

KAREN LEE et al., Plaintiffs and Appellants,
v.
FIDELITY NATIONAL TITLE INSURANCE COMPANY, Defendant and Respondent.

No. A134169.

Court of Appeals of California, First District, Division One.

Filed November 27, 2013.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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SEPULVEDA, J.¹

This is the second appeal in this case, which arises from a **title insurance** coverage dispute between plaintiffs Karen and Terry **Lee** and defendant **Fidelity National Title Insurance Company**. In our opinion in the first appeal, *Lee v. Fidelity National Title Ins. Co.* (2010) 188 Cal.App.4th 583, 587, 599, 602 (*Lee I*), we reversed the trial court's grant of summary judgment for defendant. We held a preliminary report issued to plaintiffs could be reasonably construed as offering coverage for the disputed parcel of land, and the legal description of the insured land in the governing policy did not preclude a reasonable expectation of coverage. (*Lee I, supra*, at pp. 587-588, 594-595, 597-599, 602.)

On remand, after a trial culminating in jury verdicts on some issues and court rulings on others, the court entered judgment in favor of defendant. On appeal, plaintiffs contend the trial court violated the law of the case doctrine, improperly analyzed the legal issues it decided, deprived plaintiffs of the right to jury trial, and committed procedural errors in dismissing the case. We reject these arguments and affirm the judgment.

I. BACKGROUND

A. Plaintiffs' Lawsuit and *Lee I*

As we discussed in more detail in our opinion in *Lee I*, plaintiffs purchased in 1990 a parcel of land on Ryer Island in Walnut Grove identified as Solano County Assessor's Parcel Number (APN) XXX-XXX-XXX (APN 9). (See *Lee I, supra*, 188 Cal.App.4th at pp. 588-593.) Plaintiffs' land is bordered on the

east by a slough and on the south by land owned by Raymond and Joann Walker, APN XX-XXX-XXX (APN 21). (*Id.* at pp. 589-590.) The parties dispute whether the policy issued to plaintiffs by defendant in connection with the 1990 purchase also covers some or all of another parcel, APN XXX-XXX-XXX (APN 22).^[1] (*Id.* at pp. 588, 591-592.)

As we summarized in *Lee I*, plaintiffs believed APN 22 "extended south for some distance beyond their border with the Walkers, in between the Walkers' property and the slough to the east. Plaintiffs thought, in other words, that the Walkers' parcel APN 21 was at least partially landlocked." (*Lee I, supra*, 188 Cal.App.4th at p. 590.) After a dispute arose between plaintiffs and the Walkers over ownership of APN 22, plaintiffs submitted to defendant a claim for coverage of the dispute under the policy. (*Id.* at p. 591.) Defendant denied the claim, stating plaintiffs' property included part of APN 22, but only that portion of APN 22 that was north of the boundary line between plaintiffs' property (APN 9) and the Walkers' property (APN 21). (*Id.* at pp. 591-592.) Other evidence in the summary judgment record suggested APN 22 was entirely within the Walkers' property. (*Id.* at p. 591.)

Plaintiffs' first amended complaint alleges causes of action for declaratory relief, breach of **insurance** contract, bad faith breach of **insurance** contract, and escrow negligence. The trial court granted defendant's motion for summary judgment, concluding on the basis of the policy's metes and bounds description of the insured land that the policy provided coverage only for APN 9, not APN 22. (See *Lee I, supra*, 188 Cal.App.4th at pp. 589, 593, 598.)

We reversed. (*Lee I, supra*, 188 Cal.App.4th at pp. 587, 599, 602.) We held the policy's legal description of the insured property was ambiguous because of the circumstances under which the policy was issued. (*Id.* at p. 598.) Specifically, the preliminary report issued to plaintiffs (which referred to APN's 9 and 22, listed exclusions from coverage that were specific to APN 22, and attached an assessor's parcel map with arrows pointing to APN's 9 and 22 (see Appendix A)) could be reasonably construed as an offer to insure property located outside the land described. (*Ibid.*; see *id.* at pp. 588, 594-595.) Because the legal description of the property (when read by laypersons) did not preclude a reasonable expectation of coverage (*id.* at pp. 597-598), defendant was not entitled to summary judgment (*id.* at p. 599).

