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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

KENNETH TIERSTEIN et al., Plaintiffs and Appellants, v. MERCURY CASUALTY COMPANY, Defendant and Respondent.	B279488 (Los Angeles County Super. Ct. No. BC536394)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert L. Hess, Judge. Affirmed.

Child & Marton, Bradfrod T. Child; Benedon & Serlin, Douglas G. Benedon and Melinda W. Ebelhar, for Plaintiffs and Appellants Kenneth Tierstein and Phyllis Tierstein.

Hager & Dowling, Thomas J. Dowling and Christine W. Chambers, for Defendant and Respondent.

Kenneth and Phyllis Tierstein brought a bad faith action against their insurance company, Mercury Casualty Company (Mercury), for its failure to defend them against a cross-complaint brought by their neighbors. The trial court granted Mercury's motion for summary judgment on the ground it had no duty to defend under the terms of the policy. We affirm.

FACTS

The Insurance Policies

The Tiersteins purchased two polices from Mercury. Their homeowner's policy, effective from April 7, 2003 to April 7, 2004, provided a $300,000 policy limit per occurrence. The umbrella policy provided an additional $2 million policy limit and was effective from May 22, 2003 to May 22, 2004.

The homeowner's policy provided personal liability coverage and a defense "[i]f a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies . . . ." "Bodily injury" was defined as "personal injury arising out of one or more of the following offenses: (1) false arrest, detention or imprisonment, or malicious prosecution, [¶] (2) libel, slander or defamation of character, or [¶] (3) with respect to the premises insured in the Declarations, invasion of privacy, wrongful eviction or wrongful entry." "Occurrence" was defined as "an accident, which first happens or first commences during the policy period and which results in bodily injury or property damage which first happens or first commences during the policy period."

The umbrella policy likewise provided coverage "[i]f you are legally obligated to pay damages for a loss . . . ." Loss was defined as "an accident that results in personal injury or property

damage during the policy period. This includes injurious exposure to conditions." "Personal Injury" included false arrest, false imprisonment, wrongful detention, malicious prosecution or humiliation, libel, slander, defamation of character or invasion of rights of privacy.

The Underlying Action with the Neighbors

Ron and Marleena Reiser lived downhill from the Tiersteins. In November 2007, the Tiersteins sued the Reisers to establish a view easement. They alleged the Reisers had agreed to keep their trees and bushes trimmed to a certain level to maintain the Tiersteins' view, but failed to do so.

The Reisers cross-complained against the Tiersteins, alleging causes of action for slander of title, trespass, intrusion into private affairs, and capturing impressions of personal or familial activity.[1] In the third cause of action for slander of title, the Reisers alleged the Tiersteins told a number of named individuals that they had acquired a real interest in the Reisers' property such that the Reisers were obligated to maintain the Tiersteins' view. As a result, doubt was cast on the Reisers' title and impaired the salability of their property.

In the fourth cause of action for trespass, the Reisers alleged the Tiersteins trespassed on their property multiple times beginning in 2003 to trim their landscaping. The Reisers alleged in the fifth cause of action for intrusion into private affairs and the sixth cause of action for capturing impression of personal or familial activity, that the Tiersteins invaded Ronald Reiser's

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[1] The first two causes of action disputed the existence of a view easement. There is no contention Mercury owed a duty to defend these claims, and they are not relevant to the issues in this appeal.

right to privacy by taking unauthorized photographs of him engaged in the "private act" of trimming his landscaping in order to harass and slander him.

As to all the above causes of action, the Reisers further alleged the Tiersteins acted with malice, oppression, and fraud, which justified an award of punitive damages. The Reisers alleged multiple examples of the Tiersteins' malice, oppression, and fraud, including Kenneth Tierstein yelling at Ronald Reiser, "I'm not one of your bastard children." The Tiersteins also allegedly made "inconsiderate remarks to [the Reisers'] daughter regarding her first newly purchased vehicle, which upset [her] to the point of tears." In addition, the Tiersteins held loud parties and trespassed on the Reisers' property.

The Reisers further alleged Ronald Reiser was a retired detective for the Los Angeles Police Department who had been involved in several high profile investigations. As a result of his work, he had previously been the subject of surveillance and threatening phone calls at his home. He also had been confronted by an individual he helped send to prison. Thus, it was highly offensive and threatening for Ronald to have his photograph taken while he was trimming his trees.

