2nd Civil No. B110711

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JAMES W. QUAN and LUCITA L. QUAN,

Plaintiffs and Appellants,

vs.

FARMERS INSURANCE GROUP, INC., et al.,

Defendants and Respondents.

Appeal from the Superior Court of Los Angeles County
Honorable Ronald E. Cappai, Judge
LASC Case No. BC150370

RESPONDENT'S BRIEF

COOPER, KARDARAS & SCHARF L.L.P.
EDWARD C. WILDE, SBN 144809
141 East Walnut Street
Pasadena, California 91103-3834
(818) 795-0814
(213) 681-1335

GREINES, MARTIN, STEIN & RICHLAND LLP
IRVING H. GREINES, SBN 39649
MARC J. POSTER, SBN 48493
9601 Wilshire Boulevard, Suite 544
Beverly Hills, California 90210-5207
(310) 859-7811

Attorneys for Defendant and Respondent Truck Insurance Exchange

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION AND SUMMARY OF ARGUMENT

> "There is no such thing as negligent or even reckless sexual molestation." (*J. C. Penney Casualty Ins. Co. v. M. K.* (1991) 52 Cal.3d 1009, 1021.)

This rule squarely applies here. This is so because the underlying action (*Bradford v. Quan*) seeks to impose liability on Mr. Quan based on one factual theory — and one theory only — Mr. Quan's alleged sexual assault on a 17-year-old minor. If Mr. Quan is held liable at all, it would be because of this alleged sexual misconduct.

The Quans' liability policy with Truck Insurance Exchange does not cover a sexual assault. A sexual assault is an intentional act. It is not an "accident" and therefore cannot be an "occurrence" as defined by the policy. There is no coverage without an "occurrence." Furthermore, Insurance Code section 533 prohibits coverage for such a willful act.

Because there is no potential for coverage, Truck has no duty to defend Mr. Quan (or Mrs. Quan, who was not even sued). And Truck cannot be in bad faith for refusing to defend.

On appeal, the Quans fail to overcome this fatal defect in their case. Instead, they devote most of their opening brief to addressing whether Mr. Quan's "no contest" plea to a criminal sexual assault charge involving the same incident with Ms. Bradford should be held against him. The "no contest" plea, however, is a red herring. It does not matter whether the plea should be held against him or whether someone at Truck thought it should. The relevant issue is whether the allegations of Ms. Bradford's civil

complaint and any other facts available to Truck objectively establish a potential for coverage which triggers a duty to defend. They do not.

The Quans assert that Ms. Bradford might prove her allegation that Mr. Quan *negligently* "embraced, kissed and had sexual intercourse with [her] without her consent so as to cause her to lose her virginity." But labels do not alter what is ultimately involved. Merely calling these acts "negligent" does not make them so. Even without the rape, unconsented embracing and kissing are themselves inherently intentional. They are wrongful acts, not "accidents," especially where, as here, the victim is a minor. Moreover, because the alleged embracing and kissing are part and parcel with the sexual attack that allegedly followed and that forms the heart of Ms. Bradford's complaint, those acts, too, are not covered.

The Quans speculate that Ms. Bradford could have alleged there was a negligent "bumping." However, she did not so allege and it is not plausible she would so allege. The only evidence of "bumping" comes not from Ms. Bradford, but from Mr. Quan. He claims that Ms. Bradford may have bumped into him, not the other way around. In any event, Ms. Bradford's suit is not about bumping. Speculation about unpled causes of action does not create a duty to defend.

Finally, the Quans argue that Mr. Quan denies ever touching Ms. Bradford and that there is little or no physical evidence she had been raped. Again, their argument is completely beside the point. The pertinent question is not whether Mr. Quan committed the acts alleged, but whether such acts (if committed) could potentially give rise to coverage. They cannot give rise to coverage under the law. Truck has no duty to defend

every false claim against Mr. Quan. Truck's duty is to defend only those claims that are potentially covered by the policy. True or not, Ms. Bradford's claim is not (and can never be) covered by the policy.

For these and other reasons discussed below, the Quans have no case against Truck and the judgment of dismissal should be affirmed.

