment that Safeco breached duties owed to Miller under the Barnette policy, in direct opposition to our eventual holding in *Safeco I*. Safeco's appeal thus operated to automatically stay proceedings in the bad faith action, even though the two actions were no longer consolidated.

Additional litigation in the bad faith action was also stayed by the trial court. Its order severing the two actions and staying the bad faith action tolled the limitations period with respect to Parks' cause of action under the Miller policy. (§ 356 [limitations period tolled while "commencement of action is stayed by injunction"].) Although Parks could conceivably have sought leave from the trial court to dissolve the stay and file an amended complaint, no authority mandates that he take these extraordinary steps. We conclude Parks reasonably and correctly relied on the stay imposed by the trial court to toll the limitations period. If the time the first appeal was pending is excluded, Parks' cause of action for bad faith under the Miller policy is timely.]]

2. Issues Raised In Safeco's Unsuccessful Motion For Summary Adjudication And The Absence Of Prejudice.

Safeco moved for summary adjudication of Parks' cause of action for breach of the implied covenant on the grounds that its duties to defend, settle or indemnify never arose because Miller breached the policy's notice provisions; that Miller was not prejudiced by Safeco's failure to defend because she received a defense from another insurer; and that Safeco never rejected a policy limits settlement demand. The

trial court denied the motion. Safeco contends this was error. Parks contends an order denying summary adjudication cannot be reviewed on appeal.

If a trial court denies summary judgment or adjudication because it erroneously concludes that disputed issues of material fact exist, and those issues are resolved against the moving party at a trial on the merits, the error in denying summary judgment "cannot result in reversal of the final judgment unless that error resulted in prejudice to the defendant." (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833; see also *California Housing Finance Agency v. Hanover/California Management & Accounting Center, Inc.* (2007) 148 Cal.App.4th 682, 689 [denial of summary judgment not prejudicial where jury later resolved fact issues adversely to moving party].) The applicable standard of prejudice is that described in article VI, section 13 of the California Constitution: a judgment cannot be set aside ". . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13; *Waller v. TJD, Inc., supra,* 12 Cal.App.4th at p. 833.) We apply that same standard of prejudice here.

a. Notice to Safeco Under the Miller Policy.

Safeco argued that its duty of good faith and fair dealing under the Miller policy never arose because Michelle Miller tendered her defense only under the Barnette policy and there was no evidence Safeco had actual knowledge of the Miller policy when it declined the defense.[4] The trial court correctly rejected this argument because the adequacy of Safeco's investigation of Miller's claim and the prejudice it may have suffered from delayed notice were disputed issues of material fact.

The duty of good faith and fair dealing implied in every insurance contract includes a duty on the part of the insurer to investigate claims submitted by its insured. "[A]n insurer cannot reasonably and in good faith deny payments to its insured without

[4] It cannot seriously be disputed that had Safeco diligently conducted an investigation, it would have discovered the Miller policy. Had it timely notified Michelle Miller that the Miller policy existed, she undoubtedly would have made a claim pursuant to this policy.

thoroughly investigating the foundation for its denial." (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 819.) These duties, however, arise after the insured complies with the claims procedure described in the insurance policy. (*KPFF Inc. v. California Union Ins. Co.* (1997) 56 Cal.App.4th 963, 977-978; *Paulfrey v. Blue Chip Stamps* (1983) 150 Cal.App.3d 187, 199-200 [insurer's responsibility to investigate "would not arise unless and until" insured files claim or makes "good faith effort to comply with claims procedure . . . ."].) "[W]ithout actual presentation of a claim by the insured in compliance with claims procedures contained in the policy, there is no duty imposed on the insurer to investigate the claim." (*California Shoppers Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 57.)

An insured's failure to comply with the notice or claims provisions in an insurance policy will not excuse the insurer's obligations under the policy unless the insurer proves it was substantially prejudiced by the late notice. (*Clemmer v. Hartford Ins. Co.* (1978) 22 Cal.3d 865, 881-883; *Campbell v. Allstate Ins. Co.* (1963) 60 Cal.2d 303, 306.) "Prejudice is not presumed from delayed notice alone. [Citations.] The insurer must show actual prejudice, not the mere possibility of prejudice." (*Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 761.) Where, as here, the insurer denies coverage, it may establish substantial prejudice only by demonstrating that, "in the event that a timely tender of the defense [in the underlying action] had been made, it would have undertaken the defense." (*Clemmer v. Hartford Ins. Co., supra,* 22 Cal.3d at p. 883.) "If the insurer asserts that the underlying claim is not a covered occurrence or is excluded from basic coverage, the earlier notice would only result in earlier denial of coverage. To establish actual prejudice, the insurer must show a substantial likelihood that, with timely notice, and notwithstanding a denial of coverage or reservation of rights, it would have settled the claim for less or taken steps that would have reduced or eliminated the insured's liability." (*Shell Oil Co. v. Winterthur Swiss Ins. Co., supra,* 12 Cal.App.4th at p. 763.)

Here, Safeco's notice defense was rejected by the trial court on the motion for summary adjudication and later by the jury. Those decisions were correct because

Safeco did not establish that it was prejudiced by the delayed notice. In the declaratory relief action, Safeco contended that, even if Miller was an insured under the Barnette policy, its automobile exclusion precluded coverage for this accident. Safeco now relies on the same automobile exclusion to contend there was no potential for coverage under the substantially identical Miller policy. As a result, both the trial court and the jury could reasonably infer that Safeco was not prejudiced by the late notice because it would have relied on the automobile exclusion to decline the defense under the Miller policy. Safeco suffered no prejudice by the order denying summary adjudication of the issue.

b. Defense Provided By Another Insurer.

Safeco also argued that Miller was not damaged by its denial of a defense because she was defended by Cooney's automobile insurer, California Casualty Insurance Company. The trial court found that the question whether the lawyer did everything possible to defend Miller was a triable issue of fact. The jury later found that Miller was damaged by Safeco's failure to defend.

An insured is entitled to only one full defense. (*San Gabriel Valley Water Co. v. Hartford Accident & Indem. Co.* (2000) 82 Cal.App.4th 1230, 1241.) An insurer's refusal to defend "is of no consequence to an insured whose representation is provided by another insurer: Under such circumstances, the insured '[is] not faced with "an undue financial burden" or deprived "of the expertise and resources available to insurance carriers in making prompt and competent investigations as to the merits of lawsuits filed against their insureds." [Citation.]' (*Ceresino v. Fire Ins. Exchange* (1989) 215 Cal.App.3d 814, 823 [264 Cal.Rptr. 30].)" (*Horace Mann Ins. Co. v. Barbara B.* (1998) 61 Cal.App.4th 158, 164.) This result differs, however, where the insurer who accepts the defense has a policy limit far below the amount claimed, and far lower than that of the insurer who declines the defense. Under those circumstances, our Supreme Court has held, "where more than one insurer owes a duty to defend, a defense by one constitutes no excuse of the failure of any other insurer to perform." (*Wint v. Fidelity & Casualty Co.* (1973) 9 Cal.3d 257, 263; see also *Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1320-1321.)

Here the limit of liability on the Miller policy was $100,000. The limit of liability on the automobile policy was $30,000, split among Miller and her two codefendants. The codefendants settled for amounts within the policy limits. Miller, on the other hand, suffered an arbitration award and subsequent judgment of over $2,000,000. Safeco now contends the judgment may have been collusive, an issue that would not arise had Safeco furnished Miller a defense. Given these facts, the trial court correctly denied summary adjudication. Safeco was not prejudiced by the denial of summary judgment on this issue.[5]

c. Safeco's Rejection of Policy Limits Settlement Demand.

