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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CECILIA ENCARNACION, et al.,

Plaintiff and ~~Respondent~~, Appellants

v.

20th CENTURY INSURANCE COMPANY, et al.,

Defendant and ~~Appellant~~.

After a Decision by the Court of Appeal
Second Appellate District, Division One
Case Nos. B179825 and B182737

PETITION FOR REVIEW

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PETITION FOR REVIEW

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1. ISSUES PRESENTED

This Petition presents three issues. First, does a *Johansen*[1] award against an insurer require a finding of actual policy coverage? In this case, the trial court found that without the impact of equitable considerations, the insurer's policy exclusions would have "clearly precluded coverage." **JA 6262, 6270 (155).** Nevertheless, despite the fact that coverage did not exist under the policy, the court awarded damages in excess of the policy limits

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[1] *Johansen v. California State Automobile Ass'n.,* 15 Cal. 3d 9 (1975). A "*Johansen* award" is a judgment in excess of policy limits based on an insurer's refusal to accept a reasonable settlement offer within policy limits. Thus, in this case the policy limits are $100,000 but the wrongful death judgment, when entered in 1996, was $5.6 million.

based solely on equitable theories. The Court of Appeal has affirmed that decision. It appears that no other court has ever awarded *Johansen* damages without a finding of policy coverage, and thus this case presents an important question of law for this Court to consider.

Second, in order to be entitled to *Brandt*[2] fees, *i.e.*, fees incurred by the insured (or his assignee) to recover policy benefits, must there be a finding of actual policy coverage? As with the *Johansen* issue, absent the impact of equitable considerations, the policy exclusions would have precluded coverage. Despite this, the court below has found that, on remand, the third-party claimant may seek *Brandt* fees, never considering the fact that the trial court did not find coverage under the policy.

Third, are statements of an insurer's claims representative and an attorney appointed to defend an insured made to counsel for the claimant within the protection of the litigation privilege? *Civil Code,* § 47. And, do these statements become unprotected when they occur in an action that involves both equitable and tort claims? There is considerable confusion in California law on these issues and the decision of the court below, finding that the statements were not privileged, is merely further evidence of this confusion.

2. WHY REVIEW SHOULD BE GRANTED

An award of extra-contractual damages under this Court's decision in *Johansen* ***requires*** a finding of policy coverage. No such

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[2] *Brandt v. Superior Court,* 37 Cal. 3d 813 (1985).

finding was made in this case. Indeed, the trial court found that the policy "clearly precluded coverage" and awarded damages based solely on equitable theories. The court below equated a finding of equitable estoppel with a finding of coverage – "there was coverage under the policy because 20th Century was barred from relying on the exclusion from coverage." **Opinion, p. 43.** In short, the court found that an estoppel to assert, or a forfeiture of, a policy exclusion is the same as policy coverage. This conclusion is in apparent conflict with existing California law.

The court similarly rose above the lack of any coverage determination when it permitted the third-party claimant to pursue her claim for *Brandt* fees on remand. **Opinion, pp. 47, 54**. While the right of a third-party claimant to obtain an assignment of *Brandt* fees was established by this Court's decision in *Essex Ins. Co. v. Five Star Dye House, Inc.,* 38 Cal 4th 1252 (2006), the court below went far beyond that holding. The Opinion, as written, permits the third-party claimant to seek to recoup *Brandt* fees not for the recovery of "policy benefits," but for the recovery of the amounts awarded under the equitable claims tried before the trial court. No appellate court construing *Brandt* in the last 22 years has issued such a far-reaching holding.

With respect to the litigation privilege, the question whether statements of an attorney or a claims person are – or are not – subject to the litigation privilege is subject to conflicting decisions. Despite the efforts in *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone,* 107 Cal. App. 4th 54, 82 (2003), to distinguish *Home Ins. Co. v. Zurich Ins. Co.,* 96 Cal. App. 4th 17 (2002), those decisions remain in clear tension. The

court below adds to that tension by finding, in the most cursory analysis, that discussions between counsel in a pending action to be beyond the scope of the litigation privilege. **Opinion, p. 40.** Further, the Opinion's unqualified statement that the litigation privilege is inapplicable to equitable actions is evidence of further confusion since the privilege has been applied to some equitable actions and, as the court below found, this action is also a tort action.

3. SUMMARY OF ARGUMENT

A. The *Johansen* Issue

For *Johansen* to apply, four factors must be present:

(1) The third-party claimant must have made a reasonable settlement offer within policy limits in the underlying case;

(2) The insurer must have rejected the offer;

(3) Thereafter, a judgment in excess of policy limits must have been entered in the underlying case;

(4) Thereafter, it was determined that the policy in fact covered the claim.[3]

There was ***never*** a determination that 20th Century's policy provided coverage for Aguilera's actions. Rather, what the trial court found was that, despite the absence of policy coverage, 20th Century was obligated to pay the underlying wrongful death judgment because one or more equitable findings precluded 20th Century from relying on policy

[3] *See Johansen, supra* at 12-15.

exclusions that otherwise clearly precluded coverage. Nevertheless, the trial court "relied on *Johansen*" in finding 20th Century liable for "the entire amount of the judgment." **Opinion, p. 40.** In the Legal Discussion section of this Petition, we shall explain why this conclusion is multi-flawed but we note here that, in affirming the action of the trial court, the Court of Appeal has provided this Court with an opportunity to clarify the scope of the *Johansen* doctrine in a case in which only equitable issues were tried.

B. The *Brandt* Fee Issue

The absence of a determination that 20th Century's policy actually provided coverage for the claims made against Aguilera is also fatal to the issue of *Brandt* fees. An award of *Brandt* fees ***requires a finding of coverage*** and it is only those "fees incurred to obtain the policy benefits," not fees incurred to obtain other relief, that may be recovered. *Brandt, supra* at 820. ***No policy benefits were recovered.*** The judgment for the Encarnacion plaintiffs is for "the amount of the Judgment in the underlying wrongful death action" and not for the policy benefits. **JA 7977 (194).** Thus, the Encarnacion plaintiffs did not establish actual policy coverage, were not awarded policy benefits and therefore cannot seek *Brandt* fees.

C. The Litigation Privilege Issue

The impact of the litigation privilege on claims based on statements of attorneys or party representatives in pending litigation is the subject of continuing litigation resulting in confusing and seemingly contradictory opinions. In *Home Ins. Co. v. Zurich Ins. Co.*, 96 Cal. App. 4th 17, 20-21 (2002), Zurich's counsel's allegedly false statement that the policy limits were $15,000 when they were really $500,000 was privileged.

But in *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone,* 107 Cal. App. 4th 54, 62, 82 (2003), a letter from the insurer's attorney that impliedly acknowledged a duty to indemnify for a willful act was found not to be privileged based on the thin reed that *Shafer* involved a section 11580[4] claim whereas *Home* did not. This case involves a series of conversations from which the trial court found that 20th Century had promised to pay policy limits despite the existence of several potentially applicable policy exclusions. In the Legal Discussion section of this Petition, we shall demonstrate that (1) communicative acts predominate the conduct in this case, (2) the litigation privilege has been applied to equitable actions, and (3) this action is one based squarely upon privileged communications.

4. STATEMENT OF THE CASE

A. The Shooting and the Wrongful Death Action

This case results from a fatal shooting that occurred on March 1, 1994. On that date, Ramon Aguilera ("Aguilera") shot and killed Marcos Gonzalez ("Gonzalez"). Gonzalez was a tenant at a property owned by Aguilera.

Subsequently, a "felony complaint charging Aguilera with murder while personally using a firearm" was filed. **Opinion, p. 5.** Aguilera retained Jay Jaffe ("Jaffe") to defend the criminal action.

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[4] Insurance Code, §11580.

Cecilia Encarnacion was living with Gonzalez at the time of his death and was the mother of their children. On April 25, 1994, the Encarnacion plaintiffs filed a wrongful death action against Aguilera. Paul deMontesquiou ("deMontesquiou") was the counsel for the Encarnacion plaintiffs.

B. 20th Century's Policy, the Conversations, the Letters and the Plea

20th Century had issued a homeowners policy to Aguilera. The policy contained three exclusions[5] – the intentional acts exclusion, the criminal act exclusion and the business pursuits/rental property exclusion. As the trial court observed, any one of these exclusions under "ordinary circumstances" would "have cut off any claims against the policy." **JA6262 (155).**

After being served with the Encarnacion complaint, Aguilera gave it to Jaffe, who forwarded it to 20th Century. Once it received the complaint, 20th Century sent Aguilera a reservation of rights letter, dated June 9, 1994, agreeing to defend Aguilera in the wrongful death action but reserving its rights with respect to the three exclusions and any duty to indemnify.

In the period May to August 4, 1994, there were conversations with regard to the criminal case against Aguilera and requests that 20th Century agree to pay its policy limits of $100,000 toward the civil case. The persons involved in the conversations were Jamie Brown, a claims

[5] The Opinion quotes the policy exclusions at page 5.

adjuster for 20th Century; the Encarnacion counsel deMontesquiou; Jaffe; Kenneth Wullschleger, the senior deputy district attorney handling the criminal action against Aguilera; and members of the law firm of Hill, Genson, Crandall & Wade. Hill Genson was selected by 20th Century to defend Aguilera in the wrongful death action. Thomas W. Shaver was the lawyer to whom the matter was assigned and the Hill Genson lawyer with whom deMontesquiou had the most contact.

The trial court was frank in stating that, while the conversations only involved discussion of the single "intentional acts" exclusion, the conversations were less than explicit, and that "[i]nevitably, the meaning is changed and often lost." **JA 6263 (155).** Nevertheless, the trial court found that these conversations in which Brown and Shaver discussed the "intentional" acts exclusion with deMontesquiou had the "effect of communicating a promise of coverage when 20th Century never intended to provide it." **JA 6263 (155).**

With respect to the criminal action, Aguilera was allowed to and did plead to involuntary manslaughter on August 4, 1994. Based on the conversations described above, the court below found that Aguilera pled guilty believing that the plea would not bar recovery on his policy for the civil action and that the $100,000 policy limits would be paid to the Encarnacion plaintiffs. **Opinion, pp. 6-9.** That did not happen. On August 8, 1994, 20th Century denied coverage based on the criminal act exclusion.

C. The Judgment in the Wrongful Death Action, the Action Against 20th Century and the Prior Court of Appeal Decisions of 2000 and 2002

Two years later, the jury in the Encarnacion wrongful death action rendered a verdict of $5.6 million against Aguilera, with judgment entered on August 30, 1996. **JA 4, 27-29 (1).** Thereafter, Aguilera partially assigned his claims against 20th Century to the Encarnacion plaintiffs.

On July 3, 1997, the Encarnacion plaintiffs and Aguilera filed an action against 20th Century for breach of contract and breach of the implied covenant of good faith and fair dealing. **JA 1 (1).** The complaint does not mention any promise by 20th Century to pay the $100,000 policy limits.

On October 2, 1998, 20th Century was granted summary judgment. **JA 1396-1397 (40).** Plaintiffs appealed and the court below reversed in a May 8, 2000 opinion that found triable issues of fact in light of the raising of equitable claims by plaintiffs. **JA 1555-1569 (44).**

When the case returned to the trial court, the issue arose as to what would be tried and whether the trial would be to a jury or the judge. By an order dated February 27, 2002, the trial court ruled that the issue of promissory estoppel would be tried first to a jury. **JA 2383 (79).** Plaintiffs sought relief by writ and on June 19, 2002 the court below granted a writ of mandate directing that the "issue of estoppel . . . must be tried as a court trial." **JA 2833-2837 (94).** No claim for breach of contract was set to be tried.

D. The First Phase Trial, The Statement of Decision and the Entry of Judgment

The first phase trial began on June 3, 2003[6] before Judge J. Stephen Czuleger and concluded on June 19, 2003. **RT 2137.** On August 15, 2003, the trial court issued a proposed Statement of Decision[7] and on September 26, 2003 the trial court adopted the proposed Statement of Decision as its final Statement of Decision. **HT 9/26/03 3091:16-23, 3907:7-14; JA 6262 (155).**

The Statement of Decision found for plaintiffs on the three theories they actually tried – equitable estoppel, forfeiture and promissory estoppel. In 2004, the Encarnacion plaintiffs moved to have a judgment entered against 20th Century for the amount of the wrongful death judgment plus accrued interest. At a hearing on May 14, 2004, Judge Czuleger granted the Encarnacion plaintiffs' motion,[8] based solely on the three equitable theories, and on October 5, 2004 judgment was entered in the amount of $10,519,602.58 for the Encarnacion plaintiffs. **JA 7977-7978 (198).**

E. The Appeal, the Opinion and Issues Not Relevant to this Petition

20th Century filed its Notice of Appeal on December 6, 2004 and plaintiffs filed a cross appeal on December 10, 2004. **JA 8106-8107 (209); JA 8116-8117 (210).** Following the conclusion of briefing, the matter was

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[6] **Reporter's Transcript ("RT") 1.**

[7] **JA 5986-6000 (149).**

[8] **JA 7730-7731 (185), (194); HT 5/14/04 4887:11-4888:26.**

heard by Division One of the Second Appellate District, and on September 27, 2007 the court entered its Opinion affirming the trial court decision. (*See* Exhibit A attached hereto.)[9] The Opinion also deals with issues raised by a cross appeal and in a subsequent consolidated appeal (2nd Civil No. B182737). The decision on most of those issues – denial of leave to amend to state an Insurance Code section 11580 cause of action, and the granting of a demurrer to a subsequent complaint attempting to state a section 11580 cause of action – are discussed at page 48 through 54 of the Opinion and are not challenged by this Petition.

5. LEGAL DISCUSSION

A. Because There is No Finding that 20th Century's Policy Covered Aguilera's Action, the Award of *Johansen* Damages Must be Reversed

Numerous California decisions are explicit that, to find either a contractual or tortious breach of the implied covenant of good faith and fair dealing, benefits must have been due under the insurance policy. *E.g., Waller v. Truck Ins. Exchange*, 11 Cal. 4th 1, 36 (1995). In *Waller*, the Supreme Court explained that "because a contractual obligation is the underpinning of a bad faith claim, such a claim cannot be maintained unless policy benefits are due ***under the contract***." *Waller, supra* at 35 (emphasis added). In other words, "both sets of obligations, in contract and in tort, spring from and depend on the existence of the contractual duty to pay." *Tomaselli v. Transamerica Ins. Co.*, 25 Cal. App. 4th 1766, 1770 n.4 (1994). In simple terms, in the absence of a breach of contract, there can be no

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[9] The Court of Appeal denied rehearing on October 26, 2007.

finding of bad faith. *Love v. Fire Ins. Exchange,* 221 Cal. App. 3d 1136, 1151 (1990); see also *Marie Y. v. General Star Indem. Co.*, 110 Cal. App. 4th 928, 958 (2003) ("the insurer has a duty to accept a reasonable settlement offer only with respect to a covered claim"); *Reshamwalla v. State Farm Fire & Cas. Co.*, 72 Fed. Appx. 543, 545 (9th Cir. 2003) ("the claims must have been actually covered under the Policy").

Johansen damages are awarded because of a breach of "the implied covenant of good faith and fair dealing." *Johansen, supra* at 18. In *Johansen*, the underlying Court of Appeal decision "determined that defendant's policy did in fact cover the accident." *Johansen, supra* at 12. Thus, the *Johansen* doctrine requires a finding of policy coverage – or it did until the decision of the court below.

(1) Neither the Finding of Equitable Estoppel nor Forfeiture is a Finding of Policy Coverage

The trial judge awarded judgment for the Encarnacion plaintiffs for the amount of the wrongful death judgment based solely on the equitable theories tried in the first phase trial. On appeal, 20th Century explained that two of the three theories – equitable estoppel and forfeiture – are defenses, not affirmative causes of action. Therefore, the Encarnacion judgment could not have been based on those theories. The court below agreed but found no error. **Opinion, pp. 26-27.** The court explained that the operative complaint included an untried breach of contract cause of action and that the judgment was based on this cause of action. **Opinion, p. 27.**

The conclusion of the court below is incorrect.[10] The transcript of the hearing at which the trial judge granted the motion that led to the judgment demonstrates that ***only*** the equitable claims were the basis for his decision. **HR 5/14/04 4887:11-4888:16.** Moreover, judgment could not have been entered on a breach of contract cause of action both because none was tried and, had one been tried, 20th Century would have received its much sought after jury trial.

