*2012 Cal. App. Unpub. LEXIS 3226, **

JAMES SEDLAR, Plaintiff and Appellant, v. USAA CASUALTY INSURANCE COMPANY, INC., Defendant and Respondent.

C066089

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

2012 Cal. App. Unpub. LEXIS 3226

April 30, 2012, Opinion Filed

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PRIOR HISTORY: [*1]
Superior Court of Sacramento County, No. 06AS04177.

CORE TERMS: insurer, insured's, causes of action, tortfeasor, bad faith, spoliation of evidence, co-plaintiff, policy limit, leave to amend, subrogation, spoliation, tire, subrogation action, manufacturer, contractual, prosecute, demurrer, subrogation claim, viable, notice, chair, stipulated judgment, breach of contract, right of action, good faith, fair dealing, compensated, splitting, covenant, patient

JUDGES: HOCH, J.; BLEASE, Acting P. J., HULL, J. concurred.

OPINION BY: HOCH, J.

OPINION

This case presents the issue of whether an insured may sue an insurer for negligence after the insurer's agent has lost the evidence against the manufacturer of a product alleged to have caused damage exceeding the limits of the insurance policy. Appellant James Sedlar was paid the insurance policy limit by respondent USAA Casualty Insurance Company, Inc. (USAA). Sedlar was underinsured, and informed USAA that the policy limit was inadequate to cover all his losses. USAA filed its own subrogation action against Homedics-USA, Inc., (Homedics) to recoup the amount paid to Sedlar under his policy. However, USAA's agent, John Ford, lost the product. As a result, a judgment was entered against USAA in its action against Homedics in federal court.

In this subsequently filed case, Sedlar sued USAA, Ford, and Homedics.[1] USAA demurred to the causes of action against it for negligence, breach of contract, and bad faith. The trial court sustained the demurrer without leave to amend.

FOOTNOTES

1 Sedlar also named Sidhi Consultants (Sidhi) as a defendant in the event the evidence

would show that Sidhi **[*2]** (rather than Ford) lost the defective product. However, Sedlar's theory of the case rested on the assertion that it was Ford who misplaced the product. The resolution of Sedlar's contentions regarding USAA's liability is not affected by the possibility that it might have been Sidhi that was responsible for the loss. Thus, for the sake of convenience, we refer to Ford as USAA's agent who was responsible for the loss.

On appeal, Sedlar contends (1) USAA acted in bad faith by failing to name him as a co-plaintiff in the insurer's action against Homedics, and (2) he had a valid cause of action for negligence against USAA even if there is no viable tort cause of action for negligent spoliation of evidence.

We conclude that USAA had no duty to name Sedlar as a co-plaintiff in seeking to recover from Homedics, and Sedlar's negligence cause of action constituted a nonviable cause of action. Accordingly, we affirm.

STANDARD OF REVIEW

In reviewing a judgment of dismissal following the sustaining of a demurrer without leave to amend, we apply well settled principles of review. "'The function of a demurrer is to test the sufficiency of the [pleading] as a matter of law, and it raises only a question **[*3]** of law. [Citations.] On a question of law, we apply a de novo standard of review on appeal.' (*Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420.)" (*First Aid Services of San Diego, Inc. v. California Employment Development Dept.* (2005) 133 Cal.App.4th 1470, 1476.) We begin by examining the complaint to determine whether it alleges facts stating a viable cause of action under any legal theory. (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595.) If the complaint fails to state a cause of action, we consider whether the trial court abused its discretion by sustaining the demurrer without leave to amend. (*Ibid.*) "Under both standards, appellant has the burden of demonstrating that the trial court erred. [Citation.] An abuse of discretion is established when 'there is a reasonable possibility the plaintiff could cure the defect with an amendment.' (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)" (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595.)

FACTUAL AND PROCEDURAL HISTORY

The pertinent facts of this case are undisputed. As alleged in the complaint, Sedlar bought a chair massager manufactured by Homedics that caught fire and caused more than **[*4]** $700,000 in property damage. The damaged property belonged to Sedlar and was insured against loss by USAA. Sedlar tendered a claim for the loss. USAA paid the policy limit of $366,903.96 to Sedlar, and hired Ford to examine the chair massager in preparation for a subrogation action against Homedics. Ford determined that the chair massager was defective and had caused the extensive fire damage.