Safeco contended it was entitled to summary adjudication because it never received a policy limits settlement demand that referenced the Miller policy and its rejection of a demand under the Barnette policy could not breach the Miller policy. The trial court denied summary adjudication because it concluded that the facts were in dispute concerning the adequacy of Safeco's claims investigation and its receipt of the settlement demand. That ruling was correct. There was evidence from which a reasonable trier of fact could find that Safeco breached its duties under the Miller policy when it failed, in response to Michelle Miller's claim under the Barnette policy, to investigate whether it had issued any other policy that might cover her claim. That failure to investigate, in turn, led to Safeco's rejection of the policy limits settlement demand. Safeco was not prejudiced by the order denying summary adjudication.

Among the duties imposed on an insurer by the implied covenant of good faith and fair dealing are the duty to investigate claims made by its insured and the duty to accept a reasonable settlement demand within policy limits. (*Egan v. Mutual of Omaha Ins. Co., supra,* 24 Cal.3d at p. 819; *Communale v. Traders & General Ins. Co.* (1958) 5 Cal.2d 654, 659.) Ordinarily, an insurer breaches the implied covenant by

[5] Safeco's nonparticipation in this arbitration lead to its own detriment. Miller was in sore need of motivated counsel. The arbitrator ruled that Parks was 50 percent at fault. Given his actions, this number, in theory, could have been greater. He was inebriated, violent, and had no right to continue his assault on Miller. She had little choice to defend herself by putting Parks out of the car.

denying an insured's claim without first thoroughly investigating "*all* of the possible bases" of the claim. (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1073.) In discharging this duty, the insurer " 'may not ignore evidence which supports coverage. If it does so, it acts unreasonably towards its insured and breaches the covenant of good faith and fair dealing.' " (*Id.* at p. 1074, quoting *Mariscal v. Old Republic Life Ins. Co.* (1996) 42 Cal.App.4th 1617, 1624.) Whether the insurer's investigation of a particular claim was reasonable " 'must be determined on a case by case basis and will depend on the contractual purposes and reasonably justified expectations of the parties.' " (*Chateau Chamberay Homeowners Ass'n. v. Associated International Ins. Co.* (2001) 90 Cal.App.4th 335, 346, quoting *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395.)

Administrative regulations adopted by the Insurance Commissioner provide that, "Every insurer shall disclose to a first party claimant or beneficiary, all benefits, coverage, time limits or other provisions of any insurance policy issued by that insurer that may apply to the claim presented by the claimant." (10 Cal. Code Regs., tit. 10, § 2695.4, subd. (a).) An insurer's failure to comply with this regulation does not, in itself, establish a breach of contract or bad faith by the insurer. The regulations may, however, "be used by a jury to *infer* a lack of reasonableness on [the insurer's] part." (*Rattan v. United Services Auto. Ass'n.* (2000) 84 Cal.App.4th 715, 724.)

Here, Safeco did not investigate whether any Safeco policy, other than the Barnette policy, provided coverage to Miller. The trial court denied summary adjudication because the facts were in dispute and could have supported a finding that Safeco's investigation was unreasonable. Safeco contends the trial court erred as a matter of law because neither the administrative regulation nor the implied covenant require Safeco to search for policies it has issued, other than the specific policy referenced by its insured in his or her claim. We are not convinced.

First, the plain language of section 2695.4 contains no such limitation. The regulation requires an insurer to disclose to its insured the terms "of *any* insurance policy issued by that insurer that may apply to the claim presented by the claimant." (10 Cal.

Code Regs., tit. 10, § 2695.4, subd. (a), emphasis added.) Had the Insurance Commissioner intended to limit disclosure to the policy already relied on by the insured, this regulation would refer to "the insurance policy," not to "any insurance policy[.]" Moreover, the regulations "delineate certain minimum standards for the settlement of claims . . . ." (*Id.* at § 2695.1, subd. (a)(1).) They do not provide "the exclusive definition of all unfair claims settlement practices." (10 Cal. Code Reg., tit. 10, § 2695.1, subd. (b).) Thus, just as a violation of the regulations does not, standing alone, prove the insurer acted unreasonably (*Rattan v. United Services Auto. Ass'n., supra,* at p. 724), compliance with them is not alone sufficient to prove reasonable conduct.

Second, whatever the scope of these administrative regulations, the conduct required of an insurer to discharge its duties of good faith and fair dealing will vary from case to case. (*Chateau Chamberay Homeowners Ass'n., supra,* 90 Cal.App.4th at p. 346.) In some cases, the insurer's investigation will only be reasonable if it includes a search for other policies issued by that insurer, in addition to the policy relied on by the insured. We need not here decide whether the insurer may also be obligated to search for other policies issued by other carriers. Here, it is only necessary to rule that it was unreasonable for Safeco not to search for other policies it had issued after concluding that there was no coverage under the Barnette policy.

An insurer's duty to conduct a reasonable investigation is not narrowly confined to the facts or theories of coverage relied on by its insured. For example, in *Jordan v. Allstate Ins. Co., supra,* 148 Cal.App.4th 1062, the insured made a claim against her homeowner's policy for structural damage in her living room, including failing floorboards. The damage was, her expert concluded, caused by a water conducting fungus. (*Id.* at p. 1067.) The homeowner's policy issued by Allstate excluded coverage for loss caused by "wet or dry rot" and for loss caused by "collapse." (*Id.* at p. 1066.) It provided "additional coverage," however, for the "entire collapse" of all or any portion of the house, where the collapse was " 'a sudden and accidental direct physical loss caused by . . . hidden decay of the building structure . . . .' " (*Id.* at p. 1067.) Allstate relied on the dry rot exclusion to deny coverage. The insured asked Allstate to reconsider

based only on her contention that the fungus was not "dry rot."[6] Allstate declined. It did not investigate whether the "additional coverage" for "entire collapse" might also apply.

The *Jordan* court reversed a summary adjudication in favor of Allstate on the insured's bad faith claim because the reasonableness of Allstate's investigation was a disputed factual issue. "[W]here an insurer denies coverage but a *reasonable investigation* would have disclosed facts showing the claim was covered, the insurer's failure to investigate breaches its implied covenant. The insurer cannot claim a 'genuine dispute' regarding coverage in such cases because, by failing to investigate, it has deprived itself of the ability to make a fair evaluation of the claim. [Citation.] Thus, although Allstate's interpretation of [the dry rot] exclusion was reasonable, it also had a duty to investigate [the insured's] coverage claim that was based on the 'additional coverage' provisions relating to an 'entire collapse,' which . . . was also reasonable and consistent with [the insured's] objectively reasonable expectations." (*Id.* at p. 1074.) A trier of fact could, the *Jordan* court concluded, find that Allstate unreasonably failed to consider the "additional coverage," even though the insured's claim did not mention that policy provision and even though she never provided Allstate with proof of an actual collapse. (*Id.* at pp. 1074-1075.)

Jordan, is instructive here, even though it involved a single policy, because it demonstrates that the insurer's duty to investigate may extend beyond the facts and coverage theories advanced in an insured's claim. Here, Michelle Miller made a claim against the Barnette policy on the theory that she was an additional insured under that policy. Safeco concluded Miller was not an additional insured and declined coverage. At the same time, however, Safeco knew that Michelle Miller lived somewhere. It took the position that she lived with her father and grandmother at the David Road condominium. Safeco's claims file contains no evidence that Safeco ever searched its own records for potentially applicable Safeco policies issued to the adults with whom Michelle resided, or

[6] The insured contended she was unaware of the "additional coverage" because Allstate had not provided her with a complete copy of her homeowner's policy, despite her request for one. (*Id.* at p. 1075.)

on her place of residence. Nor did Safeco interview Michelle's father or grandmother to determine whether they had Safeco policies that might cover her claim. These omissions occurred even though Safeco's unit manager instructed the adjuster to determine whether Michelle had other applicable insurance.[7] This evidence created issues of fact concerning whether Safeco acted unreasonably and breached the covenant of good faith and fair dealing implied in the Miller policy by failing, in response to Michelle Miller's claim under the Barnette policy, to investigate whether any other Safeco policy covered her claim. Safeco suffered no prejudice when the trial court denied summary adjudication on this issue.

