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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MEL CLAYTON FORD, Plaintiff, Cross-defendant and Respondent, v. FORD MOTOR COMPANY, Defendant, Cross-complainant and Appellant.	B151718 (Super. Ct. No. BC219881)

APPEAL from judgment and orders of the Superior Court of Los Angeles County, Barbara A. Meiers, Judge. Reversed and remanded.

Crowe & Rogan, Patrick G. Rogan, Kate S. Lehrman, and Robert A. Philipson for Defendant, Cross-complainant and Appellant.

Callahan, McCune & Willis and Peter M. Callahan for Plaintiff, Cross-defendant and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts A, B, D and II.

Appellant Ford Motor Company appeals from a judgment on an express indemnity contract in favor of respondent Mel Clayton Ford (the Dealer). The parties were codefendants in an earlier lawsuit involving a third party seriously injured while driving a vehicle manufactured by Ford and sold and repaired by the Dealer. The parties entered into separate settlements of that lawsuit, and then commenced this action for indemnity. The trial court ruled that: (1) under the express terms of the agreement between the parties, Ford's obligation to defend the Dealer was broader than its obligation to indemnify; (2) even if the terms of the agreement could not be so construed, a broad duty to defend whenever the underlying lawsuit was potentially covered by the indemnification provision should be implied; (3) an indemnitee who settles a lawsuit after the indemnitor breaches its duty to defend and obtains a good faith determination under Code of Civil Procedure section 877.6, is entitled, without further proof, to recover its defense costs and the settlement amount from the indemnitor; (4) the Dealer could recover its defense costs and the settlement amount from Ford whether it paid these sums personally or they were paid by its liability insurer; and (5) a decision could be made concerning good faith settlement based on the allegations of the complaint alone, without review of the facts relating to the parties' respective liabilities known by the parties at the time of the settlement. The court was incorrect in these rulings, and we, therefore, reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Indemnity Clause of Parties' Agreement

Ford and the Dealer entered into an agreement governing their relationship which included a separate indemnity provision. Among other things, Ford agreed

to "defend, indemnify, hold harmless and protect the Dealer from any losses, damages or expense, including costs and attorney's fees, resulting from or related to lawsuits, complaints or claims commenced against the Dealer by third parties concerning: [¶] (1) . . . bodily injury or property damage arising out of an occurrence caused solely by a 'production defect' in that product (i.e., due to defective materials or workmanship utilized or performed at the factory), except for any 'production defect' in tires and diesel engines made by others, provided, however, that the 'production defect' could not have been discovered by the Dealer in the reasonable pre-delivery inspection of the VEHICLE, FOREIGN VEHICLE, TRUCK or HEAVY DUTY TRUCK (as applicable) as recommended by the Company. [¶] (2) . . . bodily injury or property damage arising out of an occurrence caused solely by a defect in the design of that product . . . ."

Ford further agreed that "[i]n the event that any legal action arising out of any of these causes is brought against the Dealer, [Ford] shall undertake, at its sole expense, to defend said action on behalf of the Dealer when requested to do so by the Dealer, provided that the Dealer promptly notifies [Ford] in writing of the commencement of the action against the Dealer and cooperates fully in the defense of the action in such manner and to such extent as [Ford] may reasonably require . . . . Should [Ford] refuse to undertake the defense on behalf of the Dealer, or fail to undertake an adequate defense, the Dealer may conduct its own defense and [Ford] shall be liable for the cost of such defense, including reasonable attorney's fees, together with any verdict, judgment or settlement paid by the Dealer (provided, however, that the Dealer shall notify [Ford] within a reasonable period of any such settlement)."

Parker Action

In May 1998, David Parker filed an action against Ford and the Dealer arising from an incident involving a 1989 Ford F250 truck purchased from the

Dealer. The complaint alleged that Parker had been driving the truck on May 20, 1997, when it erupted into flames, seriously burning him. The complaint contained four causes of action. The first cause of action for strict product liability alleged that Ford and the Dealer "designed, manufactured, researched, tested, assembled, installed, marketed, advertised, distributed, and sold" the truck, and that the truck was "defective in design, manufacture, assembly, materials selection, research and installation, based on the location and lack of integrity of the fuel system and all of its component parts, including but not limited to the mid-ship fuel tank, fuel tank structure and fuel lines." In the second cause of action for negligence, the complaint alleged that Ford and the Dealer breached a duty of care to "manufacture, assemble, design, test, research, market, advertise and distribute a vehicle free of defects." In the third cause of action, the complaint alleged that Ford and the Dealer breached a duty to warn "of the inherent danger embodied in said product, based on the lack of integrity of the fuel system and all of its component parts, including but not limited to the mid-ship fuel tank, fuel tank structure and fuel lines." The fourth cause of action for breach of warranty alleged that Ford and the Dealer expressly and impliedly warranted that their product was free from material defect, including defects in design, assembly, and manufacture.

In July 1999, the Dealer's attorneys sent a letter to Ford tendering the defense of the *Parker* matter. The letter stated: "[T]he plaintiff has sued the dealer . . . on passive negligence, 'stream of commerce' theories, as well as theories of direct or active negligence in the maintenance of the vehicle. We now know that the plaintiff has no evidence of any such active or direct negligence based on improper maintenance or anything else." The letter discussed the evidence which had come to light through discovery and otherwise. It noted that the Dealer had last worked on the truck's fuel pump 40 months and 20,000 miles previously. It discussed the possibility that a pin sized hole located in the fuel filter, caused by

either a defective product or corrosion, had led to a fuel leak that started the fire in the engine compartment. Plaintiff's experts had apparently theorized that a defect in the fuel tank led to an explosion or fireball in the passenger compartment.

Ford's response denied any obligation to defend or indemnify the Dealer. The letter from Ford's counsel stated: "[O]ur experts . . . identify the source of the fire as being in the area of the frame rail where [the Dealer's] mechanics did their work in the replacement of the high pressure fuel pump. This and other work which [the Dealer] performed, (including replacement of the frame rail mounted fuel filter) are all in the area where the fire apparently developed. Also, the catalytic converter and exhaust system had holes which should have been repaired by the dealership. Heat and flames from the exhaust could have set the spare tire on fire -- another possible source of the fire initially seen by following motorists. Circumstantially, this indicates that something which the dealer did or failed to do later occasioned the fire." The letter demanded that the Dealer commit its insurance policy limits to settle the matter.

Complaint and Cross-Complaint Herein

he parties settled with Parker in 1999. Ford paid $3.5 million. The Dealer paid $175,000. In November 1999, the Dealer brought a complaint against Ford for declaratory relief and breach of express indemnity contract. Ford cross-claimed for equitable indemnification, contribution, and declaratory relief.

