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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PALP, INC., et al., Plaintiffs and Appellants, v. WILLIAMSBURG NATIONAL INSURANCE COMPANY, Defendant and Respondent.	G043956 (Super. Ct. No. 30-2008-00113786) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, B. Tam Nomoto Schumann, Judge. Reversed and remanded with directions.

Christensen Ehret, Mark E. Christensen, and Scott J. Sterling for Plaintiffs and Appellants.

Berman, Berman & Berman and Spencer A. Schneider for Defendant and Respondent.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part III.

Palp, Inc., dba Excel Paving (Excel Paving) and its commercial general liability (CGL) insurer Virginia Surety Company, Inc. (Virginia Surety) appeal from a judgment after the trial court granted Williamsburg National Insurance Company's (Williamsburg) summary judgment motion in this insurance coverage case. Williamsburg provided commercial lines automobile/trucker's insurance on a dump truck owned by its insured, REH Trucking, Inc. (REH), which was providing hauling services on Excel Paving's parking lot demolition jobsite. Excel Paving was a named additional insured on the Williamsburg policy. An Excel Paving employee struck the cab of the REH dump truck with the bucket of an excavator being used to load broken asphalt into a different vehicle, not the dump truck, injuring the dump truck driver and damaging the truck.

The dump truck driver sued Excel Paving and its employee for negligence. The physical-damage insurer of the dump truck sued Excel Paving and its employee in subrogation. Virginia Surety agreed to defend and indemnify Excel Paving (and its employee) in both lawsuits under the CGL policy, but it and Excel Paving also tendered defense to Williamsburg under the dump truck's automobile insurance policy. Williamsburg declined the tender. Virginia Surety and Excel Paving filed the instant action against Williamsburg for declaratory relief, equitable contribution, equitable indemnity, breach of the contractual duty to defend and indemnify, and bad faith.

The trial court granted Williamsburg's summary judgment motion, agreeing with Williamsburg there was no possibility of coverage because the automobile policy excluded coverage for claims of bodily injury or property damage resulting from "the movement of property by a mechanical device (other than a hand truck) unless the device is attached to the covered auto." Although the excavator was not involved in loading or unloading the damaged dump truck, the trial court agreed the exclusion did not require a relationship between the property being moved and the covered vehicle, only

that the injury result from an unattached mechanical device that was moving property. We conclude the exclusion did not apply under the circumstances. We reverse the judgment and, for reasons explained in the unpublished part of our opinion, remand to the trial court with directions to grant Williamsburg's alternative motion for summary adjudication of Virginia Surety's equitable indemnification cause of action and Excel Paving's bad faith cause of action.

I

A. The Accident

On July 23, 2007, REH was performing services for Excel Paving, hauling away loads of excavated asphalt from a parking lot Excel Paving was demolishing. Christian Suarez, an REH employee, was driving an REH-owned dump truck that was being loaded.

Excel Paving employee, Robert Schroeder, was using a hydraulic excavator to demolish the parking lot surface, scoop up broken pieces of asphalt, and load them into some of the trucks. Excel Paving employee, Pat LaPaglia, was using a front-end loader to similarly load asphalt into other waiting trucks. LaPaglia had finished loading Suarez's truck with asphalt, and Suarez was waiting to leave the job site. As Suarez was preparing to drive away, the boom arm of the excavator being operated by Schroeder swung around, and the bucket at the end of the boom arm struck the cab of Suarez's dump truck. The excavator bucket was empty when it struck Suarez's dump truck. Suarez was injured, and the dump truck was damaged.

B. The Insurance Policies

When the accident occurred Excel Paving was insured for liability arising out of its operations under a CGL policy issued by Virginia Surety. The Virginia Surety policy provided $1 million in coverage for bodily injury or property damage for which Excel Paving was liable arising out of its paving operations including from its use of "mobile equipment" defined as, among other things, "[v]ehicles designed for use

principally off public roads; [¶] [v]ehicles that travel on crawler treads; [¶] [and v]ehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted: [¶] . . . [¶] . . . [r]oad construction or resurfacing equipment such as graders, scrapers or rollers . . . ."

REH was insured for liability (also $1 million in coverage) arising out of its trucking operations under a commercial lines policy for truckers issued by Williamsburg. Excel Paving was named an additional insured under the Williamsburg policy on an additional insured endorsement "with respect to liability arising out of operations performed for [Excel Paving] by or on behalf of [REH]" subject to the "terms, conditions, agreements, [and] limitations of th[e] policy." The Williamsburg policy provided liability coverage for damages an insured must pay because of bodily injury or property damage to which its insurance applies, "caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.'" The dump truck Suarez was driving was a covered auto under the policy.

The Williamsburg policy also contained a "mechanical device" exclusion. It excluded coverage for bodily injury or property damage "resulting from the movement of property by a mechanical device (other than a hand truck) unless the device is attached to the covered 'auto'."

