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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DANNY EMERSON, Plaintiff and Appellant, v. FARMERS GROUP, INC., et al., Defendants and Respondents.	B262922 (Los Angeles County Super. Ct. No. BC533707)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ruth A. Kwan, Judge. Affirmed.

Law Offices of Michael Drell, Michael Drell; Law Offices of Stephanie Drell, Stephanie Drell; Gusdorff Law, Janet Gusdorff; The Ehrlich Law Firm and Jeffrey I. Ehrlich for Plaintiff and Appellant.

Berkes, Crane, Robinson & Seal, Steven M. Crane; Greines, Martin, Stein & Richland, Robert A. Olson and Marc J. Poster for Defendants and Respondents.

INTRODUCTION

Betty Louza brought a cross-complaint for assault against Danny Emerson alleging that after she rear-ended him, Emerson got out of his car and approached her with what appeared to be a gun, putting her in fear for her safety. Emerson tendered Louza's cross-complaint to his automobile and homeowner's insurers, Farmers Group, Inc., Farmers Insurance Exchange, and Mid-Century Insurance Company (together defendants). Defendants declined to provide Emerson a defense and so he brought the instant action alleging breach of the insuring agreements and bad faith.

The trial court granted defendants' summary judgment motion and Emerson appeals. We conclude there is no dispute of material fact with the result that, as a matter of law, there was no potential for coverage for Emerson's assault on Louza. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *the insuring agreements*

At the time of the alleged assault, Emerson was insured by defendants under two policies. The first was automobile policy No. 29-18309-60-97 (the auto policy), that provided coverage as follows: "We will pay damages for which any insured person is legally liable because of *bodily injury* to any person and property damage arising out of the ownership, maintenance or use of your insured vehicle or a private passenger vehicle." The auto policy defined "damages" as "the cost of compensating those who suffer bodily injury or property damage from an accident." "Bodily injury" was defined by auto the policy as "*bodily harm to or sickness, disease or death of any person*." (Italics added.)

Second, Emerson homeowner's policy No. 29 936093445 was issued by defendants (the homeowner's policy). Effective at the time of Emerson's alleged assault, the homeowner's policy's covered "those damages which an insured becomes legally obligated to pay because of . . . bodily injury resulting from an occurrence . . . ." "Bodily injury" was defined therein as "physical harm to the body, including physical sickness or disease, to a person other than an insured," but the homeowner's policy specifically excluded "psychological injury or effect, including by way of example but not limited to fear, depression, humiliation, anxiety, anguish or distress."

2. *the incident*

Louza rear-ended Emerson near the corner of 6th Street and Highland Avenue in Los Angeles. Emerson sued Louza for injuries and damages he sustained in the collision. Emerson's complaint is not at issue here.

Louza cross-complained. Cast as one cause of action for assault, Louza's cross-complaint alleged that on June 5, 2008, Emerson and Louza "were involved in a traffic incident. *When their vehicles were stopped*, Emerson, among other things: approached Louza; reached inside his jacket; pulled out a black object out [*sic*] that appeared to be a gun; and *threatened Louza*. [¶] Emerson's conduct was intentional. Emerson intended to cause or place Louza to fear for her health and safety, and to place Louza in apprehension of immediate physical harm to her person, which is what occurred." (Italics added, the cross-complaint.) It is undisputed that Emerson never touched Louza.

3. *Emerson notifies defendants of Louza's assault cross-complaint.*

In October 2011, Emerson tendered to defendants Louza's first amended cross-complaint (the cross-complaint). On March 24, 2012, defendants notified Emerson that they had investigated coverage. They considered available information that included Emerson's complaint, Louza's cross-complaint, the police report, Emerson's recorded statement, and the applicable insurance policies. Defendants denied Emerson a defense and disclaimed coverage, explaining that, based on their review, they were unable to identify a potential for coverage, or a duty to defend Emerson under the policies. The letter recognized that defendants' position would be subject to change if additional allegations and facts were developed in the litigation. Defendants added, "In the event you [Emerson] are served with an amended cross-complaint in connection with this lawsuit, please provide us with a copy so that we may review it for potential coverage based upon any new facts alleged therein."

