

(Cite as: 81 Cal.App.4th 796, 97 Cal.Rptr.2d 127)

**H****Briefs and Other Related Documents**

Court of Appeal, Fourth District, Division 2,  
California.

**NORTHLAND INSURANCE COMPANY,**  
Plaintiff and Respondent,

v.

Daniel BRIONES, Jr., Defendant and Appellant.  
**No. E024437.**

June 19, 2000.

As Modified July 7, 2000.

Review Denied Sept. 27, 2000. [FN\*]

FN\* Mosk, J., and Kennard, J., dissented.

Homeowners' insurer brought declaratory judgment action seeking determination that it had no duty to defend and indemnify insured in underlying action alleging that he stalked, assaulted, and raped 15-year-old student and engaged in other negligent conduct. The Superior Court, Riverside County, No. RIC 307728, Richard G. Van Frank, J., entered summary judgment for insurer, and insured appealed. The Court of Appeal, Hollenhorst, J., held that: (1) refusal to stay declaratory judgment action pending determination of underlying action did not prejudice insured, inasmuch as there was no possibility of coverage as result of any possible evidence extrinsic to allegations in complaint, and (2) there was no potential coverage under policy for acts involving sexual misconduct and thus no duty to defend or indemnify.

Affirmed.

Ramirez, P.J., filed dissenting opinion.

West Headnotes

**[1] Insurance ↪2915**

217k2915 Most Cited Cases

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.

**[2] Insurance ↪2915**

217k2915 Most Cited Cases

Facts known to the insurer and extrinsic to the third party complaint can generate a duty to defend, even though the face of the complaint does not reflect a potential for liability under the policy.

**[3] Action ↪69(6)**

13k69(6) Most Cited Cases

Stay of a declaratory relief action to determine coverage is often in order when the coverage question turns on facts to be litigated in the underlying third party action.

**[4] Declaratory Judgment ↪165**

118Ak165 Most Cited Cases

Insurer must establish the absence of any potential for coverage in order to obtain declaration that it has no duty to defend insured in underlying action.

**[5] Action ↪69(6)**

13k69(6) Most Cited Cases

Refusal to stay action seeking declaration that insurer had no duty to defend or indemnify pending determination of underlying action alleging that insured stalked, assaulted, and raped student was proper, where insured was not prejudiced by necessity of asserting his privilege against self-incrimination in underlying action, because he failed to show any possibility that his deposition testimony could have provided extrinsic evidence that would have shown a potential for coverage, which did not exist under allegations of complaint, and thus a duty to defend.

**[6] Insurance ↪2278(6)**

217k2278(6) Most Cited Cases

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There is no such thing as negligent or even reckless sexual molestation, and thus statute providing that insurer is not liable for loss caused by willful act of insured excludes liability coverage for all child sexual molestation. West's Ann.Cal.Ins.Code § 533.

**[7] Insurance**  **2278(6)**

217k2278(6) Most Cited Cases

Child sexual molestation is always intentional conduct, and raises no possibility of that liability insurer may be required to provide coverage under policy coverage for negligent conduct. West's Ann.Cal.Ins.Code § 533.

**[8] Insurance**  **2278(6)**

217k2278(6) Most Cited Cases

Exclusion from homeowners' insurance policy for injuries arising from sexual molestation precluded coverage not only for alleged acts of stalking, assaulting and raping student, but also for additional acts of alleged negligence, such as negligently causing relationship to "become far more intense than that of teacher-student" and negligently interfering with familial relationship, where all alleged acts, even if considered not to be intentional, fell within general category of sexual misconduct.

**[9] Insurance**  **2275**

217k2275 Most Cited Cases

Insured's alleged acts of stalking, assaulting, raping and harassing student did not constitute "accident" within homeowners' insurance policy.

**[10] Insurance**  **2275**

217k2275 Most Cited Cases

**[10] Insurance**  **2278(6)**

217k2278(6) Most Cited Cases

Alleged liability for "accidental touching" of 15-year-old female student involved sexual battery, which in turn was intentional sexual misconduct, and thus excluded from coverage under insured's homeowners' insurance policy by reason of absence of covered "accident," by exclusion for sexual misconduct, and by statute precluding coverage for willful acts. West's Ann.Cal.Ins.Code § 533.

