Toll Brothers

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Toll Brothers v. OneBeacon Ins. Co. CA4/3

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OPINION

Affirmed.

This case involves the rights and liabilities of the insureds and the insurer under a commercial general liability insurance policy. Plaintiffs and cross-defendants Toll Brothers, Inc., Toll Bros., Inc., Toll Land XX Limited Partnership, and Toll CA GP Corp. (sometimes collectively referred to as plaintiffs) sued defendant and cross-complainant OneBeacon Insurance Company (defendant) seeking damages for defendant's alleged failure to adequately defend them and its subsequent refusal to indemnify them in several construction defect lawsuits arising from their development of a real estate project. Defendant cross-complained against plaintiffs for a declaration that the policy did not cover the underlying claims and for reimbursement of the defense costs it paid on insurers' behalf under a reservation of rights. On cross-motions for summary adjudication, the trial court held the policy's "performing operations" and "your work" exclusions precluded coverage for all of the insureds. Subsequently, it ruled defendant was entitled to reimbursement for all fees and costs it paid to defend plaintiffs from the date it issued a reservation of rights letter in each underlying construction defect lawsuit and awarded that sum, plus prejudgment interest from the date defendant paid each invoice.

Plaintiffs appeal, challenging the judgment on several grounds. They argue the court erred in finding the above mentioned exclusions barred a potential for coverage in the underlying actions. In addition, plaintiffs contend that, even assuming the exclusions applied, the policy's "Separation of Insureds" (bold omitted) clause limited their application to only plaintiff Toll Bros., Inc., the development's general contractor. Thus, the court erred in finding the exclusions applied to all four plaintiffs. As for the reimbursement award, plaintiffs claim the court erred by finding defendant was entitled to (1) reimbursement of fees and costs from the date of the reservation of rights letters or (2) prejudgment interest from the date of each payment. Finding no error, we affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

Toll Land XX Limited Partnership is a California limited partnership. Toll CA GP Corp. is a California corporation and the general partner of Toll Land XX. Toll Bros., Inc. is a Pennsylvania corporation. Toll Brothers, Inc. is a Delaware corporation and the three other Toll entities are its wholly owned subsidiaries.

Defendant's predecessor, General Accident Insurance Company of America, issued a commercial general liability policy to "Toll Brothers, Inc., et[]al[.]" (capitalization omitted) that was effective from July 1, 1999 to September 2000. Under the policy, defendant agreed to "defend the insured" and "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage'" "caused by an 'occurrence'" during "the policy period." It defined "'Property Damage'" as "[p]hysical injury to tangible property, including all resulting loss of use of that property," and "[l]oss of use of tangible property that is not physically injured." The term "'[o]ccurrence'" was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

However, paragraph 2.j. of Section I of the policy excluded coverage for "'[p]roperty damage' to [¶] (1) [p]roperty you own, rent, or occupy; [¶] . . . [¶] (5) [t]hat particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations; or [¶] (6) [t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." The latter exclusion contained an exception rendering it inapplicable "to 'property damage' . . . in the 'products-completed operations hazard" clause, that covered "property damage' occurring away from premises you own or rent and arising out of 'your product' or 'your work' except: [¶] . . . [¶] [w]ork that has not yet been completed . . . ."

The policy identified the named insured as "Toll Brothers, Inc., et[]al[.] and all other subsidiary or affiliated entities as per the schedule on file with the company . . ., and any other corporation, company or entity which are owned, controlled, actively managed or affiliated with named insured or any subsidiary, as now constituted or may be formed or herein[]after [sic] acquired." (Capitalization omitted.) It defined the terms "'you' and 'your'" to mean "the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy." It also contained a "Separation of Insureds" clause declaring: "Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies: [¶] a. [a]s if each Named Insured were the only Named Insured; and [¶] b. [s]eparately to each insured against whom claim is made or 'suit' is brought."

In late 1999, plaintiffs began development of 97 single family residences in Coto de Caza known as the Oak View project. Construction on most of the homes involved in the underlying third party lawsuits began in April 2000 with notices of completion listing the dates of substantial completion

issued between late October 2000 and early February 2002.

