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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

ZHONG LIN WEI et al., Plaintiffs and Appellants, v. STEWART TITLE GUARANTY CO., Defendant and Respondent.	B278636 (Los Angeles County Super. Ct. No. EC062640)

APPEAL from a judgment of the Superior Court of Los Angeles County. William D. Stewart, Judge. Affirmed.

Shun C. Chen for Plaintiffs and Appellants.

Garrett & Tully, Ryan C. Squire and Jennifer R. Slater for Defendant and Respondent.

Zhong Lin Wei and Min Liang (the Weis) appeal from a judgment of nonsuit on their bad faith action against Stewart Title Guaranty Co. (Stewart Title). They contend both procedural and substantive errors warrant reversal of the nonsuit. We affirm the judgment.

FACTS

The Weis purchased a property in the City of Alhambra in 2003, which consisted of two houses on a lot. The property was oriented to the west, with the front house facing the street, and wooden fences separated the neighboring properties to the north and south. The back house was located at the rear or eastern end of the property with a one-car drive-through garage located next to it on the southeast side of the lot. The garage exited to an alley behind the property. The Weis purchased title insurance from Stewart Title when they bought the property.

The Underlying Suit

In July 2008, Tony and King T. Chan, the Weis' neighbors to the south, brought suit against them, alleging the Weis' garage and boundary fence encroached onto the Chans' property. The Weis tendered the claim to Stewart Title, which provided a defense against the quiet title action.

A survey of the properties commissioned by the Chans revealed the Weis' garage and fence encroached onto the Chans' property by approximately 16 to 18 inches. We refer to this strip of land as the southern encroachment. In addition, the survey revealed a fence separating the Weis' property and the property to the north sat approximately six inches inside the Weis' boundary line. We refer to this as the northern encroachment. A subsequent survey commissioned by the Weis confirmed their encroachment to the south and the encroachment by the northern neighbors. The Chans subsequently removed the wooden fence separating the two properties and installed a new cinderblock

wall which abutted the Weis' garage. They were ordered to stop construction pending the litigation.

The Weis filed a cross-complaint for an easement over the Chans' property to allow their garage to remain in place and allow them to use the southern encroachment. According to the Weis, the new cinderblock wall prevented them from opening the door to their car after driving through the garage because there was no longer 16 to 18 inches of space between the garage and the new wall.

After a bench trial, the court issued a judgment in January 2012. The trial court ruled in favor of the Chans, finding the garage encroached onto the Chans' property by approximately 1.4 feet. The court allowed the Chans to complete construction of the cinderblock wall which rested on the true property line.
The court, however, allowed the Weis' garage to remain in place until it was demolished or otherwise removed or condemned.
The court further ordered, "If a new garage is ever to be built, it shall be constructed entirely on Defendants' property with no encroachment onto Plaintiffs' property, consistent with governing law and pursuant to appropriate governmental approvals."
The Weis appealed the underlying action. On appeal, the judgment was affirmed.

Stewart Title's Policy and Coverage

Stewart Title issued a homeowner's plus policy of title insurance to the Weis, which insured "against actual loss, including any costs, attorneys' fees and expenses provided under this Policy, resulting from the Covered Risks set forth below . . . ."
In pertinent part, the covered risks included the following:

"1. Someone else owns an interest in Your Title.

[¶] . . . [¶]

4. Someone else has an easement on the Land.

5. Someone else has a right to limit Your use of the Land.
6. Your Title is defective.
[¶] . . . [¶]
18. You are forced to remove Your existing structures because they encroach onto Your neighbor's land. If the encroaching structures are boundary walls or fences, the amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.
[¶] . . . [¶]
21. Your existing structures are damaged because of the exercise of a right to maintain or use any easement affecting the Land, even if the easement is excepted in Schedule B.
[¶] . . . [¶]
26. Your Title is unmarketable, which allows someone else to refuse to perform a contract to purchase the Land, lease it or make a Mortgage loan on it.
[¶] . . . [¶]
28. The residence with the address shown in Schedule A is not located on the Land at the Policy date."