With respect to 20th Century's repeated requests for a jury trial, prior to the first phase trial, the trial judge ordered the matter to be tried to a jury. Plaintiffs took a writ from this ruling and obtained a reversal, the court declaring that "the issue of estoppel must be tried by the court rather than by a jury." **Opinion, p. 20.** What is critical about this phase of the litigation is the promise made by plaintiffs in their successful Writ Petition. Specifically, plaintiffs declared:

> "Liability under the terms of the policy would turn on whether the exclusions for criminal acts or business pursuits operate to eliminate coverage, which in turns rests on events at the time of the shooting, presenting a classic legal action in which there is a right to a jury trial. ***Plaintiffs' decision not to contest the policy exclusions, however, means that there is no contract issue or claim to be tried.***" **JA 2423 (80)** (Emphasis added.).

The first phase trial followed and the only claims tried were the three equitable claims. Had plaintiffs tried a breach of contract cause of

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[10] This error was pointed out to the court below in 20th Century's Petition for Rehearing but the court denied the petition without revision of the Opinion.

action, a jury trial would have been required. *Code of Civil Procedure,* § 592. The denial of a jury trial in a breach of contract action would have been *per se* reversible error.[11] Thus, the conclusion of the court below that, despite what he said, the trial judge really awarded judgment based on the policy provisions is simply an untenable attempt to avoid the conclusion that no damage claim can be based on either the finding of forfeiture or equitable estoppel.

When the court below turned to the *Johansen* issue, it took a different tack with respect to forfeiture and equitable estoppel. **Opinion, pp. 40-43.** With respect to forfeiture, the court below relied upon the trial court's restatement of the holding in *Chase v. Blue Cross of California,* 42 Cal. App. 4th 1142 (1996), that "[f]orfeiture is the assessment of a penalty against the insurer for misconduct or failure to perform an obligation ***under the contract.'"*** **Opinion, pp. 42-43** (emphasis in the Opinion). The trial court based this statement on page 1149 of the *Chase* opinion but the words ***"under the contract"*** do not there appear. *Chase* only involved the issue of whether Blue Cross had forfeited the right to compel arbitration. No issue as to policy coverage was involved.

In short, there is no authority for the proposition that forfeiting the right to rely on a policy exclusion means that the policy provides actual coverage. To the contrary, analogous California law suggests that the court below reached the wrong conclusion. First, "waiver" and "forfeiture" are sometimes treated as equivalent doctrines by our courts. *Chase, supra* at

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[11] *Heim v. Houston,* 60 Cal. App. 3d 770, 774 (1976).

1148-49. Second, established California law declares that "coverage under an insurance policy cannot be established by estoppel or waiver." *Manneck v. Lawyers Title Ins. Corp.*, 28 Cal. App. 4th 1294, 1303 (1994); *Quan v. Truck Ins. Exchange,* 67 Cal. App. 4th 583, 602 n.18 (1998).

Even weaker is the conclusion of the court below that there was coverage under the policy based on the defense of equitable estoppel. The court below stated:

> "Similarly, the trial court found '20th Century is equitably estopped from raising its exclusions. Again, there was coverage under the policy because 20th Century was barred from relying on the exclusion from coverage."

This conclusion, if not in direct conflict, is in serious tension with *Manneck* and *Quan* and the authorities they rely upon. It is one thing to award a judgment – as the trial court said – under "theories of law . . . when its policy would otherwise clearly exclude coverage"[12] and quite another thing to conclude that the policy provided coverage. The trial court did not so find and the attempt by the court below to twist the defenses of forfeiture and equitable estoppel into a finding of policy coverage is error.

(2) The Finding of Promissory Estoppel is not a Finding of Policy Coverage

Promissory estoppel, unlike forfeiture and equitable estoppel, is a basis for a cause of action for damages. However, a finding of promissory estoppel is not a finding of policy coverage, as *CalFarm Ins. Co. v. Krusiewicz,* 131 Cal. App. 4th 273 (2005), demonstrates.

[12] **JA 6270 (155).**

In *CalFarm* plaintiff had recovered on a promissory estoppel cause of action. The court explained that the finding of promissory "estoppel will not support punitive damages." *CalFarm, supra* at 285. The court further explained the implied covenant cause of action "arises out of a contractual relationship and does not exist independently of its contractual underpinnings." *CalFarm, supra* at 285. The finding of promissory estoppel therefore "was based on a promise independent of the Policy's implied covenant of good faith and fair dealing" and thus "estoppel cannot support punitive damages." *CalFarm, supra* at 286.

In this case, the promissory estoppel finding is not based on any provision of 20th Century's policy but rather on the finding of a "promise that coverage would still be available even if he (Aguilera) pled guilty." **JA 6275 (155).** Nowhere in 20th Century's policy does such a promise exist. Indeed, the court below tacitly concedes that promissory estoppel does not equal a finding of policy coverage but then returns to the claim that "however, the trial court also found that 20th Century had a duty to pay under the contract . . . ." **Opinion, pp. 43-44.** As we have explained, ***the trial court made no such finding***. Moreover, to the extent that this reference is intended to refer to the conclusion of the court below that an ***untried*** breach of contract cause of action was the basis of the judgment, it would also raise the denial of a jury trial issue discussed above.

In summary, none of the three equitable theories actually tried equate to a finding of policy coverage. In each instance, recovery for the Encarnacion plaintiffs is not based on the policy language but is found in

spite of the policy language on equitable theories. In permitting a recovery under *Johansen* – the admitted basis of the judgment for more than the $100,000 limits of the policy[13] – the trial court and the court below committed prejudicial error.

B. Because There is No Finding that 20th Century's Policy Covered Aguilera's Action, There is No Right to Seek *Brandt* Fees

The court below reversed the trial court's determination that Aguilera could not assign his *Brandt* fee rights to Encarnacion. **Opinion, pp. 46-48.** The trial court had entered its ruling before this Court's decision in *Essex Ins. Co. v. Five Star Dye House, Inc.*, 38 Cal 4th 1252 (2006), which allowed such fees to be assigned from an insured to a third-party claimant. The court below has ordered that "Encarnacion must be given an opportunity to try her tort claim for recovery of those [*Brandt*] fees." **Opinion, p. 47.** The court below skipped a step.

Brandt fees are awarded to a party that has prevailed on a claim that an insurer tortiously breached the implied covenant of good faith and fair dealing. *Brandt, supra* at 815; *Waller, supra* at 15 (no bad faith absent withholding of policy benefits); *Archdale v. American International Specialty Lines Ins. Co.*, 154 Cal. App. 4th 449, 468 n.20 (2007). *Brandt* fees are awarded to cover the "insured's cost to hire an attorney to vindicate legal rights under ***the insurance policy***." *Cassim v. Allstate Ins. Co.*, 33 Cal. 4th 780, 806 (2004) (Emphasis added). Thus, when "an insurer

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[13] "In awarding the entire amount of the judgment, the trial court relied upon *Johansen* . . . ." **Opinion, p. 40.**

withholds policy benefits in bad faith, its insured may recover attorney's fees ***to enforce the policy***." *Track Mortgage Group, Inc. v. Crusader Ins. Co.*, 98 Cal. App. 4th 857, 867 (2002). *Brandt* fees are limited to those fees "incurred to obtain the policy benefits, which award must not include attorney's fees incurred to recover any other portion of the verdict." *Brandt, supra* at 820.

While the Opinion permits 20th Century on remand to resist the imposition of *Brandt* fees on the basis that it did not act unreasonably and therefore did not breach the implied covenant, it assumes that Encarnacion has established policy coverage. As we have discussed above, that is not the case. Prior to the first phase trial, plaintiffs declared that they would "not contest the policy exclusions" and thus "no contract issue or claim" would be tried. **JA 2423 (80).** No contract issues were tried and the trial court found that the exclusions "clearly precluded coverage," finding for plaintiffs only on equitable grounds. **JA 6270 (155).** Moreover, the judgment for the Encarnacion plaintiffs was "in the amount of $10,519,602.58 (*i.e.,* the amount of the Judgment in the underlying wrongful death action . . . ." **JA 7977-7978 (198).** The judgment does not include an award of "policy benefits," which was only $100,000. Without such an award, there is no right to seek *Brandt* fees.

As with the *Johansen* issue, the court below has wrongly equated a recovery based on equitable theories with a finding of policy coverage and a recovery of policy benefits. Thus, this case raises an important question as to the scope of the *Brandt* fee doctrine, *i.e.,* is a determination of an equitable right to recovery an appropriate substitute for a finding of

policy coverage in a case in which the "policy would otherwise clearly exclude coverage?" **JA 6270 (155).**

C. The Statements by the 20th Century Representatives are Within the Scope of the Litigation Privilege

The trial court findings of forfeiture, equitable estoppel and promissory estoppel all hinge on statements made by 20th Century representatives, primarily Jamie Brown and Thomas Shaver. The trial court found that deMontesquiou, Encarnacion's counsel, had "a number of conversations with Jamie Brown at 20th Century and Thomas Shaver, insurance counsel provided for Aguilera, wherein they spoke about coverage issues in terms of intentional versus negligent acts." **JA 6265 (155).** From these conversations, the trial court found that 20th Century had led deMontesquiou "to believe that if the act was found unintentional, there would be coverage." **JA 6265 (155).** These acts were clearly communicative acts related to pending litigation. Nevertheless, the court below quickly dismissed reliance on the litigation privilege, ignoring the fact that this case raises a serious litigation privilege issue and points up the conflict in existing Court of Appeal decisions on this topic.

The litigation privilege extends to a "publication or broadcast" made in a "judicial proceeding." *Civil Code*, § 47(b). The privilege applies "to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that has some connection or logical relation to the action." *Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990). The privilege has an expansive reach, including statements ("publications or

broadcasts") made outside of court, such as in this case, when litigation is pending. *Rubin v. Green*, 4 Cal. 4th 1187, 1193-94 (1993). The privilege extends to not only attorneys such as Shaver but also to Brown; again, a claims representative of 20th Century. *Morales v. Cooperative of American Physicians, Inc. Mutual Protection Trust*, 180 F.3d 1060, 1062 (9th Cir. 1999); *Doctors' Co. Ins. Services v. Superior Court,* 225 Cal. App. 3d 1284, 1295 (1990).

Applying the *Silberg* factors to determine the applicability of the litigation privilege, at the times Brown and Shaver spoke to deMontesquiou, counsel for Encarnacion, the wrongful death action was pending and thus the first requirement is satisfied. Brown and Shaver, as noted above, obviously qualify as "litigants or other participants authorized by law," and thus the second requirement is satisfied. The object of the litigation from Encarnacion's standpoint was to recover policy benefits, and therefore the third requirement is satisfied. All of the conversations had "some connection or logical relation to the action," satisfying the fourth and final requirement. In short, on a first look, it seems that the statements made by Brown and Shaver fall fully within the litigation privilege and further examination does not change that conclusion.

Despite the foregoing, the court below disposed of this issue in one paragraph. First, the court stated that the "privilege does not apply to contract or equitable actions, however." **Opinion, p. 40** (citations omitted). With respect to contract actions, the litigation privilege has been applied to actions that included both contract and tort causes of action. *See Laborde v. Aronson,* 92 Cal. App. 4th 459, 461, 463-64 (2001); *Pollock v. Superior*

Court, 229 Cal. App. 3d 26, 28-30 (1991). While neither a contract nor a tort claim was tried in the first phase trial, the court below has emphasized that the operative complaint included both contract and tort causes of action. **Opinion, p. 27**. Thus, the existence of a contract cause of action in the complaint does not render the litigation privilege inapplicable.

The result is no different with respect to the equitable claims tried by plaintiffs. The authority upon which the court below based its statement that the litigation privilege is inapplicable to equitable actions is *Home Ins. Co. v. Zurich Ins. Co.,* 96 Cal. App. 4th 17, 26 (2002). What *Home* actually says is that the "litigation privilege does not apply to an equitable action to set aside a settlement agreement for extrinsic fraud." *Home, supra* at 26. *Home,* as we discuss below, ***applied*** the litigation privilege to the claim of misrepresentation of policy limits, finding that fraud to be "intrinsic." *Home, supra* at 27.

In *Rubin*, the plaintiff sought "interim equitable relief" and when unsuccessful amended his complaint to add a claim under the Unfair Competition Law, unquestionably an equitable remedy.[14] *Rubin, supra* at 1192. Despite the fact that an equitable remedy was involved, this Court found that the litigation privilege barred the action. *Rubin, supra* at 1202. Thus, the fact that equitable relief is involved does not necessarily render the litigation privilege inapplicable.

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[14] *Cortez v. Purolator Air Filtration Products Co.,* 23 Cal. 4th 163, 179 (2000).

Moreover, the court below in discussing Encarnacion's right to pursue a *Brandt* fee claim upon remand expressly found that this action is also a tort action. **Opinion, p. 47.** Of course, the litigation privilege applies to tort actions. Thus, in addition to the fact that the litigation privilege has been applied to contract and equitable actions, plaintiffs are also pursuing a tort action.

Moving from the label on the claims to the substance, the situation in *Home* and in this case both involved the application of the litigation privilege to statements made by attorneys or other representatives of parties to the litigation. *Home* involved a situation analogous to this case. In *Home* the claim was that Zurich's counsel had concealed "the true extent of the coverage," representing that the policy limits were $15,000 when they were actually $500,000. *Home, supra* at 25-26. In this case, the findings are that, by discussing only the intentional acts exclusion, 20th Century caused Aguilera to believe that a plea to an unintentional crime would result in policy coverage. In both cases, the existence of an insurance policy is revealed, not concealed. Therefore, the issue in *Home* – whether the statements made concealing the true policy limits – and the issue in this case – the applicability of an exclusion presumed to be inapplicable – are both within the scope of the litigation privilege.

We acknowledge that *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone,* 107 Cal. App. 4th 54 (2003), suggests a different result. In *Shafer* a revised reservation of rights letter which, when read with a prior letter, had the effect of stating the willful acts were within the duty to indemnify was found to be not protected by the litigation

privilege. *Shafer, supra* at 62. The court declared that "[N]othing in *Home* . . . is to the contrary." *Shafer, supra* at 82. But the distinction urged by the court there is plainly fanciful – that *Shafer* involves a claim under section 11580 of the Insurance Code and *Home* did not. *Shafer, supra* at 82. In both *Shafer* and *Home*, communicative statements by attorneys were alleged to be misleading, yet the results are different. We believe *Home* is the correct expression of California law, but confusion among the intermediate appellate courts is evident, and this case presents an opportunity to resolve that confusion.

Finally, the court below held that the litigation privilege was inapplicable "to a course of conduct that may include communicative acts." **Opinion, p. 40.** This broad statement is in clear tension with California law.

To begin, this case overwhelmingly involves communicative acts. The bases of the trial court's findings on the equitable theories were statements primarily by Brown and Shaver that "had the effect of communicating a promise of coverage." **JA 6263 (155).** The trial judge described the discussions as "much like the parlor game 'telephone" wherein one person makes a statement to another which is passed on to a third person and so on." **JA 6263 (155).** The point is that the actionable conduct – the "course of conduct" – consists primarily of communicative acts.[15]

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[15] The reservation of rights letter also played a part in the findings of the trial court, but that letter is, of course, just another communicative act. **JA 6264.**

In *Rusheen v. Cohen,* 37 Cal. 4th 1048, 1052 (2006),[16] this Court stated: "We conclude that where the cause of action is based on a communicative act, the litigation privilege extends to those noncommunicative actions which are necessarily related to that communicative act." In this case, three equitable theories were tried but the court below conceded that forfeiture and equitable estoppel are not causes of action. **Opinion, pp. 26-27.** The sole cause of action actually tried was promissory estoppel. The first requirement of promissory estoppel is "a promise clear and unambiguous in its terms." *Laks v. Coast Federal S. & L. Assn.,* 60 Cal. App. 3d 885, 890 (1976). *Accord, CalFarm Ins. Co. v. Krusiewicz,* 131 Cal. App. 4th 273, 284 (2005); *Lange v. TIG Ins. Co.,* 68 Cal. App. 4th 1179, 1185 (1998). Whether or not a cause of action could be based primarily on noncommunicative acts is an academic question here where the primary basis of the cause of action was conversations, *i.e.,* the game of "telephone."