The police report reviewed by defendants reflected that on the day of the collision, Louza went to the police department and related that she had just exited a store parking lot and started slowing in the eastbound left-turn lane when Emerson's vehicle began following her "at close distance and began honking excessively at her." As she continued to slow in the eastbound left-turn lane, Emerson's car suddenly changed lanes and passed her, then made another sudden lane change in front of Louza's car and came to a complete stop after cutting her car off. Louza attempted to stop but was unable to avoid colliding with Emerson's car. Emerson then "exited his veh[icle] and walked back towards her veh[icle]. She then obs[erve]d [Emerson] put

his hand in his pocket and remove something black in color. She then became concerned for her safety and drove off from the . . . scene. . . . She also stated that she was a victim of road rage."

Defendants additionally considered Emerson's recorded statement in which he acknowledged that Louza claimed he assaulted her with a gun.

In March 2010, Louza's counsel stated his intention to file a bodily injury claim "due to emotional distress."

In September 2010, Louza's automobile insurer found Louza to be 100 percent at fault for the rear-end collision.

According to defendants' loss report from October 2011, Louza's attorney reported that his client complained of back and neck pain and was alleging that Emerson pulled a gun on her after the accident and threatened her.

Defendants' loss report generated on November 29, 2011, stated that Louza's attorney "confirms that [Louza] denies any impact so she denies any injuries or property [damage] from the [collision]. [Attorney] alleges his client is claiming emotional distress from the *incident following the alleged accident*. She did not seek any medical tx [treatment] and *has no medical bills for the emotional distress*." (Italics added.)

Emerson did not give defendants any other version of Louza's cross-complaint, or her interrogatory responses, deposition transcript, statement of damages, demand letters, or doctor's report, until after defendants denied coverage and Emerson filed this lawsuit.

4. *settlement of the lawsuit between Emerson and Louza*

Emerson agreed to settle his action against Louza provided she amended her assault cross-complaint to allege negligence.

Accordingly, on July 9, 2013, Emerson and Louza entered into a settlement agreement under which he paid her $15,000, and she paid him $69,500 for release of all of their claims against each other. Louza's second amended cross-complaint for negligence only is dated just six days before the settlement was signed and more than a year after defendants denied Emerson a defense under the policies. Therein, Louza alleged that the "*traffic accident* was caused by conduct on the part of Emerson that fell below the standards of care. Louza sustained physical injury as a result of the *accident*." (Italics added, the negligence cross-complaint.) Emerson did not notify defendants of the existence of this negligence cross-complaint until after he filed this litigation.

5. *Emerson's brings the instant lawsuit against defendants.*

Emerson brought this action for damages for breach of the policies and breach of the covenant of good faith and fair dealing. The operative complaint alleged that defendants wrongly withheld policy benefits by refusing to provide a defense and indemnity as required by the insuring agreements.

Defendants moved for summary judgment on the grounds that Louza's assault cross-complaint did not allege bodily injury, or an accident or occurrence, with the result defendants owed no duty to defend and did not breach the policies or engage in bad faith claims handling.

In opposing the summary judgment motion, Emerson disputed that Louza sought only emotional distress damages. He cited defendants' responses to requests for admissions and their October 2011 loss report indicating that Louza complained of back and neck pain. Emerson also submitted his own eight facts, most of which constituted legal conclusions. Of relevance, defendants did not dispute that Louza claimed to have sustained

bodily injury from the *collision*, but asserted that those injuries were irrelevant to the cross-complaint's assault claim, and disputed that Louza ever made a claim for physical injuries that was tendered to defendants.

6. *Emerson's continuance motions*

A week after defendants moved for summary judgment, in early September 2014, Emerson applied ex parte for a continuance. He argued that defendants owed him certain discovery responses, which responses he believed would produce evidence relevant to his opposition. Emerson's attorney declared he "need[ed] to receive full and complete discovery responses and send out a second round of discovery which includes depositions, special interrogatories, further production demand, and requests for admission." Otherwise Emerson argued, he would be "seriously prejudiced."

