4th Civil No. D050041

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

RICHARD EDWARDS, SR., individually and as assignee of
JUDITH HANSEN and ANN NICHOLAS,

Plaintiffs and Appellants,

vs.

FIRE INSURANCE EXCHANGE,

Defendant and Respondent.

Appeal from the San Diego Superior Court
Honorable Richard E.L. Strauss, Judge Presiding
Case No. GIC859560

RESPONDENT'S BRIEF

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Court of Appeal
State of California
Fourth Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: D050041

Case Name: Edwards v. Fire Insurance Exchange.

Please check the applicable box:

[ ] There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208.

[X] Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
Fire Underwriters Association	Attorney in fact for Fire Insurance Exchange
Farmers Group, Inc.	Owner of Fire Underwriters Association
Zurich Financial Services	Owner of Farmers Group, Inc.

Please attach additional sheets with Entity or Person Information if necessary.

____
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INTRODUCTION

One of the fundamental principles of insurance law is that an insured has to have an insurable interest in the covered property. Not only does there need to be an insurable interest, but that interest must be the interest insured. An auto policy does not cover a neighbor's house even if the insured loans the neighbor money. Without these requirements, insurance would become gambling, not insurance. An equally fundamental legal principle is that a breach of contract is not a tort. There is an exception for insurance bad faith, but that exception applies only to the parties to the insurance contract. These two fundamental legal principles—the necessity for an insurable interest and the lack of tort liability for contract breaches—compelled summary judgment here.

Respondent Fire Insurance Exchange issued a homeowner's policy to Judith Hansen. Ms. Hansen sold her home and transferred title to appellants. She permanently left town. Appellants did not obtain their own insurance. A little over a week later, the home, now owned by appellants, was damaged by fire. Lacking any insurance of their own, appellants obtained a post-fire assignment of any insurance proceeds Ms. Hansen might be entitled to collect from Fire Insurance Exchange.

But by the time of the fire, Ms. Hansen no longer owned the property or had any insurable interest in it. And she certainly had no interest insured by her homeowner's policy, which was for a house she owned and occupied. She thus had no insurance benefits to assign. Recognizing this, the trial court granted summary judgment.

Appellants contend that Ms. Hansen, and derivatively they, retained two insurable interests after the property was sold. First, they argue that Ms. Hansen had not been taken off the mortgage, a mortgage appellants promised to pay. That technicality, however, does not afford insurance coverage to new buyers who have not obtained their own insurance, nor

does it does give Ms. Hansen an insurable interest, since mortgages in California are nonrecourse. Second, appellants claim that Ms. Hansen should be insured to the extent they still owed her money at the time of the fire. But the policy here insured Ms. Hansen's home, not a buyer's contractual performance. And more fundamentally, *appellants* cannot assert these claims on Ms. Hansen's behalf. They are the ones who ultimately promised to pay the mortgage and to pay Ms. Hansen. Any claims that they might have against the insurer by virtue of Ms. Hansen's assignment would be offset dollar for dollar by the insurer's own subrogated right to recover any such payment from them. In any event, both the mortgagee and Ms. Hansen were paid, so there was no loss to Ms. Hansen, the only claim she assigned.

Moreover, even if there were some basis for appellants' contract claim, there is absolutely none for their tort claims. Ms. Hansen never assigned any bad faith claim. And appellants are not a party to the insurance contract. At most, they are post-loss assignees of whatever proceeds may be payable under that contract. As nonparties to the contract, they have no bad faith tort claim. They do not contend otherwise on appeal. Rather, they contend that the trial court should have allowed them to amend their complaint to claim intentional interference with contract (Ms. Hansen's assignment of proceeds to them) and intentional interference with prospective economic advantage (failure to pay off the mortgage). Neither is a valid cause of action. A carrier commits no tort as to a third party by insisting—reasonably or unreasonably—on its contractual right not to pay a claim.

In any event, appellants' motion for leave to amend failed to comply with applicable court rules. The trial court was well within its discretion to deny leave to amend. The same is true of appellants' motion to compel production of Ms. Hansen's insurance file. That motion, like the motion for

leave to amend, failed to comply with applicable statutory requirements, justifying denial. Moreover, appellants have not even attempted to show prejudice on appeal.

The judgment should be affirmed.

STATEMENT OF THE CASE

A. The Facts.

1. Fire Insurance Exchange provides homeowner's insurance to Judith Hansen.

Respondent Fire Insurance Exchange issued a homeowner's insurance policy to Judith Hansen for her home at 10500 Don Pico Road in Spring Valley, California. (3 AA 690[¶ 1].) The policy covered the dwelling used as Ms. Hansen's private residence, separate structures on the premises, and Ms. Hansen's personal property. (1 AA 100-101.) The policy provides that it will pay the smaller of the policy limit or "the insured's interest." (1 AA 107.) The insured is defined as the person named in the declarations page and relatives or persons under 21 permanently residing with the named insured. (1 AA 99; see Ins. Code, § 2071, subd.(a) [similar provision in statutory standard fire policy].)

2. Ms. Hansen sells the property, transferring title to appellant Ann Nicholas.

On November 20, 2003, Ms. Hansen entered into a written agreement to sell her home to plaintiff and appellant Richard Edwards. (3 AA 692[¶ 10].) The same day, Mr. Edwards gave Ms. Hansen a $17,000 down payment and Ms. Hansen executed a quitclaim deed transferring title

in the property to plaintiff and appellant Ann Nicholas, Mr. Edwards's wife.[1] (3 AA 693[¶¶ 11, 12]; 2 AA 546.)

The next day, November 21, Ms. Hansen executed and had notarized a corrected grant deed clarifying that she was conveying the property on behalf of herself rather than on behalf of the Hansen Family Trust (as indicated on the November 20 quitclaim deed). (3 AA 732.) Ms. Hansen had received title to the property from the Hansen Family Trust several months earlier. (3 AA 730.) The November 21 deed was not immediately recorded. (3 AA 732.)

The purchase agreement provided that appellants owed the balance of the purchase price ($34,000) after the transfer. (3 AA 692[¶ 10].) Mr. Edwards also promised to take over payments on the mortgage as part of the purchase arrangement. (3 AA 691[¶ 9].)

3. After appellants assume ownership, the property suffers fire damage.

On November 30, nine days after Ms. Hansen transferred the property to Ms. Nicholas, a fire damaged the home on the property. (3 AA 693[¶ 14].) Ms. Hansen was not living on the property at the time and had left town permanently. (2 AA 536.)

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[1] Although the caption on appellants' opening brief identifies the plaintiff as Ann Nichols, it appears that her name is actually Ann Nicholas. Likewise, for some reason appellants have placed Fire Insurance Exchange's counsel's name on the cover of the opening brief. Fire Insurance Exchange's counsel had nothing to do with appellants' opening brief and disavow it.

