Filed 10/24/18 ConocoPhillips Company v. Apro, LLC CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CONOCOPHILLIPS COMPANY et al., Cross-complainants and Appellants, v. APRO, LLC, Cross-defendant and Respondent.	B285752 (Los Angeles County Super. Ct. No. BC503381)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dan T. Oki, Judge. Reversed.

Valinoti, Specter & Dito, Ronald Specter and Mark Anthony Rodriguez, for Cross-complainants and Appellants.

KAO, Chris Kao, Andrew Hamill and Whitney Miner, for Cross-defendant and Respondent.

This is the second appeal in which we are asked to decide whether cross-complainants and appellants ConocoPhillips Company and Phillips 66 Company (collectively, ConocoPhillips) sufficiently stated a claim for breach of contract based on an alleged failure to defend and indemnify. ConocoPhillips and several others were named defendants in a complaint Felipe and Maria Mireles filed for injuries Felipe suffered as the result of a propane fire at a 76-branded gas station. ConocoPhillips, which owns the 76 brand and licenses it to other entities, filed a cross-complaint seeking indemnity from Pacific Convenience & Fuels, LLC (Pacific), Convenience Retailers, LLC (Convenience), Sam and Shireen Hirbod (the Hirbods), Apro, LLC (Apro), Suburban Propane, LP (Suburban), Field Energy Corporation (Field Energy), and Stephen Dakay (Dakay). The trial court entered judgment on the pleadings for Apro, and we consider whether certain contractual language that requires Apro to indemnify ConocoPhillips does not apply as a matter of law because ConocoPhillips could only be liable on an ostensible agency theory.

I. BACKGROUND

A. The Contracts at Issue

1. ConocoPhillips licenses the 76 brand to Convenience

In January 2009, ConocoPhillips and Convenience entered into a contract they called a Master Branded Reseller Agreement (the Reseller Agreement). The Reseller Agreement "set out the terms and conditions under which ConocoPhillips [would] sell to [Convenience] and [Convenience would] purchase from ConocoPhillips various petroleum products for resale by

[Convenience] under the ConocoPhillips Brand . . . ." Through the Reseller Agreement, ConocoPhillips granted Convenience, among other things, "a non-exclusive license to use the ConocoPhillips Brand for the limited purpose of marketing, promoting, advertising and selling Branded CONOCOPHILLIPS Products." ConocoPhillips also gave Convenience permission to use the 76 brand and franchise "in conjunction with the advertising, distribution or sale of ConocoPhillips motor fuels" at certain service stations.

The Reseller Agreement includes an indemnity provision that obligated Convenience to "indemnify, defend and hold harmless ConocoPhillips . . . from any and all claims, demands, suits, actions or other loss or liability . . . arising out of any claim or cause of action at law or in equity . . . arising in any manner out of [Convenience's] operations . . . or from [Convenience's] performance or failure to perform under this Agreement, whether or not [Convenience] was negligent or otherwise at fault." The indemnity provision also states, however, that "such indemnification obligations shall not apply: [¶] (i) To the percentage of such Liabilities, if any, attributable to ConocoPhillips'[s] negligence or willful misconduct . . . ."

2. Convenience assigns the Reseller Agreement to Apro

Some six years later, in June 2015, Phillips 66 Company (Phillips 66),[1] Convenience, and Apro entered into a contract

---

[1] The operative cross-complaint identifies Phillips 66 as the assignee of "certain assets, rights, and liabilities of" ConocoPhillips Company.

designated an Assignment, Assumption and Modification Agreement (the Assignment Agreement). In its recitals, the Assignment Agreement states Convenience and Apro had entered into an asset purchase agreement pursuant to which Convenience transferred and conveyed to Apro "certain real estate and related assets including all or a portion of the gas stations owned, leased or managed by [Apro] that receive motor fuel products from [Phillips 66] pursuant to the [Reseller Agreement]." The Assignment Agreement noted the Reseller Agreement would be "assigned in its entirety" to Apro, and that Apro "desire[d] to assume all of the obligations of [Convenience]" under the Reseller Agreement. It also noted Apro desired "to make certain modifications to" the Reseller Agreement. While Apro did in fact modify certain portions of the Reseller Agreement, it did not make any changes to its indemnity provision.

