

**RIO VISTA ASSOCIATES et al., Plaintiffs and Appellants, v. HARTFORD  
CASUALTY INSURANCE COMPANY et al., Defendants and Respondents.**

**B168171, B169608**

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT,  
DIVISION SEVEN**

*2005 Cal. App. Unpub. LEXIS 1503*

**February 22, 2005, Filed**

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**PRIOR HISTORY:** APPEAL from a judgment and order of the Superior Court of Los Angeles County, No. BC 257264. Robert H. O' Brien, Judge.

**DISPOSITION:** Affirmed.

**COUNSEL:** Reuben & Novicoff, Timothy D. Reuben and Stephen L. Raucher for Plaintiffs and Appellants Rio Vista Associates, Parker Industries, Inc., and Rio Vista Village Limited Partnership.

Law Offices of R. Q. Shupe, R. Q. Shupe and Tara S. Hizon for Respondent American Automobile Insurance Company.

Murchison & Cumming, Jean M. Lawler and Bryan M. Weiss for Respondent Century Surety Insurance Company.

Stroock & Stroock & Lavan, James E. Fitzgerald and James W. Denison, for Respondents United States Fire Insurance Company, Ranger Insurance Company, and TIG Insurance Company.

Carlson, Calladine & Peterson, Robert M. Peterson, Asim K. Desai and Keith J. Turner for Respondent Transcontinental Insurance Company. [\*2]

**JUDGES:** ZELON, J.; PERLUSS, P. J., WOODS, J. concurred.

**OPINIONBY:** ZELON

**OPINION:**

Rio Vista Associates (RVA), Parker Industries, Inc. (Parker Industries), and Rio Vista Village Limited Partnership (RVVLP) appeal the judgment and a post-trial order awarding costs in their action for breach of contract, breach of the implied covenant of good faith and fair dealing, reformation, contribution, and action to recover on judgment pursuant to *Insurance Code section 11580* against respondent insurance companies.

On appeal, plaintiffs contend that the trial court erred (1) in finding that five defendants did not act in bad faith or breach the insurance contract by delaying acceptance of plaintiffs' tender under an additional insured clause of the subcontractors' policies; (2) finding that two insurance policies could not be reformed to include RVA as an additional insured; (3) including in its contribution calculation insurers who had previously been dismissed as defendants; and (4) incorrectly assessing and calculating costs. Transcontinental Insurance Company cross-appeals the trial court's finding that a settlement agreement entered into by plaintiffs and the direct insurer was [\*3] not the product of collusion. We affirm.

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY

### 1. The Underlying Litigation and the Settlement of the Underlying Litigation.

RVA is a general contractor and Parker Industries is its general partner. In October 1995, RVA contracted to build an 85-unit low-income apartment building in East Los Angeles for RVVLP, and hired numerous subcontractors for the project to do the actual construction. The project was completed in February 1997, but suffered heavy water damage during the winter storms of 1997-1998, as the building was plagued by construction defects.

On December 30, 1998, RVVLP filed an action against RVA and Parker Industries (collectively RVA/Parker) in Los Angeles Superior Court (Case No. BC203124) (the Underlying Action). RVA/Parker tendered the case to their direct insurers, Mt. Hawley Insurance Company (Mt. Hawley), Steadfast Insurance Company (Steadfast), and Legion Insurance Company (Legion), for coverage. Steadfast and Mt. Hawley declined coverage to RVA because Parker Industries was the named insured on the policies. Ultimately, Steadfast agreed to defend Parker Industries, while Legion agreed to defend RVA/Parker. [\*4] Legion paid for RVA/Parker's defense in the Underlying Action. n1

n1 Mt. Hawley retained Bistline & Cahoon to defend Parker; Legion retained Dale Braden & Hinchcliffe to defend both RVA and Parker. Legion later retained Frank Sabaitis of Sabaitis & O'Callaghan to defend RVA, and Jeffrey Pearlman.

In December 1999, RVA/Parker tendered the underlying litigation to the insurers of the subcontractors on the project, claiming to be an additional insured under the subcontractors' individual insurance policies. As discussed in more detail in connection with the insurers' motions for summary adjudication, RVA/Parker contends the insurers either refused to defend or agreed to provide a defense and then failed to do so.

Settlement negotiations between RVA/Parker and RVVLP took place after a mediation held on February 27, 2001. RVVLP's March 14, 2001 letter proposing settlement of \$ 3.8 million was forwarded to Legion, Steadfast, and Mt. Hawley. After the direct insurers (Steadfast and Mt. Hawley) refused to contribute, [\*5] RVA/Parker issued an outline containing additional settlement terms.

In early March 2001, counsel for one of the subcontractors wrote to retained insurance counsel for RVA/Parker that it was "no secret" the plaintiffs were discussing "settling around" the subcontractors. Counsel advised that he was opposed to such settlement. On June 22, 2001, RVA/Parker's counsel Jeffrey Perlman sent a letter to Timothy D. Reuben (counsel for RVVLP) in which he stated that six of the subcontractors' insurers had agreed to share in costs from tender forward, but that he was not making any final deals until settlement with RVVLP could be finalized. n2

n2 Pearlman's letter stated, "At least six or more subcontractor insurers have agreed to share in costs backwards to tender and forward, but I was careful to ensure that no final deals were struck or funds accepted until we cut a final settlement deal."

In July 2001, RVA, Parker, and RVVLP entered into an agreement to settle the Underlying Litigation (Settlement Agreement). n3 [\*6] The Settlement Agreement acknowledged that Legion had defended RVA/Parker under a policy providing for \$ 2 million of coverage, but RVA/Parker had been unable to convince the subcontractors' insurers to participate in the defense of the Underlying Action. The parties agreed to hold a hearing before a Special Master (Judge Eli Chernow) for the purpose of determining the amount of damages RVVLP incurred as a result of its construction defect claims; RVA/Parker agreed to stipulate to liability. The parties agreed Judge Chernow's ruling would be effective only upon confirmation in the Underlying Litigation in conformity with the procedures set forth in *National Union Fire Ins. Co. v. Lynette C. (1994) 27 Cal.App.4th 1434*, and the parties agreed RVA/Parker would apply to the court for a good faith settlement determination. In exchange, after entry of the award as a separate judgment, RVVLP would execute a covenant not to execute on the judgment, and instead would proceed against the insurers on the subcontractors' policies for damages in excess of the \$ 2 million of Legion coverage. Parker and RVA assigned their insurance claims against the subcontractors' insurers to RVVLP. [\*7]

n3 As discussed more fully *infra*, plaintiffs contended that they were abandoned by the additional insurers and therefore had no choice but to settle the matter.

In August 2001, prior to the agreed-upon prove-up hearing, RVA/Parker sent a copy of the Settlement

Agreement to the insurers and advised them of the prove-up hearing.

In late October and early November 2001, an uncontested prove-up hearing was conducted before Judge Chernow, at which only RVVLP offered any evidence. RVA/Parker did not present evidence, did not cross-examine witnesses, and did not present argument. Judge Chernow found RVVLP suffered \$ 12,040,950 in damages, and that the settlement with Legion was in good faith. The hearing was attended by counsel for some of the subcontractors insured by the defendants, but counsel did not participate.

On August 4, 2001, the parties entered into a Stipulation for Entry of Judgment (Stipulated Judgment) in which RVA/Parker acknowledged their liability for construction defects and agreed to entry [\*8] of judgment in the amount of \$ 15,230,434 (consisting of \$ 12,040,950 based upon Judge Chernow's findings, plus additional costs). The trial court entered the judgment in the Underlying Action on April 5, 2002.

On November 30, 2001, RVA/Parker/RVVLP filed a motion for a good faith determination of their settlement pursuant to *Code of Civil Procedure section 877.6*. In January 2002, the court denied RVA/Parker's motion for good faith settlement determination.

In February 2002, the Settlement Agreement was amended and restated to reflect Judge Chernow's award of \$ 12,040,950 and the trial court's refusal to find the settlement was in good faith pursuant to *Code of Civil Procedure 877.6*. The parties agreed to entry of the judgment, a covenant not to execute on the part of RVVLP, and assignment of RVA/Parker's rights against the insurers. They eliminated from the Settlement Agreement any requirement of a good faith determination by the court.

The Underlying Action settled globally in February 2002. The parties then entered into a Stipulated Judgment. In addition to \$ 2 million received from Legion, RVVLP collected an additional [\*9] \$ 13 million in settlement funds.

## 2. The Instant Action.

This action was commenced August 31, 2001. RVA/Parker's First Amended Complaint filed June 12, 2002, alleged six different types of claims (breach of insurance contract, breach of the implied covenant of good faith and fair dealing, reformation, contribution, action to recover on judgment pursuant to *Insurance Code section 11580*, and breach of the implied covenant of good faith and fair dealing) against 13 different insurance companies (First Financial Insurance Company, Ranger Insurance Company (Ranger), Gerling American Insurance Company, CNA Casualty Insurance

Company of California, TIG Insurance Company of Michigan (TIG), North American Capacity Insurance Company, United States Fire Insurance Company (U.S. Fire), Hartford Insurance Company (Hartford), Truck Insurance Exchange, Pacific Insurance Company, American Automobile Insurance Company (American Automobile), Century Insurance Group, aka Century Surety Group (Century), and Tudor Insurance Company).

Proceedings in the action consisted of three phases: n4 Summary adjudication motions brought by five insurers (TIG, Ranger, U.S. Fire, Hartford [\*10] and Transcontinental) under whose policies RVA or Parker Industries were additional insureds; Phase 1A of the trial, to determine whether RVA was an additional insured under policies issued by Century and American Automobile; and Phase 1B of the trial, to determine the amount the remaining insurers (TIG, Ranger, U.S. Fire, Hartford and Transcontinental) were required to contribute to RVA/Parker's defense costs.

n4 Pursuant to a pre-trial order of the court, the trial itself was divided into a non-jury trial on the issue of reformation and a non-jury trial of the contribution claim.