4. Ms. Hansen purports to assign her insurance proceeds to appellants.

After the fire, Ms. Hansen verbally agreed that appellants could seek recovery under her Fire Insurance Exchange homeowner's policy for fire damage to the house she had sold them. (3 AA 697[¶ 22].) Ms. Hansen then signed a Special Power of Attorney form giving Mr. Edwards and Ms. Nicholas the right to act on her behalf to file claims for the property. (3 AA 694-696[¶ 19].) Upon receiving the executed Special Power of Attorney, Mr. Edwards paid Ms. Hansen the balance of the property purchase price. (3 AA 696[¶ 21].) The mortgage was paid off in July 2005. (3 AA 827.)

5. Fire Insurance Exchange denies appellants' claim under Ms. Hansen's insurance policy.

Fire Insurance Exchange denied appellants' claim for benefits under Ms. Hansen's homeowner's policy. (3 AA 697[¶¶ 24, 25].)

B. Procedural Background.

1. Appellants sue Fire Insurance Exchange for the denial of coverage.

Appellants sued Fire Insurance Exchange for breach of contract and bad faith premised on its denial of their claim for insurance proceeds. (3 AA 697[¶ 26].)

2. The trial court denies leave to amend to include additional claims.

Appellants filed the operative complaint—their third in this case—on September 12, 2005. (1 AA 197.) Fire Insurance Exchange answered on December 13. (2 AA 305-314.) Five months later, in May 2006, appellants

moved to amend their complaint yet again, this time alleging four additional causes of action: intentional interference with contract, intentional interference with prospective economic advantage, intentional infliction of emotional distress, and racial discrimination. (2 AA 315-336.) Fire Insurance Exchange opposed the motion. (2 AA 563.) Appellants did not reply or appear at the hearing on the motion. (Respondent's Appendix ("RA") 1.)

Finding the motion procedurally defective and the proposed new causes of action substantively improper, the trial court denied leave to amend in July 2006. (RA 2.)

3. The trial court refuses to compel production of privacy-protected portions of Ms. Hansen's insurance file.

In the meantime, during discovery, Fire Insurance Exchange produced a copy of Ms. Hansen's insurance policy and non-confidential portions of her insurance file. (2 AA 551[¶ 4], 584[¶ 12].) Appellants thereafter sought "[t]he entire file regarding the obtaining of insurance on the property at 10500 Don Pico Road," which included statutorily confidential personal information. (3 AA 658.) Fire Insurance Exchange objected on June 2, 2006. (3 AA 642.) Appellants responded by filing a belated motion to compel production of the file 49 days later, on July 21. (3 AA 637.) The trial court denied appellants' motion based on "the grounds set out in Defendant's opposition." (3 AA 662-663.) Those grounds included that the material in the file was not relevant to the litigation, that appellants had not complied with statutory requirements for

seeking disclosure of a third party's confidential information, and that appellants had not shown good cause for production of the file. (3 AA 647-655.)

4. The trial court grants summary judgment to Fire Insurance Exchange on the ground that Ms. Hansen had no insurable interest in the property at the time of the fire and, hence, no policy proceeds to assign to appellants.

While appellants' motion to amend was pending, Fire Insurance Exchange moved for summary judgment on appellants' second amended complaint for breach of contract and bad faith. (2 AA 349-368 [dated 6/26/06].) Alternatively, it sought summary adjudication that it had no duty to pay more than $34,000, the balance appellants owed Ms. Hansen as of the time of the post-fire assignment, and that appellants' bad faith claim failed as a matter of law for lack of standing. (2 AA 366.) Following the completion of briefing and hearing, and after it had disposed of appellants' motions for leave to amend and to compel, the trial court granted the motion for summary judgment. (3 AA 877-878.) The trial court concluded that Ms. Hansen had no insurance benefits to assign to appellants after the fire because her insurable interest in the property ceased when she transferred ownership of the property before the fire. (3 AA 878.)

5. Appellants appeal.

Judgment was entered for Fire Insurance Exchange on October 19, 2006. (3 AA 880.) Appellants timely appealed on December 13, 2006. (3 AA 882.)

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE MS. HANSEN HAD NO INTEREST TO ASSIGN AFTER THE SALE AND FIRE.

An individual cannot insure something in which she does not have an insurable interest. "If the insured has no insurable interest, the contract is void." (Ins. Code, § 280; see *Hoffman v. State Farm Fire & Casualty Co.* (1993) 16 Cal.App.4th 184, 191.) Indeed, the policy here specifically limits its coverage to "the insured's interest." (1 AA 107.) As explained below, having irrevocably transferred the property at 10500 Don Pico Road, Ms. Hansen no longer had an insurable interest in it when the fire occurred. She no longer owned the property, nor did she have any other remaining interest that sufficed. The fact that Ms. Hansen's name remained on the mortgage at the time of the fire does not create an insurable interest *in the property*, the only interest that she had insured. At most, her interest was in certain payments, which were in fact made and which ultimately were appellants' responsibility anyway. Summary judgment for Fire Insurance Exchange therefore was proper.

A. Ms. Hansen Did Not Have Any Insurable Interest At The Time Of The Fire Because She No Longer Owned Or Possessed The Property.

Ms. Hansen did not own the property when the fire occurred on November 30. Ann Nicholas did—and there are two deeds to prove it. Ms. Hansen executed the first, a quitclaim deed transferring title from the Hansen Family Trust to Ann Nicholas, on November 20. (3 AA 693[¶¶ 11, 12]; 3 AA 546.) That deed was arguably incorrect, as the Hansen Family

Trust had transferred title to Judith Hansen and her late husband several months earlier. (3 AA 730.) But Ms. Hansen executed a grant deed the following day, transferring title from herself to Ann Nicholas. (3 AA 732.) That the second deed was not immediately recorded is of no import. An executed deed can transfer ownership without being recorded. (Civ. Code, § 1217 ["An unrecorded instrument is valid as between the parties thereto and those who have notice thereof"]; 5 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 11.2, pp. 12-13.)

Appellants have not alleged any other facts that would draw ownership into question. To the contrary, Mr. Edwards admitted under oath that Ms. Hansen left town on November 21 and that he never saw her again. (2 AA 536.) Either the November 20 or the November 21 deed was proper. And either way, it is clear from the summary judgment record that Ms. Hansen did not own, and was not in possession of, the property at the time of the fire. Appellants' contention that a triable issue existed as to ownership is contrary to *undisputed* facts.

