APPENDIX DOCUMENT #1

Court of Appeal, Third Appellate District - No. C091099

S281367

IN THE SUPREME COURT OF CALIFORNIA

En Banc

RAYMOND H. PIERSON III, Plaintiff and Appellant,

v.

CSAA INSURANCE SERVICES, INC. et al., Defendants and Respondents.

The petition for review is denied.

Jenkins, J., was absent and did not participate.

GUERRERO
Chief Justice

APPENDIX DOCUMENT #2

Supreme Court of California

JORGE E. NAVARRETE
CLERK AND EXECUTIVE OFFICER
OF THE SUPREME COURT

EARL WARREN BUILDING
350 McALLISTER STREET
SAN FRANCISCO, CA 94102
(415) 865-7000

June 15, 2023

Raymond H. Pierson III
3 Gopher Flat Road, Unit #7
Sutter Creek, CA 95686

Re: **S281367 (C091099) — Pierson v. CSAA Insurance Services**

Dear Mr. Pierson:

The court has granted permission to file the oversize untimely petition for review and the petition was filed this date August 15, 2023.

Very truly yours,

JORGE E. NAVARRETE
Clerk and
Executive Officer of the Supreme Court

By: Robert R. Toy, Senior Deputy Clerk

APPENDIX DOCUMENT #3

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RAYMOND H. PIERSON III as an Individual and dba RAYMOND H. PIERSON, III M.D.,

Plaintiff and Respondent
vs.

CSAA INSURANCE SERVICES., CSAA INSURANCE EXCHANGE and DOES 1 through 10,

Defendant and Appellant.

_____/

Case No.: _____

PETITION FOR REVIEW

AMADOR SUPERIOR COURT
The Honorable Renee Day
(209) 257-2603

THIRD DISTRICT COURT OF APPEALS
The Honorable Louis Mauro, Acting Presiding Judge
The Honorable Elena J. Duarte
The Honorable Samuel T. McAdams

Third Appellate District, Case No. C091099
Amador County Superior Court, Case No. 18-CVC-10813

PETITION FOR REVIEW

Following the Decision by the California Court of Appeal, Third Appellate District on July 31, 2023 to Deny Appellant's Petition for Rehearing (resubmitted 7-24-2023), Accepted for Filing 7-25-2023 of that Court's June 30, 2023 Denial of the Appellant Original Appeal filed in the Amador Superior Court on 10-17-2019.

In propria persona

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CERTIFICATE OF INTERESTED PARTIES

Rob Bonta, J.D., State of California Attorney General
Raymond H. Pierson, III, MD
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Steven D. Cribb, J.D., NCCS Counsel
Stephen Mackay, J.D., McIntyre & Collier's Counsel
Lawrence H. Cassidy, NCCS
The Honorable Renee C. Day
The Honorable JS Hermanson
Gerald McIntyre
Betty McIntyre
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Maria S. Quintero, J.D., CSAA et al. Appellate Counsel
Phyliss M. Rushing
Keliann Petty-Salado, Colliers International Real Estate Management
Hardeep Kaur, Colliers International Real Estate Management
Mark Inbody
CSAA Insurance Services, Inc.
CSAA Insurance Exchange
Liberty Mutual Insurance Co.
State Farm Insurance Company
Dorothy T. Tran, J.D., Phyliss Rushing Counsel

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RAYMOND H. PIERSON, III, MD Appellant vs. CSAA INSURANCE SERVICES., CSAA INSURANCE EXCHANGE and DOES 1 through 10, Defendant and Appellant	Case No. _____

Third Appellate District, Case No. C091099
Amador County Superior Court, Case No. 18-CVC-10813

PETITION FOR REVIEW

TO THE HONORABLE PATRICIA GUERRERO, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 8.500, California Rules of Court, Raymond H. Pierson, III, M.D., Plaintiff and Appellant, hereby petitions this Court to grant review of the decision by of the Court of Appeal for the Third Appellate District, filed on July 31, 2023 to deny Appellant's August 15, 2022 *Petition for Rehearing* (filed on July 24, 2023 and accepted on July 25, 2023). That decision followed that Court's Order of June 30, 2023 to the Appeal in this case originally filed with the Trial Court on October 17, 2019. A copy of those referenced opinions by the Third District Court of Appeal are attached as exhibits to this Petition.

ISSUES PRESENTED FOR REVIEW

1. CSAA et al. has intentionally failed throughout the entirety of this case in the lower court as well as in this related appeal to present the complete insurance contract *(" the instrument as a whole")* that was in effect between the Insured Rushing and Insurer CSAA at the time of the motor vehicle accident on 10-10-2016. This critical and intentional deficiency which Dr. Pierson repeated provided notice to the Courts should have deprived the Amador Superior Court as well as the Third District Court of Appeal of jurisdiction to proceed to a decision in the case.
2. There can be no question but that CSAA by and through its claims representatives and successive legal counsel have intentionally failed to provide the entirety of the *car policy* between CSAA and Rushing. Contrary to the indisputable facts Respondent Attorney Maria Quintero on direct questioning at the 6-23-23 Oral Argument intentionally and fraudulently misinformed the Court that the complete insurance contract had been produced. That intentional deceit is fully qualifying under CCP 109 & 1010 as a fraud perpetrated to misinform the Court which represents a misdemeanor under Bus. And Prof. Code 6128.
3. The Third District Court's decision which stated that CSAA's role here was simply an agreement to "indemnify Rushing" (p.10) fails

completely to recognize the quite extensive and exclusive role that CSAA has demanded that it must serve under the insurance contract in the management and handling of all aspects of litigations that arise due to the negligence of their insured such as exists here. It is indisputable here that CSAA has actively controlled the litigation in a manner that extends far beyond the boundaries defined by indemnification. It is an indisputable fact here that even from the time of Dr. Pierson's filing of the litigation that due to CSAA's repeated failure to settle within policy limits represented bad faith breaches of the implied covenant of good faith a judgment in excess of policy limits from the onset of litigation resided solely with CSAA et al. and not Rushing.

4. The Appeal Panel's position with respect to Civil Code 1559 relies upon the Supreme Court holding in *Harper v. Wausau* (1997) 56 Cal. App. 4th 1079, 1087 which states *"a third party should not be permitted to enforce covenants made not for his benefit but rather for others. He is not a contracting party; his right to performance is precedented on the contracting party's intent to benefit him"*. This understanding greatly misinterprets the ancient precedents which motivated and guided the early California Legislature when establishing Civil Code 1559 as well as the Supreme Court of California's early interpretation of the statute.
5. The Appellate Court decision states that "a third party such as plaintiff may not bring a direct action against an insurance company except

where there has been an assignment of rights by, or final judgment against, the insured" (p. 5). In this case at issue Pierson has repeatedly made such requests of assignment that accompanied settlement offers which pledged no personal financial risk to Rushing. Those requests were repeatedly denied (5-APP-1113, 6-APP-1487-1488) with no evidence presented to confirm that the proposal was ever even presented to Rushing.

6. The Appellate decision rejects Pierson's advancement of a *"CSAA duty of care under Biakanja"* apparently in part because *"he does not expressly state the nature of the duty he seeks to impose" (p. 13).* The Court has greatly misapprehended Dr. Pierson's argument. In fact, in the AOB (pgs. 62-66) and the RB (pgs. 42-51) the existence of special relationships between CSAA et al. and Rushing as well as between CSAA et al. and Appellant are extensively referenced and supported demonstrating the applicability of *Biakanja* here. *Biakanja* must not be excluded because the defendant simply is an insured.
7. Pierson has been denied his fundamental U.S. Constitutional Rights under the First, Fifth and Fourteenth Amendments to seek redress in the Courts for the substantial and ongoing injuries over the past almost 7 years that have resulted from the exceptional misconduct and repeated unlawful activities and fraud of Defendant/Respondent CSAA.

STATEMENT OF THE CASE

This appeal and the related underlying case previously before the Amador Superior Court below which is now also on Appeal before the Third District Court (C097290) have arisen from the damages and ongoing injuries initiated nearly seven years ago on October 10, 2016 as the direct result of the negligent operation of a motor vehicle by an elderly driver, Ms. Phyliss Rushing, who collided into and through the side structural wall of Dr. Pierson's medical office in Jackson, California. The damage that resulted caused quite extensive damage to the interior of the premises and compromised the structural integrity of that building necessitating the immediate and prolonged closure of Dr. Pierson's medical practice (1-APP-06). Liability in this case as applicable under the *Negligence Pro Se Doctrine* was fully attributable to the negligent vehicle accident damage (1-APP-22-25) and the cause of the foreseeable and ongoing severe professional, financial, and personal injuries caused to Dr. Pierson by the resulting immediate disruption of his medical practice. Those injuries were directly caused by the severe physical destruction of office as well as by the toxic contamination of the entire interior space caused by Tortfeasor

Rushing's negligence. Despite the indisputable negligence, the Tortfeasor's insurance carrier CSAA et al. (5-APP-1086, 1101-1130) even to the day of this writing has refused to provide Dr. Pierson the just compensation required to permit him financially to be able to re-open his orthopedic practice (1-APP-05). Until that just compensation is received Dr. Pierson will be unable to resume his restoration of orthopedic care to his many hundreds of patients whose care and physician-patient relationships have remained disrupted by this calamity. The flagrant and unlawful failure of CSAA et al. to adhere to the clear and well stated requirements of the California Insurance Code § 790.03(h)(5) which requires the provision of *"prompt, fair and equitable settlements"* in such cases where liability is unquestioned (1-APP-22-25) as it is here. This exceptional bad faith failure to provide fair settlement to Dr. Pierson has continued despite Dr. Pierson's repeated offers of settlement which have quite clearly and specifically agreed to eliminate any personal financial liability on the part of the insured Tortfeasor Rushing (5-APP-1-86-1096, 1101-1130).

It is important to point out that despite Dr. Pierson's having immediately reported the circumstances of the accident to his own insurance carrier, State Farm, that carrier insisted that it was unnecessary to directly inspect the damage and even refused to open a claim for a prolonged multi-month interval due to that company's conclusion that there was indisputable liability on the part of Tortfeasor Rushing which thus established the exclusive responsibility of her insurance carrier CSAA et al. In fact, Dr. Pierson's insurer, State Farm, provided repeated and strong reassurances to Dr. Pierson that in a case such as this with clear and indisputable negligence and liability that it was the common and fully anticipated practice among the auto liability insurance carriers including the insured Tortfeasor's insurance carrier (CSAA et al.) to provide full and fair compensation quite promptly as required under the insurance code. Despite those strong reassurances that expected response has never been forthcoming from CSAA et al. Nevertheless, based upon those early reassurances, Dr. Pierson proceeded to immediately and persistently contact the claim representatives for Tortfeasor Rushing's insurance carrier, CSAA,

to request that fair compensation be urgently provided in order to permit Dr. Pierson the financial opportunity to expeditiously re-open his medical practice (1-APP-5, 16-18) and to resume providing the necessary and critical care required by his many physically disabled patients.

Remarkably, Tortfeasor Rushing and her insurance carrier, CSAA et al. throughout this now almost seven-year period which has elapsed since the accident have provided no reasonable settlement offer despite Dr. Pierson's repeated offers to settle within the full equivalent of policy limits.

Furthermore, CSAA has even failed to recognize the fact that this company posture which was in full violation of the requirements of the California Insurance Code at 790.03(h)(5) was also causing the exceptional and unconscionable healthcare disruptions that have resulted from the closure of Dr. Pierson's practice which has so adversely affected his many hundreds of patients. This exceptional disregard by CSAA of those patient health interests was even fully evident in the CSAA et al. Respondent's Brief (Introduction, pgs. 6) which abjectly fails to mention or even acknowledge the exceptional relevance and tragic health disruptions that

Tortfeasor Rushing's negligence and CSAA's failure to settle have caused for this extended almost seven (7) year interval to those many hundreds of physician-patient relationships which Dr. Pierson had maintained with those patients which he had developed over the twelve (12) year period prior to the disruptions caused by the accident. It must be emphasized that Dr. Pierson had maintained his office in that location in order to provide orthopedic care to that critically underserved region of the Sierra Foothills in Amador County. From a public policy perspective, the tragic and exceptional human costs of this abject failure by Tortfeasor Rushing and her insurer CSAA et al. to fail to promptly accept responsibility and appropriately correct these injuries caused to Dr. Pierson and his staff by promptly providing a fair settlement compensation to permit the practice reopening is truly unconscionable and impermissible. Rather than proceed as instructed by the California Insurance Code 790.03(h), those parties alternatively and quite adversely through the utilization of their almost limitless financial resources have manipulated time and the legal process to effectively and indefinitely deny fair compensation to further extremely

financially marginalize Dr. Pierson while also foreseeably and quite tragically disrupting health service delivery with the interruption of care to many patients with the disruption of multi-year established physician-patient relationships. Dr. Pierson's early efforts to achieve a prompt and fair resolution of the matter which would have provided the financial resources necessary to re-open his practice while not exposing Tortfeasor Rushing to any personal financial loss included his repeated inquiries directed to the CSAA et al. claims service personnel as well as to Ms. Rushing herself to be provided the full policy information inclusive of the insurance policy limits (5-APP-1104) in order to have the necessary information to structure a proper and acceptable settlement offer. As fully reviewed in the Appellant Opening Brief at Argument #4, pgs. 69-70, the full policy inclusive of the declaration and endorsement pages has never been provided and even the policy limits were repeatedly withheld to Dr. Pierson for the initial 5½ years after the accident up until the time of the requisite settlement conference in the underlying related case held before the Amador Superior Court on May 5, 2022 (6-APP-1417). It must be

emphasized that even though the policy limits were finally provided in May 2022, the complete policy has never been provided. Not long after the accident and despite being denied access to that critical policy limit information on June 7, 2017 Dr. Pierson forwarded via certified mail to CSAA et al. claims service representatives a settlement offer reasonably interpreted to represent a settlement offer within policy limits which specifically agreed to the condition that there would be no personal financial loss to Tortfeasor Rushing (5-APP-1103). It must be stated with emphasis that this offer was extended without revision for a period of over eighteen months (1-APP-71-74). Remarkably, despite the pendency of that offer within policy limits no direct response to that offer was ever provided by Tortfeasor Rushing or by her insurer, CSAA et al. Even subsequent to the formal retraction of that initial settlement offer on February 1, 2019 (1-APP-71-74), Dr. Pierson followed that initial offer with multiple settlement offers which are reviewed in the multiple email correspondences cited between himself and Tortfeasor Rushing's CSAA et al. employed attorney. Those offers which were then extended through the time of the Court

mandated settlement conference of May 5, 2022 (6-APP-1466-1486) in the related underlying case all contained settlement terms which in all proposals eliminated any personal financial liability for Tortfeasor Rushing (6-APP-1471-1488). Again, quite remarkably, none of those offers were accepted or received meaningful counter proposals. In the time frame of the second-year anniversary following the motor vehicle accident during which Dr. Pierson's settlement offer effectively within policy limits was extended for a period of sixteen (16) months, CSAA et al. provided no notice to Dr. Pierson, an unrepresented party, of the approaching expiration of the two-year statute of limitations (CCP § 335.1) for personal injury despite the fact they had been informed earlier by Dr. Pierson in his earlier statements which explicitly stated that he and his staff had sustained physical injuries as a result of the adverse toxic environmental effects of the motor vehicle accident related damage and required demolition and reconstruction. Conversely, Dr. Pierson did subsequently on November 21, 2018 receive correspondence (see Exhibits to the August 2, 2022 AOB) from CSAA et al. claims representatives shortly following the second-year

anniversary of the accident which intentionally misinformed Dr. Pierson that the statute of limitations was properly considered to be three (3) years when not only was it two (2) years for physical injury. In addition, that correspondence itself which misinformed on the statute was also sent well after the 2-year statute had already closed. Had Dr. Pierson followed that fraudulent representation he would have lost the opportunity to pursue recovery for those physical injuries to himself and his staff due to an expiration of the two-year statute.