### A. The Summary Adjudication Motions.

Five of the insurers -- Ranger, TIG, U.S. Fire, Hartford and Transcontinental -- filed motions for summary adjudication on the breach of contract and bad faith claims against them, but did not contest the claims for contribution to defense costs. n5 The summary adjudication motions focused on the contents of RVA/Parker's tender letters and the insurers' responses. Our review of the record [\*11] indicates the undisputed facts demonstrate either that the insurers agreed to accept their defense duty prior to the finalization of the Settlement Agreement, or did not participate in the Settlement Agreement. With respect to the key fact of whether the additional insurers had agreed to defend at the time the settlement agreement was entered into, RVA/Parker contended this fact was disputed because Pearlman testified at his deposition "none of the subcontractors had actually put final deals on the table." According to RVA/Parker, Pearlman's testimony also explained why the settlement agreement was not a "set up" of the insurers or collusive. The particulars of the motions are as follows:

n5 Plaintiffs' claim against Hartford settled during the pendency of this appeal.

(1) Ranger: Ranger's insureds were Air Cell Concrete Systems and Kane Construction under two separate policies. RVA/Parker initially tendered defense to Ranger on December 9, 1999, on both policies. After much correspondence was exchanged between [\*12] the parties, Ranger agreed to defend RVA under the Air Cell policy on January 12, 2001. Similar delays occurred with respect to the Kane policy, under which Ranger also orally accepted the tender on January 12, 2001. Nonetheless, RVA/Parker contended that Ranger never contributed to its defense, nor undertook any activities in its defense, but was aware of the negotiations and settlement, provided with a copy of the agreement, and invited to attend the hearing.

Ranger's Motion. Ranger moved for summary adjudication on the breach of contract and bad faith claims against it n6 on the grounds that it had accepted tender, but that it was not liable for the stipulated judgment because it did not participate in the settlement discussions leading to the Stipulated Judgment, and did not consent to the Stipulated Judgment. Further, Ranger argued that the Stipulated Judgment was unenforceable against it because the award under it did not constitute "damages" for which it was required to indemnify RVA/Parker, relying on *Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718 (*Hamilton*); the no-action clause of the insurance contract barred the instant action because [\*13] the clause was violated by RVA/Parker's failure to include Ranger in the settlement discussions; there can be no breach of the duty to defend where another insurer has defended or the defense was accepted; RVVLP's action to recover as the judgment creditor on the Stipulated Judgment similarly failed under *Hamilton* and was barred by *Rose v. Royal Ins. Co.* (1991) 2 Cal.App.4th 709 (*Rose*); and punitive damages were unwarranted. n7

n6 The sixth through 10th (Air Cell) and 11th through 15th (Kane) causes of action of the First Amended Complaint alleged claims for breach of contract, bad faith failure to defend and indemnify the stipulated judgment, violation of *Insurance Code section 790.03*, contribution for defense costs and stipulated judgment, and bad faith for failure to pay the stipulated judgment pursuant to *Insurance Code section 11580*. Ranger did not contest the contribution claims (eighth and 13th causes of action), contending that it stood ready to contribute under the additional insured coverage for RVA/Parker.

n7 Ranger also argued that no private right of action existed under *Insurance Code section*

790.03 (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 250 Cal. Rptr. 116 (*Moradi-Shalal*)).

[\*14]

RVA/Parker's Opposition. RVA/Parker contended that while Ranger purportedly agreed to defend, it never did so on any particular terms, and even if Ranger's actions could be construed as undertaking its duty to defend, it failed to indemnify RVA/Parker in the Underlying Litigation. Furthermore, RVA/Parker argued that (1) the existence of a "no action" clause in the insurance contract did not excuse Ranger's duty to defend; (2) the fact RVA/Parker received an adequate defense from other carriers did not preclude it from seeking a defense from Ranger; (3) violations of *Insurance Code section 790.03* may serve as evidence of bad faith; and (4) an *Insurance Code section 11580* action against Ranger was valid because the Chernow hearing represented an independent adjudication of the Underlying Action.

(2) TIG. TIG's insured was Circulating Air; Circulating Air's policy contained a "blanket additional insured endorsement" which it conceded covered RVA/Parker, and RVA/Parker tendered the defense on December 9, 1999. In June 2000, RVA/Parker again wrote to TIG; TIG declined to accept defense, instead requesting more information, and [\*15] contending any coverage would be excess coverage. Additional correspondence followed in August 2000 wherein RVA/Parker again requested a defense; TIG declined in September. On December 20, 2000, TIG issued a reservation of rights letter acknowledging additional insured coverage on an excess basis, but declining to contribute to any defense on the grounds that its coverage was excess only.

TIG's Motion. TIG moved for summary adjudication on the breach of contract claims against it n8 on the grounds that it had accepted tender, but that it was not liable for the stipulated judgment, to which it did not consent. TIG contended it accepted tender on December 20, 2000. TIG contended it did not participate in the settlement discussions leading to the Stipulated Judgment, and did not consent to the Stipulated Judgment.

n8 The 26th through 30th causes of action of the First Amended Complaint alleged claims for breach of contract, bad faith failure to defend and indemnify the stipulated judgment, violation of *Insurance Code section 790.03*, contribution for defense costs and stipulated judgment, and bad faith for failure to pay the stipulated judgment

pursuant to *Insurance Code section 11580*. TIG did not contest the contribution claim (28th cause of action), contending that it stood ready to contribute under the additional insured coverage for RVA/Parker.

[\*16]

TIG argued that the Stipulated Judgment was unenforceable against it because the award under it did not constitute "damages" for which it was required to indemnify RVA/Parker, relying on *Hamilton, supra, 27 Cal.4th 718*. Furthermore, TIG argued that: no private right of action existed under *Insurance Code section 790.03 (Moradi-Shalal, supra, 46 Cal.3d 287)*; RVVLP's action to recover as the judgment creditor on the Stipulated Judgment similarly failed under *Hamilton* and was barred by *Rose, supra, 2 Cal.App.4th 709*; the no-action clause of the insurance contract barred the instant action because the clause was violated by RVA/Parker's failure to include TIG in the settlement discussions; there can be no breach of the duty to defend where another insurer has defended or the defense was accepted; and punitive damages were unwarranted.

RVA/Parker's Opposition. RVA/Parker opposed the motion on the grounds that TIG improperly relied on its "escape clause" to shift the burden to a direct insurer in refusing to defend. Furthermore, RVA/Parker argued (1) they were not afforded a complete defense by the other [\*17] carriers; (2) TIG was bound by the Stipulated Judgment because of its failure to defend; (3) *Insurance Code section 790.03* violations may be used as evidence of bad faith; (4) RVA/Parker could pursue recovery under *Insurance Code section 11580* because of TIG's failure to defend; and (5) the existence of the "no action" clause was not a bar to suit because RVA/Parker had been abandoned by TIG.

(3) U.S. Fire. U.S. Fire's insured was Regency Aluminum Products, Inc.; the policy provided additional insured coverage for RVA. RVA/Parker first tendered the action to U.S. Fire on December 21, 1999. RVA/Parker again tendered the claim on July 14, 2000, and received a response on August 31, 2000, disclaiming coverage. RVA/Parker sent several letters to U.S. Fire regarding coverage, and advised it of the mediations taking place. U.S. Fire disclaimed coverage again on December 8, 2000. After RVA/Parker again requested coverage, U.S. Fire responded on January 23, 2001, and agreed to participate in the defense. However, RVA/Parker claimed that U.S. Fire never participated in the defense, and it was left with no choice but to settle.

U.S. [\*18] Fire's Motion. U.S. Fire moved for summary adjudication on the breach of contract claims against it n9 on the grounds that it had accepted tender,

but that it was not liable for the stipulated judgment, to which it did not consent. U.S. Fire contended it accepted tender on January 23, 2001. U.S. Fire contended it did not participate in the settlement discussions leading to the Stipulated Judgment, and did not consent to the Stipulated Judgment.

n9 The 36th through 40th causes of action of the First Amended Complaint alleged claims for breach of contract, bad faith failure to defend and indemnify the stipulated judgment, violation of *Insurance Code section 790.03*, contribution for defense costs and stipulated judgment, and bad faith for failure to pay the stipulated judgment pursuant to *Insurance Code section 11580*. TIG did not contest the contribution claim (38th cause of action), contending that it stood ready to contribute under the additional insured coverage for RVA/Parker.

[\*19]

U.S. Fire argued that the Stipulated Judgment was unenforceable against it because the award under it did not constitute "damages" for which it was required to indemnify RVA/Parker, relying on *Hamilton, supra, 27 Cal.4th 718*. Furthermore, U.S. Fire argued that no private right of action existed under *Insurance Code section 790.03 (Moradi-Shalal, supra, 46 Cal.3d 287)*; RVVLP's action to recover as the judgment creditor on the Stipulated Judgment similarly failed under *Hamilton* and was barred by *Rose, supra, 2 Cal.App.4th 709*; the no-action clause of the insurance contract barred the instant action because the clause was violated by RVA/Parker's failure to include U.S. Fire in the settlement discussions; there can be no breach of the duty to defend where another insurer has defended or the defense was accepted; and punitive damages were unwarranted.

RVA/Parker's Opposition. RVA/Parker argued factual issues existed whether U.S. Fire properly refused to defend under the policy. They further argued that (1) the policy at issue covered the dispute, both under its "ongoing operations" endorsement and the [\*20] broader endorsement issued to RVA; (2) U.S. Fire failed to defend; (3) the Stipulated Judgment was enforceable because U.S. Fire did not participate in the defense of RVA/Parker; (4) *Insurance Code section 790.03* violations could be used as evidence of bad faith; and (5) RVVLP could maintain its *Insurance Code section 11580* action against U.S. Fire because no defense was provided.

