

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NEWPORT HARBOR LUTHERAN
CHURCH,

Plaintiff and Appellant,

v.

FEDERAL INSURANCE COMPANY,

Defendant and Respondent.

G046509

(Super. Ct. No. 30-2011-00449639)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Franz E. Miller, Judge. Affirmed.

Law Office of James L. Miller and James L. Miller for Plaintiff and Appellant.

Newton Rimmel, Stephen L. Newton and Lenell Topol McCallum for Defendant and Respondent.

* * *

This case arises out of an insurance dispute. The trial court granted summary judgment in favor of Federal Insurance Company (Federal), after determining as a matter of law that Federal owed no obligation to defend or indemnify its insured, Abigail Abbott Staffing Services, Inc. (Abbott), against a claim of liability arising out of Abbott's negligent referral of an employee who later embezzled money from Abbott's client.

After Federal denied coverage to Abbott, Abbott stipulated to a judgment in favor of the client, Newport Harbor Lutheran Church (the church), and assigned its claims against Federal to the church. The church then filed this lawsuit, alleging Federal had breached its obligations to Abbott under the policies when it denied Abbott coverage in connection with the church's underlying claim and that Federal had acted in an unreasonably precipitous manner in doing so.

The court's grant of summary judgment in Federal's favor was based largely on an interpretation of the policy terms. First, the court reasoned that because the church's claim against Abbott was based on its allegedly negligent provision of professional services – specifically, Abbott's failure to ascertain that the employee it referred to the church had a prior felony record – coverage was excluded. Second, it concluded the loss suffered by the church – the employee's theft of church money – could not be construed as “property damage” under the language of the policies, and thus it was not a covered loss. Third, it determined the undisputed evidence established the losses suffered by the church occurred outside the policy period. Each of those three reasons independently justified Federal's denial of coverage. And finally, the court concluded the undisputed evidence demonstrated Federal's denial of the claim followed a reasonable investigation, and thus Federal could not be held liable for breach of the implied covenant of good faith and fair dealing.

We affirm the judgment.

FACTS

Federal issued both a commercial general liability (CGL) policy and a separate “commercial umbrella” policy to Abbott, covering the period October 1, 2001 to October 1, 2002. When Federal quoted a price to Abbott for these policies, it also offered Abbott the option of purchasing “Staffing Errors and Omissions” coverage for an additional premium. Abbott, acting through its authorized insurance broker, expressly declined the additional errors and omissions coverage.

For our purposes, the salient provisions of the CGL policy are these: Federal was obligated to provide Abbott with a defense against third party claims for “bodily injury or property damage” which occurred during the policy period and was caused by an accident, or for “advertising injury or personal injury” caused by an “offense” committed during the policy period. Federal was also obligated to indemnify Abbott against damages it became legally obligated to pay on account of such a claim. “Property damage” was defined in the policy as “physical injury to tangible property including the resulting loss of use of that property” or “loss of use of tangible property that is not physically injured.” “[L]oss of use” was “deemed to occur at the time of the occurrence that caused it.”

The policy also specified a series of exclusions to coverage, including one entitled “Professional Services,” which specified that the insurance did not apply to injury or damage arising out of or related to the insured’s “rendering of or failure to render professional services or advice.” But that exclusion, in turn, carved out an exception for “the rendering or failure to render staffing placement services or staffing services unless caused by willful violation of law or regulation.” (Bold omitted.) Thus, standing alone, the “Professional Services” exclusion contained in the body of the policy excluded coverage for claims arising out of any professional services other than staffing and staffing placement services.

However, one of a series of separate *endorsements* appended to the policy, entitled “Professional Liability,” stated *without exception* that “[t]his insurance does not apply to [injury or damage] arising out of the rendering or failure to render professional services or advice, whether or not that service or advice is ordinary to the insured’s profession”

The separate umbrella policy provided for two types of coverage: Under “Coverage A,” Federal agreed to pay the portion of a third-party loss which was otherwise covered by the CGL policy but *exceeded the liability limits* contained in that policy; and under “Coverage B,” Federal agreed to pay claims against Abbott for “bodily injury, property damage, personal injury, or advertising injury covered by this insurance which takes place during the Policy Period of this policy and is caused by an occurrence” (bold omitted), but only to the extent those claims were not insured against under the CGL policy. Like the CGL policy, however, the umbrella policy limits covered “property damage” to “physical injury to tangible property, including all resulting loss of use of that property,” and the “loss of use of tangible property that is not physically injured.” And like the CGL policy, the umbrella policy carried a separate endorsement which specified the policy excludes coverage for liability arising out of the “the rendering or failing to render professional service or advice, whether or not that service or advice is ordinary to the insured’s profession”