STATEMENT OF THE CASE

This is an action for alleged breach of contract and insurance bad faith. (Appellant James W. Quan's and Lucita L. Quan's Appendix in Lieu of Clerk's Transcript ("QA") 189.) Plaintiffs and appellants James and Lucita Quan contend defendant and respondent Truck Insurance Exchange owed a duty to defend a civil action for damages brought by Darlene Bradford.[1]

A. The Relevant Facts.

The Quans have alleged, or requested judicial notice of, virtually every detail of the history of Ms. Bradford's civil and criminal cases against Mr. Quan and of Truck's refusal to defend the civil case. Here we summarize only those facts necessary to resolve this appeal and affirm the judgment.

1/ The Quans refer to the defendant in this case as "Farmers." In fact, they were insured by Truck Insurance Exchange. (QA 367.) We therefore more accurately refer to the defendant as Truck.

1. Ms. Bradford's Civil Complaint Against Mr. Quan.

Ms. Bradford sued only Mr. Quan, not Mrs. Quan. Ms. Bradford asserts four counts. Her first count for "assault and battery" alleges in pertinent part:

> "3. On or about April 7, 1988, at 3225 San Gabriel Boulevard, Rosemead, California, Defendant with force and against the consent of Plaintiff, assaulted Plaintiff and raped, ravished, and carnally knew her." (QA 370.)

Similarly, the second count for "intentional infliction of emotional distress" alleges:

> "9. On or about April 7, 1988, Defendant, JAMES QUAN forcibly and without Plaintiff's consent kissed and had sexual intercourse with Plaintiff." (QA 371.)

The third count, albeit for purported "negligence," alleges the same underlying facts:

> "14. On or about April 7, 1988, Plaintiff was seventeen years old and was in the presence of the Defendant upon his request of having her help him with his tax return and vacuuming of a house he owns at 3225 San Gabriel Boulevard, Rosemead, California.
>
> "15. At said time and place, Defendant negligently embrassed [sic, embraced], kissed and had sexual intercourse with Plaintiff without her consent so as to cause her to lose her virginity, suffer physical pain and emotional distress and to proximately cause the injury and damages described below." (QA 372.)

Finally, the fourth count for purported "negligent infliction of emotional distress" identically alleges:

"23. Said Defendant, by kissing her and forcibly having sexual intercourse with her without her consent breached his duty of care owed to Plaintiff." (QA 373.)

Ms. Bradford's action is still pending. There has been an arbitration and a court trial. Both the arbitrator and the judge found that Mr. Quan sexually assaulted Ms. Bradford. (QA 477-478; *Bradford v. Quan*, 2nd Civ. No. 098281, Opinion, p. 13.) However, the arbitration award was set aside, and Division Two of this Court recently reversed the judgment because the trial judge erred in denying Mr. Quan's motion in limine to exclude evidence that he pleaded "no contest" to a charge of sexual battery involving Ms. Bradford. (Opinion, pp. 13-14.)

2. Mr. Quan's Response To The Suit.

Mr. Quan has consistently denied all of Ms. Bradford's allegations. (AOB 4.) In his defense, he points out that there is little or no physical evidence that Ms. Bradford was assaulted. (QA 379-381.)

3. The Quans' Liability Policy.

Mr. Quan tendered the defense of Ms. Bradford's civil action to Truck under their business liability policy. (QA 430.) The policy provides in pertinent part:

"**SECTION II — BUSINESS LIABILITY**"

"We shall pay all sums for which you may become legally obligated to pay as **damages** caused by:

1. **Bodily Injury, Personal Injury**

2. **Advertising Injury** (subject to Deductible)

3. **Property damage**" (QA 354.)

"We shall defend any suit against you claiming these **damages**, even if the allegations of the suit are groundless or false." (QA 354.)

"**Damages** — means the cost of compensating those who suffer **bodily injury**, **personal injury**, **advertising injury** or **property damage** from an **occurrence**." (QA 345.)

"**Occurrence** — means an accident, including continuous or repeated exposure to conditions which result in **bodily injury** or **property damage** you neither expected nor intended. It also means an act or series of acts of the same or similar nature, resulting in **personal injury** or **advertising injury**." (QA 346.)

"We do not pay for . . . [i]njury to any employee of yours arising out of and in the course of employment." (QA 354.)

4. Truck's Denial Of Coverage And A Defense.

Mr. Quan tendered the defense of Ms. Bradford's suit to Truck. Truck then investigated the matter. In a recorded statement to Truck's investigator, Mr. Quan asserted that he never touched Ms. Bradford and that the only physical contact between him and Bradford could have been if she bumped into him while they were walking side by side. (QA 418-419.)

