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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

BUDGET RENT A CAR SYSTEM, INC.,

Cross-complainant and Appellant,

v.

MARY ANN DODIER et al.,

Cross-defendants and Respondents.

E056411

(Super.Ct.No. CIVVS807300)

OPINION

APPEAL from the Superior Court of San Bernardino County. Steve Malone,  
Judge. Affirmed.

Law Office of Michael A. Kruppe and Michael A. Kruppe for Cross-complainant  
and Appellant.

Cihigoyenette, Grossberg & Clouse, Katharine L. Spaniac and Anthony C.  
Ferguson, for Cross-defendants and Respondents.

Cross-complainant and appellant Budget Rent a Car System, Inc. (Budget) appeals from the judgment in its cross-action against cross-defendants and respondents Mary Ann<sup>1</sup> Dodier and her company, M. Dodier, Inc., (Dodier) for contractual indemnity.

## I. PROCEDURAL BACKGROUND AND FACTS

In 2004, Dodier executed an Independent Operator Agreement (2004 Operator Agreement) with Budget for the purpose of operating a rental car business. According to the 2004 Operator Agreement, Dodier was an “independent, commissioned operator” who rented Budget’s vehicles to customers. Initially, the location of Dodier’s business was 14850 La Paz Drive in Victorville, California; however, by 2007, Dodier had relocated the business to 14211 Amargosa Road in Victorville, California (Amargosa location).<sup>2</sup> Budget was the sole tenant of the Amargosa location, responsible for building out the site to fit its needs and maintaining it.

On September 18, 2007, Jo Anna Szondy (Szondy), one of Dodier’s customers, fell at the Amargosa location when she stepped into a gap between the ramp and the handrail as she was exiting the car rental agency. Szondy sued Mary Ann Dodier, Dodier and Budget for negligence and violation of Americans with Disabilities Act (ADA)

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<sup>1</sup> Although cross-defendant and respondent’s name is spelled both “Maryann” and “Mary Ann,” in the record, she signed her name as “Mary Ann” Dodier on the Independent Operator Agreement, so we will use that spelling.

<sup>2</sup> Budget entered into two separate contracts (operator agreements) with Dodier, the first in 2004, covering the 14850 La Paz Drive location, and the second in 2008, covering a separate car rental location at 15059 La Paz Drive. There was no operator agreement that identified the Amargosa location, nor was the 2004 Operator Agreement modified to recognize that the physical location of Dodier’s agency had changed from La Paz Drive to Amargosa Road.

guidelines.<sup>3</sup> Szondy claimed that defendants were negligent in that “each of them, owned, operated, and maintained” the Amargosa location and that its ramp was “an accessible means of travel” as defined by “the [ADA] Guidelines”; however, the ramp did not comply with the “ADA Guidelines and/or the building code.” Budget cross-complained against cross-defendants for indemnity, partial indemnity, contribution, apportionment, declaratory relief, and breach of contract. After Szondy settled her claims with defendants, Budget’s cross-claims were tried on January 23 and 24, 2012, by the court. The primary claim presented was Budget’s right to indemnity based on the language in the 2004 Operator Agreement.

In seeking express contractual indemnity, Budget relied on the following language: “Operator [(*Dodier*)] shall defend, *indemnify* and hold harmless the Company [(*Budget*)] and its officers, directors, employees, parent, affiliates and subsidiaries *from and against any and all claims*, liabilities, demands, losses, suits, penalties, fines, judgments and costs, including legal costs and expenses and reasonable attorney’s fees, allegedly *arising directly or indirectly from the condition of the Location and/or any willful or negligent act or omission* (including the failure to follow the Company’s instructions) *done or suffered by Operator or its employees, or by Operator’s contractors or vendors arising from the Business at the Location.*” (Italics added.) Budget further

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<sup>3</sup> She also sued Quan-Pellisier, the owner of the premises; however, Quan-Pellisier is not a party to this appeal. Szondy’s second amended complaint was filed on May 5, 2011.

pointed out that the contract provided that Dodier was to have Budget named as an additional insured under its commercial general liability policy.