C. The Lawsuits, Tenders and Settlements

Suarez sued Excel Paving and Schroeder for bodily injuries he sustained in the accident. His complaint alleged Schroeder negligently operated the excavator and Excel Paving failed to maintain appropriate safety procedures. In their answer, Excel Paving and Schroeder raised Suarez's comparative negligence as an affirmative defense.[1]

[1] Excel Paving also filed a cross-complaint against REH in the Suarez action alleging an oral agreement with REH to hold Excel Paving harmless for damages, but it dismissed the cross-complaint after REH filed a motion for judgment on the pleadings.

Lloyd's of London (Lloyd's), REH's property damage insurer, filed a subrogation action against Excel Paving and Schroeder. Lloyd's alleged Excel Paving's and Schroeder's negligence caused damage to the truck, and it sought to recover the $48,372 it paid out to REH. The Suarez and Lloyd's actions were eventually consolidated (hereafter collectively referred to as the underlying action).

Virginia Surety accepted the tender of Excel Paving and Schroeder's defense in both actions, without a reservation of rights, but it and Excel Paving also tendered Excel Paving's defense in both actions to Williamsburg. Williamsburg declined the tender based on the mechanical-device exclusion in the Williamsburg policy. Virginia Surety paid all defense costs and eventually settled Suarez's bodily injury claim for $319,000.

D. Current Action/Summary Judgment Motions

Virginia Surety and Excel Paving filed this action against Williamsburg. The operative complaint, the second amended complaint, contained causes of action for declaratory relief on behalf of both Virginia Surety and Excel Paving, breach of contract and breach of the covenant of good faith and fair dealing on behalf of Excel Paving, and equitable indemnity and equitable contribution on behalf of Virginia Surety.

On the parties' cross motions for summary judgment, or in the alternative summary adjudication, the trial court granted Williamsburg's summary judgment motion and denied Virginia Surety and Excel Paving's motion as moot. The trial court concluded, based on the undisputed facts, the mechanical device exclusion eliminated any potential for coverage under the Williamsburg policy and therefore Williamsburg had no duty to defend or indemnify Excel Paving in the underlying actions.

II

A. General Legal Principles

"[A]n insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the

insuring agreement. [Citations.]" (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 19 (*Waller*).) The insurer must defend any claim that would be covered if it were true, even if it is "groundless, false or fraudulent." (*Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 273 (*Gray*).) "Implicit in this rule is the principle that the duty to defend is broader than the duty to indemnify; an insurer may owe a duty to defend its insured in an action in which no damages ultimately are awarded. [Citations.]" (*Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081.) "'Thus, when a suit against an insured alleges a claim that potentially could subject the insured to liability for covered damages, an insurer must defend unless and until the insurer can demonstrate, by reference to undisputed facts, that *the claim cannot be covered*. In order to establish a duty to defend, an insured need only establish the existence of a potential for coverage; while to avoid the duty, the insurer must establish the *absence* of any such potential. [Citation.]" (*Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1186, fn. omitted.) Doubts concerning the potential for coverage and the existence of duty to defend are resolved in favor of the insured. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 299-300 (*Montrose*).)

"[W]hether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy" (*Waller, supra,* 11 Cal.4th at p. 19) and extrinsic facts "*known by the insurer* at the *inception* of the third party lawsuit . . . ." (*Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106, 1114.) The insurer's defense duty is obviated where the facts are undisputed and conclusively eliminate the potential the policy provides coverage for the third party's claim. (*Waller, supra,* 11 Cal.4th at p. 19.)

An insurer is entitled to summary judgment that no potential for indemnity exists if the evidence establishes no coverage under the policy as a matter of law. (*County of San Diego v. Ace Property & Casualty Ins. Co.* (2005) 37 Cal.4th 406, 414 (*Ace*).) """We apply a de novo standard of review to an order granting summary

judgment when, on undisputed facts, the order is based on the interpretation or application of the terms of an insurance policy.'"'" (*Ace*, *supra*, 37 Cal.4th at p. 414; see also *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955 ["When no extrinsic evidence is introduced, or when the competent extrinsic evidence is not in conflict, the appellate court independently construes the contract"].)

"Interpretation of an insurance policy is a question of law and follows the general rules of contract interpretation." (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 647 (*MacKinnon*).) "'The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the "mutual intention" of the parties. "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id*., § 1639.) 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' (*id*., § 1644), controls judicial interpretation. (*Id*., § 1638.)'"'" (*MacKinnon*, *supra*, 31 Cal.4th at pp. 647-648.)