Truck initially accepted the defense, but advised Mr. Quan it was still investigating whether the claim was covered and reserved its rights to limit or deny a defense or indemnity. (QA 436.) On December 2, 1992, Truck notified Mr. Quan that it had determined there was no coverage and would no longer provide a defense:

> "It is the position of the Truck Insurance Exchange that assault and battery as well as intentional infliction of emotional distress do not come within the meaning of 'occurrence' in your policy.
>
> "The complaint alleges that 'on or about April 7, 1988, at 3225 San Gabriel Blvd., Rosemead, CA, defendant with force and against the consent of plaintiff, assaulted plaintiff and raped, ravaged, and carnally knew her.'
>
> "The plaintiff prays for punitive and/or exemplary damages. These damages are not insurable pursuant to Insurance Code Section 533." (QA 75.)

As we will demonstrate below, the only relevant issue on this appeal is whether Truck's decision to deny a defense was correct. If so, Mr. Quan has no legitimate claim for breach of contract or bad faith. In particular, it does not matter whether Truck took into account Mr. Quan's "no contest" plea to the sexual battery charge when Truck refused to defend. With or without the plea, there is and can be no coverage. Coverage (or the lack of it) is based on the objective facts and the terms of the policy, not on the subjective opinions of either the insurer or the insured.

B. The Quans' Lawsuit Against Truck.

1. The Operative Second Amended Complaint.

The Quans' 103-page second amended complaint purports to state counts for declaratory relief, breach of contract, breach of the implied covenant of good faith and fair dealing, fraud-material misrepresentation (that Truck allegedly never intended to provide coverage specified in policy), negligent misrepresentation (same), and negligence (that Truck sold insurance inadequate to the Quans' needs). (QA 190.)

2. Truck's Demurrer Sustained Without Leave To Amend.

Truck demurred to the second amended complaint on the ground that it fails to state facts sufficient to state a cause of action. (QA 527.)

The trial court sustained the demurrer without leave to amend and ordered that the action be dismissed pursuant to Code of Civil Procedure section 581, subdivision (f)(1). (QA 605.) The court entered judgment on January 29, 1997. (QA 610.)

C. The Quans' Appeal.

The Quans filed timely notice of appeal on March 10, 1997. (QA 614.)

LEGAL DISCUSSION

Truck's demurrer admits all well-pleaded facts but does not admit the Quans' contentions, deductions and conclusions of fact or law. (*Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 807.) This Court must affirm the judgment if the trial court's ruling is correct on any theory. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.)

Although the Quans contend they "allege sufficient facts to state each of the causes of action against Farmers" (AOB 1-2), their brief addresses only the coverage issue. That issue relates to breach of contract and bad faith, not to fraud, negligent misrepresentation or negligence. The Quans therefore have waived any appeal as to the dismissal of the latter causes of action. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546; *Stoll v. Shuff* (1994) 22 Cal.App.4th 22, 25, fn. 1.)

The Quans suggest they should have been granted leave to amend their second amended complaint. (AOB 11-12.) However, they did not request leave in the trial court, nor have they suggested what new facts they could add after all these years that would warrant yet another round of pleading. (*Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636.) In fact, they have not and cannot state a claim against Truck. Further amendment would not change a thing.

I.

THE JUDGMENT SHOULD BE AFFIRMED SINCE MR. QUAN HAS NOT STATED A VIABLE CAUSE OF ACTION AGAINST TRUCK.

A. Unless There Is A Potential For Coverage Of *Bradford v. Quan* Under The Policy, Truck Has No Duty To Defend Mr. Quan.

An insurer's duty to defend derives from the coverage obligations it assumes under the insurance contract. Where there is no potential for coverage, there is no duty to defend. (*La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal.4th 27, 40.) As *Dyer v. Northbrook Property & Casualty Ins. Co.* (1989) 210 Cal.App.3d 1540, 1547, explains:

> "The nature and kind of risk covered by the policy limits the duty to defend. The carrier has the duty to defend the insured against loss of the nature and kind against which it was insured. [Citation.] By negative implication, the insurer has no duty to defend the insured against loss of the nature and kind that is not 'within the coverage of the policy.' [Citation.]"

As we now show, the 17-year-old Ms. Bradford's charge of sexual assault is not the nature and kind of risk covered by the Quans' policy. Accordingly, they have no right to a defense of Ms. Bradford's suit.