First Motion for Summary Adjudication

The Dealer moved for summary judgment on the declaratory relief cause of action, seeking resolution of the issue of whether Ford had a duty to defend it in the *Parker* action. The Dealer's summary adjudication motion was based on five undisputed facts: (1) "[Ford] and [the Dealer] entered into a written agreement which contain[ed] a provision for [the Dealer's] defense and indemnity by [Ford]";

(2) "The Dealer Agreement requires [the Dealer] to tender its defense to [Ford] when sued for manufacturing or design defects"; (3) "[The Dealer] was sued for manufacturing and design defects"; (4) "[The Dealer] tendered its defense to [Ford]";[1] and (5) "[Ford] repeatedly refused to accept the tender of defense by [the Dealer]."

The Dealer argued that the issue presented did not require resolution of the cause of the accident. Citing a number of cases involving insurance companies and their insureds, the Dealer contended that "'[t]he existence of a duty to defend turns not upon the ultimate adjudication of coverage under its policy of insurance, but upon those facts known by the insurer at the inception of a third party lawsuit. Hence, the duty 'may exist even where coverage is in doubt and ultimately does not develop.'" (Quoting *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295.)

In its opposition, rather than disputing the facts put forth by the Dealer, Ford sought to establish additional facts, including that the *Parker* action did not arise solely out of a production defect or design defect; that the Dealer negligently serviced the vehicle; and that Ford was entitled to indemnification from the Dealer. Ford supported the allegations with testimony from experts that indicated there was no design defect in the vehicle, and that the source of the fire was the fuel pump or fuel filter which had been serviced by the Dealer or the muffler and exhaust system which had holes and leaks from rust and should have been replaced.

The court granted the motion for summary adjudication, finding that Ford had a duty to defend the Dealer in the *Parker* action. The court essentially interpreted the parties' agreement to require Ford to provide a defense whenever "at least one" of the contentions or claims the plaintiff is making is that the vehicle suffered from a design and/or manufacturing defect that was the sole cause of his

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[1] The alleged tender was contained in the July 1999 letter quoted above.

or her injury. According to the court, "A complaint which espouses such a theory as one of the grounds for potential recovery is clearly a complaint or claim which 'is concerning' something 'caused solely by a design or other manufacturing defect.'" (Italics omitted.) It seemed to the court that "the three paragraphs of the indemnity agreement . . . read together are intended to tell the reader what the complaint or lawsuit must 'concern' before the duty to defend will attach, and that is the only reasonable reading of it -- reasonable because it is when the complaint or lawsuit is made or filed that everyone must look to see what the duty to defend encompasses and whether or not the duty to defend which is the crux of this part of the agreement will attach, and that can be judged only by looking to what the complaint or lawsuit 'concerns,' not something to be determined in hindsight by what will someday ultimately be proven or not proven."

The court stressed that the contract before it was not "pure indemnification" but also included "a right of defense . . . ." The court expressed concern that a different interpretation "would mean that, Ford would never have a duty to defend -- as opposed to possibly later indemnifying for the Dealer's costs of suit" since the court deemed it "highly unlikely that Ford will ever at the outset of litigation or early on admit . . . that everything was its fault . . . ." (Italics omitted.)

The court stated that although it did not have to reach this issue, "if called upon to so decide, the court would further determine that this is an adhesion contract and that it should and must be construed against its framer, Ford, where any ambiguities are concerned" and that "indemnification case law is not the sole body of law to look to here" because the contract was "like an insurance contract" in that it required the indemnitor (Ford) "to both defend and to later indemnify." The court further indicated that, although not sought by the Dealer in its motion for summary adjudication on the declaration relief cause of action, liability for the full amount of fees, costs, and settlement monies paid "would appear to follow this determination . . . ."

Second Motion for Summary Adjudication/Summary Judgment

Taking the court's advice, the Dealer filed a new motion for summary judgment or, in the alternative, summary adjudication, on the contract cause of action. In the statement of undisputed facts, the Dealer sought to establish that it had incurred $142,789.31 in attorney's fees in defense of the *Parker* action and $175,000 in settlement costs. Ford disputed that the Dealer had incurred these costs, presenting evidence that the fees and the settlement had been paid by the Dealer's insurer. The court granted the motion for summary judgment, finding that the Dealer "presented substantial competent and undisputed evidence of [Ford's] wrongful refusal to defend [the Dealer] and competent and undisputed evidence of [the Dealer's] defense of the *Parker* action and the settlement incurred therein." The court ruled that even if the Dealer's insurer had paid for the defense and/or settlement, the result would be the same.

Third Motion for Summary Adjudication/Summary Judgment

The Dealer next filed an application for determination of good faith settlement under Code of Civil Procedure section 877.6, subdivision (a)(2). The supporting declaration of Attorney Molly K. Zurflueh stated that Parker never alleged dealer negligence; that the Dealer "made an economic decision to buy its peace in the [*Parker*] matter [and] agreed to pay $175,000.00 to [Parker] in exchange for a release"; and that "[t]he aforementioned settlement was reached after discussions which were conducted at arms length." She further stated that "[t]he settlement [arose] out of no action of fraud and/or tortious conduct or conspiracy between this moving applicant and settling parties or any other parties in this action or the Parker action that would have the effect of injuring any of the non-settling parties as a result thereof." The court initially denied the motion on the ground that it lacked jurisdiction to make the finding requested, stating that the motion should have been made in the *Parker* action, but invited the Dealer to

"file[] authorities to persuade the Court to the contrary . . . ." The Dealer submitted further briefing, bringing the case of *Regal Recovery Agency, Inc. v. Superior Court* (1989) 207 Cal.App.3d 693, to the court's attention to support the position that the court had jurisdiction to decide the issue of good faith.

The Dealer then moved for summary judgment on Ford's cross-claim on the ground that the (expected) finding of good faith settlement precluded Ford from seeking equitable indemnity or contribution.

The court granted the motion for a finding of good faith settlement, stating that "[w]hile . . . $175,000 is not a large percentage of what Ford Motor settled for, . . . the complaint also alleges little to suggest that any negligent service on [the Dealer's] part caused the accident or that [Parker] believed that to be the case. Even [Ford's] 'experts' cannot now state that an inspection of the car showed that this accident was the dealer's fault -- they offer nothing but 'maybes' and speculation in this regard."

The court also granted the motion for summary judgment on the cross-complaint on the ground that the good faith settlement barred any action for equitable indemnity and the contract between Ford and the Dealer gave Ford no contractual right to obtain indemnification. Since this resolved all of the issues in the case, the court granted judgment for the Dealer in the amount of $351,342. Ford appealed.

DISCUSSION

I

"Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person." (Civ. Code, § 2772.) "A collection of rules, developed primarily in insurance and construction cases, governs actions to enforce indemnity agreements. Paramount is the rule that '[w]here . . . the parties have expressly contracted with respect to

the duty to indemnify, the extent of that duty must be determined from the contract and not by reliance on the independent doctrine of equitable indemnity.'" (*Peter Culley & Associates v. Superior Court* (1992) 10 Cal.App.4th 1484, 1492, quoting *Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628.)