"Land" was defined under the policy as "the land or condominium unit described in paragraph 3 of Schedule A and any improvements on the Land which are real property." Paragraph 3 of Schedule A specified the land constituted "[t]he North 40 feet of Lot(s) 6 in Block 2 of Ramona Park Tract, in the City of Alhambra, County of Los Angeles, State of California, as per map recorded in Book 11 Page(s) 114 of Maps, in the office of the County Recorder of said County." The title policy specifically

excluded from coverage any loss resulting from "the lack of a right" to land outside that delineated property.

On October 3, 2011, Stewart Title identified covered risk numbers 1, 4, 5, and 18 as potentially applying to the defense of the Chans' claim. It later clarified that it believed only covered risk number 18 applied. As a result, if the court denied the cross-complaint seeking an easement, Stewart Title would not pay for any loss or damage unless the court ordered the garage removed. Its position was that the maximum coverage would be $2,500 ($5,000 for the forced removal of a fence under covered risk number 18 less a $2,500 deductible).

After the judgment was issued in the underlying action, Stewart Title informed the Weis that it was terminating coverage since the Chans' complaint was resolved and the only remaining issue was the Weis' intention to appeal the trial court's denial of an easement. It further remitted $5,000 for loss of the fence, waiving the $2,500 deductible.

The Present Bad Faith Action

The Weis brought the present bad faith action against Stewart Title on June 9, 2014. They alleged, among other things, that Stewart Title breached its duty to defend by refusing to pay for the cost of appealing the underlying quiet title action. They also alleged Stewart Title was required to pay them for the loss of their use of the southern encroachment and it failed to fulfill its obligation to pursue the recovery of the northern encroachment. Stewart Title allegedly ignored covered risks in the policy to narrowly and unreasonably construe its coverage obligations.

At trial, Zhong Lin Wei testified he and his wife purchased the property in Alhambra. At the time, he had a "rough idea" of its size: 40 feet, 10 inches wide in the front and 42 feet, 8 inches

wide in the back. Zhong[1] did not speak much English, but understood the title insurance was purchased for peace of mind to protect him and his property. He testified the Chans approached him about rebuilding the fence separating the properties. He agreed, but the Chans' new wall extended about eight inches past the old fence and they damaged his home during their removal of the fence. He further testified the Chans chopped down a tree that had been located on the Weis' side of the fence when they erected the new wall. Zhong called the police and the Chans were ordered to stop construction of the wall during the pendency of the litigation.

He explained that he used to be able to drive through the garage and park in the area between the front and back house, but the new wall prevented him from opening his car door due to its placement. The new wall also prevented him from performing maintenance on one side of his house or garage because it abutted both structures and there was no room for a ladder or stepstool. According to Zhong, the new wall was right under the edge of his roof.

Zhong admitted that when he purchased the property, the Chans advised him they intended to build a new wall that "would be towards my side." Zhong measured the lot after construction on the wall began and discovered the width of the lot to be 39 feet and 4 inches. He estimated he lost approximately 100–200 square feet of lot space as a result of the new wall. Zhong further testified he wanted Stewart Title to address the fact that his lot was less than 40 feet after the wall was constructed. Zhong admitted he did not try to sell the property after judgment was issued in the underlying case. He also admitted he never asked

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[1] For ease of reference, we will refer to Mr. Wei by his first name with no disrespect intended.

the northern neighbor to move the fence, but expected Stewart Title to handle it. He believed the $5,000 check from Stewart Title was to pay for damage to the wall.

Emily Fox handled the Weis' claim for Stewart Title. She testified during the Weis' case in chief. Fox testified she received a letter from the Weis' first lawyer in October 2008 which asked Stewart Title to defend the Weis against the Chans' lawsuit. Fox conceded this was sufficient to initiate a claim. She testified that she initiated an investigation and commissioned an inspection report, which concluded that as to the northern encroachment, the "wood fence is on AP." She understood that to mean the wood fence to the north was on adjacent property or the northern neighbor's property, not the Weis'. Fox further testified she believed the claim was covered under covered risk 18, which applied to the forced removal of fences due to an encroachment. She did not believe any of the other covered risks applied because there was no indication the Chans alleged they had an interest in the Weis' property.