The parties' joint stipulation of facts stated, "Toll," a term the stipulation used to collectively refer to all plaintiffs, "developed and/or constructed" Oak View "along with various subcontractors and other entities under contract . . . ." Charlie Raddatz, Division President of Toll Brothers, Inc., who filed a supporting declaration for plaintiffs, also used the term "Toll" to collectively identify all four plaintiffs, and claimed "Toll and certain of its affiliates and subsidiaries acted as the developer and general contractor of . . . Oak View" and with "various subcontractors designed and constructed the . . . homes . . . ."

Between 2003 and 2005, three construction defect lawsuits were filed against plaintiffs by several persons who had purchased homes in the Oak View project. The third party complaints alleged that, due to "defective construction performed by Toll and its subcontractors," "excessive levels of water vapor [had] migrated through the concrete foundation slabs, damaging, . . . the flooring, framing, cabinets, drywall, stucco, and insulation . . . ."

Plaintiffs tendered defense of the lawsuits to defendant. It accepted each tender subject to a full reservation of rights, including the right to "[s]eek reimbursement from Toll . . . for legal fees and costs attributable to the defense of claims not covered by the . . . policy . . . ." (Capitalization omitted.) Apparently unhappy with defendant's response, plaintiffs settled the underlying construction defect actions without defendant's participation and then brought this action. Defendant answered the complaint denying these claims. It also filed a cross-complaint against plaintiffs for a declaration it had no duty to defend or indemnify them and also sought reimbursement of the defense costs it had paid in the underlying lawsuits.

Both parties moved for summary adjudication. Each motion and the opposition to the other party's motion contained a separate statement of disputed and undisputed facts and supporting evidence, but the parties also filed a joint stipulation of facts with the court. Plaintiffs' motion sought a determination the foregoing exclusionary clauses did not apply and defendant had a duty to both defend and indemnify them. Defendant argued it had no duty to defend or indemnify for property damage, claiming the damage occurred after the policy period expired and cited the policy's "owned property," "performing operations," and "your work" exclusions.

The trial court denied plaintiffs' motion. In ruling on defendant's motion, it initially found "undisputed evidence offered by [plaintiffs] suggests that at least some of the alleged damage may have occurred during the . . . [p]olicy period," and defendant "d[id] not offer evidence that any damage 'first happen[ed]' or 'first commence[d]' while [plaintiffs] . . . owne[d] . . . any of the properties." But the court held the latter two exclusions applied, finding "the entire operation is the general contractor's 'particular part' of the property." It also found the "products-completed operations hazard" exception to the "your work" exclusion "irrelevant . . . because . . ., by its own terms," the exception only applied to injury or damage "occurring away from the premises" owned or leased by

the insured. (Capitalization omitted.)

Plaintiffs sought clarification or reconsideration of the court's decision, citing in part the policy's "Separation of Insureds" clause and attaching a supplemental declaration from Raddatz. It asserted "[e]ach of the Plaintiffs is a legally and distinct entity from the other[s]," and "Toll Bros., Inc. is a licensed general contractor" which, "[i]n its capacity as general contractor, . . . built the [u]nderlying [p]laintiffs' homes." Raddatz claimed none of the other three Toll entities was a licensed contractor and either "did not build the . . . residences," or "had no role in the development or construction of the Oak View Development." The court denied the motion, holding "Raddatz's supplemental declaration does not appear to constitute 'new or different' facts . . . since [plaintiffs] do[] not explain why it could not have been filed earlier." It also declined to exercise its "inherent power to reconsider its own ruling[]" because "[n]either Mr. Raddatz's supplemental declaration nor the 'Separation of Insureds' provision create[s] a triable issue of fact."

The court conducted a trial on defendant's right to reimbursement of its fees and costs for defending plaintiffs in the underlying construction defect actions. It issued a statement of decision finding defendant was entitled to recover costs and fees incurred after the date of the reservation of rights letter issued to plaintiffs in each underlying lawsuit. The parties stipulated to the appointment of a referee to determine the amount of defendant's reimbursement. (Code Civ. Proc., § 638.) The referee determined the reimbursement amount and also found defendant was entitled to prejudgment interest from each date it paid an invoice for the defense services provided to plaintiffs. The court subsequently entered judgment for defendant awarding it over $986,000.

DISCUSSION

1. Introduction

The primary focus of this case is on whether defendant had an obligation to defend plaintiffs in the underlying construction defect actions. The generally applicable principles of liability insurance law are well established.