The burden of proof on an indemnitee (such as the Dealer) seeking to establish the liability of an indemnitor (such as Ford) under an express contract of indemnity where the indemnitee has settled the underlying claim is generally set forth as follows: "[W]hen the indemnitee settles without trial, . . . the indemnitee must show the liability is covered by the contract, that liability existed, and the extent thereof." (*Peter Culley & Associates v. Superior Court, supra,* 10 Cal.App.4th at p. 1497; accord, *Collins Development Co. v. D. J. Plastering, Inc.* (2000) 81 Cal.App.4th 771, 776.)

The trial court did not require the Dealer to establish that the underlying liability was covered by the indemnity provision. Instead, the court concluded that the parties' agreement required Ford to defend the Dealer regardless of the Dealer's negligence whenever a claim for strict product liability was included in a complaint filed by a third party. It then awarded the Dealer the cost of the defense and settlement of the *Parker* action based on the belief that a failure to defend requires such amounts to be awarded automatically, as long as the indemnitee can establish that the settlement was in good faith. The court disregarded the evidence which showed that the Dealer's insurer paid the cost of the defense or the settlement.

As we will explain, the trial court misconstrued the liability of an indemnitor, and treated Ford *worse* than an insurer, applying a presumption that does not make sense in this situation and requiring Ford to reimburse the Dealer for amounts that an insurer who breached a duty to defend would not have had to pay. Moreover, the court misinterpreted the parties' agreement. The indemnity

provision required Ford to defend the Dealer only where the occurrence was caused *solely* by a production defect, and not whenever product liability was one of the allegations of the underlying complaint. We address the interpretation issue first.

A

"The interpretation of a written instrument, even though it involves what might properly be called questions of fact [citation], is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect." (*Parsons v. Bristol Development Co*. (1965) 62 Cal.2d 861, 865.) "Appellate review of the trial judge's interpretation of a contract or other writing is governed by three rules: (a) Where extrinsic evidence has been properly admitted and the evidence is in conflict, any reasonable construction by the trial judge will be upheld under the general rule of conflicting evidence. (b) Where no competent extrinsic evidence has been introduced, the interpretation is derived solely from the terms of the instrument, the question is one of law, and the appellate court will give the writing its own independent interpretation. (c) Where competent extrinsic evidence has been introduced but it is not in conflict, the trial judge's inferences from it are not binding on the appellate court; as in the second situation, supra, the appellate court will make an independent determination of the meaning." (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 681, p. 615.)

The trial court took into account no extrinsic evidence, but based its interpretation on the contractual language standing alone. We therefore review the trial court's interpretation de novo.

As we have seen, Ford agreed to "defend, indemnify, hold harmless and protect the Dealer from any losses, damages or expense, including costs and

attorney's fees, resulting from or related to lawsuits, complaints or claims commenced against the Dealer by third parties concerning: [¶] (1) . . . bodily injury or property damage arising out of an occurrence caused solely by a 'production defect' in that product . . . ." Ford further agreed that "[i]n the event that any legal action arising out of any of these causes is brought against the Dealer, [Ford] shall undertake, at its sole expense, to defend said action on behalf of the Dealer when requested to do so by the Dealer" and that "[s]hould [Ford] refuse to undertake the defense on behalf of the Dealer, or fail to undertake an adequate defense, the Dealer may conduct its own defense and [Ford] shall be liable for the cost of such defense, including reasonable attorney's fees, together with any verdict, judgment or settlement paid by the Dealer . . . ."

The meaning of a contract is ascertained by the words used, as long as they are clear and explicit and do not involve an absurdity. (Civ. Code, § 1638.) There are also specific rules of interpretation that apply to indemnity agreements. "[A]n indemnity agreement may provide for indemnification against an indemnitee's own negligence, but such an agreement must be clear and explicit and is strictly construed against the indemnitee. [Citation.] If an indemnity clause does not address itself to the issue of an indemnitee's negligence, it is referred to as a 'general' indemnity clause. [Citations.] While such clauses may be construed to provide indemnity for a loss resulting in part from an indemnitee's *passive* negligence, they will not be interpreted to provide indemnity if an indemnitee has been *actively* negligent. [Citations.] [¶] Provisions purporting to hold an owner harmless 'in any suit at law' [citation], 'from all claims for damages to persons' [citation], and 'from any cause whatsoever' [citation], without expressly mentioning an indemnitee's negligence, have been deemed to be 'general' clauses." (*Rossmoor Sanitation, Inc. v. Pylon, Inc., supra,* 13 Cal.3d at pp. 628-629.)

In the case before the court in *Rossmoor*, there was an express contractual agreement requiring the indemnitor to indemnify the indemnitee "against 'all claims for damages' arising out of [the indemnitor's] work" and "[the indemnitee] [was] not to be held accountable 'for any loss . . . or for injury to any person . . . .'" (*Rossmoor Sanitation, Inc. v. Pylon, Inc., supra,* 13 Cal.3d at p. 629.) Since the agreement did "not state what effect [the indemnitee's] negligence will have on [the indemnitor's] obligation to indemnity," the court deemed the clause a "'general' indemnity provision," and stated that "under existing case law [the indemnitee] may not benefit from the agreement if it is deemed actively negligent . . . ." (*Ibid.*)

Here, the parties clearly did not intend for Ford to indemnify the Dealer for its active negligence. The relevant provision stated that Ford would indemnity the dealer for damages and attorney fees resulting from lawsuits, complaints, or claims "concerning" bodily injury or property damage arising out of "an occurrence caused solely by a 'production defect'" of one of Ford's products, and to defend "any legal action arising out of any of these causes . . . ." It did not say that Ford would indemnify or defend the Dealer where the Dealer's own negligence caused or contributed to the incident. The trial court, to support its interpretation that Ford must defend wherever a single cause of action in a third party complaint is based on strict product liability, stressed the broad nature of the word "concerning," stating that because the complaint in the *Parker* action espoused a theory of product defect as one of the grounds for potential recovery, the matter involved "*a complaint or claim* which 'is concerning' something 'caused solely by a design or other manufacturing defect'" and that "the three paragraphs of the indemnity agreement . . . read together are intended to tell the reader what *the complaint or lawsuit* must 'concern' before the duty to defend will attach, and that is the only reasonable reading of it . . . ." (Italics added.)