(4) Transcontinental. On December 6, 1999, RVA/Parker tendered the matter to Transcontinental's

insured, C&R Plumbing. On December 23, 1999, Transcontinental requested RVA/Parker to provide copies of the subcontract, defects, and information concerning the direct insurers. On December 27, 1999, Jeffrey Pearlman advised that he was taking over coverage issues, and tendered RVA's defense. On January 17, 2000, Transcontinental reiterated its request for information, but received no response from RVA/Parker. After a series of correspondences, on August 29, 2000, Transcontinental notified RVA it would provide a defense under a reservation of rights; it contended it never paid any fees because it did not receive the necessary materials from RVA. n10

n10 At trial, plaintiffs contended that they refused to provide the bills on the grounds they contained privileged information relating to the subcontractors against whom plaintiffs had claims, but that Transcontinental was advised of the amounts incurred.

**[\*21]**

Transcontinental's Motion. Transcontinental filed two motions for summary judgment, or in the alternative, for summary adjudication, one relating to RVA/Parker's claims and the other relating to RVVLP's claims. n11 Transcontinental contended that the Stipulated Judgment did not qualify as a final judgment under the insurance policies' no action clause; the Stipulated Judgment was not enforceable because it was the product of a collusive scheme; the contribution claim was without merit because Legion never asked it to contribute; and Parker was not an additional insured and Transcontinental owed it no duty.

n11 The 21st and 22nd causes of action of the First Amended Complaint alleged claims for breach of contract (RVA and Parker); the 23rd and 24th cause of action alleged claims for contribution (RVVLP) and recovery under *Insurance Code section 11580* (RVVLP); the 25th cause of action alleged a claim for bad faith breach of the implied covenant of good faith and fair dealing (RVVLP).

**[\*22]**

RVA/Parker's Opposition. RVA/Parker contended that Transcontinental's conduct did not amount to an acceptance of the defense; given this failure, they had no duty to make a settlement demand on Transcontinental. Furthermore, they argued that (1) Transcontinental must indemnify them due to the failure to defend; (2) because

they were abandoned by the insurers, they were forced to make the best settlement they could with RVVLP; (3) the hearing before Judge Chernow constituted an actual trial; (4) the settlement was not collusive because the additional insurers were kept informed; (5) RVVLP's contribution claim had not been satisfied, and (6) Transcontinental wrongfully denied Parker Industries' additional insured status.

(5) Trial Court Ruling. The trial court granted the motions for summary adjudication. Principally, the court found that the Stipulated Judgment did not arise from an "actual trial" within the meaning of the insurance policies' "no-action" clauses, nor was it an independent adjudication. Even if the Stipulated Judgment was not the product of collusion, the manner in which the Stipulated Judgment was determined, the trial court found it "rendered the ensuing [\*23] judgment unreliable as a basis for damages resulting from an alleged refusal to settle or as a proper judgment foundation by which to determine liability in this case." (Relying on *Hamilton, supra, 27 Cal.4th 718*.)

It was "clear" to the court that there had been no "actual trial." "At best it was a testing ground for settlement theories of the amount and apportionment of damages. . . . Defendants here were given no role whatsoever in that settlement process." While the trial court found that there was insufficient evidence to establish a collusive process, the court found that in any event, *Hamilton* did not require a finding of collusion in order to hold that an insurer was not bound to a settlement in which it did not participate. The trial court found there was no evidence that the insurers abandoned the plaintiffs; rather, with respect to the acceptance of their defense duties, the trial court found at most there was a "hesitation" to defend. With respect to the *Hamilton* decision, in that case the "insurers' acceptance of the defense . . . had little bearing on the holding."

3. Phase 1A - Trial of the Reformation Claim.

Phase 1A of the trial focused [\*24] on RVA/Parker's causes of action for reformation against American Automobile and Century, both of whom insured Walton Electric for different policy periods. RVA/Parker alleged the insurance contracts should be reformed on the grounds of mutual mistake to include RVA as an additional insured, although the contracts of insurance referred to a non-existent entity known as "Parker Associates." n12

n12 Prior to trial, the court denied the summary judgment motions of American Automobile and Century on the grounds triable

issues of fact existed with respect to the parties' intent.

*Century Surety.* Pursuant to paragraph 8 of the subcontract agreements with RVA, each subcontractor was required to procure insurance and name RVA as an additional insured. Century issued a policy to Walton Electric covering the period October 1, 1996, through October 1, 1997, covering property damage for the additional insured. n13 The certificate of insurance listed as an additional insured an entity known as "Parker Associates" [\*25] at the address 16530 Ventura Boulevard, Suite 402, Encino, California 91436, the same business address as RVA. RVA asserted claims for economic loss and admitted that it was not seeking recompense for property damage. Century Surety declined coverage on the grounds "Parker Associates" was a non-existent entity.

n13 The copy of the policy in the record was attached to Century's motion for summary judgment. It was not introduced at trial.

*American Automobile.* American Automobile issued a policy to Walton Electric covering the period October 1, 1996, through October 1, 1997, covering property damage for the additional insured. n14 The certificate of insurance listed "Parker Associates" as an additional insured. An internal American Automobile memorandum dated March 15, 2000, noted that "the 95-96 policy contains a multi-cover endorsement which automatically covers those entities the [insured] is contractually bound to indemnify, so Parker and Rio Vista Associates may not have to be named to be covered [\*26] under that policy."

n14 This policy does not appear to be part of the record on appeal.

RVA argued at Phase IA of the trial that (1) general endorsement language (a blanket additional endorsement with respect to Century, and a multi-form endorsement with respect to American Auto) in the policy could be construed to cover RVA and Parker as additional insureds; and (2) reformation of the contract on the grounds of mistake to include Parker was warranted because Parker has its place of business at the same address listed for the non-existent entity "Parker Associates."

Prior to trial, RVA/Parker filed a motion in limine to exclude evidence denying coverage under American

Automobile's "multi-cover" endorsement. RVA/Parker argued that American Automobile had never produced a copy of the multi-cover endorsement during discovery, and therefore should be precluded from producing evidence or contending that RVA/Parker were not covered as additional insureds under this endorsement. In its opposition to the motion, American [\*27] Automobile contended that it had produced all documents responsive to plaintiff's demands. American Automobile pointed out that "if the court determines that plaintiffs are not an additional insured under the [American Automobile] policy issued to Walton Electric, plaintiffs may qualify under the MultiCover endorsement of that policy, Form CG 71 5806 99 [MultiCover], which states: '[P] Blanket Additional Insured [P] Section II -- Who is an Insured . . . [P] c. Any person or organization that you are required by written insured contract to include as an insured, subject to all the following provisions; [P] 1. "Coverage is limited to their liability arising out of . . . [P] (b). your ongoing operations performed for that insured.'"" However, American Automobile contended that even if coverage were afforded for RVA as an additional insured under the MultiCover endorsement, such coverage was limited to ongoing operations. They asserted that because the damage did not occur while Walton Electric had ongoing operations (prior to October 1, 1997), the multi-cover endorsement did not apply.

The court deferred ruling on the motion until the start of trial. n15

n15 The record is unclear how the court ruled on the motion.

[\*28]

The following testimony was presented at trial on the reformation claim:

Calco, the insurance broker for RVA, would, in the usual course of business, receive the list of entities to be named as additional insureds from the direct insured. However, Calco generally would not review the subcontracts. In the case of the policies at issue, Calco was not informed that Parker Associates should not have been listed as the additional insured.

Walton Electric, the subcontractor, intended to comply with the insurance requirement to name RVA as an additional insured. Don Davis of Walton Electric did not understand why Parker Associates was listed, but Davis himself did not contact the broker to obtain the policy. No one from RVA contacted Walton Electric to say that they should have been listed as additional insureds.

John Lee, an independent contractor accountant, kept the books and records of RVA. Because paragraph 8 of the subcontracts required the subcontractors to obtain insurance, before a check would be issued to the subcontractors, Lee would make sure the insurance was in force. The named additional insured, "Parker Associates," was a mistake, and the document should have listed RVA [\*29] as the additional insured pursuant to the subcontract. Although there was no entity known as "Parker Associates," Lee did recognize that the address listed on the certificate belonged to RVA. Lee did not review the insurance policies to make sure they complied with any obligations that might exist, nor was he involved in procuring the insurance. He did not speak to any of the insurance brokers.

David Parker, the vice president of Parker Industries, is a general contractor. Parker was the project manager, and in that capacity he accepted subcontractor bids, purchased the project, wrote out the subcontractor's scope of work, and packaged and processed the subcontracts. The subcontractors did all of the actual construction work. It was Parker's belief that Parker Industries would be an additional insured as the general partner of RVA.

Parker testified that RVA/Parker would request the subcontractors to obtain insurance in accordance with paragraph 8 of the subcontracts, which provided that the subcontractor name RVA as an additional insured. Parker would send the various subcontractors a page containing a blowup of paragraph 8 of the subcontract and an example certificate of insurance. [\*30] When the subcontractors obtained the appropriate endorsement, they would send the certificates of insurance to Parker, which would send them to the accounting department where Lee worked.

Parker testified that Parker Industries and RVA shared the same place of business. Parker believed it was an oversight by the accountant in not noticing the wrong additional insured was listed on the insurance certificates. Parker believed that obtaining insurance for RVA would cover Parker Industries as the general partner. Although the subcontract required the subcontractor to insure RVA/Parker prior to commencement of work, there were sometimes exceptions to this rule.

The trial court ruled n16 that there was no ambiguity in the contract. Furthermore, it found that reformation was not warranted because there was insufficient evidence to support a finding of mutual mistake; although there was a mistake on the part of the plaintiffs, there was insufficient evidence to support a finding that the insurers knew or should have known of plaintiffs' mistake. In addition, plaintiffs' negligence in failing to

check the certificates to insure the correct entity was listed precluded the application of [\*31] reformation, an equitable remedy.

n16 Both Century and American Automobile filed motions for judgment, judgment on the pleadings, and judgment after presentation of plaintiffs' case.