The Tiersteins tendered the cross-complaint to Mercury and to AAA, their insurer after 2004. Mercury denied coverage on the grounds that the events occurred outside the policy periods, there had been no occurrences which were accidental in nature, and the invasion of privacy claim did not pertain to the premises insured in the declarations, namely, the Tiersteins' property rather than the Reisers'. AAA agreed to defend the Tiersteins and its assigned counsel represented them on the cross-complaint throughout the litigation. AAA, however,

disclaimed any coverage or duty to defend for any cross-claims alleged to have arisen prior to April 7, 2004, the effective date of its policy. The Tiersteins retained their own counsel to represent them in their suit against the Reisers for a view easement and as to any cross-claims falling outside of AAA's policy period.

After a lengthy bench trial, the trial court issued a statement of decision finding there was an enforceable agreement which required the landscaping at issue to be maintained so as to preserve the Tiersteins' view. The trial court further found the Tiersteins had trespassed on the Reisers' property, but that it caused no damage. Finally, the trial court found Ronald Reiser had no expectation of privacy when the Tiersteins took photographs of him trimming his trees. Judgment was entered for the Tiersteins and it was affirmed on appeal in February 2012. (*Tierstein v. Reiser* (Feb. 22, 2012, B223570) [nonpub. opn.].)

The Present Bad Faith Action Against Mercury

On February 14, 2014, the Tiersteins brought suit against Mercury for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief. The complaint alleged Mercury denied coverage and refused to defend against the cross-complaint brought by the Reisers in bad faith.

The parties filed cross-motions for summary judgment. The Tiersteins argued the Mercury policies contained ambiguous provisions regarding coverage for intentional torts and thus any ambiguity should be resolved in favor of coverage.

Mercury moved for summary judgment on the ground there was no potential for coverage and thus no duty to defend. It argued the Reisers' cross-complaint alleged only intentional conduct, which was not covered under Mercury's policies.

The policies expressly covered accidents only. Mercury further argued that even if it owed the Tiersteins a duty to defend, the Tiersteins were not damaged by its failure because AAA provided them with defense counsel. Finally, Mercury contended it acted in good faith, with no malice, oppression, or fraud.

The trial court granted Mercury's motion for summary judgment and denied the Tiersteins' motion. The court found none of the allegations created a potential for coverage. After they unsuccessfully moved for a new trial, the Tiersteins appealed.

DISCUSSION

The terms of the two Mercury policies expressly disclaim coverage for nonaccidental conduct. The Reisers' cross-complaint for slander, trespass, and invasion of privacy alleged only intentional conduct, not accidental conduct. Thus, Mercury had no duty to defend the Tiersteins against the Reisers' cross-complaint. The Tiersteins do not take issue with this. However, to avoid the express language of the policies, the Tiersteins urge us to find an ambiguity in them and interpret the policies in their favor. By doing so, we would have to ignore California decisional law in favor of the law from other jurisdictions. We decline to do so.

I. Standard of Review

We review de novo an order granting summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) The meaning of the policy is a legal question, which is also subject to de novo review. (*Jauregui v. Mid-Century Ins. Co.* (1991) 1 Cal.App.4th 1544, 1548.)

II. There Was No Duty to Defend Under the Terms of the Policy

A. An Insurer's Duty to Defend

"It has long been a fundamental rule of law that an insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. [Citations.] This duty . . . is separate from and broader than the insurer's duty to indemnify. [Citation.]" (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 19.) An insurer's duty to defend usually precedes its ultimate coverage determination. Thus, the duty " ' "may exist even where coverage is in doubt and ultimately does not develop." [Citation.]' [Citation.]" (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295 (*Montrose Chemical Corp.*).) The insurer makes its defense determination upon those facts known to it at the inception of a third party lawsuit. (*Ibid.*)

By contrast, " ' "where there is no possibility of coverage, there is no duty to defend . . . ." ' [Citation.] . . . [¶] . . . [W]here the extrinsic facts eliminate the potential for coverage, the insurer may decline to defend even when the bare allegations in the complaint suggest potential liability. [Citations.] This is because the duty to defend, although broad, is not unlimited; it is measured by the nature and kinds of risks covered by the policy. [Citations.]" (*Waller v. Truck Ins. Exchange, Inc., supra*, 11 Cal.4th at p. 19.) Thus, " 'the insurer need not defend if the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage.' [Citation.]" (*Montrose Chemical Corp., supra,* 6 Cal.4th at p. 300, italics omitted.)