With Ms. Hansen's transfer of title, use, and possession of 10500 Don Pico Road to Ms. Nicholas on November 21, she no longer had any insurable interest in the property. *Hoffman v. State Farm Fire & Casualty Co., supra,* 16 Cal.App.4th 184, is on point. There, the plaintiff-insureds' property suffered landslide damage that did not manifest itself until after they sold their property. The Court of Appeal held that because the insureds did not own the property—and so did not have an insurable interest—at the time the damage manifested itself, the policy provided no coverage. And so it is here. Ms. Hansen did not own the property at the time of the fire. Accordingly, the policy insuring her ownership interest had no application whatsoever. "Without ownership at the time of the manifestation of the loss, [a former owner] lack[s] an insurable interest in

the property." (*Id.* at p. 191.) And in the absence of an insurable interest, Ms. Hansen's homeowner's policy was not in effect at the time of the fire.

The cases on which appellants rely are clearly distinguishable. In *Liberty Mutual Fire Ins. Co. v. McKenzie* (2001) 88 Cal.App.4th 681, the insurer contended that its insured, McKenzie, did not have an insurable interest in a truck at the time it was stolen because he had previously filed with the Department of Motor Vehicles a document purporting to transfer title to his deceased father. (*Id.* at p. 685.) A triable issue of fact existed as to whether McKenzie retained such an interest because the purported transfer was a nullity, as he could not have transferred title to a dead person. (*Id.* at p. 688.) *Liberty Mutual* does not stand for the proposition that ownership is always a triable factual issue. It demonstrates only that ownership can be a triable issue where the transfer may be a nullity. This is not such a case. No claim is made that Ms. Hansen's transfer of the property to appellants was a nullity.

Greco v. Oregon Mutual Fire Ins. Co. (1961) 191 Cal.App.2d 674, is no more relevant. Appellants appear to cite *Greco* for the proposition that Ms. Hansen was entitled to assign her insurance claim after the fire despite having transferred title to the property before the fire. (AOB 13-16.) In *Greco*, however, the property at issue was destroyed *while in escrow* and title *had not yet passed* to the purchaser because conditions for delivery of the deed, including completion of a loan and issuance of title insurance, had not been fulfilled. (191 Cal.App.2d at pp. 678, 680.) The seller was still the owner—with an insurable interest—when the fire occurred and could thereafter assign benefits to the purchaser. (*Id.* at p. 681.) The same was true in *Long v. Keller* (1980) 104 Cal.App.3d 312, another case on which appellants rely. (*Id.* at p. 316, cited at AOB 12.)

By contrast, Ms. Hansen had clearly transferred title before the fire. There was no escrow, nor were there conditions to the transfer. (2 AA

543.) As a result, her homeowner's policy no longer applied at the time of the November 30 fire, leaving Ms. Hansen nothing to assign to the appellants.

B. Ms. Hansen Had No Insurable Interest Merely Because Her Name Remained On The Mortgage, Which Appellants Had Agreed To Pay.

Appellants contend that Ms. Hansen had an insurable interest in the property because her name remained on the mortgage (deed of trust) with the lender, Guaranty Residential Lender, despite appellants' agreement to take over the mortgage payments. Ms. Hansen's contractual obligation under the mortgage did not create an insurable interest. Code of Civil Procedure sections 580b and 580d immunize a real estate mortgagor from personal liability for a purchase money mortgage or nonjudicial sale. (Code Civ. Proc., §§ 580b ["No deficiency judgment shall lie in any event . . . under a deed of trust or mortgage given to the vendor to secure payment of the balance of the purchase price of that real property or estate for years therein"]; 580d ["No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property or an estate for years . . . in any case in which the real property or estate for years therein has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust"].) This protection against personal liability means that a mortgagee does not have an insurable interest in property.

Bonaparte v. Allstate Ins. Co. (9th Cir. 1994) 49 F.3d 486 is on point. There, holders of a second deed of trust who foreclosed on a residential property sued the former owners' insurer for refusing to pay for a fire loss incurred after the foreclosure but while the former owners still occupied the residence. (*Id.* at p. 488.) The Ninth Circuit, applying

California law, held that the former owners did not have an insurable interest by virtue of their name remaining on the first deed of trust. (*Id.* at p. 489.) The court explained that section 580b "eliminates any personal liability of [mortgagors] on the first deed of trust and thereby eliminates any 'insurable interest.'" (*Ibid.*) The same is true here.

Appellants have not identified a single case holding that a mortgagor who no longer owns or occupies the mortgaged property nonetheless retains an insurable interest in the property. The cases they do cite address whether an almond processor has an insurable interest in the almonds that it processes (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 861-862 [*Shade*]) and whether a sublessee has an insurable interest in the property that it subleases and occupies (*California Food Service Corp. v. Great American Ins. Co.* (1982) 130 Cal.App.3d 892, 895 [*California Food Service Corp.*]). Neither situation implicates the unique protection of Code of Civil Procedure sections 580b and 580d. And, in both cases, the party found to have an insurable interest had possession of the insured property when the loss occurred. (*Shade*, 78 Cal.App.4th at p. 862, 875; *California Food Service Corp.*, 130 Cal.App.3d at p. 896.) As discussed above, Ms. Hansen had neither possession nor ownership of the property at the time of the fire. Her name on the mortgage created no insurable interest for her. Accordingly, summary judgment for Fire Insurance Exchange was proper.

C. Appellants Develop No Argument Based On Money Owed To Ms. Hansen At The Time Of The Fire.

Casting about for some insurable interest, appellants also seem to suggest in passing that even if Ms. Hansen did not own the property at the time of the fire, she had an insurable interest because *appellants* had not yet paid the full purchase price. (AOB 11.) Any such argument is entirely

undeveloped. Appellants cite no authority and provide no rationale. "[A]n argument raised in such a perfunctory fashion is waived." (*People v. Harper* (2000) 82 Cal.App.4th 1413, 1419 fn. 4; see *Tilbury Constructors, Inc. v. State Compensation Ins. Fund* (2006) 137 Cal.App.4th 466, 482; Cal. Rules of Court, rule 8.204(a)(1)(B) [each point must be under separate heading or subheading and supported by argument and, where possible, citation to authority].)

D. Appellants Have No Standing To Assert Any Insurable Interest That Might Exist.

Even if Ms. Hansen had an insurable interest *appellants* are not the ones to assert it.[2] Ms. Hansen's interests, at most, were contingent and tangential. Her interests came into play only if *appellants* did not perform *their* obligations, either to pay the remainder of the purchase price or to pay the mortgage. The appellants owed the primary obligation.