B. Truck Owes No Duty To Defend Because There Is No Potential For Coverage Of The *Bradford v. Quan* Claim Under Truck's Policy.

1. The Allegations Of Intentional Wrongdoing In *Bradford v. Quan* Preclude Any Potential For Coverage.

a. Insurance Code Section 533 Prohibits Coverage For Willful Acts.

Insurance Code section 533 provides that "[a]n insurer is not liable for a loss caused by a willful act of the insured." This is a codification of "'the general rule that an insurance policy indemnifying the insured against liability due to his own willful wrong is void as against public policy.'" (*Nuffer v. Insurance Co. of North America* (1965) 236 Cal.App.2d 349, 354.)

Section 533 is read into every insurance policy. (*Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 739.) By statute, therefore, Truck could not provide coverage for any loss to Ms. Bradford caused by Mr. Quan's willful acts.

b. Truck's Policy Does Not Purport To Cover Intentional Acts.

Even if Section 533 did not exist, Truck's policy still would not cover Mr. Quan's intentional acts. Truck agreed to pay only those sums which Mr. Quan becomes legally obligated to pay as damages caused by bodily injury from an "occurrence." (QA 345, 354.) An occurrence is "an accident . . . which result[s] in **bodily injury** . . . [Mr. Quan] neither expected nor intended." (QA 346.)

An "accident" is an unintended act. (*Merced Mutual Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, 50 ["[w]here the insured intended all of the acts that resulted in the victim's injury, the event may not be deemed an 'accident.'"].) "An intentional act is not an 'accident' within the plain meaning of the word." (*Royal Globe Ins. Co. v. Whitaker* (1986) 181 Cal.App.3d 532, 537.) This is true whether or not the insured intended any harm. (*Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 810 ["If the claimant's injuries did not result from an 'accident,' it does not matter whether the insured expected or intended his conduct to cause any harm"].)

Accordingly, Truck's "accident" policy affords no coverage for intentional acts.

c. There Is No Coverage Here Because *Bradford v. Quan* Alleges An Intentional Sexual Assault On A Minor — Something Which Cannot Be An Accident.

Ms. Bradford does not allege a single fact that is or potentially could be deemed an accident. Her complaint says it in a variety of ways, but it all boils down to a core factual claim — that Mr. Quan raped her. In each cause of action, she alleges that Mr. Quan:

> ". . . with force and against the consent of Plaintiff, assaulted Plaintiff and raped, ravished, and carnally knew her." (QA 370.)

> ". . . forcibly and without Plaintiff's consent kissed and had sexual intercourse with Plaintiff." (QA 371.)

> ". . . embrassed [sic, embraced], kissed and had sexual intercourse with Plaintiff without her consent so as to cause her to lose her virginity . . ." (QA 372.)

> ". . . kissing her and forcibly having sexual intercourse with her without her consent . . . " (QA 373.)

In addition, in each count of her complaint, either directly or by incorporating previous allegations, Ms. Bradford asserts Mr. Quan's acts were wrongful and malicious. (QA 369-374, ¶¶ 5, 6, 8, 13, 20.) These alleged acts therefore could not be an accident.

d. Mr. Quan's Alleged Wrongdoing Cannot Be Characterized As Mere Negligence.

Not surprisingly, in her third and fourth causes of action, Ms. Bradford purports to characterize Mr. Quan's acts as "negligent." Such characterization, however, is meaningless. It does not change the factual essence of the case. It must be disregarded where, as here, the purported negligence count incorporates allegations that the assault was intentional and for the purpose of causing harm. (*Allstate Ins. Co. v. Kim W.* (1984) 160 Cal.App.3d 326, 334-335 [purported cause of action for negligence disregarded because it "specifically incorporates all the allegations of the two other causes of action, one of which expressly alleges that the assaults were intentional"].) The law does not recognize the relabeling of an intentional wrong as negligent in order to obtain insurance coverage. (*Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1107; *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1086 ["We do not sanction relabelling child molestation as negligence in order to secure insurance coverage for the plaintiff's injuries"].)[2]

2/ Mr. Quan has conceded that is exactly what happened here. In his Declaration in Support of Motion for New Trial in *Bradford v. Quan*, he states: "Two causes of action in this action are for negligence. It was explained to me by my former trial counsel, Jerry A. Ramsey of the Law Offices of Engstrom, Lipscomb & Lack, that the negligence causes of action were included in the complaint in order to bring my insurance carrier into the case which, if Plaintiff was successful, would provide monies to satisfy a judgment." (CT 54-55, *Bradford v. Quan*, 2nd Civ. No. B098281.)