USAA sued Homedics in an action that was removed to federal court on the basis of diversity of citizenship between the parties. USAA did not name Sedlar as a co-plaintiff in its claims of strict liability and negligence against Homedics. Homedics demanded production of the chair massager, but USAA was unable to comply because Ford had lost it. As a result, a stipulated judgment was entered against USAA in its action against Homedics.

Sedlar filed the present action against USAA, Ford, and Homedics in Sacramento County Superior Court. As relevant to this appeal, Sedlar's complaint alleged causes of action against USAA for negligence, breach of contract, and bad faith. USAA filed a demurrer, which the trial court sustained without leave to amend. In pertinent part, the court's order sustaining the **[*5]** demurrer explained:

"3rd cause of action negligence: Sustained without leave to amend since there is no cause of action for negligent spoliation of evidence. *Farmers Insurance Exchange v Superior Court* (2000) 79 Cal.App.4th 1400, 1404. Moreover, since [Sedlar] admits he has been paid all

benefits due to him under the insurance agreement, there is no breach of contract, and consequently no breach of duty arising from the contract. [¶] . . . [¶]

"6th cause of action bad faith: Sustained without leave to amend for failure to state a cause of action. [Sedlar] alleges [USAA] committed bad faith when they [*sic*] 'usurped' his claims against Homedic [*sic*] by failing to name him in the subrogation action in federal court against Homedic [*sic*], and failed to name him in as [*sic*] a plaintiff in the pending action against John Ford. However, there is no cause of action for tortious bad faith when no benefits are due. *Progressive West Ins. Co. v Superior Court* (2005) 135 Cal.App.4th 263, 279. [Sedlar] admits that no benefits were due under the policy and that the reason he was not made whole on the claim was because he was underinsured.

"In a subrogation action, if an insured is underinsured the insured **[*6]** must be fully compensated before the insurer gets anything. *Sapiano v Williamsburg Natl Insurance Co.,* (1994) 28 Cal.[App.]4th 533, 536-537. However, it does not follow that the insurer is liable for bad faith because it is pursuing a subrogation claim in its own name without also pursuing plaintiff's own separate claim to be made whole. The insurer is the real party in interest for its own subrogation claim. There is no requirement that the insurer bear the costs of litigation and pursue an action on behalf of the insured. Moreover, the rule that the insured must be made whole may not apply where the insurer bears the cost of litigation against the tortfeasor. In such event, the insurer is equitably entitled to be reimbursed for its subrogation claim out of any judgment recovered even if the insured is not made whole. *Travelers Indem. Co. v Ingebretsen* (1974) 38 Cal.App.3d 858, 866-867.

"Since plaintiff has been only partially compensated for a loss, both the insurer and the insured have an interest in the right of action against the responsible party, here the entity that is alleged to have lost the massage chair. In a subrogation action, the insurer has the right to the amount paid **[*7]** to the insured, and the insure[d] has the right to the balance of his loss. *Hodge v Kirkpatrick Development, Inc.* (2005) 130 Cal.App.4th 540, 541. Both parties should be parties to the same action to avoid splitting a cause of action. Although [Sedlar] should be joined in the Ford action, [Sedlar] has provided no authority that USAA is required to prosecute the action on his behalf and pursue his separate claim to make him whole. [U]SAA does not oppose his intervention in the pending case and [Sedlar] should seek leave to intervene in the case 06AS01140. No leave to amend is granted since plaintiff has offered no authority for a bad faith claim arising from failure of an insurer to prosecute the insureds [*sic*] separate claim against the tortfeasor."

Sedlar filed a timely notice of appeal following entry of the trial court's judgment of dismissal.

DISCUSSION

I

Cause of Action for Bad Faith

Sedlar contends the trial court erred in concluding that USAA did not have a duty to litigate on his behalf in asserting claims against Homedics. Sedlar further argues that "USAA is liable for bad faith because it unilaterally stipulated to a judgment that extinguished . . . Sedlar's claims against third **[*8]** parties through the doctrine of *res judicata.*" We reject the contentions.

