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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LESLIE ABRAHAMS et al., Plaintiffs and Appellants, v. ALLSTATE INSURANCE COMPANY, Defendant and Respondent.	B244643 (Los Angeles County Super. Ct. No. NC056919)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ross M. Klein, Judge. Affirmed.

John K. Saur for Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith, Richard B. Wolf, Gerard A. Lafond, Raquel Vidal for Defendant and Respondent.

Appellants Leslie Abrahams and Hal Gosling sued Respondent Allstate Insurance Company (Allstate), contending Allstate owed a duty arising from an "accident" provision in their homeowners policy to defend them against a lawsuit brought by Scott Miller, who alleged, among others, causes of action for invasion of privacy, stalking, intentional infliction of emotional distress, and assault. The trial court granted Allstate summary judgment, finding no triable issues as to whether Miller's alleged damages triggered Allstate's duty to defend. We affirm.

Factual Background

1. The Policy

Allstate insured Abrahams and Gosling, husband and wife, under a homeowners policy that provided coverage for "damages which an insured person becomes legally obligated to pay because of bodily injury or property damage arising from an occurrence." "Occurrence" was defined in the policy as "an accident . . . resulting in bodily injury or property damage."

2. Miller's Lawsuit

Abrahams and Gosling undertake to protect the feral cat population at California State University, Long Beach (CSULB) by maintaining feeding stations around the campus. Miller, who lives adjacent to CSULB, frequently walks, jogs and rides his bicycle through the campus with his dog and young children. On August 18, 2010, Miller filed a lawsuit against Abrahams and Gosling seeking damages for stalking, invasion of privacy, assault, defamation, negligent infliction of emotional distress, and intentional infliction of emotional distress.

Miller alleged that in the summer of 2005, Abrahams stopped Miller at CSULB and demanded that he not walk his dog on the campus. Miller ignored the demand. In 2009, Abrahams confronted Miller and his son as they walked their dog on CSULB's campus. She berated Miller, told him she represented CSULB and he was not welcome on the campus with his dog, and threatened that the campus cat club was going to "take care of him." Over the next year, on multiple occasions Abrahams and Gosling drove their car toward Miller and his sons in a threatening manner as they walked or biked with

their dog on the CSULB campus. Abrahams and Gosling repeatedly followed and stared down Miller and his sons and videotaped Miller and his family at their home and at CSULB. Abrahams also charged up to Miller in a post office parking lot, berated Miller's wife and son as they exited a local Sears store, and contacted Miller's son's daycare provider to report that Miller was emotionally unstable, a danger to the community, and a threat to the daycare provider's cats.

3. Allstate's Denial of Coverage

On September 10, 2010, appellants reported to Allstate that they had been served with the Miller lawsuit, forwarded Allstate a copy of the complaint, and requested that Allstate defend them under their homeowners policy. Allstate informed appellants on October 6, 2010 that their alleged conduct was not covered by the policy, and declined to provide a defense against the Miller lawsuit. Appellants thereafter provided Allstate with a copy of Miller's interrogatory responses detailing his injuries and requested that Allstate reconsider its position, but Allstate again refused to provide a defense.

4. Coverage Litigation

On December 8, 2011, appellants sued Allstate for breach of contract and breach of the covenant of good faith and fair dealing. Appellants moved for summary adjudication on the issue of whether Allstate owed a duty to defend them against the Miller lawsuit, and in support filed declarations stating they never intended to harm or threaten Miller. Allstate also moved for summary judgment, arguing no duty to defend existed because the Miller lawsuit sought no damages arising out of an accident or any other covered occurrence.

The trial court granted Allstate's motion for summary judgment and denied appellants' motion. The court found that because appellants' alleged conduct was deliberate, no accident occurred that triggered Allstate's duty to defend. Appellants filed a timely appeal.

Discussion

1. Standard of Review

Summary judgment is proper if there is no question of material fact and the issue raised by the pleadings may be decided as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) To obtain summary judgment, a moving defendant must show one or more elements of each cause of action cannot be established or there is a complete defense to each cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the moving defendant has met its burden, the burden shifts to the plaintiff to show a triable issue of material fact exists as to each cause of action or asserted defense. (*Ibid*.)

We review the trial court's ruling on a motion for summary judgment de novo. (*Adams v. Explorer Ins. Co.* (2003) 107 Cal.App.4th 438, 445.) "The interpretation of an insurance policy as applied to undisputed facts is a question of law for the court, and this court is not bound by the trial court's construction." (*Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 802.)