Stewart Title moved for nonsuit at the end of the Weis' case in chief. The trial court found the Weis failed to show any performance on their part or a breach by Stewart Title. In particular, it found no claim was made as to the northern encroachment, only a claim for defense of the Chans' lawsuit over the southern encroachment. In any event, Stewart Title's inspection report revealed the fence was on the northern neighbor's property. The trial court offered the Weis the opportunity to reopen to try to prove their claim. The Weis argued coverage was available under covered risks 1, 4, 5, 6, 18, and 26, but conceded they had no additional evidence to offer. The trial court granted nonsuit and released the jury. Judgment was entered in favor of Stewart Title. This appeal followed.

DISCUSSION

The Weis contend nonsuit was improperly granted on both procedural and substantive grounds, none of which are meritorious. We find the trial court properly granted the motion for nonsuit because the Weis failed to present evidence of the essential elements of their claims.

I. Standard of Review

Code of Civil Procedure section 581c, subdivision (a), permits a defendant to move for nonsuit after the plaintiff has completed its opening statement, or presented its evidence in a jury trial. (*R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 340.) " 'A trial court must not grant a motion for nonsuit if the evidence presented by the plaintiff would support a jury verdict in the plaintiff's favor.' The trial court may not weigh the evidence or consider the credibility of witnesses, and must accept the evidence most favorable to the plaintiff, disregard conflicting evidence, and indulge every legitimate inference which may be drawn from the evidence in the plaintiff's favor." (*Marvin v. Adams* (1990) 224 Cal.App.3d 956, 960.)

In response to a motion for nonsuit, a plaintiff has the right, upon request, to reopen his case to remedy defects raised by the motion. (*Eatwell v. Beck* (1953) 41 Cal.2d 128, 131–132; *S. C. Anderson, Inc. v. Bank of America* (1994) 24 Cal.App.4th 529, 538.) However, the right to present further evidence is waived unless the plaintiff also makes an offer of proof, describing the evidence and explaining how it would cure the deficiencies. (*Alpert v. Villa Romano Homeowners Assn.* (2000) 81 Cal.App.4th 1320, 1337.)

" 'In an appeal from a judgment of nonsuit, the reviewing court is guided by the . . . rule requiring evaluation of the evidence in the light most favorable to the plaintiff.' " (*Marvin v.*

Adams, supra, 224 Cal.App.3d at p. 960, quoting from *Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838 (*Carson*).) Accordingly, our review of a nonsuit motion is de novo. (*Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1060.) A judgment of nonsuit must not be reversed if plaintiff's proof raises nothing more than speculation, suspicion, or conjecture. (*Carson*, *supra,* 36 Cal.3d at p. 839.)

II. Interpretation of Insurance Contracts

The usual rules of contract interpretation apply to insurance policies. (*George v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 1112, 1120.) It is well settled that the words in an insurance policy are to be interpreted according to the plain meaning which a layman, not an attorney or insurance expert, would ordinarily attach to the words. (*Ibid.*) Only if the policy provisions are susceptible to alternative readings are doubts in interpretation resolved against the insurer. (*Paramount Properties Co. v. Transamerica Title Ins. Co.* (1970) 1 Cal.3d 562, 569 (*Paramount Properties*).)

Although insurance contract provisions relating to exclusions or exceptions to the performance of the basic, underlying obligations are construed strictly against the insurer and liberally in favor of the insured, courts may not put a strained or unnatural construction on the terms of a policy to manufacture an uncertainty or ambiguity where none reasonably exists. (*Paramount Properties, supra*, 1 Cal.3d at p. 569*; Callison v. Continental Casualty Co.* (1963) 221 Cal.App.2d 363, 366, 369–370.) "It is not the role of the courts effectively to make new agreements for the parties by creating coverage where none was intended by the clear and explicit language of the contract." (*Manneck v. Lawyers Title Ins. Corp*. (1994) 28 Cal.App.4th 1294, 1304 (*Manneck*).)

III. The Motion for Nonsuit Was Not Procedurally Defective

The Weis contend the nonsuit motion was procedurally defective because: the trial court granted it on its own motion; Stewart Title failed to specify the grounds upon which it should be granted; and the trial court employed the wrong standard when granting the motion. The record belies these claims.

We recognize that Stewart Title's motion for nonsuit was not formally made or in writing. However, the record clearly demonstrates that trial counsel for Stewart Title orally moved for nonsuit after the Weis rested. Thus, it is not the case that the trial court granted its own motion.

