

31 Cal.App.4th 375, 37 Cal.Rptr.2d 89, 60 Cal. Comp. Cases 17

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REAGEN'S VACUUM TRUCK SERVICE, INC., et al., Plaintiffs and Appellants,

v.

BEAVER INSURANCE COMPANY, Defendant and Respondent.

No. B073701.

Court of Appeal, Second District, California.

Dec 7, 1994.

SUMMARY

An employee of a petroleum storage tank cleaner brought an action against the cleaner and its oil company clients for personal injuries sustained in the course of his employment, alleging intentional concealment and aggravation of injury and intentional infliction of emotional distress. The cleaner's workers' compensation and employers' liability insurer defended the insured and settled the employee's claim, but refused to defend the insured against equitable and contractual indemnity claims asserted in cross-complaints by the oil companies. The insured then sued the insurer, and other insurance companies, alleging bad faith failure on the part of the first insurer to defend it against the cross-complaints. The trial court granted the first insurer's motion for summary judgment, having found that one of the other insurers had the obligation to defend the insured but that the first insurer had no duty to defend because there was no coverage. (Superior Court of Ventura County, No. 115064, Richard D. Aldrich, Judge.)

The Court of Appeal affirmed. The court first held that the insured's workers' compensation and employers' liability insurance policy did not provide direct and primary coverage to oil companies that were added to the policy under additional insured endorsements, so as to require the insurer to defend the oil companies in the employee's action. The court then held that the first insurer did not have a duty to defend the insured against the claims asserted in the cross-complaints. [Lab. Code, § 3864](#), bars a claim for equitable or implied indemnity against an employer absent a written agreement executed prior to the injury. The employee's complaint pleaded intentional torts. Thus, if the insured's conduct was intentional, it was not within the scope of the policy's coverage; if it was not intentional, the insured could not avoid the bar of [§ 3864](#). The policy exclusion regarding intentional conduct was not ambiguous, and the fraudulent concealment alleged by the employee to circumvent the exclusive remedy provisions of the Labor Code had to have been intentional. The court further held that the trial court did not err in concluding that the exclusionary clause in the employers' liability insurance policy for bodily injury intentionally caused or aggravated by the insured was intended by the insurer to exclude any action for aggravation of an injury due to an employer's fraudulent concealment from its coverage terms. Moreover, the court held that the insurer did not waive its right to claim that there was no coverage for intentional injury under its policy and, therefore, that it did not have a duty to defend the insured against the cross-complaints. Finally, the court held that the trial court's summary judgment ruling in favor of the insurer did not fail to dispose of all issues. (Opinion by Stone (S. J.), P. J., with Gilbert and Yegan, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Summary Judgment § 26--Appellate Review--Scope of Review.

To warrant a grant of summary judgment, the defendant must establish either a complete defense to plaintiff's action or demonstrate the absence of an essential element of plaintiff's case. In revisiting the matter on appeal, the appellate court undertakes an independent review. It is not bound by the

reasons stated by the trial court supporting its ruling, as the appellate court reviews the ruling and not its rationale.

(2a , 2b, 2c) Insurance Contracts and Coverage § 77--Employers' Liability Insurance--Construction--Additional Insured Endorsement--As Providing Direct and Primary Coverage.

A workers' compensation and employers' liability insurance policy held by a petroleum storage tank cleaner did not provide direct and primary coverage to oil companies that were added to the policy under additional insured endorsements, so as to require the insurer to defend the oil companies in an action by an employee of the insured against the insured and the oil companies for personal injuries sustained in his employment. To interpret the policy as providing such coverage would have turned it into a general comprehensive policy as to the oil companies, which would run counter to the statutory prohibition that liability insurance not include workers' compensation insurance and the rule of the Insurance Commissioner that other classes of insurance may not be included in the same policy providing workers' compensation and employers' liability insurance. The endorsements were expressly limited to employees on the payroll of the insured. Thus, the insurer would have had a duty to defend them only if the injured employee had been acting in the capacity of employee to the additional insureds.

(3) Insurance Contracts and Coverage § 10--Rules in Aid of Interpretation of Contracts.

Where the meaning of documents is in dispute, an appellate court interprets the writing independently as a matter of law, absent conflicting evidence. In construing insurance contracts, doubts, uncertainties and ambiguities in the policy language ordinarily should be construed in favor of the insured to protect the insured's reasonable expectation of coverage. Whether language in the policy is ambiguous is a question of law. Language in a policy is ambiguous when it is capable of two or more constructions, both of which are reasonable. An appellate court cannot strain interpretation of policy language to find an ambiguity, nor can a finding of ambiguity be based on an unreasonable misunderstanding on the part of the insured.