"[T]he determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy. Facts extrinsic to the complaint give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy. [Citations.]" (*Waller v. Truck Ins. Exchange, Inc., supra*, 11 Cal.4th at p. 19.)

B. Analysis

A comparison of the allegations with the terms of the policy show no possibility of coverage. Under the Tiersteins' homeowner's policy, insurance coverage and a defense is provided "[i]f a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence . . . ." An "occurrence" is defined as an accident which results in bodily injury or property damage. The umbrella policy likewise provides coverage for a "loss," which is defined as an accident which results in personal injury or property damage. Both policies thus provide coverage and a defense to the Tiersteins only if the Reisers' damages were caused by an accident. By its terms, intentional conduct is not covered.

The Reisers' cross-complaint, however, only alleged intentional conduct. Specifically, the Reisers alleged the Tiersteins "willfully, wrongfully, without justification, and without privilege spoke . . . words concerning [the Reisers'] property . . ." which resulted in a slander to their title. The Reisers further alleged the Tiersteins' trespass on to their property was "willful." As to the invasion of privacy claims, the Reisers alleged the Tiersteins took photographs of Ronal Reiser without authorization.

The conduct complained of by the Reisers were not accidents, but intentional acts. The Tiersteins do not dispute this. Nor could they. In its plain and ordinary sense, the term "accident" is defined as " 'occurring unexpectedly or by chance [or] happening without intent or through carelessness." (*St. Paul Fire & Marine Ins. Co. v. Superior Court* (1984) 161 Cal.App.3d 1199, 1202, quoting Webster's Ninth New Collegiate Dict. (1983) p. 49.) "In the context of liability insurance, an accident is ' "an unexpected, unforeseen, or undesigned happening or consequence from either a known or unknown cause." ' " (*Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 308 (*Delgado*).) "[A]n injury-producing event is not an 'accident' within the policy's coverage language when all of the acts, the manner in which they were done, and the objective accomplished occurred as intended by the actor." (*Id.* at pp. 311–312.) There was nothing unexpected, unforeseen, or undesigned about the Tiersteins' statements, trespass, or photography, as alleged in the cross-complaint.

III. There is No Ambiguity in the Terms of Coverage

To avoid the consequences of the "accident" requirement, the Tiersteins argue the policy terms create an ambiguity which should be interpreted in favor of coverage. (*Montrose Chemical Corp.*, *supra,* 6 Cal.4th. at p. 299.) The Tiersteins' theory is this: On the one hand, the policies expressly cover intentional torts, including trespass, invasion of privacy, and slander, which are all causes of action alleged in the Reisers' cross-complaint. On the other hand, the policies only cover accidents. The Tiersteins contend an intentional tort may never be accidental, so coverage for these claims is illusory. We disagree.

The Tiersteins' argument rests on the false assumption that intentional torts may never be accidental. This assumption has been disapproved by California courts. (*Uhrich v. State Farm Fire & Casualty Co.* (2003) 109 Cal.App.4th 598 (*Uhrich*), *Lyons v. Fire Ins. Exchange* (2008) 161 Cal.App.4th 880 (*Lyons*), and *Gonzalez v. Fire Ins. Exchange* (2015) 234 Cal.App.4th 1220 (*Gonzalez*).)

The court in *Uhrich, supra,* 109 Cal.App.4th 598, addressed precisely the issue raised by the Tiersteins in their appeal, interpreting substantially identical policy language. There, the claimant filed an action against the insured for malpractice, malicious prosecution, stalking, assault, trespass, conversion, defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, and invasion of privacy. (*Id.* at p. 606.) The claimant alleged the insured held a vendetta against her and conspired to frame the claimant for the theft of his files. (*Ibid.*) The insured tendered his claim to his two insurance companies, both of which denied coverage. The parties settled and the insured assigned his bad faith claims against the insurance companies to the claimant. The insurers successfully moved for summary judgment.

The insured's umbrella policy provided coverage for a "loss" which was defined as an " 'accident that results in personal injury.' " (*Uhrich, supra,* 109 Cal.App.4th at p. 609.) The claimant argued that the policy defined "personal injury" as assault, wrongful detention, and defamation, which were intentional torts. As a result, coverage would be illusory for those claims because they could never be caused by an accident. (*Id.* at p. 611.)