Following the close of evidence, the trial court issued its proposed statement of decision, finding in favor of cross-defendants and against Budget.<sup>4</sup> Judgment was entered on May 2, 2012, with the court adopting its statement of decision. Regarding Budget's right to indemnity, the trial court found that the language in the indemnity clause provides that "the claim must arise 'directly or indirectly from the condition of the Location' and/or from 'the willful or negligent act or omission done or suffered by [Dodier] or its employees.'" Classifying the provision as a type II indemnity clause,<sup>5</sup> the court concluded that it did not apply absent proof that the allegations against Budget involved passive negligence only, and there was no evidence of passive negligence. Rather, Budget's conduct involved active negligence given its responsibility for improving and maintaining the Amargosa location.

## II. DISCUSSION

In challenging the judgment, Budget's primary issues involve tender of Szondy's action to Dodier for defense and interpretation of the indemnity clause in the operator agreement. Regarding tender, Budget contends: (1) the trial court erred in finding that Budget was required to prove it had made a formal tender of this litigation to either

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<sup>4</sup> After Budget rested, the trial court granted cross-defendants' oral request for nonsuit in favor of Mary Ann Dodier without objection, but denied it as to Dodier on the grounds Budget "had met its initial burden of establishing that a contract existed."

<sup>5</sup> *MacDonald & Kruse, Inc. v. San Jose Steel Co.* (1972) 29 Cal.App.3d 413 (*MacDonald & Kruse*).

Dodier or Sequoia Insurance Company (Sequoia); (2) the trial court erred in misconstruing Budget's cross-complaint as insufficient to constitute notice of tender of this litigation; and (3) the trial court erred in refusing to allow Budget's counsel to testify that a verbal tender was made.

Regarding interpretation of the indemnity clause, Budget claims: (1) the trial court erred in requiring Budget to prove active negligence against Dodier; (2) the trial court erred in finding the indemnity clause to be type II; (3) the trial court erred in interpreting the indemnity clause in the operator agreement; and (4) the trial court erred in interpreting the allegations in Szondy's complaint as active negligence against Budget.

Additionally, Budget asserts that the trial court erred (1) in failing to apply a rebuttable presumption that Dodier was liable for the amount paid to settle the claims against it, (2) in failing to address Budget's claim that Dodier breached the contract by failing to secure adequate liability insurance and/or have Budget named as an additional insured, and (3) in failing to address Budget's assertion of promissory estoppel.

We begin our analysis with the indemnity clause because its interpretation affects the viability of Budget's other claims.

### **A. Did the Trial Court Correctly Interpret the Indemnity Clause in the Operator Agreement?**

#### *1. Indemnity*

“Indemnity may be defined as the obligation resting on one party to make good a loss or damage another party has incurred. [Citation.] This obligation may be expressly provided for by contract [citation], it may be implied from a contract not specifically

mentioning indemnity [citation], or it may arise from the equities of particular circumstances [citations]. Where, as here, the parties have expressly contracted with respect to the duty to indemnify, the extent of that duty must be determined from the contract and not by reliance on the independent doctrine of equitable indemnity.

[Citation.]’ [Citation.]

“Some California cases have interpreted express indemnity provisions by reference to a classification system described in [*MacDonald & Kruse*]. According to *MacDonald & Kruse*, the first type of indemnity provision (type I) ‘provides “expressly and unequivocally” that the indemnitor is to indemnify the indemnitee for, among other things, the negligence of the indemnitee,’ and the indemnitee is indemnified whether its liability arises from its sole or concurrent negligence. [Citation.] Under the second type of indemnity clause [(type II)], the indemnitee would be indemnified for his or her own *passive* negligence but not for *active* negligence. *MacDonald & Kruse* described the “type II” indemnity clause by examples: A clause providing for indemnity for the indemnitee’s liability “howsoever same may be caused” [citation] or “regardless of responsibility for negligence” [citation], or “arising from the use of the premises, facilities or services of [the indemnitee]” [citation], or “which might arise in connection with the agreed work” [citation], or ““caused by or happening in connection with the equipment or the condition, maintenance, possession, operation or use thereof”” [citation], or “from any and all claims for damages to any person or property by reason of the use of said leased property” [citation].’ [Citation.] The third type of indemnity clause [(type III)] ‘is that which provides that the indemnitor is to indemnify the

