

BAR-K, INC., Plaintiff, Cross-defendant and Appellant,
v.
SECURITY TITLE CORP., Defendant and Appellant,
FIRST AMERICAN TITLE INSURANCE COMPANY, Defendant, Cross-complainant and Appellant

No. A115199.

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

Filed August 25, 2010.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

LAMBDEN, J.

Plaintiff and cross-defendant Bar-K, Inc. (Bar-K), defendant Security Title Corp. (Security), and defendant, cross-complainant, and cross-defendant First American Title Insurance Company (First American) each raise appellate claims of trial court error. For years, the parties have litigated the circumstances and consequences of a 1997 transaction in which Bar-K, a lender, paid \$4.1 million to purchase certain notes and mortgages, thereby refinancing a third party's debt related to a Hawaii airport lease and improvements. Security acted as escrow holder and First American acted as Bar-K's title insurer in the transaction. When the third party defaulted and Bar-K sought to foreclose, problems emerged that led to the parties' present disputes.

Beginning in 1999, Bar-K on the one hand, and Security and First American on the other, filed various claims in Alameda County Superior Court. Bar-K and First American moved for summary judgment and summary adjudication against each other; the trial court granted a part of First American's requests and denied the remainder. After a bifurcated bench trial, the court ruled partly in favor and partly against each party on the remaining claims. Each party argues the court ruled erroneously against it and correctly in its favor. We affirm the trial court's rulings and judgment in their entirety.

BACKGROUND

Circle Rainbow's Start

In the early 1990's, Douglas Ledet and his wife (collectively, Ledet) incorporated two similarly named companies, Circle Rainbow Air, Inc. (Air) and Circle Rainbow Airlines, Inc. (Airlines^[1]) (collectively "Circle Rainbow"). Air entered into a 30-year lease (lease) of unimproved land at the Honolulu Airport with the State of Hawaii Department of Transportation (Hawaii DOT) which gave the Hawaii DOT the right to approve in writing any mortgage that encumbered the lease.

Air, via an unrecorded license agreement (license agreement), gave Airlines the right to build and own the improvements on the leased airport property in exchange for Air's rent-free occupancy of a portion of those improvements. The trial court concluded the license agreement was probably Circle Rainbow's attempt to avoid the appearance of a lease violation.

The trial court found that Circle Rainbow borrowed \$7.9 million in loans from Mich Investment Corporation (Mich) to build a private air terminal and office (terminal) on the leased land. These loans were memorialized by 13 promissory notes (notes) secured by two mortgages (mortgages). The mortgages appeared to encumber both the lease and the improvements, but were executed by Airlines only, although Air was the leaseholder. There was no evidence the Hawaii DOT approved these mortgages. Circle Rainbow never paid Mich any of the \$7.9 million principal or accrued interest, or any penalties on the notes. Mich sued Airlines in Hawaii state court (Mich Action) and won an order granting summary judgment, which awarded it \$10.3 million.

Bar-K's Decision to Purchase the Notes and Mortgages

In 1997, Ledet agreed to sell Circle Rainbow to James Downey, who intended to provide dirigible tours from the airport property. In April 1997, Downey and Ledet opened an escrow with Security, with Security's Corey Anderson responsible for handling their transaction.

As a part of the overall transaction, Downey sought to refinance the Mich debt. Bar-K became interested and, in June 1997, its president, Barney Ng, met with Ledet and Downey in Honolulu. Without the benefit of an appraisal and with minimal due diligence, Ng concluded the lease and improvements were probably worth \$8 or \$9 million and certainly no less than \$6 million. Bar-K agreed to pay \$4.1 million to Mich to purchase the notes, mortgages, and rights in the Mich Action; Downey agreed to assume responsibility for the note payments; and Bar-K agreed to give Downey an option to buy out Bar-K's financing within three years.

The trial court concluded that, promptly after this meeting, Downey sent Bar-K a copy of the license agreement, whereby Airlines was permitted to occupy a portion of the terminal rent-free, and that Bar-K received and knew about it before the close of the transaction. Bar-K never sent it or disclosed its contents to Security or First American. It proceeded with the transaction, although the terminal's potential cash flow was limited by the license agreement between Air and Airlines.

The trial court further concluded Bar-K received the lease before the transaction's close and knew the Hawaii DOT might not have approved the mortgages in writing. The record contained "little evidence" this lease requirement had been met. The court also found Bar-K had serious doubts that the Hawaii DOT would provide an assurance that the mortgages did not violate the lease.

Bar-K's Interactions with Security and First American

In July 1997, Bar-K's in-house attorney, James Kroetch, prepared several transaction documents. These included modified Mich notes showing Bar-K as the lender and Air (instead of Airlines) as the borrower; an option agreement giving Downey the unilateral right to pay off the debt to Bar-K; Mich's assignment of the mortgages to Bar-K; and Mich's assignment of the Mich Action, including the \$10.3 million summary judgment order, to Bar-K. On July 15, 1997, Kroetch faxed to Security's Anderson, copies of the modified notes, a memorandum of modification of the notes, an option agreement, and escrow instructions. Kroetch attached to the escrow instructions a one-page document for execution by a Security representative which stated, "we are now in the position to close escrow." Bar-K also required a Security representative sign the escrow instructions.

On or about July 18, 1997, Security's Anderson obtained signatures from the prospective buyer of Circle Rainbow, Downey, on the memorandum of modification of the notes, the modification of the notes, and the option agreement. Although Downey was not yet an officer of Air, nor authorized to act on its behalf, he signed the modification of the notes as an officer of Air. The court found that Security thus failed to obtain the signature of an authorized Air officer on the modification of notes. After the close of the transaction, Air claimed Downey's signature was unauthorized, and the mortgages, therefore, encumbered the terminal, but not the lease.

Kroetch also asked Security's Anderson to obtain from First American a "Closing Protection Letter" (CPL) before the transaction closed. The trial court concluded one reason Bar-K did so was because it wanted First American to insure the mortgages did not violate the lease, although Bar-K knew about the Hawaii DOT's right under the lease to approve in writing any such mortgages. This CPL request went to a First American attorney, Albert Rush, who sent a CPL to Bar-K in which First American declined to give an assurance about the mortgages. Bar-K president Ng, in a letter Kroetch prepared for him, responded on July 22, 1997, that Rush's CPL was unacceptable, including because it lacked the assurance about the mortgages Bar-K desired. That same day, Security's Anderson signed and faxed to Kroetch the written acceptance of escrow instructions Bar-K had required.

While waiting for Rush to respond to Ng's letter, Kroetch initiated a new plan for the close of escrow. He discussed with Anderson whether Bar-K could route its loan funds to Security's escrow via First American. The trial court concluded Bar-K pursued this as part of an overall strategy, probably concocted by Kroetch, to make First American appear to be a "co-escrow," even though First American took no part in handling the escrow.

Bar-K, without telling Rush, asked First American escrow officer Bette Hollenbeck, who knew nothing about the transaction, if First American would, as a convenience, transfer Bar-K's purchase money to Security. The trial court found Hollenbeck agreed to do so, with the understanding that First American would *not* be responsible for complying with escrow instructions.

Bar-K understood, and never objected, to First American immediately forwarding Bar-K's funds to Security. The trial court also found Bar-K did not make this request to First American's Rush because Rush would have been suspicious of their reasons for doing so.

Next, Kroetch sent *revised* escrow instructions, signed by Ng, to Anderson *and* Hollenbeck. These revised instructions neither suggested First American was a "co-escrow," nor required any written assurances, unlike the previous instructions. Nonetheless, Kroetch attached an escrow confirmation page, which the trial court concluded, Kroetch believed Hollenbeck would *not* sign.

Bar-K's revised escrow instructions required that Bar-K be assured "that the mortgages do not violate the provisions of the lease" before the close. The trial court found that obtaining such an assurance normally would be the responsibility of a title officer, not Anderson, and that Bar-K "knew this very well," which was one reason why it was trying to obtain the CPL from First American.

The trial court also found that Hollenbeck, with Anderson, called Bar-K about the escrow instructions "some days" before escrow closed, and were told by a Bar-K representative that First American was acting only as a conduit and not as a co-escrow, which Anderson confirmed in writing. The trial court rejected Kroetch's testimony to the contrary about this telephone conversation. It noted that Kroetch, after testifying extensively about events at deposition, could not even recall the transaction at trial; the court found he was "obviously lying" and had "zero" credibility. The court also did not believe the testimony of Bar-K's office manager that Hollenbeck had agreed to the escrow instructions in a telephone conversation. The court concluded the revised escrow instructions governed Security's work as escrow holder, but not First American's work.

The Close of Escrow and Title Insurance Policy

On July 23, 1997, Bar-K wired \$4.1 million to First American with instructions to forward the money to Security. First American's Hollenbeck forwarded the money to Security a few hours later. The trial court found First American did not act as an escrow holder in any way.

First American's Rush did not know about this money transfer. That same day, July 23, he sent a revised CPL to Bar-K and Security, again indicating First American would not assure Bar-K that the mortgages did not violate the Hawaii DOT lease provision, and narrowly limiting the grounds upon which First American would indemnify for loss caused by Security's escrow conduct. Rush also indicated First American's protection would extend only to the first set of escrow instructions, and that "[n]o guarantee by First American as to any supplemental escrow instructions is hereby made or implied, and none shall be given unless approved in advance" by Rush. Rush reiterated that First American did not have the lease, but was willing to review it to determine whether to insure that the mortgages did not violate the lease. The court concluded Bar-K received Rush's fax, but did not further communicate with him.

The trial court concluded Anderson either knew or should have known that there was not an assurance about the mortgages when escrow closed, but closed escrow anyway. Security disbursed \$3.2 million to Mich.

First American issued a \$5 million title insurance policy in favor of Bar-K, effective July 28, 1997, which stated the insured estate was a leasehold held by *Air*, encumbered by two mortgages issued to *Airlines*. Two policy provisions are particularly relevant to this appeal. One stated, "[First American] shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the . . . lien of the insured mortgage, as insured, or to prevent or reduce loss or damage to the insured." The other stated, "Whenever requested by [First American], the insured at [First American's] expense, shall give [First American] all reasonable aid (i) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act which in the opinion of [First American] may be necessary or desirable to establish the . . . lien of the insured mortgage, as insured."

Bar-K's Title Claim and the Ensuing Hawaii Litigation

Circle Rainbow did not make any principal or interest payments on the notes, and Bar-K declared default a few months after the close of escrow, in the fall of 1997. Rather than seek to rescind the transaction, Bar-K sought to foreclose. Circle Rainbow challenged Bar-K's right to enforce the notes, arguing, among other things, that the mortgages encumbered only

the improvements and not the lease, Downey lacked authority to bind Air to the July 1997 modifications of the notes and mortgages, and an October 1997 dismissal of the Mich action, with prejudice, discharged any debt that had been subject to the summary judgment order issued in that action.

In March 1998, Bar-K tendered a claim to First American under the title insurance policy. Bar-K stated it wanted to foreclose on the mortgages, but had some concerns about doing so based on the "possible correctness" of Air's allegations. In April 1998, Bar-K asserted Security and First American were each responsible for complying with Bar-K's escrow instructions. It sought payment from First American under the policy.

First American declined to indemnify Bar-K \$5 million under the policy, but concluded Bar-K's title claim potentially fell within the policy coverage. It retained the Hawaii law firm Damon Key Leong Kupchak Hastert (Damon Key) to pursue a foreclosure action on Bar-K's behalf, and with its consent, but at First American's expense.

Damon Key pursued a number of matters on Bar-K's behalf. It won the appointment of a receiver over the airport terminal; the receiver could not pay all of the property's operating expenses from income, and First American paid the difference. Damon Key also intervened to ask the court in the Mich action to set aside the dismissal of that action, which that court eventually did in October 1999. In the foreclosure action, it argued that Air and Airlines were alter egos of each other and, therefore, the mortgages issued to Airline encumbered the lease held by Air.

First American told Bar-K it would indemnify Bar-K against losses if a court finally determined Airline's mortgages were not enforceable against Air's lease, but would not indemnify Bar-K for losses suffered due to postpolicy events like the dismissal of the Mich action and Circle Rainbow's purported repudiation of Downey's authority in early 1998, or for unrecorded matters Bar-K knew about, but did not disclose in writing to, First American before the policy was issued. First American later asserted that, if the State of Hawaii successfully argued that the mortgages were invalid and unenforceable as against the leasehold interest due to a violation of a lease covenant, First American had no obligation to indemnify Bar-K for any resulting loss. Kroetch wrote various letters disputing First American's coverage assertions.

Damon Key had told Bar-K it did not represent it in any coverage disputes it might have with First American. In the face of its differences with First American, Bar-K engaged San Francisco attorney Henry Wykowski, who appeared pro hac vice in the Hawaii foreclosure action and deposed Security's Anderson. In the deposition, Wykowski focused on claims of breach of escrow agent duties that Bar-K would later assert against First American. The trial court found Bar-K "did this even though Anderson was a friendly witness who did not have to be deposed. . . . Bar-K took that deposition not to further its interests in foreclosure, but to pursue escrow claims against [Security] and First American. The Anderson deposition was an instance of gross bad faith by Bar-K, and it made the resolution of the Hawaii issues considerably more difficult." First American hired the law firm of Miller, Starr & Regalia to address Bar-K's coverage demands.

Kroetch continued to write numerous letters to First American during the Hawaii litigation. The trial court found much of what Kroetch wrote was repetitive and did not help the case, and some was "in bad faith" and "had no merit." The court concluded that, while "it was understandable that Bar-K was impatient," its "approach probably did more to hinder and delay a settlement than expedite it."

By 2001, the foreclosure action remained unresolved and Air was in bankruptcy; at that time, the parties involved agreed to settle the dispute. First American agreed to pay \$950,000 into the registry of the bankruptcy court, of which \$850,000 was paid to Air and \$100,000 for back property taxes. It was agreed that Circle Rainbow would assign the interests in the leasehold interest and the improvements to First American, which would then assign them to Bar-K, and First American and Bar-K would reserve their rights against each other. The State of Hawaii consented to the settlement and the anticipated assignment to Bar-K.

Bar-K did not cooperate in the settlement's implementation. It delayed signing the settlement documents until the bankruptcy court ordered it to do so, and refused to accept assignment when First American tendered it in May 2001. Bar-K accepted assignment in February 2002, after First American warned Bar-K it would sue to force this acceptance.

The Alameda County Litigation

Bar-K on the one hand, and Security and First American on the other, litigated two different civil actions in Alameda County Superior Court, one involving the parties' conduct regarding the close of escrow (the escrow action) and the other involving

Bar-K's and First American's duties and actions regarding the title insurance policy (the title action). These actions were eventually consolidated and adjudicated.

The parties filed timely appeals or cross-appeals from the court's judgment and posttrial orders. The parties have filed approximately 300 pages of briefs with this court, in which they vigorously recount more than a decade of disagreements and litigation, and over 10,000 pages of record. Security is the appellant, and Bar-K and First American are cross-appellants.

As for their specific appellate claims, Bar-K cross-appeals from the trial court's grant of summary judgment to First American in the title action, and from the court's ruling that Bar-K should pay First American a cost-of-proof award of \$250,000 in the escrow action. First American cross-appeals from the court's \$88,078.13 damages award in its favor, and against Bar-K, in the title action, arguing it was entitled to more.