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OPINION

HOLLENHORST, J.

Plaintiff **Northland Insurance** Company brought this declaratory relief action to obtain a judicial interpretation of its rights under a mobilehomeowner's policy it had issued to defendant Daniel Briones, Jr.

The policy provided personal liability coverage in the event suit was filed against the insured for damages because of bodily injury or property damage. However, the policy specifically applied "only to accidents, occurrences, and loss during the policy period shown on Page One while YOUR mobile home and unattached structures are within the United States...."

An endorsement to the policy provides that physical/sexual abuse is not covered by the policy: "This insurance does not apply to any 'bodily injury,' 'property damage,' 'personal injury,' or 'medical expense' arising out of: [¶] 1. Physical abuse, sexual abuse, sexual molestation or sexual harassment by anyone... [¶] ... [¶] This exclusion applies whether damages arise from an insured's act or failure to act."

The declaratory relief complaint alleges that defendant Briones had been sued for personal injury damages in an action filed in Riverside Superior \*801 Court by Connie L., a minor, and her parents (herein "the underlying action"). The complaint in the underlying action alleged that Connie L. was a 15-year-old resident at the California School for the Deaf in Riverside, and that defendant Briones was her karate instructor. A cause of action for assault and battery alleged that defendant repeatedly and intentionally raped Connie L. and systematically stalked her. A second cause of action for

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negligence alleged that other defendants were negligent in not preventing defendant Briones from stalking, assaulting and raping Connie L. A third cause of action accused other defendants of negligent hiring and supervision of defendant Briones. The fourth and fifth causes of action were against the State of California, which operates the California School for the Deaf, for intentional and negligent infliction of emotional distress.

The declaratory relief complaint alleged that defendant Briones claimed that Northland had a duty under the homeowner's policy to defend the underlying action, and to indemnify him in the event of a settlement or judgment against him. Northland alleged it had no duty to defend or indemnify Mr. Briones.

Northland reiterated its contentions in a summary judgment motion. It asserted that there was no coverage because the conduct alleged in the underlying action was intentional sexual misconduct and harassment, and that the sexual abuse exclusion made it clear that there was no coverage for such misconduct. Northland also alleged that there was no "accident or occurrence" within the meaning of the policy provision quoted above.

In addition to these specific policy provisions, the insurance company contended that Insurance Code section 533 should be read into the policy. Under that section, an insurer is not liable for a loss caused by the willful act of the insured.

The trial court agreed with the first two contentions and granted the summary judgment motion. It specifically found that (1) there was no accident or occurrence within the meaning of the policy; and (2) the conduct alleged in the underlying action was clearly excluded from policy coverage by the sexual abuse exclusion.

Defendant Briones appeals.

#### STANDARD OF REVIEW

Code of Civil Procedure section 437c, subdivision (c), provides: "The motion for \*\*130 summary judgment shall be granted if all the papers

submitted \*802 show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Our review is a de novo review. (*Milazo v. Gulf Ins. Co.* (1990) 224 Cal.App.3d 1528, 1534, 274 Cal.Rptr. 632.) "On appeal from a summary judgment, the reviewing court is not bound by the trial court's construction of a contract where that construction was not based on the credibility of conflicting extrinsic evidence as to which the trial court was in a better position to form a judgment. Thus, where there is no extrinsic evidence, where the extrinsic evidence is not conflicting or where the conflicting evidence is of a written nature only, the reviewing court is not bound by the rulings of the trial court but rather must make an independent interpretation of the written contract. [Citations.]" (*Id.* at p. 1534, 274 Cal.Rptr. 632.)

In the insurance context, this means that "[t]he trial court must decide if a triable issue of fact exists. If none does, and the sole remaining issue is one of law, it is the duty of the trial court to determine the issue of law." [Citation.] [¶] On appeal, this court must conduct de novo review to determine whether there are any triable factual issues. [Citation.] Likewise, because the 'interpretation of an insurance policy is a question of law, [we must] make an independent determination of the meaning of the language used in the contract under consideration.' [Citation.]" (*Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1481, 35 Cal.Rptr.2d 698; see also, *Milazo v. Gulf Ins. Co.*, *supra*, 224 Cal.App.3d 1528, 1534, 274 Cal.Rptr. 632.)