B. Proceedings After Remand

On remand, the trial court bifurcated trial into two phases. The first phase of trial would determine whether there was coverage for APN 22 "under the basic insuring agreement" in the policy. The second phase would address plaintiffs' claim for coverage under the policy provision relating to unmarketability of **title**, as well as all remaining issues raised by plaintiffs' causes of action.

The court ruled that, to determine coverage in phase one, it would submit to the jury the question whether plaintiffs expected coverage in 1990 when they purchased the property; the court would then determine whether any expectation of coverage was objectively reasonable. In response to two special verdict questions submitted after the presentation of evidence, the jury found: (1) plaintiffs expected they were buying a policy covering "[APN's] 9 and 22, as described on the map made part of [defendant's] preliminary report"; but (2) plaintiffs did not expect they were buying a policy covering

"[APN's] 9 and 22, including all of the land from the county road down to the water and running from the Lee-Walker property line southward, approximately the entire length of the Walker property[.]" The court held the expectation of coverage found by the jury in response to the first special verdict question was objectively reasonable.

After plaintiffs requested clarification of the verdicts as to the scope of their expectations of coverage, the court submitted to the jury an addendum special verdict question. That question asked whether plaintiffs expected to buy a policy "covering any portion at all of the land south of the Lee/Walker property line, between the county road and the water"; the jury responded, "Yes." The court ruled, however, that an expectation of coverage for land south of the property line was not objectively reasonable.

The court determined that, based on its ruling as to the scope of plaintiffs' objectively reasonable expectations, plaintiffs had no remaining viable claims to be tried in phase two. The court dismissed the case and the jury, and entered judgment for defendant. Plaintiffs appealed.

II. DISCUSSION

A. Legal Standards

In general, interpretation of an insurance policy is a question of law and is reviewed de novo under settled rules of contract interpretation. (*Ameron Internat. Corp. v. Insurance Co. of State of Pennsylvania* (2010) 50 Cal.4th 1370, 1377 (*Ameron*)). "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs its interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) . . . If the meaning a layperson would ascribe to the language of a contract of insurance is clear and unambiguous, a court will apply that meaning. [Citations.] [¶] In contrast, "[i]f there is ambiguity . . . it is resolved by interpreting the ambiguous provisions in the sense the promisor (i.e., the insurer) believed the promisee understood them at the time of formation. (Civ. Code, § 1649.)" . . . "This rule, as applied to a promise of coverage in an insurance policy, protects not the subjective beliefs of the insurer, but, rather, the objectively reasonable expectations of the insured." [Citation.] Only if this rule does not resolve the ambiguity do we then resolve it against the insurer. [Citation.] [Citations.]" (*Wells Fargo Bank v. California Ins. Guarantee Assn.* (1995) 38 Cal.App.4th 936, 942-943.)

When an issue of coverage exists, the insured has the burden to prove facts establishing its claim falls within the basic scope of the policy's coverage. (*Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1188; *MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.* (2010) 187 Cal.App.4th 766, 777; *Golden Security Thrift & Loan Assn. v. First American Title Ins. Co.* (1997) 53 Cal.App.4th 250, 255.) Plaintiffs thus had the burden to prove the portion of APN 22 extending south of the Lee-Walker property line (the subject of plaintiffs' dispute with the Walkers and the claim they submitted to Fidelity) was covered by the policy. The rule that coverage provisions are construed broadly in favor of the insured "will aid the insured in meeting its burden of proof, thereby

ensuring that the end result (coverage or noncoverage) conforms to the insured's objectively reasonable expectations." (*Aydin Corp. v. First State Ins. Co.*, *supra*, 18 Cal.4th at p. 1192.)