Also, Bar-K cross-appeals from the trial court's ruling in the escrow action that it was not entitled to any damages for Security's breach of its escrow duties and negligence. Security appeals from the trial court's "tort of another" damages award of \$436,137 against it, which the court determined Bar-K was entitled to because of some of the fees and costs it incurred as a result of Security's misconduct, mostly in the course of litigating against First American. Bar-K responds that it was entitled to these damages, *and* cross-appeals that it was entitled to additional damages against Security. It also argues in its cross-appeal that it was entitled to an additional award of costs against Security, and to a shifting of the costs it was ordered to pay First American in the title action to Security under tort of another principles. We turn to a discussion of each of these appellate claims.

DISCUSSION

I. Claims Between Bar-K and First American

A. The Litigation Between Bar-K and First American

In 1999, Bar-K sued First American and Security in Alameda County Superior Court for, among other things, escrow negligence and for breach of the revised escrow instructions, alleging Security was an agent of First American, and that the two were "jointly escrow holder." First American filed a cross-complaint for declaratory relief on its title policy, seeking the right to withdraw from the then-ongoing Hawaii litigation.

In May 2001, First American filed a declaratory relief action against Bar-K in Hawaii, but dismissed it quickly, apparently because the parties had agreed that all coverage litigation would be filed in Alameda County.

First American subsequently filed a separate title action in Alameda County Superior Court for a declaration that it had satisfied its policy obligations and was entitled to recover expenses regarding matters that the policy did not cover, and for damages for Bar-K's breach of its duty to cooperate. The court consolidated the escrow and title actions. Bar-K then cross-complained in the title action for breach of the policy and its implied covenant of good faith and fair dealing, and for declaratory relief.

1. Bar-K and First American's Summary Judgment/Adjudication Motions

Bar-K and First American moved against each other for summary judgment or summary adjudication in the consolidated action. In June 2004, the court granted First American summary judgment regarding Bar-K's title action claims in its first amended cross-complaint, finding that the undisputed evidence established that First American did not breach the title insurance policy or its duty to act fairly and in good faith with Bar-K. The court denied Bar-K's motion for summary adjudication regarding its cross-complaint, and its motion for summary judgment or summary adjudication regarding First American's causes of action in its first amended complaint in the title action.

The court also denied Bar-K's motion for summary adjudication of its escrow claims against First American, finding that there were triable issues of material fact. The court granted in part and denied in part First American's competing motion regarding these same claims; one reason it denied certain parts of First American's motion was its view that there were

triable issues of material fact regarding whether First American had impliedly agreed to act as escrow agent. A bench trial followed.

2. Bar-K's Escrow Claims Against First American

After Bar-K concluded its presentation of evidence regarding its escrow claims against First American, First American moved for judgment pursuant to Code of Civil Procedure section 631.8 dismissing these claims,^[2] which the court granted. It determined that Bar-K's escrow claims were predicated on its allegation that First American had agreed to act as a co-escrow agent with Security, that the evidence was "overwhelming" that First American had not acted as an escrow agent, and that Bar-K had "intentionally tried to trick" First American into looking like an escrow holder.

3. First American's Title Claims Against Bar-K

After the conclusion of the bench trial, the court found that First American fulfilled its obligations under the title policy, but that Bar-K breached its covenant of cooperation and its duties of good faith and fair dealing by taking Anderson's deposition in Hawaii in 1999 and initially refusing First American's 2001 tender. The court awarded First American \$88,078.13 in damages for property costs and legal fees and expenses First American had incurred after Bar-K's refusal of First American's 2001 tender, and legal fees and expenses relating to the Anderson deposition.

The trial court rejected First American's other damages claims because First American had not adequately reserved its rights to reimbursement of fees and costs incurred in the Hawaii litigation on issues that were not covered by the title insurance policy, shown what it had spent to clear up problems with the State of Hawaii, nor properly pled a claim for costs related to the Mich action. The trial court also rejected First American's claim for recovery of any part of the \$950,000 it had paid as part of the settlement.

4. Other Orders

The trial court granted in part Bar-K's motion to tax First American's memorandum of costs, ordering Bar-K to pay \$103,590 of the \$283,000 First American sought. The court also awarded First American \$250,000 in attorney fees incurred to prove matters that Bar-K had denied in response to requests for admissions regarding its co-escrow claim against First American. The court stated, "Bar-K's escrow claim was a ploy, a scam, a fraud" that was "consciously orchestrated by Bar-K" with the consent of its management.

B. Bar-K's Claims of Summary Judgment Error

Bar-K argues that the trial court should not have granted First American summary judgment in the title action regarding Bar-K's causes of action for breach of the title policy and of the implied covenant of good faith and faith dealing.^[3] According to Bar-K, the court erred because First American was required to indemnify it by paying its claim, since First American could never establish title "as insured" in the policy, there were at least triable issues of material fact regarding whether it could establish title "as insured," and there were triable issues of material fact regarding whether First American owed Bar-K damages for delay caused by its pursuit of the Hawaii litigation. Bar-K also argues that the trial court failed to provide a sufficient statement of reason for its ruling. We conclude these arguments lack merit.

Generally, "[t]he court properly grants summary judgment if the record establishes no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) '[T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]' [Citation.] Although the burden of production shifts, the moving party always bears the burden of persuasion. [Citation.] 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party

opposing the motion in accordance with the applicable standard of proof.' [Citation.] We review the record de novo." Kashmiri v. Regents of California (2007) 156 Cal.App.4th 809, 822-823.)

1. Title "As Insured"

Bar-K argues that the "main issue" of its appeal from the trial court's grant of summary adjudication to First American involves a pure question of contract interpretation regarding section 4(b) of the title insurance policy. We conduct a de novo review of this question. (See, e.g., Powerline Oil Co. v. Superior Court (2005) 37 Cal.4th 377 ["[w]e apply a de novo standard of review to an order granting summary judgment when, on undisputed facts, the order is based on the interpretation or application of the terms of an insurance policy"]; E.M.M.I., Inc. v. Zurich American Ins. Co. (2004) 32 Cal.4th 465, 470 ["[a]s a question of law, the interpretation of an insurance policy is reviewed de novo under well-settled rules of contract interpretation"].) "The rules governing policy interpretation require us to look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it." (Waller v. Truck Ins. Exchange, Inc. (1995) 11 Cal.4th 1, 18.)

Section 4(b) of the title insurance policy provides in relevant part:

"[First American] shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured, or to prevent or reduce loss or damage to the insured. . . . If [First American] shall exercise its rights under this paragraph, it shall do so diligently."

The title insurance policy states that the mortgagor is Airlines and the leaseholder is Air. Based on this discrepancy, Bar-K argues that First American could never deliver "title as insured" because Airline's mortgage did not and could not encumber Air's leasehold interest and, therefore, First American was *required* to pay Bar-K its claim, rather than pursue litigation.

First American responds that Bar-K's argument assumes that First American guaranteed that it held proper title, and that this view is not supported by law or the terms of the title insurance policy. We agree.

a. Relevant Law

Regarding the law on the matter, "a title insurance policy is a contract of indemnity, not one of guarantee. The insurer does not represent that title is in any particular condition, but only agrees to indemnify to the extent the insured suffers a loss caused by defects in the title or encumbrances on the title." (Karl v. Commonwealth Land Title Ins. Co. (1993) 20 Cal.App.4th 972, 978; accord, Southland Title Corp. v. Super. Ct. (1991) 231 Cal.App.3d 530, 537; Smith v. Commonwealth Land Title Ins. Co. (1986) 177 Cal.App.3d 625, 631.) Furthermore, "[t]he policy of title insurance . . . does not constitute a representation that the contingency insured against will not occur." (Lawrence v. Chicago Title Ins. Co. (1987) 192 Cal.App.3d 70, 74-75.) Thus, "when such contingency occurs, no action for negligence or negligent misrepresentation will lie against the insurer based upon the policy of title insurance alone. [Citations.] . . . [The] insurer does *not* represent expressly or impliedly that the title is as set forth in the policy; it merely agrees that, and the insured only expects that, the insurer will pay for any losses resulting from, or he will cause the removal of, a cloud on the insured's title within the policy provisions." (*Id.* at p. 75.) In other words, First American did not make a guarantee to Bar-K about the state of title, or that Bar-K would not face obstacles if it sought to foreclose against the leasehold.

The cases cited by Bar-K in support of its argument are either inapposite or contradict its position. Two apply Illinois law. In one, Citicorp Sav. of Ill. v. Stewart Title Guar. Co. (7th Cir. 1988) 840 F.2d 526, the court's ruling was based on the understanding that the subject policy was a "guarantee" of the mortgage's enforceability. (*Id.* at p. 530.) Similarly, in McHenry Sav. Bank v. Pioneer Nat. Title (1989) 186 Ill.App.3d 238, an Illinois appellate court held that an insurer did not fulfill its duties when it secured an equitable lien to cure a title defect because its actions failed to give the plaintiff a valid and enforceable lien, as was insured. (*Ibid.*) However, as we have already discussed, our own state's case law indicates that a title insurance policy does not amount to a "guarantee" of the mortgage's enforceability, rendering *Citicorp* and *McHenry* inapposite.^[4]

Bar-K also quotes from Stewart Title v. West (1996) 110 Md.App. 114 (*West*), in which the court stated that, "[w]hile the insurer may seek to participate in litigation concerning a title that it agrees is defective, it cannot rely on such litigation to

avoid or delay compliance with its contractual obligations." (*Id.* at p. 136.) However, as First American points out, *West* actually favors its view because the *West* court, citing *Sala, supra*, 27 Cal.App.2d 693, and other cases, adopted "the predominant view" that title insurance "is a contract of indemnity, and not a contract of guaranty or warranty." (*West*, at p. 128.) It held that "a title insurance policy is breached only *after* notice of an alleged defect in title is tendered to the insurer and the insurer fails to cure the defect or obtain title within a reasonable time thereafter." (*Id.* at p. 132.) Although the insurer may not litigate arbitrarily when it concedes an adverse title claim is valid, when it "claims that title is good and pursues an action to establish that fact," "[c]ertainly, the insurer needs an opportunity to pursue the litigation to its conclusion in order to attempt to establish the insured's title." (*Id.* at pp. 136-137.) First American acted consistent with *West's* instruction.

Bar-K argues that First American's coverage counsel, Ed Regalia, conceded at a deposition that the title as insured was defective. Bar-K's record citations do not show such a concession. At deposition, Regalia merely said that the title policy had "some lack of clarity," and that First American's goal in the litigation was to establish "the liens of the mortgages being valid and subsisting encumbrances against the leasehold estate such that they could be foreclosed, resulting in the delivery of the leasehold estate free and clear." While Regalia acknowledged problems with the terms of the policy and his own difficulty remembering them, he stated that "the intent of the policy was to ensure that those mortgages were enforceable against the leasehold estate." These statements do not contain any concession.

Bar-K also relies on notes its Hawaii litigation counsel, James McWhinnie of Damon Key, submitted with a declaration to the trial court as part of its summary judgment opposition. McWhinnie's notes state that Regalia told him in a January 1999 telephone conversation that "everybody knew that title was not insured, but First American should not have to admit that," and that first American's representative was not going to say that. Understandably, the trial court appears to have given little or no weight to this evidence, which was not a direct statement by Regalia, but notes written and submitted by Bar-K's counsel about whatever was told to him by telephone. In any event, Bar-K fails to explain why such a reported comment should influence our interpretation of the policy's terms.^[5] Therefore, we attach no legal significance to it.

b. First American's Broad Discretionary Authority Under the Policy

Bar-K's argument that First American was *required* to indemnify it is also contradicted by the plain terms of the policy, which gave First American broad discretionary authority to pursue litigation or other means to resolve title issues.

As we have discussed, title insurers, subject to the terms of the particular policy, generally have the discretion to discharge their indemnity obligation by litigating or settling with adverse claimants. The "policy gives the title insurer the right to rectify or remove whatever defect has arisen in the insured's title *in lieu of paying* for the diminution in value caused thereby." (Croskey, et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2009) ¶ 6:2666, p. 6H-26.) "Insureds may prefer to be paid money immediately rather than to have their title tied up in lengthy litigation. But title insurance is merely *indemnification against loss, not a guarantee of title*. . . . The insurer has the right under the policy to attempt to avoid any loss by removing the adverse lien or claim *before* paying off the insured." (*Id.*, ¶ 6:2667.)

Thus, in *Sala, supra*, 27 Cal.App.2d 693, the insurer litigated to remove a *lis pendens* that had been omitted from its preliminary title report pursuant to its right under the policy to clear title. (*Id.* at pp. 701, 704.) The insured claimed, among other things, that the title company was liable for damages as of the day it issued the policy. (*Id.* at p. 704.) The appellate court rejected this argument, finding that "[s]uch a theory is obviously unsound for the reason that it forecloses the title company, if it elects to do so, from exercising its right, according to the terms of the policy, to clear the title." (*Ibid.*)

First American plainly had broad discretionary rights under the title insurance policy. Section 4(b) of the title insurance policy, gave it the right to institute and prosecute any action that "may be necessary or desirable" to "establish . . . the lien of the insured mortgage, as insured," or "to prevent or reduce loss or damage to the insured." Section 4(c) entitled First American to litigate "to final determination by a court of competent jurisdiction," including appeals. Section 6(b) of the title insurance policy, entitled First American "to pay or otherwise settle with other parties for or in the name of the insured claimant any claim insured against under this policy" Bar-K, by focusing on its interpretation of the language in section 4(b) authorizing the insurer to litigate to "establish title . . . as insured," gives short shrift to the First American's discretionary authority.

Bar-K argues First American's section 4(b) discretionary authority to initiate litigation is ambiguous, vague, and meaningless. We disagree. The language is straightforward and the discretion is considerable. Also, the undisputed facts are that First

American acted diligently pursuant to this authority. Once notified by Bar-K of a foreclosure dispute, it promptly retained Damon Kay to represent Bar-K, and Damon Kay promptly pursued litigation based upon a theory that might well have established the lien of the mortgage "as insured" if the litigation had been completed, i.e., that under alter ego law, Airlines's mortgages applied to Air's leasehold interest.

Furthermore, assuming arguendo that First American had been unable to literally establish the lien of the mortgage "as insured," the policy nonetheless gave it the discretionary authority to pursue litigation "to prevent or reduce loss or damage to the insured." If First American's pursuit of litigation ultimately enabled Bar-K to obtain title to the leasehold estate, it would have succeeded in preventing or reducing loss or damage to Bar-K. Also, section 8(a) of the title insurance policy states that if the insurer "establishes the title, or removes the alleged defect, lien or encumbrance . . . or . . . otherwise establishes the lien of the insured mortgage, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby." This further shows First American's considerable discretionary authority.

c. Some Impediments to Foreclosure Were Not Covered By the Policy

Bar-K's indemnity argument also fails because its foreclosure right was indisputably impeded by matters *not* covered by the policy.