The trial court denied Emerson's continuance application on September 5, 2014, noting that the 75-day notice provisions of Code of Civil Procedure section 437c afforded Emerson adequate time to conduct the discovery necessary to oppose defendants' summary judgment motion. However, the court sua sponte granted Emerson leave to file a motion to compel the needed discovery on a shortened timeframe and accelerated the hearing on that motion to September 23, 2014. Emerson never filed a motion to compel.

Emerson again asked for a continuance when he filed his opposition to the summary judgment motion in early November 2014. His attorney declared he needed more evidence to demonstrate unreasonable claims handling and malicious and oppressive conduct. Counsel's rationale was that he "recently learned" from defendants' production of their claims file that

Louza reported neck and back pain to the claims adjuster but defendants *had not produced their claims manuals*. Emerson argued there was "a strong likelihood that the depositions and document production will demonstrate an unreasonable denial of coverage and unreasonable claims investigation."

In response, defendants' counsel declared that defendants had indeed produced the claims guidelines or manuals on September 8, 2014, the same day that the court granted Emerson leave to file his accelerated motion to compel. Defendants also noted that Emerson never sought to accelerate discovery in September as allowed by the court.

7. *the ruling*

The trial court denied Emerson's continuance request and granted defendants' summary judgment motion. The court determined that Louza's cross-complaint did not fall within the scope of either the auto or the homeowner's policy because Louza did not allege (1) that she suffered "bodily injury," (2) a qualifying "accident or occurrence," or (3) a claim for damages arising out of the "ownership, maintenance, or use" of Emerson's automobile. For these three reasons, defendants had no duty to defend. As there could be no duty to defend, there was no action for breach of the implied covenant of good faith and fair dealing, the court ruled. Emerson's timely appeal followed entry of judgment against him.

CONTENTIONS

Emerson contends there are triable issues of material fact precluding summary judgment and the trial court abused its discretion in denying his continuance motion.

DISCUSSION

1. *standard of review*

"In reviewing the propriety of an order granting summary judgment, we 'apply the same three-step analysis required of the trial court. We begin by identifying the issues framed by the pleadings since it is these allegations to which the motion must respond. We then determine whether the moving party's showing has established facts which justify a judgment in movant's favor. When a summary judgment motion prima facie justifies a judgment, the final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue.' [Citation.] *If* there is no triable issue of material fact, 'we affirm the summary judgment if it is correct on any legal ground applicable to this case, whether that ground was the legal theory adopted by the trial court or not, and whether it was raised by defendant in the trial court or first addressed on appeal.' [Citations.]" (*Morgan v. Beaumont Police Dept.* (2016) 246 Cal.App.4th 144, 150-151.)

2. *breach of the duty to defend*

a. *general principles*

"It has long been a fundamental rule of law that an insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. [Citations.] This duty, which applies even to claims that are 'groundless, false, or fraudulent,' is separate from and broader than the insurer's duty to indemnify." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 19 (*Waller*).)

To prevail on the issue of the duty to defend, the insurer must establish the absence of any potential for coverage.

(*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300 (*Montrose*).) Stated otherwise, " ' "the insurer need not defend if the third party complaint *can by no conceivable theory raise a single issue which could bring it within the policy coverage*." ' [Citations.]" (*Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 591, fn. omitted (*Quan*).)

"[T]he determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy." (*Waller*, *supra*, 11 Cal.4th at p. 19.) Complaints "are to be liberally construed in favor of potential coverage." (*Gonzalez v. Fire Ins. Exchange* (2015) 234 Cal.App.4th 1220, 1230 (*Gonzalez*).) Interpretation of an insurance policy is a question of law. (*Waller*, at p. 18.) " '[C]ourts look to all the facts available to the insurer *at the time the insured tenders its claim for a defense*.' " (*Gonzalez*, at pp. 1230-1231, italics added.) "Facts extrinsic to the complaint give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy. [Citations.]" (*Waller*, at p. 19; *Montrose*, *supra*, 6 Cal.4th at p. 295; *Quan*, *supra*, 67 Cal.App.4th at p. 591; *Gonzalez*, at p. 1229.)