2. Duty to Defend

Allstate's duty to defend is determined by the potential for insurance coverage under appellants' homeowners policy. "'"[A] liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity."'" "[T]he duty to defend is broader than the duty to indemnify." The duty "'may exist even where coverage is in doubt and ultimately does not develop.'" (*State Farm Gen. Ins. Co. v. Frake* (2011) 197 Cal.App.4th 568, 577.) To establish a duty to defend, "'"the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential.*"'" (*Ibid*.) "[T]he burden is on the insured to bring the claim within the basic scope of coverage, and . . . courts will not indulge in a forced construction of the policy's insuring clause to bring a claim within the policy's coverage." (*Collin v. American Empire Ins. Co., supra,* 21 Cal.App.4th at p. 803.)

The existence of a duty to defend is "determined by reference to the policy, the complaint, and *all* facts known to the insurer from any source" at the time the defense is tendered to the insurer. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th

287, 300; *State Farm Gen. Ins. Co. v. Frake, supra,* Cal.App.4th at p. 578.) The duty to defend does not depend on the labels given to the causes of action in the third party complaint; "the proper focus is on the facts alleged, rather than the theories for recovery." (*Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 592; *Atlantic Mutual Ins. Co. v. J. Lamb, Inc.* (2002) 100 Cal.App.4th 1017, 1034.)

3. The Evidence Established Allstate Had No Duty To Defend Against the Miller Lawsuit

Allstate established that Miller's claims did not arise out of an accident within the meaning of the policy insuring Abrahams and Gosling. The term "accident" in the coverage clause of a liability policy means "an unintentional, unexpected, chance occurrence." (*Fire Ins. Exchange v. Superior Court* (2010) 181 Cal.App.4th 388, 392.) "An accident occurs when the event leading to the injury was unintended by the insured and a matter of fortuity." (*Lyons v. Fire Ins. Exchange* (2008) 161 Cal.App.4th 880, 887.) "'In terms of fortuity and/or foreseeability, both "the *means* as well as the result must be unforeseen, involuntary, unexpected and unusual."'" (*Collin v. American Empire Ins. Co., supra,* 21 Cal.App.4th at p. 811.) "'[W]here damage is the direct and immediate result of an intended . . . event, there is no accident.'" (*State Farm Gen. Ins. Co. v. Frake, supra,* 197 Cal.App.4th at p. 580.)

Miller's original complaint detailed appellants' deliberate course of conduct to approach and engage Miller in their efforts to protect the feral cat population on CSULB's campus. This deliberate conduct directly caused Miller's alleged injury. Although appellants declare they did not intend to threaten, frighten, or intimidate Miller, their peaceable motivation did not transform their actions into accidental conduct. "Under California law, the term [accident] refers to the nature of the insured's conduct, not his state of mind." (*Collin v. American Empire Ins. Co., supra,* 21 Cal.App.4th at p. 804.) "[A] purposeful and intentional act remains purposeful and intentional regardless of the reason or motivation for the act. [Citation.]" (*Delgado v. Interinsurance Exchange of Automobile Club of Southern Cal.* (2009) 47 Cal.4th 302, 314.) Although it was undisputed appellants did not wish to harm Miller and the alleged result of their acts

surprised them, it is also undisputed the acts were deliberate. (See *State Farm Gen. Ins. Co. v. Frake, supra*, 197 Cal.App.4th at p. 579.)

Appellants repeatedly argue the trial court erred by considering only Miller's first amended complaint rather than his original complaint, as the original complaint contained a cause of action for negligent infliction of emotional distress that was absent from the first amended complaint. Their reasoning is essentially that because negligence equates to accidental conduct, Miller's cause of action for negligence would be covered under the accident provision in their homeowners policy. The argument is without merit. Setting aside appellants' false correlation between the tort of negligence and the contractual term accident, the facts Miller alleged in the original complaint were identical to those alleged in the first amended complaint. Those facts, not the theories Miller proffered, controlled his right to recovery and thus defined the scope of Allstate's duty. Therefore, the trial court properly considered only the facts Miller alleged, disregarding the theories he proffered.

Allstate having established the absence of any potential for coverage under appellants' homeowners policy, the burden shifted to appellants to raise a triable issue of material fact as to whether a potential for coverage existed.