In *Native Sun Investment Group v. Ticor Title Ins. Co.* (1987) 189 Cal.App.3d 1265, the title insurer, faced with the assertion of both covered and uncovered adverse claims to the insured's title, chose to litigate all issues, and at one point limited its willingness to pay to settle the matter. (*Id.* at pp. 1270-1272.) The insured and adverse claimant settled, with the insurer covering the settlement. (*Ibid.*) The Court of Appeal held that the insurer had satisfied its duties. (*Id.* at pp. 1272-1278.) "[N]othing . . . requires an insurer to indemnify a loss for which it is not liable—even if payment would be in the best interests of its insured." (*Id.* at p. 1278.)

Bar-K cannot establish that the purported "title as insured" defect was its sole, or even primary, impediment to foreclosure. Uncovered events also unquestionably impeded its efforts. The Mich action's dismissal after close of escrow was a "post-policy" event that potentially created a *res judicata* bar to any foreclosure efforts against Circle Rainbow. Also, First American did not insure against the Hawaii DOT's right to approve mortgages on the lease. Since obstacles to foreclosure included such plainly uncovered events, First American was not required to simply pay Bar-K policy limits before acting diligently to successfully litigate the issues within a reasonable period of time. (*Native Sun Investment Group v. Ticor Title Ins. Co.*, *supra*, 189 Cal.App.3d 1265; *Sala*, *supra*, 27 Cal.App.2d 693.)

In short, we reject Bar-K's assertion that First American pursued "arbitrary litigation merely to postpone payment of its indemnity obligation," or that "there is a striking inference, based on the evidence, that First American knew the Hawaii litigation would not achieve that result insured by the policy: that the mortgages were insured as valid liens against the leasehold interest of Circle Rainbow Air." To the contrary, we conclude that the policy did not guarantee proper title, and that First American acted reasonably and within its discretionary rights, particularly in the face of impediments not covered by the policy, when it proceeded with litigation to establish title, or the mortgage lien, as insured, or to limit or eliminate damages to Bar-K. The trial court did not err in granting First American summary judgment under these circumstances.

2. Delay Damages

Bar-K also argues that the trial court should not have granted summary adjudication because Bar-K raised triable issues of fact as to whether First American was liable for "delay damages" for failing to clear title within a "reasonable time." This argument also lacks merit.

Bar-K points out that three years passed from the time it made its claim in 1998, and that the Mich action's dismissal was not undone until October 1999. According to Bar-K, it suffered actual damages, as measured by First American's own appraisers, of at least \$650,000 of leasehold value while First American pursued the litigation. Bar-K further contends that it is "undeniable" that while the Hawaii litigation was in progress, it was entitled to, but did not receive, the 10.5 percent annual interest on the \$7.97 million in notes it had purchased.

Bar-K heavily relies on Nebo, Inc. v. Transamerica Title Ins. Co. (1971) 21 Cal.App.3d 222 (Nebo) for legal support. Nebo bought a number of improved lots from Sacramento Savings & Loan Association, with title insured by Transamerica. (*Id.* at pp. 224-225.) Jones, a third party to the transaction, had previously won a judgment against Sacramento Savings establishing his title to a number of identically situated houses, from which Sacramento Savings had appealed. (*Id.* at p. 224.) After close of escrow, tenants on four of the lots purchased by Nebo refused to vacate their houses and continued to pay rent to Jones's group. (*Id.* at 225.) Transamerica's attorney filed an action to clear title for Nebo's benefit, but otherwise waited until the determination of Sacramento Savings's appeal. (*Ibid.*) Nebo reluctantly acquiesced to this strategy. More than two years later, the appellate court affirmed the trial court's judgment in favor of Jones. (*Id.* at pp. 225-226.) Transamerica then purchased the disputed lots from Jones and delivered clear title to Nebo, more than three years, four months after the close of escrow. (*Id.* at p. 226.) Nebo won a judgment against Transamerica for the rents lost during the appeal on the ground that title defects were not removed "within a reasonable time" as required by the policy, and Transamerica appealed. (*Id.* at pp. 226, 228.)

The appellate court, after noting that what constitutes a reasonable period of time was a question of fact "depending upon the situation of the parties, the nature of the transaction and the facts of the particular case" (Nebo, supra, 21 Cal.App.3d at p. 228), held that substantial evidence supported the trial court's judgment. It pointed out that the policy did not protect Transamerica from liability for actual damages resulting from title defects while it pursued litigation, that Nebo had paid over \$15,000 to carry and maintain the four houses while receiving no rent during the litigation, and that the financial hardship and unfairness of the delay was called to Transamerica's attention numerous times. (*Ibid.*) The appellate court also agreed that Transamerica did not perfect title via litigation, as the title acquired was not the title Nebo had bargained for and that Transamerica had insured, because the acquired title did not carry with it the right to collect rents from the close of escrow. (*Id.* at p. 229.)

First American argues that Bar-K's damages analysis is incorrect for numerous reasons. We need not address all of them. Although First American does not directly raise the issue, there is a critical distinction between the policy analyzed in Nebo, supra, 21 Cal.App.3d 222, and the policy before us. Nebo's policy lacked any provision prohibiting the recovery of damages resulting from the time taken to litigate relevant disputes. (*Id.* at p. 228.) However, such a provision is contained in the title insurance policy. As we have discussed, section 8(a) of the title insurance policy states that, if First American "establishes the title . . . or otherwise establishes the lien of the insured mortgage, all as insured, *in a reasonably diligent manner, by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.*" (Italics added.) Therefore, Bar-K, unlike Nebo, was required to show a lack of reasonable diligence to prove damages. It did not and cannot do so. First American's separate statement of facts contains undisputed facts that show reasonable diligence. Among other things, First American promptly engaged counsel on Bar-K's behalf, who promptly filed suit and, when counsel became aware of the Mich action dismissal, promptly sought to set it aside. After the Mich action court set aside that dismissal in the latter part of 1999, Bar-K's counsel promptly pursued the Hawaii litigation. Shortly after that, in the beginning of 2000, the parties began discussing possible settlement, and reached a settlement after extensive negotiations in November 2000.

Bar-K argues that the Mich action dismissal was not relevant to efforts to obtain foreclosure of the property. However, Bar-K never confronts the obvious fact that a dismissal with prejudice of the predecessor lender's claims regarding Circle Rainbow's default on the notes could create significant res judicata problems for Bar-K in its efforts to foreclose based on Circle Rainbow's further default.

Also, in Nebo, supra, 21 Cal.App.3d 222, the appellate court affirmed the trial court judgment based in part on the fact that Nebo was required to pay out over \$15,000 to carry and maintain the four houses while receiving no rent. (*Id.* at p. 228.) Here, it is undisputed that First American obtained the court's appointment of a receiver and paid the property expenses during the litigation. Therefore, there was no such financial hardship imposed upon Bar-K in the course of the delay.

We also agree with First American that, unlike in Nebo, supra, 21 Cal.App.3d 222, uncovered events—such as the dismissal with prejudice in the Mich action and the Hawaii DOT mortgage approval issue—complicated efforts to establish title or a lien on the property, or limit damages against Bar-K. Bar-K fails to explain how the delay caused by these events can be disentangled from the other issues.

In short, given the particular circumstances of the foreclosure dispute, the multiple impediments raised to foreclosure, including uncovered matters, and that the policy entitled First American to engage in litigation in a "reasonably diligent" manner, we see no triable issue of fact regarding unreasonable delay.^[6]

3. *The Court's Statement of Reasons*

Bar-K next argues that we should reverse the trial court's grant of summary adjudication because the court's statement of reasons was insufficient. Again, we disagree.

Code of Civil Procedure section 437c states that "[u]pon the grant of a motion for summary judgment, on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order." (Code Civ. Proc., § 437c, subd. (g).)

The trial court granted summary adjudication by citing to 97 separate statements of fact cited by First American, and stated, "[t]he undisputed evidence establishes that First American did not breach its title insurance contract with Bar-K, and did not breach its duty, with respect to that contract, to act fairly and in good faith with Bar-K."

Bar-K argues that the court's statement was insufficient in light of the "extremely complex" issues litigated through summary judgment and the lengthy oral argument. It complains that the trial court, after indicating at hearing that it was inclined to find "triable issues of fact on all the material issues," changed its mind without sufficient explanation, merely citing 97 separate statement facts that Bar-K had heavily disputed.

We do not agree with Bar-K that the trial court's statement of reasons was insufficient. We have reviewed the separate statement facts cited by the trial court, and agree that these undisputed facts support its ruling. Bar-K's contention that it raised numerous disputed fact issues regarding these separate statement facts does not survive close examination. While Bar-K attempts to raise disputed facts repeatedly with various distinctions, quibbles and qualifications, it fails time and again to properly dispute the material facts asserted.

In any event, as First American points out, assuming for the sake of argument an error was made, "[i]f independent review establishes the validity of the judgment, then the error is harmless." (*Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1146; see also *Ruoff v. Harbor Creek Community Assn.* (1992) 10 Cal.App.4th 1624, 1628 [court's failure to provide a sufficient statement does not lead to an automatic reversal, since "[i]t is the validity of the ruling which is reviewable and not the reasons therefor"].) In our independent review herein, we have established the validity of the trial court's grant of summary adjudication. Therefore, any purported insufficiency of the trial court's statement of reasons is harmless.

C. *Bar-K's Appeal of the \$250,000 "Cost-of-Proof" Award to First American*

Bar-K also argues that the trial court erred in awarding First American \$250,000 as a cost-of-proof sanction for its failure to admit certain requests for admissions regarding its co-escrow claim. Its arguments lack merit.

1. *The Proceedings Below*

In November 2002, First American served 13 requests for admissions. Eight requests related to Bar-K's theory that First American acted as a "co-escrow" in the transaction,^[7] and the remaining five related to the license agreement between Air and Airlines. Bar-K did not admit any of these requests.

After the court granted First American's motion for judgment in the escrow action, First American moved pursuant to Code of Civil Procedure section 2033.420 (section 2033.420) for \$296,793 as its costs to prove the escrow and license agreement issues that Bar-K had denied in the 13 requests for admissions. First American submitted a declaration from one of its attorneys, who stated that he had reviewed all invoices and sought only fees for "tasks that could be easily separated or identified as involving the Escrow Action and the License Agreement, as opposed to the Title Action and other issues." The attorney stated that he included costs for work performed regarding the depositions of witnesses whose testimony was relevant to the escrow action, but not regarding the depositions of witnesses, such as Bar-K's Kroetch and Ng, whose testimony was relevant to both the escrow and title actions. The attorney separated the attorney fees requested by category,

they being percipient and expert witnesses, summary judgment, pre-trial work, and trial, and calculated a total of \$296,793 in fees, out of an unspecified millions that he stated First American had incurred in the litigation.

The trial court awarded First American \$250,000 for fees regarding Bar-K's denial of the requests for admissions regarding its "co-escrow" issue, stating, "[i]f ever there were a case for awarding costs of proof, this is it." It did not award First American any fees regarding the license agreement because there was a "debatable question of fact." The court found that "Bar-K's escrow claim was a ploy, a scam, a fraud—consciously orchestrated by Bar-K, probably under the direction of its dubious former employee James Kroetch, but with the consent of management." The court further found that "[n]one of the exceptions found in section 2033.420 applied. It was never reasonable for Bar-K to persist with a cause of action that was phony from the beginning." The court added, "Bar-K's bad faith in pursuing this claim cost First American hundreds of thousands of dollars in increased fees and costs, most of which are not recoverable." The court concluded that the co-escrow issue was the "central" issue of the action, and that "[w]ithout it, First American would not have been a defendant at all."

2. Analysis

Bar-K makes numerous arguments as to why we must reverse the trial court's award. We find no error.

Section 2033.420 states: "(a) If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

"(b) The court shall make this order unless it finds any of the following:

"(1) An objection to the request was sustained or a response to it was waived under Section 2033.290.

"(2) The admission sought was of no substantial importance.

"(3) The party failing to make the admission had reasonable ground to believe that that party would prevail on the matter.

"(4) There was other good reason for the failure to admit." (§ 2033.420.)

Thus, section 2033.420 requires a trial court to award the cost to prove matters denied in a request for admissions unless the court finds the denial was unimportant or based on good reasons. As explained in Brooks v. American Broadcasting Co., (1986) 179 Cal.App.3d 500 (Brooks), "[t]he primary purpose of requests for admissions is to set at rest triable issues so that they will not have to be tried; they are aimed at expediting trial. [Citation.] The basis for imposing sanctions . . . is directly related to that purpose. Unlike other discovery sanctions, an award of expenses . . . is not a penalty. Instead, it is designed to reimburse reasonable expenses incurred by a party in proving the truth of a requested admission where the admission sought was of 'substantial importance' [citations] such that trial would have been expedited or shortened if the request had been admitted." (*Id.* at p. 509.)^[8]

"The determination of whether 'there were no good reasons for the denial,' whether the requested admission was 'of substantial importance,' and the amount of expenses to be awarded, if any, or all within the sound discretion of the trial court." (Brooks, supra, 179 Cal.App.3d at p. 508.) "On appeal, the trial court's decision will not be reversed unless the appellant demonstrates that the lower court abused its discretion." (*Ibid.*)

a. Bar-K's Abuse of Discretion Claims

i. The Trial Court's "Dislike"

Bar-K first argues that the trial court abused its discretion by assessing sanctions without adequate evidentiary basis "merely because the court did not like" Bar-K's case. According to Bar-K, the court awarded sanctions with "virtually no

analysis," and "[w]hat analysis there was used charged language that reflected that the trial court had an intense dislike for Bar-K's escrow case against First American. There was no finding whatsoever regarding the amounts and reasonableness of the expenses allegedly incurred in proving the truth of the specific matters denied, as required under the law." Bar-K insists that the declaration of First American's attorney claiming fees for tasks "involving" the escrow action was "so over-inclusive as to be virtually useless. There were many other issues encompassed by the escrow case against First American, including lack of negligence, lack of proximate cause, and lack of damages (as well as First American's affirmative defenses . . .). Yet First American's declaration erroneously assumes that all escrow fees were spent working on the issue of 'whether First American was an escrow' and none were spent to prove other elements of the escrow case or its defenses."

Bar-K's charge that the trial court ruled based on its "dislike" of its co-escrow claim against First American ignores the court's finding that the claim was a "phony" claim, a ploy consciously concocted from the beginning by Bar-K's legal counsel, Kroetch, with the consent of Bar-K's management. In other words, the court found that Bar-K brought a meritless, bad faith claim against First American. Bar-K challenges the tone and extensiveness of the court's findings, but it does *not* challenge that substantial evidence supports the court's findings, nor could it. First American's legal counsel, Rush, had rejected certain requests by Kroetch and indicated that he, Rush, was to approve any supplemental escrow instructions that would be covered by First American's CPL. Nonetheless, Kroetch, without telling Rush, contacted First American's Hollenbeck, who agreed as an accommodation to his request that First American relay funds from Bar-K to Security. Despite this limited participation, Kroetch sent revised escrow instructions to Anderson and Hollenbeck that did not require Hollenbeck's written acknowledgment. The court found Hollenbeck promptly made clear in a telephone call with a Bar-K representative that First American was not acting as an escrow holder. Despite this history, Bar-K brought its "co-escrow" claim, which led to First American's eight requests for admissions.

ii. *The "Reasonableness" of the Responses*

Bar-K further argues that it was improper for the court to award sanctions without making findings with respect to the "reasonableness" of each of Bar-K's responses. Bar-K criticizes the trial court for its failure to break down the amounts incurred in proving the individual requests, arguing that the court "did not even reach the starting line to assess whether those amounts were reasonable or not. It is apparent that in reality, the trial court simply decided it found Bar-K's escrow case against First American to be distasteful, and that First American should be compensated some arbitrary amount because of the distastefulness. There is no legal justification for such process."