On October 3, 2008, six years after the policy period ended, the church filed suit against Abbott, alleging causes of action for breach of contract, negligence and negligent misrepresentation. The complaint alleged the church had retained Abbott, a corporation engaged in the business of providing employee staffing, to locate a reliable and trustworthy candidate to be employed as its office manager. Although the church relied on Abbott to scrutinize the integrity and qualifications of any candidate it recommended, Abbott allegedly failed to make reasonable efforts to do that and consequently recommended the church hire Cheryl Granger, a woman with a history of

criminal conduct. The church did hire Granger and over a period of approximately three years spanning December 2002 to December 2005, she allegedly embezzled a total of nearly \$400,000 from the church. The church sought recovery from Abbott of its “actual losses, including embezzled funds due to Granger’s theft,” as well as “out-of-pocket expenses and interest.”

Abbott first reported the claim to Federal approximately two weeks after the church filed its complaint. In response, a Federal claims adjuster contacted Jeffrey Allen, counsel for Abbott, and discussed with him “the need to conduct an investigation into coverage.” The claims adjuster called Allen again on November 25, 2008 – approximately a month later – to ask about additional facts to support the existence of a claim within the language of the policy. Allen told the claims adjuster he had no information other than the allegations of the complaint and suggested the claims adjuster speak directly with James Bernald, Abbott’s defense counsel in the case. The claims adjuster then contacted Bernald, who stated he wanted to review the policy before discussing coverage.

Over the course of the next month and a half, the claims adjuster made several attempts to follow up with Bernald, to no avail. The claims adjuster also sent letters to Allen, advising him of the unsuccessful efforts to contact Bernald.

In early February 2009, having still heard nothing from Bernald, Federal’s claims adjuster determined he would recommend denial of the claim on the ground the church had suffered no covered loss under the terms of the policy and because “the professional services exclusion was right on point.” On February 6, 2009, the claims adjuster sent another letter to Allen, informing Allen he had yet to hear back from Bernald, but felt he had sufficient facts to make a coverage decision and would be sending out a separate letter informing Allen of that decision.

On February 19, 2009, Federal sent a letter to Allen explaining it was declining coverage for the loss claimed by the church because the church’s claim was

based on the embezzlement of money, which did not qualify as a covered loss under the policies. Moreover, the letter indicated coverage was also denied because the church's financial loss had occurred outside of the policy period and because the claim arose out of Abbott's performance of professional services, which were excluded from coverage.

Four months later, in June 2009, Bernald sent Federal a letter disputing its coverage decision and attached discovery responses filed in connection with the church's lawsuit against Abbott as well as the police report made in connection with the embezzlement case. Relying on those documents, Bernald argued the church had suffered "property damage" both because "it lost monies stolen from its bank account and a laptop computer [taken by Granger without authorization.]" He also asserted the church was seeking to hold Abbott liable for the loss of use of the laptop computer, which was deemed to have occurred "at the time of the occurrence that caused it" – meaning the date of Abbott's negligent referral of Granger to the church.

Federal hired its own coverage counsel and on September 21, 2009, that counsel sent a lengthy letter to Bernald, reaffirming and explaining Federal's decision to deny coverage for the church's claim.

Meanwhile, on September 9, 2009, Abbott agreed to entry of a stipulated judgment in favor of the church. Specifically, Abbott and the church stipulated "Granger stole not less than \$323,870.70" from the church" and further stipulated to entry of a judgment in favor of the church, and against Abbott, in that specific amount. Abbott and the church also agreed that in exchange for the church's covenant not to record the stipulated judgment against Abbott, or to execute the judgment against Abbott or any person associated with it, Abbott would assign to the church any claims it had against its insurers arising out of the insurers' failure to defend and/or indemnify Abbott in the case.