"Standard comprehensive or commercial general liability insurance policies provide, in pertinent part, that the insurer has a duty to indemnify the insured for those sums that the insured becomes legally obligated to pay as damages for any covered claim. They also provide that the insurer has a duty to defend the insured in any action brought against the insured seeking damages for any covered claim." (Buss v. Superior Court (1997) 16 Cal.4th 35, 45, fn. omitted.) "An insurer's obligation to provide its insured with a defense arises when it 'ascertains facts which give rise to the potential of liability under the policy.' [Citations.] If a potential for liability exists, an insurer is obligated to provide an immediate and complete defense to the action. [Citation.]" (Emerald Bay Community Assn. v. Golden Eagle Ins. Corp. (2005) 130 Cal.App.4th 1078, 1088.)

But "in an action wherein none of the claims is even potentially covered, the insurer does not have a duty to defend. [Citations.] This freedom is implied in the policy's language. It rests on the fact that the insurer has not been paid premiums by the insured for a defense. This 'rule' . . . 'is grounded in basic principles of contract law.' [Citation.] . . . 'The insurer has not contracted to pay defense costs' for claims that are not even potentially covered. [Citations.]" (Buss v. Superior Court, supra, 16 Cal.4th at p. 47.)

The Supreme Court "ha[s] made clear that where the third-party suit never presented any potential for policy coverage, the duty to defend does not arise in the first instance, and the insurer may properly deny a defense. . . . [¶] These principles are equally true where, as here, the insurer does not deny a defense at the outset, but instead elects to provide one under a reservation of its right to reimbursement. By law applied in hindsight, courts can determine that no potential for coverage, and thus no duty to defend, ever existed. If that conclusion is reached, the insurer, having reserved its right, may recover from its insured the costs it expended to provide a defense which, under its contract of insurance, it was never obliged to furnish." (Scottsdale Ins. Co. v. MV Transportation (2005) 36 Cal.4th 643, 657-658.)

This case involves third party claims alleging plaintiffs were negligent in the design and construction of homes in the Oak View project. In particular, the third-party claimants alleged plaintiffs failed to properly drain and grade the lots and build the slabs on which each residence was constructed. As a result, excessive levels of water vapor migrated through the foundations, resulting in damage to the flooring, framing, cabinets, drywall, stucco, and insulation, plus mold infestation.

Whether these claims were covered requires an interpretation of defendant's policy. "'Our goal in construing insurance contracts, as with contracts generally, is to give effect to the parties' mutual intentions. [Citations.] "If contractual language is clear and explicit, it governs." [Citations.] If the terms are ambiguous [i.e., susceptible of more than one reasonable interpretation], we interpret them to protect "'the objectively reasonable expectations of the insured.'" [Citations.] Only if these rules do not resolve a claimed ambiguity do we resort to the rule that ambiguities are to be resolved against the insurer. [Citation.]' [Citation.] The 'tie-breaker' rule of construction against the insurer stems from the recognition that the insurer generally drafted the policy and received premiums to provide the agreed protection. [Citations.] [¶] To further ensure that coverage conforms fully to the objectively reasonable expectations of the insured, the corollary rule of interpretation has developed that, in cases of ambiguity, basic coverage provisions are construed broadly in favor of affording protection, but clauses setting forth specific exclusions from coverage are interpreted narrowly against the insurer. The insured has the burden of establishing that a claim, unless specifically excluded, is within basic coverage, while the insurer has the burden of establishing that a specific exclusion applies. [Citations.] [¶] The existence of a material ambiguity in the terms of an insurance policy may not, of course, be determined in the abstract, or in isolation. The policy must be examined as a whole, and in context, to determine whether an ambiguity exists. [Citations.]" (Minkler v. Safeco Ins. Co. of America (2010) 49 Cal.4th 315, 321-322.)

2. The "Performing Operations" and "Your Work" Exclusions

Paragraph 2.j. of Section I of the policy excluded coverage for "'[p]roperty damage' to [¶] . . . [¶] (5) [t]hat particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations; or [¶] (6) [t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." The policy defined the phrase "[y]our work" to include "[w]ork or operations performed by you or on your behalf," plus "[m]aterials, parts or equipment furnished in connection with such work or operations."