B. The Trial Court's Interpretation of the Policy

As noted, the trial court concluded that interpreting the policy to provide coverage for any portion of APN 22 extending south of the **Lee**-Walker property line was not consistent with the objectively reasonable expectations of the insured. Plaintiffs challenge this determination, arguing: (1) the doctrine of law of the case precluded this result; (2) the court improperly considered "subjective" factors in determining the objectively reasonable expectations of the insured; (3) the court's conclusion was inconsistent with other determinations by the jury or the court; and (4) the court deprived plaintiffs of their right to trial by jury on this question. Plaintiffs have not shown reversible error.

1. Law of the Case

Under the doctrine of law of the case, "[t]he decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case." (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491.) In their opening brief on appeal, plaintiffs appear to contend **Lee I** conclusively determined the existence of coverage, and thus precluded the trial court from determining coverage for land south of the property line was not consistent with the objectively reasonable expectations of the insured.^[2] We disagree.

In **Lee I**, this court held, based on the summary judgment record, that the policy's legal description of the insured property was ambiguous "only because of the circumstances under which the policy was issued, which involve a preliminary report that could be reasonably construed as an offer to insure property located outside the land described." (**Lee I**, *supra*, 188 Cal.App.4th at p. 598; see *id.* at pp. 594-595 ["Plaintiffs could have reasonably expected, under the circumstances, that they were buying a **title insurance** policy on APN 22 that would conform to the preliminary report."]) Because the preliminary report was reasonably susceptible to that construction (*id.* at pp. 594-595), and because the legal description of the property (when read by laypersons) did not preclude a reasonable expectation of coverage (*id.* at pp. 597-598), defendant was not entitled to summary judgment based on evidence APN 22 was outside the land as legally described in the policy (*id.* at p. 599).

We did not hold in **Lee I** that plaintiffs were entitled to summary adjudication on the issue of coverage. To the contrary, we expressly stated that, because plaintiffs did not argue they were entitled to summary adjudication of any issue, our review was confined to the issue of defendant's entitlement to summary judgment. (*Id.* at p. 593; see *In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1650, fn. 1 [no law of the case effect is given to a matter a court expressly states it is not deciding].) Moreover, after determining the policy was ambiguous (the first step in the "three-step process for **insurance** policy interpretation," see *Cooper Companies v. Transcontinental Ins. Co.* (1995) 31 Cal.App.4th 1094,

1101 (*Cooper*)), we did not expressly decide the second prong in this analysis, i.e., whether the policy provided coverage because it would be consistent with the objectively reasonable expectations of the insureds (see *id.* at pp. 1101-1102, 1106). Finally, although plaintiffs note the law of the case doctrine may apply to points that were *implicitly* determined because they were essential to the prior decision (see *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 309, italics added), plaintiffs do not explain why we should conclude **Lee I** implicitly made a final determination of the coverage issue in their favor. A final determination of coverage was not essential to our decision that defendant was not entitled to summary judgment. (See **Lee I**, *supra*, 188 Cal.App.4th at p. 599.)

2. The Court's References to "Subjective" Factors

Plaintiffs contend the trial court improperly analyzed the question of whether coverage was consistent with their objectively reasonable expectations, because the court referred to "subjective" factors (such as plaintiffs' expectations, the fact they were licensed real estate agents, and their interest in boating) in explaining its decision on that point.^[3] We find no reversible error.

To determine whether ambiguous policy language provides coverage, courts determine whether coverage is consistent with the objectively reasonable expectations of the insured. (E.g., *Farmers Ins. Exchange v. Knopp* (1996) 50 Cal.App.4th 1415, 1422.) "This question must be answered through the eyes of a reasonable person in the position of the insured." (*Jordan v. Allstate Ins. Co.* (2004) 116 Cal.App.4th 1206, 1214.) In making its determination, "the court must interpret the language in context, with regard to its intended function in the policy. [Citation.] This is because *language in a contract* must be construed in the context of that instrument as a whole, and in the circumstances of that case, and *cannot be found to be ambiguous in the abstract.*" [Citations.]" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265 (*Bank of the West*), original italics.) The court may also rely on common sense in determining the insured's objectively reasonable expectations. (*Id.* at p. 1276.) "A party's reasonable expectation of coverage is a question of law not a question of fact." (*Farmers Ins. Exchange v. Knopp, supra*, 50 Cal.App.4th at p. 1422.)