Assuming for the sake of argument that Fire Insurance Exchange owed any obligation to Ms. Hansen, it would be subrogated to her right to collect from the persons primarily obligated—*appellants.* "[A]n insurer on paying a loss is subrogated in a corresponding amount to the insured's right of action against any person responsible for the loss." (*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 633, citations omitted; accord *Pacific Gas and Elec. Co. v. Superior Court* (2006) 144 Cal.App.4th 19, 23; *Century Indem. Co. v. London Underwriters* (1993) 12 Cal.App.4th

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[2] "[W]here there is no genuine issue of material fact, the appellate court should affirm the judgment of the trial court if it is correct on any theory of law applicable to the case, including but not limited to the theory adopted by the trial court." (*Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1481, citations omitted; accord *Medill v. Westport Ins. Corp.* (2006) 143 Cal.App.4th 819, 827-828; *Westoil Terminals Co., Inc. v. Industrial Indem. Co.* (2003) 110 Cal.App.4th 139, 145.)

1701, 1707; *Kardly v. State Farm Mut. Auto. Ins. Co.* (1989) 207 Cal.App.3d 479, 488; see also 1 AA 135[¶4] [carrier contractually assigned lender's rights under the mortgage upon payment to lender of insured loss and the remaining mortgage balance, if any].) Thus, assuming an assignment from Ms. Hansen to appellants (which is what they have pleaded), any obligation that Fire Insurance Exchange might owe to appellants would be offset dollar for dollar by appellants' own obligation to Ms. Hansen, and, through her, to Fire Insurance Exchange. The result is that even with an assignment, appellants cannot recover from Fire Insurance Exchange for their own defalcation of what is *their* primary obligation, not Ms. Hansen's.

In fact, appellants did not default on their primary obligations. They paid the full purchase price and they paid the mortgage taken out in Ms. Hansen's name by refinancing. (3 AA 827.) The result is that *Ms. Hansen* suffered *no* loss. Hers are the only rights assigned. As assignees, appellants stand in her shoes. She suffered no loss, so they have nothing to recover.

E. Assuming An Insurable Interest For The Sake of Argument, It Was Not An Interest Insured By The Policy.

Even if Ms. Hansen potentially retained an insurable interest after she sold her home, any such interest was not something that her homeowner's policy insured. An insurance policy must specify "[t]he interest of the insured in property insured, if he is not the absolute owner thereof." (Ins. Code, § 381, subd. (c).) Ms. Hansen's homeowner's insurance policy with Fire Insurance Exchange is for the dwelling, separate structures, and personal property that she *owned*. (1 AA 99-101.) It did not insure esoteric potential interests such as Ms. Hansen's hypothetical and attenuated contractual obligation to make mortgage payments while

someone else owned the property, or the contractual promise of a buyer to finish paying a debt owed. The policy had a specific provision for coverage to persons to whom *Ms. Hansen* mortgaged the property. (1 AA 109.) It did not cover Ms. Hansen's own mortgage, other contract obligations if she no longer owned the property, or the obligations of others to her.

It is unreasonable to read the policy as somehow insuring Ms. Hansen in her role as either non-owner mortgagor or future mortgagee. (See *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 807 [insurance policy will not be read to have "strained" or "absurd" meaning].) Ms. Hansen was insured for her *ownership* of her home. She was not insured for what happened to the home in the hands of others after she sold it.

Appellants have provided *no* authority that a homeowner's policy continues to insure a former homeowner who has sold the property and transferred ownership to another. That's because there is none. The risk insured is entirely different. The risk of loss for a carrier insuring an individual who is living in her own home is entirely different than the risk assumed when someone else—whom the carrier does not know and has neither evaluated nor underwritten—has bought the property (here apparently as an investment). The rule advanced by appellants would place on homeowners' insurers in this State a multitude of risks that they never evaluated and or agreed to undertake. And, it would do so not out of some legal or practical necessity, but because certain buyers, like appellants here, were either unwilling or unqualified to obtain their own insurance. Appellants could have and should have obtained their own insurance. Ms. Hansen's former insurance is no substitute. The fact that a homeowner's policyholder obtains some new, non-ownership interest in her former home does not mean that the homeowner's policy automatically evolves to insure that interest or the new owners.

F. Ms. Hansen Had No Insurance Proceeds To Assign To Appellants After The Fire And Did Not Assign The Policy Before The Fire.

As just demonstrated, Ms. Hansen had *no* insurable and insured interest in her home once title transferred to appellants. Appellants here have sued as *post-loss assignees* of Ms. Hansen's insurance proceeds. They stand in Ms. Hansen's shoes as regards any proceeds due. An "assignee 'stands in the shoes' of the assignor and his rights are no greater than those of the assignor." (*Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 775.) Thus, if Ms. Hansen had no entitlement to insurance proceeds (as is the case here), appellants have none either. (See 2 AA 363-366.)

At times, appellants seem to argue that Fire Insurance Exchange should have approved an assignment of the whole policy to Ms. Nicholas (the only person on title) or to Mr. Edwards or both. But there was no purported assignment here until *after* the fire. A buyer is not automatically assigned a former property owner's insurance policy with no conscious assignment and no notice to anyone.

Relying on the *University of Judaism v. Transamerica Ins. Co.* (1976) 61 Cal.App.3d 937, appellants contend that Fire Insurance Exchange could not reasonably have withheld consent to an assignment before the loss. (AOB 16-17.) Maybe yes, maybe no, but that is irrelevant. This case does not involve a pre-loss assignment. *University of Judaism* held that an insurer cannot deny coverage based on a non-assignment provision (not relied on in the summary judgment motion here) where it would reasonably have approved a policy assignment that took place *before the loss occurred*. (*Id.* at p. 942.) But the undisputed evidence is that Ms. Hansen assigned her insurance policy proceeds to the appellants *after the fire*. Appellants conceded at summary judgment that "[w]hen purchasing Ms. Hansen's

property at 10500 Don Pico Road, Plaintiff Richard Edwards did not believe he was assuming [the policy]." (3 AA 697[¶ 23].)

Rather, according to appellants' summary judgment contention, Ms. Hansen assigned the proceeds of the policy after the fire. (3 AA 694[¶16], 696[¶20]; AOB 13.) Any post-fire assignment must have been of proceeds rather than the policy itself, as the policy cannot be assigned after a loss. An insurance contract can only indemnify against contingent or unknown events, not against a loss that has already occurred. (Ins. Code, § 22; *Prudential-LMI Com. Insurance v. Superior Court* (1990) 51 Cal.3d 674, 695 fn. 7 ["an insurer cannot insure against a loss that is known or apparent to the insured"].)