[See 1 **Witkin**, Summary of Cal. Law (9th ed. 1987) Contracts, § 699 et seq.]

(4) Insurance Contracts and Coverage § 77--Employers' Liability Insurance-- Purpose.

Employers' liability insurance is traditionally written in conjunction with workers' compensation policies, and is intended to serve as a 'gap-filler,' providing protection to the employer in those situations where the employee has a right to bring a tort action despite the provisions of the workers' compensation statute or the employee is not subject to the workers' compensation law. Generally, these two kinds of coverage are mutually exclusive. Most employers' liability policies limit coverage to liability for which the insured is held liable as an employer.

(5) Insurance Contracts and Coverage § 107--Extent of Liability of Insurer--Liability and Indemnity Insurance--Duty to Defend Insured--Extent.

The duty of an insurer to defend an insured is broader than the duty to indemnify. An insurer may owe a duty to defend where no damages are ultimately awarded. The duty to defend is measured at the outset by comparing the allegations of the complaint with the terms of the policy, and also considering facts extrinsic to the complaint when they reveal a possibility that the claim may be covered by the policy. Nevertheless, this duty, while broad is not unlimited; where there is no potential for recovery on a covered claim, there is no duty to defend. Potential for liability is the operative phrase. Any doubt whether the facts give rise to a duty to defend is resolved in the insured's favor.

[See 6 **Witkin**, Summary of Cal. Law (9th ed. 1988) Torts, § 1135 et seq.]

(6) Workers' Compensation § 7.4--Exclusivity of Remedy--Scope and Extent of Exclusivity--Tort Action Against Employer Not Barred--Aggravation of Disease or Injury Due to Employer's Fraud.

Although the workers' compensation scheme is ordinarily the exclusive remedy for an employee injured in the course of his or her employment ([Lab. Code, § 3602](#)), a separate civil action may exist for aggravation of a disease or injury sustained by an employee due to his or her employer's fraudulent concealment of the condition and its cause.

(7) Insurance Contracts and Coverage § 107--Extent of Liability of Insurer--Employers' Liability Insurance--Duty to Defend Insured--Against Equitable and Contractual Indemnity Claims by Codefendants in Cross-complaints.

The insurer of a petroleum storage tank cleaner did not have a duty to defend its insured under an employers' liability insurance policy against equitable and contractual indemnity claims asserted in cross-complaints by oil companies who had been joined as defendants in an action against the insured for personal injuries sustained by an employee of the insured in the course of his employment. [Lab. Code, § 3864](#), bars a claim for equitable or implied indemnity against an employer absent a written agreement executed prior to the injury. The employee's complaint pleaded intentional torts. Thus, if the insured's conduct was intentional, it was not within the scope of the policy's coverage; if it was not intentional, the insured could not avoid the bar of [§ 3864](#). The policy exclusion regarding intentional conduct was not ambiguous, and the fraudulent concealment alleged by the employee to circumvent the exclusive remedy provisions of the Labor Code had to have been intentional. Moreover, there was no potential that the oil companies' cross-complaints were based on a theory that the employee's work was not performed in a workmanlike manner, since they clearly sought indemnification for amounts paid because of the employee's injuries.

[Consequences of liability insurer's refusal to assume defense of action against insured upon ground that claim upon which action is based is not within coverage of policy, note, [49 A.L.R.2d 694](#).]

(8a , 8b) Insurance Contracts and Coverage § 107--Extent of Liability of Insurer--Employers' Liability Insurance--Duty to Defend Insured--Exclusion for Injury Intentionally Caused--As Applicable to Action Based on Aggravation of Injury Due to Employer's Fraud.

The trial court did not err in concluding that the exclusionary clause in a petroleum storage tank cleaner's employers' liability insurance policy for bodily injury intentionally caused or aggravated by the insured was intended by the insurer to exclude any action for aggravation of an injury due to an employer's fraudulent concealment from its coverage terms, and that, therefore, the insurer had no duty to defend the insured against equitable and contractual indemnity claims asserted in cross-complaints by oil companies who had been joined as defendants in an action against the insured by an employee of the insured, alleging intentional concealment and aggravation of injury. The insurer specifically excluded such an action from its coverage by agreeing to pay all sums its insured legally must pay as damages because of bodily injury to the insured's employees, provided the injury is covered by its policy. Bodily injury intentionally caused or aggravated by the insured was specifically excluded from coverage, and the employee's complaint alleged intentional aggravation of injury. When the policy language clearly provides no basis for coverage, there can be no reasonable expectation of a defense. Also, under [Ins. Code, § 533](#), an insurer is not liable for a loss caused by the insured's wilful act.

