

2d Civil No. B154784

IN THE COURT OF APPEAL

SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA

DIVISION SIX

ROBERT Q. KAFADER, LYLE P.)
 KAFADER, KIMBERLY COY)
 PHINNEY,)
)
 Plaintiffs and Appellants,)
)
 v.)
)
 UNITED SERVICES AUTOMOBILE)
 ASSOCIATION,)
)
 Defendant and Respondent.)
)
 _____)

2d Civil No. B154784

Santa Barbara Superior Court
Case No. 221256

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Respondent USAA argues that “appellants again resort to extraneous and collateral factors, previously decided, in an effort to impose liability on USAA.” To support this position USAA opines that “what the remand order required was an assessment of the actions of Lyle Kafader...” and that “[Appellants’ withdrawal of defense claim] was properly rejected in the first opinion from this court and should be rejected again.” None of these contentions are supported by the record before this Court.

Setting aside USAA’s hyperbole the true facts are that:

1. This Court remanded this “case to the trial court for a trial of whether Kafader’s liability to Phinney is covered by the USAA insurance policy.”

2. The remand order was broad enough to encompass the terms of the policy itself, the acts or omissions of the Appellants and the acts or omissions of the Respondent. There was no language in the remand order restricting the trial court to the assessing the “actions of Lyle Kafader.”

3. The trial court took evidence on Appellants’ withdrawal of defense claim and is prepared to rule on that issue without further proceedings.

4. If the trial court determines that USAA’s decision to stop paying Lyle Kafader’s counsel in the underlying action constitutes a withdrawal of defense, Kafader’s liability to Phinney will be “covered by the USAA insurance policy,” pursuant to California Civil Code section 2778(5).

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**THE TRIAL COURT'S VARIANCE FROM THIS COURT'S REMAND ORDER WAS
MATERIAL IN THAT IT DENIED APPELLANTS AN IMPORTANT BASIS FOR
ESTABLISHING THAT KAFADER'S LIABILITY TO PHINNEY IS COVERED BY
THE USAA INSURANCE POLICY**

The general rule applicable to the power of the trial court on remand is well established. In *Hampton v. Superior Court* (1952) 38 Cal.2d 652, 655, 242 P.2d 1, 3, it was stated that "(w)hen there has been a decision upon appeal, the trial court is reinvested with jurisdiction of the cause, but only such jurisdiction as is defined by the terms of the remittitur. The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void. (Citations.)" A more recent expression of the principle is found in *Coffee-Rich, Inc. v. Fielder* (1975) 48 Cal.App.3d 990, 998, 122 Cal.Rptr. 302, 307, that "(w)here a reviewing court has remanded a matter to the trial court with directions ' . . . the trial court . . . is bound to specifically carry out the instructions of the reviewing court. . . . (A)ny material variance from the explicit directions of the reviewing court is unauthorized and void.' "

It is defendants' position here that the trial court's determination to increase the breach-of-contract damages award was a material variance from the instructions given in the remittitur, and thus was in excess of the trial court's jurisdiction. Plaintiff argues that, in light of the remittitur language, the discussion and computation of the breach-of-contract damages in the Frankel I opinion were appropriately relied upon by the trial court upon remand, and, hence, the increased award should be upheld.

It is clear that Frankel I's holding that the evidence was sufficient to support imposition of liability on defendants (in some amount) was the "law of the case." The question before us, however, is whether the court in Frankel I intended to authorize the trial court to entirely refashion its damages award or to limit the trial court on remand to the task of making specific findings to support the \$75,000 award originally made. In determining this question, we look first to the dispositional language of the opinion the language which constitutes the remittitur directions.

In our view, the disposition language "the case is remanded to the trial court for clarification of the findings of fact supporting the amount of the damages" cannot be considered, by itself, as a clear direction to the trial court to simply make findings to support the original \$75,000 award. By considering the discussion in the opinion of Frankel I, the conclusion is inescapable that the directions to the trial court were intended to justify a redetermination of the amount of the award from the evidence previously introduced and in accord with Frankel I's instructions as to how the

breach-of- contract damages were to be computed.

(Frankel v. Four Star International, Inc. (1980) 104 Cal.App.3d 897, 902.)

Frankel mandates that the trial court should have considered the language of this Court's decision as a whole when determining the scope of the remand order. Such a consideration in this case reveals that this Court specifically noted that Appellants' withdrawal of defense claim was never adjudicated in the first phase of the trial and was therefore not the subject of judicial review. This Court's discussion in its opinion centered on whether the underlying arbitration had a collateral estoppel effect on the adjudication of coverage; nowhere in the opinion did this Court reject Appellants' withdrawal of defense claim. Read as a whole, the trial court should have considered all relevant evidence, precluding only consideration of any collateral estoppel effect of the underlying arbitration, when determining coverage.