4. Appellants Failed to Show a Triable Issue of Material Fact

Appellants argue an accident occurred within the meaning of their homeowners policy because some unexpected event, in addition to their conduct, must have caused Miller's alleged injury. This is so, they argue, because their conduct was objectively benign, and Miller, who was hypersensitive, misinterpreted this conduct and reacted in an unpredictable and irrational manner.[1] Appellants argue Miller's extreme response to their benign conduct was an unexpected occurrence that created an accident within the meaning of their policy. The argument is without merit.

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[1] Miller alleged in his original complaint that appellants knew he "was particularly vulnerable to emotional distress."

Deliberate conduct may result in an accident if "some additional, unexpected, independent, and unforeseen happening occurs that produces the damage." (*Delgado v. Interinsurance Exchange of Automobile Club of Southern Cal., supra,* 47 Cal.4th at p. 315; see also *State Farm Gen. Ins. Co. v. Frake*, *supra*, 197 Cal.App.4th at p. 580 ["an accident may exist 'when any aspect in the causal series of events leading to the injury or damage was unintended by the insured and a matter of fortuity.'"].) But when an insured performs a deliberate act, neither the insured's mistaken belief about circumstances surrounding the act nor the victim's unexpected response constitute additional occurrences. (See *Delgado v. Interinsurance Exchange of Automobile Club of Southern Cal., supra*, 47 Cal.4th at p. 312 [collecting cases]; *State Farm Gen. Ins. Co. v. Frake, supra,* 197 Cal.App.4th at p. 579.) For example, in *Lyons v. Fire Ins. Exchange*, *supra*, 161 Cal.App.4th 880 (*Lyons*), the insured was sued for assault, battery and false imprisonment after he forcibly restrained a woman in an alcove in an attempt to persuade her to perform a sexual act. (*Id.* at p. 883.) To establish his insurance company owed a duty to defend him against the victim's lawsuit, the insured argued his conduct was accidental in the sense that he mistakenly believed the woman would consent to his advances. (*Id.* at p. 888.) The court held the insured's "mental miscalculation of [the victim's] state of mind simply cannot transform his intentional conduct, done with full knowledge of all the objective facts, into an accident." (*Id.* at p. 889.)

Like the insured in *Lyons*, appellants essentially argue their mistaken belief about Miller's receptiveness to their deliberate behavior rendered their conduct accidental because they did not anticipate or intend its result. They are incorrect. Miller alleged appellants confronted, berated and threatened him on multiple occasions; drove their car toward him in a threatening manner several times; followed, stared at and videotaped him; and made a negative report about him to his son's daycare provider. Appellants might not have anticipated this conduct would injure Miller, but their miscalculation did not transform the conduct from deliberate to accidental.

5. The Trial Court Properly Sustained Allstate's Evidentiary Objections

Appellants argue the trial court erred in sustaining Allstate's evidentiary objections to appellants' declarations. We disagree.

In their declarations appellants described their benign motivations and lack of knowledge that Miller was emotionally hypersensitive. They also stated others would have perceived their behavior to be innocuous. For example, Gosling declared he and Abrahams "never did anything which was meant to be, or could be construed by a reasonable observer as being, in any way threatening, intimidating, menacing or harmful to Mr. Miller, or to his family, or to his dog." Abrahams declared: "I have never intended that any of my conduct, of any sort or at any time, would cause Mr. Miller to fear physical violence from me;" "[t]here were occasions when I talked with Mr. Miller, but my only motivation or intention on those occasions was to engage Mr. Miller in conversation . . . ." The trial court sustained most of Allstate's objections on the ground that the declarations were speculative and irrelevant.

We review a trial court's rulings on evidentiary objections for abuse of discretion. (*Miranda v. Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326, 1335.) "This is particularly so with respect to rulings that turn on the relevance of the proffered evidence." (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281.) "There must be a showing of a clear case of abuse and miscarriage of justice in order to warrant a reversal." (*Ibid.*)

As discussed above, appellants' motivations and Miller's overreaction to their "benign" conduct were irrelevant to the only pertinent question: Was appellants' conduct accidental. (See *Fire Ins. Exchange v. Superior Court, supra,* 181 Cal.App.4th at p. 392.) The trial court therefore properly sustained Allstate's evidentiary objections.

Disposition

The judgment is affirmed. Respondent is to recover its costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J.

MILLER, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.