As a consequence of that underlying stipulation, the church filed this lawsuit against Federal on February 14, 2011. The church alleged Federal breached its obligations to Abbott under the policies when it refused to either defend or indemnify

Abbott against the church's claim. Additionally, the church alleged Federal breached the covenant of good faith and fair dealing implied in the policies by failing to adequately respond to the communications of Abbott and its counsel and by denying coverage without conducting a proper investigation of the facts.

On August 4, 2011, the church filed a motion seeking summary adjudication in its favor on various issues. On August 14, 2011, Federal filed its own motion for summary judgment. The motions were scheduled for hearing on the same date.

In support of its motion, Federal argued the church's claim against Abbott was not covered by its policies for four reasons: (1) the embezzlement of funds did not qualify as "property damage" under the policy terms; (2) the church suffered no loss during the policy period; (3) Abbott's negligent performance of services did not qualify as an "occurrence" as defined in the policy; and (4) losses arising out of Abbott's negligent performance of staffing services were excluded from coverage.

The court heard both motions on November 1, 2011, and ordered summary judgment in Federal's favor on November 22, 2011. The court's formal order explained summary judgment was appropriate for several reasons. First, the court noted there was no evidence the church suffered any loss during the policy period because "[t]he first of the checks forged by Granger was dated September 30, 2002 but was not processed by the bank until October 2, 2002, one day after the policy period of the Federal Policies expired. . . . The laptop that was stolen by Granger was not purchased until September of 2005 well after the policy period"

Second, the court noted there was no coverage because "professional placement services and/or advice provided by [Abbott] was the alleged cause of [the church's loss]," and "[t]he professional liability exclusion contained in the endorsement to the Federal general liability policy prevails over any conflict with the professional liability exclusion in the main body of the policy." In this regard, the court also pointed

to “the undisputed evidence submitted by Federal [which] demonstrates that Federal quoted both general liability and staffing services errors or omissions to [Abbott,] but that [Abbott] declined to purchase errors or omissions insurance from Federal and purchased only liability insurance” And finally, the court concluded that a *permanent* loss of property caused by a conversion does not qualify as a “loss of use” of that property for purposes of the “property damage” definition contained in the policies.

On December 19, 2011, the court entered judgment in favor of Federal.

DISCUSSION

1. Standard of Review

“A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) “We 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.” [Citations.] [¶] In reviewing de novo a superior court’s summary [judgment] order in a dispute over the interpretation of the provisions of a policy of insurance, the reviewing court applies settled rules governing the interpretation of insurance contracts.’ (*Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 390, 33 Cal.Rptr.3d 562, 118 P.3d 589.) The ordinary rules of contract interpretation apply to insurance contracts. (*Ibid.*) To protect the interests of the insured, coverage provisions are interpreted broadly, and exclusions are interpreted narrowly. (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648, 3 Cal.Rptr.3d 228, 73 P.3d 1205.)” (*Stellar v. State Farm General Ins. Co.* (2007) 157 Cal.App.4th 1498, 1503.)

2. Coverage for the Church's Loss was Excluded by the Professional Liability Endorsement

The church first contends the trial court erred in concluding coverage for the church's loss was excluded by the "Professional Liability" endorsement attached to the CGL policy, which the court viewed as overriding the more limited "Professional Services" exclusion contained in the body of the policy.

Before addressing the substance of this claim, we note that while the church points to minor differences in these provisions – i.e., the *title* of the exclusion in the body of the policy is "Professional Services" whereas the *title* of the endorsement is "Professional Liability," and the text of the former refers to potential claims by a "customer" whereas the text of the latter refers to claims by a "client" – it then expressly concedes "[n]either of these differences has significance." What the church argues instead is that "these . . . virtually identical exclusions" are patently inconsistent and thus create a fatal ambiguity. We disagree.

The "Professional Services" exclusion in the body of the policy stated the insurance did not apply to injury or damage arising out of or related to the insured's "rendering of or failure to render professional services or advice, whether or not that service or advice is ordinary to the insured's profession." (Bold omitted.) But that exclusion, in turn, specified it did not apply to "the rendering of or failure to render *staffing placement services or staffing services* unless caused by willful violation of law or regulation." (Italics added.) The net effect of that exclusion, if considered in the abstract, was to provide coverage for most errors or omissions Abbott committed in the course of providing staffing or staffing placement services, while excluding coverage for liability arising out of any *other* professional service it provided.