For the same reasons, we conclude that Safeco was not prejudiced by the order denying summary adjudication on the question of whether Safeco failed to accept a reasonable policy limits settlement demand. Michelle Miller made her initial claim in March 2001. Parks made a policy limits settlement demand two months later, in May 2001. Both the claim and the settlement demand referenced only the Barnette policy. At all times, however, Safeco took the position that Michelle Miller resided not with Barnette, but with her grandmother. That is why its adjuster and analyst had been directed by their unit manager to search for other potentially applicable Safeco policies. Its database was searchable by both name and address, and either search would have disclosed the Miller policy. Thus, if Safeco had performed the investigation its own manager considered adequate, it would have found the Miller policy. This is true regardless of the specific policy referenced in the insured's claim or the third party's settlement demand. In this unusual context, we conclude that Safeco's failure to conduct a reasonable search for other Safeco policies breached duties arising under the Miller

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[7] Pagach, the adjuster, testified that he called Miller's counsel to get the contact information for her father. Pagach never contacted the father directly because he learned from Michelle's lawyer that the father rented his house and had no renter's insurance. Casualty analyst Steve Small used only Eddie Barnette's name to search Safeco's policy database for additional policies that might apply. He found none. Small did not search for policies providing coverage to Miller's father or grandmother, nor did he look for policies covering the address of Miller's primary residence. Small testified he did not know at the time that Safeco's database could search by address.

policy to reasonably investigate and settle Michelle Miller's claim. Safeco cannot rely on its breach of the duty to conduct a reasonable investigation to shield itself from liability for breach of the related duty to accept a reasonable settlement demand.

Here, there was evidence that Safeco received the May 2001 settlement demand. Parks made the demand in a letter that was incorrectly addressed. Safeco contends it was never received. But there was substantial evidence to the contrary. Parks' counsel, Martin Pulverman, testified that he hand delivered the letter to the adjuster, Michael Pagach. The unit manager, Brent French, testified that he had never seen the demand letter, but the casualty analyst, Steve Small, testified that he had seen it in the file. The jury was permitted to credit the testimony of Pulverman and Small. In these circumstances, Safeco was not prejudiced by the order denying summary adjudication on this issue.

[[3. Assignment to Parks and "Splitting" the Bad Faith Cause of Action.

After Parks and Miller discovered that the Miller policy existed, Miller assigned her cause of action for bad faith under that policy to Parks, retaining her nonassignable rights to sue Safeco for emotional distress and punitive damages. Miller then filed a cross-complaint against Safeco to recover those damages and Parks amended his complaint to allege causes of action under the Miller policy. About one month before trial began in the bad faith case, all parties attended a readiness and settlement conference. Miller settled her nonassignable claims against Safeco. At the same conference, the court set a trial date for Parks' claims. Safeco did not object to continuing with the trial in Miller's absence.

When the trial date arrived, Miller and Safeco had not yet completed their settlement agreement and Miller had not dismissed her cross-complaint. The trial court set another case management conference, excused Miller's counsel and moved on to pretrial matters between Safeco and Parks. Safeco again made no objection to continuing the trial without Miller joined as a plaintiff. The parties completed their opening statements five days later. The next day, Safeco moved for a judgment of nonsuit on the ground that Parks "split" his bad faith cause of action by failing to join

Miller as a plaintiff. The trial court denied the motion. Safeco contends that ruling was in error. We are not persuaded.

An outgrowth of the doctrine of res judicata, the rule against splitting a cause of action prevents successive lawsuits on parts of a single cause of action. (*Crowley v. Katleman, supra,* 8 Cal.4th at p. 682; see also *Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 942.) For example, in *Purcell v. Colonial Ins. Co.* (1971) 20 Cal.App.3d 807, an insured assigned his bad faith claim to the injured party who sued the insurer. The insured's subsequent action to recover damages for emotional distress under the same insurance policy was barred by the rule against splitting a cause of action. (*Id.;* see also *Murphy v. Allstate Ins. Co., supra,* 17 Cal.3d at p. 942.) "The defense that a plaintiff has split a cause of action is an affirmative defense, which must be pleaded by a defendant in abatement." (*Ferraro v. Southern Cal. Gas Co.* (1980) 102 Cal.App.3d 33, 43.) It is not jurisdictional and, because it exists for the benefit of the defendant, a defendant may waive it by failing to plead the defense or by consenting to the withdrawal of matters from consideration at trial. (*Allstate Ins. Co. v. Mel Rapton, Inc.* (2000) 77 Cal.App.4th 901, 909; *Ferraro v. Southern Cal. Gas Co., supra,* 102 Cal.App.3d at pp. 43-44.)

Here, both the insured and her assignee were parties to the same consolidated actions until the actions were severed at Safeco's request to permit its first appeal. Thereafter, Miller settled her nonassignable claims but did not dismiss her cross-complaint until after the Parks trial commenced. Safeco did not object at the settlement conference or at the next pretrial conference to continuing with the trial of Parks' claims. We conclude that Safeco waived this defense because it consented to the severance of the bad faith and declaratory relief actions and to the withdrawal of Miller's claims from consideration at the trial on Parks' bad faith claims. The trial court correctly denied Safeco's motion for nonsuit.]]

4. Automobile Exclusion.

The Miller policy excludes coverage for damages, "arising out of the ownership, maintenance, use, loading or unloading of: . . . [¶] motor vehicles . . . owned

or operated by or rented or loaned to an 'insured'." Safeco contends this exclusion bars coverage for all of Parks' damages because his injuries arose out of Miller's negligent driving or unloading of either his car or Cooney's. Safeco contends it was entitled to a directed verdict on this question. Parks contends Safeco is estopped to rely on the automobile exclusion because it paid the policy limits of the Miller policy without reference to the exclusion. He also argues the exclusion is inapplicable because he was injured while walking, after he left Cooney's car. Finally, Parks contends that coverage exists because Miller's negligence in abandoning him on the freeway was an independent, concurrent cause of his injuries.

In determining whether automobile use precludes coverage under a homeowner's policy, we ask whether automobile use was the "predominating cause/substantial factor" in causing the damages at issue? (*Prince v. United Nat. Ins. Co.* (2006) 142 Cal.App.4th 233, 245; *American Nat. Property & Casualty Co. v. Julie R.* (1999) 76 Cal.App.4th 134, 140.) Where both insured risks and excluded risks "constitute concurrent proximate causes of an accident, the insurer is liable so long as one of the causes is covered by the policy." (*State Farm Mut. Auto. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94, 102.)

Thus, for example, in *Partridge*, *supra*, the insured under a homeowner's policy negligently filed down the trigger mechanism on a gun so that it discharged with very little force. The same insured then put the gun in a car where it accidently discharged while the insured was driving, injuring a passenger. Our Supreme Court held the automobile exclusion in the homeowner's policy did not preclude coverage for the passenger's injuries. "[A]lthough the accident occurred in a vehicle, the insured's negligent modification of the gun suffices, in itself, to render him fully liable for the resulting injuries . . . . [I]nasmuch as the liability of the insured arises from his non-auto-related conduct [in filing the trigger mechanism], and exists independently of any 'use' of his car, we believe the homeowner's policy covers that liability." (*Id.*)

Similarly, in *Ohio Casualty Ins. Co. v. Hartford Accident & Indemnity Co.* (1983) 148 Cal.App.3d 641, the court held that an exclusion in a homeowner's policy for

watercraft use did not apply to injuries suffered by a boat passenger who dove into the water from the anchored boat and was injured by another passing boat as she surfaced. According to the Court of Appeal, the homeowner's "negligence was not an act of omission in failing to supervise some aspect of the operation of the boat, such as loading or unloading, but was an act of commission in permitting [the passenger] to go swimming when it was unsafe to do so . . . . [T]he negligent supervision of [the passenger's] swimming activities did not in itself constitute a use of the boat . . . . [T]he mere fact [the homeowner's] negligent act is *connected* to the use of the boat does not mean it is *dependent* on the use of the boat." (*Id*. at p. 647.)