The court scrambled the contract's words to reach its erroneous interpretation. According to the agreement, the lawsuit, claim, or complaint against the Dealer must "concern[]" bodily injury or property damages. There is no question that the *Parker* action "concerned" bodily injury. But to be compensable under the agreement, the bodily injury must arise out of "an occurrence caused solely by a 'production defect.'" In other words, the indemnity obligation and duty to defend arises not where *the claim or complaint* "concerned" a defective product, but where the bodily injury alleged in the complaint arose out of "*an occurrence caused solely* by a production defect" in the product involved. (Italics added.) The court's interpretation of the parties' agreement to require Ford to provide a defense whenever "at least one" of the plaintiff's contentions or claims involved product liability would render meaningless the word "solely." The use of that term indicated that the parties did not expect Ford's indemnity obligation and duty to defend to arise just because one possible cause of the accident or occurrence was product defect.

The trial court also expressed the belief that the interpretation advanced by Ford "would mean that, Ford would never have a duty to defend -- as opposed to possibly later indemnifying for the Dealer's costs of suit" since the court deemed it "highly unlikely that Ford will ever at the outset of litigation or early on admit . . . that everything was its fault . . . ." We are not so skeptical of a manufacturer's ability to operate in good faith. Moreover, the court's interpretation would render meaningless the provision obligating Ford to pay reasonable attorney's fees, together with any verdict, judgment, or settlement paid by the Dealer, where Ford wrongly refused to accept the defense. Clearly the agreement anticipated that there could be cases where Ford's decision to decline a defense was wrong, giving rise to a duty to compensate the Dealer after the fact.

B

As an alternate basis for its decision, the trial court expressed the belief that Ford should be held to the same standard as an insurance company. An insurer's duty to defend is often broader than its duty to indemnify because its duty to defend encompasses all claims with *a potential* to come under the policy. Under the trial court's reasoning, because it was possible that the accident was caused solely by a product defect, Ford committed an actionable breach of its duty to defend.

We do not believe a manufacturer should be held to the same standard as an insurer. To explain why, we begin with a brief discussion of the development of the law governing an insurer's duty to defend.

In the landmark case of *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, the Supreme Court held that an insurer under a comprehensive personal liability policy could not refuse to defend an action accusing the insured of assault on the ground that the policy excluded intentionally caused acts. The court noted that under the policy, the insurer made two basic promises: "'[1.] To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage, and [2.] the company shall defend any suit against the insured alleging such bodily injury or property damage and seeking damages which are payable under the terms of this endorsement, even if any of the allegations of the suit are groundless, false, or fraudulent.'" (*Id.* at p. 272.) The court believed that these promises "would lead the insured reasonably to expect the insurer to defend him against suits seeking damages for bodily injury, whatever the alleged cause of the injury, whether intentional or inadvertent." (*Ibid.*)

The court rejected the insurer's argument that the fact the insured had gone to trial and lost on the assault charge proved the insurer's lack of liability under the

policy: "We have explained that the insured would reasonably expect a defense by the insurer in all personal injury actions against him. If he is to be required to finance his own defense and then, only if successful, hold the insurer to its promise by means of a second suit for reimbursement, we defeat the basic reason for the purchase of the insurance. In purchasing his insurance the insured would reasonably expect that he would stand a better chance of vindication if supported by the resources and expertise of his insurer than if compelled to handle and finance the presentation of his case. He would, moreover, expect to be able to avoid the time, uncertainty and capital outlay in finding and retaining an attorney of his own." (*Gray v. Zurich Insurance Co., supra,* 65 Cal.2d at p. 278.)

The court further said that the allegations of the underlying complaint were not conclusive on the issue of whether a duty to defend existed and that the insurer could not "construct a formal fortress of the third party's pleadings and retreat behind its walls" because "[t]he pleadings are malleable, changeable and amendable" and courts should not "examine only the pleaded word but the potential liability created by the suit." (*Gray v. Zurich Insurance Co., supra,* 65 Cal.2d at p. 276.) "Since modern procedural rules focus on the facts of a case rather than the theory of recovery in the complaint," the court said, "the duty to defend should be fixed by the facts which the insurer learns from the complaint, the insured, or other sources. *An insurer . . . bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy*." (*Id.* at pp. 276-277, italics added.)

The court's holding in *Gray* was based in part on the well-known rule that "[i]n interpreting an insurance policy . . . doubts as to meaning must be resolved against the insurer and that any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect." (*Gray v. Zurich Insurance Co., supra,* 65 Cal.2d at p. 269.) The court

expressed as an alternate basis the belief that insurance consumers need to be protected from overreaching by insurance companies and misleading policies which appear to promise one thing, but deliver another: "[T]he individual consumer in the highly organized and integrated society of today must necessarily rely upon institutions devoted to the public service to perform the basic functions which they undertake. At the same time the consumer does not occupy a sufficiently strong economic position to bargain with such institutions as to specific clauses of their contracts of performance, and, in any event, piecemeal negotiation would sacrifice the advantage of uniformity. Hence the courts in the field of insurance contracts have tended to require that the insurer render the basic insurance protection which it has held out to the insured. This obligation becomes especially manifest if the case in which the insurer has attempted to limit the principal coverage by an unclear exclusionary clause. We test the alleged limitation in the light of the insured's reasonable expectation of coverage; that test compels the indicated outcome of the present litigation." (*Id.* at p. 280.)

Since its decision in *Gray*, the court has refined the rules governing the duty of an insurance company to defend its insured. The court made clear that the duty to defend does not depend on an ambiguous policy provision or the existence of a "reasonable potential for coverage" in *Montrose Chemical Corp. v. Superior Court*, *supra*, 6 Cal.4th at page 299, where the court said: "Because the policy at issue in *Gray* was ambiguous, and could be read either to exclude or to provide for coverage, we held that ordinary principles of insurance contract interpretation required it be construed in the insured's favor, according to his reasonable expectations. [Citations.] As a distinct, separate, and alternative basis for our decision, we recognized that the insured is entitled to a defense if the underlying complaint alleges the insured's liability for damages *potentially* covered under the policy, or if the complaint might be amended to give rise to a liability that would

be covered under the policy. [Citation.] [¶] The alternative holding in *Gray, supra*, 65 Cal.2d 263, establishes the rule that *the insurer must defend in some lawsuits where liability under the policy ultimately fails to materialize; this is one reason why it is often said that the duty to defend is broader than the duty to indemnify*. [Citations.]" (*Montrose Chemical Corp v. Superior Court, supra,* at p. 299, italics added.)