Neither does the record indicate that the grounds for the motion were unstated. Here, the Weis rely on *John Norton Farms v. Todagco* (1981) 124 Cal.App.3d 149, 161 (*John Norton Farms*) to support their claim. The *John Norton Farms* court held that "[i]t is . . . a fundamental rule that the motion [for nonsuit] should state the precise grounds on which it is made, with the defects in the plaintiff's case clearly and particularly indicated. This gives the plaintiff an opportunity to cure the defect by introducing additional evidence." (*Id.* at p. 161.) " '[As] a corollary to the rule just stated . . . only the grounds specified should be considered by the lower court in its ruling, or by the appellate court on review. If these are insufficient, a nonsuit is improper, even though other good grounds exist, for the plaintiff's attention was not called to them and he had no opportunity to eliminate them[.]' " (*Ibid.*, quoting 4 Witkin, Cal. Procedure (2d ed. 1971) § 361, p. 3159.)

Here, though counsel for Stewart Title did not initially recite a list of the bases for its nonsuit motion at the instant it was made, the grounds for its motion became apparent during the colloquy that ensued between the court and all counsel.

The record shows that before Stuart Title's counsel was able to explain the reason for his motion, the court interrupted him and began its own questioning of the Weis' attorney regarding the defects in his case. Stewart Title's counsel was only able to interject a few times during the heated exchange between the Weis' trial counsel and the court. However, counsel interjected to clarify and agree with the trial court's view of the defects in the Weis' case. The motion for nonsuit in this case may not serve as a model for all others, but it nonetheless complied with what the law required: the Weis were sufficiently apprised of the defects in their case and had the opportunity to remedy them.

Further, any error in Stewart Title's lack of opportunity to independently offer its own reasons for the motion was harmless. The court offered trial counsel for the Weis multiple opportunities to cure the defects by introducing additional evidence. The Weis' trial counsel conceded he had no additional evidence to offer. (See *Wilson v. Century 21 Great Western Realty* (1993) 15 Cal.App.4th 298, 306 [a grant of nonsuit on a ground not raised by defendant is harmless error where the motion came at the end of the presentation of all the evidence and there was no indication plaintiff had any additional evidence].)

Finally, the Weis contend the trial court used the wrong standard to evaluate the nonsuit motion because it disregarded their evidence and adopted Stewart Title's evidence. This is plainly wrong. The record shows that Stewart Title had presented no evidence when the motion was made. In fact, the Weis had just rested and Stewart Title had yet to present its defense. There simply was no evidence presented by Stewart Title for the court to consider.

IV. Nonsuit Was Properly Granted

The Weis next contend it was error to grant nonsuit because they produced sufficient evidence to prove the elements of their claims for breach of contract and breach of the implied covenant of good faith and fair dealing. The Weis argue that Stewart Title breached its contract in three ways: (1) Stewart Title failed to indemnify the Weis for the loss of use of the southern encroachment; (2) Stewart Title failed to provide a defense to the Chans' lawsuit, including paying for an appeal of the underlying case and for pre-tender legal fees; and (3) Stewart Title declined to pursue the northern encroachment on their behalf.

We discuss each claim in turn, and find the Weis failed to demonstrate by admissible evidence that any of this conduct qualified as a breach of the terms of their title policy or the covenant of good faith and fair dealing.

A. There Was No Breach of a Duty to Indemnify Resulting from the Southern Encroachment

Turning to the first contention, the Weis argue that Stewart Title breached its contract by failing to pay the actual loss they suffered from the southern encroachment which prevented them from being able to use the garage in the same manner as they had before the cinder block wall was built. Specifically, they are now unable to drive through the garage and park in the area between the houses because there is not enough room for them to open their car door. We find this contention unavailing. Whatever loss of use they may have suffered was not reimbursable because the Weiss presented no evidence that the policy covered the loss of land they never owned.