Courts have reached the same conclusion where a vehicle is used only to transport the victim to the site where injury occurs. For example, in *American Nat. Property & Casualty Co. v. Julie R., supra,* 76 Cal.App.4th 134, an uninsured motorist used his car to drive the victim to a deserted location where he raped her inside the car. The court of appeal concluded the victim's uninsured motorist policy provided no coverage for her injuries because, "[T]he vehicle provided a favorable situs for the attack, but its use was a circumstance accompanying the rape, not a predominant cause or a substantial factor in Julie R.'s injury." (*Id.* at p.142; see also *R. A. Stuchberry & Others Syndicate1096 v. Redland Ins. Co.* (2007) 154 Cal.App.4th 796, 803 [shuttle company's automobile policy provided no coverage for victim's rape where shuttle driver used van only to transport victim to site of rape].)

By contrast, in *National Indemnity Co. v. Farmers Home Mutual Ins. Co.* (1979) 95 Cal.App.3d 102, the court of appeal concluded that the automobile exclusion precluded coverage under a homeowner's policy for injuries suffered by a child who leapt out of a car in which he had been a passenger immediately after it was parked. (*Id.* at pp. 108-109.) The child ran into the street and was hit by a passing car. Coverage for his injuries was excluded under the homeowner's policy issued to the driver of the parked car because she negligently failed to supervise and control the child while "unloading" him from the car. "There is a complete absence of conduct on the part of the insured which is independent of and unrelated to the 'use' of the vehicle. The conduct of the insured which

contributed to the injury simply cannot be dissociated from the use of the vehicle." (*Id.* at p. 109.)

Similarly, *Prince v. United Nat.l Ins. Co., supra*, 14 Cal.App.4th 233, held that an automobile exclusion precluded coverage under a homeowner's policy where the insured day care provider left two children stranded in their car seats inside a locked van on a hot day. The children died of hyperthermia. Reasoning that the rapid onset of hyperthermia was particularly likely to occur in a motor vehicle, the court held that the vehicle, "far from being merely the situs of the injury, was itself 'the instrumentality' of it." (*Id*.,at p. 245.)

In determining whether the Miller policy's automobile exclusion precludes coverage for Parks' injuries, our question is whether Miller's negligent "use, loading or unloading" of a car that was "operated by" or "loaned to" her was a predominating cause or substantial factor in causing Parks' injuries. Miller was a passenger in Cooney's car; she did not operate it. The only car she operated was Parks'. Thus, the exclusion applies, if at all, based on Miller's negligent "use, loading or unloading" of Parks' car.

Miller's negligent driving of Parks' car certainly set in motion the events that culminated in his injuries. But it was not the "predominating cause" or a substantial factor in causing those injuries. The subsequent negligence of Cooney, Rivera and Miller in removing Parks from Cooney's car and leaving him on the side of the highway was an independent, concurrent cause of his injuries that is connected to, but not dependent on Miller's use of Parks' car. (*Ohio Casualty Ins. Co. v. Hartford Acc. & Indem. Co., supra,* 148 Cal.App.3d at p. 647.) Her liability for that conduct would exist regardless of whether she used a car to transport Parks to the place where they were picked up by Cooney or to the place where Parks was later abandoned. (*State Farm Mut. Auto. Ins. Co. v. Partridge*, *supra*, 10 Cal.3d at pp. 102-103.)

This conclusion is consistent with the holding in *Farmers Insurance Exchange v. Reed* (1988) 200 Cal.App.3d 1230. Applying the same predominating cause/substantial factor test, the *Reed* court held that "injuries suffered by an intoxicated woman who was struck by a car as she walked home from a bar did not arise out of her

husband's use of his insured vehicle within the meaning of his automobile liability insurance policy, even though he took the keys to that vehicle from her and left her at the bar without transportation . . . . [T]he independent acts of the woman herself and the driver who struck her broke any causal connection between the husband's use of his vehicle and her injuries." (*Id.* at pp. 1231-1232.)

Nor does Miller's conduct in "unloading" Parks from his own car into Cooney's create the necessary causal connection between Miller's use of that car and Parks' injuries. Unlike the child in *National Indemnity Co. v. Farmers Home Mutual Ins. Co., supra*, 95 Cal.App.4th 102, Parks did not wander into the highway immediately after he was removed from his car, or from Cooney's for that matter. He had walked for over a mile and more than 15 minutes before the collision occurred. (*Id.*, at pp. 108-109.) The automobile exclusion in the Miller policy does not preclude coverage for Parks' injuries. Safeco's motion for directed verdict on this issue was correctly denied by the trial court.

[[5. Jury Trial On Damages.

The trial court determined that Parks' damages on his judgment creditor's claim were equal to the interest that had accrued on the personal injury judgment and that his damages on the cause of action for bad faith were the amount of the personal injury judgment plus interest. Its verdict form informed the jury of these findings and stated that, if it found in favor of Parks, "The Court will do the actual calculations of the specific amount of those damages." Safeco contends the trial court deprived it of its constitutional right to have the factual issue of damages decided by a jury. There was no error because the verdict forms accurately state the measure of damages for each claim and the amount of those damages is undisputed.

The trial court's action is analogous to granting a directed verdict on the amount of Parks' damages. A directed verdict is proper only " 'when there is no substantial conflict in the evidence.' " (*Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, 758.) In reviewing the trial court's decision to calculate the amount of damages itself, we view the evidence in the light most favorable to Safeco, disregard all conflicting evidence, and resolve all conflicts and draw all inferences in favor of Safeco.

(*Wolf v. Walt Disney Pictures and Television* (2008) 162 Cal.App.4th 1107, 1119.) If there was substantial evidence to support an award of damages in an amount less than that directed by the trial court, the trial court erred. "On the other hand, if the record lacked substantial evidence supporting [a different award], the directed verdict was proper." (*Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195, 210.)

An insurer who unreasonably refuses to defend its insured or who fails to accept a reasonable settlement offer within policy limits "is liable for all the insured's damages proximately caused by the breach, regardless of policy limits." (*Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 725; see also *Samson v. Transamerica Ins. Co.* (1981) 30 Cal.3d 220, 237; *Johansen v. California State Auto. Assn. Inter-Ins. Bureau*, *supra*, 15 Cal.3d at p. 12.) "Where the underlying action has proceeded to trial and a judgment in excess of the policy limits has been entered against the insured, the insurer is ordinarily liable to its insured for the entire amount of that judgment [citations] excluding any punitive damages awarded [citation]." (*Hamilton v. Maryland Casualy Co.*, *supra*, 27 Cal.4th at p. 725.) Because judgments accrue interest until paid, the damages proximately caused by an insurer's unreasonable refusal to defend or settle include the interest owed on the judgment. (*Id.*; §§ 685.010, et seq.)

Here, there is no substantial conflict in the evidence on damages. Safeco is bound by the personal injury judgment because it did not participate in Miller's defense. (*Clemmer v. Hartford Ins. Co.*, *supra*, 22 Cal.3d at p. 884.) The amount of the judgment is undisputed and the interest owing on that judgment can be mathematically calculated. There is no substantial evidence that Miller's damages were any other amount. Thus, had the jury found only nominal damages, its finding would not have been supported by substantial evidence. Accordingly, the trial court properly removed this issue from the jury's consideration.