(9) Insurance Contracts and Coverage § 77--Employers' Liability Insurance-- Exclusion for Injury Intentionally Caused--Necessity for Intent of Insurer to Cause All Damage.

Where an intentional injury policy exclusion exempts from coverage expected or intended damage, a specific intent on the part of the insured to cause all the resultant damage is not required.

(10) Insurance Contracts and Coverage § 107--Extent of Liability of Insurer--Employers' Liability Insurance--Duty to Defend Insured--Exclusion for Injury Intentionally Caused--Waiver of Right to Assert Exclusion.

The insurer of a petroleum storage tank cleaner did not waive its right to claim that there was no coverage for intentional injury under its employers' liability insurance policy and, therefore, that it did not have a duty to defend the insured against equitable and contractual indemnity claims asserted in

cross-complaints by oil companies who had been joined as defendants in an action against the insured for personal injuries sustained by an employee of the insured in the course of his employment. Although the insurer assumed the insured's defense and settled the employee's suit, it never created an impression that there was no coverage dispute regarding the cross-complaints or misled the insured to its detriment on that issue. Also, in the instant action, the insured never pleaded or suggested that the insurer had assumed the defense of the cross-complaints. Even assuming that the insurer defended and contributed to the settlement of the employee's action when it had no duty to do either, that should not have precluded it from asserting lack of duty to defend the cross-complaints.

(11) Insurance Contracts and Coverage § 109--Extent of Liability of Insurer--Adjustment of Loss and Liability--Employers' Liability Insurance--Duty of Insurer to Act in Good Faith--As Dependent on Policy Benefits Being Due.

In an action by an insured alleging bad faith in the failure of one of its insurers to defend the insured against equitable and contractual indemnity claims asserted in cross-complaints by third parties who had been joined as defendants in a personal injury action against the insured, the trial court's summary judgment ruling in favor of the insurer did not fail to dispose of all issues. Since the insurer had no duty to defend on the cross-complaints, it could not have caused the insured damage by refusing to do so. Moreover, the insurer successfully argued that another defendant insurer had the duty to defend the underlying action. A "bad faith" claim cannot be maintained unless policy benefits are due. The other insurer, in settlement of the cross-complaints and action by the insured, agreed to assume the defense of the underlying action and assume the responsibility for resolution of the judgment obtained by the third parties on their respective cross-complaints. It also agreed to pay all attorney fees and costs incurred by the insured in both actions. Thus, the insured could not show how it had been damaged by any "bad faith" alleged on the first insurer's part.

COUNSEL

Henderson & Wohlgemuth and Andrew K. Whitman for Plaintiffs and Appellants.

Nemecek & Cole, Jonathan B. Cole and Karen K. Coffin for Defendant and Respondent.

STONE (S. J.), P. J.

Reagen's Vacuum Truck Service, Inc., Bennie Reagen and Dennis Reynolds (Reagen's) appeal from a judgment following entry of summary judgment in favor of Beaver Insurance Company (Beaver). Reagen's, in its first amended complaint, had alleged causes of action against Beaver for breach of duty of good faith and fair dealing, breach of *381 contract, breach of fiduciary duties, fraud, and negligence stemming from the manner in which Beaver allegedly handled defense of a claim against Reagen's by an injured employee. Beaver moved for summary judgment against Reagen's on grounds that there was no potential for coverage under the terms of Reagen's insurance policy with Beaver and that Reagen's had suffered no compensable damage because Harbor Insurance, in a settlement with Reagen's, agreed to pay all expenses relating to the defense of the underlying action. The trial court granted summary judgment based upon the policy's exclusion.

Reagen's contends that the trial court: 1) erroneously ruled no coverage existed under the terms of the employers' liability portion of the policy; and 2) erroneously concluded that the court's ruling on the coverage issue disposed of all material issues raised by the complaint. We affirm the judgment.

Facts

Reagen's was engaged in a business of providing vacuum truck cleaning services for large petroleum storage tanks. While Reagen's was covered by Beaver's workers' compensation and employers' liability policy, one of Reagen's employees, Shawn Cherry, filed a complaint against

Reagen's in the Ventura County Superior Court alleging debilitating injury and illness from exposure to toxic chemicals during his employment with Reagen's. Cherry's amended complaint included Chevron, U.S.A., Inc., Shell Western E and P, Inc., and Union Oil Company as defendants. The complaint alleged the intentional torts of intentional concealment and aggravation of injury and intentional infliction of emotional distress, by wilfully and intentionally concealing knowledge that exposure to the petroleum by-products was hazardous and refusal to provide protective devices even after other employees had been overcome by noxious fumes.