indemnitee for the indemnitee's liabilities caused by the indemnitor, but which does not provide that the indemnitor is to indemnify the indemnitee for the indemnitee's liabilities that were caused by other than the indemnitor. Under this type of provision, any negligence on the part of the indemnitee, either active or passive, will bar indemnification against the indemnitor irrespective of whether the indemnitor may also have been a cause of the indemnitee's liability.' [Citation.]" (*McCrary Construction Co. v. Metal Deck Specialists, Inc.* (2005) 133 Cal.App.4th 1528, 1536-1537 (*McCrary*)).

## 2. *Standard of Review*

The interpretation of a contract, without the use of any parol evidence, is a matter of law for this court to determine, and we are not bound by the interpretation of the trial court. Therefore, our review is de novo. (*Amwest Surety Ins. Co. v. Patriot Homes, Inc.* (2005) 135 Cal.App.4th 82, 87; *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1275 (*Heppler*)).

## 3. *Rules of Interpretation of Indemnity Clause*

Whether an indemnity agreement applies in a given case depends primarily on contractual interpretation and the intent of the parties as expressed in the agreement. (*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 633 (*Rossmoor*)). The contract must be interpreted to give effect to the mutual intentions of the parties, which are ascertained from the "clear and explicit" language the parties have used. (*Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500, 504 (*Continental Heller*); see also Civ. Code, §§ 1636, 1638, 1639.)

If indemnification is to be imposed regardless of negligence, the language of the contract to that effect must be specific and unequivocal and must evidence the clear intent of the parties. (See *Heppler, supra*, 73 Cal.App.4th at p. 1278.)

#### 4. Analysis

The indemnity provision of the operator agreement contains language requiring Dodier to indemnify Budget from any claim “*arising directly or indirectly from the conditions of the Location . . .*” (Italics added.) Relying on this provision, Budget claimed that Dodier was required to indemnify it for any and all losses it incurred in defending and/or settling Szondy’s complaint. The trial court disagreed, concluding that the language requiring Dodier to indemnify Budget from any claim “*arising directly or indirectly from the conditions of the Location*” makes the clause a type II clause. (Italics added.) Type II clauses provide for indemnity for the indemnitee’s liability ““howsoever same may be caused” [citation] or “regardless of responsibility for negligence” [citation], or “arising from the use of the premises, facilities or services of [the indemnitee]” [citation] . . . or “from any and all claims for damages to any person or property by reason of the use of said leased property” [citation].’ [Citation.]” (*McCrary, supra*, 133 Cal.App.4th at p. 1537.) As a general indemnity clause, or type II clause, under the *MacDonald & Kruse* rules, Budget is not entitled to indemnity at all if its own acts of active negligence solely or contributorily caused its own liability. (*MacDonald & Kruse, supra*, 29 Cal.App.3d at p. 419.)

Budget contends that the trial court erred in “generically classifying the indemnity provisions contained in the contracts” and “ignor[ing] the express, unambiguous intent of

the parties, concerning indemnity and defense obligations . . . .” As a result, Budget argues it was “unfairly deprived of the benefit of [its] bargain . . . and forced to prove active negligence against [r]espondent[s], despite the fact a correct reading of the indemnity provisions discloses a showing of fault is not a prerequisite to indemnification.”