An insurance policy provision is considered to be ambiguous when it is capable of at least two reasonable constructions. (*Ace, supra,* 37 Cal.4th at p. 415; *MacKinnon, supra,* 31 Cal.4th at p. 648.) "'But language in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract.'" (*MacKinnon, supra,* 31 Cal.4th at p. 648.) "Courts will not strain to create an ambiguity where none exists." (*Waller*, *supra*, 11 Cal.4th at pp. 18-19.) '"'"'"If an asserted ambiguity is not eliminated by the language and context of the policy, courts then invoke the principle that ambiguities are generally construed against the party who caused the uncertainty to exist (i.e., the insurer) in order to protect

the insured's reasonable expectation of coverage.' [Citation.]" [Citation.]' [Citation.]" (*Ace, supra,* 37 Cal.4th at p. 415.)

An insurance policy's coverage provisions must be interpreted broadly to afford the insured the greatest possible protection, while a policy's exclusions must be interpreted narrowly against the insurer. (*MacKinnon, supra,* 31 Cal.4th at p. 648.) The exclusionary clause must be "'*conspicuous, plain and clear*.'" (*State Farm Mut. Auto. Ins. Co. v. Jacober* (1973) 10 Cal.3d 193, 202.) "This rule applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded." (*MacKinnon, supra,* 31 Cal.4th at p. 648.)

The insured has the burden of establishing the claim comes within the scope of coverage, and the insurer has the burden of establishing the claim comes within an exclusion. (*MacKinnon, supra,* 31 Cal.4th at p. 648.) To prevail, the insurer must establish its interpretation of the policy is the only reasonable one. (*Id.* at p. 655.) Even if the insurer's interpretation is reasonable, the court must interpret the policy in the insured's favor if any other reasonable interpretation would permit coverage for the claim. (*Ibid*.)

B. Duty to Defend/Indemnify

With the above principles in mind we turn to the issue at hand: whether Excel Paving had any possibility of coverage under the Williamsburg policy for the damages caused to Suarez and the REH dump truck. We conclude there was coverage and the trial court erred by granting Williamsburg's summary judgment motion.

We first consider whether the claim came within the scope of the coverage clause of the Williamsburg policy. The burden on this issue was on the insured. (*MacKinnon, supra,* 31 Cal.4th at p. 648.) We need not spend undue time on this point as Williamsburg does not seriously dispute the accident fell within the policy's insuring

clause.[2] The Williamsburg policy states it will "pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.'" The accident arose out of REH's ownership, maintenance or use of the covered dump truck given that the dump truck was on the Excel Paving jobsite having been engaged by Excel Paving to haul away demolished asphalt.

Furthermore, Excel Paving was an additional insured on the policy "with respect to liability arising out of operations performed for [Excel Paving] by or on behalf of [REH]" so it is also an "insured." We additionally observe that because Excel Paving was an additional insured under a blanket additional insured endorsement, i.e. one that was not limited to coverage for the additional insured's vicarious liability for negligent conduct by the named insured, Excel Paving is provided coverage by the policy for accidents falling within the coverage clause without regard to whether injury was caused by REH (the named insured) or Excel Paving (the additional insured). (See *Vitton Construction Co., Inc. v. Pacific Ins. Co.* (2003) 110 Cal.App.4th 762, 767-768 ["the fact that an accident is not attributable to the named insured's negligence is *irrelevant* when

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[2] Williamsburg's summary judgment motion asserted there was no potential for coverage because of its policy's mechanical device exclusion; it did not claim the accident was not within the insuring clause of its policy. In their cross motion for summary judgment, Virginia Surety and Excel Paving specifically asserted the accident did fall within the insuring clause of the Williamsburg policy, and in its opposition to the cross motion, Williamsburg did not dispute that assertion—again arguing the mechanical device exclusion precluded any potential for coverage.

In their appellants' opening brief, Virginia Surety and Excel Paving again asserted the accident falls within the insuring clause of the Williamsburg policy, to which Williamsburg responded only that it "concede[d] for purpose of its [summary judgment/summary adjudication] motion that Suarez's claim for bodily injury and Lloyd's claim for property damage potentially fell within the policy's insuring agreement." At oral argument, Williamsburg for the first time argued the accident did not fall within its policy's insuring clause. "We do not consider arguments that are raised for the first time at oral argument." (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1554, fn. 9.)

the additional insured endorsement does not purport to allocate or restrict coverage according to fault"]; *Fireman's Fund Ins. Cos. v. Atlantic Richfield Co.* (2001) 94 Cal.App.4th 842, 851-852 [where additional insured endorsement did not contain language limiting coverage to vicarious liability, coverage existed regardless of additional insured's fault]; *Acceptance Ins. Co. v. Syufy Enterprises* (1999) 69 Cal.App.4th 321, 330 ["additional insured is covered without regard to whether injury was caused by the named insured or the additional insured"]; see also *Hartford Casualty Ins. Co. v. Travelers Indemnity Co.* (2003) 110 Cal.App.4th 710, 716-717 [same]; cf. *Pardee Construction Co. v. Insurance Co. of the West* (2000) 77 Cal.App.4th 1340, 1361 [no coverage for additional insured because endorsement contained language limiting coverage to additional insured's vicarious liability for named insured's negligence].)