But that exclusion did not exist in the abstract. Instead, it must be read in the context of the policy as a whole, which included a series of separate *endorsements* – one of which stated, *without exception*, that "[t]his insurance does not apply to [injury or

damage] arising out of the . . . rendering of or failure to render professional services or advice, whether or not that service or advice is ordinary to the insured's profession” (Bold omitted.) And as explained in *Aerojet General Corp v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 50, fn. 4 (*Aerojet*), “[i]f there is a conflict in meaning between an endorsement and the body of the policy, *the endorsement controls.*” (Italics added, quoting *Continental Casualty. Co. v. Phoenix Construction. Co.* (1956) 46 Cal.2d 423, 431.)

The church attempts to distinguish *Aerojet* on the basis the endorsement at issue in that case purportedly reflected a “bargained for . . . *change* in [the insured’s] deductible coverage on a policy it had held for 26 prior years” (italics added), which the parties necessarily intended would override any inconsistent language contained in earlier versions of the policy. The church also points to *Narver v. California State Life Ins. Co.* (1930) 211 Cal. 176, 181, for the proposition that an “endorsement” is an amendment or modification to “an *existing* policy of insurance.”

The church then argues that because the “Professional Liability” endorsement in this case was made part of the initial policy, it is not a “true endorsement,” and thus should not be accorded the same controlling effect over conflicting provisions contained in the body of the policy. In other words, the church claims that because the two conflicting provisions at issue here were included within the Federal CGL policy *at the same time*, there is no basis for presuming one was intended to override the other. This is an attractive distinction at first blush, but upon closer inspection it is revealed to be both factually incorrect and based on a misunderstanding of what an endorsement is.

The distinction relied upon by the church is factually inaccurate because while the operative complaint in *Aerojet* was filed “against 54 insurers, under 245 comprehensive general liability and other insurance policies with periods incepting as early as 1950 and expiring as late as 1984” (*Aerojet, supra*, 17 Cal.4th at pp. 46-47), the

Supreme Court’s reference to the controlling effect of endorsements came in the context of discussing the obligations of one specific insurer, Insurance Company of North America (INA). The court explained that INA had issued a series of standard form general liability policies to Aerojet from 1976 to 1984; a period of 13 years, not 27 as suggested in the church’s brief. More significant, however, is that contrary to the church’s claim, the Supreme Court did not recognize any “bargained for change” in the coverage offered by INA within that 13 year period. Instead, the Supreme Court simply characterized the INA policies, *as a group*, as offering certain coverages “in the body,” (*id.* at p. 49), and then limiting or taking away that same coverage by endorsement. For example: “[A]lthough, in the body, it was stated that INA had a duty to defend Aerojet, by endorsement it was provided that Aerojet should pay its own defense costs—under which provision it was understood by Aerojet that it should defend itself.” (*Aerojet, supra*, 17 Cal.4th at p. 50.) The Supreme Court then noted that in the case of such conflicts in the policy provisions, it is the language of the endorsement which controls, without in any way suggesting the rule is dependent upon the relative timing of the provisions. In fact, the Supreme Court has previously applied the same rule in cases where, as here, it is clear the endorsement (“rider”) was part of *the original version* of the policy. (See *Fageol Truck & Coach Co. v. Pacific Indem. Co.* (1941) 18 Cal.2d 731, 738.) We consequently reject the church’s attempt to distinguish *Aerojet* on factual grounds.

The church’s more fundamental error is its misunderstanding of what an endorsement is and how it fits into the structure of an insurance policy. As *Aerojet* explains, insurance policies fall into two general categories: ““standard”” policies, which are described as those policies ““issued on standard forms containing terms and conditions drafted by the [insurer]”” (*Aerojet General v. Transport Indemnity Co. supra*, 17 Cal.4th at p. 46, fn. 1), and ““manuscript”” policies, which are ““entirely nonstandard and drafted for the particular risk undertaken.”” (*Ibid.*) But as the Supreme Court noted,

the terms of “standard” policies are frequently altered because “[o]ften, the insurer is willing to *modify or change* the standard forms by “endorsements.”” (*Ibid.*, italics added.) Thus, the very purpose of an “endorsement” is to alter what are otherwise standardized provisions included in the body of a form policy to suit the particular needs of the parties. (See Ins. Code § 10274 [defining “endorsement” for purposes of disability insurance policies as “any amendment, change, limitation, alteration or restriction of the printed text of a policy by a rider upon a separate piece of paper made a part of such policy”].)