The trial court granted defendant's summary adjudication motion, finding these two exclusions applied. "An insurer may move for summary adjudication that no potential for liability exists and thus no duty to defend where the evidence establishes as a matter of law there is no coverage. [Citation.]" (Legarra v. Federated Mutual Ins. Co. (1995) 35 Cal.App.4th 1472, 1479.) While "the insured need only show that the underlying claim may fall within policy coverage[,] the insurer must prove it cannot." (Montrose Chemical Corp. v. Superior Court (1993) 6 Cal.4th 287, 300; Legarra v. Federated Mutual Ins. Co., supra, 35 Cal.App.4th at p. 1479.) On appeal, "'"[w]e apply a de novo standard of review . . . when, on undisputed facts, the order is based on the interpretation or application of the terms of an insurance policy." [Citations]'" (County of San Diego v. Ace Property & Cas. Ins. Co. (2005) 37 Cal.4th 406, 414.)

Case law has recognized the rationale underlying the foregoing exclusions is that "a liability insurance policy is not designed to serve as a performance bond [citation] or warranty of a contractor's product. [Citations.]" (F & H Const. v. ITT Hartford Ins. Co. of Midwest (2004) 118 Cal.App.4th 364, 373.) "The risk of replacing and repairing defective materials or poor workmanship has generally been considered a commercial risk which is not passed on to the liability insurer. [Citations.] Rather liability coverage comes into play when the insured's defective materials or work cause injury to property other than the insured's own work or products." (Maryland Casualty Co. v. Reeder (1990) 221 Cal.App.3d 961, 967.)

Here, the third-party claimants sought recovery for property damage resulting from plaintiffs' failure to properly design and construct their homes. Plaintiffs suggest that since the "performing operations" exclusion is "written in the present tense," it did not apply to the third party actions at issue because plaintiffs either "had designed and completed the slabs for the . . . houses," the claimants' "homes were completely finished," or "work continued on other areas of the houses." Courts have interpreted this exclusion to apply to "only damage . . . which occurred during the time defendant worked upon the property." (Action Auto Stores, Inc. v. United Capitol Ins. Co. (W.D.Mich. 1993) 845 F.Supp. 428, 435.) But as defendant notes the record indisputably establishes "all of the homes were substantially completed after September 1, 2000, it naturally follows that none of the homes were substantially complete prior to expiration of the policy," and thus "any damage during [its] policy period alleged in the underlying construction defect actions occurred during

[plaintiffs'] ongoing operations and was excluded by the . . . 'performing operations' exclusion . . . ." (Capitalization omitted.) Thus, any property damage arising from the negligent or improper work by plaintiffs or their subcontractors that would be potentially covered by defendant's policy must have occurred while the design and construction activity were still ongoing.

Citing the products completed operations hazard exception, plaintiffs contend defendant cannot rely on paragraph 2.j.6.'s "your work" exclusion. The trial court rejected this exception to the exclusion on the ground it applied to property damage "occurring away from premises you own or rent," and "[t]he underlying actions allege damage on, not away from, premises that were (at least initially) owned by" plaintiffs.

Further, as recently explained in Pennsylvania General Ins. Co. v. American Safety Indemnity Co. (2010) 185 Cal.App.4th 1515, "This type of coverage ordinarily is conditioned on damage occurring during the policy period, as long as the work was completed before the damage occurred, and is not conditioned on when the work was completed. [Citations.] The protection provided by this products-completed operations hazard appears to require three conditions: there was property damage, it arose 'out of . . . "your work,"' and '"your work"' has been completed." (Id. at pp. 1532-1533.) Defendant's policy declared the products-completed operations hazard coverage applied "except" for "[w]ork that has not yet been completed," which it defined as "[w]hen [either] all of the work called for in your contract has been completed," "all of the work to be done at the job site had been completed if your contract calls for work at more than one job site," or "that part of the work done at a job site has been put to its intended use by any person . . . other than another contractor or subcontractor working on the same project." As defendant notes, "none of the homes at issue [met] the definition of 'completed operations'" as defined in the policy. Thus, the products-completed operations hazard exception did not eliminate the "your work" exclusion.

Plaintiffs primarily focus on each exclusion's reference to "[t]hat particular part" of property where an insured was performing operations or incorrectly performed work, and argue this language creates an ambiguity leading to a potential for coverage in the underlying construction defect actions. Defendant contends, and the trial court found that, as the developer and general contractor, plaintiffs' "particular part" of the property was the entire Oak View project. We agree.