Moreover, in substance the conclusion of the trial court suggests actionable concealment. Repeatedly, the trial court found that 20th Century had "stood silent," "failed to advise its insured," or "20th Century waited too long" to speak. **JA 6268, 6269, 6270 (155).** Viewed as a promissory fraud case, obviously the litigation privilege is applicable to the statements made by 20th Century representatives.

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[16] The Opinion relies on a footnote in *Gruenberg v. Aetna Ins. Co.,* 9 Cal. 3d 566, 575-576 n.5 (1973), that pre-dates *Rusheen* by many years. Whether there is tension between that footnote and *Rusheen* is not clear, but this case provides an opportunity to resolve that tension, too.

In summary, despite this Court's recent decision in *Rusheen*, the scope of the litigation privilege remains unclear. Review of this case would clarify that scope and provide guidance for future cases.

6. CONCLUSION

Based on the foregoing, this Petition for Review should be granted to address important questions of law raised by the Court of Appeal's Opinion.

Dated: November 5, 2007

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CERTIFICATION OF WORD COUNT
PURSUANT TO RULE 8.504(d)(1)

Larry M. Golub, counsel of record for Defendant, Appellant and Respondent 20th Century Insurance Company, certifies that the foregoing *Petition for Review* contains approximately 6204 words (including footnotes), based on the "Word Count" of the computer program that was used to prepare this brief. Thus, this brief contains fewer than the 8,400 words permitted under California Rule of Court 8.504(d)(1). The type used to prepare this brief is 13 point Times New Roman, and the lines are at last one and one-half spaced.

Dated: November 5, 2007 By: _____
Larry M. Golub

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CECILIA ENCARNACION et al.,

Plaintiffs and Appellants,

v.

20TH CENTURY INSURANCE COMPANY,

Defendant and Appellant.

B179825 c/w B182737

(Los Angeles County
Super. Ct. Nos. BC174047, BC320312)

APPEALS from judgments of the Los Angeles Superior Court, Stephen Czuleger and John Shepard Wiley, Judges. Affirmed with directions.

Barger & Wolen, Kent R. Keller, Larry M. Golub, San-Chuen Lau, Michael A. S. Newman, Vivian I. Orlando; Demler, Armstrong & Rowland, Terry A. Rowland, Robert W. Armstrong and James P. Lemieux for Defendant and Appellant.

Law Offices of Ian Herzog, Ian Herzog and Evan D. Marshall for Plaintiffs and Appellants.

EXHIBIT A

INTRODUCTION

In case number B179825 (Super. Ct. L.A. County, 2004, No. BC174047), decided by Judge Stephen Czuleger, defendant 20th Century Insurance Company (20th Century)[1] appeals from a judgment in favor of plaintiff Cecilia Encarnacion, individually and as guardian ad litem for her children Nubia Cecilia Gonzalez, Marcos A. Gonzalez, Jr. and Hilda Cecilia Gonzalez (collectively Encarnacion). 20th Century claims legal and evidentiary errors, as well as insufficient evidence to support the judgment.

Encarnacion appeals from the same judgment, claiming the trial court erred in denying her leave to amend her complaint.

In case number B182737 (Super. Ct. L.A. County, 2005, No. BC320312), decided by Judge John Shepard Wiley, Jr., Encarnacion appeals from a judgment of dismissal entered after the court sustained 20th Century's demurrer without leave to amend. She claims error in sustaining the demurrer on several grounds.

This is the second time the parties have come before us on appeal. In Los Angeles County Superior Court No. BC174047, Encarnacion appealed from a summary judgment in favor of 20th Century. In *Encarnacion v. 20th Century Insurance Company* (May 8, 2000, B127594) [nonpub. opn.] (*Encarnacion I*), we reversed the summary judgment and remanded the case for trial.

On this appeal, we affirm both judgments. We also remand case number B182737 for further proceedings.

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[1] Although 20th Century is now 21st Century Insurance Company, we use the prior designation, as it has been used throughout the litigation.

FACTS

The Killing of Marcos Gonzalez

Ramon Aguilera (Aguilera) moved to Los Angeles in 1967 and bought a property on Camulos Street in East Los Angeles. There were two houses on the property. In addition, a garage had been converted to a living unit. In 1989, Aguilera retired and moved to Valinda. He then rented out the two houses on the Camulos Street property. The main house was rented to Teresa De La Rosa, while the other house was rented to Marcos Gonzalez (Gonzalez) and Encarnacion, who lived there with their three children.

Aguilera considered the tenants his friends. He visited them and attended social events at their houses. He also acted as his own handyman and went to the Camulos Street property on Tuesdays or Thursdays to do work. When Aguilera went to the property at night, he would take his gun with him because he believed East Los Angeles was a dangerous area at night.

At the end of February 1994, Gonzalez and his family had been living at the house for about a year and were about six months behind in their rent.[2] Aguilera had made an agreement with Gonzalez in December that Gonzalez and his family would not have to pay the back rent and instead could use the money to move out. During January and February, Aguilera kept checking to see when they were going to move out, but they were still looking for a place. In mid-February, Aguilera told both Gonzalez and Encarnacion that he needed them to move out so his daughter and her children could move in. They told him they already had their things packed and would move out by March 1.

Around 4:00 or 5:00 in the afternoon on March 1, Aguilera drove to the Camulos Street property. He took his gun with him because he would be out at night. When he arrived, Aguilera heard noises coming from the Gonzalez house. He was surprised to

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[2] According to Encarnacion, they had been living in the Camulos house for three years.

find that Gonzalez and his family had not moved out. When Aguilera knocked on the door, Encarnacion answered the door and told him that Gonzalez had gone out with their children.

Aguilera decided to wait for Gonzalez and went to sit in his car. Walking away from the house, he saw the tenant who lived in the garage unit and said to him, "I am going to wait for that cabron if I have to wait all night long."[3]

Instead of waiting in his car, Aguilera decided to walk to a nearby store on Eighth Street. He grabbed his gun, put a bullet in the chamber, put on the safety and put the gun in his waistband. He went to the store, bought something, and then talked to some friends who lived across the street from the store. After about an hour or an hour and a half, Aguilera walked back to Camulos Street. By that time, it was dark.

Aguilera saw Encarnacion standing at the front door. When she saw Aguilera, she went inside and a moment later, Gonzalez came to the door.

Encarnacion heard Gonzalez and Aguilera arguing about the rent. Aguilera asked Gonzalez why they didn't move out. Gonzalez replied that he didn't have money to feed his children, much less to move out. Aguilera responded that he wasn't a "public benefit" for anybody. Gonzalez made some offensive comments and then angrily told Aguilera, "Either you kill me [or] I'll kill you." He then turned and went back into the house, slamming the screen door.

Aguilera turned to leave but heard the door open again. According to Aguilera, he panicked. He remembered turning around and pulling out his gun but not pointing the gun at Gonzalez or pulling the trigger. The gun went off and Aguilera heard Gonzalez say, "Oh, God; oh, God; oh, God." Aguilera went toward the house and saw Gonzalez lying by the door. He turned around and left, walking down the street between some apartments on Eighth Street. On the way he threw his gun in a trash can. Aguilera called

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[3] Aguilera meant the Spanish term "cabron" to be a derogatory reference to Gonzalez.

for a taxi and went to a friend's house in Downey. About six days later, Aguilera turned himself in to the police.

According to Encarnacion, Gonzalez said to Aguilera, "Pull it." Aguilera turned around, pulled a gun out of his waistband with his right hand and aimed it at Gonzalez. His hands and his legs were shaking, and he had to steady the gun with his left hand. She believed that Aguilera shot Gonzalez on purpose. Gonzalez died of his wounds.

The Insurance Policy

Aguilera had a homeowners policy issued by 20th Century. Section I of the policy addresses coverages. In the Section I exclusions, the policy provides: "We do not cover loss resulting directly or indirectly from any of the following, whether or not any other cause or happening contributes concurrently or in any sequence to the loss:

"1. Intentional or criminal acts of any insured, if the loss that occurs:

"a. is a foreseeable result of such act; or

"b. is in fact the intended result of such act."

Section II of the policy contains personal liability and medical payment coverages. In the Section II exclusions, the policy provides that these coverages "do not apply to:

"a. bodily injury or property damage which is a foreseeable result of an intentional or criminal act of any insured or which is in fact intended by any insured;

"b. bodily injury or property damage arising out of business pursuits of any Insured or the rental or holding for rental of any part of any premises by any insured."

The Criminal Prosecution and Wrongful Death Action; Discussions Regarding a Plea, Insurance Coverage and Settlement

A felony complaint charging Aguilera with murder while personally using a firearm (Pen. Code, §§ 187, subd. (a), 12022.5, subd. (a)) was filed on or about March 9, 1994. Aguilera retained attorney Jay Jaffe (Jaffe) to defend him in the criminal case. Jaffe believed there was evidence to support a claim of self-defense. In addition, Jaffe had Aguilera examined by neurologist Arthur Kowell, M.D. Dr. Kowell concluded that

Aguilera was suffering from organic brain damage which prevented him from forming an intent to kill.

On April 25, 1994, Encarnacion filed a civil action against Aguilera, alleging causes of action for wrongful death, intentional infliction of emotional distress, and negligence (wrongful death action). After Aguilera was served with the complaint, criminal defense attorney Jaffe forwarded the papers to 20th Century, demanding that 20th Century defend and indemnify Aguilera.

Encarnacion was represented in the wrongful death action by attorney Paul deMontesquiou (deMontesquiou). On May 4, 1994, he spoke to 20th Century's claims adjuster, Jamie Brown (Brown). He told her that after speaking to Encarnacion and Jaffe, it appeared that the case was one of negligence. Brown advised him that there was a coverage issue. If Aguilera's act was negligent, there would be coverage, but if it was deemed intentional, there would be no coverage. Brown reiterated this in subsequent conversations. She never spoke of a "criminal act," only referring to an intentional versus a negligent or accidental act.

At that time, Brown believed an important issue in determining coverage was whether Aguilera's act was intentional versus negligent or accidental. Brown wrote to her supervisor, Janet Julien (Julien), questioning whether 20th Century should "deny coverage based on an intentional act." On May 23, 1994, Brown indicated that she did not feel they had enough information at that point to deny a claim, so she recommended that 20th Century "handle [the] case under reservation of rights at this time until more details are learned."

In further conversations, deMontesquiou questioned Brown as to whether there might be an additional umbrella policy providing excess coverage. He was concerned, because Brown said that 20th Century would only pay the policy limits of $100,000. Brown said she would look into that. She also mentioned that 20th Century would be obtaining counsel to represent Aguilera.

By letter dated June 9, 1994, 20th Century informed Aguilera that it was accepting his claim subject to a full reservation of rights. The letter, from the division claims

manager, David C. Lane (Lane), mentioned at least four possible grounds for denying coverage: (1) the Sections I and II exclusions for intentional or criminal acts; (2) Insurance Code section 533, which precludes indemnity for willful acts;[4] (3) the Section II exclusion for bodily injury arising out of business pursuits; and (4) the Section II exclusion for bodily injury arising out of the rental of premises owned by an insured.

The letter specifically advised, among other things, that "should any of the allegations outlined in the complaint be deemed an intentional act, Exclusion 1(a) on page 5 of your Homeowner's policy would apply." It also advised that Insurance Code section 533 prohibits "indemnity for willful acts of an insured."

Aguilera showed the letter to his son, who did not understand it and suggested that he show the letter to criminal defense attorney Jaffe. At one of his court appearances in June, Aguilera showed the letter to Jaffe who looked at it and returned it to Aguilera. Jaffe did not remember seeing the reservation of rights letter, however.

20th Century sent information regarding the wrongful death action to the law firm of Hill, Genson, Crandall & Wade (Hill Genson) for defense of the action. Attorney Thomas W. Shaver (Shaver), who ordinarily would have handled the matter, was going on vacation and asked attorney Todd Michael Castronovo (Castronovo) to handle it. Castronovo spoke to claims adjuster Brown on June 27, 1994. She told him about 20th Century's reservation of rights. He told her he would meet with Aguilera to learn more about the case and to obtain the appropriate *Cumis*[5] waivers. After speaking with Brown, it was Castronovo's understanding that an intentional act on Aguilera's part, versus an

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[4] Section 533 provides: "An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others."

[5] *San Diego Federal Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358 [providing for a right to independent counsel where insurer may have conflict of interest based on reservation of rights].

accidental act, would create a conflict of interest, triggering the need to appoint independent *Cumis* counsel.[6]

Castronovo spoke to Jaffe on June 28, 1994 to schedule a meeting with Aguilera. Castronovo then spoke to Hill Genson attorney Robert E. Murphy (Murphy), who would be going to the meeting with Jaffe and Aguilera. Castronovo told Murphy there was a reservation of rights letter, although Hill Genson did not have a copy of it. Castronovo also told Murphy that an intentional act would trigger a conflict of interest and the need for *Cumis* counsel.

After Shaver returned from his vacation, he spoke to Encarnacion's attorney, deMontesquiou. Shaver explained "that there needed to be a plea or a finding of something less than second degree murder . . . because the issue is whether it was intentional versus negligent, and second degree murder and above would be intentional and below that would be nonintentional." If there was such a plea, 20th Century would cover the loss and Encarnacion would have access to the policy limits of $100,000. Shaver added that deMontesquiou should "get rid of intentional torts and refine [the complaint in the wrongful death action] to negligence so that would improve [his] client's opportunity to be insured if in fact he were to be insured or covered."[7]

Shaver believed that the critical issue was intent. Had he believed that a plea to any criminal act would exclude coverage, he would have advised Aguilera to that effect.

On July 12, Jaffe and Aguilera met with Hill Genson attorney Murphy at Jaffe's office. At that time, based on conversations with Shaver and deMontesquiou, Jaffe believed that if Aguilera's shooting of Gonzalez was negligent, there would be coverage under the 20th Century policy. Therefore, if Aguilera pled guilty to an act which was

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[6] Castronovo asked Brown for a copy of 20th Century's reservation of rights letter. He did not know if Hill Genson ever received a copy of the letter.

[7] Shaver denied specifically representing to deMontesquiou, however, that if Aguilera pled guilty to anything less than second degree murder that 20th Century would pay its policy limits or that intentional versus negligent was the only coverage issue.

negligent, there would be coverage, but if he pled guilty to an intentional act, there would be no coverage. Jaffe understood that if Aguilera pled guilty to a negligent act, the civil case would be settled for the $100,000 policy limits and therefore there would be no conflict of interest requiring independent counsel for Aguilera. Jaffe believed that the two cases could be resolved within a month. Jaffe explained this to Aguilera. Aguilera signed a waiver of conflict of interest. The waiver provided, however: "This waiver shall be valid for 30 days only after which time this waiver shall be revoked pending further decision on whether an unconditional waiver will be executed."

Thereafter, Jaffe, deMontesquiou and Shaver discussed talking to the district attorney's office to arrange a plea to an involuntary charge. After numerous contacts with the district attorney's office, deMontesquiou spoke with a senior deputy district attorney, Kenneth Wullschleger (Wullschleger). He urged that Aguilera be allowed to plead guilty to involuntary manslaughter to allow the victim's family to receive insurance money. Wullschleger advised deMontesquiou that he would need to persuade Gonzalez's other family members to agree to the plea bargain. Many of them were very upset and "wanted Mr. Aguilera to be hanged." DeMontesquiou had a meeting with all the members of Gonzalez's family, and they agreed to allow Aguilera to plead to involuntary manslaughter so that Encarnacion and the children would receive the insurance money.