Here, the CGL policy issued to Abbott by Federal was a standard form policy – indeed, it was identified on the bottom of each of its 27 pages as “Form 80-02-2045(Ed. 8-98).” The policy, entitled “General Liability for Staffing Services,” was specially formulated to meet the expected needs of an insured in the business of staffing services. The policy’s standard exclusion for liability arising out of professional services, found on page 16 of the form, carved out a special rule preserving coverage for liability arising out of the rendering of professional staffing services; the form policy thus assumed coverage *would be provided* for the ordinary professional errors or omissions committed by a staffing services insured. That is the standard form. But as we have already noted, the policy issued to Abbott also included a separate “Professional Liability” endorsement, which the Supreme Court explained in *Aerojet* represents an agreement to “modify or change” an otherwise standard term of the 27-page form. (*Aerojet, supra*, 17 Cal.4th at p. 50, fn. 4.) And that endorsement excluded *all* coverage for liability arising out of professional services “whether or not that service . . . is ordinary to the insured’s profession.” (Bold omitted.) Given the specific role played by endorsements in an otherwise standard form policy, the “Professional Liability” endorsement necessarily overrode the more limited professional services exclusion contained in the body of the policy.

But even if these provisions were considered to operate on equal footing, their inconsistency could be resolved by reference to what Abbott knew at the time it purchased the coverage. “Ambiguity in an insurance policy, if it exists, must be found in the circumstances of the particular case; it may not be created in the abstract.” (*Nabisco, Inc. v. Transport Indemnity Co.* (1983) 143 Cal.App.3d 831, 835-836; *Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 916, fn. 7 [“[l]anguage in [an insurance] contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract”].) Here, the undisputed evidence demonstrates Federal offered Abbott the option of purchasing “errors and omissions” coverage, and Abbott expressly rejected that option. Having done that, Abbott could not reasonably argue it was entitled to coverage for its professional errors and omissions under the policy Federal issued. And because the church stands in the shoes of Abbott for purposes of this case, it cannot claim that either.

Finally, the church also argues the term “professional services” is vague and ambiguous because it is not defined in the policy, and hence it was reasonable for an insured such as Abbott to conclude that even the “Professional Liability” endorsement excluded only liability arising out of services provided by a regulated “professional,” such as a doctor, lawyer, or engineer. We find the assertion unpersuasive for two reasons. First, contrary to the church’s assertion, courts have long since determined that a standard “professional services” exclusion found in a CGL policy is not limited to liability arising out of the practice of licensed professions. Instead, as explained in *Hollingsworth v. Commercial Union Ins. Co.* (1989) 208 Cal.App.3d 800, 807, “as commonly understood, the term ‘professional services’ . . . generally signifies an activity *done for remuneration* as distinguished from a mere pastime.” (Italics added; see also *Amex Assurance Co. v. Allstate Ins. Co.* (2003) 112 Cal.App.4th 1246, 1251-1252.)

And second, although the CGL policy at issue in this case did not “define” the phrase “professional services,” it nonetheless made clear that “professional services”

means something other than services provided by a *licensed* professional. It did that by including a *separate coverage exclusion* for “Special Professional Services,” which governed liability arising out of the rendering or failure to render professional services or advice by an “attorney,” “engineer,” “accountant,” “architect,” “medical professional,” “stock broker” and “other licensed professionals.” In light of that distinct coverage exclusion for “Special Professional Services,” we have no trouble concluding the regular “professional services” exclusion in this case was not intended to refer specifically to the licensed professions. To conclude otherwise would render meaningless the separate exclusion for “Special Professional Services.” Such a construction must be avoided. (Civ. Code, § 1641 [“The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other”].)

For all of these reasons, we conclude the church has failed to demonstrate the trial court erred in determining that coverage for the claim it asserted against Abbott was excluded by the Professional Liability endorsement of Federal’s CGL policy.

3. Theft of the Church’s Funds Did Not Fall Within the Definition of Property Damage Contained in the Policies

Although the Professional Liability endorsement is sufficient, in and of itself, to justify Federal’s denial of coverage in this case, we would also agree with the trial court’s determination that the underlying claim asserted by the church against Abbott did not qualify as a claim for “property damage” under Federal’s policies.