The relevant case law supports the trial court's decision. In George F. Hillenbrand, Inc. v. Insurance Co. of North America (2002) 104 Cal.App.4th 784, the general contractor on a condominium development sued the plaintiff framing subcontractor for indemnity and contribution, alleging it failed to properly perform work on the project. The subcontractor tendered defense of the matter to its liability insurers. The insurers disputed their obligation to defend by filing a contemporaneous declaratory relief action, plus a cross-complaint against the subcontractor in the construction defect lawsuit seeking recovery of defense costs. After successfully defending against both of these actions, the subcontractor sued the insurers for malicious prosecution and won.

On appeal, the insurers argued the subcontractor had failed to show a lack of probable cause for their lawsuits against it. In part, they noted the existence of a policy exclusion for "'that particular part of any property, . . . [¶] . . . [¶] . . . the restoration, repair or replacement of which has been made or is necessary by reason of faulty workmanship thereon by or on behalf of the insured[.]'" (Hillenbrand, Inc. v. Insurance Co. of North America, supra, 104 Cal.App.4th at pp. 793-794.) The Court of Appeal rejected the insurers' argument, finding their reliance "on cases holding there was no coverage for damage to other property," because the cited cases "involved general contractors as the insureds, not subcontractors. In the case of a general contractor, all the work at the project is considered its work product, whereas in the case of a subcontractor, . . . only its portion of the work . . . is the work product and damage to other parts of the project is considered damage to other property." (Id. at p. 805.)

Here, plaintiffs served as the developer and general contractor forthe entire Oak View project. Hillenbrand construction of the phrase"that particular part of . . . property," supports a conclusion the policy's "performingoperations" and "your work" exclusions apply in this case. For thesame reason, plaintiffs' reliance on Roger H. Proulx & Co. v.Crest-Liners, Inc. (2002) 98 Cal.App.4th 182 and McGranahan v. Ins.Corp. of New York (E.D.Cal. 2008) 544 F.Supp.2d 1052 also lacks merit.Those cases involved the applicability of the "performing operations"exclusion in the context of alleged defective work by subcontractors.

Thus, we conclude the trial court properly held the foregoing exclusions eliminated defendant's duty to provide plaintiffs with a defense to the underlying construction defects lawsuits.

3. The "Separation of Insureds" Clause

Defendant's policy also contained a clause stating "[e]xcept with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies: [¶] a. As if each Named Insured were the only Named Insured; and [¶] b. Separately to each insured against whom claim is made or 'suit' is brought." Citing this provision and Raddatz's supplemental declaration, plaintiffs argue, "even if the . . . [p]olicy exclusions . . . apply, the trial court erred in applying the[exclusions] to all four of the Toll entities without regard for their different corporate structures and functions and their right to individualized coverage . . . ." Defendant argues "all of the Toll entities jointly comprise a single [n]amed [i]nsured," relying on the policy's endorsement identifying as the named insured as "Toll Brothers, Inc., et[]al[.] and all other subsidiary or affiliated entities (capitalization omitted)," plus plaintiffs' admissions in the joint facts stipulation and Raddatz's original declaration.

The trial court reached the correct result in this case. Each policy must be interpreted in light of its own language and the case before it. "The existence of a material ambiguity in the terms of an insurance policy may not, of course, be determined in the abstract, or in isolation. The policy must be examined as a whole, and in context, to determine whether an ambiguity exists. [Citations.]" (Minkler

v. Safeco Ins. Co. of America, supra, 49 Cal.4th at p. 322.) "The courts [have] reasoned that [the purpose of] a severability clause [is to] require[] each insured be treated as having a separate insurance policy, so that the term 'insured' in the exclusion must be interpreted to mean only the person claiming coverage. If liability against that person is not based on an excluded act committed by that person, he or she is covered. [Citation.]" (California Casualty Ins. Co. v. Northland Ins. Co. (1996) 48 Cal.App.4th 1682, 1697.)

The policy identifies "Toll Brothers, Inc. et[]al[.]" (capitalization omitted) as the named insured with an endorsement identifying this phrase to include "all other subsidiary . . . entities . . . and any other . . . entity . . . owned, controlled, actively managed or affiliated with [the] named insured . . . ." (Capitalization omitted.) Toll Bros., Inc., Toll Land XX Limited Partnership, and Toll CA GP Corp. are wholly-owned subsidiaries of Toll Brothers, Inc. In addition, the exclusions applied to "you" or "your," terms the policy defined to mean "the Named Insured shown in the Declarations, and any other . . . organization qualifying as a Named Insured under this policy."