We next consider whether the mechanical device exclusion relied upon by Williamsburg excludes coverage. As already noted, the burden in this regard is with the insurer. (*MacKinnon, supra*, 31 Cal.4th at p. 648.) Exclusionary clauses are interpreted narrowly. (*Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 406.) Although when the meaning is clear, such a clause will be enforced (*California State Auto. Assn. Inter-Ins. Bureau v. Warwick* (1976) 17 Cal.3d 190, 195, fn. 4), where there is ambiguity the clause must be construed in the insured's favor consistent with its reasonable expectations. (*Gray, supra*, 65 Cal.2d at pp. 271-272; see *Montrose, supra*, 6 Cal.4th at p. 299.)

Excel Paving argues the mechanical device exclusion does not apply to the undisputed facts of this case. The primary gist of its argument is the exclusion must be narrowly interpreted to apply only when the movement of property (i.e., the asphalt) by the mechanical device not attached to the covered vehicle (i.e., the excavator), was in relation to the loading or unloading of the covered vehicle (i.e., the REH dump truck). It is undisputed the excavator was not loading or unloading Suarez's truck (that task was

performed by a different mechanical device—the front-end loader), and, furthermore, Suarez's truck was finished being loaded when the accident occurred. Williamsburg argues no interpretation of the mechanical device exclusion is needed—its meaning is clear and unambiguous on its face. It contends the mechanical device exclusion applies whenever an accident involving a covered vehicle results from the movement of property by a mechanical device that is not attached to the covered vehicle, period. There is no requirement the movement of the property have anything to do with loading or unloading the covered vehicle.

We cannot agree with Williamsburg's broad reading of the exclusion—such a construction could lead to exclusion of coverage for the most random of acts simply because a mechanical device that was moving property was involved. The exclusion applies to damage "resulting from the movement of property by a mechanical device (other than a hand truck) unless the device is attached to the covered 'auto'." But movement where and movement why?? An exclusion must be read narrowly and in accordance with the reasonable expectations of an insured. The references in the exclusion to "hand trucks" and mechanical devices that are attached to the covered vehicle both support that the "movement of property" must be in relation to the covered auto, i.e., damage resulting from the movement of property *to or from* the covered auto by a mechanical device (other than a hand truck) unless the device is attached to the covered auto.

There is no reported California case considering the mechanical device exclusion. There are, however, numerous decisions from sister states and federal courts, all of which discuss the mechanical device exclusion in the context of the movement of property *in relation to* the covered vehicle—more specifically the loading or unloading of the covered vehicle. (See *Travelers Indem. Co. v. Gen. Star Indem. Co.* (S.D. Ala. 2001) 157 F.Supp.2d 1273, 1288 [forklift loading steel into covered vehicle—mechanical device exclusion applies]; *Assicurazioni Generali S.P.A. v. Public Serv. Mut. Ins. Co.*

(E.D. Pa. 1995) 882 F.Supp. 1537, 1538, 1541 [freight elevator operator injured by bed frame unloaded from insured delivery truck—mechanical device exclusion not applicable because elevator (mechanical device) stationary at time of accident so no movement of property by mechanical device]; *Truck Ins. Exchange v. Home Ins. Co.* (Colo. Ct. App. 1992) 841 P.2d 354, 355, 358 [mechanical loading device loading cylinders onto covered vehicle—but mechanical device exclusion violates state mandatory coverage laws]; *Cont'l Ins. Co. v. Am. Motorist Ins. Co.* (Ga. Ct. App. 2000) 542 S.E.2d 607, 608, 610 [hydraulic pallet jack being used to unload truck—mechanical device exclusion applies]; *Cobb County v. Hunt* (Ga. Ct. App. 1983) 304 S.E.2d 403, 405 [pipe being loaded onto covered vehicle by front-end loader—mechanical device exclusion applies]; *Dauthier v. Pointe Coupee Wood Treating, Inc*. (La. App. 1990) 560 So.2d 556, 557-558 [pilings being unloaded from covered vehicle with forklift—mechanical device exclusion applies]; *Sonoco Products Co., Inc. v. Fire & Cas. Ins. Co. of Connecticut* (N.J. Super. App. Div. 2001) 767 A.2d 1018, 1019, 1020 [forklift unloading pallets from insured tractor trailer—but mechanical device exclusion violates state mandatory coverage laws]; *Parkway Iron & Metal Co. v. New Jersey Mfrs. Ins. Co*. (N.J. Super. App. Div. 1993) 629 A.2d 1352, 1353 [crane unloading sheet metal from covered truck— but mechanical device exclusion violates state mandatory coverage laws]; *General Accident Ins. Co. v. United States Fidelity & Guar. Co.* (N.Y. App. Div. 1993) 602 N.Y.S.2d 948, 950-951 [water softener tank being unloaded from covered vehicle by push cart—mechanical device exclusion inapplicable because push cart could be included in definition of hand truck]; *Sellie v. North Dakota Ins. Guar. Ass'n* (N.D. 1992) 494 N.W.2d 151, 153, 158 [luggage cart being used to unload luggage from insured bus—mechanical device exclusion not applicable because luggage cart was a hand truck]; *Shell Oil Co. v. Employers Ins. of Wausau* (Ore. Ct. App. 1984) 684 P.2d 622, 623-624 [forklift loading oil drums onto covered truck—mechanical device exclusion applies]; *Sisson v. Hansen Storage Co.* (Wis. Ct. App. 2008) 756 N.W.2d 667,