As a result of the failure of CSAA to settle the case in the face of the offer in policy limits, Dr. Pierson was left with no alternative but to proceed with litigation. On October 9, 2018, one day prior to the two-year anniversary of the motor vehicle accident and in the absence of any action by either the Tortfeasor Rushing or her insurer CSAA Dr. Pierson had no alternative but to proceed with the filing of the complaint in this matter (1-APP-2-27). At the time of that filing in this case which had quite high potential for a judgment in excess of policy limits, the failure of CSAA et al. to achieve settlement of the case within policy limits fully breached the insurer's

implied covenant of good faith and fair dealings. This Supreme Court of California in multiple case law precedents has held that under such conditions where there is risk of a judgment more than policy limits and where a settlement offer within policy limits has been extended requires that the insurer must settle the case [*Comunale v. Traders & General Ins. Co. (1958); Johansen v. USAA (1975) pg. 17 and Crisci v. Security Ins. Co. (1967) pg. 429].* The California Second District even more recently has further emphasized that a failure to settle under such conditions represents a breach of the *implied covenant of good faith and fair dealing* [*Merritt v. Reserve Ins. Co. (2013) pg. 272].*

Furthermore, this Supreme Court of California has also emphasized that under such circumstances where there is a failure to settle within policy limits that the insurer becomes fully liable and at risk for the entirety of the judgment inclusive of any component in excess of the policy limits [*Comunale, p. 660; Crisci p. 428; and Johnsen p. 17].* Thus, it is critical for this Supreme Court of California to understand that in this case at issue, which was filed one day before the expiration of the two-year statute of

limitations for personal injury, that CSAA et al. even at that time of filing had already exceptionally breached its duty under the *implied covenant* as interpreted by the many case law precedents to settle within policy limits making it fully liable for the entirety of any judgment even in excess of policy limits. Furthermore, it can be quite accurately stated that even at that time of initial filing of the litigation by Dr. Pierson that CSAA et al. from the time of filing the complaint had established a position which required that it must assume the entirety of risk for any and all judgments in the case inclusive of any judgments in excess of policy limits. The corollary to this point is that from the date of filing of the litigation by Dr. Pierson, Tortfeasor Rushing has absolutely **no** personal financial risk whatsoever to her assets inclusive of any judgment in excess of policy limits. A further relevant point which must be emphasized is that the case law from the multiple state courts across this Country inclusive of the California Courts of Appeal and this Supreme Court have long emphasized that insurance contracts extended by automobile insurance companies such as CSAA et al. require as a condition of enrollment that the insured must

designate to the insurer complete and absolute control over any litigation arising from insured's negligent acts covered under the contract. (See *Hiller v. Western Auto Ins. Co. (1932) p. 258; Comunale v. Traders & Gen'l Ins. Co. (1973) p. 972; Jamestown Builders v. Gen'l State Indemnity Co., 1999) p. 346; and Rova Farms Resort v. Investors Ins Co. (1974) p. 497).*

In conclusion to this section, it is important to strongly emphasize the point that even from the first day of the filing of the complaint by Dr. Pierson all risk resided absolutely and completely with the insurer, CSAA et al., due to their multitude of flagrant breaches of the *implied covenant of good faith and fair dealing* which resulted from its abject failure to settle the case despite fully qualifying offers within policy limits. Thus, it must be stated again with emphasis that Tortfeasor Rushing from the time of filing of the litigation on October 9, 2018 had no risk whatsoever to her personal finances and assets. From that clear perspective there is just no explanation for Rushing to not have demanded settlement of the case by CSAA. Thus, in this case where CSAA had exclusive right of control in the handling of

the litigation and where it had created those circumstances where it's failure to act to settle within policy limits resulted in the requirement under the case law that it assume all risk. These circumstances which CSAA crested for itself demonstrate quite clearly that its further involvement under such conditions was for the exclusive management of its own financial circumstances in a manner best benefitting the company and its shareholders. Put simply, from the time of the onset of the litigation CSAA was involved in managing its own risk exclusively and in complete conflict with the interests of its insured, Rushing. From this perspective, there can be no question but that the litigation should have been permitted to proceed against CSAA from the onset given the clear facts that it was representing only its own interests with the full intent of further greatly marginalizing Dr. Pierson financially in the attempt to leverage him into the financial position that he was forced to accept an unacceptable settlement which further violates Ins. Code 970.04(h)(7).

STATEMENT OF FACTS

This section will demonstrate the critical facts relevant to providing this Court with a complete understanding of the role of Respondent/Appellee CSAA et al. int the litigation through a chronological review of the important developments in case below in the Amador Superior Court as well as with respect to the filings provided before the Third District Court of Appeal.

10-10-2016 Tortfeasor's negligent vehicle operation caused a collision with and penetration of a critical side structural wall of the building containing Dr. Pierson's medical practice.

- Due to structural instability Dr. Pierson and his office staff were not even permitted entry into the structure for one week until the structure had been provisionally stabilized.
- The initial demolition and structural stabilization phase resulted in an extensive and complete disruption of the entire interior office space with contamination

throughout with a toxic mixture of demolition dust and debris rendering the space uninhabitable and unsafe environmentally for health care delivery. This required an immediate interruption of office operations requiring provisional practice closure. Due to the subsequent prolonged period of building reconstruction and the related uninhabitability of the space as well as due to the adverse financial effects of the practice closure in the absence of any early financial compensation from CSAA to permit practice re-opening the practice has had to remain closed indefinitely. This ongoing closure has had exceptional and compounding adverse professional, financial, and personal effects which continue to accrue to Dr. Pierson to this time.

- Despite immediate notification to Dr. Pierson's own insurer, State Farm, that insurer made the

determination that due to the clear negligence of Tortfeasor Rushing and resultant indisputable liability it was determined by State Farm that an inspection of the space or establishment of an initial claim was unnecessary because Tortfeasor's insurer would recognize the existence of clear-cut liability and provide the necessary prompt compensation necessary to reopen the practice. Of note, even at this late stage almost seven (7) years after the accident, Dr. Pierson has received no compensation from CSAA nor has that insurer provided any reasonable settlement offer. All offers extended by CSAA have been well below policy limits.

- For the above reasons, Dr. Pierson immediately and repeatedly contacted the CSAA et al. claim management staff over the next eight (8) months with formalized requests for compensation with itemized

justifications as well as requests for policy information and policy limits of insurance (2-APP-257-269). In the detailed December 14, 2016 request it was specifically emphasized:

> *"That accident has created immediate and quite compromising adverse financial effect. Please understand that the resultant financial injury has literally brought me financially both personally and professionally to my knees. I will require immediate action on your part in order to prevent further injury. Should that assistance not be immediately forthcoming, please understand that my financial situation will become incrementally further compromised and my losses will incrementally increase. The possibility even exists that such a delay may result in the need to consider a bankruptcy filing. As a result of the significant financial injury that has been caused by your insured, I would greatly appreciate a prompt response to this matter."*

- No response was received to these early requests.

6-07-2017 Dr Pierson forwarded via certified mail letters to the assigned CSAA claims representative (2-APP-288-289) as well as to Tortfeasor Rushing (2-APP-291-292). Note that a copy of the Rushing letter which included the full equivalence of a settlement offer within policy limits was included with the CSAA et al. claims representative letter. That Rushing letter (2-APP-288) emphasized that Dr. Pierson would not pursue claims against Ms. Rushing's personal assets:

> *"A primary intent of this correspondence is to inform you that from my perspective your auto insurance carrier, AAA, has acted*

in "bad faith" and not protected your interests as required of them by your auto insurance contract. In fact, I believe that they are in flagrant violation of multiple subsections of the State of California Insurance Code, Division 1, Part 2, Chapter 1, Article 6.5 at 790.03 (h) and contrary to the objective of the insurance commission as cited in the California Code of Regulations, Title 10 , Chapter 5, Subchapter 7.5, Section 2695.1 paragraph (a) (3) "To promote the good faith, prompt, efficient and equitable settlement of claims on a cost effective basis". Because of this, it may come to pass that I am placed in a position where I must initiate litigation in your name in order to position your auto insurance company where they will be required to meet the reasonable compensation requirements that I have presented them. Please have full confidence that I have the deepest respect for you and have no interest, whatsoever, in any element of your personal assets. . .
In closing, I wish you the best and would again provide full reassurances that you have nothing to fear from me."

The letter to Rushing also requested Rushing's assistance on obtaining the policy information which the insurer had refused to provide over the prior eight months.

> *"Incidentally, your insurance carrier has provided no information whatsoever on the level of coverage for an accident of this type which you had in effect at the time of the accident. Any information that you might provide in that regard would be quite useful and much appreciated."*

10-19-2017 Filing of the Complaint against Rushing and CSAA et al. by Dr. Pierson as a self-represented party.

- The complaint was filed one day prior to the expiration of the statute of limitations for physical injury to preserve those claims.
- It is important to emphasize the fact that despite Dr. Pierson's extending his equivalent settlement offer within policy limits through this period, CSAA et al.'s

claims representatives remained unresponsive necessitating this action.

- It must be emphasized that under the existing precedents of this Court (*Comunale, Crisi and Johanson*) and as a result of this resistance of CSAA to settle within policy limits that all risk for judgments in the case including any judgment in excess of policy limits exclusively became the responsibility of CSAA et al. with no risk resting with Rushing or exposing her personal assets. Thus, based upon these facts at least from this point forward in the case CSAA and the CSAA employed attorneys representing Rushing and CSAA et al. proceeded in a manner to exclusively protect CSAA corporate and shareholder interests which represented a direct conflict with the insured Rushing's interests to be free of the litigation especially at her advanced age.

2-01-2019 Dr. Pierson's correspondence to the CSAA employed attorneys for Rushing and CSAA in which he formally, but only temporarily withdrew his settlement offer within policy limits (2-APP-338-341).

5-10-2019 Amador Superior Court Judge Renee C. Day granted the

CSAA et al. *Demurrer* without leave to amend as to all six causes of action.

- On this same date the Court also granted Rushing's *Demurrer* as to Count #4 – Intentional Emotional Distress – Direct Victim, Count #5 Negligent Business Interference with Projected Economic Advantage and the striking of punitive damages (2-APP-515-516). These dismissal's fully and unlawfully eliminated Dr. Pierson's ability to pursue Count #5 which was fully justified based upon the fact that the persistent harm done to Dr. Pierson by CSAA was done in CSAA's efforts to advance its own corporate and shareholder financial interests.

8-21-2019 Notice of Entry of Judgment as to CSAA et al. was mailed to Dr. Pierson.

10-17-2019 Dr. Pierson's submission of the *Notice of Appeal* (Form APP-002) as to Defendants CSAA (2-APP-526-537).

12-19-2019 Notice of Appeal *"lodged/received"* in the Third District Court of Appeal.

1-9-2020 Order by Presiding Judge Raye to authorize the appeal to proceed.

7-02-2020 Order by Presiding Judge Raye to deny Dr. Pierson's

effort to proceed with an Interlocutory Appeal of the dismissed causes of action as to Rushing (Counts #4, #5 and the stricken Punitive Damages) which were elements in common with the CSAA et al. appeal.

8-02-2022 Respondent Brief filed.

3-14-2023 Appellant Reply Brief filed.

6-23-2023 Oral Argument Third District Court of Appeal.

6-29-2023 Submission by Appellant of an extensively referenced *Judicial Notice* which provided irrefutable case record evidence that CSAA never during the entirety of the case up through that point in time on appeal had abjectly and intentionally failed to provide the full insurance policy *"instrument as a whole"* inclusive of the *Declaration* and *Endorsement* pages. This Judicial Notice also indisputably proved that CSAA's Appellate Counsel, Attorney M. Quintero had falsely stated at the June 23, 2023 oral argument that the complete insurance contract had been provided to the Court below.

7-30-2023 Rejection by the Court of the entirety of the Judicial Notice inclusive of the over two-hundred-page (200+) case record excerpts.

6-30-2023 Denial of the Appeal by the panel of three judges of the

Third Appellate District Court of Appeal.

7-24-2023 Petition for Rehearing (resubmission) by Dr. Pierson. (Note the initial Petition submitted on 7-17-23 was overlength and was attached to a *Motion for Leave to File an Overlength Brief.* That request was *denied* on July 19, 2023 with Leave granted to refile at the correct length).

7-31-2023 Denial of the *Petition for Rehearing* (resubmission) by Acting Presiding Judge Mauro.

ARGUMENTS

Argument #1

CSAA et al. has intentionally failed throughout the entirety of this case in the lower court as well as in this related appeal to present the complete insurance contract *(" the instrument as a whole")* that was in effect between the Insured Rushing and Insurer CSAA at the time of the motor vehicle accident on 10-10-2016.