#### 4. Phase IB - Trial of the Contribution Claim.

Phase IB concerned contribution claims for Legion's payment of defense costs for RVVLP to the extent Legion paid more than its share of those costs. The evidence at trial established that Legion made total payments of \$ 2,751,606.65. Of that amount, \$ 751,606.65 consisted of legal fees and costs.

Testimony established the relative liability for construction defects at the project was as follows: RVA/Parker, 20 percent; Air Cell, 34 percent; C&R Plumbing, 16 percent; Circulating Air, 22 percent, Kane Construction, two percent; Regency Aluminum, two percent; and Walton Electric, four percent.

RVVLP argued that Legion should be excluded from the contribution determination because it was the subject of rehabilitation proceedings in Pennsylvania. The trial court ruled that while [\*32] there was evidence Legion suffered from financial distress, this was insufficient evidence of its insolvency. n17

n17 After trial concluded, a Liquidation Order was issued in Legion's insolvency proceedings. See footnote 21, *infra*.

The trial court issued a Statement of Decision, in which it made the following findings and rulings relevant to the issues raised on appeal.

(1) The \$ 2,000,000 Legion payment was to settle loss exposure relating to the stipulated judgment, and therefore did not constitute defense costs. The court found there was no evidence that that \$ 2,000,000 or any part therefore constituted defense costs; rather, "the evidence points to the clear finding that \$ 2,000,000.00 was payment on the stipulated loss judgment only."

(2) The best method of apportionment in this case was by pro rata share, rejecting a comparative fault analysis. The court then selected as the participants the original 13 defendants, plus Steadfast, Mt. Hawley and Legion for a total of 16 potential contributors. [\*33] The trial court then excluded Century and American

Automobile on the grounds they had no duty to indemnify, leaving 14 potential contributors. The court deducted from the total claimed figure of \$ 751,606.65 the following: post-settlement costs (\$ 54,760.73), duplicate billings (\$ 18,993.97), and work on a related case (\$ 52,017.96) for net defense costs of \$ 625,833.99. The court allocated this sum at \$ 44,702.43 for each of the 14 contributors, and ordered Transcontinental, TIG, U.S. Fire, Ranger and Hartford to pay RVA/Parker \$ 44,702.43 each.

## DISCUSSION

### I. Summary Adjudication Motions.

RVA/Parker argue that the summary adjudication motions must be reversed because: (1) the trial court improperly found plaintiffs' claims were barred under *Hamilton* regardless of whether plaintiffs were defended; (2) there are disputed issues of fact concerning both whether the insurers had agreed to defend, and if they did agree to defend, whether a defense was provided; and (3) the Stipulated Judgment was based upon an "actual trial" and therefore binding; in any event, because plaintiffs' claims were independent of the Stipulated Judgment, summary adjudication was improper. [\*34] We disagree.

#### A. Standard of Review.

We review the trial court's rulings on the insurer's summary adjudication motions de novo. (*Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 491.) Summary judgment is proper if the "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken" in support of and in opposition to the motion "show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*Code Civ. Proc.*, § 437c, subds. (b), (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) Because summary judgment is drastic, denying the opposing party a trial, we strictly construe the moving party's papers, accepting only those portions not contradicted by opposing papers, while liberally construing the opposing party's papers, accepting all facts therein as true. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768-769.)

Additionally, in ruling on a summary judgment motion, "the determination whether facts have been adduced . . . which present [\*35] triable issues of fact is to be made in the light of the pleadings." (*Leasman v. Beech Aircraft Corp.* (1975) 48 Cal. App. 3d 376, 380, 121 Cal. Rptr. 768.) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine

whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 843.) A defendant seeking summary judgment is entitled to it if he either proves an affirmative defense, disproves at least one essential element of the plaintiff's cause of action, or shows that an element of the cause of action cannot be established. (*Code Civ. Proc.*, § 437c, subd. (o)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pp. 849-851, 853-855.) Only if defendant makes the requisite showing does the court examine plaintiff's opposing papers to determine if they demonstrate the existence of a triable issue of material fact. (*Code Civ. Proc.*, § 437c, subd. (o)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pp. 854-857.) [\*36]

On appeal, we independently examine the facts and determine their effect as a matter of law. (*Saelzler v. Advanced Group 400*, *supra*, 25 Cal. 4th at p. 767.) We are not bound by the trial court's stated reasons, if any, for its ruling; we review the ruling, not the rationale. (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 102; *Stratton v. First Nat. Life Ins. Co.* (1989) 210 Cal. App. 3d 1071, 1087, 258 Cal. Rptr. 721.)

### B. The Insurers Were Entitled to Summary Adjudication Because No Triable Issues Exist Whether the Insurers Agreed to Defend or Whether They Participated in the Settlement.

Here, because the insurers agreed to defend prior to the time the settlement agreement was consummated, there was no breach of the duty to defend and in any event, plaintiffs were receiving a defense from their direct insurer Legion. Therefore, as we explain, the additional insurers had the right to participate in the settlement, and the failure of RVA/Parker to permit them to do so violated the no-action clause of the policies, rendering the Stipulated Judgment unenforceable against them.

Most insurance policies contain [\*37] a "no-action" clause n18 which bars any action against the insurer until the insured's liability to the claimant has been determined by either a final judgment or a settlement approved by that insurer. As long as the insurer is providing a defense, it has the right to decide whether or not to settle. (*Safeco Ins. Co. v. Superior Court* (1999) 71 Cal.App.4th 782, 787.)

n18 Such clauses typically state, "No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally

determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company." (*Rose, supra, 2 Cal.App.4th at p. 714*; see also *Safeco Ins. Co. v. Superior Court, supra, 71 Cal.App.4th at p. 787*.)

*Insurance Code section 11580*, subd. (b)(2) provides [\*38] a statutory basis upon which a judgment creditor of an insured may pursue a direct action against the defendant's insurer. (*Ins. Code, § 11580*, subd. (b)(2); *Reliance Ins. Co. v. Superior Court (2000) 84 Cal.App.4th 383, 386*.) However, the "no-action" clause requires a judgment be obtained after an "actual trial," which is interpreted to require (1) an independent adjudication of facts based upon an evidentiary showing, and (2) a process that does not create the potential for abuse, fraud, or collusion. (*National Union Fire Ins. Co. v. Lynette C., supra, 27 Cal.App.4th at p. 1449*.) Where the insurer has refused to defend, a stipulated judgment with a covenant not to execute may form the basis of an *Insurance Code section 11580* action, provided it was not the product of abuse, fraud or collusion. (*Sanchez v. Truck Ins. Exchange (1994) 21 Cal.App.4th 1778, 1787*.)

However, where the insurer has agreed to defend, a stipulated judgment is not enforceable against the insurer in an *Insurance Code section 11580* action. (*Wright v. Fireman's Fund Ins. Companies (1992) 11 Cal.App.4th 998, 1024*.) [\*39] Rather, a section 11580 action requires a judgment against the insured because the purpose of the "no action" clause is to give the insurer the right to control the defense, and to decide whether to settle or take the matter to trial. The insured has no right to interfere with the insurer's defense of the action. (*Safeco Ins. Co. v. Superior Court, supra, 71 Cal.App.4th at pp. 787-788*.) Furthermore, a stipulated judgment presents a potential for abuse -- "with no personal exposure the insured has no incentive to contest liability or damages. To the contrary, the insured's best interests are served by agreeing to damages in any amount as long as the agreement requires the insured will not be personally responsible for those damages." (*Wright, supra, at p. 1023*.)

With respect to what constituted a "judgment after an actual trial," *Rose, supra, 2 Cal.App.4th at p. 716*, the court concluded that "the term 'judgment after actual trial' presupposes 'a contest of issues leading up to final determination by court or jury, in contrast to a resolving of the same issues by agreement of the parties; i.e., without a contest.'" (*Ibid.*) "[A] [\*40] judgment against the insured after actual trial eliminates the possibility of collusion since it 'imposes the requirement of an actual contest of issues and does not include a judgment entered by the court after the approval of a compromise

settlement agreement. . . ." (*Id. at p. 715*.) In *Rose*, the judgment at issue was a consent judgment in which the insured and injured party agreed to liability and damages; *Rose* found that in entering judgment, the court merely exercised an administrative function in recording the parties' agreement. (*Id. at p. 716*.)

In *Hamilton, supra, 27 Cal.4th 718*, the court addressed the issue of whether a stipulated judgment could be treated as a presumptive measure of the damages the policyholder suffered as a result of the insurer's failure to enter into a reasonable settlement. (*Id. at p. 725*.) While an insurer who has failed to make a reasonable settlement is liable for all of the insured's damages caused by the insurer's failure to make such settlement without regard to the policy limits (*ibid.*), *Hamilton* held that the stipulated judgment was entitled to no weight in [\*41] a later proceeding because it was reached without the consent of the defending insurer. (*Id. at p. 730*.)

Here, there can be no dispute that the insurers agreed to defend RVA/Parker prior to the time the Settlement Agreement was entered into: all accepted tender prior to February 2001, when settlement discussions were commenced. At most, there was some delay in the additional insurers' acceptance of their defense obligations prior to that time and some haggling over submission of bills. In any event, RVA/Parker were already receiving a defense from their direct insurer, and therefore actual payment of defense costs is immaterial to the duty to defend issue. Thus, plaintiffs' bad faith and breach of contract claims fail.

RVA/Parker's contention that it had no choice but to enter into the settlement cannot stand. Because a defense was provided, although they were not yet funding that defense, the additional insurers had the right to participate in the settlement with RVVLP. There is no evidence that they participated in any meaningful fashion; only that they knew of the settlement discussions and were informed of the hearing. However, the insurers' lack of participation [\*42] was not a green light for RVA/Parker to negotiate a settlement in their absence. For this reason, the Stipulated Judgment does not qualify as an "actual trial" to permit suit under *Insurance Code section 11580*. Nothing short of a litigated outcome will suffice to bind a defending insurer to a judgment, and the record here contains no such adversarial proceeding, as no cross-examination or adverse witnesses were presented.