The court disagreed, reasoning that the torts may be committed via negligent, not intentional, conduct. For example, "an insured could be liable for defamation for negligently publishing a defamatory statement. (*Uhrich, supra,* 109 Cal.App.4th at p. 610.) The claimant cannot assume all assaults, defamations, and wrongful detention are covered "simply because those labels are included in the policy definition of personal injury." (*Id.* at p. 611.) The allegations showed there was no possibility of coverage—the insured's conduct was intentional and he intended to inflict harm. (*Ibid.*)

Similarly, the court in *Lyons, supra,* 161 Cal.App.4th at page 888, reasoned that false imprisonment, an intentional tort involving intentional acts, can arise through negligence. The court provided two examples which illustrate negligent false imprisonment. One, a shopkeeper intentionally locks his storage vault, but forgets he had sent an employee inside to take inventory. In the other, a store employee honestly but mistakenly detains a customer for shoplifting. "Hence, even though conduct is intentional and results in the restraint and control of the movements of another person, false imprisonment can be in some circumstances accidental." (*Ibid.*) The *Lyons* court held an intentional tort may be accidental if based on a mistake as to objective facts. (*Ibid.*; see also *Gonzalez, supra,* 234 Cal.App.4th at p. 1235 [following *Lyons*]; *Mullen v. Glens Falls Ins. Co.* (1977) 73 Cal.App.3d 163, 171 ["an insured might be able to show that in physically defending himself, even if he exceeded the reasonable bounds of self-defense, he did not commit willful and intended injury, but engaged only in nonintentional tortious conduct."]; *Grange Insurance Assoc. v. Lintott* (N.D. Cal. 2015) 77 F.Supp.3d 926, 936 (*Grange*) ["the notion that an intentional

tort can occur by accident is not implausible, and California courts have determined as much."].)

Given the analysis in *Uhrich* and *Lyons* involving substantially similar policy language, coverage was not illusory under Mercury's policies merely because they required intentional torts to be accidental. *Uhrich* demonstrates there are situations in which an intentional tort may be accidental or nonintentional. This is not one of those situations.

We are not persuaded by the Tiersteins' argument that *Uhrich*, *Gonzalez, Lyons,* and *Grange* were wrongly decided. The Tiersteins rely on *Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 595–596 (*Quan*) to argue the term "accident" is not synonymous with "negligence." The Tiersteins interpret this to mean that a negligent act may never be accidental for insurance purposes. However, *Quan* does not stand for this proposition.

In Quan, the court found a liability insurer had no duty to defend against claims of negligence and negligent infliction of emotional distress arising from the insured's alleged rape and assault of the claimant. The insured argued he might be found to have mistakenly believed the claimant had consented to intercourse, in which case her injuries would arise from an "accident." The court rejected that contention as well as the " 'misapprehension that all claims for negligence must at least potentially come within the policy and therefore give rise to a duty to defend.' " (*Quan, supra,* 67 Cal.4th at p. 596.)

The court reasoned, "the insured's conduct alleged to have given rise to claimant's injuries is necessarily nonaccidental, not because any 'harm' was intended, but simply because the conduct could not be engaged in by 'accident.' " (*Quan, supra,* 67 Cal.4th

at p. 596.) Thus, the *Quan* court's statement that the terms accident and negligence are not synonymous related to the insured's attempt to seek coverage for the negligence cause of actions against him even though they were based on nonaccidental conduct. *Quan* does not stand for the proposition that an intentional tort committed negligently may never be a covered accident. *Quan* does not override the analysis in *Uhrich*, *Gonzalez, Lyons,* and *Grange.*[2]

Because we find the conduct alleged was not accidental as required for coverage under the policies' terms, we need not address the other ways in which coverage and a duty to defend were not available to the Tiersteins. (*Charpentier v. Von Geldern* (1987) 191 Cal.App.3d 101, 107.)

DISPOSITION

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

BIGELOW, P.J.

We concur:

RUBIN, J. GRIMES, J.

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[2] At oral argument, the Tiersteins cited to *Delgado, supra*, 47 Cal.4th 302, for the proposition that it is not an accident when a person's conduct is intentional. We have no quarrel with this holding, which, like in *Quan*, does not override or address the negligence analysis discussed in the cases above.