The full facts and evidence provide irrefutable confirmation that CSAA failed through the entire duration of this case below as well as through this Appeal to provide the entirety of the insurance contract *("that instrument as a whole")* inclusive of all declaration and endorsement pages [*Harper v. Wausau Ins. Corp.,* 56 Cal. App. 4th 1079, 1085-1086]. That abject failure to present the *"whole"* policy fully eliminated, as a matter of law, the jurisdiction of the Superior Court to proceed with that Court's order *"sustaining the Demurrer without leave to amend"* (2-APP-508).

The well-established caselaw precedents of the California Appellate Courts

require that when a case in controversy involving the interpretation of a contract is brought before the court that the review must consider the *"instrument as a whole"* [*Harper v. Wausau Ins. Corp.,* 56 Cal. App. 4th 1079, 1085-1086]:

> The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. (Civ. Code, § 1636.) ...In so doing, the court must interpret the language in context, with regard to its intended function in the policy. **This is because 'language in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract.'** (*Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal. 3d 903, 916-917 & fn. 7 . . .)

The clear and undisputed facts of the case record (case #18-CVC-10813) inclusive of all documents referenced in this *Petition* with one exception (the 4-21-2017 File Memo by Pierson's Assistant Shelly Hills found at Exhibit B in the AOB) are found within the 6 volume Appeal Appendix. Those true facts provide full evidence that CSAA has never produced the *"whole"* contract between Rushing and CSAA for review by the Courts despite Pierson's repeated requests. Two incomplete, non-specific examples of a *"Car Policy"* included as exhibits to the two CSAA Replies to Dr. Pierson's Opposition to their Demurrer and Motion to Strike (2-APP-377-389, 408-420) did not contain *Declaration* or *Endorsement* pages. These *"Car Policies"* were undated and contained no specific information identifying them to be the policy in effect between Rushing and CSAA.

A. **The true facts provide indisputable confirmation that CSAA by and through its Agents and Attorneys did not provide the complete insurance contract before or after that Court's 5-10-2019 decision to grant the CSAA Demurrer.**

1. **4-21-17, 12:07 PM** – Dr. Pierson had his office assistant, Shelly Hills, listen while he left a voicemail for Christine Binder, the CSAA Supervisor, in which he requested a full copy of Ms. Rushing's policy. Immediately following that call Hills placed a handwritten memo into the file (Exhibit B in AOB).

2. **6-7-2017**– Pierson's letter to patient Rushing (2-APP-291-292).

    a. Pierson informed Rushing that CSAA Representatives refused to provide the contract (2-APP-292).

    b. Pierson then asked Rushing to provide that information – *"Any information that you might provide in that regard would be quite useful and much appreciated."*

    c. A copy of the Rushing letter was forwarded with the certified letter sent that same date to CSAA Claims Representatives, Brewer, and Binder (APP-288-289).

        i. Rushing letter clearly communicated Pierson's settlement offer, which was effectively within policy limits *"Please have full confidence that I have the deepest respect for you and have no interest,*

whatsoever, in any element of your personal assets."

(2-APP-291).

3. **3-29-2019** - Pierson's Opposition filed to CSAA Demurrer and Motion to Strike (2-APP-236-357).

   a. In the Opposition Dr. Pierson provided repeated notice to Superior Court of CSAA *"Attorney Costello's failure to provide Dr. Pierson with the information he requested in his March 11, 2019, letter concerning the policy provision as well as her failure to address this issue in her March 12, 2019, Amended Demurrer and Motion to Strike requires that her current motions before this Court be denied."* (2-APP-248 L5). (See Pierson 3-11-2019 letter to Attorneys Costello and Leonard 2-APP-349-352).

4. **4-15-2019**– *Reply Brief in Support of Demurrer to Complaint by Defendant CSAA Insurance Services, Inc. and Declaration Attorney Costello* (2-APP-358-390).

   a. Exhibit C included with this CSAA Reply, is a document titled *AAA Insurance – AAA Member's Car Policy* (undated) (2-APP-377-389).

      i. This Car Policy represents an incomplete generic version of an AAA *Car Policy* is undated, has no *Declarations* or *Endorsements* and contains no specific information identifying that it to be part of the insurance contract

between Rushing and CSAA. The absence of any specific identifiers or *Declarations* or *Endorsements* is unqualifying under the *Parol Evidence Rule CCP 1856.*

5. **4-5-2019** – *Reply Brief in Support of Motion to Strike by Defendant CSAA* (2-APP-391-421).
   a. Exhibit C to this *Reply Brief* (2-APP-408-420) represents a second exact copy of the generic form of the *Car Policy* (2-APP-408-420) reviewed in Section #4 above.
   b. This undated *Car Policy* also has no date or any information identifying it to be specific to Rushing and does not include the *Declarations* or *Endorsements*. It is important to point out that the *Car Policy* specifically states in bold print page 1 (2-APP-410) that the *Declarations* and *Any Applicable Endorsements* are what *"constitute your policy"*. The absence of those elements proves that even from CSAA's perspective this does not represent a *"whole"* policy.

6. **5-10-2019** – *Reporter's Transcript of Proceedings* at Superior Court on CSAA Demurrer and Rushing's *Demurrer* and *Motion to Strike.* In attendance: Dr. Pierson, CSAA Attorney Stanley Michael and CSAA Attorney Bruce Leonard for Rushing (2-APP-481-517).

a. Pierson repeatedly testified that the insurance contract between CSAA et al. and Rushing was never produced:

i. *"That policy has not been produced"* (2-APP-498, L20-21).

ii. *"I have not been presented the policy"* (2-APP-499, L4-5).

b. Despite this strong testimony the Court disregarded that deficiency and granted the CSAA *Demurrer*: *"I am sustaining the Demurrer without leave to Amend"* (2-APP-508, L20-21).

7. **4-20-2022** – *Settlement Conference Statement... Rushing (Attorney Leonard)* (6-APP-1415-1419).

a. On page 3, line 11 (6-APP-1417) under title ***Settlement Negotiations***, the policy limits allegedly contained within the *Declaration* of the insurance policy was provided. That information was contained within the phrase *"Plaintiff has demanded the policy limits (100/300 BI, 50 PD)"*. No other policy information, Declaration or Endorsement pages were included. This limited information had never previously been disclosed to Pierson.

8. **8-22-22** AOB (p. 39)

a. It was clearly stated that the policy had never been produced: *"CSAA and the attorneys for CSAA and Tortfeasor Rushing*

failed to provide full access to the indemnification insurance contract . . .".

b. This failure *"fully invalidates the Court's consideration of those motions...".*

9. **8-22-22** AOB at Argument #4 (p.69) alerts the Court of failure by CSAA to provide the insurance policy and stated that failure to provide the *"full insurance policy limits and Declaration page(s)"* represented *"bad faith"*. It also stated *"That this misconduct suggests a corporate pattern to deny that information and obstruct settlement efforts..."*

The 2nd District Court in *Reid v. Mercury Ins. Co.,* 220 Cal. App 4th, 252, 273 (2013) found such conduct to warrant a charge of *bad faith* (citing *Boicourt v. Ames. Ass. Co.* (2000) 78 Cal. App 4th 1390).

10. **3-14-23** ARB at Argument #7 (p. 51) emphasized the failure of CSAA *"in the proceedings below to provide a copy of the insurance policy . . .".*

11. **6-23-23** Appellant Oral Argument (audio transcript 2:07-5:39 minutes) emphasized that CSAA *"never showed a full copy of contract"*. Pierson emphasized that the declaration pages were never provided only *"a short phrase with the limits"* was provided in the Rushing Settlement document 4-20-22 (6-APP-1378).

B. Strong case law support was provided in the 8-22-22 Appellant Opening Brief as well as at the 6-23-23 Oral Argument that a Court must review the entire insurance contract or *"instrument as a whole"* before making a valid determination on whether a third-party beneficiary is incidental or intentional with enforcement rights under CCP 1559:

1. In the AOB (p. 45) the case law decisions of the Second District in *Bancomer v. Superior Court,* 44 Cal. App 4th 1450 (1996) and Fourth District in *Cione v. Foresters Equity Services*, 58 Cal. App. 4th 625, 636 (1997) were reviewed. Those Courts emphasized that a contract determination had to be based upon "*the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered. [Citations omitted.]"*
2. At the 6-23-23 Oral Argument Pierson referenced *La Barbera v. Security National Ins. Co.*, 89 Cal. APP. 1329,1341 (2022) which referenced the earlier Second District opinion in *Harper v. Wausau*, 56 Cal. App.1079,1087 which cited *Producer's Dairy Delivery co. v. Security Ins. Co.* (1986) 41 Cal. 3d 903, 916-917 & fn.7 emphasizing *"language in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case..."*

Conclusion to Argument #1

The facts contained within this case record confirm beyond any doubt

the CSAA misconduct to intentionally not produce the entirety of the insurance contract for the Courts or Pierson despite repeated requests. That CSAA failure to provide the *"whole"* policy eliminated the authority of the Court to proceed to a proper determination on third-party enforcement rights under CCP 1559. The fact that both Courts proceeded to decisions adverse to Pierson despite the absence of the *"whole"* represents *error* which has caused an exceptional injustice to Dr. Pierson as well as to his many hundreds of patients who have been denied access to his care because of the CSAA failure to promptly compensate Pierson to enable his reopening of the practice.

Argument #2

There can be no question but that CSAA by and through its claims representatives and successive legal counsel have intentionally failed to provide the entirety of the *car policy* between CSAA and Rushing. Contrary to those indisputable facts Respondent Attorney Maria Quintero on direct questioning at the 6-23-23 Oral Argument intentionally misinformed the Court that the complete insurance contract had been produced.

Based upon the evidence contained within the case record below as well as that placed before this Third District Court, it can be stated with absolute certainty that the entirety of the *car policy* in effect between Rushing and CSAA at the time of the 10-10-2016 accident was never provided either to the Superior Court or to Dr. Pierson. Despite that evidence, Attorney Quintero on direct questioning on this critical issue falsely stated that the

complete insurance contract had been provided:

> *"I believe it was presented in connection with the reply papers in support of the Court. And it was provided to the judge". (Transcribed by AI software from the poor-quality audio file of oral argument provided by the Clerk and found at time interval 18:51 - 19:50)*

That indisputably false statement by Quintero in the face of such substantial and contrary evidence is not only disheartening, but also fully qualifying as a *deceit* perpetrated upon this Court under CCP 1709 and 1710. Thus, it is qualifying under the California Business and Professions Code 6128, as a misdemeanor. Furthermore, it is reasonably concluded that Attorney Quintero knowingly made that false representation with the intent to misinform the Court in order to achieve her desired outcome. Due to that false testimony, it can be stated that the Court's 6-30-23 decision to *affirm* was based upon blatant fraud.

Argument #3

The Third District Court's decision which stated that CSAA's role here was simply an agreement to "indemnify Rushing" (p. 10) fails completely to recognize the quite extensive and exclusive role that CSAA has demanded that it must serve under the insurance contract in the management and handling of all litigations that arise due to the negligence of their insured such as exists here. It is indisputable here that CSAA has actively controlled the litigation in a manner that extends far beyond the boundaries defined by indemnification by extending that control into areas which target the corporation's best interests with a primary focus directed at maximizing shareholder value and profits while fully disregarding the interests of their insured as well as those interests of injured third-party beneficiaries.

1. **Auto insurance contracts have been well recognized by the multiple Federal and State courts nationally to demand complete and absolute control over all litigation matters.**

There is a plethora of evidence provided in the caselaw decisions of the Supreme Court of California as well as those of the many state and federal reviewing courts that the Courts have fully recognized that automobile insurance contracts require that complete and absolute control over all aspects of covered litigation must reside with the Insurer. The corollary is that Insureds have absolutely no control over the handling and resolution of those cases. This contractual control relegated to the insurer results in a complete subservience of the insured's interests to those of the insurer. The recognition of the existence of these contractual conditions by the Courts is well demonstrated on review of many caselaw precedents. One of the earliest cases which recognized the existence of this absolute level of control by the auto insurers was considered by the Supreme Court of Wisconsin which has been cited by the California courts. That case titled *Hilker v. Western Auto Insurance Co.,* 204 Wis. 1; 231 N.W. 257 importantly references an earlier Wisconsin case from 1916 at the beginning of the automobile era:

> *The case presents a question of vital importance to both insurer and insured, which has been considered by this court in but a single case, decided in 1916. Wisconsin Zinc Co. v. Fidelity & D. Co. 162 Wis. 39, 155 N.W. 1081. Since that case was decided, a great body of automobile law has*

> *been developed. The court at that time did not see, and could not then foresee, the problems that would arise under the provisions of these policies which* ***give the insurer complete and absolute control*** *of all claims arising out of automobile accidents.*

A later precedent by the Supreme Court in *Comunale v. Traders & General Ins. Co.,* 50 Cal.2d 654 referenced this Wisconsin case and fully acknowledged *"the insurer has reserved control over the litigation and settlement . . ."*. The First District in *Ivy v. Pacific Auto Ins. Co.,* 156 Cal. App. 2d 652, 659 (1958)] also recognized that *"under the terms of the policy the insurance company retains control of the litigation"*. More recently in *Merritt v. Reserve Ins. Co.,* 34 Cal. App.3d 858, 872 (1973) the Second District again recognized that the insurance contract is designed to provide the insurer with the *"right to control litigation"*.

Finally, in a recent decision by the Supreme Court [*Pitzer College v. Indian Harbor Ins. Co.,* 8 Cal. 5th 93 (2019)] the Court observed that *"The insurer [is invested] with complete control and direction of the defense"*.

The point to be emphasized here is that an auto Insurer's exclusive control and active participation in auto negligence cases defines a level of involvement which extends well beyond the characterization of a simple *indemnification* process which this Court suggests in the opinion. Rather, that active involvement extends prominently into areas where

the insurer becomes actively involved in protecting its own financial interests which represent a much higher-level priority than those interests of the Insured which results in a high-level conflict of interests. Such involvement is in sharp contrast to the interpretation of the vast body of caselaw which choses only to recognize to the limited indemnification function. The true facts are that insurers are not the hands-off, detached, and disinterested check dispersers, but rather highly actively involved in controlling all aspects of negligence claims with the primary intent of protecting and advancing their own corporate financial interests. Insurers have utilized their unique and dominant control over these auto negligence claims to transform them into investment opportunities. They manage the claims with a unifying intent to minimize payments to injured parties and maximize return for shareholders. Such an approach is truly unlawful as it is completely contrary to the Insurance Code at 790.03(h)(5) which requires that once negligence is established the insurer must *"effectuate prompt, fair and equitable settlements..."*

2. **The facts of this current case provides full confirmation of this exceptional level of control that CSAA has exerted over this litigation as evidenced by the fact that the team of attorneys assigned to represent CSAA and Rushing are either directly employed by CSAA or at a minimum appear to maintain near exclusive working relationships with CSAA.**

This high level of CSAA control over cases certainly extends to the

attorneys selected to represent the insured defendants. In the current case this is evidenced by simply reviewing the business email addresses of Defendants' counsel.