Finally, our reading of the relevant legal principles indicates the trial court did not apply the wrong legal test as RVA/Parker contends. The critical question for determining whether a Stipulated Judgment may be enforceable is whether the insurers accepted the insured's

defense, and because the trial court found the insurers did agree to defend, it correctly concluded that the Stipulated Judgment was not binding.

## II. The Trial Court's Additional Insured Findings Are Supported by the Evidence.

RVA/Parker argue that (1) the trial court's interpretation of the ambiguous policies to cover only a non-existent entity leads to an absurdity; (2) American Automobile admitted that RVA was covered under the MultiCover endorsement; and [\*43] (3) substantial evidence does not support the trial court's conclusion that there was no mutual mistake or a unilateral mistake on the part of RVA because the testimony reflects the parties' intent to provide coverage for RVA. We disagree.

An insurance policy provision is ambiguous when it is capable of two or more constructions, both of which are reasonable. (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 867.) The uncertainty may relate to the extent or existence of coverage, the peril insured against, the amount of liability or the party or parties protected. (See *Continental Cas. Co. v. Phoenix Constr. Co.* (1956) 46 Cal.2d 423, 437-438.) The contested provision must be construed in the context of the policy as a whole, in light of the circumstances of the case, and cannot be found to be ambiguous in the abstract; the question is whether the particular phrase is ambiguous in "the context of *this* policy and the circumstance of *this* case." (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.*, *supra*, 5 Cal.4th at p. 868; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265.) [\*44]

"Words used in an insurance policy are to be interpreted according to the plain meaning which a layman would ordinarily attach to them. Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists." (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 807, 180 Cal. Rptr. 628.) The question of ambiguity is a question of law. (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.*, *supra*, 5 Cal. 4th at p. 867; *Appleton v. Waessil* (1994) 27 Cal. App. 4th 551, 554-555.) Lastly, where no ambiguity exists, we do not consider the insured's reasonable expectations. (*La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal.4th 27, 37-38.)

Here, the term "Parker Associates" is not ambiguous because it is not reasonably susceptible to more than one interpretation; indeed, the parties agree "Parker Associates" is a non-existent entity.

RVA/Parker is not entitled to reformation because there was no actionable mistake, unilateral or otherwise.

RVA/Parker alleged that, through mistake, the written contract did not express the parties' agreement correctly. [\*45] (*Civ. Code*, §§ 3399, 3401.)

Where the parties reach agreement, but through mistake the written contract does not express their agreement correctly, the contract may be reformed. (*Civ. Code*, §§ 3399, n19 3401.) The purpose of reformation is to make the contract express the parties' true intent. (*Shupe v. Nelson* (1967) 254 Cal. App. 2d 693, 700, 62 Cal. Rptr. 352.) Mistake permitting reformation can be mutual, or in some circumstances unilateral. A mutual mistake exists where both parties share the same factual misconception. (*Sutter Youth Organization v. Borsen* (1963) 214 Cal. App. 2d 676, 680, 29 Cal. Rptr. 628.) Unilateral mistake providing legal grounds for reformation exists where the mistake was not the fault of the party seeking reformation, and the mistake is known to the other party or should be known to the other party. (*Architects & Contractors Estimating Service, Inc. v. Smith* (1985) 164 Cal. App. 3d 1001, 1007-1008, 211 Cal. Rptr. 45.)

n19 *Civil Code* section 3399 provides that where "through fraud or mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention. . . ."

### [\*46]

To obtain reformation, the plaintiff must establish entitlement to it by clear and convincing evidence. (*Shupe v. Nelson*, *supra* 254 Cal. App. 2d at p. 700.) On appeal, however, the substantial evidence test applies. (*Ibid.*; accord, *Crail v. Blakely* (1973) 8 Cal.3d 744, 750, 106 Cal. Rptr. 187.) Accordingly, this court views the entire record in the light most favorable to the prevailing party to determine whether there is substantial evidence to support the trial court's findings. (*Bowers v. Bernards* (1984) 150 Cal. App. 3d 870, 873-874, 197 Cal. Rptr. 925; accord, *Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60, 148 Cal. Rptr. 596.) We must resolve all conflicts in the evidence and draw all reasonable inferences in favor of the findings. (*Watson v. Department of Rehabilitation* (1989) 212 Cal. App. 3d 1271, 1289, 261 Cal. Rptr. 204.)

Here, there is no mutual mistake, nor is there unilateral mistake entitling RVA/Parker to relief. RVA/Parker erred in placing the wrong name on the certificate and was negligent in failing to discover the error. n20 There is no evidence Calco, the insurance [\*47] broker, or American Automobile or Century knew

at the time the policy was issued that "Parker Associates" did not exist and was the wrong entity on the policy. David Parker's beliefs about the insurance policy or the provisions of paragraph 8 of the subcontract agreement offer no comfort to RVA under these circumstances. It was Parker Industries' responsibility to ensure that it and RVA were correctly named on the policy.

n20 Because we find substantial evidence supports the trial court's findings on this issue, we do not address American Auto's contention the reformation claim is time-barred.

Lastly, RVA/Parker's argument that the Multi-Cover endorsement on American Auto's policy provides additional insured coverage fails. The policy language expressly limits coverage to "ongoing operations," which operations the trial court concluded had ceased prior to the storm damage to the property. (See *Pardee Construction Co. v. Insurance Co. of the West* (2000) 77 Cal.App.4th 1340, 1359, fn. 16 [when [\*48] operations are no longer ongoing, additional insured no longer had coverage].) Substantial evidence supports the trial court's conclusion because the heavy rains occurred during the period 1997 to 1998, not during October 1996.

### III. CONTRIBUTION CLAIM.

RVA/Parker argues that the trial court erred in (1) refusing to allow recovery of the \$ 2 million Legion paid to settle the matter; (2) allocating costs among 14 carriers where the evidence only supported a finding of six carriers because the other carriers had been dismissed; (3) including Legion in the calculation, when it should have been excluded due to its insolvency (see, e.g., *Jans v. Nelson* (2000) 83 Cal.App.4th 848, 856); n21 (4) excluding defense costs incurred after the settlement agreement but prior to the time plaintiffs' exposure was removed on entry of judgment in April 2002 (see, e.g., *Truck Ins. Exchange v. Unigard Ins. Co.* (2000) 79 Cal.App.4th 966, 976); and (5) refusing to award pre-judgment interest (see, e.g., *Hartford Accident & Indemnity Co. v. Sequoia Ins. Co.* (1989) 211 Cal. App. 3d 1285, 1307, 260 Cal. Rptr. 190).

n21 RVA/Parker have requested that this court take notice of a Liquidation Order issued by the Los Angeles Superior Court on April 23, 2003, appointing the Insurance Commissioner as Liquidator of Legion. We take judicial notice of the Liquidation Order. (*Evid. Code*  $\beta$   $\beta$  459, subd. (a), 452, subd. (d)(1) [records of any court of this state may be judicially noticed], 453

[judicial notice shall be taken of any matter specified in section 452 if the party requesting judicial notice (1) provides notice to the adverse party, and (2) furnishes the court with sufficient information to enable it to take judicial notice].)

We point out that while we may take judicial notice of the order, we cannot take judicial notice of the facts in the order. (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564-1565.) The doctrine of judicial notice recognizes certain facts are indisputably true, and thus dispenses with the introduction of evidence to prove them. *Sosinsky* recognized the consequence of judicial notice is to treat the "fact" noticed as true for purposes of proof. (*Sosinsky v. Grant, supra*, 6 Cal.App.4th at p. 1564.) *Sosinsky* concluded a court may take judicial notice that the judge in a prior case did make a factual finding, but it cannot take judicial notice of the particular fact itself. (*Id. at p. 1565.*) "It appears to us . . . neither a finding of fact made after a contested adversary hearing nor a finding of fact made after any other type of hearing can be indisputably deemed to have been a correct finding." (*Id. at p. 1568.*) However, because we find Legion's insolvency in any event does not impact upon the contribution calculation, judicial notice of the underlying facts is irrelevant.

[\*49]

#### A. The Trial Court Correctly Apportioned Contribution Among Legion and the Other Carriers.

Equitable contribution in the insurance context refers to the right of one insurer to recover from another insurer a portion of the cost of defense and indemnity of an insured where the first insurer has paid more than its portion of the loss or defended the action without participation of other insureds. (*Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1293.) "The purpose of this rule of equity is to accomplish substantial justice by equalizing the common burden shared by coinsurers, and to prevent one insurer from profiting at the expense of others." (*Ibid.*)

Equitable contribution between insurers need not be based upon comparative fault of the insureds. (*Fire Ins. Exchange v. American States Ins. Co.* (1995) 39 Cal.App.4th 653, 663.) Equitable principles require that an insolvent joint tortfeasor should be excluded in a contribution allocation so that the fault-free plaintiff does not bear the burden of the tortfeasor's insolvency. (See *Paradise Valley Hospital v. Schlossman* (1983) 143 Cal. App. 3d 87, 92, 191 Cal. Rptr. 531) [\*50]

"In determining the equities among insurers, no specific rules govern." (*St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal.App.4th 1234, 1253.) The court considers the nature of the claim, the relationship of the insurers and the insured, the particulars of the policies at issue, and any other equitable considerations. (*Ibid.*) Methods of allocation include determining: the duration of each policy compared to the overall period of coverage of risk; the relative policy limits of each policy; and the amount of premiums paid each carrier. Allocation can also be by apportionment in equal shares. (*Golden Eagle Ins. Co. v. Insurance Co. of the West* (2002) 99 Cal.App.4th 837, 854-855.) "Trial courts must maintain equitable discretion to fashion a method of allocation suited to the particular facts of each case and the interests of justice, subject to appellate review for abuse of that discretion." (*Centennial Ins. Co. v. United States Fire Ins. Co.* (2001) 88 Cal.App.4th 105, 116.)