The trial court concluded that "[n]o reasonable person in the [p]laintiffs' position" would have believed, without further investigation, that they were obtaining coverage for property below the **Lee**-Walker property line. On appeal, plaintiffs do not expressly ask this court to hold that, applying a de novo standard of review (see *Ameron, supra*, 50 Cal.4th at p. 1377), and in light of the surrounding circumstances and common sense (see *Bank of the West, supra*, 2 Cal.4th at pp. 1265, 1276), the trial court's conclusion was incorrect. Instead, plaintiffs contend, apparently on the basis of statements the court made when orally announcing its decision and in its written opinion, that the court used an improper method of analysis to decide this question (i.e., the court incorrectly considered plaintiffs' subjective intent and characteristics). We are not persuaded the court's references to these matters establish its conclusion is incorrect.

Portions of the court's decision suggest the court did consider whether the evidence showed plaintiffs in fact expected coverage. For example, the court stated the testimony of John Perez (plaintiffs' real estate agent when they bought the property) "adds no credible support to the proposition that the [p]

laintiffs thought they were buying land along the slough south of the Lee/Walker property line." The court also noted plaintiffs' experience as licensed real estate agents and recreational boaters.

But, despite these references, the court repeatedly made clear that its ultimate conclusion was that no reasonable person in plaintiffs' position could have expected coverage. For example, after discussing Perez's testimony, the court concluded the testimony "does not credibly support a finding that a *buyer in [p]laintiffs' circumstances* could believe they were buying land south of the Lee/Walker property line." (Italics added.) Similarly, as to plaintiffs' lack of investigation, the court stated its conclusion applied to a reasonable person in plaintiffs' position, while noting plaintiffs' experience as real estate agents. The court stated: "*No reasonable person in the [p]laintiffs' position* would have completed the purchase of the property and **title insurance** without undertaking a further investigation into what they were purchasing, and particularly what waterfront was included in the purchase. [¶] *[N]o reasonable buyer* would purchase the property without knowing where it was. *No reasonable buyer* would accept the degree of ambiguity in the preliminary report as found by the Court of Appeal without further investigation. It is virtually patently unreasonable for *any buyer* to approach a transaction in such a way, particularly where that buyer is a licensed real estate agent." (Italics added.)

Because the court made clear it determined a reasonable person in plaintiffs' position would not expect coverage, the court's references to the evidence of plaintiffs' subjective intent and experiences do not establish its decision was erroneous. (Cf. Cooper, supra, 31 Cal.App.4th at p. 1109 [after concluding that neither the plaintiff nor any other insured could have held an objectively reasonable expectation of coverage, the appellate court noted "the testimony relating to [the plaintiff's] actual understanding of the coverage it was purchasing is not inconsistent with our view of how an objectively reasonable insured would interpret the policy language"; Farmers Ins. Exchange v. Knopp, supra, 50 Cal.App.4th at p. 1423 [appellate court stated that, although the reasonable expectations of the insured are determined as a matter of law, it was "noteworthy" that on the insured's application for a personal automobile **insurance** policy, he listed an occupation other than motor vehicle operator, and nothing in the record indicated the insured actually expected to be covered when working as a motor vehicle operator].)