1. Bruce Leonard – bruce.leonard@csaa.com
2. Dorothy Tran – dorothy.tran@csaa.com
3. Lisa Costello – lisa.costello@csaa.com
4. Mark Inbody – mark.inbody@csaa.com

This almost exclusive level of CSAA corporate employment of the assigned defense attorneys provides confirmation of an implied high-level conflict of interest existing for those attorneys with respect to the insured, Rushing. That is, the concern of those attorneys for their ongoing employment by CSAA would more likely than not motivate them to handle the case in a manner that benefits the insurer financially even if such handling were disadvantageous for the insured. On this issue of inherent conflicts, it will be useful to make a comparison of this arrangement where the Insurer can directly employ and influence the attorneys they assign to their Insureds and to make the comparison to that which exists with the practice of medicine in California where there is a prohibition to the corporate practice of medicine. That restriction in medicine which bars health systems and hospitals from direct employment and control of physicians represents public policy effort designed to avoid such conflicts.

3. The facts of this case provide an overwhelming amount of evidence which demonstrates a plethora of blatant <u>bad faith</u> violations by CSAA of the Insurance Code Article 6.5, 790.03(h) with particular attention directed to subsections (5), (12) and (15).

Before proceeding, it is important to emphasize that Tortfeasor Rushing was a sole operator who crashed into and through the side structural wall of Dr. Pierson's medical practice, a negligent act fully documented in the Jackson *Police Report* (1-APP-22-25). That Rushing negligence is fully qualifying under the *Negligence Per Se Doctrine* (Evid. Code 669). Thus, at trial there would be no requirement to prove negligence, which has already been established as a matter of law. With negligence established, 790.03(h)(5) then required the insurer to pursue "*prompt, fair and equitable settlement*". From that perspective, the status of this case demonstrates just how significantly and unlawfully the requirements of the Insurance Code have been flagrantly and repeatedly disregarded by CSAA. Such infractions are rarely addressed by the Department of Insurance nor have there been adverse consequences in the California courts due to the California Supreme Court's refusal to recognize a *cause of action* for infractions under 790.03(h). Despite that Court position it has emphasized that (*Moradi-Shalal v. Fireman's Fund Ins. Co., 46 Cal. 3d 287, 305):*

> *We caution, however, that our decision is not an invitation to the insurance industry to commit the unfair practices proscribed by the Insurance Code. We urge the Insurance Commissioner and the courts to continue to enforce the laws forbidding such practices to the full extent consistent with our opinion.*

In fact, CSAA et al.'s conduct here provides confirmation of the intent to do just that.

At this juncture, it will be useful to review the caselaw precedents in the California which have long recognized that an insurer's failure to settle claims within policy limits when risk of an excess judgment exists represents a *bad faith* breach of the *implied covenant of good faith and fair dealing*. The Supreme Court has fully recognized that such a breach results in the insurer having full liability for any excess judgment that occurs [*Comunale v. Traders & General Ins. Co.,* (1958) 50 Cal. 2d 654, 660,659]. In another case the Supreme Court proposed a *test* which the insurer must apply when the risk of an excess judgment is high. That test requires the insurer to consider the liability exposure as if there was no policy limit and full risk rests with the insurer [*Crisci v. Security Ins. Co.,* 66 Cal. 2d 425, 429 (1967)]. The Second Circuit also found that an insurer was in breach of the *implied covenant* when there is an unreasonable failure to settle when the risk of an award in excess of policy limits exists [*Merritt v. Reserve Ins. Co.,* 34 Cal. App 3d 858, 872 (1973)]. In *Johansen v. Cal. State Auto Assn. Inter-Ins. Bureau,* 15 Cal. 3d 9, 17 (1975) the Supreme Court again emphasized that the insurer must achieve settlement of a claim within policy limits when the conditions exist for a judgment beyond policy limits. More recently the Second District [*Reid v. Mercury Ins. Co.,* 220 Cal. App. 4th 262, 272

(2013)] has again emphasized this point.

With this background in the caselaw, it is indisputable in this case at issue that CSAA has exceptionally breached this duty to settle owed to Rushing for its refusal to settle despite Dr. Pierson's many settlement offers within policy limits between 6-7-2019 (2-APP-291-292) and May 5,2022 (6-APP-1491-1513) (see ARB, pgs. 12-16). Thus, in this case at issue the insurer here has flagrantly and in bad faith repeatedly breached these duties and must accept all financial risk.

4. There is significant evidence available here that the CSAA repeated failure to settle within policy limits fully and indisputably demonstrates a failure to uphold its California recognized Fiduciary Relationship that exists with Rushing.

> *"The relationship between an insurer and an insured is akin to a fiduciary relationship." [State Farm Fire and Casualty Co. v. Superior Court,* 215 Cal. App 3d 1222, 1226 (1989)]

There can be no question that under the circumstances reviewed above in which the CSAA et al. hired attorney for Rushing has repeatedly refused settlement offers which posed no financial risk to his client, that Attorney Bruce Leonard has clearly and repeatedly violated not only his professional duties, but also his *fiduciary relationship* owed to Rushing. The existence of such a *fiduciary relationship* between the Insurer and Insured has been well established in California. The Supreme Court in considering this issue has referenced the Supreme Court of New Jersey decision in *Rova Farms Resort, Inc. v. Investors*

Ins. Co., 65 N.J. 474, 492 (1974)]:

> *By virtue of the terms of such a policy, proscribing the insured from settling on his own behalf, the carrier has made itself the **agent** of the insured in this respect. Fidelity & Cas. Co. v. Robb, 267 F. 2d 473, 476 (5th Cir. 1959). Thus, the relationship of the company to its insured regarding settlement is one of inherent fiduciary obligation. (Citations omitted).*

It is critical to point out that the *Rova* Court recognized that the Insurer becomes the *agent* for the insured which defines a level of involvement that extends well beyond simple indemnification.

Due to this relationship, the Supreme Court in *Crisci v. Security Ins. Co.*, 66 Cal.2d 425, 431 (1967) long ago explicitly stated that the insurer could not place its own interests above those of the insured:

> *"An insurer should not be permitted to further its own interests by rejecting opportunities to settle within the policy limits unless it is also willing to absorb losses which may result from its failure to settle."*

Conclusion to Argument #3

When viewed from the accurate perspectives provided in the sections above and considering the contractual terms that provide CSAA complete control over all aspects of the claim pre- and post-filing of the complaint it becomes evident that CSAA has: (1) repeatedly violated the Insurance Code 790.03(h), (2) repeatedly in *bad faith* violated the *Implied Covenant of Good Faith and Fair Dealing* as to Rushing, (3) repeatedly failed to provide a complete copy of the insurance policy,

(4) at Oral Argument falsely claimed that the *"whole"* insurance policy had been produced, and (5) for the almost seven (7) years following the accident intentionally and foreseeably has continued to financially and professionally marginalize Pierson. This collective evidence proves beyond any doubt that CSAA et al.'s actions extend well beyond simple indemnification functions but rather extends to that of being a quite active participant here whose efforts were directed exclusively in the corporation and shareholder's financial interests. With this exclusive control and active participation in managing the claim CSAA has been motivated to interfere with and disadvantage Pierson's business of providing health services to hundreds of patients and to protect and advance the financial interests of its corporate shareholders. This evidence validates Pierson's 5th Cause of action – *Negligent Business Interference with Projected Economic Advantage*. These facts demand that the California Courts and Legislature must provide a *cause of action* to exist when there is a multifaceted plethora of unethical and unlawful activities are demonstrated and to permit direct actions against Insurers who repeatedly violate the insurance code and commit fraud.

Argument #4

The Appeal Panel's position with respect to Civil Code 1559 relies upon the Supreme Court holding in *Harper v. Wausau* (1997) 56 Cal. App. 4th 1079, 1087 which states *"a third party should not be permitted to enforce covenants made not for his benefit but rather for others. He is not a contracting party; his right to performance is precedented on the*

contracting party's intent to benefit him". **This understanding greatly misinterprets the ancient precedents which motivated and guided the early California Legislature when establishing Civil Code 1559 as well as the Supreme Court of California's early interpretation of the statute.**

The key to understanding the true intent of the California Legislature in the 1882 creation of Civil Code 1559 was fully reviewed in the AOB (p. 34-35). That analysis included a review of the early contract law of Maine and Massachusetts as well as that of the U.S. Supreme Court in *Second National Bank v. Grand Lodge,* 98 U.S. 123, 124 (1878) which contributed to the legislative foundation of CCP 1559.

A short seven years following an initial Appeal in *Chung Kee v. Davidson*, 73 Cal. 522 (Cal. 1887) in which the Court interpreted CCP 1559 the case was returned to the Supreme Court on a second Appeal (*Chung Kee v. Davidson*, 102 Cal. 188 (1894). In that second appeal the Court reviewed the critical principles of contract law that had been established in those above-mentioned early precedents of the Supreme Courts of Maine and Massachusetts as well as that of the U.S. Supreme Court. It was those principles of contract law which had influenced and guided the Legislature in establishing CCP § 1559 which have critical relevance. Those early Courts established the principle that under circumstances where one party finds itself in the possession of the money or property of another party that in principle a *"privity"* of one to the other was established. In other words, a substantive legal relationship would exist:

> *In Lewis v. Sawyer, 44 Me. 337, the court, quoting from Hall v. Marston, 17 Mass. 575, said: "Whenever one man has in his hands the money of another which he ought to pay over, he is liable to the action of money had and received, although he has never seen or heard of the party who has the right. When the fact is proved that he has the money, if he cannot show that he has legal or equitable ground for retaining it, the law creates the privity and the promise."(Id., p.195-196)*

In this second *Chung Kee* opinion, the California Supreme Court proceeded to review the U.S. Supreme Court's opinion in *Second National Bank v. Grand Lodge,* 98 U.S. 123, 124 (1878) which emphasized that there were multiple exceptions to the existence of the privity of contract which created the right to proceed with suit for non-performance. The Court observed that the most common such exception was that situation in which in a contract between two parties assets come into the possession or control of the promiser which lawfully belong to a non-contracted third party under which circumstances the third party *"may sue in his own name".*

> *The Supreme Court of the United States, after conceding the general rule to be that privity of contract is necessary to the maintenance of the action of assumpsit said: "But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control, which in equity belong to a third party (Id., p. 196-197)*

There can be no doubt that this interpretation by the U.S. Supreme Court is fully consistent with the power of enforcement authorized by the Legislature in CCP § 1559. These case-law precedents certainly support the recognition of the broader right of a non-contracted third party to sue to

obtain possession of that property to which they are lawfully entitled. The further implications of this early precedent in *Second National Bank v. Grand Lodge* as to third-party enforcement with insurance contracts requires a review of the understanding of the role of an *assumpsit* in a contracted relationship. The legal definition for assumpsit in Black's law dictionary (Third Pocket Edition) is:

> *An express or implied promise, not under seal, by which one person undertakes to do some act or pay something to another.*

The point to be emphasized is that the role of an insurance company such as CSAA offering an indemnification contract as in this case is that it represents a contracted entity that has made a promise (assumpsit) to pay the obligations of a client (Tortfeasor Rushing here) which may arise from that client's negligent acts. The point that must be emphasized is that the promise (or assumpsit) is owed to the third party that the insured may at some point in time become indebted to. By way of example, this is completely analogous to the role that an independent accountant would assume to tally and pay the debts of a client as that client accrues debts over some agreed time period. Another example would be the contractual relationship developed between a home builder and his independent accountant; the homebuilder would deposit funds with the accountant (assumpsit) who would then utilize those deposited funds for payment of the legitimate debts that come due within the contractual time. Thus, when

the homebuilder purchases a supply of lumber and has the bill forwarded to the accountant, the accountant would be obligated to pay that indebtedness with the previously deposited funds. Under those circumstances should the independent accountant refuse to make good on that promise of payment (the assumpsit) then the lumber provider would have a third party right of enforcement against the accountant to seek payment irrespective of whether there is an assignment by the homebuilder in the subcontracting lumber supplier's name. To apply this practical understanding to this case, CSAA Insurer has made the promise to pay Rushing's indebtedness with the funds deposited by Rushing pooled with those funds of other insureds. In that circumstance, the debt is owed to the injured third party (Pierson) who was unnamed at the time of establishment of the contract. The intent or *"end and aim"* in this contractual relationship is always for the insurer to pay the debt owed to the injured party and to never make a directed payment to the insured, Rushing. In simple terms, the insurance policy could be considered to include *a blank space for future entry of the name of the injured third-party beneficiary* which after a negligent injury caused by the insured immediately gets filled in with the name of the entitled third party. These circumstances are completely analogous to the example provided above when the contractor in the middle of a building project obtains additional lumber from and becomes indebted to the subcontracting lumber supplier who under the pre-existing contractual relationship between the

contractor and the accountant is then paid from the pre-deposited funds. In this example, if the accountant refuses to pay the lumber supplier (the promise) then the lumber supplier has a lawful right of enforcement against the accountant. With this understanding and insights provided from the ancient precedents reviewed above it becomes patently clear that the injured third party in the insurance case represents an *intended and not incidental* 3rd party who thus has *enforcement rights*.

It is important to point out that the U. S. Supreme Court in *Second National Bank* emphasized that there are many exceptions in this type of relationship with the most frequent one being when assets *"come to promisor's hands . . . which . . . belong to a third party"*. Certainly, such an occurrence can arise at any time in these relationships involving such business or personal injury cases. This analysis of the early case precedents fully supports Dr. Pierson's stated position in the AOB that he has Third Party enforcement rights as an intended third-party under CCP 1559.

Argument #5

The Appellate Court decision states that "a third party such as plaintiff may not bring a direct action against an insurance company except where there has been an assignment of rights by, or final judgment against, the insured" (p. 5). In this case at issue Pierson has repeatedly made such requests of assignment that accompanied settlement offers which pledged no personal financial risk to Rushing. Those requests were repeatedly denied (5-APP-1113, 6-APP-1487-1488) with no evidence presented to confirm that the proposal was ever even presented to Rushing.