On July 25, 1994, Shaver wrote to claims adjuster Brown that "[Jaffe] informs me that he has worked out a tentative arrangement with the District Attorney whereby the case may be settled. He made a demand on behalf of the insured that 20th Century pay the $100,000.00 policy limits to plaintiffs to attempt to settle the case. He believes a settlement might help with the criminal hearing."

Jaffe confirmed in a letter to Brown on August 2, 1994 that he was "optimistic that the District Attorney's office will accept the plea to what would amount civilly as gross negligence. As you have been informed in the past, my client suffers organic and inorganic brain dysfunction which clearly demonstrates that he did not have any criminal intent in killing Marcos A. Gonzalez on March 1, 1994.

"My client was validly covered by a policy of insurance . . . . Even though you sent a Reservation of Rights letter, it is clear through investigation that I have provided you that the Reservation of Rights letter should not have been sent. My client fully admits that he was negligent in shooting and killing Mr. Gonzalez, but did not intend to do so. Therefore, since a very clear conflict has arisen between 20th Century and my client, I feel it necessary to fully protect my client and your insured's interest by compensating my office . . . as independent counsel for Mr. Aguilera in this civil matter." Jaffe withdrew Aguilera's previous *Cumis* waiver.

The following day, August 3, 1994, deMontesquiou wrote to Shaver to confirm that if 20th Century offered the policy limit of $100,000, "Plaintiffs will accept this offer, provided that an asset check and investigations concerning other applicable insurance coverage are fruitless. In exchange, Plaintiffs will dismiss the entire [wrongful death] action, including the intentional and negligent causes of action." The offer would be kept open for 120 days—until December 1, 2004.

On August 4, 1994, Aguilera pled guilty to involuntary manslaughter. He did so because of the agreement that "the [insurance] money would be given to Mrs. Gonzalez [Encarnacion]" if he did.

Shaver then wrote to Brown notifying her that Jaffe had informed him that Aguilera had pled guilty to involuntary manslaughter. He also notified her of deMontesquiou's offer.

20th Century's Denial of Coverage

According to Carol Brennan (Brennan), one of 20th Century's claims attorneys, "[t]here had been a long standing issue over the criminal and intentional acts exclusion." Specifically, "a number of policy holders and their attorneys had been raising the question of whether the criminal acts exclusion was a standalone exclusion or if it was modified by intentional acts." As Brennan understood the exclusion, however, it covered any criminal act, whether intentional or negligent.

At the beginning of June 1994, Brennan had 20th Century retain attorney Michael Leahy (Leahy) of Haight, Brown & Bonesteel to provide it with advice on coverage issues. On June 3, Brennan wrote to Leahy, outlining the situation. She stated: "We ask that you monitor the criminal proceedings and keep us informed of whether Mr. Aguilera is convicted of, or pleas to any criminal charge. Depending on the outcome of the criminal action, we may wish to consider bringing a Declaratory Relief action, based on the intentional/criminal acts exclusion. [¶] Apart from the intentional/criminal acts issue, we have discovered that the loss took place on the Insured's rental property. The rental is not listed as an Insured location on the Policy. The Insured did not purchase Option R, which extends liability to a separate dwelling listed in the Declarations. Because the liability extension was not purchased, we believe that the business pursuits exclusion may apply." Brennan asked Leahy to review the policy and make "specific recommendations for further handling."

On July 5, 1994, Leahy wrote back to Brennan, informing her that Aguilera's preliminary hearing had been continued, and that "[b]oth Mr. Jaffe and the Deputy District Attorney . . . stated that there would be a possible disposition in the matter. . . . [¶] . . . We will continue to monitor the matter, so as to determine what disposition there might be. Obviously, if he pleads to a lesser offense the Criminal Acts exclusion should take this matter out of coverage."

Brennan did not send a copy of Leahy's July 5 letter to Shaver. Brennan understood that if Shaver or any of the Hill Genson attorneys knew that a plea to a criminal charge would exclude coverage, the attorney would have an obligation to inform Aguilera of that fact. She explained that she "would have expected" that Shaver understood 20th Century's coverage position and given that information to Aguilera.[8]

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[8] Brennan stated in her deposition, however, that it was her understanding that Hill Genson would not involve itself in issues of coverage. All communication from 20th Century regarding coverage would have to come directly from 20th Century.

20th Century had a form which was used when a claims adjuster had a coverage question. The adjuster would fill out a coverage questionnaire giving the facts of the case and the issue to be resolved. The questionnaire would be routed from the adjuster to the supervisor, then to the unit manager, then to the manager, and finally to the claims attorney unit at the home office. Each person would give his or her opinion about the coverage issue and make a recommendation as to what should be done.

Brown had filled out such a questionnaire in May 1994, framing the issue as "should we deny coverage based on an intentional act?" Julien, Brown's supervisor, noted that a criminal action was pending and wrote: "I agree with handling under an ROR [reservation of rights] for intentional act, business exclusion, rentals may be primary business." Bob Grabot (Grabot), the unit manager, added that "our insured's intent may be difficult to prove here as far as murder goes. The reservation of rights may be proper as we may not be indemnifying the insured if the acts are found to be intentional." The manager "agree[d] with recommendation to accept defense under a comprehensive reservation of rights, intentional act, coverage R, business pursuits." Brennan then recommended that 20th Century defend under a reservation of rights based on the intentional acts exclusion, Insurance Code section 533, and a lack of coverage for punitive or willfully caused damage.

Brennan did not contact any of the people who had filled out the questionnaire before her to ask them about their focus on an intentional act, as opposed to a criminal act. Brennan also had read the claims adjusters' notes; this was something she normally did so that she could advise the adjuster as to whether the adjuster was making correct statements to insureds or claimants regarding coverage. From these notes she knew that Brown was in contact with Aguilera's and Encarnacion's attorneys. Brennan did not talk to Brown regarding the representations she had made as to coverage or exclusions, however.

Brennan dictated the June 9, 1994 reservation of rights letter for Brown, who prepared the letter for division claims manager Lane. Brennan stated that the reservation of rights was based on an "intentional act."

Brennan sent a copy of Leahy's July 5, 1994 letter to 20th Century's claims department on July 11. Grabot, Julien, Lane and Brown all received copies of the letter. On the same day Brown noted receipt of the letter in her log, July 13, she also noted Aguilera's upcoming preliminary hearing date.

Lane saw no reason why the letter or its contents should have been communicated to Aguilera. He believed the reservation of rights letter was sufficient. Additionally, since Leahy used the terms "if" and "should," Lane believed the letter was not definitive as to coverage, and there was no reason to forward it to Aguilera or his attorneys. Lane acknowledged that he understood the likelihood that if Aguilera pled guilty the criminal acts exclusion would apply. He additionally stated that "[b]y sending this letter to Mr. Aguilera, we might adversely affect his plea bargain with the District Attorney's office." He explained further that if Aguilera thought 20th Century would disclaim coverage as a result of the plea bargain, then he might reject the plea bargain, be convicted of a more serious charge and serve more time in prison.[9]

On August 8, 1994, after Aguilera pled guilty to involuntary manslaughter, Brennan wrote a memorandum to Lane, notifying him of the plea, that 20th Century was going to deny coverage, and that Haight, Brown & Bonesteel would write the denial letter. She requested that Lane notify her if Aguilera took exception to the denial.

Leahy wrote to Aguilera on August 8, 1994 that "[s]ince the death of Marcos Gonzalez was the foreseeable result of the criminal act of Mr. Aguilera, Exclusion 1.a. of the policy applies . . . because the exclusion applies to bodily injury which is a foreseeable result of an intentional or criminal act of any insured. [¶] Because Mr. Aguilera has pled guilty to a felony out of which the civil action arose, Exclusion 1.a. of the policy is effective and no coverage is available under the 20th Century policy to

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[9] Lane also denied that Shaver's July 25, 1994 letter to Brown regarding Aguilera's tentative arrangement with the District Attorney regarding settlement and Aguilera's demand for payment of the policy limits reflected a misunderstanding as to 20th Century's position regarding coverage.

defend or indemnify Mr. . . . Aguilera. Consequently, 20th Century has asked that I advise you that it regretfully cannot defend you in this action, nor can it indemnify you for any damages which may be awarded [to] the heirs of Mr. Gonzalez." (Italics omitted.)

Leahy also wrote to deMontesquiou on August 8, 1994. He stated that his office represented 20th Century, who had asked him to advise deMontesquiou of its position with regard to Aguilera's claim. He stated that since Gonzalez's death was the foreseeable result of Aguilera's criminal act, the intentional or criminal act exclusion applied, and there was no coverage under the policy.

On August 9, 1994, deMontesquiou responded to Leahy that Leahy had misinterpreted Penal Code section 192, subdivision (b). He explained Aguilera was engaged in the lawful act of collecting rent but did so negligently, resulting in involuntary manslaughter but no intentional conduct. He concluded that "[s]ince the insured has admitted negligence and has demanded that 20th Century tender the policy limit, your client's failure to pay constitutes first and third party bad faith." A copy of the letter also was sent to Shaver. Leahy forwarded a copy of the letter to Brennan, pointing out that deMontesquiou "apparently [was] not recognizing the 'criminal act' aspect to the exclusion, and focusing solely on the 'intentional act' aspect thereof."

Jaffe, upon learning of 20th Century's position, wrote to Leahy. He stated his position that the intentional or criminal act exclusion "only applies to foreseeable results of an intentional act not amounting to a crime, or a criminal act where the result is directly intended or foreseeable as a result of intentional conduct." He also withdrew his request to act as Aguilera's independent counsel.

After further correspondence, Leahy wrote to Brennan on August 11, 1994, forwarding letters from deMontesquiou and Jaffe and stating: "While I disagree with the strained analysis set forth by both of these gentlemen, it does not appear as though they want to let this matter drop. The question, therefore, becomes how you wish to proceed with this matter. The obvious would be to merely stick with our denial and hope that these people go away, recognizing that if they do not, you will undoubtedly be faced with a bad faith case . . . . As suggested by Mr. demontesquiou [*sic*], that judgment might be

in excess of the policy limit. [¶] The second way to proceed would be to file a declaratory relief action now to determine the effectiveness of the 'criminal acts' component of the exclusion, which I continue to feel will be upheld."

In addition to contacting Leahy, deMontesquiou called Shaver and asked him if he knew about the criminal acts exclusion and that Leahy had been "laying [in] the weeds" all along. Shaver denied knowing anything about Leahy and told deMontesquiou that he felt "victimized" as well. In response, deMontesquiou told Shaver that he needed to "press . . . upon 20th Century" that the shooting was a negligent act.

In deMontesquiou's mind, Hill Genson's and Shaver's continued defense of Aguilera indicated that Leahy was playing games. If there was no coverage, there would have been a substitution of attorney or a declaratory relief action. Additionally, Leahy sent deMontesquiou a letter brief with authority which deMontesquiou considered extremely weak, in that the cases cited on the issue of reasonable expectation of coverage were from states that were not as progressive as California.

About a year after Leahy's August 8, 1994 letters, deMontesquiou spoke to Leahy. Leahy continued to deny coverage but offered to settle the case for $50,000 to $60,000. This offer confirmed deMontesquiou's belief that Leahy was playing games and that 20th Century was not being genuine about their coverage position. Wanting to give 20th Century every reasonable opportunity to change its mind, deMontesquiou wrote letters asking 20th Century to pay the policy limits and sought Shaver's help in convincing the company to pay the claim.

It was deMontesquiou's belief that 20th Century's position violated "the notion of reasonable expectations of coverage." In his view, "[t]here is no way a homeowner's policy would exclude every criminal act because there would be an inordinate number of . . . technical violations and technical criminal acts . . . that would void coverage." Shaver agreed with deMontesquiou that 20th Century's position was wrong. Shaver felt that according to the language of the policy, the criminal acts exclusion did not apply and there was coverage for Aguilera.

The Wrongful Death Action Proceeds

In light of 20th Century's refusal to pay the policy limits, the wrongful death action proceeded. Despite Leahy's August 8, 1994 letter, Shaver continued to provide Aguilera with a defense.

Before the wrongful death action went to trial, Shaver transferred the case to Hill Genson partner Thomas Scutti (Scutti).[10] Encarnacion's attorney deMontesquiou spoke with Scutti. According to deMontesquiou, Scutti said that 20th Century should have paid the claim and acted in bad faith.[11] 20th Century now wanted Scutti to find a way to protect Aguilera and proposed that Aguilera and Encarnacion enter into a stipulated judgment. The problem with this proposal, as deMontesquiou saw it, was that it would not be binding on 20th Century, only on the parties to the transaction. Scutti testified that he "was trying to work out a covenant not to execute with Mr. deMontesquiou to protect Mr. Aguilera." He never got to the point of suggesting a stipulated judgment, in that deMontesquiou was unwilling to enter into a covenant not to execute.

On May 9, 1995, Leahy sent letters to Aguilera and Shaver, stating that effective June 8, 20th Century would be withdrawing from the defense. The trial was scheduled to begin less than two weeks after the June 8 effective date. In response, deMontesquiou wrote to 20th Century, accusing it of unethical conduct in abandoning Aguilera on the eve of trial. On May 25, Shaver notified Aguilera that 20th Century had reconsidered its position and had decided to continue the defense, although 20th Century still took the position that it would not indemnify Aguilera for any damages awarded.

The wrongful death action thus proceeded to trial. On July 10, 1995, the jury returned a verdict in favor of Encarnacion for $5.6 million. Judgment was entered on

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[10] According to deMontesquiou, Shaver transferred the case to Scutti because he was concerned about bad faith issues. Scutti testified, however, that Shaver merely asked for his assistance on some law and motion work because he was engaged in trial. Shaver represented Aguilera at trial.

[11] According to Scutti, he never told deMontesquiou that, and doing so would be inappropriate.

September 6, 1996. Thereafter, Aguilera assigned his rights against 20th Century to Encarnacion.

PROCEDURAL BACKGROUND

Case Number B179825

On July 3, 1997, Encarnacion and Aguilera filed the instant action against 20th Century, Hill Genson,[12] Shaver and Scutti. The first cause of action was by Encarnacion against 20th Century for breach of contract. The second cause of action by all plaintiffs against 20th Century was for breach of the implied covenant of good faith and fair dealing. The third cause of action was by Aguilera against Hill Genson, Shaver and Scutti for legal malpractice.

20th Century filed an answer and a cross-complaint for declaratory relief, seeking a declaration that it had no duty to defend Aguilera in the wrongful death action or to indemnify him for damages in that action. Aguilera and Encarnacion filed answers to the cross-complaint and asserted a number of affirmative defenses, including unclean hands, waiver, and estoppel.

20th Century filed a motion for summary judgment. The trial court granted the motion. It explained that Aguilera "at least partly acted like a landlord during the relevant times, as to which the business exclusion applies." In addition, "[i]n light of the dispositive issue involving the business exclusion, the Court need not reach the issues of estoppel and the exclusion for criminal acts."

Aguilera and Encarnacion appealed. In *Encarnacion I*, "[w]e conclude[d] that the doctrine of estoppel require[d] reversal of the judgment." (At pp. 9-10.) We pointed out that an insurer may lose a contractual right through estoppel, when the insurer's conduct reasonably causes an insured to rely on it to his detriment. (*Id.* at p. 10, citing *Chase v.*

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[12] At that point, Hill Genson had become Genson, Even, Crandall & Wade. We refer to the law firm as Hill Genson to avoid confusion.

Blue Cross of California (1996) 42 Cal.App.4th 1142, 1151.) In order to establish estoppel, a party must prove four elements: "'(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) he must rely upon the conduct to his injury.' (*Spray, Gould & Bowers v. Associated Internat. Ins. Co.* (1999) 71 Cal.App.4th 1260, 1268, internal quotation marks omitted.)" (*Encarnacion I*, at p. 10.)

The instant case, we observed, "presents the classic situation where a party's left hand does not know what its right hand is doing. 20th Century's corporate counsel, Carol Brennan, and its coverage counsel, Michael Leahy, determined at the outset that if Aguilera pleaded guilty to *any* crime, there would be no coverage. Meanwhile, 20th Century's claims adjuster, Jamie Brown, and its 'panel' counsel, Thomas Shaver, were telling deMontesquiou, counsel for the Encarnacion plaintiffs, that 20th Century would pay the policy limits as long as Aguilera did not plead guilty to an 'intentional criminal' act. With that understanding, deMontesquiou and Shaver negotiated a global settlement with the District Attorney's Office, the Encarnacion plaintiffs, and Aguilera." (*Encarnacion I*, at pp. 10-11.)