Appellants make much of the difference between an assignment of proceeds or benefits and an assignment of the policy as a whole. We agree that the issue here is appellants' rights as assignees of policy proceeds only. But the fact is that the policy was not and, after the fire, could not be assigned in toto. "[A]fter the fire the subject of coverage no longer existed; it had been destroyed; and the subsequent dealings of the parties in this area must have contemplated the right to collect the proceeds payable under that policy" rather than of the policy itself. (*Greco v. Oregon Mut. Fire Ins. Co., supra*, 191 Cal.App.2d at p. 682.) This case is, at most, about an assignment of proceeds. The problem for appellants is that based on her lack of ownership at the time of the fire, Ms. Hansen had no proceeds owing to assign.

Accordingly, summary judgment was proper and should be affirmed.

II. THERE IS NO BASIS FOR APPELLANTS' BAD FAITH CLAIM.

The operative complaint alleged not only breach of contract, but also a claim for tortious breach of the implied covenant of good faith and fair

dealing, i.e., insurance bad faith. (1 AA 199.) In addition to summary judgment, Fire Insurance Exchange sought summary adjudication of the insurance bad faith claim for lack of standing. (2 AA 366.) The trial court did not reach this issue in light of its broader summary judgment ruling. But for the reasons explained below, even were this court to reverse the trial court's summary judgment ruling, it should, at a minimum, instruct the trial court to summarily adjudicate the bad faith claim in favor of Fire Insurance Exchange.

It is black letter law in California that only insureds or express beneficiaries of an insurance policy can sue for a breach of the implied covenant of good faith and fair dealing. (*Austero v. National Cas. Co.* (1976) 62 Cal.App.3d 511, 515 [*Austero*]; *Seretti v. Superior Nat. Ins. Co.* (1999) 71 Cal.App.4th 920, 929-930 [*Seretti*].) That is so because the implied covenant arises only out of the contractual relationship. (*Austero, supra*, 62 Cal.App.3d at pp. 515, 516-517.) Appellants were not party to the insurance contract between Ms. Hansen and Fire Insurance Exchange, nor were they insured under the terms of the policy. (1 AA 99[¶ 9] [defining "insured" persons to include Ms. Hansen and any permanent residents of her household who are relatives or under the age of 21].)

Nor were appellants assigned the policy itself. (3 AA 697[¶23] [appellants' concession that Mr. Edwards did not believe he was assuming the insurance policy when he purchased the property].) Thus, they were not parties, directly or by assignment, to the insurance contract. Accordingly, appellants' claim that Fire Insurance Exchange owed them a duty of good faith and fair dealing under the insurance contract is wrong. Perhaps that is why appellants' opening brief cites no authority in support of the bad faith claim nor otherwise attempts to defend it.

The purported post-fire assignment of Ms. Hansen's right to insurance proceeds doesn't change any of this. The assignment was not of

the contract, but only of such sums as may happen to be paid under the contract. As such, appellants are in no different position than others (e.g., creditors) who may have a pecuniary interest in the outcome of an insured's claim, but who have no standing to sue. Were the law otherwise, every creditor of an insured would have a potential bad faith claim. That's not the law.

Seretti is on point. There, individual shareholders in a closely-held family corporation sued for bad faith for the carrier's failure to pay benefits under a policy issued to the corporation. (71 Cal.App.4th at pp. 922-923.) Although the shareholders undoubtedly had a pecuniary interest in the outcome and a legal interest in the proceeds of the corporation's insurance claim, the Court of Appeal held that they had no standing to pursue a bad faith cause of action because they were not parties to the insurance contract. (*Id.* at p. 931; see also *Austero, supra*, 62 Cal.App.3d at p. 517 [wife could not pursue bad faith claim based on failure to pay disability benefits to husband]; *Hatchwell v. Blue Shield of California* (1988) 198 Cal.App.3d 1027 [same re health benefits]; *Gantman v. United Pacific Ins. Co.* (1991) 232 Cal.App.3d 1560 [individual members of homeowners association could not sue association's carrier for bad faith].) As the assignee of the proceeds of Ms. Hansen's insurance claim, appellants stand in no different relationship to the insured, Ms. Hansen, than others who may have a pecuniary or even legal interest in the outcome of an insured's claim. In all of those instances, there is no tort claim for bad faith.

Nor is there any evidence that Ms. Hansen assigned any bad faith claim. She did not have an accrued bad faith claim to assign at the time of the post-fire assignment, given that no one had even submitted a claim to Fire Insurance Exchange yet, and there is no claim of any later assignment. Without a direct contractual relationship with Fire Insurance Exchange or

an assignment of an accrued chose in action, appellants have no bad faith claim.

III. THE TRIAL COURT PROPERLY REJECTED APPELLANTS' INTENTIONAL INTERFERENCE CLAIMS.

Perhaps recognizing the meritlessness of their bad faith claim, and as an apparent afterthought, appellants sought to amend their second amended complaint in the trial court to add four new claims, including interference with contract and interference with prospective economic advantage. The trial court denied leave to amend. In doing so, it acted within its discretion.[3] (See Code Civ. Proc., § 473, subd. (a).)

The proffered claims were substantively defective. (*California Casualty Gen. Ins. Co. v. Superior Court* (1985) 173 Cal.App.3d 274, 280 [affirming denial of leave to amend for that reason].) And, as explained below, the attempt to add them to the complaint was procedurally flawed. The trial court acted within its discretion in denying leave.

A. There Is No Legal Basis For Appellants' Claims Of Intentional Interference With Contract And Prospective Economic Advantage; These Claims Cannot Be Premised On Fire Insurance Exchange Asserting Its Own Contractual Rights.

Although not clearly explained in the opening brief, appellants' intentional interference with contract claim appears to be that appellants had

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[3] Appellants' opening brief does not challenge the denial of leave to amend as to claims for racial discrimination and intentional infliction of emotional distress. They may not raise that issue for the first time in their reply brief. (*Pallco Enterprises, Inc. v. Beam* (2005) 132 Cal.App.4th 1482, 1502.)

a contract with Ms. Hansen for assignment of her insurance proceeds and that Fire Insurance Exchange interfered in the contract because it determined that there were no proceeds to pay to Ms. Hansen or her assignees. Along similar lines, the theory behind the intentional interference with prospective advantage claim seems to be that appellants expected Fire Insurance Exchange to pay mortgagee Guaranty Residential Lender for fire damage and that Fire Insurance Exchange somehow interfered in their prospective advantage—not having to pay the mortgage themselves—by not paying Guaranty. Neither theory is valid.

1. A carrier's performance or nonperformance of its own contract cannot be a tortious interference with the assignment of the proceeds of that contract.