More fundamentally, Ms. Bradford's factual allegations simply do not describe negligent conduct. Calling rape "negligence" does not make it so. (*Chamberlain v. Allstate Ins. Co.* (9th Cir. 1991) 931 F.2d 1361, 1365.) Indeed, "[i]t strains the imagination to speculate how a pattern of sexual overtures and touching can be accidental." (*Sena v. Travelers Ins. Co.* (D. N. M. 1992) 801 F. Supp. 471, 475.) As we noted at the outset of this brief, the Supreme Court holds in *J. C. Penney Casualty Ins. Co. v. M. K.*, *supra*, 52 Cal.3d 1009, 1021, 1026:

> "There is no such thing as negligent or even reckless sexual molestation. . . . Some acts are so inherently harmful that the intent to commit the act and the intent to harm are one and the same. The act is the harm."

Unlike the fisticuffs involved in *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, there is no potential that any liability stemming from a claim of rape could ever be imposed on the basis of an innocent misunderstanding.[3] As the court explains in *State Farm Fire & Cas. Co. v. Ezrin* (N.D. Cal. 1991) 764 F. Supp. 153, 156 [applying California law, original emphasis]:

> "Sexual battery is also distinguishable from other types of battery because it may never be justified by a claim of self-defense. As with child molestation, the unwanted touching is *itself* the harm. We can think of no logical basis for applying different rules of coverage for non-consensual acts performed with adults."[4]

3/ In *Gray*, the facts were that "Dr. Gray, fearing physical harm to himself and his passengers, rose from his seat and struck Jones." (65 Cal.2d at p. 267, fn 1.)

4/ See also, *Allstate Ins. Co. v. Gilbert* (9th Cir. 1988) 852 F.2d 449, 452 [applying California law]: "Whereas in an assault and battery case it is possible that evidence at trial may demonstrate self-defense or simple

The nature of Ms. Bradford's allegations of intentional wrongdoing also distinguishes this case from the principal case relied on by the Quans, *State Farm Fire and Cas. Co. v. Nycum* (9th Cir. 1991) 943 F.2d 1100. There, the civil action against the insured alleged that he intentionally or negligently touched the three-year-old plaintiff in the anal or vaginal area while the child was at a child-care center in the insured's home. The jury returned a general verdict for the plaintiff. In the coverage action, the insurer argued there was no coverage for sexual molestation. The Ninth Circuit agreed there would be no coverage if the evidence showed there had been penetration, but there was no such evidence. The plaintiff told her mother only that the insured touched her bottom and it hurt. (*Id.* at pp. 1102-1105.) That touching was consistent with non-sexually related conduct, such as a playful pat by the insured on the child's buttocks or, perhaps, a spanking for a naughty child.

In this case, in sharp contrast, Ms. Bradford's claim of rape permits no potential for liability based on an innocent touching. If the rape occurred and liability was imposed, such liability had to be based on conduct not insured under Truck's policy and not insurable under California law.[5]

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negligence rather than commission of an intentional act, no such possibilities exist where child molestation is alleged. [Citation.] The intent to cause harm in molesting a child is supplied as a matter of law."

5/ Even if Ms. Bradford's allegations somehow could be viewed as encompassing some wrongdoing less than an unconsented sexual assault (they cannot), the alleged wrongdoing still would not be insurable. Here, the alleged misconduct involved sex with a minor. Statutory rape, even where the victim consents, is still a wrongful act and not insurable. (*Linebaugh v. Berdish* (1985) 144 Mich.App. 750, 763 [376 N.W.2d 400, 406] ["an intent . . . to injure . . . may be inferred as a matter of law from his

e. The Alleged Unconsented "Embracing and Kissing" Is Inextricably Intertwined With The Alleged Unconsented Sex That Followed.

The Quans fail in their effort to analogize this case to the circumstances in *Horace Mann Ins. Co. v. Barbara B.*, *supra*, 4 Cal.4th 1076.