Reagen's turned to its various insurers to provide a defense. Beaver defended Reagen's in the direct action by Shawn Cherry and settled Mr. Cherry's claim. Reagen's oil company clients who were named as additional defendants in the Cherry suit, cross-complained against Reagen's for equitable and contractual indemnity. Beaver had not assumed the defense of the oil companies and denied coverage for the cross-complaints based upon a contractually assumed liability exclusion in the policy. Reagen's brought suit against Beaver and other insurance companies. Reagen's alleged that Beaver postured the settlement of the action so that the bulk of Reagen's financial responsibility would not fall within the direct action brought by Cherry but ***382** would fall instead within the cross-complaints prosecuted by the oil companies for which Beaver denied coverage.

Beaver moved for summary judgment on grounds that its policy specifically and unambiguously excluded coverage for "bodily injury intentionally caused or aggravated" by the insured and that it had no duty to defend the oil companies which Reagen's had contractually agreed to indemnify. Reagen's moved for summary adjudication of issues based on its "bad faith" claim. The trial court ruled that Harbor Insurance had the obligation to defend Reagen's under its general comprehensive liability policy, but that Beaver had no duty to defend because there was no coverage. Based upon its ruling, the court found unnecessary the resolution of Reagen's motion for summary adjudication of issues.

Discussion

1. *Standard of Review.*

(1) To warrant a grant of summary judgment, the defendant must establish either a complete defense to plaintiff's action or demonstrate the absence of an essential element of plaintiff's case. (*Davis v. Gaschler* (1992) 11 Cal.App.4th 1392, 1396 [14 Cal.Rptr.2d 679]; *Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1510-1511 [285 Cal.Rptr. 385]; Code Civ. Proc., § 437c.) In revisiting the matter on appeal, we undertake an independent review. (*Davis, supra, at p. 1396; Saldana, supra, at p. 1515.*) We are not bound by the reasons stated by the trial court supporting its ruling as we review the ruling and not its rationale. (*Stratton v. First Nat. Life Ins. Co.* (1989) 210 Cal.App.3d 1071, 1083 [258 Cal.Rptr. 721].)

2. *Construction of Policy.*

(2a) Reagen's asserts that the court never should have reached the issue of the "intentionally caused injury" exclusion because the additional insured endorsements should have provided direct and primary coverage to the oil companies. Further, Reagen's asserts that "it is clear" the type of injury claimed by Shawn Cherry falls within the employer's liability coverage under the employer's liability policy.

(3) Where the meaning of documents is in dispute, we interpret the writing independently as a matter of law, absent conflicting evidence. (*Stratton v. First Nat. Life Ins. Co., supra, 210 Cal.App.3d 1071, 1084.*) In construing insurance contracts, doubts, uncertainties and ambiguities in the policy language ordinarily should be construed in favor of the insured to ***383** protect the insured's reasonable expectation of coverage. (*Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 912 [226 Cal.Rptr. 558, 718 P.2d 920].) Whether language in the policy is ambiguous is a question of law. (*Ibid.*) Language in a policy is ambiguous when it is capable of two or more

constructions, both of which are reasonable. (*Ibid.*) We cannot strain interpretation of policy language to find an ambiguity, nor can a finding of ambiguity be based on an unreasonable misunderstanding on the part of the insured. (*Id.*, at pp. 912, 913; see also [Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.](#) (1993) 5 Cal.4th 854, 867 [21 Cal.Rptr.2d 691, 855 P.2d 1263].)

(2b) The employers' liability policy was written in conjunction with the workers' compensation policy. Under Reagen's interpretation, by adding the oil companies as additional insureds, the employers' liability policy became a general comprehensive policy as to those named insureds. This interpretation would run counter to the statutory prohibition that liability insurance not include workers' compensation insurance and the rule of the Insurance Commissioner that other classes of insurance may not be included in the same policy providing workers' compensation and employers' liability insurance. ([Producers Dairy Delivery Co. v. Sentry Ins. Co.](#), *supra*, 41 Cal.3d 903, 914.)

(4) "[E]mployers' liability insurance is traditionally written in conjunction with workers' compensation policies, and is intended to serve as a 'gap-filler,' providing protection to the employer in those situations where the employee has a right to bring a tort action despite the provisions of the workers' compensation statute or the employee is not subject to the workers' compensation law.... Generally, these two kinds of coverage are mutually exclusive.... Most employers' liability policies limit coverage to liability for which the insured is held liable *as an employer*." ([Producers Dairy Delivery Co. v. Sentry Ins. Co.](#), *supra*, 41 Cal.3d 903, 916, fn. omitted; see also [B & E Convalescent Center v. State Compensation Ins. Fund](#) (1992) 8 Cal.App.4th 78, 87-88, fn. 9 [9 Cal.Rptr.2d 894].)