Since "'an attorney's knowledge is imputed to the client'" (*Bennet v. Shahhal* (1999) 75 Cal.App.4th 384, 391, fn. 3), we found that, "[b]ased on the knowledge of Brennan and Leahy, . . . 20th Century 'knew the facts,' i.e., it would deny coverage if Aguilera pleaded guilty to any crime." (*Encarnacion I*, at p. 11.) Next, we found that 20th Century intended that its conduct be acted upon or acted in a manner which led Aguilera to believe 20th Century had that intent. "In several conversations, Shaver and Brown told deMontesquiou that negligent conduct was covered and that intentional conduct was not. They also told deMontesquiou that if Aguilera pleaded guilty to something less than second degree murder, 20th Century would pay the policy limits. Those discussions provided the foundation for the resolution of the cases." (*Ibid.*)

We found "no evidence that Aguilera or his attorneys believed that a plea to involuntary manslaughter would strip him of coverage." (*Encarnacion I*, at p. 12.) As to detrimental reliance, we observed that Jaffe recommended that Aguilera plead guilty to involuntary manslaughter based on 20th Century's promise to pay the policy limits to the Encarnacion plaintiffs. "Similarly, Aguilera stated in his declaration that he agreed to plead guilty because 20th Century had agreed to pay the policy limits to settle the civil action. We [found] it clear that pleading guilty to involuntary manslaughter, as opposed to going to trial and arguing self-defense, constitutes a detriment." (*Ibid.*, fn. omitted.)[13]

In reversing the summary judgment, we rejected a number of arguments raised by 20th Century. We rejected the argument that Aguilera's estoppel claims was "nothing more than a failed attempt to create coverage where none ever existed. (See *Aetna Casualty & Surety Co. v. Richmond* (1977) 76 Cal.App.3d 645, 652–653.)" (*Encarnacion I*, at p. 10, fn. 17.)

We also rejected the claim "that Shaver and Brown lacked actual and ostensible authority to make representations about coverage." (*Encarnacion I*, at p. 13.) As to Shaver, we found that under the circumstances (*Granco Steel, Inc. v. Workmen's Comp. App. Bd.* (1968) 68 Cal.2d 191, 205), an attorney in deMontesquiou's or Jaffe's position would have relied on Shaver's representations in attempting to settle the case. (*Encarnacion I*, at p. 13.) As to Brown, we found it clear that, as a claims adjuster, she had at least apparent authority to make representations regarding coverage. (*Ibid.*, citing *State Farm Mut. Auto. Ins. Co. v. Porter* (9th Cir. 1951) 186 F.2d 834, 841–842.)

Following our opinion, the case was returned to the trial court.[14] 20th Century moved for summary adjudication of the issue of its contractual duty to defend and

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[13] We found additional detriment in Aguilera's decision to execute the *Cumis* waiver and forego independent counsel (see *Tomerlin v. Canadian Indemnity Co.* (1964) 61 Cal.2d 638, 646–648) based upon Brown's and Shaver's representations as to coverage. (*Encarnacion I*, at p. 12.)

[14] On May 26, 2000, we denied 20th Century's petition for rehearing. The Supreme Court denied 20th Century's petition for review on August 9, 2000.

indemnify. The trial court denied that motion. Aguilera dismissed his complaint as to Shaver and Hill Genson.

20th Century then moved for adjudication of the issue of the applicability of policy exclusions, raised by its cross-complaint, before trial of Encarnacion's and Aguilera's estoppel defenses. After extensive briefing by the parties, the trial court ruled: "The Order of Proof shall proceed as follows: First, plaintiffs shall prove their cause of action for breach of covenant of good faith and fair dealing based on a promissory estoppel claim in a jury trial. Should defendants prevail, then judgment shall be entered for the defendant. Should plaintiffs prevail, then the jury trial shall proceed with the damage phase."

20th Century filed another motion for summary judgment. This was based on the claim that alleged misrepresentations by Shaver and Brown were absolutely privileged under Civil Code section 47. The trial court denied the motion.

Encarnacion filed a petition for writ of mandate challenging the trial court's ruling on the order of proof. She argued that the equitable issue of estoppel should be tried by the court, not a jury. On June 19, 2002, we issued an opinion and order granting the petition. (*Encarnacion v. Superior Court* (Jun. 19, 2002, B157545) [nonpub. opn.].) We agreed that the issue of estoppel must be tried by the court rather than by a jury.

20th Century filed a petition for rehearing and its own petition for writ of mandate, by which it challenged the trial court's denial of its motion for summary judgment. We denied the petition for rehearing on July 18, 2002, and 20th Century filed a petition for review. The Supreme Court denied the petition for review on August 14, 2002. We denied the petition for writ of mandate on June 27, 2002.

Thereafter, Encarnacion and Aguilera filed a motion for summary adjudication of equitable and bad faith issues. Specifically, they sought adjudication that 20th Century forfeited its right to assert any policy exclusions; 20th Century was equitably estopped to assert any policy exclusions; and 20th Century breached its duty of good faith and fair dealing.

While the motion for summary adjudication was pending, 20th Century filed a number of motions in limine. One was to limit the court trial of the equitable issues to promissory estoppel and not to allow Encarnacion and Aguilera to argue equitable estoppel or forfeiture.[15] The trial court denied this motion. It appears that it also denied plaintiffs' summary adjudication motion.

The case proceeded to a court trial before Judge Czuleger. On September 26, 2003, the trial court issued a statement of decision. The court found that plaintiffs had met their burden as to all three equitable theories they proffered: forfeiture, equitable estoppel and promissory estoppel.

As to forfeiture, the trial court found that "20th Century's employees' conduct and their intention to rely on the [criminal acts] exclusion, despite representations to all involved that the exclusion would only apply to intentional criminal acts exhibits 20th Century's subjective intent" to mislead Aguilera, the policyholder. "Hence, plaintiffs have established forfeiture and 20th Century, therefore, has forfeited its right to rely on the criminal acts exclusion." (Citing *Chase v. Blue Cross*, *supra*, 42 Cal.App.4th 1142, 1157.)

As to equitable estoppel, the trial court relied on both 20th Century's affirmative representations as to coverage and its failure to meet its legal duty to represent its position on coverage clearly and to clarify that position when it appeared clear that Aguilera was operating under a misapprehension as to 20th Century's position. By so doing, it caused Aguilera to rely on 20th Century's representations and inaction to his detriment.

Finally, with respect to promissory estoppel, the trial court found "[t]he evidence is murky because certain witnesses provided clearly contradictory testimony." However,

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[15] In our opinion granting Encarnacion's petition for writ of mandate, we referred to both promissory estoppel and equitable estoppel. In our disposition, we ordered that the trial court "set[] trial on the issue of estoppel as a court trial." (*Encarnacion v. Superior Court*, *supra*, at p. 5.)

"[i]n the end, one thing is clear, much confusion was generated in participants' knowledge and that confusion resulted from 20th Century's actions including its representations, direct[ly] and indirectly, that coverage was still available." Specifically, 20th Century's communications with Aguilera and the attorneys led them to believe that coverage turned on whether there was an intentional act. "20th Century at every opportunity engaged in conduct and made representations which would have caused any reasonable insured and his representatives to believe that a guilty plea would not foreclose coverage. Most importantly, 20th Century represented by word and action this promise of coverage, yet 20th Century knew that there would be no coverage." Therefore, "20th Century's representations raise promissory estoppel to the exclusion of all policy defenses."

Encarnacion and Aguilera then moved for leave to file a first amended and supplemental complaint. They claimed amendment was "necessary and appropriate to conform to proof and to clarify the right of the Encarnacion plaintiffs to recover damages in their own right and not simply as assignees for defendant 20th CENTURY INSURANCE COMPANY'S breach of the duty of good faith and fair dealing." They sought to add a cause of action under Insurance Code section 11580 on behalf of Encarnacion as judgment creditor and third party beneficiary of Aguilera's insurance contract.

The trial court denied the motion. It explained that the motion "was untimely and that no explanation or excuse for the delay in filing the motion for leave to amend was given as the Encarnacions' standing as judgment creditors has existed for over seven years, and leave to amend was only first sought after the Statement of Decision in the first phase of the bifurcated trial was completed." Additionally, the motion violated then-rule 327 of the California Rules of Court[16] by failing to include a separate declaration as to the effect of the amendment, why it was needed, when the facts on which it was based were discovered and why the motion was not brought earlier.

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[16] Now see California Rules of Court, rule 3.1324.

The same day as the hearing, 20th Century filed a motion for summary adjudication of Encarnacion's claims for non-economic damages, emotional distress, punitive damages and *Brandt* attorney's fees.[17] Encarnacion then filed a petition for writ of mandate challenging the trial court's denial of the motion for leave to amend the complaint. We summarily denied her petition on December 19, 2003.

Thereafter, 20th Century filed a motion for summary judgment on the grounds that Aguilera and Encarnacion were not entitled to equitable relief, in that Aguilera was guilty of unclean hands and equitable relief was not necessary to avoid injustice. In turn, Encarnacion filed a motion for summary adjudication of the issue of duty.[18]

On 20th Century's motion for summary adjudication of Encarnacion's damages claims, the trial court granted the motion as to Encarnacion's claim for punitive damages, on the ground punitive damages are not assignable. It denied the motion as to the other claims on the ground they were not the proper subject of a motion for summary adjudication. It did agree with 20th Century that these claims were not assignable to Encarnacion, however. 20th Century then filed its motion in limine no. 1 seeking to exclude all evidence as to Encarnacion's claims for non-economic damages, emotional distress and *Brandt* attorney's fees.

Following a hearing on the pending motions, the trial court granted 20th Century's motion in limine no. 1 to exclude damages evidence on the ground the claimed damages were personal and not assignable. It denied 20th Century's motion for summary judgment. It granted Encarnacion's motion for summary adjudication, ruling that 20th Century had a duty to pay the judgment in the underlying wrongful death action.

20th Century moved to clarify the remaining issues to be tried. At that point, the trial court indicated it intended to enter judgment in favor of Encarnacion. 20th Century

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[17] *Brandt v. Superior Court* (1985) 37 Cal.3d 813 holds that attorney's fees are recoverable as damages when an insurer tortiously withholds benefits, causing the insured to incur such fees to obtain those benefits. (*Id.* at pp. 815, 817.)

[18] Aguilera later joined in this motion.

then filed notice of intention to move for new trial or, in the alternative, for an order modifying the statement of decision, vacating the judgment and entering a new judgment in favor of 20th Century or, in the alternative, entry of judgment in favor of Encarnacion and Aguilera in the amount of $100,000 only. As grounds for this motion, 20th Century cited a long list of claimed errors.

On October 5, 2004, the trial court entered judgment in favor of Encarnacion and against 20th Century in the amount of the judgment in the wrongful death action, $10,519,602.58 plus interest and costs. Thereafter, the trial court denied 20th Century's motion for a new trial. It found the motion raised no issues not previously disposed of by the court and did not demonstrate any error in the trial proceedings.

Subsequently, a jury trial was held on Aguilera's claims against 20th Century. By special verdict, the jury found that 20th Century breached the implied covenant of good faith and fair dealing in relation to its handling of Encarnacion's claim against Aguilera. The jury also found, however, that this breach did not cause Aguilera any damages. The trial court (Judge Wiley) therefore entered judgment in favor of Aguilera.[19]

Case Number B182737

In the meantime, on August 19, 2004, Encarnacion filed a second action for damages against 20th Century, alleging causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing. The gravamen of the complaint was that Encarnacion was a judgment creditor as to the judgment entered in the wrongful death action and thus a beneficiary of the insurance contract pursuant to Insurance Code section 11580, subdivision (b)(2). By 20th Century's failure to pay the amount due under the judgment in breach of the insurance contract, Encarnacion was damaged in the amount of the judgment.

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[19] We grant 20th Century's motion for judicial notice of these subsequent proceedings. We note that Aguilera has an appeal pending from the judgment in favor of 20th Century. (*Aguilera v. 20th Century Insurance Company* (B190775).)

20th Century filed a demurrer based on the expiration of the statute of limitations and improper claim splitting. The trial court (Judge Wiley) sustained the demurrer without leave to amend on the ground the action violated the rule against claim splitting and was barred by res judicata. On March 18, 2005, a judgment of dismissal was entered.

CONTENTIONS

Case Number B179825—20th Century's Appeal

1. 20th Century contends the trial court erred in applying equitable estoppel and forfeiture offensively, in that they cannot form the bases of causes of action. Additionally, Encarnacion is judicially estopped from relying on equitable estoppel or forfeiture.

2. 20th Century further contends the trial court erred prejudicially in refusing to consider relevant evidence.

3. 20th Century asserts that there is no substantial evidence to support the judgment, in that there is no evidence of a promise on which a finding of promissory estoppel could be based. Additionally, there is no evidence of reasonable and detrimental reliance, and no evidence that 20th Century waived reliance on the business pursuits exclusion in the policy.

4. 20th Century adds that the conversations upon which the claim of promissory estoppel were based fell within the litigation privilege, requiring reversal of the judgment.

5. 20th Century assets that under any theory, Encarnacion's recovery was limited to $100,000.

6. Finally, 20th Century contends that the trial court erroneously barred it from raising two defenses.

Case Number B179825—Encarnacion's Appeal

1. Encarnacion contends the trial court erred in ruling that *Brandt* fees are not assignable.

2. Encarnacion further contends the trial court erred in denying her leave to amend her complaint.

Case Number B182737—Encarnacion's Appeal

1. Encarnacion contends the trial court erred in sustaining 20th Century's demurrer based on the rule against splitting a cause of action.

2. Encarnacion further contends her complaint is not barred by the statute of limitations.

3. Additionally, Encarnacion asserts that the denial of leave to amend in case number B179825 did not bar the filing of an independent action.

4. Finally, Encarnacion asserts that the appeal in case number B179825 has no bearing on this appeal.

DISCUSSION

CASE NUMBER B179825—20TH CENTURY'S APPEAL

1. Equitable Estoppel and Forfeiture

20th Century contends the trial court erred in applying equitable estoppel and forfeiture offensively, in that they cannot form the bases of causes of action. Additionally, Encarnacion is judicially estopped from relying on equitable estoppel or forfeiture. We find no error and no basis for applying judicial estoppel.

In support of its contention, 20th Century relies on the principle that, unlike promissory estoppel, "equitable estoppel is available only as a defense," and it cannot form the "'basis for a cause of action for damages.'" (*Tiffany, Incorporated v. W.M.K. Transit Mix, Inc.* (Ariz. 1972) 493 P.2d 1220, 1225; accord, *Money Store Investment Corp. v. Southern Cal. Bank* (2002) 98 Cal.App.4th 722, 732.) The same rule would apply to forfeiture. "A court cannot, under the guise of equity, confer substantive rights

on a party who otherwise has none." (*In re Marriage of Umphrey* (1990) 218 Cal.App.3d 647, 658.)

The trial court did not violate this principle, however. Encarnacion's two causes of action were for breach of contract and breach of the implied covenant of good faith and fair dealing. In its cross-complaint for declaratory relief, 20th Century sought a declaration that it had no duty under the contract. Encarnacion then asserted estoppel as an affirmative defense.

The trial court's statement of decision showed a recognition that recovery was based on the policy, not on equitable estoppel or forfeiture. The court noted that "[u]nder ordinary circumstances, Aguilera's commission of a crime like this would have cut off any *claims against the policy*. These are not ordinary circumstances. For the reasons set forth below, 20th Century Insurance Company is equitably barred from raising its ordinary *policy-based defenses*." (Italics added.) The court later concluded that "plaintiffs have met their burden and established equitable bars against 20th Century's policy exclusions. The court finds that 20th Century has forfeited its rights *under the policy*, and that it is equitably estopped from challenging *plaintiffs' claims against the policy* . . . ." (Italics added.)