In *Horace Mann*, the insured teacher had engaged in inappropriate but nonsexual behavior towards his student on some occasions and sexually molested the student on other occasions. (*Id.* at p. 1079, fn. 2.) The Supreme Court held that the teacher's insurer was obligated to defend the student's civil action because the teacher could "be liable for torts of negligence against the victim which are apart from, and not integral to, the molestation." (*Id.* at p. 1083.) The Court was quick to point out, however, that in many cases the allegations of molestation and other misconduct "may be inseparably intertwined (e.g., when the molestation allegedly was carried on in secret, without any distinct injury to the plaintiff's social relations)," in which event there would be no duty to defend. (*Id.* at p. 1085.)

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alleged sexual intercourse with a fourteen-year-old girl"].)

Neither Ms. Bradford nor Mr. Quan contend that Mr. Quan only "embraced and kissed" Ms. Bradford. And it would not matter if they did. These acts also are, by definition, intentional acts. They cannot be done accidentally. To "embrace" is "to take or clasp in the arms; press to the bosom; hug." (Random House Unabridged Dict. (2nd ed. 1993), p. 636, col. 1.) And to "kiss" is "to touch or press with the lips slightly pursed, and then often to part them and emit a smacking sound, in an expression of affection, love, greeting, reverence, etc." (*Id.* at p. 1059, col. 3.)

This latter situation was exactly the case in *Jane D. v. Ordinary Mutual* (1995) 32 Cal.App.4th 643. There, the plaintiff alleged that a priest who had counseled her for years obtained information about her and used it to induce her into having sexual relations with him. The appellate court found

> "the allegations of nonsexual conduct — obtaining information about plaintiff during counseling and using this information and misusing counseling techniques to create transference and to control and induce plaintiff's behavior — were 'inseparably intertwined' with the sexual misconduct. . . . None of the allegations of [the priest's] malfeasance in counseling stands separate from the allegation of sexual misconduct. Accordingly, there is no coverage . . . ." (*Id.* at p. 653.)

This same point was reiterated recently in another sex case, *State Farm Fire & Cas. Co. v. Century Indemnity Co.* (1997) 59 Cal.App.4th 648, mod. 60 Cal.App.4th 792e. The appellate court found there was no duty to defend even for certain of an alleged molester's nonsexual but inseparable torts:

> "When viewed in isolation, certain acts against [the students] were not inherently sexual or harmful. However, here the evidence, unlike that in *Horace Mann*, establishes the temporal and spatial context in which all alleged physical misconduct occurred. As is clear from our summary of the record, all physical contact between [the teacher and students] was integral to and inseparable from the alleged molestation, in that it was either concurrent with or a prelude to it and part of indivisible incidents of molestation." (*Id.* at p. 664.)

The instant case is conceptually identical to the *Jane D.* and *State Farm* cases. Here, of course, Ms. Bradford alleges no "torts of negligence . . . which are apart from, and not integral to, the molestation." (*Horace Mann Ins. Co., supra,* 4 Cal.4th at p. 1083.) The charge is rape. The entire

sequence of events occurred in one place, in private, within one hour. The alleged embracing and kissing were "integral" to the sexual contact that followed and were "inseparably intertwined" with it. (*Id.* at p. 1085.) All of the misconduct alleged by Ms. Bradford was "either concurrent with or a prelude to" the alleged sexual attack and "indivisible incidents" of the attack. (*State Farm*, *supra*, 59 Cal.App.4th at p. 664.)[6]

In short, based on the allegations in *Bradford v. Quan*, there was no possibility of coverage for Mr. Quan. His liability policy precludes coverage and so, too, does Insurance Code section 533. Truck therefore had no duty to defend him in that action and the Quans could not reasonably expect that it did. (*B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal.App.4th 78, 100 ["an insured cannot 'reasonably' expect a defense on claims based on conduct or risks clearly not covered or conspicuously excluded from coverage under the policy"].)

6/ For this reason, the "amended findings and award of arbitrator" cited by the Quans do not require Truck to defend. (QA 81-82.) Those findings were drafted by Quan's counsel, were not reviewable for errors of law or fact, and were never entered as a judgment. While the arbitrator might be able to separate foreplay from intercourse for purposes of awarding damages, governing law holds that for purposes of insurance coverage those acts are inseparable and do not invoke the duty to defend.

2. Nothing Outside The Allegations Of The *Bradford v. Quan* Complaint Creates A Potential For Coverage.

a. Mr. Quan's Denials Of Wrongdoing Do Not Matter — They Cannot Alter The Coverage Contemplated By The Policy.