Despite the fact that Pierson had directly stated to Attorney Leonard that he

had a Professional and Fiduciary Duty to inform his client of Pierson's settlement offers which entailed no personal financial risk to Rushing coupled in the later stages (4.5 years post-accident) with the request for assignment of her *bad faith* claims under the *Implied Covenant* (5-APP-1117), no direct evidence was ever presented from Rushing indicating her refusal. In fact, a Rushing refusal would have been would have been truly unexplainable. There is absolutely no reason that an elderly nonagenarian would refuse such offers which agree to completely vindicate her from the litigation with no financial risk. As a result, these circumstances strongly suggest that Rushing or alternatively her legal guardian(s) have never been informed of those reasonable offers extended over an almost 5-year period. If true, it should be fully evident that under such conditions where the insured is isolated and fraudulently not informed, then the plaintiff would never be able to acquire such an assignment of rights as he has no access to the defendant. Therefore, it is unreasonable for the courts to require such an assignment of rights when such a request can be so easily defeated by defense counsel's unethical and unlawful behavior. Thus, the requirement to require the assignment of rights or in the alternative to obtain a judgment at trial before a plaintiff can move against the Insurer creates quite impermissible and exceptionally unequal protections for Insurers such as CSAA et al. from being sued for their misdeeds. Those restrictions on Dr. Pierson's *right of petition* and the elevated and unequal protections

provided to Insurer CSAA et al. are inherently unjust and impermissible under the First, Fifth and Fourteenth Amendments of the U. S. Constitution.

Argument #6

The Appellate decision rejects Pierson's advancement of a *"CSAA duty of care under Biakanja"* apparently in part because *"he does not expressly state the nature of the duty he seeks to impose" (p. 13).* The Court has greatly misapprehended Dr. Pierson's argument. In fact, in the AOB (pgs. 62-66) and the RB (pgs. 42-51) the existence of special relationships between CSAA et al. and Rushing as well as between CSAA et al. and Appellant are extensively referenced and supported demonstrating the applicability of *Biakanja* here. *Biakanja* must not be excluded because the defendant simply is an insured.

In the ARB (p.42), it was emphasized first that CSAA had a *special relationship* with Rushing because it was the CSAA provision of insurance coverage which assisted that eighty-nine-year-old negligent driver to keep her car registered and her driver's license current by facilitating her ability to meet the *financial responsibility* requirements of the Vehicle Code 16020 and 4000.37. As a result of that act and the opportunity it represented for the elderly Rushing, CSAA was best positioned to ensure that she was a competent driver. Thus, CSAA created a special relationship with Rushing which served to establish a duty of care for CSAA to prevent or minimize the harm that Rushing might cause others. Furthermore, Rushing's negligent act resulted in the persistent closure of Dr. Pierson's medical practice and immediate disruption of care to many hundreds of patients. CSAA was immediately informed of these disruptions and injuries (2-APP-259,289). As a result, CSAA had early knowledge of the extent of the

ongoing injuries that Dr. Pierson had sustained and knowledge that the only monies that would become available to repair and reopen the practice location would be those forthcomings from the insurance settlement; therefore, CSAA had full *foreseeability* that their failure to act to assist Pierson would result in significant ongoing injuries accruing (2-APP-259, 289). The fact that a CSAA insured's negligent vehicle operation resulted in the disruption of care for many hundreds of patients at a critical health resource in an underserved region had the effect to also create a special relationship between CSAA and Dr. Pierson (ARB, p.46) with a resultant *duty of care* to assist to get the practice back in operation as soon as possible.

In addition, due to the unquestioned liability as documented by the police report (1-APP-21-25) which confirms the applicability of the *Negligence Per Se Doctrine* which established negligence, CSAA from the outset had certain knowledge that liability existed and would need to be compensated. This analysis fully confirms that all six factors qualifying factors specified under *Biakanja* were met or exceeded. Furthermore, the closure of a critically needed health clinic confirmed that public policy interests demanded that CSAA accept its duty of care and immediately assist with the practice restoration (*Biakanja v. Irving*, 49 Cal. 2d 647, 650 (1958).

The above review of facts along with the closure of the clinic which was a critically needed health resource confirms that a duty of care existed under

CCP 1714 in the absence of any *Rowland* factors (Rowland v. Christian, 69 Cal. 2d 108 (1968) supporting an exception to that duty. From these multiple perspectives, Appellant must respectfully disagree with the conclusions of the Appeal panel (p. 13) because the facts strongly support the existence of a *duty of care* under CCP 1714 and *Biakanja*. In this regard the Court is referred to the discussion provided in the Court's recent decision on this issue (*Sheen v. Wells Fargo Bank, 12 Cal. 5th, 905, 938 (2022):*

> *"In Biakanja, we held that a defendant's negligent performance of a contractual obligation resulting in damage to the property or economic interests of a person not in privity could support recovery if the defendant was under a duty to protect those interests"]; Quelimane, supra, 19 Cal.4th at p. 58 [discussing Biakanja in the context of "existence of a duty to third parties"]; Bily, supra, 3 Cal.4th at p. 397 ["We have employed a checklist of factors [laid out in Biakanja] to consider in assessing legal duty in the absence of privity of contract between a plaintiff and a defendant"]; J'Aire, supra, 24 Cal.3d at p. 804 ["Where a special relationship exists between the parties, a plaintiff may recover for loss of expected economic advantage through the negligent performance of a contract although the parties were not in contractual privity."*

Argument #7

Pierson has been denied his fundamental U.S. Constitutional Rights under the First, Fifth and Fourteenth Amendments to seek redress in the Courts for the substantial and ongoing injuries over the past almost 7 years that have resulted from the exceptional misconduct and repeated unlawful activities and fraud of Defendant/Respondent CSAA.

The right to a remedy in the Courts for wrongful injury holds a revered place in our civil justice system. Lord Coke, Chief Justice of

the Common Pleas, traced this right to Chapter 29 of the Magna Carta, which guaranteed: *"Every Subject may take his remedy by the course of the Law, and have justice, and right for the injury done to him..."* 1 Edward Coke, *The Second Part of the Institutes of the Laws of England* *55 (London, E. & R. Brooke 1797). Chief Justice John Marshall, the longest serving Chief Justice on the Supreme Court of the United States, provided the following understanding of this fundamental and essential principle in American Jurisprudence:

> *The very essence of civil liberty certainly consists in the right of every individual to claim protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. (citing* Marbury v. Madison, 4 U.S. (1 Cranch) 137, 163 (1803)

The Superior Court's 5-10-2019 order granting the CSAA Demurrer and subsequent Dismissal of Dr. Pierson's case against CSAA which was affirmed by this Third District Court's 6-30-23 decision have denied to Dr. Pierson his fundamental U.S. Constitutional Rights under the First, Fifth and Fourteenth Amendments to seek redress for the substantial and ongoing injuries sustained over an almost 7 year period which have resulted from the exceptional bad faith, misconduct and repeated unlawful activities inclusive of fraud by Respondent CSAA.

In regard to the applicability of the Fourteenth Amendment as it relates to this issue of due process and equal representation in a person's right of petition in seeking redress for injury against the person(s) causing that injury; it is important to recognize that under both Federal and California law that a corporate entity such as CSAA et al. is a *"person"* under the Fourteenth Amendment. In the early precedent of the U.S. Supreme Court [*Gulf, C & S.F.R. Co. v. Ellis, 165 U.S. 150, 154 (1896)]* the Court emphasized:

> *It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States. . . . The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens.*

It is important to point out the Court's emphasis that the rights and securities guaranteed to corporations are those same guarantees afforded to *"individual citizens"*. That is the protections must be equal and not disproportionate as exists currently in California law where insurers are protected from being held accountable for their mistakes. A last point in this regard which is emphasized in the U.S. Supreme Court decision in *Shelley v. Kraemer, 334 U.S. 1, 14 (1948)* which emphasizes that no branch of state government may impugn these fundamental rights:

> *That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment. Thus, in Virginia v. Rives, 100 U.S. 313, 318 (1880), this Court stated: "It is doubtless true that a State may act through different agencies, -- either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.*

Thus, the efforts by the California legislature and the California courts to provide such disproportionate protections to insurance corporations over the rights of the individual to seek redress for injury have no rational basis and thus represent unconstitutional prohibitions of the rights of individual citizens.

Despite Pierson's exhaustive efforts within the restrictions imposed by the California Legislature in the Insurance Code [Code 790.03 and 11580(b)(2)] and the interpretations of those statutes by the Supreme Court as expressed in the case precedents *Moradi-Shalal v. Fireman's Fund Ins. Co. 46 Cal. 3d 287, 306 (1998)* and *Royal Indemnity co. v. United Enterprises Inc. (2008) 162 Cal. App. 4th 194, 205*, Dr. Pierson been abjectly denied his fundamental Federal right to seek redress for injury from CSAA which has indisputably caused him substantial ongoing injury. This proves beyond any doubt that Dr. Pierson has been effectively denied his fundamental U.S. Constitutional Rights under the First, Fifth and

Fourteenth Amendments to seek redress for the substantial and ongoing injuries caused by exceptional misconduct, fraud and repeated unlawful activities of CSAA which has been unlawfully and unconstitutionally permitted as a result of the elevated and unequal protections provided under the California statutes and Judicial interpretations of those statutes. At this point in the litigation and appeal, after exhausting all potential avenues to seek redress for his injuries under California law, Dr. Pierson has proper standing to proceed with constitutional challenges to those defective California statutes and judicial precedents which have deprived him of his fundamental civil liberties inclusive of his unrestricted right of petition, due process and equal protection under the First, Fifth and Fourteenth Amendments of the U.S. Constitution.

Conclusion

For all the reasons advanced above with the support of the fundamental civil liberty protections provided by the California and U.S. Constitutions, Dr. Pierson prays for the mercy of this esteemed Court to reverse the Court's June 30, 2023 *decision,* the July 31, 2023 denial of the Petition for Rehearing and to *Grant* the Appeal with *Remand* below for trial by jury against Defendant CSAA.

August 10, 2023

Raymond H. Pierson, III MD

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Appellant, Pro Per

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume and limitations and typeface requirements of Fed. R. App. P. 32(a)(7) because this motion is typed in Times New Roman 14-point proportionally spaced typeface and contains 12,541 words, as determined by Microsoft Word 365.

August 10, 2023

Respectfully submitted,

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Exhibit A

July 31, 2023 Order to Deny the Resubmitted Petition for Rehearing

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

RAYMOND H. PIERSON III,
Plaintiff and Appellant,
v.
CSAA INSURANCE SERVICES, INC., et al.,
Defendants and Respondents.

C091099
Amador County
No. 18CVC10813

BY THE COURT:

Appellant's petition for rehearing is denied.

Mauro
MAURO, Acting P.J.

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cc: See Mailing List

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: Pierson v. CSAA Insurance Services, Inc., et al.
C091099
Amador County Super. Ct. No. 18CVC10813

Copies of this document have been sent by mail to the parties checked below unless they were noticed electronically. If a party does not appear on the TrueFiling Servicing Notification and is not checked below, service was not required.

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Exhibit B

June 30, 2023 Third District Court of Appeal Decision to Deny the Appeal

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

RAYMOND H. PIERSON III, Plaintiff and Appellant, v. CSAA INSURANCE SERVICES, INC. et al., Defendants and Respondents.	C091099 (Super. Ct. No. 18CVC10813)

Following an incident in which Phyliss M. Rushing allegedly drove her car into an unoccupied medical office operated by plaintiff Raymond H. Pierson III, M.D., plaintiff filed a complaint asserting causes of action against Rushing and her insurer, defendant CSAA Insurance Service, Inc. and CSAA Insurance Exchange (hereafter CSAA). The complaint alleged that both CSAA and Rushing were liable for negligence and intentional infliction of emotional distress (IIED), and it alleged that CSAA was liable for acting in

bad faith. Plaintiff sought compensatory damages and, with respect to his IIED claim, punitive damages.

CSAA demurred to the complaint; it argued in part that plaintiff lacked standing to bring his claims against it because he was a nonparty to the insurance contract. The trial court agreed with CSAA and sustained the demurrer without leave to amend.

Plaintiff appeals. He contends he had standing to sue CSAA because he was a third party beneficiary under the insurance contract and because CSAA owed him a duty to attempt to settle his claim in good faith. He further argues that CSAA acted in bad faith by refusing to provide him with the policy limits and declaration pages of Rushing's insurance policy, and that his allegations related to CSAA's conduct were sufficient to support his request for punitive damages.

We conclude plaintiff lacked standing to sue CSAA, and we reject plaintiff's attempt to establish an insurer's duty to an injured third party to negotiate with the third party because the law clearly states that no such duty exists. We also reject plaintiff's remaining claims; the statute he relies upon to establish his bad faith claim does not provide for a private cause of action, and, in the absence of a viable claim against CSAA, he necessarily failed to plead facts sufficient to support the imposition of punitive damages. Finally, we observe that plaintiff fails to argue on appeal that there is a reasonable possibility the defect in his pleading could be cured by amendment, and therefore he has failed to satisfy his burden to make such a showing. Accordingly, we will affirm the judgment.

FACTS AND PROCEEDINGS

CSAA issued an automobile insurance policy (insurance contact) to Rushing, which included an indemnity clause stating in relevant part that CSAA "will pay damages, other than punitive or exemplary damages, for which any insured person is legally liable because of bodily injury or property damage arising out of the . . . use of a

car."[1] The insurance contract also included a provision for medical payments coverage, which provided in relevant part: "[CSAA] will pay reasonable expenses incurred within one year from the date of accident *by an insured person* who sustains bodily injury as a result of an accident covered under this Part for necessary medical, surgical, X-ray, and dental treatment, including prosthetic devices, eyeglasses, and hearing aids and necessary ambulance, hospital, professional nursing, and funeral costs." (Italics added.)

On October 9, 2018, plaintiff filed a complaint against Rushing and CSAA. The complaint asserted that on October 10, 2016, CSAA's insured, Rushing, drove her car into plaintiff's unoccupied medical office, causing plaintiff to suffer economic losses and personal injury.[2] The complaint asserted causes of action against both CSAA and Rushing, including: general negligence (first cause of action); negligent operation of a motor vehicle--business disruption (second cause of action); negligence--personal injury (third cause of action); and negligent business interference with projected economic advantage (fifth cause of action). As to plaintiff's negligence claims, the complaint alleged that Rushing was negligent, that CSAA was vicariously liable for Rushing's negligent conduct, and that CSAA negligently caused disruption of plaintiff's medical practice by refusing in bad faith to make a reasonable settlement offer.