This court has previously recognized that estoppel may be applied to provide coverage under the policy where there otherwise would be none. (*Canadian Ins. Co. v. Rusty's Island Chip Co.* (1995) 36 Cal.App.4th 491, 498; see also *Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152-1153; *State Farm Fire & Casualty Co. v. Jioras* (1994) 24 Cal.App.4th 1619, 1627-1628.) Forfeiture, too, may be applied to prevent an insurer from asserting its rights under the insurance contract. (*Chase v. Blue Cross of California, supra*, 42 Cal.App.4th at p. 1151.)

The trial court therefore did not apply equitable estoppel and forfeiture offensively, as the bases of causes of action. Rather, it properly applied them to preclude 20th Century from asserting defenses to Encarnacion's contractual causes of action.

20th Century also asserts that Encarnacion is judicially estopped from relying on equitable estoppel and forfeiture based upon her commitment to try this case on the

theory of promissory estoppel only. Where a party takes a position in one phase of the litigation and prevails, the party may be judicially estopped to take a contrary position in a later phase. (*International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1190-1191; *Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics* (1998) 61 Cal.App.4th 672, 678-679.) Judicial estoppel "'"'"is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. . . .'"'"' (*International Billing Services, Inc.*, *supra*, at p. 1191.)

20th Century made a motion in limine below to limit the court trial to the issue of promissory estoppel. The basis of this motion was judicial estoppel.

The trial court denied the motion. It explained: "Defendant argues that earlier representations by plaintiff made before Judge Recana made clear that only promissory estoppel was at issue and that they are now themselves estopped under theories of promissory, equitable and judicial estoppel from offering any evidence outside that one theory. [¶] Plaintiff responds that they never intended nor actually foreclosed the use of equitable . . . estoppel and forfeiture in addition to promissory estoppel as their theory.

"A review of the record that I have made demonstrates at this time in my mind that no compelling grounds warrant limiting plaintiff only to a theory of promissory estoppel. . . . [¶] Furthermore, judicial estoppel does not in my mind apply here. Applying one of my favorite cases by one of my favorite authors, that would be *International Engine Parts*[, *Inc. v.*] *Fedderson* [*& Co.* (1998)] 64 Cal.App.4th, 345 beginning around page 350, the concept of judicial estoppel prevents a party from asserting a position in a judicial proceeding that is contrary or inconsistent with a position previously asserted in a prior proceeding. [¶] The purpose is to protect the integrity of the judicial process and not the parties of the lawsuit. Judicial estoppel is most commonly applied to bar a party from making a factual assertion as opposed to here which is a legal assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one.

"Judicial estoppel looks to the connection between the litigant and the judicial system . . . . [¶] It is a doctrine invoked by the courts in their discretion, and I am not inclined to invoke it. I do not believe there is any good reason to grant defendant's motion in limine . . . ."

We see no abuse of discretion in the trial court's order. The statements on which 20th Century relied in support of its motion were made during the course of argument of various motions. They were not intended to be taken as an unequivocal election to try the case on one theory only.

In addition, throughout the course of the proceedings, the term "estoppel" was used rather loosely. The type of estoppel meant was not always specified. As noted by Encarnacion, the term may be "used indiscriminately" (*Old Republic Ins. Co. v. FSR Brokerage, Inc.* (2000) 80 Cal.App.4th 666, 678 [referring to use of the term "waiver"]), without consideration as to the specific type of estoppel involved. Even this court, in *Encarnacion I*, "conclude[d] that the doctrine of *estoppel* require[d] reversal of the [summary] judgment." (At p. 10.)

Further, 20th Century points to no """"adverse impact on the judicial process""""" (*International Billing Services, Inc. v. Emigh*, *supra*, 84 Cal.App.4th at p. 1191) from allowing Encarnacion to proceed on all equitable theories raised during the course of the proceedings. The trial court found none, and neither can we.

2. Refusal to Consider Relevant Evidence

According to 20th Century, "[a] major issue in this case is whether there was a 'clear and unambiguous' promise[, sufficient to support a judgment based on promissory estoppel]. On this central issue, the trial court committed prejudicial error by refusing to consider evidence critical to 20th Century's defense—evidence of ***what did not***

happen."[20] Specifically, 20th Century claims, the trial court refused to consider evidence as to the lack of documentation of any promise by 20th Century to provide coverage if Aguilera pled guilty to involuntary manslaughter.

The first part of 20th Century's argument consists of a review of the evidence and, in essence, a claim that Encarnacion's evidence is insufficient to support a finding of a clear and unambiguous promise, therefore the trial court must have refused to consider 20th Century's evidence that there was no promise. 20th Century cites no authority which supports this claim.[21]

20th Century further argues the trial court erred in refusing to consider its proffered expert testimony. 20th Century sought to introduce the testimony of attorney Charles Lynberg, who was experienced in representing insurance companies in bad faith and coverage actions. Attorney Lynberg would testify as to the custom and practice of insurance companies regarding documentation of settlement agreements and his opinion as to the lack of "evidence reflecting any awareness on the part of 20th Century Insurance Company that Mr. Aguilera was pleading guilty with the expectation that 20th Century Insurance Company would provide coverage as a result of the plea."

20th Century also sought to introduce the testimony of Boyd Veenstra, an expert on insurance claims handling. Mr. Veenstra would testify as to the custom and practice of insurance companies and that "20th Century's claims file did not contain any of the sort of documentation Mr. Veenstra would expect to find if there had been a 'clear and unequivocal' agreement between 20th Century and attorney Paul deMontesquiou that 20th Century would pay its $100,000 insurance policy limits if Mr. Aguilera pled guilty to involuntary manslaughter."

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[20] Promissory estoppel requires a "clear and unambiguous promise" by the defendant on which the plaintiff reasonably and foreseeably relied. (*Copeland v. Baskin Robbins U.S.A.* (2002) 96 Cal.App.4th 1251, 1261.)

[21] The sufficiency of the evidence to support the judgment is discussed below.

The trial court ruled that the proffered evidence was neither probative nor relevant. The question before the court was what actually happened in this case. The court noted that, "[a]s counsel have mentioned on numerous occasions . . . , this is really a credibility call." The court saw no "value in having an expert come in and say this is something we would always, always do or never, ever do." The court added that some of the testimony regarding custom and practice in the insurance industry already had been introduced through 20th Century's witnesses, including Leahy, Murphy, Shaver, Scutti and Brown. Ultimately, the court ruled: "I will reject the testimony as not probative of issues that we need to resolve in this case."

Only relevant evidence is admissible at trial. (Evid. Code, § 350.) Relevant evidence is that which has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*Id.*, § 210.) The trial court has the duty to determine the relevance and thus the admissibility of evidence before it can be admitted. (*Id.*, §§ 400, 402.) The trial court is vested with broad discretion in performing this duty. (*People v. Harris* (2005) 37 Cal.4th 310, 337.) We review the trial court's determination as to admissibility that turns on relevance for abuse of discretion. (*Ibid.*)

20th Century is correct that the lack of evidence to support a fact may provide substantial evidence of the truth of that fact's nonexistence. (See *People v. Manson* (1977) 71 Cal.App.3d 1, 46; cf. *Greening v. General Air-Conditioning Corp.* (1965) 233 Cal.App.2d 545, 550.) It was the trial court's position, however, that this case could not be resolved by a lack of evidence that 20th Century possessed the type of documentation that an insurance company customarily would possess to establish the existence of a settlement agreement. Ultimately, resolution of this case involved a credibility determination regarding what actually was said by 20th Century's representatives. Non-percipient expert witnesses could be of no help in making this determination. (See, e.g., *People v. Smith* (2003) 30 Cal.4th 581, 628; *People v. Wells* (2004) 118 Cal.App.4th 179, 189.) The trial court therefore did not abuse its discretion in excluding the expert witness testimony.

Moreover, 20th Century's witnesses did testify as to the documentation in the claim file, what it did and did not show.[22] The proffered expert testimony thus was, to a large extent, cumulative. The trial court properly could have excluded it on that basis (Evid. Code, § 352), and its exclusion was, in any event, not prejudicial (cf. *People v. Ayala* (2000) 23 Cal.4th 225, 282; *People v. Reeder* (1978) 82 Cal.App.3d 543, 553).

3. Sufficiency of the Evidence

20th Century asserts that there is no substantial evidence to support the judgment, in that there is no evidence of a promise on which a finding of promissory estoppel could be based. Additionally, there is no evidence of reasonable and detrimental reliance, and no evidence that 20th Century waived reliance on the business pursuits exclusion in the policy.

When the trial court's factual determination has been challenged on appeal, the scope of appellate review is limited to an examination of the entire record to determine whether substantial evidence exists which will support the trial court's conclusion. (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1229; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) Substantial evidence is evidence of ponderable legal significance. (*Id.* at p. 873.)

The trial court, as trier of fact, has the duty to weigh and interpret the evidence and draw inferences therefrom. (*In re Cheryl E.* (1984) 161 Cal.App.3d 587, 598.) We cannot reweigh the evidence or draw contrary inferences. (*2,022 Ranch v. Superior Court* (2003) 113 Cal.App.4th 1377, 1387; *In re Cheryl E.*, *supra*, at p. 598.) We presume the trial court found every fact and drew every reasonable inference necessary to support its determination. (*Provencio v. WMA Securities, Inc.* (2005) 125 Cal.App.4th

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[22] For example, Leahy testified that he "never receive[d] any written or oral communication that would be consistent with an allegation that . . . 20th Century or Tom Shaver had agreed to settle the case if Mr. Aguilera would plead guilty to involuntary manslaughter and waive all of his exclusions."

1028, 1031.) We cannot reject evidence accepted by the trial court as true unless it is physically impossible or its falsity is obvious without resort to inference or deduction. (*Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1293.)

Promissory estoppel requires (1) a "clear and unambiguous promise" by the defendant, (2) which the defendant should reasonably expect to induce action or forbearance on the part of the plaintiff, (3) on which the plaintiff reasonably and foreseeably relied, (4) to the plaintiff's detriment. (*CalFarm Ins. Co. v. Krusiewicz* (2005) 131 Cal.App.4th 273, 283-284; *Copeland v. Baskin Robbins U.S.A.*, *supra*, 96 Cal.App.4th at p. 1261; *Laks v. Coast Fed. Sav. & Loan Assn.* (1976) 60 Cal.App.3d 885, 890.) It will be applied when injustice would result if the promise were not enforced. (*CalFarm Ins. Co.*, *supra*, at p. 284; *Lange v. TIG Ins. Co.* (1998) 68 Cal.App.4th 1179, 1185.)

20th Century challenges the trial court's finding of a promise on two fronts: the lack of evidence of a specific promise made to a specific person or persons on a specific date, and the substantiality of the testimony of deMontesquiou and his legal assistant, David deRubertis (deRubertis), on which the trial court relied in finding a promise.

It is true that the trial court did not find that 20th Century made a specific promise to a specific person or persons on a specific date. Rather, it found that "20th Century engaged in a course of conduct that taken together communicated to Aguilera and the lawyers involved in the plea, the promise the coverage would still be available even if he pled guilty. . . . [¶] 20th Century at every opportunity engaged in conduct and made representations which would have caused any reasonable insured and his representatives to believe that a guilty plea would not foreclose coverage. . . ."

The court added that 20th Century, through its agents Brown, Shaver, and those working with them, engaged in unambiguous conduct. "20th Century knew Aguilera's case was going towards a plea and acted as if it were knowledgeable and in agreement with it. 20th Century furthered the execution of the plea by its acquiescence and affirmative conduct."

20th Century relies on the principle that "failure to inform is not a promise and certainly unsaid words cannot form a clear and unambiguous promise." (*Lange v. TIG Ins. Co.*, *supra*, 68 Cal.App.4th at p. 1187.) Under this principle, 20th Century's failure to inform Aguilera and the lawyers involved in the plea that 20th Century intended to rely on the exclusions in the policy if he pled guilty to involuntary manslaughter, despite Aguilera's belief to the contrary, would not constitute a promise sufficient to apply promissory estoppel.

The trial court found both "acquiescence and affirmative conduct," however. Both deMontesquiou and deRubertis "related a number of conversations with [Brown and Shaver], wherein they spoke about the coverage issue in terms of intentional versus negligent acts. [They] led deMontesquiou and deRubertis to believe that if the act was found unintentional, there would be coverage."

According to deRubertis, he listened to a May 5, 1994 conversation on speakerphone between deMontesquiou and Brown. Brown "indicated there was probably going to be some coverage question about whether it was in intentional act . . . or a negligent act, and [deMontesquiou] said, well I don't understand what the coverage issue is because it was a negligent accidental shooting. She said, well, if it is a negligent accidental shooting, there is obviously coverage, but we need to determine that it is an intentional act or negligent act." After deMontesquiou forwarded a copy of Encarnacion's complaint in the wrongful death action to Brown, he had another conversation with Brown, which deRubertis heard via speakerphone. In that conversation, "Brown reiterated that the issue was, was this an intentional act or a negligent act. And if it was a negligent act, obviously, with the catastrophic loss, and with the three children, that the minimal hundred thousand dollar policy would be offered."

Similarly, deMontesquiou testified that he spoke to Brown on May 5, 1994 about the question of coverage. "She indicated that if it was considered to be a negligent act, there would be coverage. But if it was deemed to be an intentional act, that there would not be coverage." In a follow-up conversation one to two weeks later, Brown again

"indicated that if it was determined by the company the act was negligent then this loss would be covered." Brown "was very specific, that if it was determined to have been a negligent act, there clearly could be coverage." She said that if the act was negligent, 20th Century would cover the loss and pay the policy limits.

Brown's statements "permit an inference of a clear and unambiguous promise arising to promissory estoppel." (*CalFarm Ins. Co. v. Krusiewicz*, *supra*, 131 Cal.App.4th at p. 284.) 20th Century claims, however, that deMontesquiou's and deRubertis's testimony as to Brown's statements "is inherently suspect," based on Brown's testimony that she never would have made such statements, evidence that she had no authority to settle the case, and other evidence supporting 20th Century's position that no promise was made.

Assuming deMontesquiou's and deRubertis's testimony as to Brown's statements was "inherently suspect," we have no authority to reject it as substantial evidence in support of the judgment. Not "'even testimony which is subject to justifiable suspicion . . . justif[ies] the reversal of a judgment, for it is the exclusive province of the [trier of fact] to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.'" (*Evje v. City Title Ins. Co.* (1953) 120 Cal.App.2d 488, 492.) We may reject evidence accepted as true by the trier of fact only if it is "'"so inherently improbable and impossible of belief as in effect to constitute no evidence at all"'" (*People v. Maxwell* (1979) 94 Cal.App.3d 562, 577), i.e., if it is "'unbelievable *per se*,'" physically impossible or "'wholly unacceptable to reasonable minds'" (*Evje*, *supra*, at p. 492). That testimony "is inherently suspect" is not a sufficient basis on which to reject it when the trier of fact has accepted it as true.

Additional evidence supported the trial court's finding of a promise. There was evidence that Shaver told deMontesquiou that if there was "a plea or a finding of something less than second degree murder," then 20th Century would cover the loss and Encarnacion would have access to the policy limits of $100,000. Additionally, Shaver told deMontesquiou to amend the complaint in the wrongful death action to "get rid of

intentional torts" to "improve [his] client's opportunity to be insured if in fact he were to be insured or covered."

Thereafter, Shaver, deMontesquiou and Jaffe discussed talking to the district attorney's office about allowing Aguilera to plead guilty to a charge of involuntary manslaughter. As plea discussions progressed, Shaver and Brown were kept informed, made aware that an offer of the policy limits of $100,000 was expected if Aguilera pled guilty to involuntary manslaughter, and did nothing to indicate the offer would not be made. As the trial court found, 20th Century engaged in unambiguous conduct leading deMontesquiou and Jaffe to believe that it would pay the policy limits if Aguilera entered his plea. "A false promise can as easily, perhaps more easily, be implied from conduct as from language; indeed, as the well-worn maxim goes, actions speak louder than words." (*Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1046.) In summary, there is substantial evidence of a promise on which promissory estoppel can be based.