While the parties agreed plaintiff Toll Bros., Inc., acted as the general contractor on the Oak View project, they further agreed the third-party construction defect actions "alleged that Toll's negligent design and/or construction was the cause of the[] alleged problems in the[] residences." In his original declaration Raddatz used the term "Toll" to collectively refer to all four plaintiffs and acknowledged "Toll and certain of its affiliates and subsidiaries acted as the developer and general contractor," and that along with "various subcontractors," "Toll . . . designed and constructed the [u]nderlying [p]laintiffs' homes . . . ."

Plaintiffs rely on the California Supreme Court's recent decision in Minkler v. Safeco Ins. Co. of America, supra, 49 Cal.4th 315. That case is distinguishable. Minkler involved a homeowner who was sued for negligent supervision based on her son's sexual molestation of the third party claimant. The plaintiff's homeowners' insurance policies named the son as an additional insured and included a separation of insureds clause. But the policies excluded coverage for injury that "'is expected or intended by an insured or which is the foreseeable result of an act or omission intended by an insured . . . .'" (Id. at p. 320.)

Minkler held the homeowner was entitled to coverage under the polices. "[T]he severability clause in [the] policies, when read in conjunction with the exclusion for the intentional acts of 'an insured,' created an ambiguity as to whether a coverage exclusion for an intentional act or injury by one insured extended to all other insureds under the policies" (Minkler v. Safeco Ins. Co. of America, supra, 49 Cal.4th at p. 324), and the homeowner "would reasonably have expected [the] policies, whose general purpose was to provide coverage for each insured's 'legal[ ] liab[ility]' for 'injury or . . . damage' to others, to cover her separately for her independent acts or omissions causing such injury or damage, so long as her conduct did not fall within the policies' intentional acts exclusion, even if the acts of another insured contributing to the same injury or damage were intentional" (id. at p. 325).

Plaintiffs' argument relies on the amended declaration Raddatz submitted along with their motion for reconsideration. The trial court denied the motion and plaintiffs do not challenge the merits of that ruling on appeal. To the extent Raddatz claimed Toll Bros., Inc. acted as Oak View's general contractor, the trial court was correct in finding it did not state new or different facts. As for his belated assertion the remaining three Toll entities "had no role in the development or construction of . . . Oak View," it simply contradicted the parties own stipulated facts. Thus, plaintiffs' reliance on the separation of insureds clause lacks merit.

4. The Scope of Reimbursement

In Buss v. Superior Court, supra, 16 Cal.4th 35, the Supreme Court held that, "[a]s to the claims that are not even potentially covered, . . . the insurer may . . . seek reimbursement for defense costs." (Id. at p. 50.) Buss involved "a 'mixed' action [case], in which some of the claims are at least potentially covered and the others are not . . . ." (Id. at p. 47.) However, in Scottsdale Ins. Co. v. MV Transportation, supra, 36 Cal.4th 643, the Supreme Court applied the rule "where the third-party suit never presented any potential for policy coverage . . . ." (Id. at p. 657.) Thus, "where, as here, the insurer does not deny a defense at the outset, but instead elects to provide one under a reservation of its right to reimbursement," subsequently "courts can determine that no potential for coverage, and thus no duty to defend, ever existed," and where "that conclusion is reached, the insurer, having reserved its right, may recover from its insured the costs it expended to provide a defense which, under its contract of insurance, it was never obliged to furnish." (Id. at p. 658.)

Plaintiffs acknowledge this is the law, but argue it should not apply here for several reasons. First, they cite case law in other jurisdictions that have refused to allow reimbursement. Under Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455, we must follow California Supreme Court precedent.

Second, plaintiffs claim defendant's insurance policy did not include an explicit "right of reimbursement clause . . . ." Buss rejected this argument, finding "[t]he insurer therefore has a right of reimbursement that is implied in law as quasi-contractual, whether or not it has one that is implied in fact in the policy as contractual." (Buss v. Superior Court, supra, 16 Cal.4th at p. 51, fn. omitted.) In a footnote, the court explained "[t]hat the insurer does not have a right of reimbursement express in the policy does not mean that it does not have one implied in law. Rather, that it has an implied-in-law right helps explain why it does not have an express-in-policy one. The former renders the latter unnecessary. . . ." (Id. at p. 51, fn. 13.)