Never has the Supreme Court or any California appellate court indicated that these judicially created rules apply outside the insurance field. To the contrary, courts have consistently said that contracts containing indemnity provisions are to be interpreted in accordance with the ordinary rules of construction. In *Rossmoor Sanitation, Inc. v. Pylon, Inc., supra,* 13 Cal.3d at page 633, for example, the Supreme Court said: "[T]he question whether an indemnity agreement covers a given case turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control. When the parties knowingly bargain for the protection at issue, the protection should be afforded. This requires an inquiry into the circumstances of the damage or injury and the language of the contract; of necessity, each case will turn on its own facts." (Citing *Harvey Mach. Co. v. Hatzel & Buehler, Inc.* (1960) 54 Cal.2d 445, 449.) A similar sentiment was expressed in *E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 507, wherein the court stated: "[The legal rules] governing so-called 'express' indemnity reflect its contractual nature, permitting great freedom of action to the parties in the establishment of the indemnity arrangements while at the same time subjecting the resulting contractual language to established rules of construction." Moreover, in *Davis v. Air Technical Industries, Inc*. (1978) 22 Cal.3d 1, 6, footnote 6, the Supreme Court reversed a trial court order instructing the manufacturer of a defective product to pay the seller's defense costs, and "decline[d]" the seller's "invitation to treat manufacturers in such cases

like liability insurance carriers" who must "pay attorney's fees if they have refused to defend an insured when aware of facts making them potentially liable under the insurance policy."[2]

If noninsurer parties are to be afforded "great freedom of action" in formulating their mutual rights and obligations with respect to indemnification, the court cannot step in and supply new terms simply because it believes they might be more fair. Moreover, even if the court's conclusion that a duty to defend existed was correct, it erred in further ruling that "liability would appear to follow . . . in the full amount of fees and costs and settlement monies paid by [the Dealer] in the Parker action . . . ." This is not an accurate statement of the law. If a broad duty to defend is breached and the indemnitee settles, the indemnitee is entitled to the presumption set forth in *Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, that *the indemnitee* was liable on the underlying claim -- a presumption that is not at all helpful in the present case, as we explain in the next section.

C

In *Isaacson v. California Ins. Guarantee Assn., supra,* 44 Cal.3d 775, the Supreme Court acknowledged the rule that where an insurer breaches a contractual duty to defend and the insured settles the underlying lawsuit on its own behalf, a rebuttable evidentiary presumption arises: "In a later action against the insurer for reimbursement based on a breach of its contractual duty to defend the action, a reasonable settlement made by the insured to terminate the underlying claim

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[2] The Dealer attempts to distinguish *Davis* on the ground that there was no express agreement, whereas in the present case there is. That is true, but misses the point. The issue is whether to imply an agreement to defend broader than the words of the express indemnity contract justify. *Davis* support's Ford's position that no such agreement should be implied.

against him may be used as presumptive evidence of *the insured's* liability on the underlying claim, and the amount of such liability. [Citations.]" (*Id.* at pp. 791-792, italics added.) According to the court, the presumption operates "where the insurer has wrongfully refused to cover or defend a claim, leaving the insured to mount his own defense or suffer a default. In order to recover reimbursement from the insurer, the insured must demonstrate that the claim was covered under the policy in question, or that the insurer breached its duty to defend. Once a breach of contract is proved, the insured's act of settling the claim is said to raise the presumption that the third party's claim against him was legitimate, and that he was liable in the amount which he agreed to pay in settlement. [Citation.]" (*Id*. at pp. 793-794.)[3]

These rules derive from statements of law first set forth in *Lamb v. Belt Casualty Co.* (1935) 3 Cal.App.2d 624, 631. The insurer in *Lamb* had undisputedly committed breach of duty to defend. Complaints based on the alleged negligent operations of the insured's truck and the policy obligated the insurer to defend such actions. The court considered the two potential outcomes of the underlying litigations and their ramifications on the liability of the insurer for breaching its duty to defend. If the underlying actions proceeded to trial, the court held, the insurer "is bound by the result of [the] litigation" provided it "had notice of the suit and an opportunity to control and manage it." (*Ibid.*) In other words, "[t]he judgment recovered in such a case is the mode by which *the insured proves to the insurer that the intrinsic character of the accident was such that he was*

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[3] It should be noted that *Isaacson* was not a failure to defend case. The insurer had allegedly breached its duty to accept a reasonable settlement offer, and the issue was whether the insurer should bear the burden of proving that a settlement offer within policy limits was unreasonable or whether the burden should be on the insured to prove that it was reasonable.

liable for the consequences of it, and the judgment is conclusive evidence that the insured was liable, and to the extent of the amount of the judgment. [Citations.]" (*Ibid*., italics added.)

The rule was different if the underlying case settled: "[W]here there is no trial and no judgment establishing the liability of the insured, but a settlement of the litigation has been made, *the question whether the liability of the insured was one which the contract of insurance covered is still open, as is also the question as to the fact of liability and the extent thereof, and these questions may be litigated and determined in the action brought by the insured to recover the amount so paid in settlement*. The settlement, or a judgment rendered upon a stipulation of such a settlement, becomes presumptive evidence only of the liability of *the insured* and the amount thereof, which presumption is subject to being overcome by proof on the part of the insurer. [Citations.]" (*Lamb v. Belt Casualty Co., supra,* 3 Cal.App.2d at pp. 631-632, italics added.)

As should be obvious, applying a presumption that *the indemnitee* is liable to the third party makes sense only in the situation where the indemnitor had agreed to compensate the indemnitee for the consequences of *the indemnitee's* own negligence. Unless rebutted, the presumption establishes that the indemnitee was truly liable on the underlying claim and did not pay the injured party as a volunteer. Such a presumption is not particularly helpful here, where Ford is *not* liable to indemnify the Dealer if the accident was caused by the Dealer's active negligence. Put another way, assuming a broad duty to defend could be read into the agreement and assuming Ford breached the duty, the Dealer would be entitled to a presumption that it was liable on the *Parker* claim. That presumption would not resolve the crucial question here: Whether the Dealer was passively negligent as a link in the chain of commerce on a product liability suit, or actively negligent

for improperly making repairs on the vehicle. In the former case, Ford would be liable under the indemnity agreement, in the latter, it would not.

At least one recent appellate court has noted the error of attempting to apply the *Isaacson* presumption in a non-insurance context. In *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, a developer, J.M. Peters Company, Inc., settled with a class of homeowners by, among other things, assigning its indemnification rights against nonsettling subcontractors. The agreement between the developer and certain of the subcontractors contained language providing that "the subcontractor 'agree[s] to indemnify and save [Peters] harmless against all claims for damages to persons or to property growing out of the execution of the work, and at his own expense to defend any suit or action brought against [Peters] founded upon the claim of such damage . . . .'" (*Id.* at p. 1278.) In a pretrial ruling, the trial court "[o]btained stipulations from the parties that Peters had tendered its defense in the underlying complaints to the subcontractors and received rejections." (*Id.* at p. 1274.) The plaintiffs in *Heppler* sought a jury instruction that "plaintiffs were entitled to a rebuttable evidentiary presumption that Peters [the developer] was liable for the amount it paid to settle the claims against it and the allocations of the good faith settlement were reasonable . . . ." (*Id.* at p. 1275.) The trial court refused that instruction, and instead ruled "that the indemnity provisions at issue did not apply unless plaintiffs proved the subcontractors were at fault." (*Ibid*.)