The "Assignment and Assumption" clause in the Assignment Agreement states Convenience assigned to Apro, and Apro "hereby accept[ed] and assume[d], all right, title, interest, obligation and liability of [Convenience] under the [Reseller Agreement], with the same force and effect as though [Apro] were originally named in the [Reseller Agreement] as a party thereto." It provides the liability Apro assumed was "direct and primary" and Apro "agree[d] to be bound by the terms and conditions contained in the Assumed Agreements [including the Reseller Agreement] exactly as if [Apro] had been an initial party thereto."

The Assignment Agreement also includes its own indemnity clause, which provides in pertinent part as follows: "In the event of any dispute between or among [Apro] and [Convenience] or any Guarantor (which dispute does not also involve [Phillips 66]), [Convenience] and [Apro] shall defend,

indemnify, and save [Phillips 66] . . . harmless from any and all damages, expenses and liabilities of any type whatsoever . . . actually suffered or incurred as a result of or in connection with any such dispute."

B. The Underlying Personal Injury Action

In March 2013, Felipe and Maria Mireles filed a complaint for personal injury and damages, alleging causes of action for negligence and loss of consortium. As alleged in the complaint, Felipe visited a 76 gas station in La Puente, California on October 1, 2011, to have his propane tank filled, and he was grievously injured by a fire that ignited at the station when an employee was filling the tank.

The Mireles complaint named various defendants, including ConocoPhillips, Field Energy, Dakay (an employee at the gas station), and Suburban. Pacific and Convenience were added to the lawsuit at a later date.[2]

ConocoPhillips eventually moved for summary judgment on the Mireles complaint, arguing it (ConocoPhillips) did not own, operate, lease, control, or manage the location and property at which Felipe was injured, the propane that caused the incident, or the propane equipment involved in the incident. The trial court granted the motion, finding "no reasonable trier of fact could find ostensible agency for the 'supply' of the propane under the[ ] circumstances." In a prior appeal, we reversed the grant of summary judgment because ConocoPhillips had not addressed

---

[2] The record indicates Felipe and Maria Mireles dismissed their complaint against Pacific in April 2015 and their complaint against Convenience in March 2016.

the issue of ostensible agency in its motion for summary judgment, thus denying the Mireles plaintiffs an adequate opportunity to respond. (See *Mireles v. ConocoPhillips Company* (Sept. 8, 2015, B262204) [nonpub. opn.].)

After remand, ConocoPhillips again moved for summary judgment, this time addressing the ostensible agency theory of liability in its motion. The trial court denied the summary judgment motion because it found, after the issue had been properly raised, that the Mireles plaintiffs had "raise[d] a triable issue of fact as to ConocoPhillips'[s] liability based on . . . ostensible agency, i.e., whether Mr. Mireles reasonably believed, based on the 76 brand and logo, that he was purchasing [propane] from 76 and/or the agents of 76." Following the denial of ConocoPhillips's second motion for summary judgment, the sole theory of liability pending against ConocoPhillips was the ostensible agency theory.

C. ConocoPhillips's Cross-Complaint for Indemnification

In September 2016, ConocoPhillips filed a cross-complaint against Pacific, Convenience, Apro, Suburban, the Hirbods, Field Energy, and Dakay. As relevant here, the original cross-complaint alleged causes of action for breach of contract to indemnify and breach of contract to defend as against Pacific, Convenience, and Apro. It also alleged causes of action for equitable indemnity, contribution, and declaratory relief against all cross-defendants.

ConocoPhillips thereafter filed a First Amended Cross-Complaint (FACC). Among other things, ConocoPhillips alleged Apro (as well as Pacific and Convenience) owed a duty under the Reseller Agreement to provide ConocoPhillips a defense and

indemnify it against any damages awarded in the Mireles action. Apro demurred to the FACC, as did Pacific, Convenience, and the Hirbods.

The trial court sustained the demurrers with leave to amend. The court sustained Apro's demurrer because the Assignment Agreement's indemnity provision did not cover suits that involve ConocoPhillips. As to the other cross-defendants and as pertinent here, one of the grounds on which the trial court sustained the demurrer as to the breach of the contractual indemnity cause of action was its conclusion that the Reseller Agreement's indemnity provision did not apply because the only viable theory of liability—ostensible agency—requires proof that the agency arose either from ConocoPhillips's intentional acts or neglect while the Reseller Agreement states indemnity need not be provided if liability arises from "ConocoPhillips'[s] negligence or willful misconduct . . . ."