Plaintiff also asserted a cause of action against Rushing and CSAA for IIED (fourth cause of action), which alleged that CSAA was vicariously liable for Rushing's

---

[1] Plaintiff contends that CSAA has only disclosed a generic version of the CSAA insurance policy, but CSAA's counsel stated in a declaration submitted with CSAA's reply in support of its demurrer that the policy is "a copy of the relevant portions of the automobile policy issued by [CSAA] to [Rushing] that was in force and effect at the time of the subject incident."

[2] The complaint alleged plaintiff aggravated a preexisting shoulder injury when vacating the office and that plaintiff and his staff suffered pulmonary injuries from breathing air contaminated by construction dust and debris.

infliction of emotional distress on plaintiff, and that CSAA's bad faith refusal to resolve plaintiff's claim caused him emotional distress. Plaintiff sought punitive damages related to that claim.

Plaintiff's sixth cause of action for bad faith alleged that CSAA engaged in unfair claims settlement practices (Ins. Code, § 790.03) by failing to attempt to resolve his claims in good faith. The complaint acknowledged that plaintiff could not pursue that claim until he had secured a judgment against Rushing.

Following unsuccessful attempts to meet and confer, CSAA filed an amended demurrer to the complaint and a motion to strike punitive damages. The demurrer argued plaintiff lacked standing to bring his lawsuit against CSAA because he was not a party to the insurance contract. CSAA also argued that plaintiff's negligence claims failed because it had no duty to plaintiff to investigate his claim, plaintiff could not bring a bad faith claim against CSAA because he was not a party to the insurance contract, the complaint failed to allege sufficient facts regarding a duty of care CSAA owed to plaintiff or how it breached that duty, and plaintiff's IIED claim failed because the CSAA's conduct did not satisfy the "outrageous" standard required to support the claim as a matter of law.

Plaintiff opposed the demurrer and motion to strike. He argued that he had standing to bring his claims against CSAA because he was a third party beneficiary of the insurance contract and because it was possible that the insurance contract included a medical payment provision requiring payment of plaintiff's medical expenses not contingent on fault.[3] Regarding his negligence claims, he argued CSAA owed him a duty of reasonable care "to get his practice up and running again," and it breached that duty by failing to adequately attempt to resolve his claims. Finally, he asserted that the

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[3] Plaintiff asserted that CSAA's attorney had failed to provide the applicable insurance contract.

"exceptional nature and extent of the financial and physical harm" he suffered were sufficient to overcome demurrer to his IIED claim, and the facts alleged in the complaint were sufficient to support the imposition of punitive damages.

The trial court issued a detailed tentative ruling sustaining CSAA's demurrer without leave to amend for failure to state a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) The court concluded plaintiff lacked standing to sue CSAA because a liability insurer's duties flow to its insured alone, and a third party such as plaintiff may not bring a direct action against an insurance company except where there has been an assignment of rights by, or a final judgment against, the insured. (Citing *Shaolian v. Safeco Insurance Co.* (1999) 71 Cal.App.4th 268, 271.) The court further concluded that an insurer cannot be charged with negligence in connection with its investigation of any insurance claim (citing *Adelman v. Assoc. Intern. Ins. Co.* (2001) 90 Cal.App.4th 352, 365-366), and that plaintiff could not sustain a cause of action for bad faith because he was not a party to the insurance contract (citing *Moradi-Shalal v. Fireman's Fund Ins. Co.* (1988) 46 Cal.3d 287). The court sustained CSAA's demurrer to plaintiff's IIED claim on the basis that CSAA's conduct was not sufficiently outrageous as a matter of law. The court denied leave to amend because plaintiff failed to satisfy his burden to show in what manner he could amend or how the amendment would change the legal effect of his pleading. (Citing *Goodman v. Kennedy* (1976) 18 Cal.3d 335.) The court noted its ruling rendered moot CSAA's motion to strike punitive damages.

The trial court adopted its tentative ruling following a hearing, and it entered the dismissal of the complaint against CSAA. Notice of entry of judgment or order was served on August 21, 2019.

Plaintiff timely filed notice of appeal. A panel of this court granted plaintiff's request for permission to appeal, which he was required to file as a vexatious litigant. The case was assigned to the current panel on February 28. 2023, and it was fully briefed in March 2023.

DISCUSSION

I

Standard of Review

"A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law." (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316.) Thus, the standard of review on appeal is de novo. (*Ibid.*)

A general demurrer is appropriate where the complaint "does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).) "In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

"To satisfy that burden on appeal, a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' [Citation.] The assertion of an abstract right to amend does not satisfy this burden. [Citation.] The plaintiff must clearly and specifically set forth the 'applicable substantive law' [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.]

Allegations must be factual and specific, not vague or conclusionary." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44.)

"While negligence is ordinarily a question of fact, the existence of duty is generally one of law. [Citations.] Thus, a demurrer to a negligence claim will properly lie only where the allegations of the complaint fail to disclose the existence of any legal duty owed by the defendant to the plaintiff." (*Osornio v. Weingarten, supra*, 124 Cal.App.4th at p. 316.)

II

Standing

The trial court concluded plaintiff lacked standing to sue CSAA because he was not a party to the insurance contract, and there had been no assignment of rights by, or judgment against, the insured. Plaintiff recognizes that he was not a party to the insurance contract, but he contends he had standing to sue CSAA because the insurance contract was intended to compensate parties injured by the insured's negligent acts, and therefore he was a third party beneficiary of the insurance contract. As we will explain, we disagree.

A. *Applicable Law*

Standing is related to the requirement contained in Code of Civil Procedure section 367 that "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." The real party in interest is generally the person who has the right to sue under the substantive law. (*Estate of Bowles* (2008) 169 Cal.App.4th 684, 690.) "A party who is not the real party in interest lacks standing to sue because the claim belongs to someone else." (*Ibid.*) "Where someone other than the real party in interest files suit, the complaint is subject to a general demurrer." (*Ibid.*; Code Civ. Proc., § 430.10.)

Injured third parties typically lack standing to sue the insurer of an insured tortfeasor. " ' "[G]enerally, an insurer may not be joined as a party-defendant in the

underlying action against the insured by the injured third party. The fact that an insurer has agreed to indemnify the insured for any judgment rendered in the action does not make the insurer a proper party. Liability insurance is not a contract for the benefit of the injured party so as to allow it to sue the insurer directly." ' " (*Royal Indemnity Co. v. United Enterprises, Inc.* (2008) 162 Cal.App.4th 194, 205; see *Shaolian v. Safeco Ins. Co., supra*, 71 Cal.App.4th at p. 271 ["Because the insurer's duties flow to its insured alone, a third party claimant may not bring a direct action against an insurance company"].)

The general rule that an injured third party lacks standing to sue an insurer of the tortfeasor extends to causes of action for breach of an insurer's duty to settle a claim made by an injured third party. An insurer has a duty to settle within policy limits when there is a substantial likelihood of recovery in excess of those limits, but that duty is implied in law to protect the *insured* and "does not directly benefit the injured claimant." (*Murphy v. Allstate* (1976) 17 Cal.3d 937, 941.) Accordingly, an injured third party does not have the right "to require the insurer to negotiate or settle with him prior to the establishment of the insured's liability." (*Zahn v. Canadian Indemnity Co.* (1976) 57 Cal.App.3d 509, 514.) Thus, "as a third party who is not in privity of contract with the liability insurer (nor named as an express beneficiary of the policy), [plaintiff] would normally lack standing to sue the insurer to resolve coverage questions about a tortfeasor, such as where there has been a failure to settle a claim under the policy." (*Royal Indemnity Co. v. United Enterprises, Inc., supra*, 162 Cal.App.4th at p. 205.)

There are exceptions to the general rule that a third party lacks standing to sue an insurer directly. A third party claimant may bring claims against an insurer when the third party is an assignee of the insured's claims, or when the third party has obtained a final judgment against the insured. (*Harper v. Wausau Ins. Co.* (1997) 56 Cal.App.4th 1079, 1086 (*Harper*).)

Additionally, as relevant to plaintiff's argument on appeal, under certain circumstances a third party claimant may sue an insurer as a third party beneficiary of the contract utilizing traditional contract principles. (*Harper*, *supra*, 56 Cal.App.4th at p. 1086.) "Under California law third party beneficiaries of contracts have the right to enforce the terms of the contract under Civil Code section 1559 which provides: 'A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.' " (*Harper*, at p. 1086.) "A third party may qualify as a beneficiary under a contract where the contracting parties must have intended to benefit that individual and such intent appears on the terms of the agreement." (*Id.* at p. 1087.) For example, where an insurance contract provides for medical payments coverage for anyone injured by the insured with no requirement of a determination of fault, a party injured by the insured may sue the insurer as a third party beneficiary of the contract. (See *id.* at p. 1090.)

"It is well settled, however, that Civil Code section 1559 excludes enforcement of a contract by persons who are only incidentally or remotely benefited by the agreement. [Citations.] The Supreme Court has held: 'A third party should not be permitted to enforce covenants made not for his benefit, but rather for others. He is not a contracting party; his right to performance is predicated on the contracting parties' intent to benefit him.' " (*Harper*, *supra*, 56 Cal.App.4th at p. 1087.) "Generally, a policy of indemnity insurance will not inure to a third party's benefit unless the contract makes such an obligation express, and any doubt should be construed against such intent." (*American Home Insurance Company v. Travelers Indemnity Co.* (1981) 122 Cal.App.3d 951, 967.)

B. *Analysis*

Plaintiff acknowledges that he is not a party to the insurance contract, but contends he is a third party beneficiary of the contract because the parties to the insurance contract intended for the insurer to compensate injured third parties for damages incurred due to the insured's negligent conduct within the scope of the contract. But the law to the

contrary is clear: " ' "Liability insurance is not a contract for the benefit of the injured party so as to allow it to sue the insurer directly." ' " (*Royal Indemnity Co. v. United Enterprises, Inc., supra*, 162 Cal.App.4th at p. 205.) The mere fact that CSAA agreed to indemnify Rushing for any judgment rendered in an action does not make CSAA a proper party to a lawsuit brought by plaintiff.

Plaintiff's sixth cause of action alleged that CSAA acted in bad faith by refusing to attempt to resolve his claim, in violation of Insurance Code section 790.03. Insurance Code section 790.03, subdivision (h) provides: "Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices: [¶] . . . [¶] (5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear." Plaintiff also argues on appeal that CSAA's claim representatives and legal counsel demonstrated "exceptional" bad faith by refusing to provide him with Rushing's insurance policy, which he contends "strongly suggests a '*blanket*' company policy to improperly deny this information to opposing parties" in violation of Insurance Code section 790.03. However, Insurance Code section 790.03 does not create a private cause of action in favor of third party claimants. (*Moradi-Shalal v. Fireman's Fund Ins. Companies*, *supra*, 46 Cal.3d at p. 294.) Plaintiff lacked standing to sue CSAA for violation of Insurance Code section 790.03.

Plaintiff also contends that CSAA is a proper party because Rushing's negligence has been "fully established and documented." But while plaintiff might consider Rushing's liability to be a foregone conclusion, plaintiff has not obtained a judgment against Rushing, and her liability has not yet been established. "[T]he insured's liability must be established independently and not in an action brought directly against the insurer and the insurer may not be joined in the action against the insured." (*Zahn v. Canadian Indemnity Co.* (1976) 57 Cal.App.3d 509, 514.) Thus, plaintiff does not have standing to sue CSAA based on his belief that Rushing was negligent.

Plaintiff argues it was inappropriate for the trial court to sustain CSAA's demurrer because CSAA refused to disclose Rushing's insurance policy with the declaration page and provided only a "generic copy" of an automobile insurance policy. He speculates that a "full, complete and individualized copy of the existing insurance policy" would show that he is a third party beneficiary under the agreement. But his complaint did not allege on information and belief that the insurance contract included a provision that would make him a third party beneficiary. To survive a demurrer, plaintiff was required to plead "[a] statement of the facts constituting [a good] cause of action, in ordinary and concise language." (Code Civ. Proc., § 425.10, subd. (a).) He failed to plead the facts sufficient to survive demurrer and thus preserve his ability to later try to prove those facts by way of discovery. (See 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 398, pp. 537-538.) Moreover, the insurance contract CSAA submitted to the court included a provision for medical payments coverage, but the provision did not provide for medical payments coverage to injured third parties, unlike the medical payments coverage provision at issue in *Harper, supra*, 56 Cal.App.4th at page 1090.

Because plaintiff lacks standing to bring his claims against CSAA, we reject his argument that he appropriately requested punitive damages due to CSAA's "exceptional bad faith handling" of his claim. In the absence of standing to sue CSAA, the complaint necessarily failed to allege facts sufficient to support a prayer for punitive damages.

Finally, plaintiff's opening brief does not contend that there is a reasonable possibility the defect in his pleading can be cured by amendment. We disregard the argument he makes for the first time in his reply brief. (*Cohen v. Kabbalah Centre International, Inc.* (2019) 35 Cal.App.5th 13, 22; *Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 322.) Accordingly, plaintiff failed to satisfy his burden of proving such reasonable possibility. (See *Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.)

III

Duty Of Care Under Civil Code Section 1714 and Biakanja

Plaintiff contends he is entitled to advance claims of bad faith, negligence, physical injury, and mental distress because CSAA had a "special" relationship with him and thus owed him a duty of care. At the outset, we observe that plaintiff's argument is constrained by the law on which he purports to rely. He rests his contention on the applicability of Civil Code section 1714 and our Supreme Court's decision in *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*), which concern the circumstances under which a duty of care is owed to an injured party in the absence of contractual privity, such that the injured party may pursue a claim for *negligence*. Accordingly, while plaintiff briefly asserts that his argument applies to his bad faith and IIED claims, the nature of his argument clearly establishes that it applies *only* to his negligence claims. In any event, as we have explained, the law is well-settled that an insurer has no duty to settle with a third party, and therefore plaintiff's arguments that he is owed a duty by CSAA lack merit.

" 'The indispensable precondition to liability founded upon negligence is the existence of a duty of care owed by the alleged wrongdoer to the plaintiff, or to a class of which plaintiff is a member.' " (*Spearman v. State Farm Fire & Cas. Co.* (1986) 185 Cal.App.3d 1105, 1110.) "In California, the 'general rule' is that people owe a duty of care to avoid causing harm to others and that they are thus usually liable for injuries their negligence inflicts. [Citation.] Under Civil Code section 1714, subdivision (a), '[e]veryone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.' " (*Southern California Gas Leak Cases* (2019) 7 Cal.5th 391, 398.)