(2c) Reagen's asserts that its policy with Beaver added certain oil companies as additional insureds. However, the record contains copies of endorsements only as to Chevron Geothermal, Union Oil Company, and Sun Exploration and Production. These endorsements are expressly limited to employees on the payroll of Reagen's. The policy stated that "You are insured if you are an employer named in item 1 of the Information Page." Consequently, Beaver would have a duty to defend the additional insureds only if Cherry was acting in the capacity of employee to the additional insureds.
*384

As stated in [Producers Dairy Delivery Co. v. Sentry Ins. Co.](#), *supra*, 41 Cal.3d 903, 916, the workers' compensation policy and the employers' liability provisions in Beaver's policy were meant to be read together. Reagen's proffered interpretation would require Beaver to pay for Cherry's injuries twice, once through workers' compensation on Reagen's behalf, and the second time by providing on Reagen's behalf indemnity for Cherry's tort suit. (*Id.*, at p. 917.) This dual recovery is contrary to the concept of employers' liability insurance and violative of the statutory policy of the state. (*Ibid.*) If the trial court correctly found that Beaver owed no duty to defend Reagen's, there was no need to discuss Reagen's opposition to the motion on grounds of the additional endorsements.

3. Duty to Defend.

(5) The duty of an insurer to defend an insured is broader than the duty to indemnify. ([Montrose Chemical Corp. v. Superior Court](#) (1993) 6 Cal.4th 287, 295 [24 Cal.Rptr.2d 467, 861 P.2d 1153]; [Devin v. United Services Auto. Assn.](#) (1992) 6 Cal.App.4th 1149, 1157 [8 Cal.Rptr.2d 263].) An insurer may owe a duty to defend where no damages are ultimately awarded. ([Montrose Chemical Corp.](#), *supra*, at p. 295.) The duty to defend is measured at the outset by comparing the allegations of the complaint with the terms of the policy, and also considering facts extrinsic to the complaint when they reveal a possibility that the claim may be covered by the policy. (*Ibid.*) Nevertheless, this duty, while broad, is not unlimited; where there is no potential for recovery on a covered claim, there is no duty to defend. ([Devin](#), *supra*, at p. 1157.) "Potential for liability" is the operative phrase. ([Horace Mann Ins. Co. v. Barbara B.](#) (1993) 4 Cal.4th 1076, 1084 [17 Cal.Rptr.2d 210, 846 P.2d 792]; see also [Gray v. Zurich Insurance Co.](#) (1966) 65 Cal.2d 263, 275-276 [54 Cal.Rptr. 104, 419 P.2d 168].) Any doubt whether the facts give rise to a duty to defend is resolved in the insured's favor. ([Horace Mann Ins. Co.](#), *supra*, at p. 1081.)

(6) Although the workers' compensation scheme is ordinarily the exclusive remedy for an

employee injured in the course of his employment (see [Lab. Code, § 3602](#)), a separate civil action may exist for aggravation of disease or injury due to the employer's fraudulent concealment of the condition and its cause. ([Johns-Manville Products Corp. v. Superior Court \(1980\) 27 Cal.3d 465, 469 \[165 Cal.Rptr. 858, 612 P.2d 948, 9 A.L.R.4th 758\].](#)) Cherry's cause of action was, as Reagen's acknowledged, a "Johns-Manville" cause of action to avoid the exclusive remedy of workers' compensation and bring himself within the exception now codified in [Labor Code section 3602](#), subdivision (b)(3). (See [*385 Chase Chemical Co. v. Hartford Accident & Indemnity Co. \(1984\) 159 Cal.App.3d 229, 242 \[205 Cal.Rptr. 469\].](#))

(7) Reagen's asserts that Beaver had a duty to defend on the equitable and contractual indemnity claims. [Labor Code section 3864](#) bars a claim for equitable or implied indemnity against an employer absent a written agreement executed prior to the injury. Reagen's cites [Val's Painting & Drywall, Inc. v. Allstate Ins. Co. \(1975\) 53 Cal.App.3d 576 \[126 Cal.Rptr. 267\]](#) as an analogous case in which the insurer, Allstate, was found to have a duty to defend pursuant to a cause of action for implied indemnity, regardless of the contractual liability exclusion and regardless of [section 3864](#). *Val's Painting & Drywall, Inc., supra*, differs in several significant aspects from the case before us. The policy at issue in *Val's* was a general comprehensive liability policy and not an employers' liability policy. Additionally, the conduct of the employer in *Val's* was at least potentially negligent rather than intentional, as here, and thus was one covered by the Allstate policy. (*Id.*, at p. 585.)