ConocoPhillips thereafter filed a Second Amended Cross-Complaint (the operative cross-complaint). Among the claims in the operative cross-complaint were a breach of contract claim against Apro and an equitable indemnity claim as against all cross-defendants. The breach of contract cause of action alleged that Apro, by entering into the Assignment Agreement, had agreed to assume the defense and indemnification obligations originally undertaken by Convenience in the Reseller Agreement. ConocoPhillips thus alleged Apro's obligation to indemnify ConocoPhillips was based on the indemnification obligations in the Reseller Agreement.

D. Apro's Demurrer to the Operative Cross-Complaint

In May 2017, Apro demurred to the operative cross-complaint.[3] The demurrer asserted the causes of action for breach of contract and equitable indemnity were barred by res judicata and/or collateral estoppel. In its reply brief, Apro argued that if the trial court decided not to "officially apply res judicata or collateral estoppel, it should apply the same reasoning for its earlier ruling [i.e., the ruling sustaining the demurrer to the FACC] . . . which Apro effectively re-raised in this demurrer." Apro's reply also asserted it "reincorporated all of the court's previous holdings as reasons to deny the [operative cross-complaint]."

Prior to the hearing on Apro's demurrer to the operative cross-complaint, ConocoPhillips voluntarily dismissed its fifth cause of action for equitable indemnity against Apro. At the hearing, the trial court overruled the demurrer. It characterized Apro's demurrer as being made "*solely* on the basis that it is allegedly barred by res judicata and collateral estoppel," and concluded its prior orders sustaining demurrers with leave to amend do not constitute res judicata, collateral estoppel, or any other claim- or issue-precluding disposition.

---

[3] Pacific, Convenience, and the Hirbods filed their own demurrer to the operative cross-complaint. We decide the propriety of the trial court's ruling on that demurrer in *ConocoPhillips Company v. Pacific Convenience & Fuels, LLC* (Oct. 24, 2018, B284021) [nonpub. opn.].

E. Apro's Motion for Judgment on the Pleadings

Apro later answered the operative cross-complaint and subsequently filed a motion for judgment on the pleadings. Apro's motion argued (as some of the other defendants had argued) that the Reseller Agreement did not require it to indemnify or defend ConocoPhillips because the only theory still pending against ConocoPhillips was the ostensible agency theory and ostensible agency requires a showing of act or neglect on the part of a principal—which Apro believed would trigger the exclusion in the Reseller Agreement's indemnity provision for losses attributable to "ConocoPhillips'[s] [own] negligence or willful misconduct" and therefore bar the indemnity claim. In opposing the motion, ConocoPhillips argued, among other things, that the motion was procedurally improper because Apro had previously filed an unsuccessful demurrer to the operative cross-complaint.

In ruling on Apro's motion for judgment on the pleadings, the trial court took judicial notice of several documents or portions thereof, including the Mireles complaint and this court's prior appellate decision. The trial court granted the motion for judgment on the pleadings without leave to amend.

The trial court reasoned Apro's motion was not procedurally improper because Apro's prior demurrer was based solely on res judicata and collateral estoppel. On the merits, the trial court concluded indemnity was precluded because the Reseller Agreement did not clearly and explicitly state ConocoPhillips was to be indemnified for its own conduct, and its liability, if any, was necessarily based only on ostensible agency, the establishment of which requires ConocoPhillips to have (as the trial court put it) "committed acts." The trial court

additionally believed the ostensible agency theory foreclosed ConocoPhillips's argument that a "'percentage liability'" scenario could give rise to a claim against Apro under the Reseller Agreement, because only ConocoPhillips's intentional or negligent actions could lead to liability under ostensible agency, and comparative fault is determined only among parties who could be directly, not vicariously, liable. The trial court further found the Assignment Agreement confirmed Apro did not agree to indemnify ConocoPhillips for its "own actions" because that agreement's indemnity provision only requires indemnity for disputes between or among Apro, Convenience, and any guarantor that does not involve Phillips 66.[4]

The court later signed a judgment of dismissal in Apro's favor, from which ConocoPhillips now appeals.

II. DISCUSSION

ConocoPhillips contends that the trial court should not have entertained Apro's motion for judgment on the pleadings at all, having previously overruled its demurrer, but once entertaining the motion, that the court reached the wrong conclusion on the merits. The first procedural argument fails, but ConocoPhillips is right on its second, substantive argument.

---

[4] In addition, the trial court reasoned the Reseller Agreement's indemnity clause does not set forth the obligations to defend and hold harmless as "separate and specific" promises and, therefore, the Civil Code section 2778, subdivision (3) presumption that an indemnity provision embraces the costs of defense did not apply.