On appeal, the plaintiffs attacked the trial court's refusal to give the requested instruction and its "legal determination that subcontractor fault (negligence plus causation) was a prerequisite to trigger the contractual obligation to indemnify under [the] subcontracts . . . ." (*Heppler v. J.M. Peters Co., supra,* 73 Cal.App.4th at p. 1275.) The appellate court found no error, noting: "It appears what plaintiffs in fact wanted was an instruction that they were entitled to a

rebuttable presumption that *nonsettling subcontractors* -- not Peters -- were liable for the amounts Peters paid to settle the claims. But the law does not so provide."[4] (*Id*. at p. 1282.)

The decision in *Heppler* has further significance here because the plaintiffs also sought a ruling that the trial court's earlier finding under Code of Civil Procedure section 877.6 that the settlement between the developer and the homeowners was in good faith could be used to conclusively establish the amount owed by the subcontractors. The plaintiffs in *Heppler* appeared to believe -- much as the Dealer does here -- that the good faith finding could be used offensively to establish the amount due under a contract for indemnity. The trial court "refused to tell the jury the court had previously issued an order finding the settlement and allocations were in good faith," and ruled that "the only effect of the good faith

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[4] In reaching that conclusion, the court in *Heppler* stated: "Contrary to plaintiffs' contentions, these subcontractors, who promised to indemnify Peters against damages caused by their negligent work, did not assume the role of liability insurers. Liability insurers protect insureds against damage or liability from generally defined risks in exchange for a premium. [Citation.] Insurers have a distinct and free-standing duty to defend their insureds [citation] as opposed to indemnitors, whose duty to defend is not triggered until it is determined that the proceeding against the indemnitee is 'embraced by the indemnity.' (Civ. Code, § 2778, subd. 4 . . . .) Plaintiffs' reliance on a line of insurance coverage cases (e.g., *Isaacson v. California Ins. Guarantee Assn.[, supra,]* 44 Cal.3d 775 . . .) is misplaced." (*Heppler v. J.M. Peters Co., supra*, 73 Cal.App.4th at p. 1282.) That statement by the court creates the impression that had the litigants in *Heppler* been an insurance company and its insured rather than a developer and a group of subcontractors, the law would have granted the presumption of liability sought by the plaintiffs for breach of the duty to defend. In fact, as a comprehensive treatise on insurance law explained, it is by no means clear that "in cases where it turns out there was in fact *no coverage*, the insurer who wrongfully refused to defend a claim against its insured should be liable for: . . . a settlement negotiated by the insured in good faith, and free of fraud or collusion, in order to avoid the uncertainty of an adverse judgment in a greater amount." (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2002) ¶ 7:692.4, p. 7B-54, italics omitted.)

settlement order would be to establish the allocations as the 'cap' of the indemnity obligation." (*Heppler v. J.M. Peters Co. supra,* 73 Cal.App.4th at p. 1274.)

The Court of Appeal agreed with the trial court. The plaintiffs' requested ruling had "blurred and confused the distinctions between good faith confirmation hearings, which address equitable indemnity issues, and proceedings to enforce contractual indemnity, where 'reasonableness,' does not equate with 'good faith.'" (*Heppler v. J.M. Peters Co. supra,* 73 Cal.App.4th at p. 1283.) "An adjudication that a settlement was made in 'good faith' under Code of Civil Procedure sections 877 and 877.6 bars cross-complaints against the settling parties and provides an offset to nonsettling tortfeasors against their remaining liability. [Citation.] Code of Civil Procedure section 877.6 allows a settling tortfeasor to insulate itself from contribution and equitable indemnity claims. [Citation.] Thus, these statutes provide a '*defensive'* procedure by which a joint tortfeasor may extricate itself from a lawsuit and bar actions for equitable indemnity by the remaining joint tortfeasors. [Citation.] [¶] The fundamental inquiry in a good faith hearing pursuant to Code of Civil Procedure sections 877 and 877.6 is whether the settling defendant is paying the plaintiff an amount that is so far below defendant's proportionate share of liability as to be completely '"out of the ball park."' (*Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499 . . . .) In an indemnity action, the crucial question is whether the settling indemnitee acted unreasonably by paying too much, thereby acting as a volunteer." (*Heppler v. J.M. Peters Co., supra,* 73 Cal.App.4th at pp. 1283-1284.) Because of these "crucial distinctions," the trial court's earlier finding under Code of Civil Procedure section 877.6 that the developer had settled in good faith "had no relevance in the indemnity trial" (*Heppler,* at p. 1284), and the appellate court was "not persuaded by plaintiffs' attempt to use the earlier good faith adjudication [of the settlement agreement] as a punitive 'hammer' . . . ." (*Id*. at pp. 1284-1285.)

In this regard, the court was following an earlier decision in *Peter Culley & Associates v. Superior Court, supra,* 10 Cal.App.4th 1484. There, an architectural firm sued a condominium developer to collect payments owed on the project. The developer cross-complained, alleging that design flaws caused construction delays and increased costs. The developer and architectural firm settled the cross-complaint, and the architectural firm assigned to the developer its rights under an indemnity agreement with the structural engineer. The developer then brought an action to enforce the indemnity agreement against the structural engineer. The trial court entertained the developer's motion to determine whether the settlement between it and the architect was in good faith and, after so finding, determined that it was conclusive against the structural engineer. The court in *Peter Culley* rejected the notion that a trial judge can resolve the issues presented in a contractual indemnity case by way of a motion to determine the good faith of a settlement under Code of Civil Procedure section 877.6, and held that an indemnitee's right to contractual indemnity must be resolved by trial rather than by abbreviated proceedings. Noting that "Code of Civil Procedure section 877.6 provides a *defensive* procedure by which a settling joint tortfeasor or co-obligor may extricate itself from a lawsuit and bar actions for equitable indemnity by remaining joint tortfeasors or co-obligors" and that the case before it "illustrates some of the problems caused by blurring the distinction between the role of good faith in *defensive* section 877.6 proceedings and its role in *offensive* actions to enforce indemnity agreements," the Court of Appeal granted a writ directing the trial court to vacate its good faith settlement order and to conduct further proceedings. (*Peter Culley & Associates v. Superior Court, supra,* 10 Cal.App.4th at pp. 1488, fn. omitted, 1499.)

The developer in *Peter Culley* argued that a good faith settlement was conclusive based on language in Civil Code section 2778, which provides

specific rules for the interpretation of an indemnity contract. Among other things, section 2778 provides: "4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity . . . ; [¶] 5. If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter suffered by him in good faith, is conclusive in his favor against the former." The court concluded that "insofar as Civil Code section 2778, subdivision 5 makes a 'recovery' suffered in good faith conclusive, the statute refers only to a recovery by judgment against the indemnitee. We also conclude the indemnification for either a recovery by judgment or a settlement presupposes that other contractual conditions for indemnity, such as the indemnitor's negligence, have been proven." (*Peter Culley & Associates v. Superior Court, supra,* 10 Cal.App.4th at pp. 1495-1496, fn. omitted.)