Thus, " '[i]f any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer's duty to defend arises and is not extinguished *until the insurer negates all facts suggesting potential coverage*. On the other hand, if, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance.' [Citation.]" (*GGIS Ins. Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493,

1506 (*GGIS*), italics added, quoting from *Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 655.) " ' "Any doubt as to whether the facts give rise to a duty to defend is resolved in the insured's favor." ' [Citation.]" (*Gonzalez*, *supra*, 234 Cal.App.4th at p. 1231.)

On summary judgment, an insurer is entitled to judgment in its favor if it can establish a lack of coverage based on undisputed material facts. (*GGIS*, *supra*, 168 Cal.App.4th at p. 1505.) If there are no triable issues of fact material to that showing, the court may determine the absence of both coverage and a duty to defend as a matter of law. (*Ibid.*)

b. *bodily injury*

Emerson contends he was covered under the auto policy for bodily injury. The auto policy defines "bodily injury" as "bodily harm to or sickness, disease or death of any person."

"The cases overwhelmingly hold that the phrase 'bodily injury, sickness or disease' is plain and unambiguous and that coverage under the bodily injury clause is limited to physical injury to the body and does not include nonphysical, emotional or mental harm." (*Chatton v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 846, 854 (*Chatton*).) "[D]efinitional unanimity indicates that the ordinary and popular meaning of the word 'bodily' does not reasonably encompass, and in fact suggests a contrast with, the purely mental, emotional, and spiritual." (*Aim Insurance Co. v. Culcasi* (1991) 229 Cal.App.3d 209, 219 (*Aim*).) The definition "*does not include emotional distress in the absence of physical injury*." (*Id.* at pp. 220, 224, fn. omitted, italics added.)

Liberally construing Louza's cross-complaint in favor of Emerson (*Gonzalez*, *supra*, 234 Cal.App.4th at p. 1230), it

claimed emotional distress damages caused by Emerson's *assault*. Louza alleged that Emerson's intentional conduct placed her in "*fear* for her health and safety" and "in *apprehension* of immediate physical harm to her person." (Italics added.) The extrinsic facts available to defendants at the time Emerson tendered his claim for a defense (*Gonzalez*, *supra*, 234 Cal.App.4th at pp. 1230-1231) showed that Emerson never touched Louza. The cross-complaint nowhere alleges that Louza suffered physical harm. That Louza allegedly suffered fear and apprehension and emotional distress, standing alone, does not necessarily indicate that she also suffered physical injury. (Accord, *Aim*, *supra*, 229 Cal.App.3d at p. 227.) The cross-complaint did not apprise defendants of any facts suggesting "bodily injury" that might have given rise to the potential for coverage under the auto policy. (*Id*. at pp. 227-228.)

Emerson disputed that Louza sought only non-physical, emotional distress damages citing facts extrinsic to the cross-complaint, namely defendants' admission and loss report from October 2011 reflecting that Louza claimed she suffered neck and back pain. On appeal, Emerson adds that defendants knew that Louza's "claim asserted bodily injury in addition to mental distress" because in March 2010 her counsel stated to investigators that he planned to file a bodily injury claim from Louza's emotional distress. Emerson also quotes from Louza's deposition testimony—not mentioned in any separate statement—that Louza experienced nervousness, sleeplessness and shaking. He asserts that "Louza's sleeplessness and shaking constitute bodily injury, not emotional distress." We conclude Emerson has not demonstrated a triable factual issue.

Counsel's mere threat to file a bodily injury claim occurred in March 2010, and Louza's deposition testimony about nervousness, sleeplessness, and shaking was given in March 2011. Even assuming these facts gave rise to a potentially covered bodily injury claim associated with Louza's emotional distress, defendants did not deny coverage then; they continued to investigate. Later, on November 29, 2011, Louza's attorney "confirm[ed]" to defendants that Louza "*denies any impact so she denies any injuries or property [damage] from the [collision]*;" she claimed emotional distress from the "*incident following the alleged accident*." (Italics added.) More important, her attorney stated that Louza did not seek any "medical [treatment] and *has no medical bills for the emotional distress*" and so she could not seek to recover for physical injuries resulting from the emotional distress. (Italics added.) (Compare *Employers Cas. Ins. Co. v. Foust* (1972) 29 Cal.App.3d 382, 385, 387 [coverage where negligence complaint sought damages for " 'severe fright, shock, emotional distress *and resulting physical injuries,*' " italics added].) Regardless of whether sleeplessness and shaking constitute bodily injury, which we doubt (*SL Industries, Inc. v. American Motorists Ins. Co*. (1992) 128 N.J. 188, 201-202 [sleeplessness not a physical injury]), Louza's attorney's latest confirmation in November 2011 fully negated all facts suggesting a potential for coverage, thereby extinguishing any duty to defend (*GGIS*, *supra*, 168 Cal.App.4th at p. 1506).