Unlike collateral estoppel, the duty to provide a defense is a contractual duty and the breach of this contractual obligation acts as a waiver of the right to deny coverage. (*See, United Services Automobile Association v. Alaska Insurance Co. (2001) 94 Cal.App.4th 638.*)

Examining the trial court's decision not to decide Appellants' withdrawal of defense claim, without further directions from this Court, the appropriate inquiry is whether such a variance from this Court's remand order is material:

The correct analysis, we believe, is the determination whether an apparent variance in the trial court's execution of the appellate ruling is "material." (*See, Coffee-Rich, Inc. v. Fielder, supra, 48 Cal.App.3d 990, 998, 122 Cal.Rptr. 302; Bach v. County of Butte (1989) 215 Cal.App.3d 294, 301-302, 263 Cal.Rptr. 565; Frankel v. Four Star International, Inc. (1980) 104 Cal.App.3d 897, 902, 163 Cal.Rptr. 902.*)

(In re Candace P. (1994) 24 Cal.App.4th 1128, 1131-1132.)

Applying this analysis to the facts of this case establishes that: (1) the trial court took evidence on Appellants' withdrawal of defense claim and is prepared to rule on that issue without further proceedings; and, (2) if the trial court determines that USAA's decision to stop paying Lyle Kafader's counsel in the underlying action constitutes a withdrawal of defense, Kafader's liability to Phinney will be "covered by the USAA insurance policy," pursuant to California Civil Code section 2778(5). Under these circumstances it is hard to imagine a variance that would be more material, since a decision in either party's favor by the trial court will be determinative¹ of the coverage issue.

**TO DATE, NO COURT HAS DETERMINED APPELLANTS' WITHDRAWAL OF
DEFENSE CLAIM THAT, IF DECIDED IN APPELLANTS' FAVOR, WOULD
ESTABLISH THAT KAFADER'S LIABILITY TO PHINNEY IS COVERED BY THE
USAA INSURANCE POLICY**

Contrary to Respondent's specious argument, the record before this Court is clear—no Court has ever ruled on Appellants' withdrawal of defense claim.

During the first phase of the trial, the original trial court specifically noted in its Amended Statement of Decision that:

USAA acknowledges that a potential for coverage existed all of the way through arbitration and judgement. Therefore, USAA owed Ms. Kafader a defense all of the way through arbitration and judgment.

USAA's contention that they never received the billings from Mr. Zilinskas' office is not credible. Other correspondence addressed in exactly the same manner was received by USAA during the same time period. The reasonable inference from the

¹ As statutorily proscribed in Civil Code Section 2778(5), a determination of this issue in favor of the Appellants would be "conclusive" on the issue of coverage. Such a conclusive effect in and of itself establishes the materiality of the trial court's omission to decide this issue.

evidence is that Mr. Zilinskas' billings were received by USAA and never were paid until after the instant action was filed and USAA's defense counsel wisely arranged for the billings to be paid.

Because USAA had the opportunity to defend and refused to pay for the defense after the stipulation for binding arbitration, USAA is bound by the judgment against the insured and cannot relitigate the insured's liability or the amount of the claimant's damages.

The court makes no finding as to whether USAA'S failure to pay defense fees amounted to withdrawal of defense. This issue is left for the subsequent phase of the trial; because, in light of the other points set forth above in this decision, it is not necessary to decide this issue at this time. (JA 147.)(Emphasis added.)

On Appeal from the first phase of the trial this Court observed that:

The amended statement of decision found that USAA improperly stopped paying the attorney fees of Kafader's counsel after the stipulation to arbitration. An insurer who fails to provide a defense to an insured is bound by a judgment in the action. (See, *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 884-556.) **The amended statement of decision, however, expressly states that the court makes no finding whether failure to pay these fees 'amounted to withdrawal of defense' and provides no other basis for estoppel because fees were withheld. (JA 156.)(Emphasis added.)**

And on retrial, the successor trial judge found that:

The Court of Appeal remand does not expressly instruct this court to determine whether USAA's failure to pay fees amounted to 'withdrawal of defense' so as to estop USAA from denying that it was bound by the judgment based on the arbitration award. The Court of Appeal remand order recognizes that the issue of 'withdrawal of defense' has not been decided in this case because the previous trial court expressly stated that it made no finding whether failure to pay defense attorney fees amounted to a 'withdrawal of defense.' The Court of Appeal remand suggested by implication that 'withdrawal of defense' might be a basis for estoppel under which USAA would be liable for the judgment. However, such a determination would be outside the scope of the remand order to determine whether Kafader's liability to Phinney is covered by the USAA insurance policy, unless California Civil Code §2778 is read as a term and condition of the USAA policy requiring this court independently to decide wither USAA's conduct amounted to a "withdrawal of defense."