Although the trial court and the parties agree the indemnity clause contemplates the loss incurred by Budget resulting from Szondy’s action; they disagree on whether it is a type I, II, or III. Budget contends the indemnity language in the operator agreement does not require proof of negligence because the language is substantially similar to the type I indemnity clause at issue in *Continental Heller, supra*, 53 Cal.App.4th 500. In *Continental Heller*, the appellate court held that an indemnity provision did not require that a contractor’s loss be caused by a subcontractor’s fault. (*Id.* at p. 505.) But that case is distinguishable: A general contractor paid \$20,000 to settle injury claims against it arising out of an explosion caused by a defective valve installed 11 years earlier by subcontractor Amtech in a refrigeration system at a plant where several employees were injured. (*Id.* at pp. 503-504.) Even though Amtech was found not to be at fault for the explosion, based on the indemnity language in the subcontract, the Court of Appeal upheld Amtech’s liability for the \$20,000 settlement. (*Id.* at pp. 505, 507.) The *Continental Heller* court found the contractual language before it “leaves no doubt the parties intended Amtech should indemnify Continental irrespective of whether Continental’s loss arose by reason of Amtech’s negligence or for any other reason except for the sole negligence or willful misconduct of Continental. [Citation.]” (*Id.* at p. 505.)

The language stated that Amtech had to indemnify Continental Heller for loss which “*arises out of or is in any way connected* with the performance of work under this Subcontract,” and “shall apply to *any acts or omissions*, willful misconduct or negligent conduct, whether active or passive, on the part of Subcontractor.’ (Italics added.)” (*Ibid.*, fn. omitted.)

The *Continental Heller* court never labeled the indemnity clause at issue as type I. Further, the case fails to include the entire language used in the indemnity clause, and thus, there is no indication that the indemnity provision at issue required Amtech to indemnify Continental Heller for its own negligence. As previously noted, a type I indemnity provision expressly states that the indemnitor is to indemnify the indemnitee “for, among other things, the negligence of the indemnitee,’ and the indemnitee is indemnified whether its liability arises from its sole or concurrent negligence. [Citation.]” (*McCrary, supra*, 133 Cal.App.4th at p. 1536.) Here, there is no such language in the indemnity provision in the operator agreement. Thus, we conclude that it is not a type I clause.

In contrast, Dodier contends that the indemnity clause at issue is a type III clause because it provides “indemnity in the instance of [Dodier’s], not [Budget’s], negligence.” Because the clause is silent on providing indemnity in instances of Budget’s negligence, Dodier argues that it is not required to indemnify Budget if it was either passively or actively negligent. We disagree. The language requiring Dodier to indemnify Budget from any claim “*arising directly or indirectly from the conditions of the Location*” supports the court’s determination that the clause is a type II clause. (Italics added.)

When an indemnity clause fails to address itself to the issue of an indemnitee's negligence, it is referred to as a "general" indemnity clause. (*Rossmoor, supra*, 13 Cal.3d at p. 628.) "While such clauses may be construed to provide indemnity for a loss resulting in part from an indemnitee's *passive* negligence they will not be interpreted to provide indemnity if an indemnitee has been *actively* negligent. [Citations.]" (*Id.* at pp. 628-629.)<sup>6</sup> Thus, we turn to the question of whether or not Budget was actively negligent in causing Szondy's fall.

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<sup>6</sup> To the extent Budget claims that it was deprived of the benefit of its bargain, we consider all of the language used in the indemnity provision, not just the first sentence emphasized by the parties. The entire provision provides:

"Operator shall defend, indemnify and hold harmless the Company and its officers, directors, employees, parent, affiliates and subsidiaries from and against any and all claims, liabilities, demands, losses, suits, penalties, fines, judgments and costs, including legal costs and expenses and reasonable attorney's fees, allegedly arising directly or indirectly from the condition of the Location and/or any willful or negligent act or omission (including the failure to follow the Company's instructions) done or suffered by Operator or its employees, or by Operator's contractors or vendors arising from the Business at the Location. *Pursuant to this indemnity, the Company may, in its sole discretion, deduct from any commission payment due Operator, the following losses incurred by the Company: (i) the total loss of revenue to the Company, or \$500.00, whichever is higher, as a result of conversion of a vehicle due to Operator's failure to follow established Budget System customer qualification procedures; (ii) the total amount of repairs to a vehicle in an accident due to Operator's failure to follow established Budget System customer qualification procedures or due to Operator's failure to properly report all damage and accidents to Budget System Members' vehicles and for which collection or recovery cannot be made from the responsible third party; (iii) \$100.00 per rental, or Operator's average revenue per rental, whichever is higher, on missing rentals (defined as unaccounted for Budget System or Company rental agreements); (iv) \$1.00 per mile on all missing mileage; (v) the total loss to Company due to Operator's or Operator's employee's theft, fraud, unauthorized use of a vehicle, missing or inaccurate deposits, missing funds, acceptance of dishonored checks or credit cards, rates not consistent with Company standards, or other acts of misappropriation; (vi) the full cost of Budget System Member's vehicle stolen due to Operator's failure to follow established Budget System customer qualification procedures or Operator's*

