

FILED

ELECTRONICALLY

Mar 22, 2019

DANIEL P. POTTER, Clerk

T. JACKSON Deputy Clerk

Filed 3/22/19

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

VILLA RIVIERA CONDOMINIUM
ASSOCIATION,

Plaintiff,

v.

SPECTRA COMPANY,

Defendant, Cross-
Complainant and Appellant;

STEADFAST INSURANCE
COMPANY et al.,

Intervenors and Respondents.

B281723

(Los Angeles County
Super. Ct. No. NC057122)

APPEAL from orders of the Superior Court of Los Angeles
County, Michael P. Vicencia, Judge. Affirmed.

Collins Collins Muir & Stewart, David C. Moore and
Edward J. Riffle for Defendant, Cross-Complainant and
Appellant.

Horvitz & Levy, Robert H. Wright and Shane H. McKenzie;
Gaglione Dolan & Kaplan and Jeffrey S. Kaplan for Intervenor
and Respondent American International Specialty Lines
Insurance Company.

Horvitz & Levy, Robert H. Wright and Shane H. McKenzie;
Mavredakis Cranert Crawford, David Crawford III and Susan E.
Luhning for Intervenor and Respondent Steadfast Insurance
Company.

This action arose from a contractor's restoration of a large
condominium complex. The building owner sued the contractor,
appellant Spectra Company, for defective work, and Spectra
cross-complained against its subcontractors. After most of the
parties had settled, Spectra's remaining claims for indemnity and
equitable subrogation against one of the subcontractors,
respondent PDG Environmental, Inc. (PDG) were litigated in a
bench trial. Spectra pursued the theory that PDG's work was
substandard and had caused part of the damages sustained by
the building owner. The trial court ruled in PDG's favor, finding
that it was not negligent. After trial, Spectra objected to the
statement of decision and asserted as one of the grounds that the
trial court had not addressed why Spectra did not prevail on its

theory that PDG had breached its duty to defend Spectra and procure insurance for Spectra. The trial court found that Spectra had failed to prove the elements of its claims, and entered judgment for PDG.

On appeal, Spectra contends that (1) the trial court erred in not finding that PDG had breached its duties to defend Spectra and to procure insurance for Spectra, and (2) the doctrine of superior equities in subrogation cases compels judgment in its favor.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Building Restoration

In 2007, Spectra contracted with Villa Riviera Condominium Association (Villa Riviera) for a \$3.5 million restoration of its condominium. The restoration work included the removal of 95 percent of the lead-based paint and loose material from the exterior of the building. Spectra subcontracted with PDG to perform this work for \$845,000. PDG agreed to indemnify Spectra against any loss or liability arising out of PDG's performance of the subcontract "except loss or liability caused by [] Spectra's sole willful misconduct or active negligence." PDG performed the lead remediation work, and thereafter Spectra itself painted the exterior.

2. Villa Riviera Sues Spectra, and Spectra Cross-Complains

In January 2012, Villa Riviera sued Spectra for breach of contract and negligence alleging that Spectra's work was defective in several respects: roof repairs, construction of retaining walls, entry doors and walkways, "coating" of driveways and parking lots, and application of "exterior paint and patching

materials.” Spectra’s insurers accepted Spectra’s tender of defense.

Spectra cross-complained against several of its subcontractors, including PDG, asserting claims for express indemnity, equitable indemnity, and declaratory relief. Spectra alleged that Villa Riviera’s claims arose from the subcontractors’ substandard work, and the subcontractors had a duty to defend and indemnify Spectra. After PDG went out of business, PDG’s insurers, Steadfast Insurance and American International Specialty Lines Insurance Company (collectively, Intervenors) intervened to defend PDG.

In March 2015, Spectra, through its insurers, paid Villa Riviera \$1,000,000 to settle the case. Later that year, Villa Riviera dismissed its claims against PDG in exchange for a payment of \$900,000. The trial court found that both settlements were made in good faith. The court dismissed with prejudice Spectra’s claim for equitable indemnity against PDG. (See *Far West Financial Corp. v. D & S Co.* (1988) 46 Cal.3d 796, 817, [“a tort defendant who has entered into a good faith settlement within the meaning of section 877.6, subdivision (c) is absolved of any further liability for all equitable indemnity claims”].)