A.

Whether USAA Had a Duty to Name Sedlar as a Co-plaintiff

As this court has previously explained, "'Every contract imposes on each party an implied duty of good faith and fair dealing. [Citation.] Simply stated, the burden imposed is "'that neither party will do anything which will injure the right of the other to receive the benefits of the

agreement.'" [Citations.] Or, to put it another way, the "implied covenant imposes upon each party the obligation to do everything that the contract presupposes they will do to accomplish its purpose." [Citations.] A "'breach of the implied covenant of good faith and fair dealing involves something beyond breach of the contractual duty itself,' and it has been held that '"[b]ad faith implies unfair dealing rather than mistaken judgment. . . ." [Citation.]' [Citation.]" [Citation.] For example, in the context of the insurance contract, it has been held that the insurer's responsibility to act fairly and in good faith with respect to the handling of the insured's claim "'is not the requirement mandated by the terms of the policy itself — to defend, settle, or pay. It is the **[*9]** obligation . . . under which the insurer must act fairly and in good faith in discharging its contractual responsibilities.' [Citation.]" [Citation.]' (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 345-346.)" (*Tilbury Constructors, Inc. v. State Comp. Ins. Fund* (2006) 137 Cal.App.4th 466, 474.)

Here, USAA fulfilled its contractual duties by paying the insurance policy limit to Sedlar. Having paid Sedlar, USAA acquired subrogation rights against Homedics. "Subrogation is the insurer's right to be put in the position of the insured, in order to recover from third parties who are legally responsible to the insured for a loss paid by the insurer. [Citation.]" (*Plut v. Fireman's Fund Ins. Co.* (2000) 85 Cal.App.4th 98, 104, quoting *Barnes v. Independent Auto. Dealers of California* (9th Cir. 1995) 64 F.3d 1389, 1392.) Once the insurer has fulfilled its obligation to the insured, it becomes "entitled to consider its own interests especially in the context of conduct it engages in after it timely pays out benefits." (*Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 282 (*Progressive West*).)

If the insured has not yet sued **[*10]** the tortfeasor, the insurer ordinarily may initiate legal action by bringing a subrogation claim against the tortfeasor. In *Allstate Ins. Co. v. Mel Rapton, Inc.* (2000) 77 Cal.App.4th 901 (*Allstate Ins. Co.*), this court has explained: "Pursuant to the subrogation doctrine, when an insurer has paid an insured the amount of a loss caused by a third party, the insurer may step into the shoes of the insured and pursue the insured's rights and remedies against the third party tortfeasor. (*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 633-634; *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1994) 21 Cal.App.4th 1586, 1595-1596.) [¶] When, as often happens, the insured is only partially compensated by the insurer for a loss (because of deductibles, policy limits, and exclusions), operation of the subrogation doctrine 'results in two or more parties having a right of action for recovery of damages based upon the same underlying cause of action.' (*Ferraro v. Southern Cal. Gas Co.* [(1980)] 102 Cal.App.3d [33,] 41, fn. omitted.) The insured retains the right to sue the responsible party for any loss not fully compensated by insurance, and the insurer has the right to sue the **[*11]** responsible party for the insurer's loss in paying on the insurance policy. (*Ibid.*) The insurer is not limited to an action in intervention but may bring a separate independent action to recover directly from the third party tortfeasor. (*Deutschmann v. Sears, Roebuck & Co.* (1982) 132 Cal.App.3d 912, 915-916.)" (*Allstate, supra,* 77 Cal.App.4th at p. 908.)

If the insured has already commenced action against the tortfeasor, the insurer may join in the action. (*Progressive West, supra,* 135 Cal.App.4th at p. 272.) In such a case, "to preserve its right of subrogation, the insurance company must either interplead itself into any action brought by the insured against the third party tortfeasor, or wait to seek reimbursement under the language of its policy from its insured to the extent that the insured recovers money from the third party." (*Id.* at p. 273.) "To avoid a violation of the rule against splitting a cause of action, the insured and insurer 'should join in a single suit against the tortfeasor.'" (*Allstate, supra,* 77 Cal.App.4th at p. 909, quoting *Ferraro v. Southern Cal. Gas Co.* (1980) 102 Cal.App.3d 33, 43.)