[footnote continued on next page]

## **B. Did Budget’s Actions Regarding the Amargosa Location Constitute Active Negligence?**

Budget contends the trial court erred in interpreting the allegations in Szondy’s complaint as “active” negligence instead of “passive” negligence. Further, it argues that because the evidence failed to support any notion that ADA had any relevance in this case, coupled with Szondy’s admission to “tripping over her own feet,” any “active” negligence was “imaginable.”

### *1. Standard of Review*

“Whether conduct constitutes active or passive negligence depends upon the circumstances of a given case and is ordinarily a question for the trier of fact; active negligence may be determined as a matter of law, however, when the evidence is so clear and undisputed that reasonable persons could not disagree. [Citations.]” (*Rossmoor, supra*, 13 Cal.3d at p. 629.) ““When a finding of fact is attacked on the ground that there is not substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or

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*[footnote continued from previous page]*

*negligence in safeguarding such vehicle; and (vii) the cost of all telephone calls that are not made in the course of the Operation of the Business.”*

The italicized portion of the paragraph identifies the circumstances upon which Budget may seek indemnity, namely, when Budget realizes a loss due to Dodier’s failure to follow Budget System’s established procedures, including vehicle repairs, conversion, inaccurate mileage, theft, fraud or unauthorized use, to name a few. Given the clear and explicit language in the entire indemnity paragraph, the mutual intention of the parties was to assure that Dodier would indemnify Budget for losses involving the use of Budget’s vehicles. However, the loss in this case stemmed from the design of the ramp which provided ingress to and egress from the location’s office. Such loss is not from the result of Dodier’s failure to follow Budget System’s established procedures.

uncontradicted which will support the finding of fact.’ [Citation.] [¶] ‘It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.’ [Citations.]” (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

## 2. Analysis

According to the trial testimony, Budget was solely responsible for leasing, building out, and maintaining the Amargosa location to fit Budget’s needs. Three witnesses testified: Teri Johnson, a Budget trainee who was present when Szondy fell, Donald Pierce, an agency manager for Budget, and Mary Ann Dodier.

Mary Ann Dodier had worked in the car rental industry since 1988. In 2004 she incorporated as M. Dodier, Inc., and became an agency operator for Budget. In 2007, Budget instructed Dodier to move its car rental agency to another location. Budget, through Donald Pierce and Rick Kuehner, assisted in finding a new location, determined its feasibility, and checked to see whether the property was compliant with accessibility guidelines set forth by the ADA. Budget negotiated and signed the lease for the Amargosa location with the property owner, Quan-Pellissier. Dodier began operating the rental car agency at the Amargosa location sometime in 2007.

According to the lease of the property for the Amargosa location, Budget was obligated to “place and maintain the Premises in a condition that is in full compliance with all building, use and zoning ordinances, laws and requirements for Tenant’s intended uses as set forth herein, including without limitation, the [ADA].” Mr. Pierce, Budget’s agency manager, actively took part in ensuring that the Amargosa location

complied with ADA requirements; he hired and coordinated with the contractor providing the build out, as well as with city inspectors. In contrast, Ms. Dodier had no expertise in determining a property's ADA compliance, and she had no role in building out the Amargosa location to fit Budget's needs. Instead, she relied on Budget's expertise in ensuring that the Amargosa location complied with all building codes, as well as with the ADA. Ms. Dodier stated that Budget maintained the Amargosa location and that she had no right to make structural changes to the building or the ramp in question.