6. Instructional Errors.

Safeco contends that errors in the trial court's instructions to the jury require reversal. To prevail on this claim, Safeco "must show that the error was prejudicial, (Code Civ. Proc., § 475), resulting in a 'miscarriage of justice.' (Cal. Const. art. VI, § 13.)

A 'miscarriage of justice' occurs when it is ' " . . . reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." ' [Citation.]" (*Lundy v. Ford Motor Co.* (2001) 87 Cal.App.4th 472, 479; see also *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574; *Kaljian v. Menezes* (1995) 36 Cal.App.4th 573, 589.) None of the claimed errors were prejudicial under this standard.

a. Duty to Initiate Settlement Negotiations.

The trial court instructed the jury that, "Jamey Parks claim[s] Michelle Miller was harmed by Safeco's breach of the obligation of good faith and fair dealing because it failed to either reasonably initiate settlement discussions to resolve the case or reasonably respond to a reasonable settlement demand in a lawsuit against Michelle Miller." The jury was further instructed that Parks was required to prove, among other things, that Safeco "unreasonably failed to reasonably initiate settlement discussions to resolve that case or to accept a reasonable settlement demand for an amount within policy limits[.]" Safeco contends these instructions were prejudicial error because an insurer has no duty to initiate settlement discussions.

Some cases suggest that the insurer's duty to accept a reasonable settlement demand may, in appropriate circumstances, include a duty to initiate settlement negotiations. In *Garner v. American Mut. Liability Ins. Co.* (1973) 31 Cal.App.3d 843, the court concluded that an insurer is required by the implied covenant of good faith to consider the "welfare and interests" of its insured, including the financial risk to its insured from a "failure to settle or attempt to settle." (*Id.* at pp. 847.) As a consequence, the insurer may be liable if it fails in bad faith "to consider, accept, or make a reasonable settlement offer . . . ." (*Id.* at p. 848.)

More recently, *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, affirmed a jury verdict that an insurer acted in bad faith because it "failed to make good faith efforts to negotiate a settlement[,]" where the insurer's unreasonable settlement posture and refusal to negotiate jeopardized the insured's business relationship with its biggest customer, the third party to whom damages were owing. (*Id.* at p. 906; see also *Boicourt v. Amex Assurance Co.* (2000) 78

Cal.App.4th 1390, 1399 [a "formal settlement offer is *not* an absolute prerequisite to a bad faith action in the wake of an excess verdict when the claimant makes a request for policy limits and the insurer refuses to contact the policyholder about that request."].) A federal appellate court has also held that Insurance Code section 790.03, subdivision (h)(5) imposes upon insurers a duty to actively attempt to settle claims against their insured. (*Pray By and Through Pray v. Foremost Ins. Co.* (9th Cir. 1985) 767 F.2d 1329, 1330.)

We are not convinced that any special circumstances exist here that would impose on Safeco a duty to initiate settlement negotiations rather than respond to a settlement demand. But even if the trial court here overstated Safeco's duty to initiate settlement negotiations, the error was not prejudicial. There was substantial evidence that Safeco breached the covenant of good faith and fair dealing by failing to conduct a reasonable investigation of Miller's claim. Accordingly, there is no reasonable probability that the jury would have returned a verdict more favorable to Safeco had the instructions omitted the reference to a duty to initiate settlement discussions.

b. Contract Defenses.

Safeco contends the trial court erred in instructing the jury on its contract defenses that coverage was barred by late notice and the automobile exclusion. We are not persuaded.

The trial court instructed the jury that, "Safeco claims that it does not have to pay the judgment against Michelle Miller because it did not receive timely notice of the Parks *v.* Miller lawsuit in the manner required by the Evelyn Miller policy." Safeco contends this was error because the trial court did not repeat the phrase "in the manner required by the Evelyn Miller policy," when enumerating the elements of this defense in the very next instruction. Any error was harmless. The trial court's instructions made it clear that the notice at issue was notice as required by the Miller policy. It is not reasonably probable that the jury would have reached a verdict more favorable to Safeco had the point been repeated.

Similarly, there was no prejudicial error in the instructions concerning the automobile exclusion. The trial court instructed the jury that, to succeed in this defense, "Safeco must prove that Michelle Miller's liability arises solely out of the use or unloading of a motor vehicle." Safeco contends use of the term "solely" was prejudicial error, because the policy more broadly excludes coverage for damages "arising out of" the use or unloading of a motor vehicle. As we have previously noted, substantial evidence supports the finding that there were concurrent proximate causes of Parks' injuries unrelated to Miller's use or unloading of a motor vehicle. (*State Farm Mut. Auto. Ins. Co. v. Partridge*, *supra*, 10 Cal.3d at p. 102.) Any error was harmless.

c. Failure to Instruct on Unreasonable Conduct.

The trial court's instructions to the jury included several references to "reasonable" or "unreasonable" conduct by Safeco. For example, the trial court instructed the jury that, to prove Safeco breached the obligation of good faith and fair dealing, Parks was required to prove that, "Safeco unreasonably failed to properly investigate the loss . . . [,]" and that "SAFECO'S unreasonable failure to properly investigate the loss caused harm." (CACI No. 2332.) Similarly, the jury was instructed

that Safeco could breach its obligation of good faith and fair dealing by failing, "to either reasonably initiate settlement discussions . . . or reasonably respond to a reasonable settlement demand . . . ." (CACI No. 2334.) Finally, the trial court instructed the jury that it could find Safeco breached the implied covenant if Safeco "unreasonably failed to defend Michelle Miller against [Parks'] lawsuit." (CACI No. 2336.) Safeco contends the trial court erred because its instructions did not define the term "unreasonable."[8]

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence. The trial court may not force the litigant to rely on abstract generalities, but must instruct in specific terms that relate the party's theory to the particular case." (*Soule v. General Motors Corp., supra,* 8 Cal.4th at p. 572.) There is, however, "no rule of automatic reversal or 'inherent' prejudice applicable to any category of civil instructional error, whether of commission or omission. A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.)" (*Id.* at p. 580.) In deciding "whether an error of instructional omission was prejudicial, the court must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Id.* at pp. 580-581.)

The jury here heard lengthy testimony about insurers' statutory and regulatory obligations, Safeco's internal procedures and policies, the capabilities of its computer database, and the conduct of the employees who made decisions about Miller's claim. Witnesses testified on both sides of the question whether Safeco's conduct was

[8] We note that, when this trial occurred, the California Civil Jury Instructions (CACI) did not include an instruction defining "reasonable" conduct by an insurer. The omission has been remedied with CACI No. 2337, included in the most recent supplement to the CACI. (CACI April 2008 Supp., at p. 171.) The alternative BAJI instructions include a similar pattern instruction on evaluating the conduct of an insurer. (BAJI No. 12.94.)

reasonable. The trial court correctly instructed the jury that Safeco had a duty to avoid doing "anything to injure the right of the [insured] to receive the benefits of the agreement[,]" and that Safeco was required to "give at least as much consideration to the interest of the insured as it gives to its own interests." (CACI 2330.) There were no questions from the jury concerning application of these instructions or the definition of the term "reasonable."

We agree that the better practice would be for the trial court to instruct the jury on the factors it should consider in determining whether the insurer's conduct was reasonable. We cannot, however, say that the failure to do so here resulted in a miscarriage of justice. The term "reasonable" has a generally accepted meaning in common usage. The evidence before the jury – especially that of the expert witnesses and Safeco's employees – was sufficient to allow it to determine whether Safeco's investigation and resolution of Miller's claim was consistent with the business practices an average insured person would expect his or her insurer to adopt. We further note that the special instructions proposed by Safeco would not have defined "reasonable" with any greater specificity, beyond admonishing the jury to avoid relying on hindsight in evaluating Safeco's conduct.[9] That same point was made in other instructions given to the jury, including the opening instruction, CACI No. 5000.]]