The trial court in this case noted that Sedlar should have joined in USAA's **[*12]** action against Homedics in order to avoid splitting a cause of action against the product's manufacturer. Sedlar agrees that he should have been a party to USAA's lawsuit against Homedics. However, Sedlar goes further by asserting that he should have been named by USAA as a co-plaintiff.

Asserting that "[USAA] had complete control over that litigation, which was dispositive of both USAA's and . . . Sedlar's rights against the tortfeasor," Sedlar implies that the insurer should be responsible for prosecuting his claim. (Bolding omitted.) We disagree.

USAA fulfilled its obligation to Sedlar by timely paying the policy limit for his loss. (*Progressive West, supra,* 135 Cal.App.4th at p. 279.) Sedlar does not argue that USAA had any express contractual obligation to name him as a co-plaintiff or to prosecute an action against Homedics on his behalf. Instead, Sedlar maintains that USAA had a fiduciary duty to him that exceeded the extent of the policy limit to include the obligation to litigate on his behalf in USAA's subrogation action against Homedics. Thus, Sedlar asks us to create tort liability for USAA's failure to name him as a co-plaintiff. We decline to do so.

Just as an insurer must **[*13]** preserve its subrogation rights by interpleading itself into extant litigation by the insured against the tortfeasor, so too the insured must interplead or join litigation initiated by the insurer against the tortfeasor in order to preserve his or her rights and to avoid splitting a cause of action. (See *Allstate, supra,* 77 Cal.App.4th at p. 909.) As the trial court noted, Sedlar was aware of the action commenced by USAA against Homedics and failed to join that action even though USAA did not object to him intervening. In the absence of an agreement to prosecute an action on Sedlar's behalf, USAA had no duty to name him as a co-plaintiff.

Accordingly, Sedlar's bad faith claim against USAA fails because "there can be no action for breach of the implied covenant of good faith and fair dealing because the covenant is based on the contractual relationship between the insured and the insurer." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 36.)

We reject Sedlar's reliance on the case of *Faraino v. Centennial Ins. Co.* (N.Y. Sup. Ct. 1982) 117 Misc.2d 297, reversed by *Faraino v. Centennial Ins. Co.* (N.Y. App. Div. 1984) 103 A.D.2d 790. There, the trial court concluded that the equitable **[*14]** duty of good faith and fair dealing gave rise to an obligation of the insurer to provide counsel for the insured in an action against the tortfeasor. (*Faraino, supra,* 117 Misc.2d at p. 302.) However, this conclusion was reversed by the New York appellate court, which held that it was a "fictional implementation" that allowed the insurer to sue in the name of the insured in order to bring a subrogation claim. (*Faraino, supra,* 103 A.D.2d at p. 791.) The appellate court held, "This fiction does not, however, require the insurer to commence such an action." (*Ibid.*) Consequently, the only case cited by Sedlar to create a noncontractual obligation by an insurer to prosecute an action on behalf of the insured against a tortfeasor has been overruled.

Here, the trial court correctly concluded that Sedlar's complaint failed to state a cause of action for bad faith based on grounds that USAA had a duty to name him as a co-plaintiff or to prosecute an action on his behalf against Homedics.

B.

Whether USAA Acted in Bad Faith by Stipulating to a Judgment with Homedics

Sedlar next contends USAA acted in bad faith by entering into a stipulated judgment with Homedics that extinguished his right to damages **[*15]** against the manufacturer.[2] We deem the argument forfeited for failure to provide an adequate record to allow review of the claim.

FOOTNOTES

[2] We note that Sedlar's and USAA's interests in bringing an action aligned insofar as they both sought to recover for product liability. USAA suffered the same extinguishment of a claim against Homedics as did Sedlar.