Spectra and PDG stipulated to a bifurcated bench trial on the express indemnity cause of action in the cross-complaint. The first phase of the trial was to be heard “by way of briefs and oral argument on the issues of whether (1) any active negligence by Spectra barred its indemnity claim, and (2) whether Spectra’s failure to request mediation precluded recovery of attorney’s fees under the prevailing party fee clause of the subcontract.” Phase two of the trial would involve “questions of fact pertaining to Spectra’s damages against PDG.” As it turned out, the trial court

would hold two phases of briefing on legal issues, and then a third phase during which it received evidence on PDG's alleged negligence and Spectra's damages.

3. Phases One and Two of Trial

At the end of phase one, the trial court found that (1) the presence of *some* active negligence by Spectra in itself did not preclude recovery for express indemnity against PDG, (2) Spectra was entitled to recover its damages from PDG under an express indemnity theory except for those damages caused by Spectra's sole willful misconduct or active negligence, and (3) Spectra's failure to request mediation precluded Spectra's recovery of attorney's fees under the subcontract's attorney fee clause.

Spectra then filed a brief arguing that, even if it could not recover fees under the attorney fee clause, it was still entitled to recover fees that were incurred in defending Spectra against Villa Riviera's claims under the subcontract's indemnity clause. PDG, through the insurance company intervenors, argued that Spectra was barred from recovering fees that Spectra's own insurers had paid on its behalf. Spectra then entered into an agreement in which its insurers assigned to Spectra their claims against PDG for monies expended defending Spectra from Villa Riviera's claims.

In the court's ruling on what was now called "phase two" of trial, the court concluded that (1) the assignment allowed Spectra to pursue claims for monies paid by the insurers to defend against Villa Riviera's claims, (2) Spectra's insurers would have otherwise been entitled to premise their subrogation claim on Spectra's express indemnity rights against PDG, and (3) Spectra, in turn could assert its insurer's subrogation right by way of the

assignment. The court allowed Spectra to amend to allege a subrogation claim.

4. Phase Three of Trial and the Statement of Decision

Phase three of trial consisted of testimony and other evidence on property damage at the Villa Riviera building and whether any of Spectra's damages were caused by PDG's negligence. Spectra's counsel represented to the court that Spectra's "theory of liability" was that "the damages were, in fact, caused by PDG's defective work."¹ When asked whether Spectra was making "any claim" that PDG would be liable if Spectra was solely negligent for Villa Riviera's damage, Spectra's counsel replied in the negative. The court concluded, "Under the Indemnity agreement, PDG has to pay for any negligent work that they were involved with even if Spectra was partially negligent as well." The court further ruled that Spectra was "entitled to attorney's fees in defense of the action to the extent that they would be entitled to damages."²

¹ When the court asked Spectra's counsel what their "liability argument" was, counsel said Spectra's theory was that damages "were not solely caused by Spectra but were in part caused by PDG, and that would trigger the indemnity agreement under the court's earlier ruling."

² The trial court's full statement was: "The court rules that . . . cross-complainant [Spectra] is entitled to attorney's fees in defense of the action to the extent that they would be entitled to damages." Spectra did not object to this ruling or argue that, irrespective of its entitlement to attorney fees in conjunction with the recovery of damages for PDG's negligence, it was *also* entitled to attorney's fees based on the alternate theory that PDG had

After hearing testimony from competing expert witnesses, the court found for PDG, concluding that PDG's work was performed in compliance with the applicable standard of care. The court found that Spectra had "failed to prove the required elements for its causes of action for equitable subrogation, express indemnity and declaratory relief asserted against PDG," and was not "entitled to be indemnified by PDG."

Spectra objected to the statement of decision. Despite having previously represented to the court that its theory of liability was based solely on PDG's negligence, Spectra now argued that the court should find that PDG breached its obligation "to defend Spectra against Plaintiff even if PDG was *not* found negligent." (Emphasis added.) Spectra argued that "Even if PDG is ultimately determined to have *no fault*, the subcontract that Spectra and PDG negotiated and mutually agreed upon undoubtedly required PDG to defend Spectra against claims arising in connection with PDG's performance under the contract." (Emphasis added.) The court found that Spectra had failed to prove its claims, and entered judgment in PDG's favor. Spectra timely appealed.