Here, Legion's \$ 2 million contribution constituted an indemnity settlement of the claim, a settlement in which the insurers liable for [\*51] contribution did not participate; thus, the contribution claim only concerned *defense* costs and it was not error to exclude Legion from the calculation for this reason. Furthermore, inclusion of dismissed carriers in the calculation was not an abuse of discretion. RVA/Parker put on no evidence from which the court could equitably determine how to allocate costs among the missing insurers because it had no information of how much they paid in settlement. Thus, the trial court's selection of an equal share method was appropriate given the state of the evidence. Lastly, with respect to Legion's insolvency, the equitable principles cited to exclude Legion have no application here because at the time it made the payments hereunder, Legion was not insolvent and plaintiffs did not bear any undue burden by virtue of its insolvency. On the contrary, excluding Legion here would result in a windfall to plaintiffs because they already received payment from it.

## **B. Exclusion of Post-Settlement Defense Costs and Pre-Judgment Interest.**

### *1. Defense Costs Incurred Between July 2001 and April 2002.*

The insurer is obligated to pay defense costs only while the duty to defend exists. [\*52] The duty to defend arises when the potential for coverage arises, and extends until the insurer proves otherwise. (*Hartford Accident & Indemnity Co. v. Superior Court* (1994) 23 Cal.App.4th 1774, 1778.) However, an insurer may be able to withdraw from the defense if it is able to demonstrate by reference to undisputed facts that the claim cannot be covered. (*Ringler Associates Inc. v.*

*Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1186-1187.)

Here, although the insurers in this case did not seek a judicial determination concerning their duty to defend, once the settlement was consummated by entry of judgment in April 2002, the plaintiffs were no longer at risk. However, the trial court was within its discretion to exclude post-July 2001 settlement defense costs from the contribution allocation because it reasonably could have concluded that the settlement would have been approved in a timely fashion and not required revision if the parties had not sought a good faith settlement determination of an uncontested prove-up in which the insurers did not participate.

### *2. Pre-Judgment Interest on Defense Costs.*

Prejudgment interest is intended [\*53] to make the plaintiff whole "for the accrual of wealth which could have been produced during the period of loss." (*Cassinovs v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1790.) Prejudgment interest may be awarded where "damages are certain or capable of being made certain by calculation," and the right to recover such damages is vested in the plaintiff on a particular day. (*Civ. Code, § 3287, subd. (a).*) The test of certainty is whether the defendant actually knows the amount owed or could have computed the amount from reasonably available information. (*Children's Hospital & Medical Center v. Bonta'* (2002) 97 Cal. App. 4th 740, 774; *Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 960.) The requirement of certainty "is that in situations where the defendant could have timely paid [the amount demanded] and has thus deprived the plaintiff of the economic benefit of those funds, the defendant should therefore compensate with appropriate interest." (*Wisper Corp., supra*, 49 Cal.App.4th at p. 962.)

Plaintiffs contend that they were entitled to pre-judgment interest because the [\*54] only dispute in this matter concerned defendants' liability for certain costs, not the amount of those costs. We reject this argument, because at no time during the litigation prior to settlement were the amount of defense costs fixed or ascertainable. The fact that such costs were ultimately ascertainable at the time of trial does not mean they are recoverable under *Civil Code section 3287*. On the contrary, by their very nature defense costs were uncertain at the outset of the litigation and were not capable of being made certain until the conclusion of the litigation. Furthermore, the parties had not settled on the relative contribution of the additional insurers, so their liability was not certain or capable of calculation. An award of pre-judgment interest here would not advance the purposes of such interest, which is to make the

plaintiff whole for the loss of the timely payment of its damages.

#### IV. TRANSCONTINENTAL'S CROSS-APPEAL.

Transcontinental contends that RVVLP's claims for contribution were barred by the doctrine of unclean hands, collusion, and non-cooperation under the insurance policy's cooperation clause. It contends the trial court's [\*55] Statement of Decision recognized that Transcontinental had demonstrated the facts necessary to establish those defenses, but nonetheless ruled that the right to contribution was independent of Transcontinental's affirmative defense. Finally, it contends the trial court erroneously applied a higher standard of proof, clear and convincing evidence, to the evidence presented at trial.

##### A. Factual Background.

In its Statement of Decision, the trial court noted that defendants had initially asserted the defense of collusion in the procurement of the Stipulated Judgment. However, the court considered the issue moot following the rulings on the motion for summary adjudication, which found the Stipulated Judgment could not be used as the basis of recovery. Nonetheless, Transcontinental raised the issue at trial, contending there could be no contribution because of the collusion claim. The court found that the testimony of the plaintiffs indicated they had little knowledge of the processing of the lawsuit and the settlements, including the assignment of rights to RVVLP. Although the court found this unusual, it was insufficient to show, "beyond a strong suspicion," any evidence of [\*56] collusion.

With respect to the claim of unclean hands, the trial court found this "troubling," noting that the "the troubling aspect of the process is, however, not evidence and there is insufficient evidence to establish a basis for 'unclean hands' which would foreclose any contribution recovery." The court pointed out that in its earlier ruling, it had determined defendants did not unreasonably delay defense of the underlying action, but any exclusion of defendants from the settlement process did not harm them because the settlement was not enforceable against them. The court noted that "from the outset of the settlement process, the court has noted some skepticism with the manner it came about. The most the court was, and is, willing to ascribe to the process was a recognition that the referee's analysis was to be treated only as any other expert's opinion, but certainly not an adjudication, a ruling, or a decision resulting from a 'trial.' [P] The troubling aspect of the process is, however, not evidence and there is insufficient evidence to establish a basis for 'unclean hands' which would foreclose any contribution recovery." With respect to the quantum of evidence, the

court [\*57] noted that Transcontinental's claims required "substantial evidence in order to ban the claim for contribution." The court concluded that the defenses of collusion and unclean hands did not "fit" against the contribution claim because RVVLP's right to contribution was independent from allegations against Pearlman and RVVLP's counsel, and there was insufficient evidence of collusion or unclean hands on the part of RVVLP or Legion.

##### B. The Trial Court's Findings Are Supported by Substantial Evidence.

Collusion constitutes an affirmative defense that may be asserted by the insurer. Collusion in the procurement of a judgment constitutes breach of the cooperation clause and breach of the covenant of good faith and fair dealing. (*Span, Inc. v. Associated Internat. Ins. Company* (1991) 227 Cal. App. 3d 463, 483-484, 277 Cal. Rptr. 828.) Collusion in the insurance context may be "(1) 'a deceitful agreement or compact between two or more persons, for the one party to bring an action against the other for some evil purpose, as to defraud a third party of his right'; (2) 'a secret arrangement between two or more persons, whose interests are apparently conflicting, to [\*58] make use of the forms and proceedings of law in order to defraud a third person, or to obtain that which justice would not give them, by deceiving a court or its officers'; and (3) 'a secret combination, conspiracy, or concert of action between two or more persons for fraudulent or deceitful purpose.' [Citation.]" (*Hone v. Climatrol Industries, Inc.* (1976) 59 Cal. App. 3d 513, 522, fn. 4, 130 Cal. Rptr. 770.) What constitutes collusion depends upon the facts of each case. (*Span, Inc. v. Associated Internat. Ins. Co.*, supra, 227 Cal. App. 3d at p. 484.) A finding concerning collusion will not be disturbed on appeal if supported by substantial evidence. (*Andrade v. Jennings* (1997) 54 Cal.App.4th 307, 328.)

The equitable doctrine of "unclean hands" bars recovery where the plaintiff has engaged in wrongdoing connected to the transaction; the conduct must be intimately connected to the injury to the defendant. (*Blain v. Doctor's Co.* (1990) 222 Cal. App. 3d 1048, 1060, 272 Cal. Rptr. 250; *Wiley v. Wiley* (1943) 59 Cal. App. 2d 840, 842.) The nexus requirement of the unclean hands doctrine is to avoid [\*59] punishing the plaintiff for some distant and unrelated conduct and is therefore a rule of relevance. (See *Nealis v. Carlson* (1950) 98 Cal. App. 2d 65, 69.) Although originally an equitable defense, the defense may be raised in a legal action for damages. (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 619-620.) Finally, application of the doctrine is a question of fact. (*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 639.)

Lastly, the cooperation clause of an insurance policy requires the insured to cooperate with the insurer in order that the insurer may discharge its defense duty. (*Valladao v. Fireman's Fund Indem. Co.* (1939) 13 Cal.2d 322, 328-330.) However, the clause does not override the attorney-client privilege. (*Rockwell Internat. Corp. v. Superior Court* (1994) 26 Cal.App.4th 1255, 1264.)

Here, the trial court's conclusion that there was no collusion, unclean hands, or lack of cooperation is support by substantial evidence. The facts essentially established that the Stipulated Judgment was unenforceable as being in violation of the "no-action" clause because [\*60] the insurers had not been allowed to participate in the settlement process, and the prove-up hearing before Judge Chernow was essentially one-sided given the lack of adversarial process. On the other hand, plaintiffs seemed to believe they had been denied a defense because of the delay in acceptance, the non-payment of bills, and difficulties in establishing a pro-rata share of costs; furthermore, because the subcontractors were adverse to plaintiffs, the disclosure of bills might reveal privileged information. This evidence, without more, does not conclusively establish any secret or deceitful arrangement or wrongdoing, or failure to cooperate with the insurer's preparation of a defense. Therefore, the trial court could reasonably conclude there was no collusion, unclean hands, or breach of the cooperation clause. n22

n22 Nor does the trial court's comment about "substantial evidence" in its Statement of Decision imply that it applied a higher standard of proof than preponderance of the evidence. Rather, it found that more than mere breach of the cooperation clause or suspicious facts were required to demonstrate collusion.