Vanoni v. Western Airlines (1967) 247 Cal.App.2d 793 and *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, cited by Emerson, do not help him.[1] As *Aim* explained in

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[1] Despite Emerson's assertion, these cases do not hold that shock to the nerves and nervous system is "sufficient to allege

distinguishing *Molien* and *Vanoni*, they "indicate, among other things, that (1) emotional distress may or may not involve physical injury, (2) physical and emotional well-being are equally entitled to protection from intentional and negligent impairment, and (3) physical injury is no longer required to recover damages for emotional distress in tort actions. *However, they do not imply that emotional distress by itself is physical or bodily injury or that it automatically causes such injury*." (*Aim*, *supra*, 229 Cal.App.3d at pp. 223-224, italics added.) The undisputed material facts show that Louza did not and could not claim that her emotional distress from Emerson's assault resulted in bodily injury.

Turning to the homeowner's policy, Emerson cites its exclusion from the definition of bodily injury for "psychological injury or effect, including by way of example but not limited to fear, depression, humiliation, anxiety, anguish or distress." Recognizing that this definitional exclusion foreclosed coverage for Louza's assault cross-complaint under his homeowner's policy, Emerson argues that the lack of a similar such exclusion in the automobile policy shows that emotional distress should be covered under the latter policy. Not so. The cases are clear that the definition of "bodily injury" in Emerson's auto policy is "unambiguous" (*Aim*, *supra*, 229 Cal.App.3d at pp. 220, 224) and does not include "nonphysical, emotional or mental harm." (*Chatton*, *supra*, 10 Cal.App.4th at p. 854.) We need not consider other extrinsic evidence to construe the unambiguous automobile policy.

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bodily injury." Furthermore, the cross-complaint nowhere alleges shock to the nerves and nervous system.

c. *The assault cross-complaint does not seek recovery for the collision itself.*

Emerson's overarching view, both below and on appeal, is that Louza's cross-complaint arose from the collision itself, for which defendants had a duty to defend and indemnify him. He argues a potential for coverage existed because the facts disclosed that the cross-complaint might be amended to allege a covered liability. Emerson is incorrect.

The assault cross-complaint contains no allegations about any injury arising from the collision. The only allegations in the entire cross-complaint even suggesting that a collision occurred were that Emerson and Louza "were involved in a traffic *incident*." However, the pleading goes on to allege "[*w*]*hen their vehicles were stopped*, Emerson" assaulted Louza. (Italics added.) There is no allegation in Louza's assault cross-complaint that the vehicles touched, or that Louza suffered property damage or bodily injury *from the collision*. Furthermore, as noted, the last communication to defendants from Louza's counsel "confirm[ed]" that she was only seeking emotional distress damages "from the incident *following the alleged accident*." (Italics added.)

Emerson suggests that Louza *could* potentially have amended her cross-complaint to allege bodily injury from Emerson's negligence causing the collision to "merely recognize that an accident occurred in addition to the purported assault, and that Louza suffered bodily injury in part from that accident— allegations that she ultimately made when she filed" her amended cross-complaint.