The Reseller Agreement states Apro must indemnify ConocoPhillips for certain liabilities, but not for the percentage of those liabilities attributable to ConocoPhillips's negligence or willful misconduct. As we will explain, an ostensible agency liability theory, which does require proof of an act or neglect by the principal, is not wholly inconsistent with the indemnity provision that excuses indemnity if attributable to ConocoPhillips's "negligence or willful misconduct"—particularly when the indemnity provision states indemnity is excused only "[t]o the percentage of such Liabilities" that are so attributable. Put more concretely, even if the indemnity provision's exclusion for negligence or willful misconduct were coextensive with the showing required to establish ostensible agency (though, as discussed *post*, it is not because an intentional act is not always willful misconduct), ConocoPhillips could still be entitled to indemnity for any damages it pays that are not attributable to its ostensible agent's actions but to the actions of another joint tortfeasor.

A. Standard of Review and Background Legal Principles

"The same de novo standard of review applies to motions for judgment on the pleadings and to general demurrers. [Citation.] In both instances, we exercise our independent judgment as to whether a cause of action has been stated under any legal theory when the allegations are liberally construed. [Citation.] The facts alleged in the pleading are deemed to be true, but contentions, deductions, and conclusions of law are not. [Citation.] In addition to the complaint, we also may consider matters subject to judicial notice. [Citation.]" (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1162.)

The trial court's interpretation and application of an indemnity agreement is also a question reviewed de novo. (*McCrary Construction Co. v. Metal Deck Specialists, Inc.* (2005) 133 Cal.App.4th 1528, 1535.) When the trial court's interpretation does not turn on the credibility of extrinsic evidence, "we review the trial court's application of law independently." (*Ibid.*; accord, *Gribaldo, Jacobs, Jones & Associates v. Agrippina Versicherunges A.G.* (1970) 3 Cal.3d 434, 445.)

"An indemnity obligation . . . . may arise from 'express contractual language establishing a duty in one party to save another harmless upon the occurrence of specified circumstances.' (*E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 506[ ].) Courts interpret contractual indemnity provisions under the same rules governing other contracts, with a view to determining the actual intent of the parties. [Citations.]" (*Maryland Casualty Co. v. Bailey & Sons, Inc.* (1995) 35 Cal.App.4th 856, 864.) Courts "look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it. [Citations.]" (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) The parties' "intent is to be inferred, if possible, solely from the written provisions of the contract. [Citation.] The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' [citation], controls judicial interpretation. [Citation.] Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning." (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822.)

B. The Motion for Judgment on the Pleadings Was Not Procedurally Barred

A party generally cannot move for judgment on the pleadings on the same grounds that were raised in an unsuccessful demurrer absent "a material change in applicable case law or statute since the ruling on the demurrer." (Code Civ. Proc., § 438, subd. (g)(1).) ConocoPhillips contends the trial court should have rejected Apro's motion for judgment on the pleadings out of hand because Apro had previously demurred to the operative cross-complaint and raised in its reply brief substantive arguments upon which it later based its motion for judgment on the pleadings.

That is not our view of Apro's demurrer. It presented two grounds for dismissal of the operative cross-complaint, res judicata and collateral estoppel, and no other grounds were mentioned. Any objections to a pleading that are not distinctly specified in a demurrer may be disregarded (Code Civ. Proc., § 430.60), and there is no indication the trial court considered any arguments Apro made (belatedly) in its reply when deciding the demurrer. To the contrary, in its demurrer ruling the trial court stated res judicata and collateral estoppel were the only grounds on which Apro demurred. The substantive arguments Apro advanced in its motion for judgment on the pleadings were thus not properly before the court when it ruled on Apro's demurrer.

Further, even if the trial court had erred in considering the motion, ConocoPhillips would not automatically be entitled to reversal. "Where, as here, a motion for judgment on the pleadings is granted based upon a question of law, there is no

miscarriage of justice if the court's ruling on the legal merits is correct." (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 603.) Thus, the determinative question is whether the trial court's ruling was substantively correct, and that is the question we now answer.

C. The Motion for Judgment on the Pleadings Should Not Have Been Granted

Pursuant to the Assignment Agreement, Apro "accept[ed] and assume[d], all right, title, interest, obligation and liability of [Convenience] under the [Reseller Agreement], with the same force and effect as though [Apro] were originally named in the [Reseller Agreement] as a party thereto." It also "agree[d] to be bound by the terms and conditions contained in the Assumed Agreements [including the Reseller Agreement] exactly as if [Apro] had been an initial party . . . ." Accordingly, we look to the terms of the Reseller Agreement's indemnity provision to determine whether judgment on the pleadings was proper.