The above constitutes substantial evidence in support of the trial court's finding of active negligence, which we will not disturb. Since Budget was actively negligent, it was not entitled to indemnity.<sup>7</sup>

**C. Did Dodier Secure Adequate Liability Insurance and Name Budget as an Additional Insured?**

Budget faults the trial court for failing to "address the breaches of contract by [Dodier] with respect to (1) [Dodier's] failure to secure adequate liability insurance, and (2) [Dodier's] failure to have [Budget] named as an additional insured on the . . . the liability policy." In its statement of decision, the trial court stated: "Further, and as for BUDGET's claim that DODIER breached Paragraph 4n of the Independent Operator

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<sup>7</sup> Assuming its right to indemnity, Budget also contends the trial court erred in finding that it had failed to tender defense of Szondy's litigation to Dodier and/or Sequoia, and that liability for Szondy's damages should have been apportioned to both Budget and Dodier in accordance with the percentage paid in the global settlement. However, having concluded the trial court correctly found that Budget was not entitled to indemnity, we need not reach these contentions.

Agreement (this Paragraph deals with DODIER'S insurance obligations), BUDGET presented no evidence at trial to show that DODIER failed to do that which the contract required. Other significant gaps in BUDGET'S proof include failing to show if Sequoia Insurance declined BUDGET'S defense and indemnity, and why. Therefore, BUDGET'S claim under Paragraph 4n must fail.”

According to paragraph 4n, Dodier was required to obtain and maintain insurance coverage for the Amargosa location with Budget and Quan-Pellisier named as additional insured's. Dodier testified that she complied with paragraph 4n. She contacted Sequoia and had them change the insurance policy from the La Paz Drive location to the Amargosa location. Sequoia issued a commercial general liability policy to Dodier, which was in force when Szondy fell. Sequoia sent the policy to Budget, and Dodier never heard from Budget regarding any problems with the insurance policy. Budget's agency manager testified that Budget did have a certificate of insurance covering the Amargosa location for the period of time involving Szondy's accident. He further stated that he had no information identifying whether Dodier breached any agreement in reference to the requirement that Dodier was to have Budget named as an additional insured under its commercial general liability policy.

When questioned why the certificate of insurance for the Amargosa location identified Avis Rent A Car Systems, Inc. as an additional insured, instead of Budget, Dodier stated that she had no idea. She explained that her “insurance company does all of [her] certificates.” However, Budget's agency manager testified that he works for

Avis Budget Group, Inc. which is the result of a 2002 merger between Avis and Budget. During his testimony, he referred to the Avis Budget Group.

Moreover, there was no evidence that Budget tendered defense of Szondy's litigation to Sequoia and that Sequoia declined to defend Budget because it was not identified as an additional insured on the policy. Instead, the evidence showed that Budget cross-complained for indemnity and breach of duty to defend against Dodier.

Given the above, we conclude the trial court correctly found that Dodier did not breach the operator agreement by failing to secure adequate liability insurance naming Budget as an additional insured.

**D. Did the Trial Court Err in Failing to Address Budget's Assertion of Promissory Estoppel?**

Budget asserts the trial court failed to address the issue that Dodier is estopped from refusing to indemnify Budget based on her promise to fully defend, indemnify and hold it harmless for all liabilities arising out of the operation of her facility at the rental location. "Promissory estoppel is "a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced." [Citation.]' [Citation.] Because promissory estoppel is an equitable doctrine to allow enforcement of a promise that would otherwise be unenforceable, courts are given wide discretion in its application. [Citations.]" (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901-902.) Here, Budget failed to plead a claim for promissory estoppel, thus the trial court did not err in failing to address it. In any event, the facts failed to support such claim. As previously noted,

Dodier did request an insurance policy identifying Budget as an additional insured; a certificate of such policy was sent to Budget who never raised any issues concerning the policy; the indemnity clause in the operator agreement did not require Dodier to indemnify Budget if it was actively negligent; and there is no evidence that Sequoia was asked, but refused, to provide a defense for Budget.

III. DISPOSITION

The judgment is affirmed. Cross-defendants and respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

KING

J.

CODRINGTON

J.