[\*61]

## V. APPEAL FROM COST AWARD.

### A. Century Surety's Cost Bill.

#### 1. Factual Background.

On December 16, 2002, Century made a *Code of Civil Procedure* section 998 n23 offer to RVA, Parker, and RVVLP to settle the matter by allowing judgment to be entered against it in the amount of \$ 100 for each plaintiff, with each party to bear their own costs. At the time, RVA/Parker and RVVLP had entered into settlement agreements with other defendants in the case, ranging from a low of \$ 75,000 to a high of \$ 425,000,

for a total of \$ 3,625,000. Plaintiffs therefore did not accept the settlement offers.

n23 In this section, all statutory references unless otherwise noted are to the Code of Civil Procedure.

After Phase 1A of the trial concluded and Century prevailed on its argument that RVA was not an additional insured under its policy, pursuant to section 998, Century filed a cost memorandum for reimbursement of costs of \$ 66,500.76, consisting of \$ 31,424.95 in expert fees [\*62] and \$ 30,658.69 in other costs. Plaintiffs filed a motion to tax costs, asserting that Century's offers were nominal and not in good faith under section 998 and it was therefore not entitled to the expert witness fees and certain other costs. Century contended its offer was not nominal because it included a waiver of costs, which were skyrocketing at the time, relying on *Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 154.

At the hearing on the motion to tax costs, Century argued that the benchmark for good faith was whether the party making the offer reasonably believed it would be accepted. The court remarked that if Century believed it would prevail on its arguments, the offer would be a reasonable section 998 offer. Plaintiffs argued that an objective standard of reasonableness should prevail. The court took the matter under submission, and awarded Century's costs as requested.

#### 2. Discussion.

Plaintiffs argue that the trial court employed the incorrect criteria in evaluating the reasonableness of Century's settlement offers because whether a party believes it will prevail at trial and whether it believes its offer is reasonable are two different [\*63] inquiries. They argue that the purpose of section 998 is to punish parties who fail to accept a reasonable settlement offer, not to punish parties who ultimately lose at trial. Furthermore, Century's reliance on *Carver v. Chevron U.S.A., Inc.*, *supra*, 97 Cal.App.4th 132 is misplaced because had plaintiffs accepted the offer, they would have been entitled to their costs pursuant to section 1032, and thus they would have been waiving their costs.

Section 998, subdivision (c)(1) provides that "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her post offer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in

its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant."

An award of [\*64] expert witness fees under section 998 requires consideration of many factors, including whether the defendant's offer was "reasonable," "in good faith," "token," or "nominal." The amount of the offer "is only one of the many factors to be taken into consideration by the trial judge in making his decision. To hold otherwise could force a liability-free defendant to pay for damages not of his doing." (*Culbertson v. R.D. Werner Co., Inc.* (1987) 190 Cal. App. 3d 704, 710, 235 Cal. Rptr. 510.)

In *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262-1263, the court held that "good faith requires that the pretrial offer of settlement be 'realistically reasonable under the circumstances of the particular case. Normally, therefore, a token or nominal offer will not satisfy this good faith requirement, . . . .' [Citation.] The offer 'must carry with it some reasonable prospect of acceptance. [Citation.]' [Citations.] One having no expectation that his or her offer will be accepted will not be allowed to benefit from a no-risk offer made for the sole purpose of later recovering large expert witness fees. [Citation.]"

In *Wear v. Calderon* (1981) 121 Cal. App. 3d 818, 175 Cal. Rptr. 566, [\*65] the defendant made a section 998 settlement offer of one dollar, which was rejected. The defendant prevailed at trial and sought costs, including expert witness fees. (*Id.* at p. 820.) *Wear* found the settlement offer was not in good faith because the plaintiff had received a jury verdict of \$ 18,500 in damages from a co-defendant. "A plaintiff may not reasonably be expected to accept a token or nominal offer from any defendant exposed to this magnitude of liability unless it is absolutely clear that no reasonable possibility exists that the defendant will be held liable." (*Id.* at p. 821.) Thus, *Wear* pointed out that if there is a reasonable possibility, however slight, that the defendant might be held liable, "there is practically no chance that a plaintiff will accept a token or nominal offer of settlement from that defendant in view of the current cost of preparing a case for trial." (*Ibid.*) Thus, *Wear* concluded the defendant's one dollar offer defeated the purpose of section 998 and was not made in good faith. (*Id.* at p. 821-822; see also *Pineda v. Los Angeles Turf Club, Inc.* (1980) 112 Cal. App. 3d 53, 169 Cal. Rptr. 66.) [\*66]

On the other hand, in *Carver v. Chevron U.S.A., Inc.*, *supra*, 97 Cal.App.4th 132, the defendant offered \$ 100 to each plaintiff plus a waiver of costs and attorneys'

fees, which at the time of the offer were \$ 308,064.08 and \$ 1,113,810.40, respectively. (*Id.* at p. 152.) *Carver* found this offer was made in good faith because the waiver of costs was a considerable amount and "it was no secret at any time that Chevron hired expensive lawyers who were expected to pursue all available avenues of defense." Therefore, in light of the circumstances of the case at the time the offer was made and the fact that it was reasonably foreseeable that defendant might prevail at trial, the trial court did not abuse its discretion. (*Id.* at p. 154.)

In *Jones v. Dumrichob*, *supra*, 63 Cal.App.4th 1258, the defendant in a personal injury action offered that judgment be taken against him with a waiver of his costs. (*Id.* at p. 1261.) After a verdict in his favor, defendant presented a cost bill for \$ 14,555.46, including expert witness fees of \$ 5,440. (*Ibid.*) The court found this offer had significant monetary value because of [\*67] the cost waiver. (*Id.* at p. 1263.) "The good faith requirement allows for great flexibility in customizing pretrial settlement offers. . . . Section 998 does not confine an offeror to strict-content based rules, but rather imposes only the flexible parameters of the good faith requirement on the formulation of a section 998 offer." (*Id.* at p. 1264.)

We review the trial court's award of costs under section 998 for abuse of discretion. (*Jones v. Dumrichob*, *supra*, 63 Cal.App.4th at p. 1262.) We "examine the circumstances of the case to determine if the trial court abused its discretion in evaluating the reasonableness of the offer or its refusal." (*Carver v. Chevron U.S.A., Inc.*, *supra*, 97 Cal.App.4th at p. 152.) We therefore will only reverse if the trial court's actions were arbitrary, capricious or beyond the bounds of reason. (*Culbertson v. R.D. Werner Co., Inc.*, *supra*, 190 Cal. App. 3d at p. 710.)

Here, the trial court did not abuse its discretion in finding the offer was made in good faith. Although Century's costs were not large in comparison to the amount at stake, plaintiffs' reformation [\*68] action barely survived summary judgment. The trial court noted in denying summary judgment with respect to American Automobile that "the court opines that the evidence thus far does not show that RVA is an additional insured," but nonetheless found factual disputes existed. With respect to Century, the court noted that "leaving aside the triable issue of what entities or persons may be properly included within the phrase 'Parker Associates,' there is no mention in any form of RVA." Given that the trial of Phase 1A was a bench trial, the court's comments in this regard are ominous and did not portend well for RVA/Parker. Thus, Century was justified in concluding that it had a good chance of prevailing at trial; its offer to

waive costs therefore had monetary value and was justified.

## **B. Plaintiffs' Motion to Tax Defendants' Costs and Seeking Allocation.**

### *1. Factual Background.*

Transcontinental, Ranger, TIG, and U.S. Fire filed cost memoranda. Because they were represented by the same counsel, Ranger, TIG, and U.S. Fire filed a joint cost memorandum. Plaintiffs moved to tax those costs on the grounds that defendants were only the prevailing parties as to RVA/Parker's [\*69] claims, not RVVLP's claims, and therefore that the defendants' costs should be reduced by one-half. Alternatively, plaintiffs argued the costs should be allocated among the defendants in thirds.

TIG, Ranger and U.S. Fire opposed on the grounds there was no basis to reduce the costs by half because defendants would have incurred the costs sought whether RVVLP was a party or not, and that RVVLP had no standing to bring the motion because costs were not sought against it. Transcontinental argued that apportionment was improper because it defeated RVVLP on two of its three causes of action, and RVVLP only recovered \$ 44,000 of a \$ 15 million stipulated judgment against it.

The trial court struck certain costs requested by the defendants, awarded Transcontinental \$ 53,629.65 and denied the motion for allocation. Plaintiffs were awarded \$ 133,857 in joint and several costs against the five defendants.

### *2. Discussion.*

Plaintiffs contend that the trial court abused its discretion in failing to allocate costs among the defendants, who only prevailed on some of their claims, and argue that the trial court implicitly recognized that defendants were not entitled to costs incurred [\*70] in defending RVVLP's claims against them because it struck costs related to those issues.

Section 1032 governs whether a party to litigation is entitled to recover costs. Subdivision (b) provides, "except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." Section 1032 defines a "prevailing party" for purposes of determining entitlement to costs as (1) the party with a "net monetary recovery;" (2) "a defendant in whose favor a dismissal is entered;" (3) "a defendant where neither plaintiff nor defendant obtains any relief;" and (4) "a defendant as against those plaintiffs who do not recover any relief against that defendant."

The successful plaintiff is entitled to recover his or her costs even where a partial victory has been obtained. The defendant is not entitled to an offset, even where the defendant has prevailed to a lesser extent. (*Mitchell v. Olick* (1996) 49 Cal. App. 4th 1194, 1200; see also *Hyatt v. Sierra Boat Co.* (1978) 79 Cal. App. 3d 325, 350, 145 Cal. Rptr. 47 [no reduction of prevailing plaintiff's costs although damages reduced because of [\*71] plaintiff's contributory negligence].) In *Mitchell*, the plaintiff recovered all of her costs in spite of the fact some of the costs pertained to claims upon which she did not prevail. (*Mitchell v. Olick*, *supra*, at pp. 1200-1201.) *Mitchell* pointed out that costs may nonetheless be disallowed a prevailing party on the grounds they were unnecessary or unreasonable. (*Id.* at p. 1200.)