670, 677 [forklift being used to unload covered truck—mechanical device exclusion applies].)

Williamsburg does not assert the excavator was involved in loading or unloading the dump truck and cites no published case in which the mechanical device exclusion was applied to an accident that was not related to the covered vehicle by use of the mechanical device in connection with loading or unloading the vehicle. Williamsburg cites *Travelers Indem. Co. v. Gen. Star Indem. Co.*, *supra*, 157 F.Supp.2d at page 1288, *Cont'l Ins. Co. v. Am. Motorist Ins. Co.*, *supra*, 542 S.E.2d at pages 608, 610, and *Dauthier v. Pointe Coupee Wood Treating, Inc*., *supra*, 560 So.2d at pages 556-558, for the proposition the mechanical device exclusion is clear and unambiguous and therefore enforceable. But in each of those cases the injury was related to loading or unloading the covered vehicle with the unattached mechanical device. Because the movement of property by the excavator bore no relationship to the REH dump truck, i.e., it was not, and had not been, loading or unloading the dump truck, the mechanical device exclusion does not apply. Accordingly, there was coverage for the accident under the Williamsburg policy and summary judgment for Williamsburg was improper.[3]

III

Williamsburg argues in the alternative even if there is coverage for the accident under its policy, it is nonetheless entitled to summary adjudication on most of the complaint's causes of action. Williamsburg agrees that if there is coverage Virginia Surety may proceed with its cause of action for equitable contribution from Williamsburg towards defense and indemnification costs, but it argues the equitable indemnity cause of action is barred because Virginia Surety had its own independent duty to defend and indemnify Excel Paving. It also contends Excel Paving's breach of contract and bad faith

[3] For this reason we need not address Virginia Surety and Excel Paving's remaining arguments concerning the applicability of the mechanical device exclusion.

causes of action cannot be proven for the simple reason that Excel Paving has suffered no damage because Virginia Surety fully defended and indemnified it and Schroeder. In the alternative, Williamsburg argues Excel Paving's bad faith cause of action is barred because there was a genuine dispute as to coverage.

Although Virginia Surety and Excel Paving respond to Williamsburg's arguments in their reply brief, they suggest in passing we should not address them because the trial court never ruled on Williamsburg's request for summary adjudication (for obvious reasons—granting summary judgment obviated the need to rule on the alternative summary adjudication motion). They further assert that if we are inclined to address the issues, they should be permitted to file supplemental briefing. (Code Civ. Proc., § 437c, subd. (m)(2).)[4] We may affirm a summary judgment if it is correct on any ground that the parties had an adequate opportunity to address in the trial court, regardless of the trial court's stated reasons. (*Blanco v. Baxter Healthcare Corp.* (2008) 158 Cal.App.4th 1039, 1058; *California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 22.) These issues were all raised in the trial court in Williamsburg's summary judgment/adjudication motion and addressed in Virginia Surety and Excel Paving's opposition. They were directly raised in Williamsburg's respondent's brief on appeal and briefed by Virginia Surety and Excel Paving in their reply brief. Accordingly, we may address the issues here. (See *Bains v. Moores* (2009) 172 Cal.App.4th 445, 471, fn. 39 [where defendants directly addressed issue in respondent's brief and plaintiffs

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[4] Code of Civil Procedure section 437c, subdivision (m)(2), provides: "Before a reviewing court affirms an order granting summary judgment or summary adjudication on a ground not relied upon by the trial court, the reviewing court shall afford the parties an opportunity to present their views on the issue by submitting supplemental briefs. The supplemental briefing may include an argument that additional evidence relating to that ground exists, but that the party has not had an adequate opportunity to present the evidence or to conduct discovery on the issue. The court may reverse or remand based upon the supplemental briefing to allow the parties to present additional evidence or to conduct discovery on the issue. If the court fails to allow supplemental briefing, a rehearing shall be ordered upon timely petition of any party."

addressed in reply brief, purpose of Code of Civil Procedure section 437c, subdivision (m)(2), is met]; *Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1147, fn. 7 [supplemental briefing not required pursuant to Code of Civil Procedure section 437c, subdivision (m)(2), where issue raised below and on appeal].)