The church’s contention is that Granger’s embezzlement of its funds, as well as her theft of a laptop computer owned by the church, gave rise to a claim for “loss of use of tangible property that is not physically injured,” and thus fell within the definition of “property damage.” There are several flaws in this argument.

First, the fact the church lost the ability to use the money (and the laptop) stolen by Granger is not the same thing as the church *making a claim* against Abbott for

“loss of use.” There is no evidence the church made such a claim. What it sought, instead, was the replacement value of what was stolen. In the complaint it filed against Abbott, the church sought recovery of its “actual losses, including embezzled funds due to Granger’s theft . . . plus interest thereon.” In a later discovery response, the church described its property loss as follows: “Plaintiff lost lots of property, particularly in the form of monies stolen from its bank account; and a laptop computer.” The church did not identify any distinct losses it suffered as a result of its inability to use the money or the laptop.

In *Advanced Network, Inc. v. Peerless Ins. Co.* (2010) 190 Cal.App.4th 1054, 1061-1064 (*Advanced Network*), a case very similar to this one, the court concluded that claim for the permanent loss of property through conversion is not a claim for “loss of use” under the terms of a standard CGL policy. In *Advanced Network*, the plaintiff was a company which serviced cash machines in credit unions. It filed suit against its commercial general liability insurer for breach of contract and breach of the implied duty of good faith and fair dealing after the insurer denied it coverage for a claim arising out of an employee’s theft of cash from a credit union client. Relying on a line of cases beginning with *Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, the appellate court noted that “it is established in California that [“loss of use”] cannot reasonably be interpreted to include the permanent *loss* of property through conversion.” (*Id.* at p. 1061.) The court explained “that the terms ‘loss of use’ and ‘loss’ are not interchangeable for insurance purposes. If we were to hold otherwise, we would have to ignore the words ‘of use’ in the term ‘loss of use.’” (*Id.* at p. 1063.) Moreover, the court noted that allowing recovery for “loss of use” in circumstances where the property has been permanently lost would lead to absurd results. For example, if the stolen property were a car, the measure of damages for its “loss of use” value would likely be the rental value of a replacement vehicle, and “the measure of damages of a stolen car cannot be its

rental value ad infinitum on the ground there was a permanent ‘loss of use’ of the property.” (*Id.* at p. 1064.)

The church seeks to distinguish *Advanced Network* by arguing its loss of the funds stolen by Granger should be viewed as merely temporary, rather than permanent, because the church later received some payment from its own insurer, Zurich Insurance Co. on account of the loss, and might yet receive other payments. But the church’s receipt of insurance proceeds does not reflect any *recovery* of the stolen funds; those funds remain permanently lost. Moreover, it is well-settled that an injured party’s receipt of insurance benefits cannot affect his claim for damages against the party responsible for his loss. “[I]f an injured party receives some compensation for his [or her] injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor.” (*Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6.)

Instead, whatever funds are paid by the church’s own insurer on account of a loss caused by Abbott would simply give that insurer a subrogated right to, in turn, recover the value of its payment from Abbott (or its insurer.) (*Fireman’s Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1291-1292 [“In the case of insurance, subrogation takes the form of an insurer’s right to be put in the position of the insured in order to pursue recovery from third parties legally responsible to the insured for a loss which the insurer has both insured and paid”].) Consequently, such a payment could not be viewed as affecting either the character or the size of the church’s loss for purposes of its claim against Abbott.

The church also relies on a footnote in *Advanced Network*, in which the court acknowledges that a financial institution’s “temporary deprivation of a large amount of cash” might qualify as a “loss of use,” because such a loss “would presumably cause damages such as lost interest on loans (a possible equivalent of rental value) or lost profits on potential investments.” (*Advanced Network, supra*, 190 Cal.App.4th at p.

1064, fn. 2.) But the acknowledgement is of no help to the church – just as it was of no help to the plaintiff in the case – because the fact remains the church’s underlying claim against Abbott was not based on a mere temporary deprivation of the money. The church’s loss was permanent and what it sought from Abbott was the replacement value of its money, not compensation for a temporary inability to use it.