Plaintiffs rely on *Slavin v. Fink* (1994) 25 Cal.App.4th 722. However, *Slavin* does not stand for an apportionment of costs based the number of claims on which a party prevails. Rather, in *Slavin*, the court held that costs must be apportioned between the plaintiff and defendants represented by the same counsel because one of the defendants prevailed at trial, while the other did not. Therefore, costs could only be recovered where they were spent for the prevailing defendant. (*Id.* at pp. 725-726.) Furthermore, to allocate costs, the trial court must have some factual basis for doing so. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 130.) The trial court's award of costs is reviewed for abuse of discretion, [\*72] and we will not disturb the trial court's exercise of discretion as to a motion to tax costs if substantial evidence supports its decision. (*Lubetzky v. Friedman* (1991) 228 Cal. App. 3d 35, 39, 278 Cal. Rptr. 706.)

Here, the trial court did not abuse its discretion in refusing to allocate costs. Nothing in the statute requires it to do so; rather, costs are awarded to the "prevailing party." Here, plaintiffs prevailed on their contribution claims, while defendants prevailed on the other claims, and costs were awardable on that basis. Furthermore, the burden is on the party seeking allocation to make a record; here, the record contains no evidence from which the trial court could determine an appropriate allocation between the parties based upon how much costs were expended to prevail on each separate claim. Hence, any reduction in costs awarded on a basis other than that the costs were unnecessary or unreasonable would have been improper. (*Nelson v. Anderson*, *supra*, 72 Cal.App.4th at p. 130.)

## **C. No Improper Award to Transcontinental Under Section 2033, Subdivision (o).**

### *1. Factual Background.*

Transcontinental filed a separate [\*73] motion seeking \$ 58,575.87 in attorney's fees and costs against

RVA based upon its denial of its request for admission No. 5 (RFA 5).<sup>n24</sup> That request for admission requested that RVA admit that on August 29, 2000, in response to Dale, Braden & Hinchcliffe's August 17, 2000 tender letter on behalf of Parker Industries, Transcontinental requested a complete itemization of all legal fees and costs incurred by Dale, Braden & Hinchcliffe in the Underlying Action. Transcontinental's August 29, 2000 letter agreed to defend RVA under a reservation of rights. Transcontinental advised Dale, Braden & Hinchcliffe that it had not agreed to any set formula or pro-rata share of bills.

<sup>n24</sup> Transcontinental's first motion for attorneys' fees and costs, brought after summary judgment but before trial, was denied without prejudice. Transcontinental brought the motion anew after the entry of judgment.

RVA denied RFA 5, and in its response to form interrogatory No. 17.1, stated that Transcontinental's request had been made to the [\*74] Dale, Braden & Hinchcliffe firm for its bills, which firm was only representing Parker Industries, and no request was made to Frank Sabaitis, Esq., RVA's coverage attorney. Initially, Dale, Braden & Hinchcliffe represented both RVA and Parker Industries in connection with the defense of the action, but only represented Parker with respect to coverage issues. Sometime after the August 17, 2000 letter, Dale, Braden & Hinchcliffe took over coverage issues for RVA as well.

In Transcontinental's summary judgment motions, Fact No. 84 focused on Transcontinental's request for bills from RVA's counsel so that such bills could be paid. Plaintiffs disputed Fact No. 84, stating that Transcontinental's agreement to defend was conditioned upon a preliminary funding agreement with all additional insured carriers, which was never reached. At the hearing on the summary judgment motions, however, RVA's counsel advised the court that there had been requests for bills, but that Transcontinental had not agreed to a percentage of costs that it would pay. The court in its ruling on Transcontinental's summary judgment motion noted that at most it had hesitated to defend because plaintiff failed to provide [\*75] financial data.

Transcontinental's motion for attorneys' fees and costs under section 2033, subdivision (o), sought attorneys' fees for RVA's improper denial of RFA 5 and its dispute of Fact No. 84. RVA/Parker opposed Transcontinental's request, contending that the motion was filed late under *California Rules of Court, rule 870*, subd. (a)(1) (motion must be filed with 15 days of mailing of entry of judgment); the subject matter of the

request for admission was inconsequential to the litigation; they had reasonable grounds to deny RFA 5; and Transcontinental failed to show what portion of the fees and costs were actually related to RVA/Parker's response to RFA 5.

At the hearing, counsel argued the timeliness issue to the exclusion of the other arguments raised. The court took the matter under submission. The court issued a minute order in which it granted the motion "in the amount of \$ 2,500.00 as to Rio Vista Associates only."

## 2. Discussion.

Plaintiffs contend that Transcontinental's motion was untimely, as it was not filed within 15 days of entry of the judgment pursuant to *California Rules of Court 870*; Transcontinental [\*76] did not prove the truth of the requested admission; RFA 5 was of no substantial importance to the matter, and sanctions were therefore unjustified; and RVA was justified in denying the admission.

### a) TRANSCONTINENTAL'S MOTION WAS TIMELY.

Section 2033, subdivision (o) provides a statutory basis for a party to obtain attorneys' fees and costs. Under *California Rules of Court, rule 870* and *rule 870.2*, it is unclear whether the motion should be filed within 15 days or 60 days. *California Rules of Court, rule 870.2*, which has a 60-day limit from the date of mailing of judgment, or 180 days, "applies in civil cases to claims for statutory attorney fees and claims for attorney fees provided for in a contract." Further, "subdivisions (b) and (c) [of *California Rules of Court, rule 870.2*] apply when the court determines entitlement to the fees, the amount of the fees, or both, whether the court makes that determination because the statute or contract refers to 'reasonable' fees, because it requires a determination of the prevailing party, or for other reasons." (*Cal. Rules of Ct., rule 870.2* [\*77], subd. (a).)

Conversely, *California Rules of Court, rule 870* provides that a cost memorandum, which may include contractual or statutory attorneys' fees, must be filed with 15 days of notice of mailing of judgment, or within 180 days of judgment. (*Cal. Rules of Ct., rule 870*, subd. (a).) In Weil & Brown, *California Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2004) paragraphs 8:1413.3, 8:1413.4, the authors note the conflict between the rules and suggest filing a motion for attorneys' fees within 15 days of the judgment "to be safe."

We see no reason to confine Transcontinental to a 15-day time limit just to "be safe," in this instance because both rules contemplate an outside time limit of

180 days, and there is no evidence of any prejudice to plaintiffs resulting from the filing of the instant motion 45 days after entry of the court's judgment.

**B) SUBSTANTIAL EVIDENCE SUPPORTS A FINDING THAT RFA 5 WAS TRUE.**

Section 2033, subdivision (o), provides that reasonable expenses are recoverable that are incurred in proving a fact at trial that was denied in a request for admission. n25 Whether the expenses [\*78] are recoverable (i.e., the standards of section 2033, subdivision (o) have been met) is reviewed de novo; whether the award itself was reasonable is reviewed for abuse of discretion. (*Barnett v. Penske Truck Leasing Co.* (2001) 90 Cal.App.4th 494, 497 (*Barnett*)). Where a trial court has made no express findings in the record, we imply findings in support of the order. Thus, even where there are no express findings, we must review the trial court's exercise of discretion based on implied findings that are supported by substantial evidence. (*In re Complex Asbestos Litigation* (1991) 232 Cal. App. 3d 572, 585, 283 Cal. Rptr. 732.)

n25 In relevant part, section 2033, subdivision (o) provides: "If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this section, and if the party requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make this order unless it finds that (1) an objection to the request was sustained or a response to it was waived under subdivision (l), (2) the admission sought was of no substantial importance, (3) the party failing to make the admission had reasonable ground to believe that that party would prevail on the matter, or (4) there was other good reason for the failure to admit."

[\*79]

Sanctions are awarded where a party denies a request later proved at trial in order to expedite trial. Therefore, the sanctions are intended to reimburse a party proving the truth of the requested admission. (*Barnett, supra*, 90 Cal.App.4th at p. 499.) An issue is of "substantial importance" within the meaning of the

statute if it has "at least some direct relationship to one of the central issues in the case, i.e., an issue which, if not proven, would have altered the results in the case." (*Brooks v. American Broadcasting Co.* (1986) 179 Cal. App. 3d 500, 509, 224 Cal. Rptr. 838.) *Brooks* noted other relevant factors to be considered in evaluating whether a party had "no good reason" for the denial, including "the degree to which the party making the denial has attempted in good faith to reach a reasonable resolution of the matters involved . . ." (*Id.* at p. 510.) Furthermore, a party responding to a request for admission has a duty to make a reasonable investigation and may initially justifiably deny a request, but later discover information that would call for an admission. (*Id.* at p. 510.)

Here, there is substantial [\*80] evidence to support an award of costs. First, the issue was of substantial importance because the summary adjudication/motions for summary judgment hinged on the time frame within which Transcontinental accepted tender of the defense. The record establishes such tender was accepted on August 29, 2000, and that Transcontinental requested bills from the party tendering the defense, Dale, Braden & Hinchcliffe. Second, the record establishes there was some ongoing confusion over which firm was representing which party. The burden was on RVA/Parker to ensure that Transcontinental got the correct bills from the correct attorney -- it was the one requesting the defense. RVA/Parker cannot take advantage of such confusion in order to avoid admitting that Transcontinental requested bills from them. The trial court's order on the summary judgment/summary adjudication motions indicates that there was at best hesitation to defend based upon "plaintiffs' failure to provide underlying financial data," implying it found that such request was properly made. Therefore, Transcontinental established that the response to RFA 5 should have been an admission, entitling it to the requested fees and costs [\*81] under section 2033, subdivision (o).

**DISPOSITION**

The judgment and order of the superior court are affirmed. Respondents and cross-appellant Transcontinental to recover costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.