However, "[a]n insured may not trigger the duty to defend by speculating about extraneous 'facts' regarding potential liability or ways in which the third party claimant might amend

its complaint at some future date. This approach misconstrues the principle of 'potential liability' under an insurance policy." (*Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106, 1114, italics added (*Gunderson*).) "Although an insurer's duty to defend is broader than the duty to indemnify, the duty to defend depends upon *facts known to the insurer at the inception of the suit*. [Citations.]" (*Hurley Construction Co. v. State Farm Fire & Casualty Co.* (1992) 10 Cal.App.4th 533, 538, italics added.) " 'We look to the nature and kind of risk covered by the policy as a limitation upon the duty to defend . . . .' [Citation.]" (*Gunderson*, at p. 1114.) "Our Supreme Court, anticipating imaginative counsel and the likelihood of artful drafting, has indicated that a third party is not the arbiter of the policy's coverage. [Citations.] A corollary to this rule is that the insured may not speculate about unpled third party claims to manufacture coverage." (*Hurley,* at p. 538.)

Emerson argues that he is not speculating about facts because the collision is in the record, giving rise to the potential for coverage. *Gunderson* is factually analogous as extrinsic facts of property damage were in the record but they did not trigger a potential for coverage or defense under the policy. (*Gunderson*, *supra*, 37 Cal.App.4th at pp. 1115-1116.) There, the insureds removed a fence on their neighbor's property believing they had an easement. (*Id*. at p. 1109.) The neighbor sued seeking equitable relief only. (*Id*. at pp. 1110-1111.) Interrogatory responses, letters, and deposition testimony, all available to the insurer, indicated the neighbor suffered tangible property damage from removal of the fence. (*Id*. at p. 1115.) The insureds argued that their insurer "knew or should have known that there was a potential that [the neighbor] would make a property

damage claim against them, and therefore had a duty to defend upon [the insureds'] tender of the [neighbor's] lawsuit." (*Id.* at p. 1113.) The appellate court rejected the contention explaining that at the inception of the lawsuit, "*none of the allegations* concerning damage to the fence, as found in the several letters of [the neighbor's] attorney and in her responses to discovery requests, *were ever incorporated in her complaint against* [*the insureds*]." (*Id.* at p. 1116, italics added.) The neighbor's attorney declared that none of the pleadings alleges claims involving property damage. The interrogatory response and deposition statements related merely to establishing the time for the neighbor's adverse possession claim and in response to the insureds' own attempts to establish they had not abandoned the easement. (*Ibid.*)[2]

Likewise here, despite the facts of the collision and counsel's early statement of intent to file a bodily injury claim, as in *Gunderson*, Louza's tendered assault cross-complaint did not include any allegation about injury from the collision. To the contrary, Louza's own attorney confirmed that his client suffered *no* property damage or *bodily injury*, *and was not making a claim about, the collision* itself. It is undisputed that Emerson never touched Louza, and that her automobile insurer determined *Louza* was 100 percent responsible for the collision. Emerson cannot trigger a duty to defend by speculating about potential liability and how Louza might amend her complaint from negated facts.

Emerson nonetheless points to Louza's negligence cross-complaint, filed as part of her settlement with Emerson of his

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[2] Emerson's attempt to distinguish *Gunderson* is unavailing.

complaint, to argue that defendants should have anticipated this entirely new theory of liability arising out of a different event, namely the collision itself. Louza's negligence pleading dispensed with the intentional tort of assault after the collision and instead alleged one cause of action for negligence arising from the collision. The negligence cross-complaint alleged that the "traffic *accident* was caused by conduct on the part of Emerson that fell below the standards of care. Louza sustained physical injury as a result of the *accident*." (Italics added.) But, it had already been established that Louza was 100 percent at fault for the collision. More important, Emerson never tendered Louza's negligence cross-complaint to defendants for a defense and he cannot create liability for breach of the insuring agreement for a claim never tendered. (*Travelers Casualty And Surety Co. v. Employers Ins. of Wausau* (2005) 130 Cal.App.4th 99, 110 [No breach of insurance contract where "[e]ven if the additional allegations would have triggered [the insurers'] duty to defend, [the policy holder] never tendered the later complaint to [the insurers]."].) "Once it determined on the basis of the lawsuit itself and the facts known to it at that time that there was no potential for coverage, [the insurer] *did not have a continuing duty to investigate or monitor the lawsuit to see if the third party later made some new claim, not found in the original lawsuit*." (*Gunderson*, *supra*, 37 Cal.App.4th at p. 1117, italics added; *Travelers Casualty And Surety Co. v. Employers Ins. of Wausau*, *supra,* at p. 110.) It behooved Emerson to notify defendants of the amended negligence pleading, just as defendants requested in their letter denying him a defense of the only cross-complaint they received. In sum, Emerson did not dispute that there was no potential for coverage under either policy for Louza's assault

cross-complaint, with the result that defendants were entitled as a matter of law to summary adjudication of the breach of contract cause of action.[3]