Appellants' intentional interference with contractual relationship claim is actually a standard breach of contract claim dressed up as a tort. The contract that they assert Fire Insurance Exchange interfered with is Ms. Hansen's purported assignment of insurance proceeds to them. (2 AA 341-342.) The interference they assert is that Fire Insurance Exchange failed to pay the contract proceeds that appellants claim were assigned to them. (2 AA 342.) But as an assignee, appellants stand in Ms. Hansen's shoes. (*Dell Merk, Inc. v. Franzia* (2005) 132 Cal.App.4th 443, 451.) Fire Insurance Exchange did nothing to interfere with the assignment from Ms. Hansen to appellants. It simply did not pay a contract claim to Ms. Hansen that it did not believe was owed. Appellants have received the full value of the assignment of proceeds paid to Ms. Hansen. Those proceeds just happen to have been $0.

Recognizing a claim on these facts would violate the rule that the tort for disruption of contractual relationships "can only be asserted against a stranger to the relationship." (*Kasparian v. County of Los Angeles* (1995)

38 Cal.App.4th 242, 262.) The contract that was supposedly interfered with here was an assignment of payments under a contract to which Fire Insurance Exchange is a party. Fire Insurance Exchange cannot possibly be described as a stranger to that assignment.

Recognizing a tort claim on these facts would also convert every breach of contract suit involving an assignee into a tort. That result contravenes our Supreme Court's mandate against "obliterat[ing] vital and established distinctions between contract and tort theories of liability by effectively allowing the recovery of tort damages for an ordinary [alleged] breach of contract." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510.) "'A person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations.'" (*Stop Loss Ins. Brokers, Inc. v. Brown & Toland Medical Group* (2006) 143 Cal.App.4th 1036, 1041.) Accordingly, there was no legal basis for the interference with contract claim and the trial court was justified in refusing to allow an amendment of the complaint to state such a meritless cause of action.

2. A carrier's failure to pay a claim is not an intentional interference with a third party's prospective economic advantage.

The proffered interference with prospective economic advantage claim was likewise baseless. Appellants alleged Fire Insurance Exchange's interference with appellants' expectancy that *Fire Insurance Exchange itself* would pay off the mortgage on appellants' property so that appellants would not have to pay the mortgage themselves. (2 AA 343.) There are several flaws in this theory.

First, like a claim for intentional interference with contract, a claim for interference with prospective economic advantage claim "can only be

asserted against a stranger to the relationship." (*Kasparian v. County of Los Angeles, supra*, 38 Cal.App.4th at p. 262.) These torts are designed to protect parties from "frustration by outsiders who have no legitimate social or economic interest" in the relationship. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd., supra*, 7 Cal.4th at p. 514.) In the prospective economic advantage context, this rationale means that a claim will not lie against "a party to the relationship from which the plaintiff's anticipated economic advantage would arise." (*Kasparian v. County of Los Angeles, supra*, 38 Cal.App.4th at p. 262.)

Here, appellants' claim is that Fire Insurance Exchange failed to perform a supposed contractual obligation that would have been an ancillary benefit for plaintiffs. That's not interference by an outsider to the economic relationship. How could it be, given that the anticipated economic advantage was having Fire Insurance Exchange pay off the mortgage on appellants' property? The rule set forth in *Applied Electronics* and *Kasparian* therefore bars appellants' claim.

Second, appellants' claim fails to comply with the requirement that there be some legally wrongful act independent of the interference itself. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1158.) The supposedly wrongful acts alleged in the complaint all stem from Fire Insurance Exchange's failure to pay Guaranty Residential Lender under the terms of its insurance policy. (2 AA 343-344.) But that's the "interference" itself. There is no legal basis for a claim of interference by nonperformance of one's own contract obligation.

Further undermining appellants' proffered claim is the fact that the record here does not even show a contractual obligation by Fire Insurance Exchange to pay the mortgage. The lender submitted a proof of loss form on November 30, 2004, a year after the fire. (3 AA 736-737.) Fire Insurance Exchange promptly informed the lender that the proof of loss

form was deficient because it did not include the estimated claim or a fair market value appraisal of the insured property. (3 AA 766.) Appellants neither alleged nor have identified any evidence that the lender ever provided this additional information or followed up on the claim in any other way. One timely request for additional information in response to an incomplete proof of loss form filed a year after the fire does not establish an independent legal wrong sufficient to sustain a claim for intentional interference with prospective economic advantage.

Notably, the lender itself no longer has a claim for coverage. The mortgage was paid off in July 2005 as part of a refinancing transaction. (3 AA 827.) That payment extinguished any claim the lender might have had. (*Track Mortgage Group, Inc. v. Crusader Ins. Co.* (2002) 98 Cal.App.4th 857, 864; 3 Cal. Insurance Law and Practice (Matthew Bender 2006) § 35.09[8], p. 35-42 ["once the debt is extinguished through either payment or foreclosure, the mortgagee has no remaining interest in the insurance"].) Given that the lender has no interest in the insurance, Fire Insurance Exchange's legitimate failure to pay what is not owed cannot be a tortious inference with anything.

Home Savings of America v. Continental Ins. Co. (2001) 87 Cal.App.4th 835 (*Home Savings*), relied on by appellants, does not help overcome these obstacles. *Home Savings* was a suit by the mortgagee against its insurer. (*Id.* at p. 840.) The issue was whether the insurer could deny the lender-mortgagee's claim based on defenses the insurer would have solely against a claim by the owner-mortgagor. (*Ibid.*) It has nothing to do with a claim for intentional interference with prospective economic advantage based on an insurer's failure to pay a mortgagee. Neither *Home Savings* nor any other authority cited by appellants can change the fact that appellants do not have a valid claim for intentional interference with prospective economic advantage. And because their claim was invalid, the

trial court was well within its discretion in denying appellants' motion to add it to their complaint.

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Appellants have no proper interference claim. The trial court, therefore, properly denied leave to amend. For the same reasons, appellants' claim that these causes of action are somehow inherent in the operative complaint (AOB 29-31) is of no import.

B. The Trial Court Properly Exercised Its Discretion In Denying Appellants' Motion For Leave To File A Third Amended Complaint Because The Motion Was Procedurally Defective.

In addition to its substantive defects, the trial court also denied appellants' motion for leave to amend on the procedural ground that "[p]laintiffs have made essentially no showing in support of their motion, counsel's supporting declaration fails to comply with [former Rule of Court 327(b), now California Rule of Court 3.1324(b)], and there is no explanation for the lateness of this request." (RA 2.) That ruling, too, was well within the court's discretion.