We note that, while plaintiffs criticize the trial court for its references to their subjective expectations and characteristics, they omit the context surrounding these references. For example, the court provided its assessment of the trial testimony, including Perez's testimony, in response to *plaintiffs'* argument that this evidence supported their position that their expectation of coverage was objectively reasonable. After the jury found plaintiffs expected coverage for some land below the Lee-Walker property line, the court gave plaintiffs' counsel the opportunity to "make the case that the . . . expectation was objectively reasonable." In making this argument, plaintiffs' counsel relied on plaintiffs' testimony they believed they were acquiring land south of the property line. Plaintiffs' counsel also stated: "The testimony of Mr. Perez is also supportive of that, to the extent that he can recall." When the court orally announced its decision immediately after the parties' arguments, it explained why it believed Perez's testimony did not support plaintiffs' position (i.e., he had a poor recollection of the relevant events); the court then included this point in its written decision. More generally, the court rejected plaintiffs' argument that the trial testimony bolstered their position.

Finally, plaintiffs' suggestion the trial court should have focused solely on information in the purchase agreement and the preliminary report that were transmitted between the parties, and should have ignored "uncommunicated," "subjective factors" such as plaintiffs' experience as real estate agents is somewhat disingenuous in light of the record. Plaintiffs' status as real estate agents was communicated to defendant. A handwritten term of the purchase agreement that was transmitted to defendant prior to its issuance of the preliminary report specifies: "Both purchasers [i.e., plaintiffs] are licensed real estate agents acting as principals buying for their own interest."

We conclude the court's discussion of "subjective" factors does not invalidate its conclusion that an expectation of coverage for land below the Lee-Walker property line was not objectively reasonable.

3. Inconsistency with Other Findings or Rulings

Plaintiffs argue the trial court's determination as to the objective reasonableness of an expectation of coverage for land below the property line is inconsistent with other determinations made by the court and the jury. We disagree.

First, plaintiffs argue the court's determination (after the jury's addendum verdict) that an expectation of coverage for land below the property line *was not* objectively reasonable is inconsistent with the court's earlier determination (after the jury's response to the first special verdict question) that plaintiffs' expectation of coverage for APN 22 "as described on the map made part of [defendant's] preliminary report" was objectively reasonable. We do not agree that these determinations are inconsistent. The map did not clearly show the precise location of APN 22. Accordingly, as the trial court explained, a general expectation of coverage for APN 22 "as described on the map" is not the same as an expectation of coverage for land south of the property line.

Second, plaintiffs contend the court's determination of a lack of objective reasonableness is inconsistent with the jury's finding, in the addendum verdict, that plaintiffs actually expected coverage for land below the property line. But the jury and the court addressed different questions. The jury found plaintiffs subjectively expected coverage; this finding did not require the court to conclude the expectation was objectively reasonable.

4. Right to Trial by Jury

Plaintiffs claim the court, by deciding the objective reasonableness question, deprived plaintiffs of their right to trial by jury. But plaintiffs agreed in the trial court that the court should make the reasonableness determination; they declined the court's suggestion of an advisory verdict on that point. Plaintiffs forfeited any argument that the jury should decide that question. (See, e.g., *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1 [failure to object to ruling or occurrence in trial court results in loss of appellant's right to attack that ruling or occurrence on appeal]; *Abbott v. Cavalli* (1931) 114 Cal.App. 379, 383 [party cannot seek reversal for alleged errors the party committed or invited].)

C. Dismissal of the Case

Plaintiffs argue the trial court erred by dismissing the case and releasing the jury "without following any cognizable statutory procedure." We conclude plaintiffs forfeited this argument by failing to timely object on this ground in the trial court.

1. Background

After the court's ruling on objective reasonableness at the conclusion of phase one of the trial, plaintiffs' counsel conceded plaintiffs no longer had viable claims for breach of contract or bad faith relating to coverage for land south of the Lee-Walker property line. The court ruled that, in light of its prior rulings, plaintiffs also had no viable claim for unmarketability of title. Finally, plaintiffs' counsel acknowledged that, in light of the court's ruling on reasonable expectations, plaintiffs' cause of action for escrow negligence failed as well.

Because no claims remained to be tried in phase two, the court discussed with the parties what the next procedural steps should be and suggested they reconvene the next day to decide that question. The court also asked: "Do we release the jury tonight?" After a short recess, plaintiffs' counsel responded that he was "not prepared to release the jury." Plaintiffs' counsel stated he was "going to leave this to the Court and to defendants to decide how best to dispose of it."