The title policy in this case excludes from coverage any loss resulting from "the lack of a right" to land outside "[t]he North 40 feet of Lot(s) 6 in Block 2 of Ramona Park Tract, in the City of

Alhambra, County of Los Angeles, State of California, as per map recorded in Book 11 Page(s) 114 of Maps, in the office of the County Recorder of said County."[2] In short, the plain language of the policy excludes from coverage land which is not owned by the Weis. There is no dispute that the Weis do not own the 1.4-foot-wide strip of land comprising the southern encroachment; that issue was decided in the underlying suit and is not at issue in this case.

In an effort to circumvent this unambiguous exclusion, the Weis argue the following covered risk provisions of the title policy apply to their claim: 1 (which applies when someone else owns an interest in the insured's title); 5 (which applies when someone else has a right to limit the use of the insured's land); 6 (which applies when title is defective); 18 (which applies when the policy holder is forced to remove a structure because it encroaches on a neighbor's property); 21 (which applies when the policy holder's structures are damaged because of an easement); 26 (which applies when the insured's title is unmarketable); and 28 (which applies when the address on the policy is not located on the land described in the policy).

We now consider each of the covered risks listed by the Weis and conclude that, with the exception of covered risk number 18, there is no evidence they apply. This is because each

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[2] The Weis take issue with the definition of "Land" under the policy, contending it is ambiguous and must be interpreted in their favor. "Land" is defined under the policy as "the land or condominium unit described in paragraph 3 of Schedule A and any improvements on the Land which are real property." We find no ambiguity in this definition. Even if we were to accept the Weis' contention that it is ambiguous, the Weis provide no explanation how a different definition of Land could include property they did not purchase.

of the other covered risks depend upon the Weis being the rightful title owners of the portion of the property at issue, and, as we have already pointed out, this is not the case.

We begin with an examination of covered risk number 18, which we agree applies to provide coverage in this case. There is no dispute, however, that Stewart Title has already paid the maximum dollar limit of policy liability on this covered risk when it sent the Weis a check for $5,000. We reject the Weis' contention that Stewart Title must pay anything more than what it has already paid.

Contrary to the Weis' assertion, Stewart Title is not obligated to indemnify them for the future removal of the garage. The policy here covers "actual loss," not potential or speculative loss. At trial, there was ample evidence the garage remained on the property. Indeed, the Weis entered into evidence numerous photographs of the garage, which show it is intact and still standing. Additionally, the trial court in the underlying action did not order the garage removed. Stewart Title is not liable to pay for the potential removal of the garage under covered risk number 18.

We next consider covered risk numbers 1, 6, and 26, which relate to problems of title, and conclude none of these apply to the Weis' claim for indemnity. Here, *Manneck, supra,* 28 Cal.App.4th 1294, is instructive. In that case, the plaintiffs purchased title insurance when they bought their home. They decided to rebuild a fence on their property, and engaged a surveyor to determine the lot lines of the property. (*Id*. at pp. 1297–1298.) The surveyor determined that their property ended, essentially, at their back door. As a result, their backyard, including a deck and pool, was located on adjoining property owned by a development company. The plaintiffs contacted their title insurance company, which negotiated with the development company in an attempt to

resolve the issue. The title insurer, however, advised the plaintiffs that a coverage event had not yet occurred because they had not been forced to remove any of the improvements. (*Ibid.*)

Thereafter, the plaintiffs filed a declaratory relief action against the title insurance company, alleging an impairment of title, and demanding that the title insurer immediately sue the development company regarding the improvements. The plaintiffs were ultimately allowed to retain their backyard and its improvements pursuant to a stipulated judgment between the title insurance company (on behalf of the plaintiffs) and the owner of the adjacent land. (*Manneck, supra,* 28 Cal.App.4th at p. 1298.)

Although the underlying issue was resolved in their favor, the plaintiffs argued the title insurer acted in bad faith by failing to sue immediately, even before they had been forced to remove the deck and pool. After a bench trial, the trial court found no ambiguity in the contract and no bad faith on behalf of the title insurer. (*Manneck, supra,* 28 Cal.App.4th at p. 1300.) The Court of Appeal affirmed, reasoning, "Plaintiffs' focus on language in the insurance policy pertaining to circumstances where 'anyone claims a right against [the] insured title' is irrelevant to the factual situation here. There never was any actual or even potential challenge to plaintiffs' title. Plaintiffs' possession of title to the property described by lot and tract in their deed and referred to in their title insurance policy was never at issue. Indeed, the problem is that plaintiffs desired to obtain a greater amount of land than they purchased and which had been accurately described in their deed, albeit to satisfy their reasonable expectations at the time of purchase. Plaintiffs thus have confused title with the physical condition or value of the property they purchased. [Citation.]" (*Id.* at p. 1302.) In short, the *Manneck* court rejected the plaintiffs' argument that there

was a problem with their title simply because their property lines were not where they thought they would be.