To reiterate, paragraph 22 of the Reseller Agreement states Apro (having assumed Convenience's obligations) must "indemnify, defend and hold harmless ConocoPhillips . . . from any and all claims, demands, suits, actions or other loss or liability . . . arising out of any claim or cause of action at law or in equity . . . arising in any manner out of [Convenience's] operations . . . or from [Convenience's] performance or failure to perform under this Agreement, whether or not [Convenience] was negligent or otherwise at fault." The proviso that immediately follows states "such indemnification obligations shall not apply: [¶] (i) To the percentage of such Liabilities, if any, attributable to ConocoPhillips'[s] negligence or willful misconduct . . . ."

An indemnity provision that is silent on the issue of an indemnitee's negligence is referred to as a "general" indemnity provision. (*Morgan v. Stubblefield* (1972) 6 Cal.3d 606, 624; *Markley v. Beagle* (1967) 66 Cal.2d 951, 962.) Paragraph 22 in the Reseller Agreement is not a general indemnity provision because it *does* address the issue of the indemnitee's negligence. (See *Oltmans Construction Co. v. Bayside Interiors, Inc.* (2017) 10 Cal.App.5th 355, 363 (*Oltmans*).) Paragraph 22 states its indemnity obligations do not apply "[t]o the percentage of such Liabilities, if any, attributable to ConocoPhillips'[s] negligence or willful misconduct . . . ." In other words, ConocoPhillips is entitled to indemnification for any percentage of liability it faces that is *not* attributable to its "negligence or willful misconduct."

Apro contends ConocoPhillips is precluded from establishing its entitlement to indemnity and defense because the only theory of liability still viable against ConocoPhillips at the time of the motion[5] was ostensible agency. Apro contends this means the entirety of any liability incurred by ConocoPhillips is necessarily excluded from the Reseller Agreement's indemnity provision because (1) ostensible agency requires intentional or negligent acts and (2) there can be no comparative fault between

---

[5] The Mireles litigation was subsequently dismissed with prejudice. Apro and ConocoPhillips state in their appellate briefing that ConocoPhillips settled the Mireles complaint, but the only document cited in support of that representation states the Mireles plaintiffs "ha[d] not received a Settlement Agreement and Release," though it does express an intent to request dismissal with prejudice once the documents were received and executed. Because the fact of settlement has not properly been established, we do not consider it in reaching our decision.

ConocoPhillips and any ostensible agent. Apro is wrong on both points.

As to the first, the elements of ostensible agency and the language of the indemnity clause are not coextensive and inconsistent. Three elements are required to establish an ostensible agency: "The person dealing with an agent must do so with a reasonable belief in the agent's authority, such belief must be generated by some act or neglect by the principal sought to be charged[,] and the person relying on the agent's apparent authority must not be negligent in holding that belief. [Citations.] Ostensible agency cannot be established by the representations or conduct of the purported agent; the statements or acts of the principal must be such as to cause the belief the agency exists. [Citations.]" (*J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 403-404 (*J.L.*).)

Apro's indemnification obligations under the Reseller Agreement do not extend to the "percentage of such Liabilities, if any, attributable to ConocoPhillips'[s] *negligence or willful misconduct*" (emphasis ours), but an ostensible agency relationship can arise from an intentional act (not just "neglect") and an intentional (non-negligent) act is not necessarily willful misconduct. An "act" is merely "[s]omething done or performed, esp. voluntarily; a deed," or, as also described, "[t]he process of doing or performing; an occurrence that results from a person's will being exerted on the external world." (Black's Law Dict. (10th ed. 2014) p. 29, col. 1.) "Willful misconduct," on the other hand, is "[m]isconduct committed voluntarily and intentionally," and "misconduct" is "[a] dereliction of duty; unlawful, dishonest, or improper behavior, esp. by someone in a position of authority or trust." (*Id.* at pp. 1149, col. 2; 1150, col. 1.) Thus, the

exclusion of liability for voluntary, intentional, unlawful, dishonest, or improper behavior does not exclude all things "done or performed" that could have created an ostensible agency. But that is precisely what Apro needed to show to prevail, at the pleading stage, on ConcocoPhillips's cross-complaint for indemnity. Because it is factually possible the ostensible agency that is the only potential source of liability for ConocoPhillips could have arisen from neither ConocoPhillips's own negligence nor its willful misconduct, there was no proper ground for granting Apro's motion for judgment on the pleadings.[6]