Reagen's asserts that where the cross-complaint includes the potential for liability on a theory of equitable indemnity, the insurer cannot deny coverage based upon a contractually assumed liability exclusion because the issue of whether the contractual indemnity agreements are valid or applicable to the underlying claim is at issue in the litigation. (See [Val's Painting & Drywall, Inc. v. Allstate Ins. Co., supra, 53 Cal.App.3d 576, 585.](#)) While that broad statement might be true in the abstract, it does not aid Reagen's here. As Reagen's admits, to avoid the prohibition against indemnity under [Labor Code section 3864](#), the employer must have "stepped outside" of that protected role as an employer. ([Chase Chemical Co. v. Hartford Accident & Indemnity Co., supra, 159 Cal.App.3d 229, 238](#), fn. omitted; see also [Fermino v. Fedco, Inc. \(1994\) 7 Cal.4th 701, 713-714 \[30 Cal.Rptr.2d 18, 872 P.2d 559\].](#)) Cherry's complaint specifically pleaded intentional torts. *Chase's* holding, as Beaver notes, presupposes intentional conduct. If Reagen's conduct was intentional, it was not within the scope of coverage in the first place. If it was not intentional, *Chase* does not assist Reagen's in avoiding the bar of [section 3864](#). Additionally, there is nothing in the record that indicates the oil companies ever requested a defense by Beaver.

The policy specifically excludes "1. liability assumed under a contract. This exclusion does not apply to a warranty that your work will be done in a workmanlike manner ...; [¶] 4. any obligation imposed by a workers' compensation, occupational disease unemployment compensation, or disability benefits law, or any similar law; [¶] 5. bodily injury intentionally [*386](#) caused or aggravated by you" The policy also provided that Beaver had "no duty to defend a claim, proceeding or suit that is not covered by this insurance."

The policy exclusion regarding intentional conduct which causes or aggravates an injury is not ambiguous. The fraudulent concealment alleged by Cherry to circumvent the exclusive remedy provisions of the Labor Code had to be intentional. (See [Johns-Manville Products Corp. v. Superior Court, supra, 27 Cal.3d 465; Chase Chemical Co. v. Hartford Accident & Indemnity Co., supra, 159 Cal.App.3d 229.](#)) We reject Reagen's assertion that "there is the potential that the oil companies' cross-complaints are based upon a theory that Mr. Cherry's work was not performed in a workmanlike manner," and that "Beaver's motion for summary judgment is fatally flawed because this issue was not addressed." The cross-complaints clearly sought indemnification for amounts paid because of Mr. Cherry's injuries and not because work was performed in an unworkmanlike manner.

4. Exclusion Excused Coverage Obligations.

(8a) Reagen's asserts that the court erred in concluding that Beaver's exclusionary clause for "bodily injury intentionally caused or aggravated" by Reagen's was intended by Beaver to exclude any *Johns-Manville* type claim from its coverage terms. Reagen's relies on [Transport Indemnity Co. v.](#)

[Aerojet General Corp. \(1988\) 202 Cal.App.3d 1184 \[249 Cal.Rptr. 463\]](#) for the proposition that an employer's aggravation of injuries by fraudulent concealment is not necessarily a wilful act under [Insurance Code section 533](#) (hereinafter [§ 533](#)), thus precluding coverage. [Section 533](#) states that an insurer is not liable for a loss caused by the wilful act of the insured.

[Transport Indemnity Co. v. Aerojet General Corp., supra, 202 Cal.App.3d 1184](#), relied upon [Clemmer v. Hartford Insurance Co. \(1978\) 22 Cal.3d 865, 887 \[151 Cal.Rptr. 285, 587 P.2d 1098\]](#), which stated that "even an act which is 'intentional' or 'willful' within the meaning of traditional tort principles will not exonerate the insurer from liability under [Insurance Code section 533](#) unless it is done with a 'preconceived design to inflict injury.'" In [Transport Indemnity Co., supra](#), the court concluded that a *Johns-Manville* cause of action does not "unavoidably include ... a preconceived design to inflict injury or a malicious intent to injure." ([202 Cal.App.3d at p. 1188](#).)

The reviewing court in [Transport Indemnity Co. v. Aerojet General Corp., supra, 202 Cal.App.3d 1184, 1189-1190](#), stated that "[t]he Supreme Court did not limit the right to bring an action to those cases where the intent to induce plaintiff to continue to work in a dangerous environment or where the *387 intentional misconduct is motivated by a specific intent to injure." The California Supreme Court in [Johns-Manville Products Corp. v. Superior Court, supra, 27 Cal.3d 465, 476](#), perceived in prior cases "a trend toward allowing an action at law for injuries suffered in the employment if the employer acts deliberately for the purpose of injuring the employee or if the harm resulting from the intentional misconduct consists of aggravation of an initial work-related injury." *Transport* reads the two exceptions mentioned in *Johns-Manville* in the disjunctive, i.e., intentional misconduct requiring an intent to injure, and fraudulent concealment resulting in aggravation of a prior injury. ([202 Cal.App.3d at pp. 1190-1191](#).) The court ruled that the cause of action therein was a properly pleaded cause of action under *Johns-Manville* and [Labor Code section 3602](#), subdivision (b)(2), and did not involve a " 'preconceived design to inflict injury.' " Consequently, [section 533](#) did not prohibit coverage and the insurer had an obligation to defend. ([202 Cal.App.3d at p. 1191](#).) The dissent viewed the majority's conclusion as "judicial prestidigitation." (*Id.*, at p. 1194 (dis. opn. of Evans, Acting P. J).)