The holdings in *Heppler* and *Peter Culley* make clear that there are no shortcuts in this area. If the parties' agreement provides for indemnification and defense only where the indemnitee is not negligent, then the indemnitee must prove through admissible evidence in the action for reimbursement that it was not negligent in the underlying matter, or was at most passively negligent. Tempting as it may be to rely on good faith motions and conclusive presumptions, they simply have no place where the indemnitee has never litigated the issue of negligence, and is seeking to use a prior settlement offensively to conclusively establish the amount owed by the indemnitor under an express indemnity contract.

D

The trial court's ruling is erroneous for another reason, one that derives from appellate authority of which neither the parties nor the court were aware at the time of the motions for summary judgment and summary adjudication were heard. Two recent cases have taken the position that, at least where there is another insurance company involved that agrees to pick up the burden of litigation expenses, an insurer who refuses to defend cannot later be held liable for damages for breach of a duty to defend.[5] In *Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, the insured, Ringler Associates Incorporated, was sued for defamation in two separate lawsuits. It tendered the defense to the insurance companies that provided general commercial liability insurance coverage. The insurance companies initially agreed to provide a defense, but subsequently concluded that the defamatory statements at issue had been made prior to the commencement of the policy period, and, even if republished during the policy period, were subject to an exclusion based on their date of first publication. Represented by other insurers, Ringler settled with the plaintiffs, and then brought suit against the insurers for breach of contract and breach of the covenant of good faith and fair dealing. After careful analysis of the underlying claims and the terms

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[5] We sent a letter to the parties pursuant to Government Code section 68081, asking them to address these authorities in oral argument. Another even more recent decision that undermines the Dealer's position is *Miller v. Ellis* (2002) 103 Cal.App.4th 373, where the court held that the collateral source rule does not allow a tortfeasor whose insurer paid a malpractice claim to recover from joint tortfeasors the sums paid by his insurer. The court concluded that the doctrine of equitable indemnity allows a tortfeasor to recover only the amount he paid personally in excess of his fair share. To permit a tortfeasor to recover the amounts covered by insurance would not be equitable, and "would effectively reward [the tortfeasor] for his own wrongdoing." (*Id* at p. 381.) Because we did not give the parties an opportunity to discuss or brief this case, we do not rely on its reasoning.

of the policies, the court concluded that there was no duty to defend or indemnify under the policies. (*Id.* at p. 1185.)

Ringler cited the rule requiring a defense to be provided wherever there was a potential for liability, and "attempt[ed] to bootstrap a claim that because respondents allegedly breached this duty to defend, they are also liable to indemnify Ringler for at least part of the amount it agreed to pay the underlying plaintiffs in settlement." (*Ringler Associates Inc. v. Maryland Casualty Co., supra,* 80 Cal.App.4th at p. 1186.) The court rejected that claim, stating that "even if [it] harbored a reasonable doubt that [the insurers] might have had a duty to defend because of some conceivably arguable possibility or potential of coverage [citations], California law would still not permit Ringler to recover damages for breach of the duty to defend." (*Id.* at p. 1187, italics omitted.) As the court explained: "The basic measure of damages for such a breach 'is that amount which will compensate the insured for the harm or loss caused by the breach of the duty to defend, i.e., the cost incurred in defense of the underling suit.' [Citation.] Exceptions to this rule -- as where the insured suffers liability in excess of the policy limits or is defaulted because of inability to defend itself -- are inapplicable here. [Citations.] Ringler suffered no liability in excess of the Policy limits; nor was it compelled or unable to defend itself. Instead, as Ringler implicitly acknowledges, it was fully protected from having to pay any costs of its own defense by other insurers who were on the risk when Ringler allegedly first slandered the plaintiffs . . . . [¶] Thus, even were we to agree with Ringler's contention that respondents breached a duty to defend, respondents would still not be liable to Ringler for damages arising from breach of that duty as a matter of law. Ringler was adequately protected by other insurers, and respondents' withdrawal from its defense did not enhance its defense liability or increase the costs it

incurred in defense of the underlying lawsuits." (*Id.* at pp. 1187-1188, italics omitted.)

Ringler was followed in *Tradewinds Escrow, Inc. v. Truck Ins. Exchange* (2002) 97 Cal.App.4th 704. Plaintiff therein, Tradewinds Escrow, Inc., had been sued by a woman, Allison Feltus, who claimed that Tradewinds had wrongfully cancelled an escrow, refused to return her deposit, and engaged in discriminatory conduct, and that its president had defamed and harassed her. Tradewinds neglected to tender defense to any of its insurers until after it had incurred $20,000 in legal fees. Then it tendered the matter to its errors and omissions carrier, Media One, which agreed to provide a defense. A few months later, Tradewinds tendered the defense to Truck Insurance Exchange, which provided commercial general liability and commercial automobile coverage. Truck declined to provide a defense on the grounds that the lawsuit arose out of a failure to render professional services. After Feltus's claim was settled, Tradewinds commenced a lawsuit against Truck.

Relying on *Ringler*, the court held that Truck's alleged breach of its duty to defend did not cause Tradewinds any damage because Media One provided an adequate defense. "An insurer's breach of the duty to defend is actionable as breach of contract; where the refusal to defend is unreasonable, it is actionable as a tort. [Citation.] Even if coverage is ultimately denied and hence there is no duty to indemnify, the insured may nonetheless recover the costs incurred in defense of the action. [Citation.] The rationale is that if there was a potential for recovery at the outset of the lawsuit, the duty to defend was implicated. However, such costs may not be recovered where other insurers were on the risk and assumed the insured's defense. (*Ringler Associates, Inc. v. Maryland Casualty Co.*[, *supra*, 80 Cal.App.4th at p. 1187].) *Ringler* conclusively demonstrates that Tradewinds is not entitled to post-tender defense costs because Tradewinds admits Media One

handled the defense of the Feltus action." (*Tradewinds Escrow, Inc. v. Truck Ins. Exchange, supra,* 97 Cal.App.4th at p. 712.)

We agree with the analysis of the courts in *Ringler* and *Tradewinds* that if the indemnitee has received an adequate defense from another source, such as its liability carrier, it has suffered no damage and cannot state a claim for breach of duty to defend. (See also *Amato v. Mercury Casualty Co.* (1997) 53 Cal.App.4th 825, 831 [where insurer wrongfully refused to defend an action and insured was financially unable to mount a defense and suffered a default, insurer was liable in the amount of the default judgment]; *Barratt American, Inc. v. Transcontinental Insurance Co.* (2002) 102 Cal.App.4th 848, 864 [referencing "line of authority holding that where an insurer has breached a duty to provide legal representation to the insured, leaving the insured to mount his own defense or suffer a default, a presumption arises that the amount of any settlement and/or defense costs was reasonable"].)