In arguing that USAA's stipulated judgment ended his right of action against Homedics, Sedlar alludes to the trial court's dismissal of his claim against the manufacturer on summary judgment. Sedlar's complaint does not allege that the judgment extinguished his right of action against Homedics. And Sedlar has not provided a record that supports this assertion. We do not have the stipulated judgment entered into by USAA and Homedics or the trial court's order on Homedics's summary judgment in this case. Thus, we cannot assess the effect of the stipulated judgment on Sedlar's ability to recover from Homedics for a defective product.

An appellant "bears the burden to provide a record on appeal which affirmatively shows that there was an error below, and any uncertainty in the record must be resolved against the [appellant]." (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549; **[*16]** accord *People v. $17,522.08 United States Currency* (2006) 142 Cal.App.4th 1076, 1084.) For lack of an adequate record to review his contention regarding the preclusive effect of the stipulated judgment between USAA and Homedics, we deem Sedlar's contention to be forfeited.[3]

FOOTNOTES

[3] We deny USAA's request to take judicial notice of documents filed after Sedlar's notice of appeal. "Appellate courts rarely accept postjudgment evidence or evidence that is developed after the challenged ruling is made." (*In re Sabrina H.* (2007) 149 Cal.App.4th 1403, 1416.) Here, the documents for which judicial notice is requested do not inform whether the trial court's order was correct at the time the judgment was entered, and we decline to notice them. (See *ibid.*)

II

Cause of Action for Negligence

Sedlar next contends the trial court erred in dismissing his cause of action for negligence against USAA. He argues that he asserted a viable negligence cause of action rather than a nonviable cause of action for negligent spoliation of evidence. We disagree.

A.

Negligent Spoliation of Evidence

The California Supreme Court addressed spoliation (or loss) of evidence in the seminal cases of *Cedars–Sinai Med. Ctr. v. Superior Court* (1998) 18 Cal.4th 1 **[*17]** (*Cedars–Sinai*) and *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464 (*Temple Community*). In *Cedars-Sinai,* the high court held that no tort cause of action could be asserted against a hospital for intentional spoliation of evidence due to its failure to preserve evidence when it was sued for medical malpractice. (*Cedars–Sinai, supra,* 18 Cal.4th at p. 5.) In *Temple Community,* the Supreme Court held that a badly burned patient could not assert a claim for third-party spoliation of evidence against a hospital that lost a piece of medical equipment claimed to have been responsible for the injuries. (*Temple Community, supra,* 20 Cal.4th at p. 469.) The hospital's loss of the equipment effectively eliminated the patient's ability to bring a product liability action against the manufacturer. (*Id.* at p. 474.) Even though the patient's legal counsel expressly requested that the hospital preserve the evidence, the hospital's loss did not give rise to a tort cause of action. (*Id.* at pp. 467, 474.)

Justice Kennard dissented in *Temple Community* on grounds that she would have allowed the patient to state a cause of action for intentional spoliation of evidence against the hospital. **[*18]** (*Temple Community, supra,* 20 Cal.4th at p. 480 [dis. opn. of Kennard, J.].) However, even the dissent would have disallowed a tort cause of action for loss of the evidence as a

matter of mere negligence. (*Id.* at p. 485.) Thus, even under the dissent's approach, "there would be no liability if the missing evidence simply has been discarded or misplaced in the ordinary course of events." (*Ibid.*)

In *Farmers Ins. Exchange v. Superior Court* (2000) 79 Cal.App.4th 1400 (*Farmers*), the Court of Appeal concluded that "[a] tort cause of action for negligent spoliation of evidence cannot be maintained." According to *Farmers,* this conclusion followed "inexorably" from the California Supreme Court's holdings in *Cedars-Sinai* and *Temple Community.* (*Farmers, supra,* at pp. 1401-1402.) *Farmers* involved a passenger in a motor vehicle who sought to bring a products liability action against the manufacturer of an allegedly defective tire that caused an accident. (*Id.* at p. 1402.) The insurer of the motor vehicle took possession of the tire before losing it. (*Ibid.*) The passenger then brought an action against the insurer for negligence. (*Id.* at pp. 1402-1403.) The trial court denied the insurer's motion **[*19]** for summary judgment on the theory that the passenger "was entitled to proceed 'under a theory that a voluntary undertaking with detrimental reliance took place.'" (*Id.* at p. 1403.)