We reject this argument because Bar-K does not establish, and we are not aware of any law that establishes, that a trial court is required to calculate the amounts owed regarding each denied request for admission once the court concludes that a party took a meritless position on the entire issue that was the subject of the requests. Rather, case law indicates that a court does not have to do so in such circumstances. (See *Rosales v. Thermex-Thermatron* (1998) 67 Cal.App.4th 187, 198 [the court, in affirming a cost-of-proof award, found it unnecessary to review each request and response when the defendant had refused to admit successor liability altogether].) First American's eight requests for admissions covered the field regarding Bar-K's "co-escrow" claim. First American in effect requested that Bar-K admit that there was no evidence that First American agreed to act, or acted in any way, as an escrow in the transaction, such as by executing escrow instructions, orally or expressly agreeing to act as an escrow, agreeing with Security to act as an escrow, having Security act as its agent or otherwise on its behalf, or receiving fees for conduct as an escrow. Given the comprehensive scope of its requests for admission, First American did not need to do anything more than establish its total fees for defending against Bar-K's claim. Its attorney's declaration satisfied that evidentiary requirement. The court did not abuse its discretion in awarding its estimate of the total fees incurred under these circumstances.

iii. *The Failure to Segregate Fees*

Next, Bar-K contends that, although the trial court awarded sanctions with regard to only the eight "co-escrow" requests, it had no way of knowing the fees expended regarding these particular matters because First American did not segregate its "co-escrow" fees from those attributable to the License Agreement issue. Bar-K considers the court's award of \$250,000 of the \$296,793 claimed by First American to be arbitrary in the absence of such a breakdown, particularly when the court awarded First American 84 percent of its total fee claim when the subject requests amounted to only 62 percent of the 13 requests.

Again, we do not agree. We are guided by the principle that the "amount of an attorney fee to be awarded is a matter within the sound discretion of the trial court. [Citation.] The trial court is the best judge of the value of professional services rendered in its court, and while its judgment is subject to our review, we will not disturb that determination unless we are convinced that it is clearly wrong. [Citations.] The only proper basis of reversal of the amount of an attorney fees award is if the amount awarded is so large or small that it shocks the conscience and suggests that passion and prejudice influenced the determination." (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1134.) The trial court's reduction of the amount to \$250,000 was a reasonable approach intended to limit recovery to fees for work done related to the co-escrow issue, which the court specifically found was the "central issue" of the escrow case. Furthermore, First American, by excluding altogether fees related to work done on those who were witnesses in both the escrow and title insurance actions (including Kroetch, a central figure in the "co-escrow" claim), stated only some of its total fees spent on the "co-escrow" issue. Accordingly, although the court's \$250,000 award was based on an estimate, we conclude it was a reasonable estimate that limited recovery to the co-escrow issue covered by the eight requests for admissions. (Cf., *Smith v. Circle P Ranch Co.* (1978) 87 Cal.App.3d 267, 280 [reversing and remanding because of an insufficient record indicating the basis for the courts conclusions or its computations].)

iv. The Information Known to Bar-K

Bar-K also argues that the court's award was improper because five of the eight "co-escrow" requests sought information unknown to Bar-K at the time it received the requests (such as whether First American agreed with Security to act as escrow agent), and that its only reasonable response to these five was that it lacked sufficient information to admit or deny. Again, we disagree.

A party is subject to sanctions if it "*fails to admit . . . the truth of any matter*" (§ 2033.420, subd. (a), italics added), which includes responses that improperly assert that the party can neither admit nor deny the admission. The party "has a duty to make a reasonable investigation to ascertain the facts even though the party has no personal knowledge of the matter when the party has available sources of information as to the matters involved[.]" (*Brooks, supra*, 179 Cal.App.3d at p. 510.) It is not "enough for the party making the denial to 'hotly contest' the issue. . . . [T]here must be some reasonable basis for contesting the issue in question before sanctions can be avoided." (*Id.* at p. 511.)

Bar-K does not cite to any evidence that would support denial of the requests to which it claimed to lack sufficient information, nor does it show that it made any reasonable investigation regarding these facts. More importantly, there is substantial evidence that Bar-K did not have a reason to respond to any of these requests with anything other than an admission, since there is evidence indicating that First American's Rush refused to provide an assurance regarding the mortgages and did not approve of the revised escrow instructions, First American's Hollenbeck told Bar-K that First American would not act as an escrow, and Bar-K consciously and in bad faith concocted its co-escrow claim against First American as a ploy and scam in the face of these circumstances. Bar-K's argument cannot be maintained in the face of this evidence.

b. Bar-K's Claims Regarding Summary Judgment/Adjudication

i. Reasonable Belief

Bar-K also argues that the trial court's cost-of-proof award must be reversed because the court's rejection of First American's summary judgment motion gave Bar-K a "reasonable belief" that it would prevail at trial. (See § 2033.420, subd. (b)(3).) The court found that there were triable issues of fact regarding such issues as "whether First American impliedly agreed to serve as a joint escrow." Bar-K asserts that, in light of the court's findings, "it would have been inconceivably foolhardy for Bar-K to have abandoned its case" and malpractice by its attorneys to recommend such a course. Moreover, awarding sanctions under these circumstances would "chill the efforts of legitimate litigants who simply want their case heard by a jury of their peers."

Bar-K provides no legal authority for its claim that, in effect, a summary adjudication denial precludes the court from making a cost-of-proof award. As First American points out, the purpose of the cost-of-proof statute "is to set at rest *triable issues* so that they will not have to be tried." (*Brooks, supra*, 179 Cal.App.3d at p. 509, italics added.) Thus, a party's success against motions for summary judgment or adjudication has little relevance to a court's posttrial determination that a cost-of-proof

award is appropriate. Tellingly, Bar-K does not cite any case that holds that a denial of summary adjudication deprives the court of discretion to make such an award. We conclude that under the circumstances of this case, when the trial court found after trial that Bar-K consciously conducted a ploy and scam to entrap First American into a "co-escrow" claim, the summary judgment ruling relied on by Bar-K has no bearing on the merits of the trial court's factual determinations and award.

ii. First American's Summary Judgment Motion Fees

Bar-K also argues that First American's fees that are specifically attributable to its summary judgment motion, which totaled \$49,442.50, must be deducted from the cost-of-proof award. Bar-K argues in its opening brief, without citation to any case law, that "[i]t was certainly error to award these amounts as sanctions. Since the summary judgment motion was denied on [the co-escrow issue], those efforts did not 'prove' anything, as a matter of law. Thus, the summary judgment expenses contravene the express statutory language that the court may award fees only for 'reasonable expenses incurred in making that proof,'" contained in Code of Civil Procedure section 2033, 420, subdivision (a).

Bar-K does not establish that it made this argument below, and it is not contained in its opposition briefing to the trial court. Regardless, the argument is unpersuasive in light of Barnett v. Penske Truck Leasing Co. (2001) 90 Cal.App.4th 494 (Barnett), which First American cites. In *Barnett*, the appellate court held that a court could order a cost-of-proof award upon granting summary judgment, rejecting the argument that the award was improper because the party receiving it had not "proven" the truth of the matters at trial. (*Id.* at pp. 496-497.) The court noted that the statute upon which section 2033.420 is based did not require on its face that the issue be proven at trial, and concluded that a party "who successfully moves for summary judgment proves the facts in issue by submitting papers that '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.'" (*Id.* at p. 498.)

The reasoning in Barnett, supra, 90 Cal.App.4th 494, applies to this case as well for two reasons. First, the trial court, while it denied First American summary adjudication regarding certain "co-escrow" action claims, also *granted* First American summary adjudication regarding certain other claims in that action.

Bar-K does not establish that the court's award of summary judgment fees was beyond its discretion in light of this partial grant. Therefore, Bar-K has not met its burden as appellant of affirmatively showing error. (See Lennane v. Franchise Tax Bd. (1996) 51 Cal.App.4th 1180, 1189 (Lennane).)

Furthermore, even though First American was denied summary adjudication, the nature of this dispute was such that the trial court could reasonably conclude First American's work on the summary adjudication motion contributed to its trial preparations. Therefore, Bar-K's argument that the trial court could not, pursuant to section 2033.420, subdivision (a), award First American summary judgment fees is unpersuasive.

c. Bar-K's Further Claim of Reasonable Belief

Finally, Bar-K argues the law recognizes it had a reasonable belief that First American had agreed to act as an escrow because First American accepted funds from Bar-K and transferred them to Security. We need not discuss the details of this theory because it fails to take into account the court's finding that Bar-K consciously concocted a ploy and scam against First American in attempting to wrongly portray it as a co-escrow holder, as we have already recounted.

Bar-K contends that the court's findings were the result of Kroetch's "meltdown" at trial, and that his previous and extensive deposition testimony provided the same factual summary as the one he provided to Bar-K's management at the time of the transaction, which caused them to form a reasonable belief that First American was acting as an escrow. This flies in the face of the trial court's conclusion that the scam was "consciously orchestrated by Bar-K, probably under the direction of its dubious former employee [Kroetch], *but with the consent of management*." (Italics added.) In other words, Bar-K's "reasonable belief" contention cannot be maintained in light of the court's conclusion that Bar-K's management consented to the scam at the time it was orchestrated.

D. First American's Cross-Appeal Regarding Its Damages Award

The trial court awarded First American \$88,078.13 in damages against Bar-K in the title action. This consisted of \$3,868 for legal fees and expenses related to the Anderson deposition; \$31,724.04 for legal fees and expenses paid to Damon Key for work incurred after Bar-K refused First American's postsettlement tender; and \$52,486.09 for costs incurred by First American in managing the property after Bar-K's refusal of this tender. First American challenges the court's denial of certain other damages on a number of grounds. We review these one at a time.

1. *First American's Settlement Payment for Back Taxes*

Among other things, First American sought recovery of \$100,000 it paid as part of the settlement for back property taxes Air owed to the City and County of Honolulu. We affirm the trial court's determination that First American was not entitled to this recovery.

In its statement of decision, the trial court ruled on this issue as follows:

"I do not award First American the \$100,000 that it said that it paid to the State of Hawaii, as part of the settlement in bankruptcy court. I did not see satisfactory evidence that the money was paid directly to the State for the benefit of Bar-K."

We review the trial court's decision based on a substantial evidence standard of review. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053 ["[w]here findings of fact are challenged on a civil appeal ". . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below"].) There was substantial evidence to support the court's decision.

The title insurance policy excluded coverage for tax liens not in existence on the date the policy was issued and liens (except those not at issue here) attached or created after the policy was issued. A settlement agreement provision stated that the defendants in the Hawaii foreclosure litigation agreed to execute and deliver a quitclaim assignment in favor of First American of all of their past, present, and future rights, title, and interests in the license agreement, lease, property and fixtures. In this same settlement agreement provision, First American agreed to pay any tax and leasehold obligations that were defaulted as of the date of the settlement agreement's execution. First American also agreed to pay \$850,000 to Air.

Pursuant to this settlement, First American delivered \$950,000 to James Duffy, the escrow agent commissioned by the parties and the bankruptcy court. Duffy promptly sent a \$100,000 check to the City and County of Honolulu "in full settlement of the City and County of Honolulu's claim for real property taxes against [Air] accruing prior to April 12, 2000 (the date the petition for bankruptcy was filed), and including the payment due and owing in August 2000, for the period from July 1, 2000 [through] February 10, 2001[.]" Duffy authorized the City and County to cash the check upon its release of unpaid tax liens and the withdrawal of its proof of claim in bankruptcy court.

First American argues this evidence shows it paid \$100,000 to remove the tax liens on the property for Bar-K's benefit, and that no contrary evidence was submitted. Therefore, the trial court's finding "was unreasonable and lacked substantial evidence support," based on *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652 (the ultimate test of substantial evidence is "whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record").

Bar-K argues that the court's ruling was supported by substantial evidence because, as Duffy indicated in his letter to the City and County of Honolulu, the payment was made to settle a claim of taxes against Air, not Bar-K, in payment of a tax debt owed by Air during its possession of the property.

We agree with Bar-K that First American's payment for Air's back taxes is substantial evidence supporting the court's ruling and, therefore, do not consider the remainder of the parties' arguments. The Hawaii litigation was resolved via a settlement that enabled First American to fulfill its obligations to Bar-K. However, it does not necessarily follow that every step First American took along the settlement path was specifically for Bar-K's benefit. The trial court could rightly conclude from the evidence that First American paid the back taxes into the bankruptcy proceeding for the benefit of Air in return for the foreclosure defendants' quitclaim assignment, even if Bar-K ultimately benefited from this payment. We see no reason to disturb this ruling under a substantial evidence standard of review.

2. *Litigation Expenses*

First American also argues the trial court committed prejudicial error because it did not order Bar-K to pay damages to First American for litigation expenses First American incurred defending claims that were not covered by the title insurance policy. Once more, we disagree.

The trial court denied First American's request for reimbursement of these litigation expenses entirely. The court stated: "The court determines that First American can recover upon none of its claims for recoupment of non-covered defense expenses because it failed to effectively reserve its rights to recover such expenses. The court determines that the law obligated First American to make an express reservation of rights to recover defense expenses on claims not covered by the policy. As a matter of law the court rejects First American's contention that this rule does not apply in the title insurance context because the language of the title insurance policy is different from that in a Commercial General Liability [CGL] policy.

"First American never provided Bar-K with an adequate 'reservation of rights' expressly advising Bar-K that it was reserving its right to seek recoupment of litigation expenses in the Hawaii foreclosure litigation. Were it not for this failure to adequately reserve its rights, First American would have a better argument that it could recover expenses it incurred in litigating the claim that the mortgages were never approved by the landlord, the State of Hawaii."

The court also found that "[e]ven if Bar-K were found liable to reimburse First American for what it spent to clear up problems with the State of Hawaii, First American has not shown what that amount would be. Damon Key spent some of its attorney time dealing with the State of Hawaii, but it is impossible to identify how much time in any meaningful way."

First American argues that the trial court's ruling was incorrect because an express reservation of rights, while required when a CGL policy is involved, was not required for First American's title insurance policy. We conclude that an express reservation of rights was necessary.^[9]

In Buss v. Superior Court (1997) 16 Cal.4th 35 (Buss), upon which both parties rely heavily for their arguments, our Supreme Court considered certain issues relating to standard CGL policies, including to what extent the insurer could seek reimbursement from the insured for defense costs. (*Id.* at p. 39.) The court noted that a CGL insurer has a duty to defend that is broader than the insurer's duty to indemnify, and "extends beyond claims that are actually covered to those that are merely potentially so—but no further." (*Id.* at pp. 46-47.) Thus, in a "'mixed' action, in which some of the claims are at least potentially covered and the others are not, the insurer has a duty to defend as to the claims that are at least potentially covered . . . , but does not have a duty to defend as to those that are not[.]" (*Id.* at p. 48.)