A. Virginia Surety's Equitable Indemnification Cause of Action

Williamsburg contends if there is coverage for the accident under its policy, then it and Virginia Surety are both primary insurers—each had the duty to defend and indemnify. Accordingly, Williamsburg asserts Virginia Surety may pursue equitable contribution from Williamsburg to recover a share of the defense costs, but it may not seek equitable indemnification to recover *all* those costs. We agree.

"Equitable indemnity '"applies in cases in which one party pays a debt for which another is primarily liable and which in equity and good conscience should have been paid by the latter party."' [Citation.]" (*United States Auto Assn. v. Alaska Ins. Co.* (2001) 94 Cal.App.4th 638, 644-645.) "[F]or instance, an excess insurer who defends and indemnifies the insured following the primary insurer's wrongful refusal to do so may seek equitable indemnity from the primary insurer for amounts paid in defense and settlement of the claim." (Croskey, et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2011) ¶ 8:65.1, p. 8-23.) Primary insurance provides coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability. (*North American Capacity Ins. Co. v. Claremont Liability Ins. Co.* (2009) 177 Cal.App.4th 272, 291.) Primary insurers have a duty of defense. (*Ibid.*)

By contrast, equitable contribution applies when the insurers' level of risk is the same. "[Equitable contribution] is the right to recover, not from the party *primarily* liable for the loss, but from a *co-obligor* who *shares* such liability with the party seeking contribution. In the insurance context, the right to contribution arises when several

insurers are obligated to indemnify or defend the same loss or claim, and one insurer has paid more than its share of the loss or defended the action without any participation by the others. Where multiple insurance carriers insure the same insured and cover the same risk, each insurer has independent standing to assert a cause of action against its coinsurers for equitable contribution when it has undertaken the defense or indemnification of the common insured. Equitable contribution permits reimbursement to the insurer that paid on the loss for the excess it paid over its proportionate share of the obligation, on the theory that the debt it paid was *equally* and *concurrently* owed by the other insurers and should be shared by them pro rata in proportion to their respective coverage of the risk. The purpose of this rule of equity is to accomplish substantial justice by equalizing the common burden shared by coinsurers, and to prevent one insurer from profiting at the expense of others. [Citations.]" (*Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1293, fn. omitted.)

The Williamsburg policy states its coverage is "primary for any covered 'auto' while hired or borrowed by you and used exclusively in your business as a 'trucker' and pursuant to operating rights granted to you by a public authority. This [c]overage. . . . is excess over any other collectible insurance for any covered 'auto' while hired or borrowed from you by another 'trucker.'" The provision further states "this [c]overage . . . provides primary insurance for any covered 'auto' you own and excess insurance for any covered 'auto' you don't own."

Virginia Surety is also a primary—co-insurer—of the risk because the Virginia Surety policy provides coverage for bodily injury or property damage for which Excel Paving was liable arising out of its operations including its use of its "mobile equipment" such as the excavator. Virginia Surety defended and indemnified Excel Paving and Schroeder without reservation of rights thus acknowledging its duties.

Virginia Surety and Excel Paving point out the Virginia Surety policy states its coverage is excess if there is other insurance available. The Virginia Surety policy

states its coverage is primary *unless* "subdivision (b) applies," and subdivision (b) provides, as relevant here, that the Virginia Surety insurance is excess insurance over "(2) [a]ny other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement."

But under California law equitable contribution applies when there is the same level of insurance, both primary or both excess, for the same risk, regardless of any "other insurance" policy language. (See *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1080 (*Dart Industries*); *Edmondson Property Management v. Kwock* (2008) 156 Cal.App.4th 197, 203 (*Edmondson*); *CSE Ins. Group v. Northbrook Property & Casualty Co.* (1994) 23 Cal.App.4th 1839, 1845.) In *Dart Industries*, our Supreme Court stated, "[T]he modern trend is to require equitable contributions on a pro rata basis from all primary insurers regardless of the type of 'other insurance' clause in their policies." (*Dart Industries, supra,* 28 Cal.4th at p. 1080; see also *Edmondson, supra,* 156 Cal.App.4th at p. 203.) This is because public policy favors apportionment among coinsurers. (*Edmondson, supra,* 156 Cal.App.4th at p. 203.) Accordingly, we agree with Williamsburg that equitable contribution applies in this instance, not equitable indemnification.

B. Excel Paving's Breach of Contract and Bad Faith Causes of Action

1. Damages

Williamsburg contends Excel Paving cannot prevail on its breach of contract or bad faith causes of action because it was defended and indemnified by Virginia Surety and thus suffered no damages as a matter of law. We conclude there is a triable issue of fact as to whether Excel Paving was damaged.