DISCUSSION

Although Spectra objected to the Statement of Decision on several grounds, on appeal it limits its argument essentially to these points: (1) the trial court erred in not finding that PDG breached its duty to defend Spectra; (2) the statement of decision's omission of any discussion of PDG's breach of its duty to defend and to procure insurance constitutes reversible error;

breached its duty to defend. Spectra now makes this latter point on appeal.

(3) the court should not have applied the doctrine of superior equities to the subrogation claim, and in any event balanced the wrong equities, and (4) the statement of decision did not address PDG's failure to procure insurance for Spectra.

1. Spectra's Claim for Breach of the Duty to Defend

Spectra first contends the trial court erred in not finding that PDG had breached its duty to defend. Its fallback argument is that the duty to defend was a "principal controverted" issue at trial within the meaning of Code of Civil Procedure section 632, and, therefore, the trial court had a duty to explain this finding in its statement of decision. We find no error in the trial court's conclusion that Spectra failed to carry its burden of proof on any of its claims asserted in its cross-complaint including, at least implicitly, PDG's duty to defend. We also conclude the issue was not a "principal controverted issue" that the trial court was required to specifically address in its statement of decision.

a. Standard of Review

"[W]hen an appellant challenges a trial court's conclusion that the appellant failed to carry its burden of proof at trial, 'the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citation.]'" (*Vieira Enterprises, Inc. v. McCoy* (2017) 8 Cal.App.5th 1057, 1074 (*Vieira*)). This rule is a variation on the substantial evidence standard and is employed when the party who had the burden of proof at trial is the appellant on appeal. "Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.'

[Citation.]” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) “Where, as here, the judgment is against the party who has the burden of proof, it is almost impossible for him to prevail on appeal by arguing the evidence compels a judgment in his favor. That is because unless the trial court makes specific findings of fact in favor of the losing plaintiff, we presume the trial court found the plaintiff’s evidence lacks sufficient weight and credibility to carry the burden of proof.” (*Bookout v. State of Cal. ex rel. Dept. of Transportation* (2010) 186 Cal.App.4th 1478, 1486.)

b. *The Trial Court Properly Found that Spectra Did Not Prove Its Claims*

According to Spectra’s appellate brief, Villa Riviera’s complaint arose from PDG’s alleged negligent work on the property, and this allegation triggered PDG’s duty to tender a defense to Spectra. Spectra argues that PDG breached its duty by not providing Spectra with a defense at the outset of the case, and thus must reimburse Spectra for the attorney fees and costs it incurred defending Villa Riviera’s claims.

Under Civil Code section 2778, “a promise of indemnity against claims, demands or liability ‘embraces the *costs of defense* against such claims, demands, or liability’ insofar as such costs are incurred reasonably and in good faith. [Citation.] . . . [A] contractual indemnitor has the obligation, upon proper tender by the indemnitee, to accept and assume the indemnitee’s active defense against claims encompassed by the indemnity provision.” (*Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541, 553, 555 (*Crawford*)). Claims “‘embraced by the indemnity,’ as to which the duty to defend is owed, include those which, at the

time of tender, *allege* facts that would give rise to a duty of indemnity.” (*Id.* at p. 558.)

Here, Villa Riviera’s complaint against Spectra alleged multiple breaches of contract, from Spectra’s alleged failure to fix defective entry doors to the improper construction of retaining walls and walkways. Spectra argues that one of the alleged breaches—that “exterior paint and patching material was defectively applied”—triggered PDG’s duty to defend because Spectra “could not” paint “until after PDG had performed its work in removing 95% of the old, lead-based paint.”³

Even if PDG’s duty to defend was triggered by the complaint’s allegations of defective painting, the trial court found Spectra failed to meet its burden of proof at trial on all its claims. A burden of proof “means the burden to *persuade* [the fact-finder] on the issue involved. If the trier of fact is not persuaded to the required degree of certainty its finding must be against the party with the burden on that issue.” (Burdens and Standards of Proof, Cal. Prac. Guide Civ. Trials & Ev. Ch. 8G-D citing *Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 959.)