Reagen's asserts that the law according to [Transport Indemnity Co. v. Aerojet General Corp., supra, 202 Cal.App.3d 1184](#), makes clear that an employer can be held liable on a *Johns-Manville* action without the specific intent to harm or specific intent to aggravate an employee's injury. However, the linchpin of *Transport's* and Reagen's arguments has been removed by the California Supreme Court's explanation that the "preconceived design to inflict injury" requirement of [Clemmer v. Hartford Insurance Co., supra, 22 Cal.3d 865](#), is relevant only to the issue of whether the insured had the mental capacity to intend to commit the wrongful act. ([J. C. Penney Casualty Ins. Co. v. M. K. \(1991\) 52 Cal.3d 1009, 1023-1025 \[278 Cal.Rptr. 64, 804 P.2d 689\]](#); [Fire Ins. Exchange v. Altieri \(1991\) 235 Cal.App.3d 1352, 1354 \[1 Cal.Rptr.2d 360\]](#).) An insured cannot show or attempt to show he subjectively intended no harm and thereby obtain insurance coverage. (See *J. C. Penney Casualty Ins. Co. v. M. K.*, [supra, at p. 1028](#); [Shell Oil Co. v. Winterthur Swiss Ins. Co. \(1993\) 12 Cal.App.4th 715, 742-743 \[15 Cal.Rptr.2d 815\]](#).)

In [Cole v. Fair Oaks Fire Protection Dist. \(1987\) 43 Cal.3d 148, 159 \[233 Cal.Rptr. 308, 729 P.2d 743\]](#), the California Supreme Court indicated that it had followed [Johns-Manville Products Corp. v. Superior Court, supra, 27 Cal.3d 465](#), in [Foster v. Xerox Corp. \(1985\) 40 Cal.3d 306, 310-312 \[219 Cal.Rptr. 485, 707 P.2d 858\]](#), where the court held that the action for fraudulent concealment did not require affirmative misrepresentations so *388 long as it was shown that the employer knew of the industrial injury and that work aggravated it, and concealed that knowledge from the employee. ^{FN1}

FN1 [Cole v. Fair Oaks Fire Protection Dist., supra, 43 Cal.3d 148, 159](#), stated that "[t]o permit liability [for intentional infliction of emotional distress] where the employer did not specifically intend to cause distress but his misconduct reflected a reckless disregard of the probability of injury would be contrary to *Johns-Manville*. As there pointed out: 'It is not uncommon for an employer to "put his mind" to the existence of a danger to an employee and nevertheless fail to take corrective action....' [Citation.] Since awareness of the danger by the employer is not a basis for liability for damages, it follows that

reckless disregard of the probability of injury should not warrant exemption from the exclusive remedy provisions of the Labor Code. In addition, recovery based on aggravation where there was no intent to injure might encourage employers to seek excuses to terminate rather than attempt to continue employment of injured persons."

[Section 533](#) precludes indemnification for liability arising from deliberate conduct that the insured expected or intended to cause damage. ([Shell Oil Co. v. Winterthur Swiss Ins. Co.](#), *supra*, [12 Cal.App.4th 715, 743.](#)) Moreover, Beaver had no obligation to defend under the contractual provisions of its policy. It specifically excluded a *Johns-Manville* type of action from its coverage by agreeing to pay all sums its insured legally must pay as damages because of bodily injury to the insured's employees, provided the bodily injury is covered by its employers' liability policy. Bodily injury intentionally caused or aggravated by the insured is specifically excluded from coverage. Cherry's complaint alleged intentional aggravation of injury.^{FN2} When the policy language clearly provides no basis for coverage, there can be no reasonable expectation of a defense. ([B & E Convalescent Center v. State Compensation Ins. Fund](#), *supra*, [8 Cal.App.4th 78, 100.](#))

FN2 "Willful" has been defined to mean an intent to injure in the context of physical assaults by employers or coemployees under [Labor Code sections 3601](#), subdivision (a) (1) and [3602](#), subdivision (b)(1). (See [Soares v. City of Oakland](#) (1992) [9 Cal.App.4th 1822, 1827-1829](#) [[12 Cal.Rptr.2d 405](#)].)