Nonetheless, the insurer has a duty to defend a "mixed" action in its entirety. (Buss, supra, 16 Cal.4th at p. 48.) The court justified this requirement "as an obligation imposed by law in support of the policy. To defend meaningfully, the insurer must defend immediately. [Citation.] To defend immediately, it must defend entirely. It cannot divide the claims, dividing those that are at least potentially covered from those that are not," particularly in light of "'[t]he plasticity of modern pleading.'" (*Id.* at p. 49, fn. omitted.) As to claims that are not even potentially covered, the insurer has a right to reimbursement for defense costs "implied in law as quasi-contractual" (*id.* at p. 51), provided it meets its burden of proving its right to reimbursement by a preponderance of the evidence. (*Id.*, at pp. 51-57.)

The Buss court, noting the Court of Appeal had assumed the insurer must reserve its right to reimbursement for defense costs, stated that "[t]o the extent that this right is implied in law as quasi-contractual, it *must* indeed be reserved. [Citation.] Through reservation, the insurer gives the insured notice of how it will, or at least may, proceed and thereby provides it an opportunity to take any steps that it may deem reasonable or necessary in response—including whether to accept defense at the insurer's hands and under the insurer's control [citation] or, instead, to defend itself as it chooses. To the extent that this right is implied in fact in the policy as contractual, it *should* be reserved. Through reservation, the insurer avoids waiver." (Buss, supra, 16 Cal.4th at p. 61, fn. 27; accord, Scottsdale Ins. Co. v. MV Transportation (2005) 36 Cal.4th 643, 656.)

First American argues that, unlike a CGL policy, its title insurance policy with Bar-K included specific exceptions to coverage that, in effect, gave Bar-K all the notice it was entitled to regarding First American's right to reimbursement. Specifically, First American points to the policy provisions which state that First American "will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of" a variety of matters, including, First American contends, off-record matters known to the insured but not disclosed to the insurer, or postpolicy matters. Furthermore, the policy states that First American "will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy." First American argues that, unlike CGL policies, "which do not exclude coverage for

defending uncovered claims," these provisions allocate responsibility for costs "on a claim-by-claim basis" and "expressly limit the coverage duty to covered claims." Therefore, "no separate reservation of rights should be required."

First American's arguments are based on a misconstruction of *Buss*. As indicated by our independent research, our Supreme Court has held that "[t]he duty to defend in a title insurance case is governed by the same principles which govern the duty to defend under general liability policies." (*Lambert v. Commonwealth Land Title Ins. Co.* (1991) 53 Cal.3d 1072, 1077.) The *Buss* court's analysis drew from numerous cases to address whether a CGL insurer could seek reimbursement from an insured for defense costs when it assumes responsibility for the defense of a "mixed" action. Although the court was discussing standard comprehensive or commercial liability insurance policies, its analysis focused on an insurer's right to reimbursement for defending plainly uncovered claims, versus claims that were plainly or potentially covered. The court determined that, even when the insurer has not bargained for a right to reimbursement for its defense of uncovered claims, it nonetheless retains a right to reimbursement for such a defense "that is implied in law as quasi-contractual, whether or not it has one that is implied in fact in the policy as contractual" because otherwise, the insured would benefit from "unjust enrichment." (*Buss, supra*, 16 Cal.4th at p. 51.) "To the extent that this right [of reimbursement] is implied in law as quasi-contractual, it *must* indeed be reserved." (*Id.* at p. 61, fn. 27.) This analysis applies in the present case, as Bar-K argues.

First American finds support for its argument that *Buss* applies only to CGL policies in the distinction made by Justice Kennard in her dissent that, "[b]y stating their defense obligation in terms of defending particular causes of action, rather than entire suits, title insurers have done what insurers issuing standard CGL policies have not done—limited their contractual defense obligation to the defense of potentially covered claims." (*Buss, supra*, 16 Cal.4th at p. 64.) This is of no consequence here. Justice Kennard's dissent expressed her view that the language of the CGL policy compelled the insurer to defend the entirety of the action in every case that stated a potentially covered claim. (*Id.* at p. 66.) Therefore, an insurer issuing a CGL policy did not have a contractual right to reimbursement of defense fees, whether or not it issued a reservation of rights letter. This is not at issue in the present case.

First American points out that *Buss* also states that, when a right to reimbursement is implied in fact in the policy as contractual, the right "should be reserved. Through reservation, the insurer avoids waiver." (*Buss*, 16 Cal.4th at p. 61, fn. 27.) According to First American, this instruction advises that it is "prudent," but not required, to reserve rights for a policy like the one at issue here, which terms purportedly implied in fact the contractual right to reimbursement. However, First American fails to establish that it had such an implied in fact right, citing only its exclusion clauses, which make no reference to any right to *reimbursement* of any portion of its litigation expenses.

Furthermore, as indicated by our independent research, this court has held that "[i]f a liability insurer *with knowledge of a ground of forfeiture or noncoverage under the policy*, assumes and conducts the defense of an action brought against the insured, without disclaiming liability and giving notice of its reservation of rights, it is thereafter precluded in an action upon the policy from setting up such ground of forfeiture or noncoverage. In other words, the insurer's unconditional defense of an action brought against its insured constitutes a waiver of the terms of the policy and an estoppel of the insurer to assert such grounds." (*Miller v. Elite Ins. Co.* (1980) 100 Cal.App.3d 739, 754, italics added.) This further indicates that First American was required to make a reservation of rights to reimbursement in the present case.

In short, First American does not point to anything in the policy which gives it the right to reimbursement of litigation expenses it assumed, nor does it point to anywhere in the record where it reserved its rights to reimbursement of such expenses. We conclude that under these circumstances, the trial court properly concluded that a reservation of rights was required. (*Buss, supra*, 16 Cal.4th 61, fn. 27; *Miller v. Elite Ins. Co., supra*, 100 Cal.App.3d at p. 754.)

3. Allocation of the Settlement Payment for Uncovered Claims

First American also argues that the trial court was required to allocate at least some settlement payment to it for uncovered claims. For this argument, it relies on its discussion of *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817 and *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 811, with regard to litigation expenses;^[10] these cases address an insured's right to recover when an insurer engages in a bad faith denial of coverage. First American argues in one paragraph that "[t]he same principles also warrant reversal and remand of the trial court's decision to allocate no portion of [First American's] \$850,000 settlement payment [to Air] to non-covered claims." We find its argument unpersuasive.

As we have discussed, the Supreme Court in Buss, supra, 16 Cal.4th 35, held that a CGL insurer seeking reimbursement must prove the costs sought were incurred solely on a claim for which there was no potential for coverage. (*Id.* at p. 53.) Bar-K urges us to apply Buss's approach here to litigation expenses. It further argues that with respect to settlement amounts, "there is no precedent in the annals of California insurance law for a court to do what First American has requested," and, furthermore, that "with respect to *settlement payments*, any 'allocation' would be an impossible task."

First American argues again that the Buss rule is limited to CGL policies, and that "[a] title insurer's duty, by contrast, is restricted to covered causes of action so its rights are more analogous to the qualified rights under *Brandt*."

As we have indicated, we agree with Bar-K that Buss's analysis applies to a discussion regarding the allocation of litigation expenses, particularly given that "[t]he duty to defend in a title insurance case is governed by the same principles which govern the duty to defend under general liability policies." (Lambert v. Commonwealth Land Title Ins. Co., supra, 53 Cal.3d at p. 1077.) First American fails to explain why we should rely here on case law involving bad faith insurance questions, which are not at issue here. Therefore, we reject First American's argument that we should rely on Brandt v. Superior Court, supra, 37 Cal.3d at p. 817, and Cassim v. Allstate Ins. Co., supra, 33 Cal.4th at p. 811, to hold that the trial court was required to make an allocation regarding the settlement payment. At a minimum, First American has failed to meet its appellate burden of showing error. (In re S.C. (2006) 138 Cal.App.4th 396, 408 ["appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. . . . [C]onclusory claims of error will fail"]; Lennane, supra, 51 Cal.App.4th at p. 1189.)^[11]

II. The Claims Between Bar-K and Security

A. The Litigation Between Bar-K and Security

The trial court determined that Security breached Bar-K's revised escrow instructions and was negligent by failing to obtain an authorized Air representative's signature on the requisite documents (obtaining Downey's signature instead), and by allowing escrow to close without Bar-K receiving an "assurance" that the mortgages did not violate the lease. The court rejected Bar-K's other claims against Security.

The trial court found that Bar-K did not prove it had incurred direct damages from Security's breach and negligence. After the second phase of the bench trial, the trial court awarded Bar-K \$436,139.96 in tort of another damages against Security on the ground that Security's negligence was a substantial factor in Bar-K incurring attorney fees and costs in its dealings with the State of Hawaii and its dealings with, and litigation against, First American.

B. Bar-K's Claims of Trial Court Error Regarding Its Lack of Damages

Bar-K argues that the trial court erred when it failed to award Bar-K any direct damages for Security's breach of the revised escrow instructions and negligence.

We do not agree.

1. The Trial Court's Damages Ruling

The court found that Bar-K was not directly damaged by Security's failures regarding the "mortgages assurance" issue because, although the lease provision requiring the Hawaii DOT approval was probably violated and the issue was raised as a defense to Bar-K's foreclosure action, "Bar-K did not have to pay anything to resolve matters with the State of Hawaii or litigate Circle Rainbow's arguments based on the alleged absence of State of Hawaii approval. First American paid all of the expenses incurred to resolve this problem. In the title action, First American did not recover reimbursement from Bar-K for what it paid to secure the State of Hawaii's approval of the transfer of lease to Bar-K. [¶] Bar-K thus has no recoverable damages for expenses incurred in resolving the question of State of Hawaii approval. Bar-K ended up with something better than a mere assurance: It ended up with full title to the lease, provided at First American's expense, and at no expense to Bar-K."

The trial court also found that, while Bar-K may have been entitled to delay damages resulting from Downey's pre-closing execution of documents on Air's behalf, it did not prove any. The court found that "[i]f there had not been the confusion between [Air] and [Airlines], and if Downey had actually held authority to sign on behalf of [Air], the foreclosure would have been easier and faster. In particular, [Air] would not have been able to raise the defense that the notes were secured only by the building and not by the lease."

However, the court also found that, while "[m]ost likely, Bar-K would have completed its foreclosure action if there had been no problem with the security," "it would be speculative to say how much sooner." Bar-K presented no evidence regarding how long the foreclosure would have taken if there had not been a problem with the security, and the court, noting that lawsuits take time and often are unpredictable, found that Air's 2000 bankruptcy "would have delayed things even if the security had been impeccable," and that the dismissal of the Mich action gave Circle Rainbow a possible defense to the foreclosure action, which "they asserted vigorously." The court stated, "[w]e do not know whether this would have happened anyway if Bar-K's right to foreclose on the mortgages was not challenged," and concluded that it would have to rely on impermissible speculation to determine the length of any delay caused by Security's breaches.

The court cited four other reasons for its rejection of Bar-K's delay damage claim. First, it found the property ran a negative cash flow, which Bar-K knew would occur before the close of escrow from the license agreement providing Air free rental space in the terminal. The court also concluded that the delay actually "saved Bar-K money in the long-run" because Bar-K did not pay for property management, taxes, maintenance, insurance, or lease payments during the dispute.

Second, Bar-K did not provide evidence showing whether the property's value had increased or decreased during the time of any purported delay, and in any event would have had to show any depreciation exceeded the money it saved from avoiding the property's negative cash flow.

Third, the court concluded that "Bar-K deliberately sought to avoid taking the [l]easehold collateral in the settlement and after the settlement once it was tendered by First American. Bar-K's own delay in taking the collateral demonstrates Bar-K was not suffering any loss by any delay in its receipt of the collateral." The court found that Bar-K's own delay estopped it from contending it was entitled to delay damages.

Fourth, the court found Bar-K's computation of "lost opportunity" damages to be either an improper effort to pursue rescissionary damages, or based on insufficient evidence. The court concluded that there was a "fatal logical flaw" in Bar-K's logic because "[i]f the escrow had not been closed, then Bar-K would still have had its money, but then it would not have had the right to the property. The \$4.1 [million] was tied up for years *but so was the property*. The court finds that after Bar-K learned of the issues with the transaction it nevertheless pursued its rights in the property, as well as the title policy issued in the transaction. By doing so, it elected its remedy. . . . [¶] Thus, Bar-K's damage theory is predicated on a rescissionary remedy, as Bar-K seeks in effect to recover its \$4.1 million investment as of the time of the close of escrow. . . . [T]he evidence shows that Bar-K determined it would be better off pursuing the collateral and the policy benefits rather than seeking rescission of the transaction and restitution from [Security], Downey and Circle Rainbow. Having elected that strategy, and playing it out, Bar-K may not now assert its attempted rescissionary remedy."

2. Analysis

Bar-K challenges both the trial court's damages findings and denial of Bar-K's motion to reopen the trial in order to present damages evidence.

a. The Trial Court Did Not Err In Awarding No Damages

According to Bar-K, the trial court's difficulty in pinpointing *how much* damages Bar-K suffered was insufficient reason to award nothing in damages. Bar-K contends that the trial court confused the existence of tort damages with the amount. It argues, based on Clemente v. State of California (1985) 40 Cal.3d 202, and California Jurisprudence Third, that, even if the amount of damages is uncertain or subject to speculation, it "does not bar the right to recover any damages at all."

Bar-K further argues that it is entitled to lost profits, that its economics expert, Dr. Ben-Zion provided sufficient evidence of damages, and that the trial court, if it found his calculations to be imperfect, "had the obligation to devise its own method of calculating damages." Bar-K also argues that it is entitled to "lost opportunity" damages.

Bar-K's arguments fail for numerous reasons. The trial court is *not* required to award damages if the award is based on speculation. As the court noted in its statement of decision, "[d]amages which are remote, contingent, or merely possible cannot serve as a legal basis for recovery." (*California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 62.)

Bar-K also misreads the trial court's damages analysis. The court was not merely uncertain about the length of delay and amount of damage. The court found that Bar-K was *not* damaged by Security's allowing escrow to close without the required assurance and, while Bar-K *might* have been entitled to damages arising out of the Downey authority issue, it failed to prove *any* such damages.

Furthermore, the trial court repeatedly indicated that circumstances and events for which Security was not responsible contributed to any delay. Bar-K does not effectively counter this finding. Bar-K argues that the court should have found damages in part because it concluded that "[i]f there had not been the confusion between [Air] and [Airlines], and if Downey had actually held authority to sign on behalf of [Air], the foreclosure would have been easier and faster." However, Bar-K ignores the obvious fact that, while Security was responsible for the Downey authority issue, it was not responsible for the confusion between Air and Airlines. Bar-K also does not effectively counter the court's findings that "lawsuits take time and often are unpredictable," that Air's filing for bankruptcy in 2000 "would have delayed things even if the security had been impeccable," and that "[a]nother intangible" was the Mich action dismissal, which gave Circle Rainbow "a possible defense to a foreclosure action, and which they asserted vigorously."

The trial court also made several findings indicating no damages were incurred, or that there was insufficient proof of any damages. It concluded that Bar-K saved, rather than lost, money during the delay because of the property's negative income; had not incurred any costs for maintaining the property, taxes, and the like; did not establish property depreciation damages; and was estopped from claiming delay damages by its own delay in accepting First American's tender after settlement. Bar-K fails to effectively challenge these findings as well.