Rule of Court 3.1324(b) requires a motion for leave to amend to be accompanied by a declaration stating "(1) The effect of the amendment; (2) Why the amendment is necessary and proper; (3) When the facts giving rise to the amended allegations were discovered; and (4) The reasons why the request for amendment was not made earlier." In opposing appellants' motion for leave to amend, Fire Insurance Exchange noted that the supporting declaration did not satisfy these requirements. (2 AA 570-575.) Specifically, it pointed out that the declaration was silent as to the effect of the amendment, why it was necessary and proper, when counsel discovered the facts supporting the amendment, and why the request was not made earlier. (2 AA 321-322.)

If anything, the information provided in the motion demonstrated that only appellants' own lack of diligence prevented these claims from being made earlier. The motion asserted that appellants' counsel had only recently become aware of a fact supporting the intentional interference claims, namely that the lender had submitted a proof of loss to Fire Insurance Exchange. (2 AA 316, 321.) But counsel conceded that he had the proof of loss form in his possession for some time—he just hadn't noticed it earlier. (2 AA 321[¶ 4].) And appellants' opening brief emphasizes that they could have stated these causes of action based on the same facts contained in the second amended complaint, further undermining appellants' explanation for why the causes of action was not pled until 18 months after they initiated this suit and 6 months after Fire Insurance Exchange produced non-privileged portions of Ms. Hansen's claim file, including the proof of loss form. (AOB 30.) These facts amply support the trial court's ruling that there was no persuasive explanation for the lateness of the motion to amend. (RA 2.)

The larger context of this case further supports the trial court's exercise of discretion. The court had already sustained demurrers to appellants' first complaint and their first amended complaint. (AOB 1.) Appellants then filed a second amended complaint. Five months after Fire Insurance Exchange answered the second amended complaint, appellants moved to amend their complaint yet again. (2 AA 313 [answer dated 13/13/05]; 2 AA 315 [motion for leave to amend dated 5/16/06].) Fire Insurance Exchange moved for summary judgment and opposed the motion to amend shortly thereafter. (2 AA 562 [summary judgment motion dated 6/26/06], 580 [opposition to motion for leave to amend dated 7/7/06].) In opposing the motion to amend, Fire Insurance Exchange emphasized that in addition to a lack of diligence in bringing the motion, appellants also had demonstrated a pattern of not cooperating with discovery. (2 AA 567-568.)

Appellants did not file a reply, nor did they appear at oral argument after the court issued a tentative order denying the motion to amend. (RA 1.) They never addressed any of the tardy motion's procedural defects, in the trial court or on appeal. Without having done so, they cannot now be heard to complain about the trial court's exercise of discretion. The trial court acted well within its discretion in denying the motion for leave to amend.

The cases cited in appellants' opening brief are not contrary. In *Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, plaintiffs sought to amend their complaint based on events that had transpired since the filing of the original complaint. There is no such allegation here. And in *Burkle v. Burkle* (2006) 141 Cal.App.4th 1029, the Court of Appeal held that a motion for leave to amend on the eve of summary judgment should have been granted because the evidence revealed a triable issue of fact on the proposed new causes of action. (*Id.* at pp. 1035, 1042.) Here, appellants' motion to amend was not denied for lack of evidence in the record, but rather for procedural and legal defects. (3 AA 817.) *Burkle* is inapposite.

Where the complaint has already been amended twice and the third attempt to amend does not comply with procedural requirements and comes without a persuasive explanation for the late causes of action, it is well within the court's discretion to deny it.

C. Appellants Have Not Demonstrated Prejudice From The Trial Court's Failure To Entertain The Intentional Interference Claims.

Our Constitution permits reversal only for an error that resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) The Code of Civil Procedure elaborates that a judgment may be reversed only based on an error that is "prejudicial" and that caused the moving party "substantial

injury." (Code Civ. Proc., § 475.) As discussed above, appellants' intentional interference claims fail as a matter of law. Although appellants argue that they should be allowed to take yet another stab at amending the complaint if this Court determines that their proffered claims fail (AOB 33), they have not specified how they could remedy the defects. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349-350 [requiring party seeking leave to amend to explain how it can legitimately do so]; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) There simply is no basis for intentional interference claims on this record. And, because the intentional interference claims are without merit, they would not have precluded summary judgment even if the trial court had granted leave to amend. Accordingly, appellants were not prejudiced by any supposed error in the trial court's ruling and the judgment should be affirmed.

IV. THE TRIAL COURT ACTED WELL WITHIN ITS BROAD DISCRETION IN DENYING APPELLANTS' MOTION TO COMPEL DISCOVERY OF IRRELEVANT, CONFIDENTIAL CONSUMER INFORMATION.

Finally, appellants argue that the trial court abused its discretion in not compelling production of certain documents they requested, namely "[t]he entire file regarding the obtaining of insurance on the property at 10500 Don Pico Road . . . including any dealings with Judith Hansen or Richard Edwards, from 2003 to the present." (3 AA 658; see AOB 27-28.) Fire Insurance Exchange produced much of the requested material but withheld those portions containing confidential, personal information of Ms. Hansen. In denying appellants' motion to compel, the trial court agreed with Fire Insurance Exchange's opposition to the motion "on a lot of grounds." (Appellants' Motion to Augment, Exhibit 1, p. 1; see 3 AA 663.) Fire Insurance Exchange set forth several grounds for denying the motion,

including that appellants had not demonstrated that the material sought is relevant and that the file was protected under the Insurance Code and Code of Civil Procedure, with whose procedural requirements appellants had not complied. Appellants' opening brief addresses only one of these grounds, the file's protected status. (AOB 27-28.) Because they have not even tried to demonstrate error as to the other ground for the ruling (relevance), appellants' challenge fails. But even as to the file's protected status, they have demonstrated neither an abuse of discretion nor prejudice.

A. The Unchallenged Relevance Ground Amply Supports The Trial Court's Exercise Of Discretion.

Only material that is "relevant to the subject matter involved in the pending action" is subject to discovery. (Code Civ. Proc., § 2017.010.) Fire Insurance Exchange produced a copy of Ms. Hansen's policy and of non-privileged portions of the claims file by the time appellants filed their motion to compel. In opposing the motion, Fire Insurance Exchange pointed to these documents and questioned the relevance of the other information contained in Ms. Hansen's file. (2 AA 551[¶ 4], 584[¶ 12].)

Appellants asserted in the trial court that the file is relevant because it would allow them to "cross-check the accuracy of the documents that were produced in response to my request for the claims file." (Appellants' Motion to Augment, Ex. 1, p. 4.) But they pointed to no document already in their possession that they believed to be inaccurate or otherwise demonstrated the relevance of Ms. Hansen's private information. On appeal, appellants made *no* argument as to relevance. Accordingly, they waived argument regarding that ground. (E.g., *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368.)

Moreover, appellants have never suggested any relevance of Ms. Hansen's confidential, personal information beyond speculative "cross-

checking" and none is apparent. Her personal information has nothing to do with this case. The trial court's denial of the motion to compel on relevance grounds was well within its discretion.