We likewise reject the Weis' argument that a problem with their title arose from the southern encroachment such that covered risk numbers 1, 6, or 26 apply. There was no evidence adduced at trial that anyone owned an interest in their title (covered risk number 1) or that their title was defective (covered risk number 6) or unmarketable (covered risk number 26). As in *Manneck,* the Weis' possession of title to the property "described by lot and tract" in their title insurance policy was never at issue.[3] (*Manneck, supra,* 28 Cal.App.4th at p. 1302.) Under the holding in *Manneck,* there is thus no indemnity obligation for problems with their title under covered risk numbers 1, 6, or 26 simply due to incorrect boundary lines.

We also reject the Weis' contention that covered risk 5, which provides coverage when someone else has a right to limit the Weis' use of their land, applies to this case. There is no dispute the Weis have full use of the land they purchased. What they no longer have is full use of the southern encroachment,

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[3] The Weis rely on the policy's description of their land as "[t]he North 40 feet of Lot(s) 6 in Block 2 of Ramona Park Tract" to argue that Stewart Tile is obligated to provide them with at least 40 feet of land. Zhong testified at trial that he measured the lot after the Chans' wall was put up and indicated he is left with land that is 39 feet and four inches wide. According to Zhong, Stewart Title is obligated to remedy that eight-inch deficiency. It is unclear whether this measurement includes the approximately six inches of the northern encroachment. In any event, the Weis have identified no coverage under the policy, as we discuss exhaustively in this opinion, which includes an affirmative obligation to purchase, seek an easement for, or otherwise remedy an encroachment situation such as this.

which, again, is not their property. The terms of covered risk number 5 apply only to another person's wrongful use of the Weis' land, not to the Weis' use of their neighbor's land.

The same defect underlies the application of covered risk number 21, which applies to damage to existing structures "because of the exercise of a right to maintain or use any easement affecting the Land." We state this again: the terms of the policy, including covered risk number 21, only apply to an easement affecting the Weis' land, not to an easement they contend exists on their neighbor's land. The Weis presented no evidence at trial of an easement affecting their property, much less any damage resulting therefrom. The only easement at issue was the one they unsuccessfully sought to place on the Chans' property.

Finally, there is no merit to the argument that covered risk number 28 applies. Covered risk number 28 provides coverage under the policy when "the residence with the address shown in Schedule A is not located on the Land at the Policy date." The Weis contend "residence" must include the garage, a small slice of which is not located on their property, but on the Chans'. We reject this tortured reading of covered risk number 28. There was no evidence that the Weis' address no longer correlated with the land simply because a small portion of the garage was located on the Chans' land.

B. There Was No Breach of a Duty to Defend

The Weis next contend Stewart Title's duty to defend included the obligation to pay for the appeal in the underlying case as well as the attorney fees they incurred before tendering their claim in the underlying case. According to the Weis, Stewart Title's failure to pay these fees constituted a breach of its duty to defend. Not so.

As to the pre-tender fees, the policy specifically states Stewart Title will only pay those fees and costs it approves in advance. The Weis presented no evidence that the pre-tender fees were approved by Stewart Title. Instead, they contend the bulk of the contested fees were incurred after the date they tendered the claim. It is irrelevant when the fees were incurred. The policy requires that the fees be approved by Stewart Title, which they were not. Under the terms of the policy, Stewart Title was not obligated to pay any fees it did not approve in advance, whether they were incurred pre-tender or afterwards.