And finally, the church’s claim that it suffered separate “loss of use” damage on account of the embezzlement, because it was forced to incur the expense of borrowing other money to make up for the lost funds, adds nothing to the analysis. That added cost of borrowing funds is still a consequence of a permanent – rather than temporary – loss of the embezzled funds. Because the permanent loss of property as a result of theft or conversion does not qualify as a covered “loss of use” of that property, the trial court correctly determined that the church’s underlying claim against Abbott was not a covered loss under the terms of the Federal policies.

Having already determined that Federal’s denial of Abbott’s claim was justified on two independent bases – both because the underlying claim made by the church against Abbott was not a covered loss and because the Professional Liability endorsement of the CGL policy excluded coverage – we need not address the question of whether the denial was also justified on the basis that the church’s loss did not occur within the policy period.

4. The Church Has Failed to Raise a Triable Issue of Fact on Its Claim For Breach of The Covenant of Good Faith and Fair Dealing

The church also argues that even if Federal had no duty to provide coverage to Abbott under the terms of its policies, there nonetheless remains a dispute of fact concerning whether Federal breached the covenant of good faith and fair dealing implied in those policies by denying coverage without conducting an adequate investigation. We cannot agree.

The church's argument is based on *Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, and *Amato v. Mercury Casualty Co.* (1997) 53 Cal.App.4th 825, (the *Amato* cases), which hold that an insurer can be liable for breach of the covenant of good faith and fair dealing based on its failure to provide a defense to a permissive user of its insured's vehicle, even though it was later determined the claim was not covered by the policy. Unfortunately for the church, the *Amato* cases have almost no bearing on this case. In the *Amato* cases, coverage under the policy turned on whether the permissive user lived in the same home with the insured; if he did, there was no coverage. Significantly, at the time the insurer denied coverage, it "had information which, if true, indicated that at the time of the accident Amato and Sutton did not live at the same residence." (*Amato v. Mercury Casualty Co.*, *supra*, 53 Cal.App.4th at p. 829.) Thus, "[a]lthough the jury subsequently agreed with Mercury as to the facts determinative of coverage, those facts were disputed at the time of the refusal to defend, and Mercury therefore owed a duty to defend." (*Id.* at p. 830.)

In this case, by contrast, there is no indication Federal ever had information suggesting the church's underlying claim might be covered. Indeed, what the record reflects is that the only information Abbott gave to Federal was a copy of the church's underlying complaint – a complaint which, on its face, reflected both that the church's loss was a permanent loss of funds as a result of embezzlement and that the claim arose from Abbott's provision of professional services. Thereafter, Federal made several attempts to get additional information from Abbott, but was repeatedly rebuffed over a period of several months. It was only after Federal issued a formal denial of the claim that it even got Abbott's attention. And the resulting letter from Abbott's counsel provided no additional meaningful facts suggesting the potential for coverage. The insurer's duty to provide a defense is not evaluated in the abstract. Instead, it arises only when the insurer *learns of the facts* giving rise to the potential coverage. "The duty to defend is determined by reference to the policy, the complaint, and *all facts known to the*

insurer from any source.” (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300, some italics added.)

In this case, because there is no evidence Federal was ever made aware of any facts giving rise to potential coverage for Abbott under its policies, Federal had no obligation to provide Abbott with even a defense against the church’s claim. That represents a significant departure from the situation presented in the *Amato* cases. Moreover, although the church also suggests that Federal breached a duty to conduct its own investigation of the facts before denying the claim, the church makes no effort to detail what additional investigative efforts Federal might have been obligated to undertake, what information it would have been expected to uncover had it undertaken that additional investigation, or how that information might have made a difference in assessing coverage. Absent that effort, the church has not raised any triable issue of fact.

5. The Church’s Evidentiary Objections Do Not Warrant Reversal

The church’s final contention is that the trial court erred by not sustaining some of its objections to declarations submitted by Federal in support of its motion for summary judgment. As the church correctly points out, “the trial court’s failure to rule expressly on any . . . evidentiary objections did not waive them on appeal.” (*Reid v. Google* (2010) 50 Cal.4th 512, 526.) But merely establishing that its objections are not waived for purposes of appeal falls far short of persuading us either that those objections were meritorious or that the challenged evidence is material. And in our view, none of the challenged evidence is sufficient to raise a triable issue of fact which might warrant reversal of the judgment.