The court's rejection of Bar-K's request for "lost opportunity" damages was also well-founded. Bar-K contends there would not have been a "double recovery" because its expert backed out the value of the Hawaii property from its damages calculation, but it does not provide any record citations for this argument. Therefore, we disregard it. (*Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379 [court may disregard any factual contention not supported by a proper citation; see also *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 [the Cal. Rules of Court require factual assertions to be supported by citations to the record].)

Bar-K also fails to address the court's conclusion that Bar-K was not entitled to lost opportunity damages because it was based on a rescissionary theory of damages, thereby failing to meet its burden to show error. (*In re S.C.*, *supra*, 138 Cal.App.4th at p. 408; *Lennane*, *supra*, 51 Cal.App.4th at p. 1189.)

Finally, Bar-K largely ignores the fact that we are not the court of first instance and argues its positions without regard for our deferential standard of review for the court's findings. "Where findings of fact are challenged on a civil appeal, we are bound by the 'elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . . [Citation.]" (*Bickel v. City of Piedmont*, *supra*, 16 Cal.4th at p. 1053.) Bar-K does not explain why the trial court's factual findings regarding its damages analysis were not supported by substantial evidence. As indicated by our discussion herein, we conclude substantial evidence supported the trial court's determinations. Therefore, we reject Bar-K's various arguments why the trial court should have awarded it damages.

b. Bar-K's Motion to Reopen the Evidence Regarding Damages

Bar-K next argues that the trial court erred in two respects when it denied Bar-K's motion to reopen the evidence regarding its damages claims against Security. Again, we disagree.

After the court issued a notice of its intended decision regarding escrow damages, Bar-K moved to reopen the evidence. At the June 10, 2005 hearing on Bar-K's motion, the court heard argument and took the matter under submission. On August 15, 2005, it issued an order giving notice of further trial regarding the "escrow case," "on the sole remaining issue—Bar-K's claim that it is entitled to an award of damages for attorney fees and costs incurred in the Hawaii litigation (under the tort of

another doctrine). [¶] As indicated at the hearing on June 10, 2005, the court will not reopen the case for further evidence on any other issue. This remaining issue is being tried now because the parties stipulated that the question of these attorney fees would be tried separately."

During trial, the trial court denied Security's motion for judgment pursuant to Code of Civil Procedure section 631.8. Bar-K argues that the court's notice of its intended decision regarding escrow damages was, "for all practical purposes," a ruling granting such a motion because the court's intended decision relied solely on defects in Bar-K's case-in-chief. Citing case law regarding nonsuits, Bar-K asserts that the court could not do so without allowing Bar-K "all opportunity to avoid nonsuit by presenting further evidence to cure the deficiency," which was "in furtherance of justice" and particularly appropriate because "after a lengthy, complex trial such as this one, all parties should be indulged with every opportunity to 'put their best foot forward' in the presentation of their case."

Bar-K's arguments are unpersuasive. Regardless of the rules regarding nonsuits, "[t]rial courts have broad discretion in deciding whether to reopen the evidence. [citation.] We review a court's denial of a motion to reopen evidence for an abuse of discretion. [Citation.] The appropriate test for abuse of discretion is whether the trial court's decision exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, we have no authority to substitute our decision for that of the trial court." (*Horning v. Shilberg*, (2005) 130 Cal.App.4th 197, 208-209.)

Given the trial court's numerous determinations regarding the lack of damages that we have discussed herein, the court acted within its discretion to deny Bar-K's motion to reopen the evidence. Bar-K argues that its proposed additional evidence would have "cured" the defects the court found in its evidence. It claims it provided to the trial court "a reasonable explanation for why this evidence was not presented earlier," that its introduction would not prejudice defendants, and that the motion should have been granted "in the interests of justice." These arguments merely indicate that Bar-K may have made certain tactical decisions in the course of the trial that it later regretted, and tardily sought to offer additional evidence to attempt to persuade the court to change its mind. Bar-K does not contest that it had every opportunity to introduce damages evidence during the trial itself. Its arguments are not persuasive under an abuse of discretion standard of review. Our task is to determine if the court's ruling was supported by reason (*Horning v. Shilberg*, *supra*, 130 Cal.App.4th at pp. 208-209), not whether Bar-K would have improved its case if the court had re-opened the evidence.

Bar-K also argues that the court failed to actually exercise any discretion regarding the motion to reopen the evidence because, according to Bar-K, the court "never actually made a ruling either granting or denying this crucial motion." Although Security does not cite to a specific ruling, it argues that the court ruled on the motion. We agree with Security. The court's August 15, 2005 order indicates that the court, although it mistakenly referred to its denial of the motion at hearing when it had taken it under submission, unquestionably denied Bar-K's motion. In short, we find no reason to disturb the trial court's denial of Bar-K's motion.

C. Security's Tort of Another Damages Claims

Security challenges the trial court's award to Bar-K of \$436,139.96 in tort of another damages on a variety of grounds. Bar-K cross-appeals that the court did not award a sufficient amount. We affirm the court's award.

1. The Proceedings Below

The parties stipulated that the court would bifurcate the trial and litigate the tort of another damages separately in a "phase two" trial. This "phase two" trial occurred on November 10, 2005.

After the trial, the court issued a statement of decision awarding Bar-K tort of another damages from Security totaling \$436,139.96 based on Security's two acts of negligence. These were Security's allowing Downey to sign documents for Air, which "caused a major problem when [Air] stopped making payments on the notes payable to Bar-K," and Security's failure "to honor the demand in Bar-K's escrow instructions that escrow not close unless Bar-K was given assurance that the mortgages securing the notes did not violate the underlying master lease with the State of Hawaii." The court found Security "could not have obtained this assurance on short notice. It therefore should not have let the escrow close unless Bar-K removed this requirement from its instructions. If [Security] had complied with the instructions, the escrow would not have closed. [¶] The escrow did close and Bar-K ended up in a risky situation not of its own making."

The court concluded that Bar-K was entitled to recover "some attorney fees and litigation costs" from Security, but not all; it stated that "[t]he test is whether [Security's] negligence was a substantial factor in requiring Bar-K to incur the fees and costs." It defined "substantial factor" as "a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm." The court found it was "relatively easy to find causation when we are dealing with attorney fees incurred in dealing with the State of Hawaii lease. The fact that [Security] did not provide the required 'assurance' provides the nexus." The court continued:

"I find that [Security's] failure to obtain the correct signatures also was a substantial factor in bringing about a chain of events where Bar-K had to litigate and defend its interest in court. If there had not been a problem with the title, or if [Security] had not allowed the escrow to close, First American would not have had to become involved. Once First American became involved, it raised issues that Bar-K was forced to litigate." The court then set out two categories of legal fees to which Bar-K was entitled.

a. The Hawaii Litigation

Drawing unfavorable inferences for billing entries that were redacted by Bar-K and acknowledging that the limited evidence required that it "make estimates of what the work was for," the court awarded Bar-K \$25,000 in attorney fees for matters involving the Hawaii litigation.

Although Bar-K's personal attorneys were not of record for Bar-K in the Hawaii litigation, the court found that a portion of the fees for their representation was recoverable because First American's representation was subject to a broad and complex reservation of rights, and because "[t]he long delay in resolving things in Hawaii made it reasonable for Bar-K to retain a personal attorney to monitor, and perhaps expedite, the resolution." The court also found that Bar-K was entitled to fees incurred in the Hawaii bankruptcy court proceedings, even though Damon Key provided the formal representation.

The court found, however, that much of the legal work for Bar-K in the Hawaii litigation "did not help" because "[i]t was aimed at promoting Bar-K's ill-conceived contention that First American was a 'co-escrow' with [Security]." Therefore, it did not award fees for Bar-K's deposition of Anderson.

b. First American's Litigation Against Bar-K

The court found that Bar-K was "entitled to some attorney fees incurred in its dispute with First American, even though the dispute between Bar-K and First American was tried at the same time as Bar-K's suit against [Security]."

Noting that First American had sued Bar-K in three separate filings, the court first awarded Bar-K 80 percent of the fees it incurred from 1999 to 2002, mostly regarding First American's Hawaii state court declaratory relief action, which was eventually dismissed. This came to \$34,997.

Most of the attorney fees Bar-K sought were incurred in the Alameda County title action from 2002 to 2005. The trial court found Bar-K was entitled to recover fees for defending against First American's second and third causes of action, but not the first and fourth causes of action in the title action. The court specifically found Bar-K's defense regarding the first cause of action—that it had title insurance coverage regarding the failure of the mortgages to conform to the requirements of the lease—to be "frivolous."

The trial court also found that, while Bar-K was entitled to attorney fees to defend against First American's attempt to deny Bar-K full title insurance coverage, "relatively little time was spent on this at trial. The vast majority of the testimony at trial was on the escrow claim." The court continued, "To the extent that we dealt with any of First American's claims, the focus was on two things: Bar-K's failure to cooperate in the Hawaii litigation and Bar-K's failure to accept the property once the case was settled in the Hawaii bankruptcy court. As to these, First American was in the right."

The trial court concluded that the "most accurate figure" was that 20 percent "at most, of attorney time spent by Bar-K's attorney was devoted to matters where attorney fees should be awarded." The court awarded Bar-K 20 percent of the approximately \$1.65 million dollars in fees it sought, which was \$336,548, as well as 20 percent of its costs, which was another \$39,594.96.

The trial court further stated that it had reviewed in camera certain billings in the escrow action (*not* the title action) alleged by Bar-K to contain privileged information, but for which Bar-K was making no claim. The court determined that they were not relevant enough to spend time analyzing privilege issues. The court stated that it did not admit these billings into evidence, and did not consider them in determining damages.

2. Analysis

Security argues that the court's \$436,139.96 tort of another award must be reversed for several reasons. These arguments lack merit.

Generally, "[i]n the absence of some special agreement, statutory provision, or exceptional circumstances, attorney's fees are to be paid by the party employing the attorney." (*Prentice v. North Amer. Title Guar. Corp.* (1963) 59 Cal.2d 618, 620 (*Prentice*); Code Civ. Proc., § 1021.) However, it is an "established rule that attorney fees incurred as a direct result of another's tort are recoverable damages." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751.) Thus, "[a] person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred." (*Prentice, supra*, at p. 620.) When "the natural and proximate consequence" of an escrow holder's negligence is to require a party to bring (or defend) a lawsuit to defend their interests, that party is entitled to recover "as damages reasonable compensation for attorney's fees incurred by them in their litigation with such third parties." (*Id.* at p. 621, followed in *Moe v. Transamerica Title Ins. Co.* (1971) 21 Cal.App.3d 289, 303.) The party's success, or lack thereof, in the action against the third party is "of no legal importance" if their legal endeavors are a "natural and probable result" of the "tortious conduct." (*Moe*, at p. 303.)

The tort of another doctrine is a form of consequential tort damages, not costs. (*Prentice, supra*, 59 Cal.2d at pp. 620-621.) "[W]e are not dealing with the 'measure and mode of compensation of attorneys' but with damages wrongfully caused by defendant's improper actions." (*Ibid.*) The "doctrine has been applied to permit recovery of attorneys fees resulting from an insurer's tortious conduct" (*Third Eye Blind, Inc. v. Near North Entertainment Ins. Services, LLC* (2005) 127 Cal.App.4th 1311, 1325 (*Third Eye Blind*)), including from a negligent escrow holder. (*Prentice, supra*, at pp. 620-621.)

We apply a substantial evidence standard of review in evaluating the sufficiency of the evidence, and view the evidence in a light most favorable to the prevailing party, resolving all conflicts in its favor. (*Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th at pp. 787, 805; *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 503.) We review de novo pure questions of law. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

a. Causation

i. Proximate Cause

Security argues that Bar-K was not entitled to any tort of another damages because it did not prove such damages were proximately caused by Security's negligence. (See *Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th at p. 812.) We disagree.

In seeking recovery of tort of another damages, "the law recognizes that there may be multiple causes of a plaintiff's injury. "It is not essential to a recovery of damages that a defendant's wrongful act be the sole and only cause of the injury; it is sufficient if it be a proximate cause which in the natural course of events produced, either by itself or in conjunction with other causes, the damage." (*Third Eye Blind, supra*, 127 Cal.App.4th at p. 1319.) In other words, as the court noted in its statement of decision, "[a] substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. (CACI 430.)"

In *Third Eye Blind, supra*, 127 Cal.App.4th 1311, Division Three of this district considered an appeal from a case in which the appellants had sued their insurer for coverage under a CGL policy, and won. (*Id.* at p. 1314.) The appellants sought tort of another damages from their business manager and insurance broker for their negligent failure to advise about a policy exemption or obtain an errors and omissions policy that would have provided the desired coverage. (*Id.* at 1314-1317.)

When the appellants won against the insurer, the trial court granted the respondents' motions for judgment on the pleadings,

holding that the victory negated the negligence claims as a matter of law. (*Ibid.*) Division Three reversed because, as a result of the negligent failure to advise or obtain the errors and omissions insurance, the appellants were required to sue the insurer for coverage and litigate the issue. (*Id.* at p. 1325.) Therefore, the appellants could recover the fees and costs incurred in that successful coverage litigation as damages. (*Ibid.*) The court stated that, "[s]ince the very purpose of respondents' hiring was to ensure appellants had adequate insurance coverage, such coverage litigation was a reasonable result of their alleged negligence in fulfilling this purpose." (*Id.* at p. 1323.)

Similarly, in the present case, the trial court found it "relatively easy to find causation" for attorney fees incurred in dealing with the lease. According to the court, the fact that Security allowed escrow to close without the mortgage assurance or proper signatures by an Air officer "was a substantial factor in bringing about a chain of events where Bar-K had to litigate and defend its interest in court. If there had not been a problem with the title, or if [Security] had not allowed the escrow to close, First American would not have had to become involved. Once First American became involved, it raised issues that Bar-K was forced to litigate."

The court's findings were supported by substantial evidence. Bar-K's escrow instructions to Security indicate that Bar-K did not want escrow to close if its instructions were not met. Security's negligence caused the close to occur in violation of these instructions. Later, when Bar-K sought to foreclose, Circle Rainbow resisted in part based on the consequences of Security's negligence. Circle Rainbow contended, among other things, that Downey had not been authorized to sign on Air's behalf prior to the close of escrow.

In this context, First American assumed responsibility for Bar-K's representation in the Hawaii litigation upon Bar-K's tender of a claim. First American reserved its rights not to indemnify Bar-K for matters not covered by the policy, which included the Downey authority issue, and it had not insured Bar-K with regard to the mortgage assurance issue. In October 1999, First American's Robert Hull wrote to Bar-K that "First American must question the entire basis of Bar-K's claim," and again asserted its reservation of rights. Also, the Hawaii foreclosure litigation involved complications, like the Mich action dismissal issue, that caused a considerable amount of time to pass. These circumstances provided substantial evidence for the court's decision that it was "reasonable for Bar-K to retain a personal attorney to monitor, and perhaps expedite, the resolution" of the Hawaii litigation.