The Quans operate under the erroneous impression that none of the legal principles discussed above apply unless Mr. Quan either admits he raped Ms. Bradford or has been convicted of rape. (AOB 44.) In other words, according to the Quans, coverage can be manufactured out of whole cloth whenever the insured denies that the alleged misconduct occurred. This is absurd. "Neither an admission by the insured nor a criminal conviction is necessary to give rise to the exclusion under section 533." (*J. C. Penney Casualty Ins. Co. v. M. K.*, *supra*, 52 Cal.3d 1009, 1025, fn. 13.)

Coverage also does not depend on whether Mr. Quan actually assaulted Ms. Bradford. Even if her lawsuit is entirely fabricated, Truck has no duty to defend unless the allegations of her complaint, if true, would establish a covered claim. Truck did not promise the Quans it would defend every false and groundless claim. It only promised to defend those claims *potentially covered by the policy*. If such a potentially covered claim is alleged, then Truck must defend even if it is false and groundless. (QA 354.) Were the rule otherwise, insurers would have to defend every tendered claim without regard to the limitations of coverage in their policies. That is not the law. As the court holds in *Nichols v. Great*

American Ins. Companies (1985) 169 Cal.App.3d 766, 776-777 [original emphasis]:

> "[T]he duty to defend a suit which raises a *possibility* of liability, but is eventually shown to be groundless, does not equate with a duty to defend a suit which raises *no* potential for liability."

b. Truck's Consideration Of Mr. Quan's "No Contest" Plea Does Not Matter.

The Quans devote most of their opening brief purporting to show why Mr. Quan's "no contest" plea to the criminal sexual battery charge should not be used as evidence against him. They urge this point because there is a discussion of the plea in inter-office memoranda in Truck's files and because there is an indication that subordinate claims adjusters asked their superiors for authority to provide Mr. Quan with a defense. (QA 439-445, 450, 460, 462, 473-474.)

The fact that evidence may be inadmissible in a court of law does not mean that an insurer should disregard that evidence in determining the potential for coverage. But assuming it should be disregarded, the point is irrelevant to the determination whether Truck has a legal duty to defend. The duty to defend depends on the allegations of the complaint against the insured and any additional facts available to the insurer. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295; *Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106, 1114.) It does not depend on the subjective thoughts of particular Truck claims people about reasons for denying coverage. For example, in *Waller v. Truck Ins. Exchange, Inc.*

(1995) 11 Cal.4th 1, the insurer refused to defend for specified reasons. The refusal to defend was upheld by the Supreme Court for a different reason. It did not matter that the reason was different from the insurer's original reason:

> "If the terms of the policy provide no potential for coverage, as in this case, the insurer acts properly in denying a defense even if that duty is later evaluated under case law that did not exist at the time of the defense tender." (*Id.* at p. 26.)

Similarly, statements by individual Truck employees regarding coverage do not create coverage. "[C]overage under an insurance policy cannot be created by waiver or estoppel." (*Manneck v. Lawyers Title Ins. Corp.* (1994) 28 Cal.App.4th 1294, 1303.) Thus, even if an authorized Truck representative had told the Quans there was coverage (no one ever did), Truck could still properly refuse to defend if, as a matter of law, there was no potential for coverage. (*Equitable Life Assurance Society v. Berry* (1989) 212 Cal.App.3d 832, 842; *Hartford Fire Ins. Co. v. Spartan Realty International, Inc.* (1987) 196 Cal.App.3d 1320, 1325; *Aetna Casualty & Surety Co. v. Richmond* (1977) 76 Cal.App.3d 645, 653 ["the doctrines of implied waiver and of estoppel, based upon the conduct or action of the insurer, are not available to bring within the coverage of a policy risks not covered by its terms"].) A fortiori, statements not made to the Quans, but simply made in discussions between Truck claims adjusters, cannot create coverage and a duty to defend where, as here, there is no coverage as a matter of law.[7]

7/ In any event, inter-office memoranda are not, as the Quans would have it, "admissions" of coverage by Truck. The statements were not

The bottom line is that, regardless of the views that may have been expressed by certain claims people, Truck's decision to decline a defense for the reasons stated in Truck's December 7, 1992 letter to Mr. Quan (QA 74-75) was correct as a matter of law in light of the allegations of Ms. Bradford's complaint and the facts available to Truck.

c. No One Alleges That Mr. Quan Negligently "Bumped" Ms. Bradford.