Spectra primarily argues that it met its burden of proof on this claim because it presented relevant argument and submitted

³ There may be some doubt that PDG’s duty to defend was precipitated by Villa Riviera’s allegation of defective painting. The duty to defend does not arise until the known facts point to a potential for liability under the policy. (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2002) 7:515, p. 7B–6; *id.*, ¶ 7:604, p. 7B–28). That PDG’s paint removal was a precursor to Spectra’s painting does not, by itself, establish facts pointing to a potential for liability founded on defective painting.

supporting evidence during the two early phases of trial. In particular, Spectra argues that “PDG’s obligation to defend Spectra was *implicated* by at least one of the specific issues delineated by the trial court in Phase One, *i.e.*, whether any active negligence by Spectra precluded it from recovering under the express indemnity clause of the subcontract.” (Emphasis added.) Even if we accept this argument, after the trial court ruled in phase one that Spectra could go forward with its claims for express indemnity, Spectra did not pursue any claim for PDG’s breach of its duty to defend during phase 3, the fact-finding stage of trial.

Spectra did not submit evidence of tender or PDG’s alleged rejection of Spectra’s tender during phase 3.⁴ Spectra argues that its attorneys’ legal invoices and a partial settlement agreement between one of PDG’s insurers and Spectra evidenced tender. However, Spectra’s counsel did not provide any testimony or argument at trial discussing the two lines in the document that address Spectra’s tender, let alone how the hundreds of pages of attorney billing records compelled the finding that PDG’s had breached its duty to defend.

In fact, during phase 3, Spectra did not address PDG’s alleged breach of its duty to defend at all, with one brief exception: Spectra’s counsel, on *cross-examination*, stated he did not remember when “the matter was tendered to PDG by Spectra.” Rather, Spectra’s counsel represented to the court that

⁴ Spectra argues it filed “letters, emails, and deposition excerpts” addressing tender but acknowledges that this evidence was “submitted to the trial court with Spectra’s trial brief *in the early phases of the trial*” and was never actually admitted into evidence. (Emphasis added.)

Spectra was seeking damages based solely on PDG's negligence, that PDG's negligence "triggered" the indemnity agreement, and Spectra was entitled to be indemnified for its damages and attorney's fees. Only after the trial court found that PDG had not been negligent, did Spectra change course and argue that it was entitled to recover its insurers' attorney's fees on the theory that even though PDG had not been negligent, PDG had breached the duty to defend. Even if Spectra's claim for PDG's breach of its duty to defend may have been "implicated" by one of the issues raised in the briefing stages of trial, Spectra abandoned the claim during the fact-finding phase by representing to the court it was only pursuing a negligence theory and by failing to address any evidence of tender or PDG's rejection. Accordingly, Spectra has not demonstrated on appeal that the evidence compelled a finding in its favor as a matter of law. (*Vieira, supra*, 8 Cal.App.5th at p. 1074.)

c. *The Statement of Decision*

Spectra also faults the trial court for not expressly addressing PDG's duty to defend Spectra in the statement of decision. Code of Civil Procedure section 632 obligates the trial court to "issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial." A trial court's failure to make a finding on a principal controverted issue in a requested statement of decision is subject to harmless error review. (See also *F.P. v. Monier* (2017) 3 Cal.5th 1099, 1102 [a trial court's total failure to issue a statement of decision is subject to harmless error review].)

Here, PDG requested a statement of decision, and at the trial court's request, drafted a proposed statement of decision.

Spectra asserted several objections, including, that the court had made a “finding that PDG must indemnify and defend Spectra from 2012 to 2015.” Spectra argued the statement of decision should have included this finding.

Spectra submitted its own proposed statement of decision. This proposed draft did not incorporate the court’s alleged finding that PDG had a duty to defend Spectra from 2012 to 2015. Rather, it only stated that (1) “PDG was contractually obligated to indemnify Spectra” except if the plaintiff’s damages were the result of Spectra’s “sole willful misconduct or sole active negligence,” and (2) “neither PDG nor PDG’s insurers (Intervenors) defended or indemnified Spectra in this matter.” In addition, although Spectra’s proposed statement of decision listed the principal controverted issues at trial, the list did not include PDG’s alleged breach of its duty to defend.⁵

⁵ According to Spectra’s “revised proposed statement of decision,” the “two controverted issues for the Court’s determination during the trial were as follows: Whether (1) Spectra may recover its damages, via the assignment from its insurers, through its express indemnity cause of action; (2) if the answer to 1 is yes, whether Spectra established that it is permitted to recover under the express indemnity clause because Spectra was not the sole cause of plaintiff’s alleged damages and PDG’s scope of work was implicated in Plaintiff’s claimed damages; (3) If the answer to 1 is no, whether Spectra can recover its damages, via the assignment from its carriers, through its equitable subrogation cause of action; and (4) if the answer to 3 is yes, whether Spectra proved during trial that, under the doctrine of superior equities and the resulting balancing of the equities between Spectra’s insurers and PDG, that Spectra’s insurers were in the superior equitable position, thus allowing Spectra to recover its claimed damages.”