First American also vigorously pursued its litigation claims against Bar-K. Ultimately, it sought recovery from Bar-K for the \$950,000 First American paid in settlement, which we have discussed at some length, *ante*. First American's counsel stated in correspondence to Bar-K that "First American intends to blackboard at least \$1 million in damages" on its title insurance claim. The trial court could reasonably conclude that this litigation would not have occurred but for Security's negligent close of escrow. In short, there was substantial evidence that Security's negligence was a substantial factor in the legal fees and costs incurred by Bar-K in its dispute with First American.

Security makes a series of challenges to the trial court's ruling that amount to a rehashing of the evidence. It contends that no substantial evidence exists because First American "stepped in, employed counsel, and secured all right to foreclose upon the secured property to which Bar-K was entitled," and that Bar-K, having knowingly purchased a "nonperforming" loan at a steep discount, "could hardly blame anyone else for the obligor's default." Also, Security argues, Bar-K ratified its transaction, rather than rescind it, and ultimately received its bargained-for collateral.

Security further contends that the record "amply supports" the trial court's other findings that Bar-K retained its own counsel to intervene and interfere with First American's effort to recover the collateral, including its refusal of First American's tender upon settlement. Security claims that Bar-K brought First American's recoupment claims upon itself, and that First American's "strategic decision to bring these claims was wholly independent of any escrow errors" by Security. Therefore, Security concludes, "the trial court erred by 'reason[ing] that absent the escrow errors, there would have been no 'title case.' There is nothing in the record to engage in such speculation about the litigation motivations of the parties." Instead, First American was "drawn into the litigation" based on bad faith allegations by Bar-K that First American was involved in a co-escrow arrangement, and Bar-K's actions in the Hawaii case, rather than being reasonable, were to further those claims.

Security's arguments lack merit. Many of them require that we reweigh the evidence, which we will not do under our substantial evidence standard of review. Also, although the court did find that Bar-K engaged in certain bad faith and unhelpful acts, Security ignores the fact that the court reduced its damages award accordingly. Security fails to explain why the court erred in doing so, particularly when First American pursued certain matters that were independent of Bar-K's bad acts.

Security also does not establish why Bar-K should have pursued rescission rather than foreclosure. While Bar-K chose to pursue foreclosure, it appears to have been reasonably necessary to protect its rights and interests. (See Gray v. Don Miller & Associates, Inc., *supra*, 35 Cal.3d at p. 508 ["We reject defendant's argument that plaintiff was not required to seek specific performance against the sellers but that he voluntarily brought the action. . . . Unless plaintiff was willing to waive what appeared at the time he filed suit against the sellers to be his right to buy the property, he was required to initiate action against them"].) Certainly, Security does not establish otherwise. Therefore, we reject this argument as well. (*In re S.C.*, *supra*, 138 Cal.App.4th at p. 408; *Lennane*, *supra*, 51 Cal.App.4th at p. 1189.)

Security also claims that Bar-K was not damaged by Security's negligence. Whether or not Bar-K's lender interests were ultimately damaged as a result of Security's negligence is not relevant. As the court explained in *Third Eye Blind*, *supra*, 127 Cal.App.4th 1311, a party whose interests ultimately are not harmed by the tortious acts involved is not barred from seeking tort of another damages if it was reasonably necessary to incur litigation fees and costs against a third party as a result of those acts. (*Id.* at p. 1325.)

In short, Security's factual contentions do not diminish the substantial weight of the evidence that it was reasonably necessary for Bar-K to incur legal fees and costs in its title insurance disputes with First American as a result of Security's negligence. Our review ""begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below."" (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.) We find substantial evidence supports the court's determinations.

ii. "But For" Causation

Security also argues that the holding of *Viner v. Sweet* (2003) 30 Cal.4th 1232—that a legal malpractice plaintiff must prove that a better outcome would have resulted absent the attorney's negligence—applies to the present case, and was not met. We disagree.

As stated in *Viner v. Sweet*, *supra*, 30 Cal.4th 1232, "the 'substantial factor' test subsumes the traditional 'but for' test of causation." (*Id.* at p. 1240.) That said, a party must meet "the well-established requirement in negligence cases that the plaintiff establish causation by showing either (1) *but for* the negligence, the harm would not have occurred, or (2) the negligence was a concurrent independent cause of the harm." (*Id.* at p. 1241.) Here, the trial court found that "if [Security] had complied with the instructions, the escrow would not have closed," and the chain of events leading to litigation between First American and Bar-K would not have occurred. As we have discussed, substantial evidence supports this conclusion. Therefore, Bar-K established that "but for" Security's negligence, the harm—in this case, the necessity that Bar-K incur legal fees and expenses in its title insurance disputes with First American—would not have occurred.

Security also argues that "[s]urely proof of any legal cause-in-fact should have been even more exhaustive in this complex case," and points to the trial court's "guesstimate" of percentages to identify the amount of damages. However, regarding tort of another damages, "[u]ncertainty as to the amount" of damages is not fatal to recovery. (*Bruckman v. Parliament Escrow Corp.* (1987) 190 Cal.App.3d 1051, 1061.)

b. Notice

Security argues that Bar-K failed to give it notice of its tort of another damages claims prior to trial based on our Supreme Court's general statement in *Hsu v. Abbata* (1995) 9 Cal.4th 863, that "[u]nless the parties stipulated otherwise, a claim for attorney fees under the 'tort of another' doctrine may not be asserted by post-trial motion but rather must be pleaded and proved to the trier of fact." (*Id.* at p. 869, fn. 4.)

As a preliminary matter, Bar-K argues that Security, if it "believed it had been unjustly 'surprised' by Bar-K's tort-of-another claim . . . had ample opportunity to bring the issue . . . to the attention of the trial court prior to the [p]hase [t]wo trial, and thereby obtain a ruling precluding consideration of the tort-of-another-fees on that ground. Having not adequately preserved this issue at the trial level, it cannot now complain on appeal that the [p]hase [t]wo trial never should have been held." We agree. Security has waived its notice claim by failing to first raise it below. (See *Ghirardo v. Antonioli*, *supra*, 14 Cal.4th at pp. 48-49.)

Therefore, we do not address the remainder of the parties' arguments on the matter, other than to note that, even if there were a pleading error, the record indicates that "the issue was thoroughly tried and understood by counsel and by the court, and no prejudice has resulted to defendant from a failure to allege the damage more specifically in the complaint." (*Prentice, supra*, 59 Cal.2d at pp. 621-622.) As Bar-K also points out, Security did not propound written discovery, and Bar-K stated before trial that it intended to seek tort of another damages, such as in its opposition to First American's motion for summary judgment in the escrow case. Therefore, assuming arguendo that Bar-K's pleading was insufficient, and assuming a proper objection had been made below, any error did not result in a miscarriage of justice and, therefore, we disregard it. (*Id.* at p. 622; *People v. Watson* (1956) 46 Cal.2d 818, 836; Cal. Const., art. VI, § 13.)

c. Security's "Joint Tortfeasors" Theory

Security also argues that Bar-K is not entitled to tort of another damages because they are not available against multiple joint tortfeasors alleged to bring about a single harm, as Bar-K alleged regarding Security and First American. Security's statement of law is correct. (See, e.g., *Watson v. Department of Transportation* (1998) 68 Cal.App.4th 885, 893-894.) However, it does not apply here.

The court awarded Bar-K tort of another damages for the fees and costs it incurred in the *title action*, in which First American and Bar-K were the only parties. Security contends tort of another damages cannot be awarded here because Bar-K alleged that First American and Security both served as escrow holders in the *escrow action*, the escrow and title actions were consolidated, Bar-K presented the same damages evidence as to both defendants, issues were "commingled" between the escrow and title claims, and Bar-K pled and asserted that Security, as First American's underwritten title agent, and First American, as the title insurer, had an agency-principal relationship.

Security's contentions do not establish its "multiple joint tortfeasors" theory, however, in light of the fact that Bar-K sued First American only in the title action, and did *not* seek, and the court did *not* award, any damages for fees it incurred in the escrow action. Given these circumstances, the applicable principle is that stated in *Prentice*: "[T]here is no reason why recovery of such fees should be denied simply because the two causes . . . are tried in the same court at the same time. [Citation.] [¶] There was no disadvantage to defendant in the fact that the causes, although separate, were concurrently tried." (*Prentice, supra*, 59 Cal.2d at p. 621.) As Bar-K characterizes it, Security's argument "attempts to fit a square peg in a round hole." It has no merit.

d. Public Policy

Security next argues that determining whether or not legal causation, or proximate cause, exists turns not only on whether cause in fact exists, but also on ""the various considerations of policy that limit an actor's responsibility for the consequences of his conduct."" (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1045.) Security argues that Bar-K's high degree of "premeditation even before escrow closed" is somehow a ground for limiting Security's liability, and that we should take heed of our Supreme Court's comment that the court "moved cautiously in expanding the nonstatutory bases on which awards of attorney's fees may be predicated." (*Bauguess v. Paine* (1978) 22 Cal.3d 626, 636, superseded by statute as stated in *Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 809-810.)

We find no merit in these arguments. The court awarded the damages appropriately, based on Security's plain negligence in handling the close of escrow. Security does not provide any public policy considerations that suggest we should limit its liability for this negligence.

e. The Trial Court's Statement of Decision

Security next argues that the trial court's statement of decision does not sufficiently address how Security's escrow errors were legally responsible for Bar-K's expenditure of litigation fees, despite Security's requests that the court do so, nor state whether there was substantial evidence that the fees charged were reasonable. We disagree.

Code of Civil Procedure section 632 states in pertinent part: "The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial." (Code Civ. Proc., § 632.)

The parties do not dispute that causation is a principal, controverted issue here. Security emphasizes that it is reversible error if the statement of decision fails to make findings on a material issue that would fairly disclose the trial court's determination, citing, for example, Sperber v. Robinson (1994) 26 Cal.App.4th 736, 745. Bar-K, on the other hand, emphasizes that, as the trial court stated in the statement of decision, the court "need only state the grounds on which the judgment rests, without necessarily specifying the particular evidence considered in reaching a decision," as indicated in Muzquiz v. City of Emeryville (2000) 79 Cal.App.4th 1106, 1125.

Security contends that the trial court's statement of decision "lacks the necessary findings that would explain or support the causative link between the two escrow errors and the fees and costs claimed and awarded by Bar-K. The trial court merely stated its conclusion and threw out an approximate percentage. This was simply not enough, particularly given the inconsistent findings in the escrow case statement of decision filed at the same time."

Security's argument is without merit. It appears based on its refusal to accept the trial court's findings. As is also stated in Sperber v. Robinson, *supra*, 26 Cal.App.4th at page 745, "[i]t is settled that '[i]n rendering a statement of decision . . . , a trial court is required only to state ultimate rather than evidentiary facts; only when it fails to make findings on a material issue which would fairly disclose the trial court's determination would reversible error result.'" (*Ibid.*) We have discussed the trial court's findings at some length already, and will not repeat them. Suffice it to say, they were sufficient to fairly disclose the trial court's determinations on the ultimate facts regarding causation.

Security also complains that the trial court did not address all of the pertinent issues Security raised in its requests to the court. However, as Bar-K points out and the trial court indicated, "[a] statement of decision need not address all the legal and factual issues raised by the parties." (Muzquiz v. City of Emeryville, *supra*, 79 Cal.App.4th at pp. 1124-1125.) The court was not required to address all of Security's issues.

f. Security's Procedural Due Process Argument

Security also argues that the trial court violated its procedural due process rights in the course of the tort of another trial by reviewing a portion of Bar-K's attorney fee invoices in camera, over Security's objection. We disagree.

Bar-K sought tort of another damages from Security for fees and costs it incurred in the title action against First American only, and not in the escrow case. Security did not seek discovery of Bar-K's escrow case billings. During trial, the court and parties discussed whether or not the court should review the escrow action billings to determine such things as whether Bar-K had carefully segregated billings between the two actions. Security formally requested that the court order their production, which the court took under submission. Some days later, Security repeated its request, asking the court to order Bar-K to produce, unredacted, the escrow billings subject to a protective order. Bar-K objected, but stated it was agreeable to the court's in camera review of the bills if the court considered it necessary. The court subsequently reviewed them in camera. In its statement of decision, it stated:

"[Security] raises a question about whether it was proper for me to review in camera certain billings for which Bar-K was making no claim. Bar-K claimed an attorney-client privilege for these. [Security] had not requested these billings before this last stage of the trial, so the question of privilege could not have been resolved earlier.

"It was suggested that I review them in camera to evaluate the claim of privilege. Upon review, I determined instead that they were not relevant enough to spend time analyzing whether the billings were privileged or not. They were never admitted into evidence and I did not consider them in deciding any of the issues here."

Security's arguments are unpersuasive. Despite the court's statement that the billings were not relevant, never admitted into evidence, and not considered in determining damages, Security asserts "they were clearly relevant to the trial court's ultimate arrival at its apportionment." This simply was not the case.

Security next complains that the court, as trier of fact, should not have reviewed material submitted by one side without giving the other side the chance to review it, whether or not the documents were admitted into evidence or considered relevance. It cites in support of this proposition In re George G. (1977) 68 Cal.App.3d 146, 157-158. However, that case is inapposite. The appellate court found that parents facing termination of their parental rights to minor children should have been allowed to review certain documents paraphrased by a probation officer in a report considered by the court, so that the

parents could effectively cross-examine the probation officer on the report. (*Id.* at pp. 157-158.) Here, the trial court stated that it did not consider *any* evidence based on the escrow action billings. In light of these circumstances, Security fails to establish that its cross-examination rights were somehow impaired.

Security also claims the court's in camera review violated Evidence Code section 915, subdivision (a), which Security claims expressly "precludes a court from hearing the allegedly privileged matter as a precondition to ruling on a claim of privilege," relying on dicta in *People v. Lutman* (1980) 104 Cal.App.3d, 64, 68, fn. 3. However, our independent research indicates that Evidence Code section 915, subdivision (a), merely provides, with certain exceptions, "that 'the presiding officer may not require disclosure of information claimed to be privileged under this division . . . in order to rule on the claim of privilege . . .'" (Evid. Code, § 915, subd. (a).) Section 915 also prohibits disclosure of information claimed to be privileged work product under Code of Civil Procedure section 2018.030, subdivision (b), but as to the work product privilege, if the court is unable to rule on the claim of privilege "without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and any other persons as the person authorized to claim the privilege is willing to have present." (Evid. Code, § 915, subd. (b).)" (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 736, fn. omitted.) We fail to see how the court's action violated Evidence Code section 915 in light of *Costco*, particularly when the court did not rule on any privilege or work-product claims because it found the escrow action billings were not sufficiently relevant.

In any event, the trial court stated it did not admit the escrow billings into evidence or consider them in making its rulings. Therefore, assuming for argument's sake that the court erred, it was undoubtedly harmless under any standard of review.

D. Bar-K's Tort of Another Damages Claims

1. "Relative Little Time Spent"

Bar-K cross-appeals that "[t]here is no substantial evidence to support the statement [by the trial court] that 'relatively little time was spent' on defending against First American's attempts to deny Bar-K full title insurance. Indeed, defending against these allegations was always a primary focus on Bar-K's legal strategy, as was proving them a primary focus for First American." Bar-K claims that as a result, we should remand this matter "with directions to the trial court to award tort of another damages at a greater-than-20 percent rate, in deference to the fact that Bar-K was reasonably compelled to expend a great deal of compensable time defending First American's title insurance complaint." We disagree.