In *Farmers,* the insurer sought writ review of the trial court's decision, and the appellate court reversed. (*Farmers, supra,* 79 Cal.App.4th at p. 1404.) The *Farmers* court explained that "[t]he policy considerations that led the Supreme Court to refuse to recognize tort causes of action for both first party and third party intentional spoliation apply with equal force when the loss or destruction of evidence was the result of negligence. First, any injury from spoliation is speculative, requiring a two-step process of assessing the merits of the legal claim to which the evidence related and then the importance of the evidence to that claim. 'It seems likely that in a substantial proportion of spoliation cases the fact of harm will be irreducibly uncertain. In such cases, even if the jury infers from the act of spoliation that the spoliated evidence was somehow unfavorable to the spoliator, there will typically be no way of telling what precisely the evidence would have shown and how much it would have weighed **[*20]** in the spoliation victim's favor. Without knowing the content and weight of the spoliated evidence, it would be impossible for the jury to meaningfully assess what role the missing evidence would have played in the determination of the underlying action. The jury could only speculate as to what the nature of the spoliated evidence was and what effect it might have had on the outcome of the underlying litigation.' (*Cedars–Sinai, supra,* 18 Cal.4th at pp. 13-14.)" (*Farmers, supra,* 79 Cal.App.4th at p. 1404.)

We agree with the *Farmers* court that a cause of action for negligent spoliation of evidence is not viable. The trial court correctly dismissed Sedlar's cause of action for negligence, which was premised on Ford's unintentional loss of the evidence against Homedics. (*Farmers, supra,* 79 Cal.App.4th at pp. 1403-1404.)

Sedlar urges us to reverse on the basis of the decision in *Cooper v. State Farm Mutual Automobile Ins. Co.* (2009) 177 Cal.App.4th 876 (*Cooper*). As in *Farmers, supra,* 79 Cal.App.4th 1400, *Cooper* involved an insurance company that took possession of an allegedly defective tire to investigate whether it had been the cause of a vehicle accident. (*Cooper, supra,* at pp. 892-894.) **[*21]** State Farm, the insurance company in *Cooper,* took possession of the tire to prepare its $15,000 subrogation claim but lost the tire after expressly promising the insured that it would preserve the tire. (*Id.* at p. 883.) Due to the loss, the insured had no way to prove that nearly $41,000 of medical expenses were caused by the product defect. (*Id.* at p. 887.) The *Cooper* court held that the insurance company's express promise gave rise to an action for breach of contract, even though the related cause of action for negligent spoliation of evidence was not viable. (*Id.* at p. 894.)

As *Cooper* explains, "rather than seeking to impose a general tort duty of care on State Farm to preserve evidence, [the insured], during his opening statement, presented prima facie facts to support an independent duty to preserve the tire based on State Farm's promise and [insured's] reliance thereon. As stated in *Coprich* [*v. Superior Court* (2000)] 80 Cal.App.4th [1081], while there may be no general tort duty to preserve evidence, this 'does not preclude the existence of a duty based on contract.' (*Coprich, supra,* [at p.] 1091, citing *Temple, supra,*

20 Cal.4th at p. 477.) The general tort duty 'policy considerations **[*22]** do not negate the existence of a contractual obligation created by mutual agreement or *promissory estoppel.*' (*Coprich, supra,* at p. 1092, italics added.)" (*Cooper, supra,* at p. 894.)

Unlike *Cooper, supra,* 177 Cal.App.4th 876, plaintiff in this case alleges no express promise to safeguard the evidence that would hold the insurer responsible under a breach of contract theory. Consequently, we reject Sedlar's reliance on the breach of contract theory upon which *Cooper* rests. The trial court did not err in dismissing Sedlar's cause of action for negligence arising from the loss of the allegedly defective product by USAA's agent.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (5).)

HOCH, J.

We concur:

BLEASE, Acting P. J.

HULL, J.

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