#### THE ALLEGED ERROR OF THE TRIAL COURT IN PROCEEDING TO DECIDE NORTHLAND'S SUMMARY JUDGMENT MOTION

##### 1. The Contention.

Defendant Briones first contends he was prejudiced by having to choose between asserting his privilege against self-incrimination in the underlying action and fully opposing the motion for summary judgment. He bases this contention on the theory that the complaint in the underlying action charged him with criminal conduct, e.g. rape, as well as

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allegations that Connie L. was injured by his negligent acts. Because of the possibility of criminal charges, he alleges that he was required to invoke his Fifth Amendment right against self-incrimination when his deposition was taken in the underlying action. As a result, he was unable to make factual statements which inferentially would have impacted on the duty to defend. He therefore argues that, since a summary judgment motion in this situation can consider extrinsic evidence as well as the allegations of the complaint in the underlying action, the trial court erred in deciding the summary judgment motion on the face of the complaint in the underlying action without staying the action until he could freely provide the requisite extrinsic evidence.

[1] \*803 In 1998, shortly after defendant Briones filed his answer to the declaratory relief complaint, he filed a motion to stay the proceedings until the facts were determined in the underlying action. The trial court denied the motion but ordered all discovery addressed to defendant Briones stayed. Thus, when the summary judgment motion was filed a month later, Northland addressed the issues raised by the complaint in the underlying action. It thus relied on the general rule that "[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." (*Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081, 17 Cal.Rptr.2d 210, 846 P.2d 792.) However, the Supreme Court goes on to state: "Facts extrinsic to the complaint also give rise to a duty to defend when they reveal a possibility \*\*131 that the claim may be covered by the policy." (*Ibid.*)

Mr. Briones inferentially argues that, had he been freely able to testify, he could have supplied some extrinsic facts that would have shown the existence of a duty to defend. Since he could not testify without fear of incriminating himself, he argues the trial court erred in proceeding to grant the summary judgment motion on the basis of the allegations of the complaint itself. In other words, he argues that "[i]t was gross error of the trial court to basically assume that this defendant could not possibly have anything to say that would affect the decision of the

court concerning the issue of coverage."

[2] Mr. Briones relies on *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 24 Cal.Rptr.2d 467, 861 P.2d 1153. *Montrose* discussed the use of extrinsic evidence in the context of an adjudication of the insurer's duty to defend its insured in an underlying third-party lawsuit. After discussing the nature of the duty to defend, our Supreme Court noted that the prior case of *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 54 Cal.Rptr. 104, 419 P.2d 168 "made clear that facts known to the insurer and extrinsic to the third party complaint can generate a duty to defend, even though the face of the complaint does not reflect a potential for liability under the policy. [Citation.] This is so because current pleading rules liberally allow amendment; the third party plaintiff cannot be the arbiter of coverage." (*Montrose Chemical Corp.*, at p. 296, 24 Cal.Rptr.2d 467, 861 P.2d 1153.) Thus, considered in the context of a declaratory relief action seeking a coverage adjudication, the principle is simple: "To prevail, the insured must prove the existence of a *potential for coverage*, while the insurer must establish the *absence of any such potential*." (*Id.* at p. 300, 24 Cal.Rptr.2d 467, 861 P.2d 1153, original italics.)

In some situations a stay of the declaratory relief action is appropriate until the facts are determined in the underlying action. Mr. Briones relies on the discussion of this point in *Montrose*: "To eliminate the risk of inconsistent factual determinations that could prejudice the insured, a stay of the \*804 declaratory relief action pending resolution of the third party suit is appropriate when the coverage question turns on facts to be litigated in the underlying action. [Citations.] For example, when the third party seeks damages on account of the insured's negligence, and the insurer seeks to avoid providing a defense by arguing that its insured harmed the third party by intentional conduct, the potential that the insurer's proof will prejudice its insured in the underlying litigation is obvious. This is the classic situation in which the declaratory relief action should be stayed. By contrast, when the coverage question is logically unrelated to the issues of consequence in the underlying case, the