Finally, plaintiffs contend defendant is not entitled to reimbursement because "its three reservation of rights letters . . . only generally reserved its right to seek reimbursement but never specifically denied coverage based on any of the [p]olicy provisions . . . ." Defendant's reservation of rights letters adequately notified plaintiffs of the potential bases for seeking reimbursement in the future. Each letter "advised" plaintiffs that defendant's "investigation of the coverage issues . . . is ongoing," that

"[b]y accepting the defense" defendant "does not intend to waive any coverage defense," and its reservation of rights included "[s]eek[ing] reimbursement . . . for legal fees and costs attributable to the defense of claims not covered . . . ." In addition, each letter listed "some of the coverage issues" and set out verbatim the "[r]elevant terms . . . of the applicable . . . policy," which included the exclusions ultimately relied on in this action.

"An insurer may agree to defend a suit subject to a reservation of rights. [Citation.] In this manner, an 'insurer meets its obligation to furnish a defense without waiving its right to assert coverage defenses against the insured at a later time.' [Citation.] . . . [¶] An insurer can reserve its right to assert noncoverage unilaterally merely by giving notice to the insured. [Citations.] By accepting the insurer's defense under these circumstances, the insured is deemed to have accepted this condition. [Citations.]" (Blue Ridge Ins. Co. v. Jacobsen (2001) 25 Cal.4th 489, 497-498.)

Thus, we reject plaintiffs' claim the trial court erred in awarding defendant reimbursement for the defense costs it paid in the underlying third party construction defect lawsuits.

5. Prejudgment Interest

Plaintiffs' final contention is that the trial court erred in accepting the referee's finding that defendant was entitled to receive prejudgment interest on the reimbursed defense costs from the date it paid each invoice. We disagree.

Civil Code section 3287, subdivision (a) declares, "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day . . . ." "Generally, the certainty required of Civil Code section 3287, subdivision (a), is absent when the amounts due turn on disputed facts, but not when the dispute is confined to the rules governing liability. [Citations.]" (Olson v. Cory (1983) 35 Cal.3d 390, 402.) Where, as here, "the facts are not in dispute, we independently review whether . . . damages were certain or capable of being made certain by calculation." (KGM Harvesting Co. v. Fresh Network (1995) 36 Cal.App.4th 376, 390-391, fn. omitted.)

In Evanston Ins. Co. v. OEA, Inc. (9th Cir. 2009) 566 F.3d 915, the federal Court of Appeals held an insurer recovering reimbursement for defense expenses and settlement of the underlying third-party action was entitled to receive prejudgment interest on the sum awarded. "It is clear that the 'vesting' provision as interpreted by the California courts . . . requires that the amount must be vested, not that the legal entitlement to that amount be vested. OEA's interpretation of [Civil Code section] 3287[, subdivision] (a) would rule out any prejudgment interest where legal liability can only be determined after judgment. The statute and case law, however, make clear that the California [L]egislature intended to allow for prejudgment interest where the amount of damages is certain instead of restricting plaintiffs to postjudgment interest." (Id. at p. 921.) While Evanston is not binding on us (Howard Contracting, Inc. v. G.A. MacDonald Construction Co., Inc. (1998) 71

Cal.App.4th 38, 52), we find its analysis persuasive here.

In Hartford Accident & Indemnity Co. v. Sequoia Ins. Co. (1989) 211 Cal.App.3d 1285, the plaintiff-insurer who had paid sums to settle claims arising out of a motor vehicle accident sued two other insurance companies seeking a determination over which policy should be deemed primary or excess. The plaintiff recovered judgment against both defendant-insurers, but the trial court denied recovery of prejudgment interest against one of them. The Court of Appeal reversed as to denial of prejudgment interest against the second defendant. "While Hartford's right to recover damages from Transamerica, like Hartford's right to recover damages from Sequoia, was in issue, the amount of damages recoverable was 'certain, or capable of being made certain by calculation' and was 'vested' in Hartford . . . the day Hartford exhausted its primary policy limit and first paid out money under its umbrella policy. Assuming Hartford was entitled to recover damages, the only question remaining was how the trial court would prioritize the policies . . . . This was purely a question of law since the amount of damages under either formula was readily ascertainable by mathematical calculation. Thus, the amount of damages were never 'unliquidated' or 'contingent' but rather, only the legally proper order of priority of the respective policies was uncertain." (Id. at p. 1307.)

This same analysis applies here. The trial court properly awarded prejudgment interest to defendant.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

WE CONCUR: MOORE, J. ARONSON, J.