To rebut this conclusion, the Weis rely on *Fiorito v. Superior Court* (1990) 226 Cal.App.3d 433 (*Fiorito*). Their reliance is misplaced. In *Fiorito,* the court found the plaintiffs alleged sufficient facts to overcome a demurrer, including that the policy did not "clearly or unambiguously" exclude the payment of pre-tender fees and that the insurer never apprised them that they would be liable for pre-tender attorney fees. (*Id.* at pp. 437–438.) *Fiorito* does not assist the Weis because the policy here clearly and unambiguously requires approval by Stewart Title for repayment of attorney fees and costs.[4]

The Weis further contend Stewart Title was obligated to pay for their appeal in the underlying case. The policy, however, ensures only that Stewart Title "will defend Your Title in any legal action only to that part of the action which is based on a Covered risk and which is not excepted or excluded from coverage

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[4] In a related argument, the Weis contend the trial court erred in granting Stewart Title's motion in limine number 1, which excluded evidence of attorney fees incurred before the date Stewart Title received the tender. We see no error. The trial court properly excluded evidence of attorney fees incurred by the Weis, but not approved by Stewart Title. It advised trial counsel it would allow evidence of approval of pre-tender fees.

in this Policy." Stewart Title provided a defense to the Weis under covered risk number 18, which applied to the forced removal of a structure due to an encroachment. The trial court determined the garage did not have to be removed and the Chans did not appeal that ruling. The Chans' lawsuit against the Weis was concluded, as was Stewart Title's duty to defend. In other words, Stewart Title's duty to defend did not include paying for an appeal of the denial of the easement claim, especially since it was not covered under the policy.

The Weis' argument that the duty to defend is broader than a duty to indemnify does not invalidate our conclusion. As we have discussed above, there is no obligation under the policy terms to seek an easement or pay the actual loss as a result of the southern encroachment.

C. There Was No Evidence of a Breach of Duty to Remedy the Northern Encroachment

The Weis also argue that Stewart Title had a duty to initiate an investigation and effect a remedy once it was made aware of the northern encroachment. This claim, too, falters.

At trial, the Weis failed to prove the northern neighbors claimed any interest in the strip of land that comprises the northern encroachment. What the Weis appear to contend is that the placement of a fence six inches onto their property means that there is a dispute as to the ownership and title to that six-inch strip of land. Yet, the Weis presented no evidence the current northern neighbors installed the fence or that they otherwise claim any ownership interest in the northern encroachment. Indeed, Zhong admitted he did not know whether his neighbor ever claimed the right to keep the fence there. Further, Zhong never asked him to move the fence and the neighbor had never told him he intended to claim a right to the northern encroachment. Because there is no evidence of actual

loss or a duty to defend arising from the mere location of a fence, we reject the Weis' contention that covered risk numbers 1, 4, 5, 6, and 26 apply to the northern encroachment.

D. There Was No Breach of the Implied Covenant of Good Faith and Fair Dealing

To establish breach of the implied covenant of good faith and fair dealing in an insurance context, the Weis were obligated to show that benefits due under the policy were withheld. (*Tilbury Constructors, Inc. v. State Comp. Ins. Fund* (2006) 137 Cal.App.4th 466, 475.) "[N]either the duty nor the covenant of good faith and fair dealing extends beyond the terms of the insurance contract in force between the parties." (*New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co.* (1992) 7 Cal.App.4th 1088, 1096.) Because the Weis failed to provide any evidence of a breach of the policy, they have failed to prove a breach of the implied covenant of good faith and fair dealing. Likewise, there was no evidence of fraud, malice, or oppression where there has been no bad faith. (*Miller v. Elite Ins. Co.* (1980) 100 Cal.App.3d 739, 758.)

V. The Rulings on the Motions in Limine Were Proper

The Weis challenge the trial court's rulings on two motions in limine, numbers 4 and 6. However, they fail to demonstrate how these rulings affect the judgment or prejudice them.

In motion in limine number 4, the trial court denied the Weis' motion to exclude Stewart Title's expert from testifying regarding the interpretation of the policy. However, Stewart Title's expert never testified. Any error resulting from this ruling is harmless. (See *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1593–1595.) Motion in limine number 6 sought to estop Stewart Title from asserting the statute of limitations applied. It does not appear Stewart Title ever asserted the statute of

limitations at trial, and any error in denying the motion is also harmless. (*Ibid.*)

DISPOSITION

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

BIGELOW, P.J.

We concur:

RUBIN, J.

ROGAN, J.*

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