(9) As stated in [United States Fid. & Guar. Co. v. American Employer's Ins. Co.](#) (1984) [159 Cal.App.3d 277, 289](#) [[205 Cal.Rptr. 460](#)], disapproved on other grounds in [J. C. Penney Casualty Ins. Co. v. M. K.](#), *supra*, [52 Cal.3d 1009, 1019-1020](#), footnote 8, the better and majority view appears to be that where an intentional injury policy exclusion exempts from coverage expected or intended damage, a specific intent on the part of the insured to cause all the resultant damage is not required. (See also [Aetna Cas. & Sur. Co. v. Sheft](#) (C.D.Cal. 1990) [756 F.Supp. 449, 451.](#))

(8b) Consequently, the Cherry action for "Intentional Concealment-Aggravation of Injury" which alleges intentional aggravation of injury is therefore excluded from coverage under the Beaver policy by the intentional acts exclusion. There cannot be a negligent or reckless fraudulent concealment since the elements are 1) knowingly ordering an employee to work in [*389](#) an unsafe environment, and 2) deliberately concealing the danger from the employee. ([Johns-Manville Products Corp. v. Superior Court](#), *supra*, [27 Cal.3d 465, 468.](#))

5. No Waiver of Defense by Beaver.

(10) Reagen's asserts that Beaver waived its right to claim no coverage for "intentional injury" because it assumed Reagen's defense and proceeded to negotiate and settle the suit brought by Cherry. (See [Miller v. Elite Ins. Co.](#) (1980) [100 Cal.App.3d 739, 753](#) [[161 Cal.Rptr. 322](#)]; [Aetna Casualty & Surety Co. v. Richmond](#) (1977) [76 Cal.App.3d 645, 653](#) [[143 Cal.Rptr. 75](#)].) The record does not support this assertion. Reagen's own first amended complaint alleges that "... Beaver wrongfully and intentionally denied coverage in regard to the [oil companies'] cross-complaints" Reagen's never pleaded or suggested that Beaver assumed the defense of the cross-complaints.

Reagen's acknowledges that Beaver "initially undertook the defense without asserting a reservation of rights, but later reserved rights only as to the contractually assumed liability exclusion" Beaver did defend Reagen's in the underlying action but never created an impression that there was no coverage dispute regarding the cross-complaints or misled Reagen's to its detriment on that issue. ([J. C. Penney Casualty Ins. Co. v. M. K.](#), *supra*, [52 Cal.3d 1009, 1017-1018.](#)) Assuming that Beaver defended and contributed to the settlement of the Cherry action when it had no duty to do either, that should not preclude it from asserting lack of duty to defend the cross-complaints.

6. Summary Judgment Disposed of All Issues.

(11) Reagen's asserts that Beaver's motion and the court's ruling failed to dispose of all issues. We disagree. If Beaver had no duty to defend, we fail to see how Beaver could have caused Reagen's damage by refusing to defend on the cross-complaints. Moreover, Beaver successfully argued that Harbor had the duty to defend the underlying action. A "bad faith" claim cannot be maintained unless policy benefits are due. (*McMillin Scripps North Partnership v. Royal Ins. Co.* (1993) 19 Cal.App.4th 1215, 1222 [23 Cal.Rptr.2d 243]; *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1153 [271 Cal.Rptr. 246].)

Harbor, in settlement of the cross-complaints and action by Reagen's, agreed to assume the defense of the underlying action and assume the responsibility for resolution of the judgment obtained by Chevron, Unocal *390 and Shell on their respective cross-complaints. Harbor further agreed to pay an amount equivalent to the total of all attorney fees and costs incurred to date by the insured in the defense of the oil companies' cross-complaints, as well as all attorney fees and costs incurred in the prosecution of Reagen's action. Reagen's cannot show how it has been damaged by any "bad faith" alleged on Beaver's part.

Similarly, we reject Reagen's assertion that the court failed to rule on Reagen's evidentiary objections. Reagen's does not specify any erroneous evidentiary rulings. It was incumbent upon Reagen's to press for a ruling. Reagen's fails to show prejudicial error on the issue.

The judgment is affirmed. Costs to respondent Beaver.

Gilbert, J., and Yegan, J., concurred.

Appellants' petition for review by the Supreme Court was denied February 23, 1995. *391

Cal.App.2.Dist.

Reagen's Vacuum Truck Service, Inc. v. Beaver Ins. Co.

31 Cal.App.4th 375, 37 Cal.Rptr.2d 89, 60 Cal. Comp. Cases 17

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