7. Collusive Judgment.

Safeco contends the trial court erred when it rejected a proposed special jury instruction on the question whether the judgment against Miller in the underlying

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[[[9] One requested instruction would have informed the jury that the reasonableness of an insurer's conduct, "must be measured as of the time it was confronted with the factual situation to which it was called upon to respond. You may not apply a 'hindsight' test to measure an insurance company's conduct. Rather, only the particular facts, claims and circumstances presented to the insurance company at the time it made its various decisions may be considered." The next requested instruction stated, "To be liable for breach of the implied covenant of good faith and fair dealing, an insurance company must knowingly commit an act or acts which are unreasonable. Negligent conduct by an insurance company does not constitute a breach of the implied covenant of good faith and fair dealing."]]

personal injury action was collusive. The trial court declined the instruction because there was "no viable evidence to support it."

Generally, an insurer with notice of an action against its insured and an opportunity to defend will be bound by the judgment as to all issues litigated in that action. (*Clemmer v. Hartford Ins. Co., supra,* 22 Cal.3d at p. 884.) Where the insurer declines the defense, the insured "is free to make the best settlement possible with the third party claimant, including a stipulated judgment with a covenant not to execute. Provided that such settlement is not unreasonable and is free from fraud or collusion, the insurer will be bound thereby." (*Pruyn v. Agricultural Ins. Co.* (1995) 36 Cal.App.4th 500, 515; see also *Samson v. Transamerica Ins. Co., supra,* 30 Cal.3d at pp. 240-242.) In this context, collusion occurs when the insured and the third party claimant work together to manufacture a cause of action for bad faith against the insurer or to inflate the third party's recovery to artificially increase damages flowing from the insurer's breach. (*Andrade v. Jennings* (1997) 54 Cal.App.4th 307, 327; see also *J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 18.)

The insurer may raise collusion as a defense in a subsequent bad faith action. Where there is substantial evidence of collusion, its existence is a question of fact for the jury to determine. (*Andrade v. Jennings, supra,* 54 Cal.App.4th at p. 328.) Several factors are relevant to a determination whether a settlement is collusive. These include, "the amount of the overall settlement in light of the value of the case [citations]; a comparison with awards or verdicts in similar cases involving similar injuries [citations]; the facts known to the settling insured at the time of the settlement [citations]; the presence of a covenant not to execute as part of the settlement [citation]; and the failure of the settling insured to consider viable available defenses [citations]." (*Id.* at p. 331.)

Here, the trial court correctly determined there was no substantial evidence to support this defense. Safeco's evidence of collusion is that Miller assigned her bad faith claims to Parks before the arbitration occurred, her codefendants settled before the arbitration, and the arbitration award was very large. This does not amount to substantial

evidence that Miller and Parks colluded to manufacture her liability or Parks' damages. The matter was submitted to binding arbitration before a neutral arbitrator, a retired superior court judge. This fact alone lends credibility to the award and distinguishes the present case from those cited by Safeco, each of which involved a settlement. If there had been collusion between Miller and Parks at the arbitration, we presume that the retired superior court judge would have perceived as much and ruled accordingly.

Moreover, Miller's counsel at the arbitration testified that he provided her with a complete defense that "vehemently" denied any liability on her part. The defense focused on liability because it was counsel's professional opinion that, "there was not a lot . . . to dispute about [damages]. The gentleman had suffered horrific injuries, and it would have been stupid, and ill advised for me to suggest to the contrary." Miller and her co-defendants presented evidence about what happened on the road the night Parks was injured and argued they breached no duty by ejecting Parks from the car. When Miller's counsel received the arbitration award, he requested that the arbitrator modify it because he believed the arbitrator failed to consider some important issues. The request was denied and Miller's counsel did not thereafter oppose Parks' motion to confirm the award in a judgment because he believed opposition would be futile.

Safeco submitted no evidence that Parks' arbitration award was unreasonably high in light of the value of the case or of awards in other, similar matters. The assignment to Parks is not by itself evidence of collusion. (*Samson v. Transamerica Ins. Co*, *supra*, 30 Cal.3d at pp. 240-241.) Although there was evidence that Miller's counsel did not pursue some available lines of inquiry – such as the hospital's negligence in permitting Parks to contract a serious infection – there was little if any evidence that these omitted issues constituted a "viable" defense, either to Miller's liability or to the amount of the award. Under these circumstances, the trial court did not err in removing the issue of collusion from the jury's consideration.

[[8. Evidentiary Errors.

a. Testimony of Martin Pulverman.

One of Parks' trial counsel, Martin Pulverman, testified at trial that he hand-delivered Parks' policy limits settlement demand to Mick Pagach when the two met to discuss another case. Safeco contends the trial court erred in permitting that testimony because the court previously granted Parks' motion to quash a deposition subpoena for Pulverman, preventing Safeco from taking his deposition in a timely manner prior to trial. There was no abuse of discretion. (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900.) The trial court granted the motion to quash without prejudice, informing Safeco that it could seek leave to depose Pulverman if it was unable to obtain the information it sought by other means. Safeco never sought leave to depose Pulverman. Parks provided written discovery detailing his version of the events at issue and Safeco declined Pulverman's offer to have his deposition taken. Because Safeco could have conducted the discovery it now claims it was unfairly denied, the trial court did not abuse its discretion in permitting Pulverman's testimony.

b. Safeco's Objections to Requests for Production of Documents.

Safeco contends the trial court prejudicially erred in admitting into evidence its objections and refusal to produce documents in response to Parks' request for production of, "Copies of all of [Safeco's] applicable insurance policy or policies providing coverage for the nature and extent of the damages alleged. . . ." When the demand and response were served, Parks had not yet discovered the Miller policy.

The trial court did not abuse its discretion when it admitted evidence that Safeco refused to search for other policies that might provide coverage to Miller. The relevant fact is not that Safeco's counsel interposed a legal objection to a document request, but that Safeco itself refused to conduct a reasonable search of its own records for the policies.

9. Award of Attorney Fees Under *Brandt v. Superior Court*.

In *Brandt v. Superior Court*, *supra*, 37 Cal.3d 813 (*Brandt*), our Supreme Court held that damages for an insurer's breach of the implied covenant of good faith and

fair dealing properly include attorney fees incurred by the insured to obtain benefits due under the policy. The judgment in favor of Parks included an award of $40,400 in *Brandt* attorney's fees. Safeco contends the fee award is not supported by substantial evidence. The contention is without merit.

Safeco stipulated that, if the jury was "asked to hear evidence on attorney's fees, and award attorney's fees, that the award would be $40,400." It also reserved its right to appellate review "as to any and all issues . . . [,]" including whether it had breached the implied covenant and whether attorney fees should be submitted to the jury. Counsel concluded his remarks by repeating, "the amount of fees that would be recoverable . . . is $40,400."

This stipulation plainly means that Safeco reserved its right to appeal issues relating to Parks' entitlement to *Brandt* fees, but not the amount of those fees. The statement that, "the amount of fees . . . is $40,400[,]" has no meaning at all if Safeco intended for Parks to prove the amount of his *Brandt* fees. Safeco did not raise this purported failure of proof before the close of evidence at trial, when it could have been remedied, or in its post-trial motions. Any error was invited. (*Norgart v. Upjohn Co., supra,* 21 Cal.4th 383 at p. 403; *Geffcken v. D'Andrea* (2006) 137 Cal.App.4th 1298, 1312.)