The church objects to the entirety of the declaration filed by Starr, Federal’s claims adjuster, on the basis it was unsigned. At first blush, this does appear to be a persuasive objection, but as Federal points out, the declaration was electronically filed with the trial court, and it was thus governed by California Rules of Court, rule

2.257(a)(1), which provides: “When a document to be filed electronically provides for a signature under penalty of perjury, the following applies: [¶] (1) The document is deemed signed by the declarant if, before filing, the declarant has signed a printed form of the document.” As Federal explains, after the church filed an objection to the declaration in the trial court on the basis it was unsigned, Federal provided the court with proof the declaration had been signed on August 1, 2011, three days before it was electronically filed with the court on August 4, 2011. Consequently, the declaration was deemed signed and thus the church’s objection was not well-taken.

The church also objects to the content of Starr’s declaration on the ground he lacked personal knowledge of the facts, but that objection is similarly unpersuasive. In substance, the church argues that Starr’s earlier deposition testimony, in which he claimed to remember little about the case, conclusively established he could have no personal knowledge of the facts set forth in his declaration. But as Federal points out, the facts set forth in Starr’s declaration were essentially reflective of the information contained in the claims file he had created and maintained – the pertinent portions of which were attached to his declaration – rather than on any claim of an independent recollection. Because Starr was not required to review that file to refresh his recollection before the deposition, we see no inconsistency between his inability to independently recollect facts at his deposition and his later ability to summarize the content of the claims file in a declaration.

The church also objects to portions of the declaration of Katie Foxx, a vice president of the division of Federal that issued the policies. Foxx’s declaration established her as a custodian of records for Federal’s underwriting files, and she vouched for the authenticity of its records reflecting that Abbott expressly declined Federal’s offer to provide optional coverage for staffing errors and omissions at the time it purchased the policies at issue in this case. The church contends that because Foxx “has no personal knowledge of such *alleged* events,” she cannot testify about what

coverage Abbott intended to purchase. But Foxx never claimed to be a percipient witness or to have personal knowledge; she claimed to be a custodian of records. And in that capacity, she could provide foundation for the authenticity of the records. (Evid. Code, § 1271.) It was the records themselves that Federal relied upon to establish that Abbott rejected staffing errors and omissions coverage. Any objection to the content of those records, or arguments about the sufficiency of that content to support the fact asserted, would be separate issues and are not raised by the church.

The church also objects to the portion of Foxx’s declaration which characterized the “broad professional services exclusion which deleted all coverage arising out of the rendering or failure to render professional advice.” The church asserts this characterization merely constitutes Foxx’s own opinion about the legal effect of the exclusion, which was objectionable on several grounds, including hearsay, lack of personal knowledge, lack of qualification, and because it “usurp[ed] the court’s sole province to determine what the Policy provided coverage for.” We might agree with some or all of those grounds for exclusion, but we could not agree that the inclusion or exclusion of that evidence would have a material effect on the resolution of Federal’s summary judgment motion. Because our interpretation of an insurance policy is based on the language of the policy itself, and not on any witness’s characterization of it, Foxx’s statement is simply irrelevant to our analysis.

Moreover, because our review of a summary judgment is *de novo*, we are not concerned with the church’s suggestion that *the trial court* might have been either persuaded by or confused by any of this challenged evidence. “We owe the superior court no deference in reviewing its ruling on a motion for summary judgment; . . . ‘[i]t is axiomatic that we review the trial court’s rulings and not its reasoning.’ [Citation.]” (*Coral Const., Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 336.) We thus reject the church’s assertion that the trial court’s purported reliance on inadmissible evidence is itself a ground for reversal of the summary judgment.

Finally, the church's suggestion that the inclusion of the Professional Liability endorsement in the CGL policy was itself a subject of material dispute in this case is contrary to the record. In its response to Federal's separate statement, the church agreed the policies placed into evidence by Federal were undisputed. Moreover, as Federal points out, the church otherwise acknowledges in its opening brief that "[Federal] submit[ted] with its motion the same, genuine Policy as does [the church's] [c]omplaint." Although the church has made several arguments about the *legal effect* of Federal's policies as applied to the facts of this case, it cannot avoid summary judgment by asserting a belated claim of confusion about the *content* of the policies.

DISPOSITION

The judgment is affirmed. Respondent is entitled to its costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.