Bar-K's argument is based on a subtle, but significant, rewriting of the trial court's actual statement. The court sought to "come up with a fair apportionment between fees that are recoverable and fees that I find are not recoverable" for litigation in Alameda County between 2002 and 2005, and determined that 20 percent of Bar-K's "total effort was devoted to issues that I find are compensable." The court stated some reasons for its decision. One reason was that "Bar-K [was] entitled to attorney fees to defend against First American's attempt to deny Bar-K full title-insurance coverage, *but relatively little time was spent on this at trial.*" (Italics added.) Bar-K rewrites the court's statement as that "'relatively little time was spent' *on defending against First American's attempts to deny Bar-K full title insurance coverage.*" (Italics added.) Bar-K then contends, based on its misstatement, that the court was incorrect, largely because of what Bar-K claims was an extensive effort before and during trial in preparing numerous written motions and arguing legal issues. However, Bar-K does *not* contest the court's characterization of the "relatively little time" spent *during trial* on the issue. Moreover, Bar-K does not explain why the court was not entitled to consider this fact as a significant factor in determining the amount of the award. In short, Bar-K fails to establish that the court's statement was not supported by substantial evidence.^[12] Therefore, we find Bar-K's claim of error lacks merit. (*In re S.C., supra*, 138 Cal.App.4th at p. 408; *Lennane, supra*, 51 Cal.App.4th at p. 1189.)

2. First American's First Cause of Action

Bar-K also argues that the trial court's decision to not award it tort of another damages for fees incurred successfully defending against First American's first cause of action in the title action was not supported by substantial evidence. Bar-K argues that we should remand to the trial court with directions to award damages that include this defense. Again, we disagree.

The court declined to award Bar-K attorney fees for its defense against First American's first cause of action (which alleged First American had no obligation regarding the mortgages' failure to conform to the lease's requirements "because Bar-K's claim that it did have title insurance coverage to protect it on this point was frivolous. Bar-K always knew that it had no such title-insurance coverage. The ploy that it concocted to try to make First American look like a 'co-escrow' is evidence of that." However, Bar-K points out, the court at the same time concluded that First American could not recover legal fees for its representation of Bar-K on this issue because it did not reserve its rights to recover such fees. Bar-K contends that the fact that it "prevailed" on its defense of the first cause of action "demonstrate there is no 'substantial evidence' for the court's finding that Bar-K's position was 'frivolous.'" Moreover, whether or not its position was frivolous is not relevant because all that matters is whether Security's "negligence was a substantial factor in causing the fees and costs incurred. [Security's] escrow negligence left Bar-K in a position where it had no choice other than to fight against First American's allegations. That is the heart of 'tort of another' law. That is why the only reasonable result is for Bar-K to recover its fees and costs[.]"

Bar-K's argument, unsupported by any legal authority, ignores that tort of another damages are to be awarded only when the court determines that it was "reasonably necessary" to incur the fees sought. (*Prentice, supra*, 59 Cal.2d at p. 620.) The court, having determined that Bar-K's defense was frivolous, obviously found the fees it incurred to make this defense were not reasonably necessary. Moreover, the court did *not* find that Bar-K "prevailed" on the first cause of action; rather, it determined in the title action that "Bar-K claims that the problem with the State of Hawaii was something that First American had to take care of anyway, but the Policy provides otherwise. The covenants, conditions, restrictions, reservations, agreements, obligations and other provisions as contained in the Sate of Hawaii lease are listed as Exceptions from Coverage under Schedule B of the Policy. First American did not insure that the mortgages did not violate the lease." Nonetheless, the court found First American was not entitled to damages because it did not reserve its rights to recover the expenses it incurred representing Bar-K. The court's reasoning in denying Bar-K tort of another damages under these circumstances was sound and supported by substantial evidence. Bar-K's argument is unpersuasive.

E. Bar-K's Claims Regarding Costs of Suit Against Security

Bar-K argues that the trial court also erred by failing to award Bar-K its full costs of suit against Security because Bar-K was so entitled as the "prevailing party." This argument also lacks merit.

1. The Proceedings Below

In its statement of decision regarding tort of another damages, the trial court awarded Bar-K \$39,594.96 in costs as tort of another damages, including 20 percent of its costs in the consolidated cases, which totaled \$32,122.11. The court stated that it was not awarding these as "costs in the usual sense, but as damages against [Security]. [¶] The decision here covers all costs incurred by Bar-K through the last session of the trial. If Bar-K claims recoverable costs against [Security] for periods thereafter, it may claim them by cost bill." The court issued a judgment filed on July 5, 2006 that stated, "Bar-K is also awarded its costs of suit against [Security], but only to the extent that those costs were incurred after the last session of the trial. These are to be requested by filing a memorandum of costs."

Subsequently, Bar-K filed a memorandum of costs for \$55,666.81, which included costs incurred prior to the last session of the trial. In its memorandum, Bar-K acknowledged that \$59,453.40 of its costs had been previously submitted to the court for its tort of another damages motion, and stated that it was reducing these costs by 20 percent (to \$47,562.72) to "reflect the previous award" by the court.

Security moved to strike or, in the alternative, tax Bar-K's costs. It based its motion in part on the assertion that apportionment was required because "certain items are not allowable costs under Code of Civil Procedure section 1033.5." It asserted that Bar-K had elected to seek recovery of costs in the consolidated cases as tort of another damages, the court had awarded Bar-K 20 percent of these costs as damages, and the court's judgment limited Bar-K's recovery of costs to those incurred after the last session of the trial.

Bar-K opposed Security's motion. It argued that, since it was the prevailing party in light of its damages award in the escrow action, it was entitled by statute to recover all of its costs unless Security showed that specific items were not reasonable or necessary, which Security had not even attempted to do. In its opposition, Bar-K made no mention of its previous submission of costs to the court as part of its request for damages, or of the court's judgment, other than to simply state that

there was no legal support" for Security's "newfangled theory" that its previous treatment of costs as tort of another damages amounted to an election that barred further recovery. It asserted that the court "has no discretion to do anything other than deny [Security's] motion in its entirety."

The court granted in part, and denied in part, Security's motion. It referred to the portion of its judgment limiting Bar-K's recovery of costs to those incurred after the last session of the trial, stated that "Bar-K has chosen to ignore this part of the judgment," and awarded Bar-K \$578.80 in recoverable costs.

2. Analysis

Bar-K argues that the trial court erred because its verified memorandum of costs was prima facie evidence of the propriety of the claimed cost; it was entitled as "prevailing party" as a matter of right to recover costs of suit pursuant to Code of Civil Procedure section 1032, subdivision (b) and case law; the court had no discretion to apportion it 20 percent of its costs in light of its status as the prevailing party; and, since it was the prevailing party, the trial court did not have the authority to reject 80 percent of its costs bill before Bar-K filed it.

Security argues that the court struck the great bulk of Bar-K's cost bill because it had already ruled that Bar-K could recover only 20 percent of its costs as tort of another damages. Security argues that allowing Bar-K to recover for costs both as damages and as costs would amount to a "double recovery."

We reject Bar-K's argument because Bar-K fails to establish how it can avoid the consequences of the trial court's judgment. As Security indicates, Bar-K elected to ask the court to treat its costs as damages. As a result, the court ruled that Bar-K was entitled to only 20 percent of its costs, and issued a judgment based in part on this ruling. As stated in the case cited by Security to the trial court in its motion to strike or tax Bar-K's memorandum of costs, "[t]he general rule is that once a judgment has been entered, the trial court loses its unrestricted power to change that judgment. The court does retain the power to correct clerical errors in a judgment which has been entered. However, it may not amend such a judgment to substantially modify it or materially alter the rights of the parties under its authority to correct clerical error." (*Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1237.) While the court maintains jurisdiction for a time to consider certain motions that could lead to modifications of the judgment (*ibid*), Bar-K employed none of these. Instead, as the court rightly pointed out in its ruling on Security's motion to strike or tax Bar-K's memorandum of costs, Bar-K chose to ignore the judgment altogether. By doing so, it left the court no choice but to deny its request for costs.^[13]

Bar-K's appellate arguments similarly ignore the critical consequences of the court's judgment. Bar-K argues without legal citation that "the trial court acted on the assumption that because Bar-K had claimed its costs in the earlier tort of another proceeding, it was somehow barred from again claiming those costs on its cost bill. This assumption finds no support in the law. The costs incurred by Bar-K in the instant lawsuit were all properly awardable by posttrial cost bill, as Bar-K was the prevailing party against [Security]. They were also properly awardable as damages on a tort of another theory (although the court ultimately decided to award them at a 20 percent rate under that theory). There is no legal or logical reason why the first award should act as any type of bar to the second."

As we have already indicated, the judgment was such a bar, which the court recognized when it denied Bar-K most of the costs it requested again postjudgment, in an effort that can only be characterized as an attempted second bite at the proverbial apple. Bar-K ignores the consequences of this judgment in its appellate papers. Therefore, we reject Bar-K's argument. (*Rochin v. Pat Johnson Manufacturing Co.*, *supra*, 67 Cal.App.4th at p. 1237; *In re S.C.*, *supra*, 138 Cal.App.4th at p. 408; *Lennane*, *supra*, 51 Cal.App.4th at p. 1189.)

F. Shifting the Costs of Suit Awarded to First American to Security

Bar-K argues that the trial court also erred by not "shifting" the costs of suit Bar-K was required to pay First American in the title action to Security pursuant to tort of another "principles." Bar-K fails to establish a basis for this claim.

The court issued a final statement of decision regarding tort of another damages on July 5, 2006. It did not award Bar-K any damages for costs Bar-K might be required to pay First American in the title action.

On September 1, 2006, Bar-K filed a motion to tax costs requested by First American or, in the alternative, "to shift costs" to Security pursuant to the tort of another principles articulated in Prentice, supra, 59 Cal.2d at p. 620. Security opposed this "shift" request on a variety of grounds, including that *Prentice* provided the authority for an award of damages only, and the court lacked jurisdiction to do so via a postjudgment award of costs. The court subsequently granted Bar-K's motion to tax costs in part, ordered it to pay First American \$103,590.19 in costs, and declined to allocate any of them to Security.

On appeal, Bar-K does not cite to anywhere in the record where it sought these costs as part of tort of another damages, referring us only to its "shift" request in its motion to tax costs. As Security argued below, *Prentice* plainly does not provide authority for such a request. Bar-K fails to further explain on appeal why the court erred in denying its request under these circumstances. Therefore, we reject its argument. (*In re S.C., supra, 138 Cal.App.4th at p. 408*; *Lennane, supra, 51 Cal.App.4th at p. 1189*.)

DISPOSITION

The trial court's rulings and judgment are affirmed in their entirety. The parties shall bear their own costs of appeal.

We concur:

Kline, P.J.

Haerle, J.

[1] Airlines later changed its name to "Rainbow City Partners." To be consistent, we refer to it as "Airlines" throughout this opinion.

[2] Security moved for judgment as well, which the court denied without prejudice.

[3] The trial court's grant of summary judgment also applied to Bar-K's third cause of action, which is not an issue on appeal.

[4] In fact, the dissenting judge in *Citicorp Sav. of Ill. v. Stewart Title Guar. Co., supra, 840 F.2d 526*, cited *Sala v. Security Title Ins. & Guar. Co. (1938) 27 Cal.App.2d 693 (Sala)*, in disagreeing with the approach taken by the majority. (*Citicorp*, at p. 534.)

[5] First American argues that the trial court decided to disregard this evidence based on a statement it made at hearing. However, the court's written order overruled First American's objection to McWhinnie's declaration.

[6] In light of our conclusion that Bar-K did not raise a triable issue of material fact regarding First American's diligence, we need not address other arguments by the parties, such as Bar-K's claim that it raised a triable issue of fact about the amount of damages it incurred because of the delay, and First American's argument that Bar-K has failed to show prejudicial error. Also, in making our rulings, we have not considered the trial court's later findings cited by First American in its discussion of prejudice. We agree with Bar-K that it would be inappropriate to do so. (See *Jacobs v. Retail Clerks Union, Local 1222 (1975) 49 Cal.App.3d 959, 966* ["the validity of a summary judgment is to be determined solely by the sufficiency of the affidavits . . . and . . . the facts before the trial court at the time it ruled on the motion"].)

[7] The requests for admissions related to Bar-K's co-escrow claim stated:

"No. 1: First American did not sign any escrow instructions in connection with the 1997 Transaction.

"No. 2: First American did not orally agree with Bar-K that it would act as an escrow agent in the 1997 Transaction.

"No. 3: First American did not expressly agree with Bar-K to act as an escrow agent in the 1997 Transaction.

"No. 4: First American did not agree with Security Title that it (First American) would act as an escrow agent in the 1997 Transaction.

"No. 5: Security Title did not act as First American's agent in handling the escrow for the 1997 Transaction.

"No. 6: First American did not authorize Security Title to act on its behalf in handling the escrow for the 1997 Transaction.

"No. 7: First American's only roles in the 1997 Transaction were: (1) conduit for funds between Bar-K and Security Title; and (2) insurer of title as set forth in the Policy."

"No. 8: First American received no fees or compensation for escrow services in connection with the 1997 Transaction."

[8] *Brooks, supra, 179 Cal.App.3d 500*, construed former Code of Civil Procedure sections 2033 and 2034, the substance of which was continued in the renumbered Code of Civil Procedure sections 2033.010 through 2033.420. (Stats. 2004, ch. 182, § 23.)

[9] Furthermore, First American argues, the court erred when it found it impossible to segregate the litigation expenses for uncovered claims. Also, argues First American, the court should have allocated at least some litigation expenses as damages, and should have

determined the issue in a separate trial phase pursuant to the parties' stipulation. We do not need to address these arguments because of our conclusion that a reservation of rights to reimbursement was necessary in the first place. For this same reason, we do not address Bar-K's argument that, because First American elected to prosecute an action to clear title, the policy required that First American bear the cost of that prosecution.

[10] We have no need to discuss this reasoning further regarding First American's right to recover its litigation expenses (see footnote 9, *ante*).

[11] In light of our conclusion, we do not need to further address Bar-K's argument that First American's effort to recoup some portion of its settlement payment did not meet the standards articulated in *Blue Ridge Ins. Co. v. Jacobsen* (2001) 25 Cal.4th 489.

[12] Furthermore, although Bar-K vigorously contends that it performed a great deal of motion work and research that the court purportedly ignored, it does not cite to any place in the record establishing the extensive fees it incurred for this work.

[13] Also, Security brought its motion to strike or tax Bar-K's memorandum of costs pursuant to Code of Civil Procedure section 1033.5. Code of Civil Procedure section 1033.5 provides that costs are recoverable only if they are "reasonably necessary to the conduct of the litigation." (Code Civ. Proc., § 1033.5; *Thon v. Thompson* (1994) 29 Cal.App.4th 1546, 1548.) The trial court's determination that Security was only entitled to 20 percent of its costs as tort of another damages necessarily involved the conclusion that only that amount was "reasonably necessary" for Bar-K to have incurred. (See *Prentice, supra*, 59 Cal.2d, at p. 620 ["a third person is entitled to recover compensation for the *reasonably necessary* loss of time, attorney's fees, and other expenditures thereby suffered or incurred" (italics added)].)

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