20th Century's challenge to the sufficiency of the evidence to support a finding of reasonable reliance on the promise focuses on the fact that, in pleading guilty to involuntary manslaughter, Aguilera relied on Jaffe, who relied on deMontesquiou, who never obtained and read a copy of the policy, which clearly set forth the exclusions to coverage. 20th Century argues that deMontesquiou and Jaffe, as attorneys, must be held to a higher standard than Aguilera and could not have reasonably relied on Brown's and Shaver's representations without reading the policy and determining whether those representations were consistent with the policy. (See, e.g., *General Accident Ins. Co. v. Workers' Comp. Appeals Bd.* (1996) 47 Cal.App.4th 1141, 1149; *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 48.)

That deMontesquiou and Jaffe are attorneys does not preclude their reasonable reliance on Brown and Shaver as to the scope of the policy exclusions and coverage. (See, e.g., *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 75-77.) Brennan acknowledged that there was confusion among attorneys as to the meaning of the criminal acts exclusion. Even after deMontesquiou

and Jaffe read the policy, they believed there was coverage for unintentional criminal acts. We thus cannot say that it was unreasonable for them to rely on the representations of 20th Century's representatives as to coverage for Aguilera's acts.

20th Century also claims lack of reliance based upon Jaffe's testimony that he would have advised Aguilera to plead guilty to involuntary manslaughter even without the promise of a settlement, in that the offer of the plea was a "good deal." Aguilera was only offered the involuntary manslaughter plea, however, based on the promise that it would ensure insurance coverage so that Encarnacion could receive payment. Additionally, Aguilera testified that he pled guilty based on the promise of insurance coverage. Moreover, Jaffe previously stated that he would not have advised Aguilera to plead guilty to involuntary manslaughter had he known the plea would cause a loss of insurance coverage.

In examining whether substantial evidence supports the judgment, we must examine the entire record. (*Hellman v. La Cumbre Golf & Country Club*, *supra*, 6 Cal.App.4th at p. 1229; *Bowers v. Bernards*, *supra*, 150 Cal.App.3d at pp. 873-874.) 20th Century cannot demonstrate a lack of evidence to support the judgment by citing only the evidence supporting its position. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282.)

As to the evidence of detriment, in *Encarnacion I*, we found it "clear that pleading guilty to involuntary manslaughter, as opposed to going to trial and arguing self-defense, constitutes a detriment." (At p. 12.) We also noted that execution of a *Cumis* waiver and "loss of independent counsel may be sufficient to establish detrimental reliance where the insurer has reserved its rights and created a conflict of interest for the attorney it has chosen to represent the insured. (See *Tomerlin v. Canadian Indemnity Co.*, *supra*, 61 Cal.2d at pp. 646–648.)" (*Encarnacion I*, at p. 12.)

In finding detriment, the trial court noted: "It is argued by 20th Century that Aguilera did not rely to his detriment, that this was a favorable plea given him and that, in fact, he benefited from any confusion here. While having a certain surface appeal, the argument fails for three reasons. First, Aguilera said that the civil compromise was why

he pled guilty. While the court discounted Aguilera's testimony greatly, clearly it was a reason why Aguilera pled guilty. Jaffe too says that this was a substantial factor in Aguilera's decision. Second, Aguilera waived *Cumis* counsel because of the discussion underway to reach a global settlement. Had he not waived *Cumis* counsel (or had Shaver been given all of the necessary information by 20th Century), the *Cumis* counsel would undoubtedly have discovered the potential hole in coverage and this case never would have unfolded as it has. Finally, Aguilera gave up his right to trial by jury wherein the criminal standard of proof beyond a reasonable doubt would be utilized."

20th Century argues that it is not enough that the promise of coverage have been "a substantial factor" in Aguilera's decision; it must have been "an immediate cause." 20th Century relies on *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, involving a cause of action for fraud, in which the court stated that "[a]ctual reliance occurs when the defendant's misrepresentation is an immediate cause of the plaintiff's conduct, altering his legal relations, and when, absent such representation, the plaintiff would not, in all reasonable probability, have entered into the transaction." (*Id.* at p. 519.)

In making the foregoing statement, *Cadlo* cited *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951. The Supreme Court in *Engalla* went on to state: "'It is not . . . necessary that [a plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct. . . . It is enough that the representation has played a substantial part, and so has been *a substantial factor*, in influencing his decision.' (Rest.2d Torts, § 546, com. b, p. 103.)" (*Engalla, supra*, at pp. 976-977, italics added.) The trial court therefore did not err in using the substantial factor standard.

20th Century further argues a lack of detriment, in that Aguilera executed a second *Cumis* waiver after 20th Century denied coverage and Aguilera's waiver of his right to a jury trial was not detrimental in light of Jaffe's statement that the plea to involuntary manslaughter was a "good deal." This argument ignores the fact that Aguilera obtained the "good deal" based upon 20th Century's promise to provide coverage. Absent that

promise, no deal would have been offered, and Aguilera might have obtained an acquittal at a jury trial based on self-defense or mental illness.

While Aguilera executed a second *Cumis* waiver after 20th Century denied coverage, the damage already had been done: he had waived his right to a jury trial and pled guilty to involuntary manslaughter. The second waiver did not preclude a finding of detriment.

Finally, 20th Century contends there is no substantial evidence to support a finding that it waived reliance on the business pursuits exclusion. 20th Century notes that exclusion was set forth in the reservation of rights letter, and none of 20th Century's further dealings with Aguilera, Jaffe or deMontesquiou indicated an intent to waive reliance on that exclusion.

"'"[W]aiver is the intentional relinquishment of a known right after knowledge of the facts."'" (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31.) It "may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right." (*Ibid.*) It may be implied when a "'party's acts are so inconsistent with an intent to enforce that right as to induce a reasonable belief that such right has been relinquished.'" (*Id.* at pp. 33-34.)

Here, there was substantial evidence from which the trial court could find that 20th Century's actions were so inconsistent with an intent to enforce the business pursuits exclusion as to induce a reasonable belief on Aguilera's part that 20th Century had relinquished its right to rely on that exclusion. Specifically, 20th Century's statements that there was coverage and it would pay the policy limits were sufficient to support such a finding. Accordingly, there is substantial evidence supporting a finding 20th Century waived reliance on the business pursuits exclusion.

4. Litigation Privilege

The litigation privilege set forth in Civil Code section 47, subdivision (b)(2), applies to communications "(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the

litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212; *Susan A. v. County of Sonoma* (1991) 2 Cal.App.4th 88, 93.) While the privilege applies only to statements "'made in judicial or quasi-judicial proceedings,'" it is not necessary that the statements have been made inside the courtroom and involve the function of the court. (*Susan A.*, *supra*, at p. 93; accord, *Silberg*, *supra*, at p. 212.) The privilege applies to all tort causes of action based on the communications. (*Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17, 23.)

The litigation privilege does not apply to contract (*Stacy & Witbeck, Inc. v. City and County of San Francisco* (1996) 47 Cal.App.4th 1, 7-8; *Mattco Forge, Inc. v. Arthur Young & Co.* (1992) 5 Cal.App.4th 392, 406) or equitable (*Home Ins. Co. v. Zurich Ins. Co.*, *supra*, 96 Cal.App.4th at p. 26) actions, however. Neither does it apply to a course of conduct which may include communicative acts. (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 575-576, fn. 5; *Stacy & Witbeck, Inc.*, *supra*, at p. 8.) Inasmuch as the instant action falls within these categories, the litigation privilege does not apply. (*Gruenberg*, *supra*, at pp. 575-576, fn. 5.)

5. Limitation of Recovery to $100,000

20th Century asserts that under any theory, Encarnacion's recovery was limited to the policy limits of $100,000. It thus was not liable for the entire $5.6 million judgment in the wrongful death action.

In awarding the entire amount of the judgment, the trial court relied on *Johansen v. California State Auto. Assn. Inter-Ins. Bureau* (1975) 15 Cal.3d 9. In *Johansen*, the Supreme Court reiterated the rule established in *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654 that "California authorities establish that an insurer who fails to accept a reasonable settlement offer within policy limits because it believes the policy does not provide coverage assumes the risk that it will be held liable for all damages resulting from such refusal, including damages in excess of applicable policy limits." (*Johansen*, *supra*, at p. 12.) It does not matter whether the failure to accept the settlement

offer was in good faith, i.e., the insurer's "refusal to settle stems from a bona fide belief that the policy does not provide its insured coverage." (*Id.* at pp. 12-13, 15.)

The court explained that "[t]he implied covenant of good faith and fair dealing imposes a duty on the insurer to settle a claim against its insured within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits." (*Johansen v. California State Auto. Assn. Inter-Ins. Bureau*, *supra*, 15 Cal.3d at pp. 14-15; *Comunale v. Traders & General Ins. Co.*, *supra*, 50 Cal.2d at p. 659.) Therefore, "in deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. [Citation.] Thus, the only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer. Such factors as the limits imposed by the policy, a desire to reduce the amount of future settlements, or a belief that the policy does not provide coverage, should not affect a decision as to whether the settlement offer in question is a reasonable one." (*Johansen*, *supra*, at p. 16.)

The court rejected the contention "that the *Comunale* rule requires an insurer to settle in all cases irrespective of whether the policy provides coverage." (*Johansen v. California State Auto. Assn. Inter-Ins. Bureau*, *supra*, 15 Cal.3d at p. 19.) If it turns out that the policy does not provide coverage, the insurer will not "be liable for damages flowing from its refusal to settle; all that *Comunale* establishes is that an insurer who fails to settle does so 'at its own risk.'" (*Ibid.*) The insurer "retains the ability to enter an agreement with the insured reserving its right to assert a defense of noncoverage even if it accepts a settlement offer. If, having reserved such rights and having accepted a reasonable offer, the insurer subsequently establishes the noncoverage of its policy, it would be free to seek reimbursement of the settlement payment from its insured." (*Ibid.*)

More recently, in *Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, the Supreme Court explained that "'[a]n insurer is required to act in good faith in dealing with its insured. Thus, in deciding whether or not to settle a claim, the insurer must take into account the interests of the insured, and when there is a great risk of recovery beyond

the policy limits, a good faith consideration of the insured's interests may require the insurer to settle the claim within the policy limits. An unreasonable refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits. [Citation.]' [Citation.]" (*Id.* at pp. 724-725.)

"An insurer that breaches its duty of reasonable settlement is liable for all the insured's damages proximately caused by the breach, regardless of policy limits. [Citations.] Where the underlying action has proceeded to trial and a judgment in excess of the policy limits has been entered against the insured, the insurer is ordinarily liable to its insured for the entire amount of that judgment [citations], excluding any punitive damages awarded [citation]. The insured's action for breach of the contractual duty to settle may be assigned to the claimant, regardless of whether assignments are permitted by the policy. [Citation.] Such an assignment may be made before trial, but the assignment does not become operative, and the claimant's action against the insurer does not mature, until a judgment in excess of the policy limits has been entered against the insured. [Citations.]" (*Hamilton v. Maryland Casualty Co.*, *supra*, 27 Cal.4th at p. 725.)

20th Century argues that the foregoing principles do not apply here, in that there can be no breach of the implied covenant of good faith and fair dealing absent liability under the contract (insurance policy). (*Waller v. Truck Ins. Exchange, Inc.*, *supra*, 11 Cal.4th at p. 35.) Inasmuch as the trial court did not find liability under the insurance policy and breach of the provisions of that policy, 20th Century claims, it cannot be held liable for the entire judgment in the wrongful death action.

The trial court granted relief under three theories: forfeiture, equitable estoppel and promissory estoppel. It explained that these theories, "alone, or taken together may provide relief for an insurance policyholder in his or her dispute with the insurance carrier. Each acts as a potential bar against an insurance company which acts inappropriately."

Citing *Chase v. Blue Cross of California*, *supra*, 42 Cal.App.4th at page 1149, the trial court noted that "[f]orfeiture is the assessment of a penalty against the insurer for

misconduct or failure to perform an obligation *under the contract.*" (Italics added.) *Chase* states that an insurer may forfeit its contractual rights if it "breaches the covenant of good faith and fair dealing by engaging in bad faith conduct designed to mislead the insured." (*Id.* at p. 1158.) The trial court found that 20th Century "forfeited its right to rely on the criminal acts exclusion" by its "conduct in concealing its true intent to deny coverage" while representing that Aguilera would be covered if he pled guilty to involuntary manslaughter. In other words, the trial court found that 20th Century was liable for coverage under the insurance policy because it had forfeited the right to rely on the criminal acts exclusion.

Similarly, the trial court found "20th Century is equitably estopped from raising its exclusion." Again, there was coverage under the policy because 20th Century was barred from relying on the exclusion from coverage.

The rule of *Comunale* and *Johansen* thus applies here, in that 20th Century's liability was based on its failure to accept a reasonable settlement offer within policy limits in breach of the implied covenant of good faith and fair dealing contained within the insurance policy. (*Johansen v. California State Auto. Assn. Inter-Ins. Bureau*, *supra*, 15 Cal.3d at pp. 12, 14-15; *Comunale v. Traders & General Ins. Co.*, *supra*, 50 Cal.2d at p. 659.) The trial court found the requisite liability under the insurance policy. (*Waller v. Truck Ins. Exchange, Inc.*, *supra*, 11 Cal.4th at p. 35.)

That the trial court also found 20th Century liable under a promissory estoppel theory does not mandate a different result. 20th Century argues that "[p]romissory estoppel and breach of contract are mutually exclusive doctrines. . . . Accordingly, no finding of breach of 20th Century's policy is possible in this case. This in turn means that the *Johansen* doctrine is inapplicable."

It is true that promissory estoppel is used to impose liability when there is no contract due to a lack of consideration. (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901-902; *Signal Hill Aviation Co. v. Stroppe* (1979) 96 Cal.App.3d 627, 637.) In this case, promissory estoppel was used to enforce a promise to pay under the contract, i.e., the insurance policy. As discussed above, however, the trial court also

found 20th Century had a duty to pay under the contract, and 20th Century breached that duty. The *Johansen* doctrine thus is applicable. (*Johansen v. California State Auto. Assn. Inter-Ins. Bureau*, *supra*, 15 Cal.3d at pp. 12, 14-15.)

6. Barred Defenses

20th Century contends that the trial court erroneously barred it from raising two defenses: unclean hands on the part of Aguilera, and the lack of resulting injustice necessary to prevail on a promissory estoppel claim. For the reasons set forth below, we must reject this contention.

In addressing an appeal, we begin with the presumption that the judgment of the trial court is correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; *Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 357.) "It is well settled, of course, that a party challenging a judgment has the burden of showing reversible error by an adequate record." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 318.) Meeting this burden requires citations to the record to direct the court to the pertinent evidence or other matters in the record which demonstrate reversible error. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115; *Culbertson v. R. D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 710.) It also requires citation to relevant authority and argument. (Cal. Rules of Court, rule 8.204(a)(1)(B); *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546; *People v. Dougherty*, *supra*, 138 Cal.App.3d at p. 282.) It is not our responsibility to comb the appellate record for facts, or to conduct legal research in search of authority, to support the contentions on appeal. (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768; see also *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1301.) The failure to meet this burden waives the issues on appeal. (*Mansell*, *supra*, at pp. 545-546; *Dougherty*, *supra*, at p. 282.)

20th Century's discussion of its contention does not include adequate citations to the record to enable us to determine the merits of the contention. For example, 20th

Century claims that "[a]t a September 26, 2003 hearing, 20th Century raised the fact that the Statement of Decision did not address its unclean hands and absence of injustice defenses. The court responded these issues were 'not ripe,' that '[t]oday is not the day to resolve it,' and that subsequent motions should be filed to raise these issues for the court's consideration."

In support of this claim, 20th Century cites a statement by the trial court. This statement was preceded by a statement by Encarnacion's attorney that he thought "we need to have maybe a hearing on what are the issues and whether they are collaterally estopped on the issue of bad faith . . . . We did brief that issue for today, but maybe it is not ripe today for decision. The trial court responded: "It is not ripe is the problem. They suggested that I made a finding that Mr. Aguilera acted in such a fashion that he is equitably estopped from going forward, if you will, with damages. That is an issue that I have thought about. Today is not the day to resolve it. I think I raised it actually orally in the closing arguments in this case. So it is not a motion, it is not a request. I am not going to say, no, I am going to throw this case out because he acted in an inequitable fashion."