The Quans have urged that Truck should have defended Mr. Quan because he told a Truck investigator that Ms. Bradford might have bumped into him. (QA 418-419, 440.) They speculate that Ms. Bradford could have amended her complaint to allege negligence in this regard. (AOB 34.)

Ms. Bradford's suit has already gone through an arbitration and a trial, and she has never alleged a negligent bumping. It is not even plausible that she would do so, since neither she nor Mr. Quan has ever suggested he negligently bumped her. "[T]he insured may not speculate about unpled third party claims to manufacture coverage." (*Hurley Construction Co. v. State Farm Fire & Casualty Co.* (1992) 10 Cal.App.4th 533, 538; *Stanford Ranch, Inc. v. Maryland Cas. Co.* (9th Cir. 1996) 89 F.3d 618, 629.) And the insurer has no duty to defend where, as here, the

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authorized by Truck (Evid. Code, § 1222) and were not adopted by Truck (Evid. Code, § 1221). Exactly the opposite is true. The persons who made the statements were not even purporting to speak for Truck; they were asking for direction from their superiors as to how to respond to the Mr. Quan's tenders of the defense.

potential for unpled liability is "tenuous and farfetched." (*Michaelian v. State Comp. Ins. Fund*, *supra*, 50 Cal.App.4th 1093, 1106.)

The Quans' tenuous and farfetched speculation about claims that Ms. Bradford has never made is patently insufficient to create a duty to defend Ms. Bradford's rape claim.

C. Truck Could Not Be In Bad Faith For Refusing To Defend A Claim That It Had No Duty To Defend.

"[I]f there is no *potential* for coverage and, hence, no duty to defend under the terms of the policy, there can be no action for breach of the implied covenant of good faith and fair dealing because the covenant is based on the contractual relationship between the insured and the insurer." (*Waller v. Truck Ins. Exchange, Inc.*, *supra*, 11 Cal.4th 1, 36, original emphasis; *Ticor Title Ins. Co. v. Employers Ins. of Wausau* (1995) 40 Cal.App.4th 1699, 1714 ["There being no duty, as a matter of law there could be no breach of the covenant for failure to defend or any ancillary duty such as the duty to investigate"]; *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1151-1153 [same].)

In short, Mr. Quan can state no claim for breach of contract or bad faith against Truck. The trial court properly sustained Truck's demurrer to his complaint.

II.

THE JUDGMENT SHOULD BE AFFIRMED SINCE MRS. QUAN ALSO HAS NOT STATED A VIABLE CAUSE OF ACTION AGAINST TRUCK.

It is unclear why the Quans contend Truck breached a duty to Mrs. Quan. In their complaint, they alleged she has some sort of derivative right of action against Truck based on Truck's alleged breach of duty to defend Mr. Quan. (QA 204.) However, as we have shown, Mr. Quan has no right of action against Truck on that ground. A fortiori, Mrs. Quan would have no derivative right of action, either.

Furthermore, Ms. Bradford did not sue Mrs. Quan. (QA 369.)[8] Truck promises only to defend a "suit" claiming damages covered by the policy. (QA 354.) A "suit" refers to civil litigation. (*Perzik v. St. Paul Fire & Marine Ins. Co.* (1991) 228 Cal.App.3d 1273, 1277.) There is no civil litigation against Mrs. Quan.

Truck breached no duty to Mrs. Quan. The trial court properly sustained Truck's demurrer to her causes of action as well.

8/ The Quans suggest Ms. Bradford could have sued Mrs. Quan for negligence in the selection of Mr. Quan to handle maintenance matters on their property. (AOB 38.) She never did.

CONCLUSION

This case involves an alleged rape. In California, there is no insurance for rape, and Truck's policy did not promise to defend charges of rape. The Quans have not and cannot state a cause of action against Truck for refusing to defend *Bradford v. Quan*. The judgment of dismissal should be affirmed.

Respectfully submitted,

COOPER, KARDARAS & SCHARF L.L.P.
EDWARD C. WILDE
GREINES, MARTIN, STEIN & RICHLAND LLP
IRVING H. GREINES
MARC J. POSTER

By_____
Marc J. Poster

Attorneys for Defendant and Respondent Truck Insurance Exchange