The next day (June 28, 2011), defendant's counsel orally moved "to dismiss the remaining claims that we discussed yesterday," to dismiss the jury based on the court's legal rulings, and to prepare a joint statement reflecting those rulings. In response to a question from the court, defendant's counsel stated he was not moving for a directed verdict. Plaintiffs' counsel stated he did not agree to any particular findings of fact or conclusions of law in any written decision to be prepared by defendant's counsel, and would only approve such a decision as to form. Plaintiffs' counsel also stated he wanted to make an offer of proof by presenting certain documents to be marked for identification. Plaintiffs' counsel stated that, "Beyond that, Your Honor, I have no further comment concerning the manner in which this matter is disposed of at this time."

After further colloquy, the court stated it would discharge the jury. Plaintiffs' counsel stated the court should rule on the motion to dismiss first. When the court asked the parties whether they had further comments on the motion to dismiss, plaintiffs' counsel stated it was "submitted from the plaintiffs' standpoint[.]" The court granted the motion to dismiss, and dismissed the jury.

Several days later, on July 6, 2011, plaintiffs filed written objections to defendant's motion to dismiss, arguing defendant had not cited "any recognized procedure," and "the statutes [and] Rules of Court" did not authorize dismissal under the circumstances. On September 9, 2011, plaintiffs filed a written motion for a mistrial, contending (1) the dismissal was improper because defendant had not specified a statutory procedure that would provide a basis for dismissal, and (2) as a result of the allegedly

improper dismissal and the lapse of time, the trial court had lost jurisdiction to enter a judgment adverse to plaintiffs. The court entered judgment in favor of defendant.

2. Analysis

As the foregoing summary of the proceedings demonstrates, plaintiffs did not object, prior to the court's dismissal of the case and the jury, that the proposed dismissal was procedurally improper. Plaintiffs' counsel's statement that the jury should not be dismissed (which counsel made in response to the court's question whether the jury should be dismissed *that evening*) did not clearly advise the court that plaintiffs categorically opposed dismissing the jury; counsel did not repeat even this general objection the next day when the court announced its intention to dismiss the jury; and counsel did not argue dismissal of the case or the jury was procedurally improper. To the contrary, despite the court's invitation to the parties to comment on the appropriate procedure for disposing of the case, plaintiffs' counsel declined to take a position on this issue.^[4]

In light of this record, plaintiffs forfeited any argument that the dismissal was procedurally improper on the grounds they now assert on appeal (see, e.g., *Doers v. Golden Gate Bridge etc. Dist.*, supra, 23 Cal.3d at pp. 184-185, fn. 1), including their argument the court should have granted a mistrial based on the alleged procedural error.

III. DISPOSITION

The judgment is affirmed. Defendant shall recover its costs on appeal.

MARGULIES, Acting P.J. and BANKE, J., concurs.

Appendix A

[*] Retired Associate Justice of the Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[1] Attached as Appendix A to this opinion is a copy of an assessor's parcel map of the area, which was attached to a preliminary report issued to plaintiffs by defendant. (See *Lee I*, supra, 188 Cal.App.4th at p. 588.)

[2] In their reply brief, plaintiffs identify other principles they contend were established by *Lee I* pursuant to the law of the case doctrine. We decline to consider these points, because plaintiffs did not raise them in their opening brief. (See, e.g., *Laupheimer v. State of California* (1988) 200 Cal.App.3d 440, 459; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 723, pp. 790-791.)

[3] Plaintiffs do not appear to contend it was error for the court to submit to the jury the question of whether plaintiffs expected coverage, prior to the court's consideration of whether an expectation of coverage was objectively reasonable. We thus do not address any question as to the propriety of that procedure.

[4] Plaintiffs' after-the-fact objections and motion for mistrial did not afford the trial court an opportunity to prevent or correct any alleged error. As plaintiffs note in their opening brief on appeal, the court's discharge of the jury was irrevocable—"once done, it could not be undone."

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