Although this court took evidence on the ‘withdrawal of defense’ issue and is prepared to decide that issue without further evidentiary hearing, it declines to do so absent express direction from the Court of Appeal. Such a decision by the court would be outside the terms of the remittitur and void. (JA 861-862.)(Emphasis added.)

Accordingly, putting aside USAA’s argument, the undisputed record before this Court is that the Appellants’ withdrawal of defense claim has never been decided by any Court or been the subject of Appellate review.

**THE MERITS OF APPELLANTS’ WITHDRAWAL OF DEFENSE CLAIM IS NOT
BEFORE THIS COURT**

Ironically, Respondent USAA does not want this case remanded to the trial court to rule on the merits of Appellants’ withdrawal of defense claim, but, instead wants to make its argument before this Court and have this Court decide the merits of Appellants’ claim. The Respondent asks this Court to weigh the evidence presented to the trial court, apply selected law and make a factual determination that there was no withdrawal of defense. First, this issue is not ripe for review in that it has yet to be decided by any factfinder. Secondly, contrary to USAA’s argument, case law is plentiful concerning a insurer’s wrongful refusal to defend.

The controlling law on this issue was summarized in *Cathay Mortuary (Wah Sang) Inc. v. United Pacific Ins. Co.* (1984) 582 F.Supp. 650, 659 -660:

California law is quite clear on the damages Cathay may receive from the insurers. **"An insurer's wrongful refusal to defend will automatically subject it to liability for both the costs of defense and any adverse judgment the insured suffers, even when the judgment was rendered on a theory not within the policy coverage."** (Kapelus v. United Title Guaranty Co., 15 Cal.App.3d 648, 93 Cal.Rptr. 278 (1971); see also, Gray v. Zurich, 65 Cal.2d 263, 280, 54 Cal.Rptr. 104, 419 P.2d 168 (1966); Arenson v. National Automobile & Casualty Insurance Co., 45 Cal.2d 81, 84, 286 P.2d 816 (1957); Cal.Civ.Code § 2778. (Emphasis added.)

If USAA wishes to have this issue adjudicated, the proper course of action would be for the Respondent to join in Appellants' request to have this issue remanded to the trial court for a factual determination of the merits of Appellants' claim, which the trial court is prepared to do.

**APPELLATE REVIEW IS AN APPROPRIATE REMEDY FOR THE TRIAL COURT'S
VARIANCE FROM THIS COURT'S REMAND ORDER**

Respondent argues that Appellants should have petitioned for a rehearing to clarify this Court's remand order. Such an argument conflicts with the facts of this case and the California Supreme Court's view of this issue.

A failure to follow appellate directions can be challenged on appeal from the subsequent judgment or order. (*Hampton v. Superior Court (Young)* (1953) 38 Cal.2d 652, 652, 656.)

Such is the course that the Appellants followed.

To argue that the Appellants should have somehow anticipated that the trial court would conclude that Appellants' withdrawal of defense claim was not within the scope of this Court's remand order, and petition for a rehearing to clarify, is flattering but strains credulity. The trial court itself had not made a decision regarding its interpretation of this Court's remand order when it began hearing evidence on this issue of Appellants' withdrawal of defense claim. (RT 2-16.) The reasonable course of action was that followed by the Appellants, put on their evidence, await the trial court's decision, and appeal the issue if necessary.


CONCLUSION

Respondents argue that the time has come to close this litigation. Appellants respectfully submit that the time to close this litigation is after all of the coverage issues have been decided, as

previously ordered by this Court. Appellants respectfully request this Court remand this action with instructions for the trial court to rule on USAA's withdrawal of defense and the effect that withdrawal had on USAA to provide coverage for Kafader's liability to Phinney under its policy.

Dated: September 16, 2002

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 2402 words as counted by the Coral WordPerfect version 8 word processing program used to generate this brief.

Dated: September 16, 2002

LAW OFFICES OF ZILINSKAS & WOOSLEY

A handwritten signature in black ink, appearing to read "Eric A. Woosley", is written over a horizontal line.

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