In view of these authorities, Ford has asked that we direct the trial court to enter a judgment in its favor on the complaint. That would be inappropriate. *Ringler* and *Tradewinds* involved a duty to defend that was broader than the duty to indemnify. The courts there held that where an indemnitor breaches a duty to *defend*, but the indemnitee obtains an adequate defense from its liability insurer, the indemnitee suffers no damage. The rule may be different where the indemnitor breaches a duty to *indemnify*. In *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175 and *Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, the courts indicated that, depending on the precise terms of the parties' agreement, the indemnitor could be required to pay attorney fees even where the indemnitee did not pay them itself. In *Staples*, the provision at issue said that "the prevailing party 'shall be entitled to his reasonable attorney's fees to be paid by the losing party as fixed by the court.'" (189 Cal.App.3d at p. 1409.) The court concluded

that since the provision did not "require that [the indemnitee] 'incur' attorney's fees" but rather "provide[d] that the losing party will pay reasonable fees as determined by the court," the award of fees to the indemnitee "was clearly proper, regardless of whatever separate arrangements existed to provide a defense for him." (*Ibid*.) In *Emigh*, the parties' agreement provided: "'You promise to reimburse Company for any legal fees, liability, or loss which Company incurs as a result of any unauthorized disclosure or use of Confidential Information by You.'" (84 Cal.App.4th at p. 1180.) The court held that the Company had incurred fees even though it was not the source of payment, and was entitled to an award of fees under the contract.

The present case came to us on appeal from orders granting the Dealer's motions for summary adjudication and summary judgment on breach of duty to defend. No attempt was made to establish based on the facts of the underlying accident whether or not Ford breached a duty to indemnify. Although Ford has repeatedly contended that the Dealer suffered no damages from the alleged failure to provide a defense because the Dealer's liability carrier provided both a defense and funds for settlement, Ford never moved for summary judgment and never sought to establish as a matter of undisputed fact that the Dealer paid nothing or that Ford's obligation under the indemnity provision was triggered only if the Dealer itself paid defense costs. Since the trial court was unaware of the decisions in *Tradewinds* and *Ringler*, no finding was ever made on whether the Dealer's litigation and settlement expenses were fully covered by its carrier. These matters cannot be resolved by this court, but must be directed to the trial court on remand.[6]

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[6] At oral argument, Ford indicated another ground for judgment in its favor. According to counsel, the settlement between Ford and Parker eliminated the product liability portion of the claim from the action, leaving the Dealer to settle only the portion of the claim based on its own active negligence in maintaining the vehicle. The Dealer's

II

The finding that the settlement between the Dealer and Parker was in good faith was also used defensively to obtain summary judgment on Ford's cross-claim for equitable indemnity. Ford does not dispute that this is an appropriate application of a good faith determination, but contends that the trial court erred in making the good faith finding. Ford first contends that the court lacked jurisdiction, claiming that the only court with the power to decide a good faith settlement motion is the court which heard the settled action.

Code of Civil Procedure section 877, subdivision (b) provides: "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect: [¶] . . . [¶] (b) It shall discharge the party to whom it is given from all liability for any contribution to any other parties." Section 877.6, subdivision (a)(1) provides: "Any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors . . . ." The court's determination that the settlement was made in good faith "shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or

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counsel disputed that the settlement eliminated its potential liability for selling a defective product. This issue turns on interpretation of the settlement agreement and should first be presented to the trial court for resolution before we consider it on appeal. We note, however, that if Ford is correct that it settled the product defect portion of the *Parker* action, leaving the Dealer to fend for itself on the negligence portion, there would appear to be no basis for Ford's claim for equitable indemnity.

comparative indemnity, based on comparative negligence or comparative fault." (Code Civ. Proc., § 877.6, subd. (c).) Under 877.6, "[t]he party asserting the lack of good faith shall have the burden of proof on that issue." (*Id*., subd. (d).)

In *Regal Recovery Agency, Inc. v. Superior Court, supra,* 207 Cal.App.3d 693, the court held that nothing in these two provisions requires the hearing on good faith to be held prior to the dismissal of the action settled. Instead, the court concluded, the motion could also be made in a later action for equitable indemnity brought against a settling party. Based on *Regal*, we agree with the Dealer that the trial court herein had jurisdiction to hear the Dealer's motion for a determination of good faith.

Ford also contends that there was no substantial evidence of good faith before the court to enable it to make the proper determination. Here, we agree with Ford. In *Tech-Bilt, Inc. v. Woodward-Clyde & Associates, supra,* 38 Cal.3d 488, the Supreme Court set forth a number of factors which need to be taken into consideration in determining good faith: "a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial[,] . . . the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants." (*Id.* at p. 499.) The court stressed that "practical considerations obviously require that the evaluation be made on the basis of information available at the time of settlement" and that "'[A] defendant's settlement figure must not be grossly disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be.'" (*Ibid.*, quoting *Torres v. Union Pacific R.R. Co.* (1984) 157 Cal.App.3d 499, 509.)

In moving for a good faith determination, the Dealer presented no evidence by way of expert opinion or otherwise to support its position that the accident was caused solely by a defective product supplied by Ford. It relied on a two-page declaration from its attorney expressing her nonexpert opinion that the Dealer had no liability and her belief that the settlement was not conclusive. The court rather than focusing on the facts available at the time of the settlement, erroneously based its ruling on the allegations of Parker's complaint, noting that "the complaint . . . alleges little to suggest that any negligent service on [the Dealer's] part caused the accident or that [Parker] believed that to be the case." The important issue in resolving good faith is the settling party's proportionate liability based on the facts known at the time of settlement. Having no facts before it other than the declarations of Ford's experts pointing to the Dealer's liability and the Dealer's attorney's conclusory allegations of good faith, the court was in no position to make a ruling on good faith or lack of it. (See *Brehm Communities v. Superior Court* (2001) 88 Cal.App.4th 730, 735 [court "fail[ed] to see how [attorney] declaration could assist the court in placing a value on the settlement consideration" where declaration stated that a retired judge acting as mediator "determined that the settlement was fair" and contained "conclusionary allegations indicating the potential liability of some of the defendants was tenuous"].) On remand, the matter can be revisited.

DISPOSITION

The judgment is reversed. The orders of September 15, 2000, and December 21, 2000, granting summary adjudication and summary judgment on the Dealer's complaint are reversed. The order of February 14, 2001, granting the Dealer's request for a finding of good faith is reversed. The order of June 6, 2001, granting the Dealer's motion for summary judgment on Ford's cross-complaint is

reversed. The matter is remanded to the superior court for further proceedings consistent with this opinion. Ford is awarded its costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

CURRY, J.

We concur:

VOGEL (C.S.), P.J.

EPSTEIN, J.