Our Supreme Court long ago employed a checklist of factors to consider in determining whether there exists a legal duty of one party to another in the absence of a privity of contract between them. In *Biakanja*, *supra*, 49 Cal.2d 647, the defendant

notary public negligently prepared a will that was intended to leave the entire estate to the plaintiff, resulting in the plaintiff receiving only a fraction of what was intended under the will. The court concluded the defendant owed the plaintiff a duty of reasonable care, emphasizing that the "end and aim" of the transaction was to benefit the plaintiff and the injury to the plaintiff from the defendant's negligent actions was clearly foreseeable. (*Id.* at p. 650.) But the court recognized that would not always be true, and it clarified that "[t]he determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm." (*Ibid.*) The *Biakanja* test has been applied in various contexts to impose a duty of care, and liability in negligence for its breach. (See, e.g., *Lucas v. Hamm* (1961) 56 Cal.2d 583 [attorney who prepares will owes duty to both testator and intended beneficiary to complete the task in a manner that achieves testator's purposes]; *Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850 [construction lender owes duty to third party home buyers to discover and prevent major defects in homes where lender financed home's construction].)

Plaintiff seeks to impose onto CSAA a duty of care under *Biakanja*. He does not expressly state the nature of the duty he seeks to impose, but his analysis of the *Biakanja* factors suggests an argument that CSAA owed him a duty to settle his claim.[4] He asserts (1) the insurance contract was intended to compensate him for injuries caused by

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[4] In his reply brief, plaintiff argues that not only did CSAA owe *him* a duty of care under *Biakanja*, but it also owed *his patients* a duty of care. Whether CSAA owed plaintiff's patients a duty of care is not before us.

Rushing's negligence, (2) the indefinite closure of his medical practice foreseeably caused him financial, personal, and professional injury, (3) Rushing's negligent conduct caused his damages,[5] (4) CSAA was morally blameworthy for failing to resolve his claim, and (5) imposing a duty of care onto CSAA would prevent CSAA's "morally repugnant behavior" representing "an unlawful level of extreme oppression."

The obvious and fatal flaw in plaintiff's attempt to establish a duty of CSAA to negotiate or settle his third party insurance claim is that the law is already well-settled: an insurer's duty to investigate and settle claims exists to protect the *insured*, not the third party claimant. (*Murphy v. Allstate Ins. Co.*, *supra*, 17 Cal.3d at p. 941; *Spearman v. State Farm Fire & Cas. Co.*, *supra*, 185 Cal.App.3d at p. 1110.) Indeed, as our Supreme Court recognized in *Murphy*, not only does the insurer's duty to settle not benefit the injured claimant, but the injured claimant usually *benefits* from the breach of the insurer's duty to the insured to settle because the claimant may obtain an award in excess of policy limits. (*Murphy*, at p. 941.) Thus, the " 'end and aim' " of the indemnity provision of the insurance contract was *not* to benefit plaintiff, a stranger to the insurance contract, but was instead intended to indemnify the insured. (*Murphy v. Allstate Ins. Co.*, *supra*, 17 Cal.3d at p. 941; *Royal Indemnity Co. v. United Enterprises, Inc.*, *supra*, 162 Cal.App.4th at p. 205; *Spearman v. State Farm Fire & Cas. Co.*, *supra*, 185 Cal.App.3d at p. 1110.) Accordingly, we reject plaintiff's argument that a special relationship between him and CSAA gave rise to a duty to negotiate or settle his claim.

Plaintiff raises other arguments for the first time in his reply brief. He argues that Insurance Code sections 16020 and 16021, which require automobile drivers to carry

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[5] Notably, plaintiff does not argue here that *CSAA's* negligent conduct caused his damages, which would be required to impose liability for negligence. (See *Peredia v. HR Mobile Services, Inc.* (2018) 25 Cal.App.5th 680, 687 [elements of negligence cause of action are duty, breach of duty, proximate cause, and damages].)

evidence of financial responsibility (typically insurance), demonstrate that an insurer has a special relationship with its insured and gives rise to an insurer's duty to ensure that its insured does not injure third parties. He argues that Rushing's negligence, which he asserts was the sole factor in the destruction of his medical practice, established a special relationship between him and CSAA because CSAA was Rushing's insurer and had the financial resources to reopen his practice. Finally, he argues that "liability exists for CSAA" under *Biakanja* due to CSAA's intentional and fraudulent misrepresentation of the applicable statute of limitations. We disregard these arguments made for the first time in reply. (*Cohen v. Kabbalah Centre International, Inc.*, *supra*, 35 Cal.App.5th at p. 22; *Scott v. CIBA Vision Corp.*, *supra*, 38 Cal.App.4th at p. 322.)

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

Duarte

Duarte, J.

We concur:

Mauro

Mauro, Acting P. J.

McAdam

McAdam, J.*

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

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: Pierson v. CSAA Insurance Services, Inc., et al.
C091099
Amador County
No. 18CVC10813

Copies of this document have been sent by mail to the parties checked below unless they were noticed electronically. If a party does not appear on the TrueFiling Servicing Notification and is not checked below, service was not required.

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Walnut Creek, CA 94597

✓ Honorable Renee C. Day
Judge of the Amador Superior Court
500 Argonaut Lane
Jackson, CA 95642

Exhibit C

June 30, 2023 Notice of the Rejection by the Court of the Judicial Notice submitted on 6-29-2023 - "Case is Already Under Submission"

rpiersonmd@sbcglobal.net

From: info@truefiling.com
Sent: Friday, June 30, 2023 9:48 AM
To: rpiersonmd@sbcglobal.net
Subject: CA 3rd District Court of Appeal - Filing Rejected - Case No. C091099

The filing filed into Case No. C091099, Pierson v. CSAA Insurance Services, Inc., et al. in the CA 3rd District Court of Appeal has been **REJECTED by DWELTON: Your submitted filing has been rejected. Case is already under submission.**.

- Filing Rejected: 6/29/2023 1:41 AM
- Filing Name: FULL JUDICIAL NOTICE WITH EXHIBITS
- Filing Type: MISCELLANEOUS - ADDITIONAL DOCUMENTS
- Filed By: Raymond Pierson, III (Pro Se)

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APPENDIX DOCUMENT #4

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

RAYMOND H. PIERSON III, Plaintiff and Appellant, v. CSAA INSURANCE SERVICES, INC. et al., Defendants and Respondents.	C091099 (Super. Ct. No. 18CVC10813)

Following an incident in which Phyliss M. Rushing allegedly drove her car into an unoccupied medical office operated by plaintiff Raymond H. Pierson III, M.D., plaintiff filed a complaint asserting causes of action against Rushing and her insurer, defendant CSAA Insurance Service, Inc. and CSAA Insurance Exchange (hereafter CSAA). The complaint alleged that both CSAA and Rushing were liable for negligence and intentional infliction of emotional distress (IIED), and it alleged that CSAA was liable for acting in

bad faith. Plaintiff sought compensatory damages and, with respect to his IIED claim, punitive damages.

CSAA demurred to the complaint; it argued in part that plaintiff lacked standing to bring his claims against it because he was a nonparty to the insurance contract. The trial court agreed with CSAA and sustained the demurrer without leave to amend.

Plaintiff appeals. He contends he had standing to sue CSAA because he was a third party beneficiary under the insurance contract and because CSAA owed him a duty to attempt to settle his claim in good faith. He further argues that CSAA acted in bad faith by refusing to provide him with the policy limits and declaration pages of Rushing's insurance policy, and that his allegations related to CSAA's conduct were sufficient to support his request for punitive damages.

We conclude plaintiff lacked standing to sue CSAA, and we reject plaintiff's attempt to establish an insurer's duty to an injured third party to negotiate with the third party because the law clearly states that no such duty exists. We also reject plaintiff's remaining claims; the statute he relies upon to establish his bad faith claim does not provide for a private cause of action, and, in the absence of a viable claim against CSAA, he necessarily failed to plead facts sufficient to support the imposition of punitive damages. Finally, we observe that plaintiff fails to argue on appeal that there is a reasonable possibility the defect in his pleading could be cured by amendment, and therefore he has failed to satisfy his burden to make such a showing. Accordingly, we will affirm the judgment.

FACTS AND PROCEEDINGS

CSAA issued an automobile insurance policy (insurance contact) to Rushing, which included an indemnity clause stating in relevant part that CSAA "will pay damages, other than punitive or exemplary damages, for which any insured person is legally liable because of bodily injury or property damage arising out of the . . . use of a

car."[1] The insurance contract also included a provision for medical payments coverage, which provided in relevant part: "[CSAA] will pay reasonable expenses incurred within one year from the date of accident *by an insured person* who sustains bodily injury as a result of an accident covered under this Part for necessary medical, surgical, X-ray, and dental treatment, including prosthetic devices, eyeglasses, and hearing aids and necessary ambulance, hospital, professional nursing, and funeral costs." (Italics added.)

On October 9, 2018, plaintiff filed a complaint against Rushing and CSAA. The complaint asserted that on October 10, 2016, CSAA's insured, Rushing, drove her car into plaintiff's unoccupied medical office, causing plaintiff to suffer economic losses and personal injury.[2] The complaint asserted causes of action against both CSAA and Rushing, including: general negligence (first cause of action); negligent operation of a motor vehicle--business disruption (second cause of action); negligence--personal injury (third cause of action); and negligent business interference with projected economic advantage (fifth cause of action). As to plaintiff's negligence claims, the complaint alleged that Rushing was negligent, that CSAA was vicariously liable for Rushing's negligent conduct, and that CSAA negligently caused disruption of plaintiff's medical practice by refusing in bad faith to make a reasonable settlement offer.

Plaintiff also asserted a cause of action against Rushing and CSAA for IIED (fourth cause of action), which alleged that CSAA was vicariously liable for Rushing's

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[1] Plaintiff contends that CSAA has only disclosed a generic version of the CSAA insurance policy, but CSAA's counsel stated in a declaration submitted with CSAA's reply in support of its demurrer that the policy is "a copy of the relevant portions of the automobile policy issued by [CSAA] to [Rushing] that was in force and effect at the time of the subject incident."

[2] The complaint alleged plaintiff aggravated a preexisting shoulder injury when vacating the office and that plaintiff and his staff suffered pulmonary injuries from breathing air contaminated by construction dust and debris.

infliction of emotional distress on plaintiff, and that CSAA's bad faith refusal to resolve plaintiff's claim caused him emotional distress. Plaintiff sought punitive damages related to that claim.

Plaintiff's sixth cause of action for bad faith alleged that CSAA engaged in unfair claims settlement practices (Ins. Code, § 790.03) by failing to attempt to resolve his claims in good faith. The complaint acknowledged that plaintiff could not pursue that claim until he had secured a judgment against Rushing.

Following unsuccessful attempts to meet and confer, CSAA filed an amended demurrer to the complaint and a motion to strike punitive damages. The demurrer argued plaintiff lacked standing to bring his lawsuit against CSAA because he was not a party to the insurance contract. CSAA also argued that plaintiff's negligence claims failed because it had no duty to plaintiff to investigate his claim, plaintiff could not bring a bad faith claim against CSAA because he was not a party to the insurance contract, the complaint failed to allege sufficient facts regarding a duty of care CSAA owed to plaintiff or how it breached that duty, and plaintiff's IIED claim failed because the CSAA's conduct did not satisfy the "outrageous" standard required to support the claim as a matter of law.

Plaintiff opposed the demurrer and motion to strike. He argued that he had standing to bring his claims against CSAA because he was a third party beneficiary of the insurance contract and because it was possible that the insurance contract included a medical payment provision requiring payment of plaintiff's medical expenses not contingent on fault.[3] Regarding his negligence claims, he argued CSAA owed him a duty of reasonable care "to get his practice up and running again," and it breached that duty by failing to adequately attempt to resolve his claims. Finally, he asserted that the

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[3] Plaintiff asserted that CSAA's attorney had failed to provide the applicable insurance contract.

"exceptional nature and extent of the financial and physical harm" he suffered were sufficient to overcome demurrer to his IIED claim, and the facts alleged in the complaint were sufficient to support the imposition of punitive damages.

The trial court issued a detailed tentative ruling sustaining CSAA's demurrer without leave to amend for failure to state a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) The court concluded plaintiff lacked standing to sue CSAA because a liability insurer's duties flow to its insured alone, and a third party such as plaintiff may not bring a direct action against an insurance company except where there has been an assignment of rights by, or a final judgment against, the insured. (Citing *Shaolian v. Safeco Insurance Co.* (1999) 71 Cal.App.4th 268, 271.) The court further concluded that an insurer cannot be charged with negligence in connection with its investigation of any insurance claim (citing *Adelman v. Assoc. Intern. Ins. Co.* (2001) 90 Cal.App.4th 352, 365-366), and that plaintiff could not sustain a cause of action for bad faith because he was not a party to the insurance contract (citing *Moradi-Shalal v. Fireman's Fund Ins. Co.* (1988) 46 Cal.3d 287). The court sustained CSAA's demurrer to plaintiff's IIED claim on the basis that CSAA's conduct was not sufficiently outrageous as a matter of law. The court denied leave to amend because plaintiff failed to satisfy his burden to show in what manner he could amend or how the amendment would change the legal effect of his pleading. (Citing *Goodman v. Kennedy* (1976) 18 Cal.3d 335.) The court noted its ruling rendered moot CSAA's motion to strike punitive damages.

The trial court adopted its tentative ruling following a hearing, and it entered the dismissal of the complaint against CSAA. Notice of entry of judgment or order was served on August 21, 2019.

Plaintiff timely filed notice of appeal. A panel of this court granted plaintiff's request for permission to appeal, which he was required to file as a vexatious litigant. The case was assigned to the current panel on February 28, 2023, and it was fully briefed in March 2023.

DISCUSSION

I

Standard of Review

"A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law." (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316.) Thus, the standard of review on appeal is de novo. (*Ibid.*)

A general demurrer is appropriate where the complaint "does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).) "In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

"To satisfy that burden on appeal, a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' [Citation.] The assertion of an abstract right to amend does not satisfy this burden. [Citation.] The plaintiff must clearly and specifically set forth the 'applicable substantive law' [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.]

Allegations must be factual and specific, not vague or conclusionary." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44.)