10. Errors in Calculating Judgment.

In the underlying personal injury action, Parks recovered $50,000 from the driver involved in the collision, $255,000 from his own underinsured motorist coverage, and $30,000 from the insurer covering Cooney and Rivera. Shortly after judgment was entered in this case, Parks received another $30,000 from another automobile insurance policy that covered Miller. Safeco contends the trial court erred because it did not grant Safeco setoffs for these amounts.[10]

"The right to a setoff is not absolute and may be restricted when the failure to do so would be inequitable. (Citations.) It follows that the trial court's decision was

[10] Safeco also paid Parks $101,000 under the Miller policy. It acknowledges that the trial court granted a setoff for that payment.

one subject to an exercise of its equitable powers, and that the only issue before us on this appeal is whether that discretion was so abused that it resulted in a manifest miscarriage of justice. (Citation.)" (*Wm. R. Clarke Corp. v. Safeco Ins. Co. of America* (2000) 78 Cal.App.4th 355, 358-359.)

Here, the trial court reasoned that, even if Michelle Miller would have been entitled to the setoffs at issue, Safeco was not because its liability to Parks is based, not on Miller's negligence but on its own, independent bad faith conduct in declining to defend Miller. This finding was not an abuse of discretion.

The collateral source rule provides that, "if an injured person receives compensation for injuries from a source wholly independent of the tortfeasor, such compensation should not be deducted from the damages the victim otherwise obtains from the tortfeasor." (*Kardly v. State Farm Mut. Auto. Ins. Co.* (1989) 207 Cal.App.3d 479, 485; see also *Pacific Gas & Electric Co. v. Superior Court* (1994) 28 Cal.App.4th 174, 178-179.) The money Parks received from the joint tortfeasors' automobile insurance policies, and from his own underinsured motorist coverage, partially compensated him for the injuries he suffered as a result of their negligence. But Safeco is not a joint tortfeasor with Miller, Cooney, Rivera, and the driver who hit Parks. Its liability derives from its own breach of the implied covenant of good faith and fair dealing. For that reason, Safeco's liability is wholly independent and the collateral source rule applies to preclude a setoff.

Safeco next contends it should be permitted to collaterally attack the underlying judgment because that judgment failed to apportion non-economic damages among the joint tortfeasors, in violation of Civil Code section 1431.2, subdivision (a). (See *DaFonte v. Up-Right Inc.* (1992) 2 Cal.4th 593, 603.) The argument is without merit. Even if collateral attack would otherwise have been available, the judgment against Miller arises from an arbitration award. The grounds upon which an arbitration award may be challenged are extremely narrow and Safeco has not demonstrated that any of those grounds exist. (*Harris v. Sandro* (2002) 96 Cal.App.4th 1310, 1313.)

11. Award of Attorney Fees Incurred in Proving Matters Not Admitted.

Parks served requests for admission asking that Safeco admit it breached the implied covenant of good faith and fair dealing in handling Miller's claim and that it owed her a defense under the Miller policy.[11] Safeco interposed several objections and denied each request. After trial, Parks filed a motion under section 2033.420 to recover $528,252.50 in attorney fees and other expenses incurred to prove those matters. The trial court awarded fees of $426,208. Safeco contends the trial court erred because Parks' counsel did not adequately document their hours and other expenses, and because Safeco had reasonable grounds to believe it would prevail on these issues. We agree with the latter point: Safeco had a reasonable ground to believe it would prevail on these issues at trial. As a consequence, we reverse in its entirety the order granting Parks' motion to recover attorney's fees as cost of proof sanctions.

Section 2033.420 subdivision (a) provides that, if a party fails to admit the truth of any matter when requested, the party requesting the admission may recover reasonable expenses incurred in proving the matter to be true. Subdivision (b) provides that the trial court shall order the payment of these expenses unless it finds that one of four exceptions applies. The exception at issue here is that the "party failing to make the admission had reasonable ground to believe that that party would prevail on the matter." (§ 2033.420, subd. (b)(3).)

We review the trial court's order granting cost of proof sanctions for abuse of discretion. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) As California courts have repeatedly noted, the deferential abuse of discretion standard asks whether the trial court acted within the bounds of reason, rather than in an arbitrary, capricious or whimsical manner. (*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448,

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[11] Parks' first request for admission asked Safeco to admit that it "breached the implied covenant of good faith and fair dealing with regard to its claims handling of Parks *v.* Miller, et al., Santa Barbara County Superior Court case No. 1002560." His second set of requests for admission sought, among other things, an admission that, "SAFECO owed Michelle Miller a defense under Evelyn Miller's policy of insurance issued by SAFECO for the claim asserted against Michelle Miller by Jamey Parks in the Santa Barbara County Superior Court case No. 1002560." In the same set of requests for admission, Safeco admitted that Michelle Miller was "an insured" under the Evelyn Miller policy.

quoting *In re Cortez* (1971) 6 Cal.3d 78, 85-86.) Even where the trial court has discretion in applying the law to the facts, however, "its conclusions of law are reviewed de novo . . . ." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712.) "Where the trial court's decision rests on an error of law, as it does here, the trial court abuses its discretion." (*People v. Superior Court* (2008) 43 Cal.4th 737, 742.)

We have no quarrel with the trial court's findings that Parks' counsel adequately documented their hours and that the fee counsel requested was objectively reasonable. Contemporaneously maintained time records are a reliable and perhaps preferable method of determining reasonable attorneys' fees. The trial court nevertheless has discretion to determine and award a reasonable fee even in the absence of such records. As our Supreme Court cautioned in *PLCM Group, Inc. v. Drexler*, *supra*, 24 Cal.4th at page 1098: "Requiring trial courts in all instances to determine reasonable attorney fees based on actual costs and overhead rather than an objective standard of reasonableness, i.e., the prevailing market value of comparable legal services, is neither appropriate nor practical; it 'would be an unwarranted burden and bad public policy.' "

We conclude, however, that the trial court erred in its legal conclusion that Safeco had "no reasonable ground to believe that [it] would prevail" at trial on the matters addressed in Parks' requests for admission. (§ 2033.420, subd. (b)(3).) Parks demanded that Safeco admit it "owed Michelle Miller a defense" under the Miller policy and that it "breached the implied covenant of good faith and fair dealing" under that same policy. We have already concluded that the facts were in dispute on these issues. Although the jury's findings on the duty to defend and breach of the implied covenant are supported by substantial evidence, we are equally convinced that Safeco had a reasonable basis for trying both issues. A reasonable trier of fact could, for example, have found that Safeco's failure to discover the Miller policy was not a breach of the implied covenant because its staff reasonably believed their only obligation was to inquire whether the Barnettes or the Millers had policies with other insurers. The jury might also have found that Safeco employees were mistaken, but not unreasonably so, when they concluded that the automobile exclusion applied. These same factual and legal disputes led the trial court to

deny Parks' motion for summary adjudication on the bad faith claim, his motion in limine to exclude evidence of untimely notice, and his motion for a directed verdict on the applicability of the automobile exclusion. Safeco's position was supported by some evidence and legal authority. It was therefore objectively reasonable for Safeco to try the case rather than admit liability at the discovery stage. The trial court erred as matter of law when it concluded that Safeco had no "reasonable ground to believe that [it] would prevail" on either or both of the matters at issue. (§ 2033.420, subd. (b)(3).) The order awarding attorney fees to Parks' counsel must be reversed.

12. Cost Award.

Safeco contends the trial court abused its discretion because it did not tax costs for models, blowups and photocopied exhibits that were used in the 2003 trial on the declaratory relief action or were prepared for, but not used in the 2007 trial. The trial court, however, accepted Parks' contention that the blowups, exhibits and tabbed exhibit notebooks were reasonably helpful to the trier of fact. It further reasoned that costs for items prepared for the 2003 trial should be reimbursed because the two cases were consolidated when those costs were incurred, and some of the items were used in both trials.