"Breach of an insurer's duty to defend violates a contractual obligation and, where unreasonable, also violates the covenant of good faith and fair dealing, for which

tort remedies are appropriate. [Citation.]" (*Amato v. Mercury Casualty Co.* (1997) 53 Cal.App.4th 825, 831.) "The general measure of damages for a breach of the duty to defend an insured, even if it is ultimately determined there is no coverage under the policy, are the costs and attorney fees expended by the insured defending the underlying action. [Citations.]" (*Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078, 1088-1089 (*Emerald Bay*).)

In a summary adjudication motion, the pleadings define the issues. (*Scott Co. v. United States Fidelity & Guaranty Ins. Co.* (2003) 107 Cal.App.4th 197, 213, disapproved on another point in *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1107, fn. 5.) Here, Excel Paving alleged it was damaged by payment of defense costs in the underlying action, including payment of its deductible on the Virginia Surety policy. In its motion for summary adjudication, Williamsburg asserted Excel Paving could not prove damages as a matter of law based on two facts that were undisputed by Excel Paving: Virginia Surety provided Excel Paving and Schroeder with a defense in the underlying litigation and agreed to pay $319,000 to Suarez to settle his claim against Excel Paving and Schroeder.[5] Although Excel Paving alleged it was damaged by paying its insurance deductible under the Virginia Surety policy, Williamsburg asserted Excel Paving's payment of the $25,000 deductible was not compensable damage as a matter of law because Excel Paving was contractually obligated by the Virginia Surety policy to pay the deductible.

We agree with Excel Paving that Williamsburg failed to establish Excel Paving did not suffer compensable damage as a result of Williamsburg's breach of its contractual duty to defend and indemnify. Williamsburg correctly states the general law

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[5] Williamsburg's moving papers made no mention of the disposition of the Lloyd's claim. Although in its respondent's brief Williamsburg states the Lloyd's action was settled for $33,000 paid by Virginia Surety, Williamsburg cites no evidence in the record to support that factual assertion, and in our review of the record we have found none.

that "[w]here more than one insurer has a duty to defend an insured, each insurer's duty is 'separate and independent from the others. . . .' [Citation.] However, '[a]n insured is entitled to only one full defense.' [Citation.] An insurer that has allegedly breached its duty to defend may demonstrate that its insured suffered no damages from its alleged breach by demonstrating that its insured received a *full and complete* defense, notwithstanding its breach. [Citation.]" (*Risely v. Interinsurance Exchange of the Automobile Club* (2010) 183 Cal.App.4th 196, 210, italics added; see also *Emerald Bay, supra,* 130 Cal.App.4th at p. 1094; *Horace Mann Ins. Co. v. Barbara B.* (1998) 61 Cal.App.4th 158, 164; *Ceresino v. Fire Ins. Exchange* (1989) 215 Cal.App.3d 814, 823.) But none of those cases considered whether the insured's payment of its deductible under the defending insurer's policy was a recoverable item of damage against another insurer that is also on the risk but which refuses to defend or indemnify.

In its respondent's brief, Williamsburg criticizes Excel Paving for claiming its $25,000 deductible constitutes compensable damage "[d]espite adverse case authority . . . ." In a footnote, Williamsburg makes its only mention of the "adverse" authority, *Tradewinds Escrow, Inc. v. Truck Ins. Exchange* (2002) 97 Cal.App.4th 704 (*Tradewinds Escrow*), which it describes as affirming a summary judgment for the nondefending insurer due to lack of compensable damages even though the insured paid a $10,000 deductible to the defending insurer. But Williamsburg has not accurately described the case, and it is easily distinguishable. In *Tradewinds Escrow*, the first insurer provided the insured with a defense under an errors and omissions policy but refused to reimburse $20,000 in legal fees the insured incurred *before* the insured tendered its defense to the first defending insurer, which included the insured's $10,000 deductible and $10,000 in disputed fees. (*Id.* at pp. 707-708.) Over a year and a half after the litigation had commenced, the insured tendered its defense to defendant CGL insurer, and the defense was denied. The court held the CGL insurer was not responsible for any of the *pre-tender* defense costs incurred by the insured because the CGL policy

contained a no voluntary payments provision. "Such clauses bar reimbursement for pre-tender expenses based on the reasoning that until the defense is tendered to the insured, there is no duty to defend. [Citation.]" (*Id.* at p. 710.) There is no suggestion here that Excel Paving's deductible was a voluntary pre-tender payment.

Williamsburg also argues Excel Paving failed to present evidence it in fact paid the deductible under the Virginia Surety policy. It contends Excel Paving's mere allegation of payment is not evidence the deductible was paid. (See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 720, fn. 7 ["[A] party cannot rely on the allegations of his own pleadings, even if verified, to make or supplement the evidentiary showing required in the summary judgment context"].) Williamsburg argues the only evidence Excel Paving provided to demonstrate it actually paid the deductible was the declaration of Kathie Weldy, an employee of Old Republic Construction Program Group responsible for handling Excel's and Schroeder's defense in the underlying action. As relevant, Weldy's declaration stated only "Excel [Paving] and Virginia Surety have paid the entirety of the defense costs of Excel and Schroeder in the Underlying Action[,]" and Virginia Surety paid $319,000 to Suarez to settle his claim. Williamsburg argues Weldy's declaration was inadmissible because it was lacking foundation and contained inadmissible hearsay, and was inadequate to establish Excel Paving actually paid the deductible.