While reversal is required for this reason alone, we add a few words regarding Apro's second contention (that there can be no comparative fault between ConocoPhillips and any ostensible agent). It is true, as the trial court stated, that comparative fault in tort liability is determined only among parties who could be directly, not vicariously liable (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1156 (*Diaz*); *Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1049), and that ostensible agency is a theory of vicarious liability (*J.L.*, *supra*, 177 Cal.App.4th at p. 403; 6 Am. Jur. Proof of Facts 3d, Vicarious Liability under Doctrine of Ostensible or Apparent Agency, p. 457). This means ConocoPhillips cannot apportion liability between itself and its potential ostensible agent; if ConocoPhillips is found to have an ostensible agent, ConocoPhillips would be 100% liable for the agent's share of liability. (*Diaz*, *supra*, at p. 1157 [share of liability of defendant

---

[6] Because Apro's argument fails on own terms, we find it unnecessary to explore whether the "negligence" referred to in Paragraph 22 of the Reseller Agreement is tantamount to the "neglect" that could give rise to an ostensible agency.

who faces only vicarious liability "corresponds to the share of fault that the jury allocates to the" agent].)

But the law and the terms of the Reseller Agreement do not foreclose the possibility that Apro could be required to indemnify ConocoPhillips for a percentage of liability it incurs even if it were found to have created an ostensible agency by "negligence or willful misconduct" because it is possible one or more of the other alleged tortfeasors would be found (a) partly responsible and (b) not to have an agency relationship with ConocoPhillips. For example, if ConocoPhillips's ostensible agent were ultimately determined to be 60 percent liable for the Mireles plaintiffs' damages while, say, Suburban were determined to be 40 percent responsible, ConocoPhillips would be entitled to indemnity for the portion of any damages paid that were not attributable to its agent, but to that other tortfeasor.[7] (See *Oltmans*, *supra*, 10 Cal.App.5th at p. 363 [indemnity clause that provided indemnity "'except to the extent'" claims arose out of active negligence or willful misconduct only precluded indemnitee from being indemnified for the portion of its liability based on its own active negligence or intentional misconduct].)

Apro's only remaining counterargument, that the *Assignment* Agreement's indemnity provision suggests Apro had no intention of indemnifying ConocoPhillips for its "own actions,"

---

[7] Any apportionment would, of course, have to take into consideration the proportion of economic damages, which are joint, and noneconomic damages, which are several, attributable to various tortfeasors. (See, e.g., *Bayer-Bel v. Litovsky* (2008) 159 Cal.App.4th 396, 400; *Union Pacific Corp. v. Wengert* (2000) 79 Cal.App.4th 1444, 1450.)

is unpersuasive. That the Assignment Agreement's indemnity provision does not provide indemnity for actions involving ConocoPhillips does not demonstrate Apro did not agree to indemnify ConocoPhillips pursuant to the terms of applicable indemnity provisions in other contracts, the obligations of which Apro knowingly assumed. In other words, the indemnity provision in the Assignment Agreement is distinct from the indemnity provision in the Reseller Agreement, and mere resort to the general interpretive principle that "[s]everal contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together" (Civ. Code, § 1642) does not alter the plain meaning of the Reseller Agreement.[8] This is underscored by Apro's express revision of some of the Reseller Agreement's terms in the Assignment Agreement—but the absence of any revisions to the indemnity language in the Reseller Agreement's Paragraph 22.

The bottom line is that it is unclear at this stage of the proceedings whether and, if so, with whom and how, ConocoPhillips created an ostensible agency, and whether ConocoPhillips has paid or will pay the Mireles plaintiffs for more than its share of liability. Accordingly, we cannot say as a matter of law that the Reseller Agreement's indemnity provision does not require Apro to indemnify ConocoPhillips for any of its liability in the Mireles action.

---

[8] Indeed, Apro's reliance on Civil Code section 1642 is logically indeterminate. Apro's appellate briefing articulates no reason why the meaning of the Reseller Agreement should change in light of the Assignment Agreement, rather than vice versa.

Because we determine the trial court erred for the reasons already discussed, we need not address ConocoPhillips's other arguments in favor of reversal.

DISPOSITION

The judgment is reversed. Appellants shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P. J.

We concur:

MOOR, J.

JASKOL, J.*

---

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