B. The Information That Appellants Sought Is Protected By Statute And They Failed To Comply With The Statutory Requirements For Obtaining It.

In declining to produce those portions of Ms. Hansen's insurance file containing individualized personal data, Fire Insurance Exchange expressed its concern that Insurance Code section 791.13 and Code of Civil Procedure section 1985.3 barred it from producing such information unless and until appellants complied with the statutory requirements. (3 AA 648-653.) Appellants do not dispute their failure to comply. Instead, they argue simply that any protection afforded by sections 791.13 and 1985.3 ceased when Ms. Hansen died and, as such, that they did not have to comply with the statutory requirements. They are wrong.

1. The privacy protections applicable to Ms. Hansen's insurance file survived her death.

Section 791.13 protects personal information held by an "insurance institution" about an "individual." (Ins. Code, § 791.13, subd. (a).) Section 1985.3 protects the personal records of a "consumer." (Code Civ. Proc., § 1985.3, subd. (b).) Neither states that the privacy right of an "individual" or a "consumer" evaporates upon death, and the treatment of privacy rights in other contexts suggests otherwise. For example, the physician-patient and attorney-client evidentiary privileges survive the death of the patient or client. (Evid. Code, §§ 953, 954, 993, 994.) The privacy rights of an individual or consumer in her personal information should be treated in the same way.

Under Insurance Code section 303, after the death of an insured, "his interest in the insurance passes to the person taking his interest in the subject matter insured" by will or intestate succession. (Ins. Code, § 303.) That an insured's interest in insurance survives death suggests that an insured's privacy right in the insurance file survives as well. That makes sense. The protections against indiscriminate distribution of private information remain necessary after death. The information contained in such records—for example, financial information, bank accounts, etc.—can still be misused if it finds its way to the wrong hands after the insured-consumer's death. (Cf. Health & Saf. Code, § 103526 [limiting individuals who may obtain a certified death certificate]; http://www.dhs.ca.gov/hisp/chs/OVR/DeathOrderCert.htm [state website explaining that purpose of restrictions is to reduce identity theft].) Insurance files may also contain embarrassing information that an insured does not want available to the world even after death, such as health and financial events in the insured's life.

Appellants provide no authority that the protections afforded by section 1985.3 and section 791.13 cease upon death. The cases that they cite (AOB 27-28) are inapposite. *Avelar v. Superior Court* (1992) 7 Cal.App.4th 1270, held that a nonparty resisting a subpoena duces tecum could not exercise a peremptory challenge to the judge in the proceeding seeking to compel disclosure. (*Id.* at p. 1280.) It says nothing about whether an insured's confidentiality interest is extinguished upon death. *Maffei v. Woodlawn Memorial Park* (2005) 130 Cal.App.4th 119, is equally unhelpful to appellants. *Maffei* involved Health and Safety Code section 7525 and the circumstances under which remains may be removed from a cemetery plot. (*Id.* at. p. 121.) It said nothing about whether an insured's statutory privacy right evaporates upon death.

2. Appellants failed to comply with the statutory requirements for obtaining privacy-protected material.

Appellants have not disputed that, absent their invented death exception, Insurance Code section 791.13 and Code of Civil Procedure section 1985.3's protections apply. Section 791.13 bars an insurance institution from disclosing personal information about an individual without the individual's written authorization. (Ins. Code, § 791.13.) Section 1985.3 provides that a subpoena duces tecum for personal records of a consumer must be accompanied by a written release signed by the consumer or by a proof of service showing the consumer was notified of the request. (Code Civ. Proc., § 1985.3, subd. (b).) Appellants did not comply with either requirement.[4]

Nor did appellants comply with section 1985.3's requirement that any motion to enforce a subpoena for consumer records be brought within 20 days after the witness provides written objections. (Code Civ. Proc., § 1985.3, subd. (g).) Appellants filed their motion to compel 49 days after Fire Insurance Exchange sent written objections. (3 AA 642 [written objections dated 6/2/06]; 3 AA 637 [motion to compel filed 7/21/06].) They have provided no explanation for the delay.

Failure to comply with the requirements of section 1985.3 alone suffices as grounds for denying a motion to compel production of material protected by that statute. (Code Civ. Proc., §1985.3, subd. (k).) Appellants do not dispute this. Accordingly, the trial court did not abuse its discretion in denying the motion to compel.

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[4] Appellants suggest that compliance was futile or impossible in light of Ms. Hansen's death. (AOB 28.) That's not so. The insured consumer's rights are held by the heirs, statutory or otherwise. (See Ins. Code, § 303.)

C. Appellants Have Not Even Attempted To Show Prejudice.

As discussed above, a judgment may be reversed on appeal only upon a showing of prejudice. (Cal. Const. art. VI, § 13.) Appellants have not even attempted to demonstrate here or in the trial court that the trial court's denial of the motion to compel was prejudicial or that a "different result would have been probable "absent the error." (Code Civ. Proc., § 475.) At most, they said that the requested information would allow them to confirm ("cross-check") the accuracy of other information they already possessed. That's not a probability of a different result. Accordingly, even if the trial court had abused its discretion, any such error would not be grounds for reversal. (*Crumpton v. Dickstein* (1978) 82 Cal.App.3d 166, 169 ["Absent a showing of abuse of discretion in ruling on a discovery motion and prejudice resulting from an adverse ruling, this court will not interfere with the trial court's action"]; *City of Los Angeles v. Superior Court* (1961) 196 Cal.App.2d 743, 748 [discovery ruling not grounds for reversal unless both erroneous and prejudicial].)

CONCLUSION

When Judith Hansen sold her house, her insurable and insured interest in it ceased. Having not purchased their own insurance, the buyers cannot bootstrap onto her policy to obtain coverage, and certainly not coverage for what were ultimately their own obligations, not Ms. Hansen's. At a minimum, they have no ground for claiming any tort recovery based on the insurer's decision to pay or not to pay insurance proceeds to Ms. Hansen. For the foregoing reasons, judgment for Fire Insurance Exchange should be affirmed.

Alternatively, if this Court determines that Fire Insurance Exchange was for some reason not entitled to summary judgment, it should affirm the trial court's proper refusal to allow tardy pleading of baseless interference tort claims and should remand the case with instructions to summarily adjudicate appellants' bad faith claim in Fire Insurance Exchange's favor.

Dated: October 1, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204 (c)(1), the attached Respondent's Brief was produced using 13-point Times New Roman type style and contains 9,602 words not including the tables of contents and authorities, caption page, or this Certification page, as counted by the word processing program used to generate it.

Dated: October 1, 2007

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