Nothing in the cited portion of the record shows that 20th Century raised the fact that the statement of decision did not address the issues of unclean hands and the absence of injustice and requested a ruling on those issues, and that the trial court declined to make a ruling.

20th Century cites another portion of the record in which the trial court stated that a grant of summary judgment was precluded, in part, because the defense of unclean hands required a weighing of the equities. 20th Century then argues that "[d]espite those triable issues requiring a 'weighing of the evidence,' the court still granted summary adjudication (and later a judgment) to Encarnacion. . . . In short, 20th Century never was permitted to try these defenses."

Did 20th Century raise the defenses in opposition to Encarnacion's motion for summary adjudication? How did the trial court rule on them? 20th Century cites nothing in the record which would show us the answers to these questions and allow us to

determine whether the trial court did, in fact, deprive 20th Century of the opportunity to try these defenses. We are not inclined to comb through the voluminous record in an attempt to find documentations which would support 20th Century's contention. (*Del Real v. City of Riverside*, *supra*, 95 Cal.App.4th at p. 768; *People v. Dougherty*, *supra*, 138 Cal.App.3d at pp. 282-283.) Accordingly, we deem the contention to be waived. (*Mansell v. Board of Administration*, *supra*, 30 Cal.App.4th at pp. 545-546; *Dougherty*, *supra*, at p. 282.)[23]

ENCARNACION'S APPEAL

1. Brandt Fees

Following the judgment against him in the wrongful death action, Aguilera assigned to Encarnacion, "[t]o the extent that it is lawful," "all of his rights, title and interests in any claims against 20th Century presently possessed or to be possessed in the future by Aguilera arising out of 20th Century's refusal to settle the underlying action within policy limits, including but not limited to the verdict, plus taxable court costs and post-judgment interest. It is the intent that Aguilera assigns and conveys only that which is lawfully assignable." 20th Century filed a motion in limine to exclude evidence as to Encarnacion's non-assignable damages, including attorney's fees. On August 25, 2004, the trial court granted the motion, finding that a claim for "attorney fees under *Brandt v. Superior Court* by the Encarnacion plaintiffs . . . [is] barred because these plaintiffs are suing only as Aguilera's assignees and such damages are not assignable because they are personal tort damages."

On July 6, 2006, the Supreme Court decided *Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252. It held that "an insured's assignment of a cause of

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[23] Judge Wiley's comments in preparation for trial of Aguilera's claims against 20th Century, cited by 20th Century, that the issues were not resolved does not establish that 20th Century raised them in opposition to Encarnacion's summary adjudication motion.

action against an insurance company for tortious breach of the covenant of good faith and fair dealing by wrongfully denying benefits due under an insurance policy carries with it the right to recover *Brandt* fees that the assignee incurs to recover policy benefits in the lawsuit against the insurance company." (*Id.* at p. 1265, fn. omitted.)

20th Century argues that *Essex Ins. Co.* does not apply here, in that it is not clear that Aguilera assigned his claim for *Brandt* fees, and this is not a tort action. Additionally, since Aguilera lost his bad faith claim against 20th Century, he—and thus Encarnacion—has no claim for *Brandt* fees.

We summarily reject 20th Century's first argument. Since *Brandt* fees are lawfully assignable, Aguilera assigned them.

As to 20th Century's second argument, Encarnacion points out that she did, in fact, bring a tort action. The second cause of action in her complaint was for breach of the implied covenant of good faith and fair dealing, a tort cause of action in which *Brandt* fees are recoverable. (*Brandt v. Superior Court*, *supra*, 37 Cal.3d at p. 817.) The trial court determined that the equitable causes of action would be tried first, and then the causes of action for damages. After the trial court found in favor of Encarnacion on the equitable causes of action, 20th Century filed its motion in limine no. 1 seeking to exclude all evidence as to Encarnacion's claims for non-economic damages, emotional distress and *Brandt* fees. The trial court granted this motion on the ground the claimed damages were personal and not assignable. The trial court thereafter granted judgment to Encarnacion on the equitable cases of action. It specifically noted that the judgment was entered after the trial court "entered an Order granting 20th Century's Motion in Limine No. 1 with regard to any remaining damages claims of the Encarnacion plaintiffs."

In other words, the trial court's ruling on the motion in limine as to the assignability of *Brandt* fees precluded her from trying her tort claim to recover those fees. In light of the subsequent Supreme Court ruling in *Essex Ins. Co. v. Five Star Dye House, Inc.*, *supra*, 38 Cal.4th at page 1265 that the right to recover *Brandt* fees is assignable, Encarnacion must be given an opportunity to try her tort claim for recovery of those fees.

Finally, 20th Century argues that in light of the judgment in its favor on Aguilera's bad faith claim, "there is nothing upon which to tether any award of *Brandt* fees." 20th Century "acknowledges that the jury answered 'yes' to the first question in the special verdict as to whether 20th Century had breached its duty of good faith and fair dealing; however, the jury then went on to find that Aguilera suffered no damages from the breach." 20th Century continues that since an assignee "'stands in the shoes of his assignor, taking his rights and remedies'" (*Essex Ins. Co. v. Five Star Dye House, Inc.*, *supra*, 38 Cal.4th at p. 1264), and Aguilera has no right and remedy against 20th Century, neither does Encarnacion.

The Supreme Court explained in *Essex* that the assignee's right to recover *Brandt* fees is "the right to recover *Brandt* fees *that the assignee incurs* to recover the policy benefits in the lawsuit against the insurance company." (*Essex Ins. Co. v. Five Star Dye House, Inc.*, *supra*, 38 Cal.4th at p. 1265, italics added.) So Aguilera's failure to prove damages does not preclude a finding that Encarnacion suffered damages, i.e., the attorney's fees incurred in attempting to recover policy benefits assigned to her. 20th Century's argument therefore is without merit.

2. Denial of Leave to Amend

After the trial court filed its statement of decision as to the equitable issues, Encarnacion and Aguilera moved for leave to file a first amended and supplemental complaint. They sought to add a cause of action under Insurance Code section 11580 on behalf of Encarnacion as judgment creditor and third party beneficiary of Aguilera's insurance contract. According to the declaration of Encarnacion's counsel, while preparing briefing on the issues to be determined by jury trial, he learned "that the Encarnacions, in their capacity as judgment creditors, have a right to sue as beneficiaries of the contract of insurance under Insurance Code §11580."

The trial court denied the motion, explaining that it "was untimely and that no explanation or excuse for the delay in filing the motion for leave to amend was given as the Encarnacions' standing as judgment creditors has existed for over seven years, and

leave to amend was only first sought after the Statement of Decision in the first phase of the bifurcated trial was completed." Additionally, the motion violated then-rule 327 of the California Rules of Court by failing to include a separate declaration as to the effect of the amendment, why it was needed, when the facts on which it was based were discovered and why the motion was not brought earlier.

Encarnacion contends that the denial of leave to amend was not justified by the delay in filing the motion, by the fact that new issues were raised in the proposed amended complaint, or by the failure to comply with the rules of court. Additionally, the denial of leave to amend was improper, in that 20th Century would not have been prejudiced by any amendment.

Code of Civil Procedure section 473, subdivision (a)(1), provides the trial court may, "in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading . . . ." "It is a basic rule of pleading in this state that amendments shall be liberally allowed so that all issues material to the just and complete disposition of a cause may be expeditiously litigated, but 'the question whether the filing of an amended pleading should be allowed at the time of trial is ordinarily committed to the sound discretion of the trial court.'" (*Vogel v. Thrifty Drug Co.* (1954) 43 Cal.2d 184, 188; *Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 746.)

In deciding whether to grant a delayed motion to amend, the trial court must consider a number of factors. These include whether the defendant has been made aware of the charges contained in the factual allegations of the amended complaint and will not be prejudiced by the proposed amendment. (*Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, 965.) They also include the conduct of the plaintiff and whether there is justification for any delay in the presentation of the proposed amendment. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 613.) "'The law is well settled that a long deferred presentation of the proposed amendment without a showing of excuse for the delay is itself a significant factor to uphold the trial court's denial of the amendment. [Citation.]' [Citation.] 'The law is also clear that even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of

itself—be a valid reason for denial.' [Citation.]" (*Ibid.*; accord, *Vogel v. Thrifty Drug Co.*, *supra*, 43 Cal.2d at p. 189.)

In reviewing the trial court's denial of a motion to amend, the appellate court must bear in mind both the policy of liberally allowing amendment of pleadings and the policy of upholding the trial court's exercise of its discretion in the absence of a clear abuse. (*Honig v. Financial Corp. of America*, *supra*, 6 Cal.App.4th at p. 965.) "'"*More importantly, the discretion to be exercised is that of the trial court, not that of the reviewing court.* Thus, even if the reviewing court might have ruled otherwise in the first instance, the trial court's order will yet not be reversed unless, as a matter of law, it is not supported by the record.'" [Citations.]" (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242.)

Discretion is abused if the trial court's action "'is arbitrary, capricious or entirely lacking in evidentiary support,'" or if it "'transgresses the confines of the applicable principles of law.'" (*Ohton v. Board of Trustees of California State University* (2007) 148 Cal.App.4th 749, 766.) The trial court's denial of leave to amend here was not arbitrary or capricious or lacking in evidentiary support. It was based on Encarnacion's long delay in making the request, without any explanation as to why the request for leave to amend could not have been made sooner. It similarly did not transgress the applicable legal principles, which clearly provide that a long, unexcused delay in making the request to amend justifies its denial. (*Vogel v. Thrifty Drug Co.*, *supra*, 43 Cal.2d at p. 189; *Leader v. Health Industries of America, Inc.*, *supra*, 89 Cal.App.4th at p. 613.) Consequently, the trial court did not abuse its discretion in denying Encarnacion leave to amend her complaint. (*Ohton*, *supra*, at p. 766.) That there were bases upon which the trial court properly could have granted leave to amend does not justify reversal of the ruling. (*Branick v. Downey Savings & Loan Assn.*, *supra*, 39 Cal.4th at p. 242.)

CASE NUMBER B182737—ENCARNACION'S APPEAL

1. Rule Against Splitting a Cause of Action

The rule against splitting a cause of action is part of the doctrine of res judicata. (*Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1146.) As noted in *Tensor Group v. City of Glendale* (1993) 14 Cal.App.4th 154 at page 160: "The doctrine of res judicata '. . . precludes parties or their privies from relitigating *the same cause of action* that has been finally determined by a court of competent jurisdiction. . . .' [Citation.] California law defines a cause of action 'by focusing on the "primary right" at stake: if two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery. [Citations.] A cause of action is based upon the nature of a plaintiff's injury. The cause of action, as it appears in the complaint when properly pleaded, will therefore always be the *facts* from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong. [Citation.]' [Citation.]

"'. . . If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. . . . The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable. [Citations.]' [Citation.]"

Encarnacion first argues that her statutory bad faith claim arose from a different primary right than her claim based on the assignment of Aguilera's rights, so there was no splitting of a cause of action. Specifically, she argues that Aguilera's rights as a policy holder—including his rights to defense and settlement of the wrongful death

action—which were assigned to her are different than her statutory right as a judgment creditor.

Boiled down to their essences, both claims "involve the same injury to the plaintiff and the same wrong by the defendant." (*Tensor Group v. City of Glendale*, *supra*, 14 Cal.App.4th at p. 160.) In both, Encarnacion sought to recover the amount of the judgment in the wrongful death action based on 20th Century's wrongful refusal to pay that judgment. That Encarnacion sought the same damages based on violation of different rights is not dispositive: """"Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief."""" (*Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1246.) Neither does it matter that different damages might be available under the different theories; there is still only one cause of action for the injury. (*Lincoln Property Co., N.C., Inc. v. Travelers Indemnity Co.* (2006) 137 Cal.App.4th 905, 915.)

For example, in *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, the court noted that although plaintiff "had two sources of payment of its construction work: (1) foreclosure of the mechanic's lien, and (2) serving a timely stop notice on the project's construction lenders," both "arose from the same transaction—[plaintiff's] work on the project—and were merely different remedies for nonpayment of the amount owed to [plaintiff]. Thus, [plaintiff] had a single right—the right to payment for its construction." (*Id.* at pp. 860-861.) Here too, Encarnacion had a single right—the right to payment of the judgment in the wrongful death action.

Encarnacion claims that acts of bad faith alleged in the second action which occurred after the filing of the first action are not subject to a charge of improper claim splitting. Since Encarnacion is not seeking damages for these acts of bad faith but is seeking payment of the judgment in the wrongful death action, the allegations of subsequent acts do not preclude a finding of improper claim splitting. (*Tensor Group v. City of Glendale*, *supra*, 14 Cal.App.4th at p. 160.)

Encarnacion next argues that since the first action was still pending, the proper resolution was a plea in abatement, not dismissal based on res judicata. (Code Civ. Proc.,

§ 430.10, subd. (c); *Hamilton v. Asbestos Corp.*, *supra*, 22 Cal.4th at p. 1146.) It is true that when Encarnacion filed the second action, on August 19, 2004, judgment had not yet been entered in the first action. At that point, a plea in abatement would have been proper. Judgment was entered in the first action on October 5, 2004. By the time judgment was entered in the second action, however, on March 18, 2005, there was a judgment in the first action.

Neither party cites any authority on the question whether the pendency of an appeal in the first action has any effect on the propriety of a plea in abatement. At this point in the proceedings, however, that question is moot. We are affirming the judgment in the first action, and it will then become final. On appeal from a judgment of dismissal following the sustaining of a demurrer without leave to amend, we review the trial court's sustaining of the demurrer de novo and apply the abuse of discretion standard in reviewing the trial court's denial of leave to amend. (*Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, 718-719; *Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.) Plaintiff bears the burden of proving the trial court erred in sustaining the demurrer or abused its discretion in denying leave to amend. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459; *Coutin v. Lucas* (1990) 220 Cal.App.3d 1016, 1020.) To show abuse of discretion, plaintiff must show in what manner the complaint could be amended and how the amendment would change the legal effect of the complaint, i.e., state a cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349; *J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 18.) This showing may be made either in the trial court or on appeal. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386.) At this point, plaintiff, Encarnacion, cannot show that her complaint in the second action can be amended to state a plea in abatement. The judgment in the first action is being affirmed on appeal and the action no longer will be pending except on the issue of Encarnacion's right to *Brandt* fees. Dismissal based on res judicata thus is appropriate.

Encarnacion also argues that 20th Century's "deliberate inconsistency in opposing amendment [in the first action] bars any splitting defense." She claims 20th Century's conduct "is a classic case for judicial estoppel." Encarnacion does not claim to have raised the estoppel issue below. It therefore is waived. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *Cabrera v. Plager* (1987) 195 Cal.App.3d 606, 611; *Hennefer v. Butcher* (1986) 182 Cal.App.3d 492, 505.)[24]

DISPOSITION

The judgments in both B179825 and B182737 are affirmed. In B179825, the matter is remanded and the trial court is directed to allow Encarnacion to proceed on her claim for *Brandt* fees. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED

JACKSON, J.*

We concur:

MALLANO, Acting P. J.

ROTHSCHILD, J.

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[24] Inasmuch as we conclude the trial court properly sustained 20th Century's demurrer without leave to amend and dismissed Encarnacion's second action based on res judicata, we need not address her contention that her causes of action are not barred by the statute of limitations.

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: Barger & Wolen LLP, 633 W. Fifth Street, 47th Floor, Los Angeles, California 90071.

On **November 5, 2007,** I served the foregoing document(s) described as **PETITION FOR REVIEW** on the interested parties in this action by placing [ ] the original [X] a true copy thereof enclosed in sealed envelope addressed as stated in the attached mailing list. **SEE ATTACHED SERVICE LIST**

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[ ] I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

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[X] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed at Los Angeles, California on **November 5, 2007.**

NAME: Anita Varela

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(Signature)

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