Section 1033.5, subdivision (a)(12) allows recovery of costs for models, blowups and photocopies of exhibits if they are "reasonably helpful to the trier of fact." (*Id.*) "It follows that fees are not authorized for exhibits not used at trial." (*Ladas v. California Sate Auto. Assn.* (1993) 19 Cal.App.4th 761, 775.) Here, the trial court is in the best position to make the factual finding that the blowups and exhibits at issue were reasonably helpful. We will not second-guess its finding on that question. As a consequence, we conclude its order was not an abuse of discretion.

13. Post-Judgment Orders in the Declaratory Relief Action.

In *Safeco II*, Safeco contended that it was entitled to recover its costs and attorney's fees in the declaratory relief action. We remanded to permit the trial court to exercise its discretion on both questions. When it did so, the trial court determined that

Safeco was not entitled to recover either its costs or its attorney's fees. Safeco contends these rulings were an abuse of discretion. We are not persuaded.

First, section 1032, subdivision (a)(4) provides that when a party recovers non-monetary relief, the trial court determines which party is the prevailing party and has discretion to award costs, or not. "Thus, the statute permits the ruling the trial court made in this case, ordering each side to pay its own costs, even though appellants were without question the prevailing parties." (*Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234, 1248-1249, fn. omitted.) Where one party obtains a declaratory judgment and the other obtains monetary relief on a separate cause of action, the trial court does not abuse its discretion if it orders the parties to bear their own costs. (*Lincoln v. Schurgin* (1995) 39 Cal.App.4th 100, 106; see also *United States Golf Assn. v. Arroyo Software Corp.* (1999) 69 Cal.App.4th 607, 625.) That is, in effect, what happened here.

Second, we conclude the trial court properly denied Safeco's attorney's fees for the reasons we previously explained. The request for admission at issue here asked Parks to admit that "Michelle Miller was not an insured . . . " under the Barnette policy. Safeco propounded that request in November 2002, nearly two years before our opinion in *Safeco I* and almost five years before we decided *Safeco II*. In the interim, Parks, Miller and the trial court were apparently sincere in their collective belief that our first opinion had not conclusively decided the question of whether Michelle Miller was an insured under the Barnette policy. We confess some surprise over that circumstance; in our view, *Safeco I* plainly settled the question. Nevertheless, we take the trial court at its word and conclude that, because the trial court was then itself of the opinion that there was a reasonable basis to continue litigating this question, Parks and Miller also had a reasonable ground for believing they could eventually prevail. The order denying attorney's fees was not an abuse of discretion.

Continued Vitality of *Safeco I.*

In connection with Safeco's appeal, Parks invites us to "disapprove" our opinion in *Safeco I* because, he informs us, "Safeco hoodwinked Parks, the trial court and this Court of Appeal. The jury in this instant case has found that Safeco knew at all times

after the claim was first tendered, that Michelle Miller was insured under the Miller policy. Because the factual predicate for this Court's opinion in *Safeco I* has been proven untrue, the opinion should not stand." (Respondent's Opening Brief, p. 87.) We decline the invitation. Not only does Parks' statement vastly overstate the jury's findings, it misunderstands our prior opinion.[12] Without reiterating that entire opinion, we note its chief "factual predicate" was that Eddie Barnette, Gloria Barnette and Michelle Miller repeatedly insisted to Safeco that Michelle was not an insured under the Barnette policy because she did not reside at Barnette's home and was not a member of his household. Nothing in this record alters those facts or our analysis of the Barnette policy.

Parks' Cross-Appeal

Parks' second cause of action, a judgment creditor's claim pursuant to Insurance Code section 11580, subdivision (b)(2), alleged that he was entitled to recover the entire amount of the personal injury judgment because Safeco had refused in bad faith to pay it. The trial court granted summary adjudication on this cause of action because it concluded that Parks' recovery as a judgment creditor was restricted to the policy limits which Safeco had already paid. He contends the trial court erred because his recovery is not so limited. He further contends that we should reverse the judgment on his first cause of action if we reverse on the third because the trial court also erred in limiting his recovery on the first cause of action.

1. Judgment Creditor's Claim for Failure to Pay Judgment.

Insurance Code section 11580 lists provisions that must be included in every liability insurance policy issued or delivered in California. One such provision is that, "an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment." (Ins. Code, § 11580, subdivision (b)(2).) This provision "makes the judgment creditor [of an insured] a third party beneficiary of the insurance contract between the insurer and the insured." (*Murphy v. Allstate Ins. Co., supra,* 17 Cal.3d at p. 943.) In that capacity, the

[12] The jury made no express finding that Safeco had actual knowledge, when it declined the defense under the Barnette policy, that the Miller policy existed.

judgment creditor "may enforce implied contractual covenants, including the covenant of good faith, to the extent that those covenants or their duties run in [his or her] favor." (*Hand v. Farmers Ins. Exchange, supra,* 23 Cal.App.4th at p. 1857, fn. omitted.) Among the duties imposed by the implied covenant of good faith and fair dealing is the "duty not to withhold in bad faith payment of damages which the insured has become obligated by judgment to pay." (*Id.*)

The trial court here correctly concluded that Insurance Code section 11580 restricts Parks' recovery to the policy limits and it properly granted summary adjudication on this cause of action because Safeco paid the policy limits to Parks. The statute grants to a judgment creditor the right to bring an action against the insurer "on the policy and subject to its terms and limitations." (Ins. Code, § 11580, subd. (b)(2).) Those "terms and limitations" include the policy limits. (*Reliance Ins. Co. v. Superior Court* (2000) 84 Cal.App.4th 383, 386.)

Our colleagues in Division 3 of this district recently came to the same conclusion in *Archdale v. American Internat.l Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449. There, third party claimants sued an insurer in their capacities as both judgment creditors and assignees of the insured. The opinion focuses almost exclusively on the assigned claims. In a footnote, however, the court affirmed judgment for the insurer on the judgment creditor's claim because it determined that recovery under Insurance Code section 11580, "is restricted to the policy limits. [Citations.] As the record reflects that the policy limits were fully paid out prior to the filing of this action, the third cause of action fails . . . ." (*Id.* at p. 480, fn. 28.)

Hand v. Farmers Ins. Exchange, supra, 23 Cal.App.4th 1847, is not to the contrary. There, the court held that "an unreasonable, bad faith refusal to pay a judgment creditor claimant the entire amount of the judgment, after it becomes final, implicates some recognizable duty of good faith by the insurer under its policy, which was intended to benefit such a third party beneficiary." (*Id.,* at p. 1857.) Breach of that duty may be "actionable in tort." (*Id.* at p. 1860.) But *Hand* did not involve an excess judgment. The insurance policy at issue provided $500,000 in coverage per accident, and the judgment

was for $234,681 plus interest and costs. (*Id.* at pp. 1851-1852.) As a consequence, the court in *Hand,* did not decide whether a judgment creditor could recover an amount in excess of the policy limit, if the creditor's contract or tort damages exceeded that amount.

2. Damages Recoverable on Judgment Creditor's Claim.

Parks contends the trial court erred when it similarly restricted his recovery of damages on the first cause of action. He asks us to reverse the judgment on the first cause of action if we reverse the judgment on the third, so that he can recover the total amount owed. Because we affirm the judgment on the third cause of action, it is unnecessary for us to decide this issue.]]

Conclusion

In the bad faith action (Case No. B199364), we reverse the trial court's order dated May 29, 2007, granting Parks $426,208 in attorney's fees as cost of proof sanctions. In all other respects, the judgments in both actions are affirmed. The parties shall bear their own costs and attorney's fees on appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Denise deBellefeuille, Judge
Thomas P. Anderle, Judge

Superior Court County of Santa Barbara

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