3. *bad faith*

Emerson contends there are triable issues of material fact about defendants' claims-handling that preclude summary adjudication of his cause of action for breach of the implied covenant of good faith and fair dealing.

However, a bad faith action may only be maintained when policy benefits are due under the insuring agreement. (*Waller*, *supra*, 11 Cal.4th at p. 35.) "[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. [Citation.]" (*Id*. at p. 36.) As we have determined that defendants owed no duty to defend, summary adjudication of the bad faith cause of action was proper as a matter of law.

4. *continuance*

The trial court denied Emerson's request for a continuance finding that Emerson's motion " 'falls short of the requisite good faith showing "that a continuance is needed to obtain facts

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[3] The trial court granted summary judgment on two additional grounds, namely (1) that Louza's cross-complaint alleged only an intentional tort and not an "accident," and (2) that Louza did not make a claim for damages arising out of the "ownership, maintenance, or use" of Emerson's vehicle. We need not address these grounds because we conclude Emerson did not dispute that Louza suffered no bodily injury, and so as a matter of law, there was no potential for coverage under the policy for Louza's mental distress.

essential to justify opposition to the motion." ' [Citation.]" On appeal, Emerson contends that the ruling was an abuse of discretion because the anticipated discovery concerned defendants' "training and implementation of claims-handling procedures," and would show bad faith either for inadequate training or deliberate failure to conduct a full investigation of potential coverage. Thus, he argues, he satisfied the requirements of Code of Civil Procedure section 437c, subdivision (h).

Under section 437c, subdivision (h) of the Code of Civil Procedure, continuances are " 'virtually mandated " 'upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the [summary judgment] motion.' " ' " (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 100-101.) To obtain a continuance, the "declaration must show (1) the facts to be obtained are *essential* to opposing the motion, (2) there is reason to believe such facts may exist, and (3) the reasons why additional time is needed to obtain these facts." (*Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 643, italics added; § 437c, subd. (h).)[4] "Where a party requests a continuance under the statute and satisfies its conditions, the determination whether to grant the request is vested in the discretion of the trial court, and will not be disturbed on appeal

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[4] Code of Civil Procedure section 437c, subdivision (h) reads, "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just."

unless an abuse of discretion appears." (*Rodriguez v. Oto* (2013) 212 Cal.App.4th 1020, 1038.)

Emerson's motion failed because the discovery he sought was not essential. (Code Civ. Proc., § 437c, subd. (h); *Chavez v. 24 Hour Fitness USA, Inc.*, *supra*, 238 Cal.App.4th at p. 643.) The stated purpose of the continuance was to obtain evidence pertaining to Emerson's bad faith cause of action only. However, as defendants had no duty to defend, it is irrelevant whether they properly trained their adjustors or adequately investigated Emerson's claim. (*Waller*, *supra*, 11 Cal.4th at p. 36.)

Emerson failed to satisfy another requirement for a continuance as he did not show why he needed additional time. (*Chavez v. 24 Hour Fitness USA, Inc.*, *supra*, 238 Cal.App.4th at p. 643.) In September 2014, the trial court gave Emerson the opportunity to accelerate the discovery he claimed he needed by way of a motion to compel. Emerson's failure to file the invited motion to compel further discovery undermines his assertion, made two months later in opposition to the summary judgment motion, that he needed still more time for discovery. Emerson's second request for a continuance in November 2014 failed to provide an explanation for why he had not utilized the discovery tool the trial court had given him two months earlier. The trial court here did not abuse its discretion in denying Emerson's second request for a continuance.

DISPOSITION

The judgment appealed from is affirmed. Respondents are to recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, Acting P. J.

We concur:

LAVIN, J.

GOSWAMI, J.*

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