The trial court did not rule on Spectra's objections, but simply adopted PDG's proposed decision in total. The court's final statement of decision provided an explanation to why PDG was not negligent, and concluded that Spectra had failed to prove the required elements for its express indemnity subrogation and declaratory relief claim against PDG. The statement of decision did not expressly address PDG's alleged breach of its duty to defend, other than to summarize the testimony of Spectra's counsel who stated he "did not know when Spectra tendered its defense to PDG."

Spectra now argues that "whether [PDG] had a duty to defend Spectra and whether it fulfilled that duty" was a separate "principal controverted issue" that the trial court was required to address in its statement of decision. We observe this is contrary to what Spectra actually represented to the trial court during the fact-finding phase: that the express indemnity claim including attorney's fees was triggered solely by PDG's negligence. This argument is also inconsistent with Spectra's proposed statement of decision which listed "controverted issues for the court's determination during the trial" without identifying PDG's duty to defend as one of those issues.

We conclude that, even if the statement of decision should have addressed the subject, any error was harmless because the minimal evidence of tender at trial did not compel a finding in favor of Spectra as a matter of law. (*Vieira, supra*, 8 Cal.App.5th at p. 1074.)

2. Failure to Procure Insurance

Spectra also argues that the trial court's statement of decision erroneously failed to address Spectra's claim that PDG breached the subcontract by failing to procure insurance for

Spectra. Spectra did not plead this claim or raise the issue in its opening or closing statements at trial. Nor does it explain how the failure to procure insurance fits within its indemnity, subrogation or declaratory relief claims. In support of its argument that this claim was “consistently asserted” at trial, Spectra cites to only one line of its counsel’s examination where he affirmed that PDG “was required to list Spectra as an additional insured.” That comment does not create a principal controverted issue at trial.

3. The Doctrine of Superior Equities

Spectra argues the trial court erred in its application of the doctrine of superior equities to its equitable subrogation claim. “Under the doctrine of superior equities, although an insurer might have a subrogation interest in the insured’s claim against the party that caused the loss, it cannot enforce its subrogation rights unless it has equities superior to those of the wrongdoer.” (*State Farm General Ins. Co. v. Wells Fargo Bank, N.A.* (2006) 143 Cal.App.4th 1098, 1108 (*State Farm*).)

Spectra first contends the court should not have applied the doctrine at all, even though California case law supports its use in all cases of equitable subrogation. (*State Farm, supra*, 143 Cal.App.4th at p. 1109.) We conclude that Spectra waived the point on appeal because Spectra’s counsel argued during trial that superior equities in fact applied in its favor.⁶ (See *People v. Hardy* (1992) 2 Cal.4th 86, 153 [arguments not raised in the trial court may not be raised for the first time on appeal].)

Spectra next argues that the trial court weighed the wrong equities. As Spectra was standing in the shoes of its insurers via

⁶ Spectra’s counsel: “The evidence will also show that Spectra is in a superior equitable position in this matter”

the assignment, the relevant inquiry was whether the insurers—not Spectra—had superior equities to PDG. (See *Fireman’s Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1292 [the elements of an insurer’s cause of action for equitable subrogation include that “justice requires that the loss be entirely shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer”].) According to Spectra, based on an “overall reading” of the statement of decision, there is “no indication that the equitable position of Spectra’s insurers was ever considered in connection with the trial court’s ruling on the subrogation claim.”

We reject this argument for two reasons: First, a review of the record shows that the trial court properly balanced the equities. For example, the court stated, “the only damages that [PDG is] liable for under this contract are those caused by [its] negligence. . . . This is not a superior position compared to the contractor and subcontractor, but the subcontractor and the insurer.”

Second, when we review a judgment, we make all inferences in its favor. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133 [“A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.”]) Here, even if the statement of decision did not expressly state that the trial court considered Spectra’s insurer’s equities rather than Spectra’s own equities, the trial court correctly stated the rule orally. The record thus establishes that the trial court understood the law and applied it correctly.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

RUBIN, P. J.

WE CONCUR:

BAKER, J.

MOOR, J.