"While negligence is ordinarily a question of fact, the existence of duty is generally one of law. [Citations.] Thus, a demurrer to a negligence claim will properly lie only where the allegations of the complaint fail to disclose the existence of any legal duty owed by the defendant to the plaintiff." (*Osornio v. Weingarten*, *supra*, 124 Cal.App.4th at p. 316.)

II

Standing

The trial court concluded plaintiff lacked standing to sue CSAA because he was not a party to the insurance contract, and there had been no assignment of rights by, or judgment against, the insured. Plaintiff recognizes that he was not a party to the insurance contract, but he contends he had standing to sue CSAA because the insurance contract was intended to compensate parties injured by the insured's negligent acts, and therefore he was a third party beneficiary of the insurance contract. As we will explain, we disagree.

A. *Applicable Law*

Standing is related to the requirement contained in Code of Civil Procedure section 367 that "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." The real party in interest is generally the person who has the right to sue under the substantive law. (*Estate of Bowles* (2008) 169 Cal.App.4th 684, 690.) "A party who is not the real party in interest lacks standing to sue because the claim belongs to someone else." (*Ibid.*) "Where someone other than the real party in interest files suit, the complaint is subject to a general demurrer." (*Ibid.*; Code Civ. Proc., § 430.10.)

Injured third parties typically lack standing to sue the insurer of an insured tortfeasor. " ' "[G]enerally, an insurer may not be joined as a party-defendant in the

underlying action against the insured by the injured third party. The fact that an insurer has agreed to indemnify the insured for any judgment rendered in the action does not make the insurer a proper party. Liability insurance is not a contract for the benefit of the injured party so as to allow it to sue the insurer directly." ' " (*Royal Indemnity Co. v. United Enterprises, Inc.* (2008) 162 Cal.App.4th 194, 205; see *Shaolian v. Safeco Ins. Co., supra*, 71 Cal.App.4th at p. 271 ["Because the insurer's duties flow to its insured alone, a third party claimant may not bring a direct action against an insurance company"].)

The general rule that an injured third party lacks standing to sue an insurer of the tortfeasor extends to causes of action for breach of an insurer's duty to settle a claim made by an injured third party. An insurer has a duty to settle within policy limits when there is a substantial likelihood of recovery in excess of those limits, but that duty is implied in law to protect the *insured* and "does not directly benefit the injured claimant." (*Murphy v. Allstate* (1976) 17 Cal.3d 937, 941.) Accordingly, an injured third party does not have the right "to require the insurer to negotiate or settle with him prior to the establishment of the insured's liability." (*Zahn v. Canadian Indemnity Co.* (1976) 57 Cal.App.3d 509, 514.) Thus, "as a third party who is not in privity of contract with the liability insurer (nor named as an express beneficiary of the policy), [plaintiff] would normally lack standing to sue the insurer to resolve coverage questions about a tortfeasor, such as where there has been a failure to settle a claim under the policy." (*Royal Indemnity Co. v. United Enterprises, Inc., supra*, 162 Cal.App.4th at p. 205.)

There are exceptions to the general rule that a third party lacks standing to sue an insurer directly. A third party claimant may bring claims against an insurer when the third party is an assignee of the insured's claims, or when the third party has obtained a final judgment against the insured. (*Harper v. Wausau Ins. Co.* (1997) 56 Cal.App.4th 1079, 1086 (*Harper*).)

Additionally, as relevant to plaintiff's argument on appeal, under certain circumstances a third party claimant may sue an insurer as a third party beneficiary of the contract utilizing traditional contract principles. (*Harper*, *supra*, 56 Cal.App.4th at p. 1086.) "Under California law third party beneficiaries of contracts have the right to enforce the terms of the contract under Civil Code section 1559 which provides: 'A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.' " (*Harper*, at p. 1086.) "A third party may qualify as a beneficiary under a contract where the contracting parties must have intended to benefit that individual and such intent appears on the terms of the agreement." (*Id.* at p. 1087.) For example, where an insurance contract provides for medical payments coverage for anyone injured by the insured with no requirement of a determination of fault, a party injured by the insured may sue the insurer as a third party beneficiary of the contract. (See *id.* at p. 1090.)

"It is well settled, however, that Civil Code section 1559 excludes enforcement of a contract by persons who are only incidentally or remotely benefited by the agreement. [Citations.] The Supreme Court has held: 'A third party should not be permitted to enforce covenants made not for his benefit, but rather for others. He is not a contracting party; his right to performance is predicated on the contracting parties' intent to benefit him.' " (*Harper*, *supra*, 56 Cal.App.4th at p. 1087.) "Generally, a policy of indemnity insurance will not inure to a third party's benefit unless the contract makes such an obligation express, and any doubt should be construed against such intent." (*American Home Insurance Company v. Travelers Indemnity Co.* (1981) 122 Cal.App.3d 951, 967.)

B. *Analysis*

Plaintiff acknowledges that he is not a party to the insurance contract, but contends he is a third party beneficiary of the contract because the parties to the insurance contract intended for the insurer to compensate injured third parties for damages incurred due to the insured's negligent conduct within the scope of the contract. But the law to the

contrary is clear: " ' "Liability insurance is not a contract for the benefit of the injured party so as to allow it to sue the insurer directly." ' " (*Royal Indemnity Co. v. United Enterprises, Inc., supra*, 162 Cal.App.4th at p. 205.) The mere fact that CSAA agreed to indemnify Rushing for any judgment rendered in an action does not make CSAA a proper party to a lawsuit brought by plaintiff.

Plaintiff's sixth cause of action alleged that CSAA acted in bad faith by refusing to attempt to resolve his claim, in violation of Insurance Code section 790.03. Insurance Code section 790.03, subdivision (h) provides: "Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices: [¶] . . . [¶] (5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear." Plaintiff also argues on appeal that CSAA's claim representatives and legal counsel demonstrated "exceptional" bad faith by refusing to provide him with Rushing's insurance policy, which he contends "strongly suggests a '*blanket*' company policy to improperly deny this information to opposing parties" in violation of Insurance Code section 790.03. However, Insurance Code section 790.03 does not create a private cause of action in favor of third party claimants. (*Moradi-Shalal v. Fireman's Fund Ins. Companies*, *supra*, 46 Cal.3d at p. 294.) Plaintiff lacked standing to sue CSAA for violation of Insurance Code section 790.03.

Plaintiff also contends that CSAA is a proper party because Rushing's negligence has been "fully established and documented." But while plaintiff might consider Rushing's liability to be a foregone conclusion, plaintiff has not obtained a judgment against Rushing, and her liability has not yet been established. "[T]he insured's liability must be established independently and not in an action brought directly against the insurer and the insurer may not be joined in the action against the insured." (*Zahn v. Canadian Indemnity Co.* (1976) 57 Cal.App.3d 509, 514.) Thus, plaintiff does not have standing to sue CSAA based on his belief that Rushing was negligent.

Plaintiff argues it was inappropriate for the trial court to sustain CSAA's demurrer because CSAA refused to disclose Rushing's insurance policy with the declaration page and provided only a "generic copy" of an automobile insurance policy. He speculates that a "full, complete and individualized copy of the existing insurance policy" would show that he is a third party beneficiary under the agreement. But his complaint did not allege on information and belief that the insurance contract included a provision that would make him a third party beneficiary. To survive a demurrer, plaintiff was required to plead "[a] statement of the facts constituting [a good] cause of action, in ordinary and concise language." (Code Civ. Proc., § 425.10, subd. (a).) He failed to plead the facts sufficient to survive demurrer and thus preserve his ability to later try to prove those facts by way of discovery. (See 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 398, pp. 537-538.) Moreover, the insurance contract CSAA submitted to the court included a provision for medical payments coverage, but the provision did not provide for medical payments coverage to injured third parties, unlike the medical payments coverage provision at issue in *Harper, supra*, 56 Cal.App.4th at page 1090.

Because plaintiff lacks standing to bring his claims against CSAA, we reject his argument that he appropriately requested punitive damages due to CSAA's "exceptional bad faith handling" of his claim. In the absence of standing to sue CSAA, the complaint necessarily failed to allege facts sufficient to support a prayer for punitive damages.

Finally, plaintiff's opening brief does not contend that there is a reasonable possibility the defect in his pleading can be cured by amendment. We disregard the argument he makes for the first time in his reply brief. (*Cohen v. Kabbalah Centre International, Inc.* (2019) 35 Cal.App.5th 13, 22; *Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 322.) Accordingly, plaintiff failed to satisfy his burden of proving such reasonable possibility. (See *Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.)

III

Duty Of Care Under Civil Code Section 1714 and Biakanja

Plaintiff contends he is entitled to advance claims of bad faith, negligence, physical injury, and mental distress because CSAA had a "special" relationship with him and thus owed him a duty of care. At the outset, we observe that plaintiff's argument is constrained by the law on which he purports to rely. He rests his contention on the applicability of Civil Code section 1714 and our Supreme Court's decision in *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*), which concern the circumstances under which a duty of care is owed to an injured party in the absence of contractual privity, such that the injured party may pursue a claim for *negligence*. Accordingly, while plaintiff briefly asserts that his argument applies to his bad faith and IIED claims, the nature of his argument clearly establishes that it applies *only* to his negligence claims. In any event, as we have explained, the law is well-settled that an insurer has no duty to settle with a third party, and therefore plaintiff's arguments that he is owed a duty by CSAA lack merit.

" 'The indispensable precondition to liability founded upon negligence is the existence of a duty of care owed by the alleged wrongdoer to the plaintiff, or to a class of which plaintiff is a member.' " (*Spearman v. State Farm Fire & Cas. Co.* (1986) 185 Cal.App.3d 1105, 1110.) "In California, the 'general rule' is that people owe a duty of care to avoid causing harm to others and that they are thus usually liable for injuries their negligence inflicts. [Citation.] Under Civil Code section 1714, subdivision (a), '[e]veryone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.' " (*Southern California Gas Leak Cases* (2019) 7 Cal.5th 391, 398.)

Our Supreme Court long ago employed a checklist of factors to consider in determining whether there exists a legal duty of one party to another in the absence of a privity of contract between them. In *Biakanja*, *supra*, 49 Cal.2d 647, the defendant

notary public negligently prepared a will that was intended to leave the entire estate to the plaintiff, resulting in the plaintiff receiving only a fraction of what was intended under the will. The court concluded the defendant owed the plaintiff a duty of reasonable care, emphasizing that the "end and aim" of the transaction was to benefit the plaintiff and the injury to the plaintiff from the defendant's negligent actions was clearly foreseeable. (*Id.* at p. 650.) But the court recognized that would not always be true, and it clarified that "[t]he determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm." (*Ibid.*) The *Biakanja* test has been applied in various contexts to impose a duty of care, and liability in negligence for its breach. (See, e.g., *Lucas v. Hamm* (1961) 56 Cal.2d 583 [attorney who prepares will owes duty to both testator and intended beneficiary to complete the task in a manner that achieves testator's purposes]; *Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850 [construction lender owes duty to third party home buyers to discover and prevent major defects in homes where lender financed home's construction].)

Plaintiff seeks to impose onto CSAA a duty of care under *Biakanja*. He does not expressly state the nature of the duty he seeks to impose, but his analysis of the *Biakanja* factors suggests an argument that CSAA owed him a duty to settle his claim.[4] He asserts (1) the insurance contract was intended to compensate him for injuries caused by

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[4] In his reply brief, plaintiff argues that not only did CSAA owe *him* a duty of care under *Biakanja*, but it also owed *his patients* a duty of care. Whether CSAA owed plaintiff's patients a duty of care is not before us.

Rushing's negligence, (2) the indefinite closure of his medical practice foreseeably caused him financial, personal, and professional injury, (3) Rushing's negligent conduct caused his damages,[5] (4) CSAA was morally blameworthy for failing to resolve his claim, and (5) imposing a duty of care onto CSAA would prevent CSAA's "morally repugnant behavior" representing "an unlawful level of extreme oppression."

The obvious and fatal flaw in plaintiff's attempt to establish a duty of CSAA to negotiate or settle his third party insurance claim is that the law is already well-settled: an insurer's duty to investigate and settle claims exists to protect the *insured*, not the third party claimant. (*Murphy v. Allstate Ins. Co.*, *supra*, 17 Cal.3d at p. 941; *Spearman v. State Farm Fire & Cas. Co.*, *supra*, 185 Cal.App.3d at p. 1110.) Indeed, as our Supreme Court recognized in *Murphy*, not only does the insurer's duty to settle not benefit the injured claimant, but the injured claimant usually *benefits* from the breach of the insurer's duty to the insured to settle because the claimant may obtain an award in excess of policy limits. (*Murphy*, at p. 941.) Thus, the " 'end and aim' " of the indemnity provision of the insurance contract was *not* to benefit plaintiff, a stranger to the insurance contract, but was instead intended to indemnify the insured. (*Murphy v. Allstate Ins. Co.*, *supra*, 17 Cal.3d at p. 941; *Royal Indemnity Co. v. United Enterprises, Inc.*, *supra*, 162 Cal.App.4th at p. 205; *Spearman v. State Farm Fire & Cas. Co.*, *supra*, 185 Cal.App.3d at p. 1110.) Accordingly, we reject plaintiff's argument that a special relationship between him and CSAA gave rise to a duty to negotiate or settle his claim.

Plaintiff raises other arguments for the first time in his reply brief. He argues that Insurance Code sections 16020 and 16021, which require automobile drivers to carry

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[5] Notably, plaintiff does not argue here that *CSAA's* negligent conduct caused his damages, which would be required to impose liability for negligence. (See *Peredia v. HR Mobile Services, Inc.* (2018) 25 Cal.App.5th 680, 687 [elements of negligence cause of action are duty, breach of duty, proximate cause, and damages].)

evidence of financial responsibility (typically insurance), demonstrate that an insurer has a special relationship with its insured and gives rise to an insurer's duty to ensure that its insured does not injure third parties. He argues that Rushing's negligence, which he asserts was the sole factor in the destruction of his medical practice, established a special relationship between him and CSAA because CSAA was Rushing's insurer and had the financial resources to reopen his practice. Finally, he argues that "liability exists for CSAA" under *Biakanja* due to CSAA's intentional and fraudulent misrepresentation of the applicable statute of limitations. We disregard these arguments made for the first time in reply. (*Cohen v. Kabbalah Centre International, Inc.*, *supra*, 35 Cal.App.5th at p. 22; *Scott v. CIBA Vision Corp.*, *supra*, 38 Cal.App.4th at p. 322.)

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

Duarte

Duarte, J.

We concur:

Mauro

Mauro, Acting P. J.

McAdam

McAdam, J.*

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