We need not decide whether Weldy's declaration was admissible or adequate for the simple reason it was not Excel Paving's burden. There were competing summary judgment/summary adjudication motions: the one filed by Williamsburg and the one filed by Virginia Surety and Excel Paving. In its motion, Williamsburg asserted Excel's payment of the $25,000 deductible was not compensable damage *as a matter of law* because Excel Paving was contractually obligated to pay the deductible. Williamsburg did not seek summary adjudication on the grounds Excel Paving could not prove it ever paid the deductible. In short, Williamsburg's motion never shifted the

burden to Excel Paving to show there was a material issue of fact as to whether it actually paid the deductible. Contrary to Williamsburg's assertion that the Weldy declaration was submitted *in opposition* to its summary adjudication motion, the Weldy declaration was submitted *in support* of Excel Paving's cross motion seeking summary adjudication in its favor on its causes of action for breach of the duty to defend and indemnify. At best, Williamsburg has demonstrated that even though it had a duty to defend, Excel Paving has not demonstrated it is entitled to judgment as a matter of law on its breach of contract cause of action because there is a triable issue of fact as to the amount of its damage.[6]

2. Genuine Dispute

Williamsburg also contends it is entitled to summary adjudication of Excel Paving's bad faith cause of action because it did not act unreasonably in asserting the applicability of the mechanical device exclusion. We agree.

"A covenant of good faith and fair dealing is implied in every insurance contract. [Citation.]" (*White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 885.) The covenant requires the insurer and the insured "to refrain from doing anything to injure the right of the other to receive the benefits of the agreement." (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 818.) "But a breach of an insurance contract does not automatically subject an insurer to tort damages for bad faith breach. Bad faith cases are analyzed in a three-step process: First, was there a breach at all so as to warrant contract damages? Second, was the breach unreasonable so as to warrant tort damages? Third, was the breach so egregious that there is evidence of 'oppression, fraud, or malice' under Civil Code section 3294, subdivision (a) so as to warrant punitive damages?" (*Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 194-195 (*Griffin Dewatering*), fn. omitted.) We have answered the first question in the affirmative, but answer the second and thus, necessarily, the third in the negative.

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[6] At oral argument, Excel Paving agreed its total out-of-pocket expenditure in the underlying litigation was the $25,000 deductible.

(*Coleman v. Gulf Ins. Group* (1986) 41 Cal.3d 782, 789, fn. 2 ["no separate or independent cause of action for punitive damages"].)

It is only when an insurer *unreasonably* fails to defend its insured that it breaches the implied covenant of good faith and fair dealing. (*Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1319.) A "'"breach of the implied covenant of good faith and fair dealing involves something beyond breach of the contractual duty itself" and it has been held that "[b]ad faith implies unfair dealing rather than mistaken judgment. . . . [Citation.]" [Citation.]' [Citation.]" (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1394.)

"It is now settled law in California that an insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability . . . is not liable in bad faith even though it might be liable for breach of contract. [Citation.]" (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 347.) "As long as the insurer's coverage decision was reasonable, it will have no liability for breach of the covenant of good faith and fair dealing. An insurer which denies benefits reasonably, but incorrectly, will be liable only for damages flowing from the breach of contract, i.e., the policy benefits." (*Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966, 977.)

In *Griffin Dewatering, supra,* 176 Cal.App.4th 172, this court acknowledged the genuine dispute concept extends to the situation in which an insurer denies a defense based on its reasonable, but what turned out to be an incorrect, interpretation of a policy exclusion clause. Where the objective reasonableness of the insurer's refusal to defend based on the exclusion was to be determined entirely based on legal precedent and statutory language, the court could decide as a matter of law whether the insurer acted reasonably. (*Id.* at p. 200.) In this case, the facts are undisputed. Williamsburg rejected the tender of defense because it interpreted the mechanical device exclusion as barring coverage under the facts of the accident. Although we have

concluded its interpretation of the exclusion clause was incorrect on the facts before it, it was nonetheless reasonable in view of the lack of any California law interpreting the exclusion.

IV

The summary judgment is reversed. The matter is remanded to the trial court with directions to: (1) enter a new order denying Williamsburg's motion for summary judgment and granting Williamsburg's motion for summary adjudication of the second amended complaint's third cause of action for breach of the covenant of good faith and fair dealing and fifth cause of action for equitable indemnity; and (2) conduct further proceedings with respect to the remaining causes of action. Appellants are awarded their costs on appeal.

O'LEARY, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.