Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-001973 08/14/2019

HONORABLE JAMES D. SMITH

CLERK OF THE COURT
S. Brown
Deputy

TRUCK INSURANCE EXCHANGE

JEANMARIE P HARRINGTON BISCEGLIA

v.

SALES FORCE WON LTD, et al.

THOMAS B DIXON
ASHLEY G HALVORSON
GENA L SLUGA
JUDGE J. SMITH

MINUTE ENTRY

The Court considered La Patisserie's Offer of Proof (filed 07/26/2019) and Truck's response. La Patisserie recognized that an offer of proof "is simply a detailed description of what the proposed evidence is." *Jones v. Pak-Mor Mfg. Co.*, 145 Ariz. 121, 129, 700 P.2d 819, 827 (1985) (quotations omitted). Typically, a party makes an offer of proof after the Court excludes evidence. "The purpose of the offer of proof is to give the trial court an opportunity to reconsider its initial ruling and to ensure an adequate record for appellate review of the issue." DANIEL J. MCAULIFFE & SHIRLEY J. MCAULIFFE, ARIZONA PRACTICE: ARIZONA CIVIL RULES HANDBOOK 1224 (2018).

The purpose underlying La Patisserie's offer is a bit different than the ordinary offer of proof. Both sides indicated at the trial management conference that they were uncertain about the scope of admissible evidence after the Court's summary judgment rulings. Both sides agreed that guidance regarding admissibility would help them prepare their trial presentations. The parties and Court agreed to La Patisserie submitting this material so the Court could address foreseeable

admissibility disputes. La Patisserie's submission also informs the Court of La Patisserie's proposed evidence under Arizona Rule of Evidence 103(a)(2).

The Court presumes that La Patisserie properly disclosed the legal theories, evidence, and expert opinions in its Offer of Proof. This ruling does not address or foreclose any disclosure objections. This ruling also is not an endorsement of La Patisserie's characterization of evidence; for example, "Truck had already determined that its agent had *unreasonably* failed to offer the Product Recall Endorsement." [La Patisserie Offer Proof at 23:22-23 (emphasis added).] Understandably, La Patisserie characterized evidence in the light most favorable to it.

La Patisserie's arguments often relied on *Nardelli v. Metropolitan Group Property & Casualty Insurance Co.*, 230 Ariz. 592, 277 P.3d 789 (App. 2012). The Nardellis reported the theft to their insurer, MetLife. Authorities found the badly damaged vehicle in Mexico. MetLife refused to declare the vehicle a total loss, leading to that bad faith litigation.

> An insurer acts in bad faith when it unreasonably investigates, evaluates, or processes a claim (an "objective" test), and either knows it is acting unreasonably or acts with such reckless disregard that such knowledge may be imputed to it (a "subjective" test).

Id. at 597-98, ¶ 19, 277 P.3d at 794-95. "[T]he duty of good faith encompasses some obligation to inform the insured about the extent of coverage and his or her rights under the policy and to do so in a way that is not misleading." *Id.* at 603, ¶ 54, 277 P.3d at 800.

The bad faith acts there included MetLife's "failure to advise [the Nardellis] of policy provisions relevant to their claim." *Id.* at 598, ¶ 20, 277 P.3d at 795. The first provision was the V550 endorsement that provided benefits for total losses of vehicles less than one year old with fewer than 15,000 miles. The Nardellis told MetLife about the vehicle's age and mileage, MetLife knew the policy included the V550, but admissible evidence indicated MetLife did not mention the endorsement to them. MetLife concluded the V550 did not apply only after it rejected the request to total the vehicle. *Id.* at 601-02, ¶¶ 42-46, 277 P.3d at 798-99. MetLife also failed to advise the Nardellis of the policy's appraisal provision. "Under the provision, each party could trigger an appraisal process to determine the amount of loss." *Id.* at 602, ¶ 50, 277 P.3d at 799. MetLife knew the Nardellis disagreed about the amount of the loss, which implicated that provision.

The Court pointed to the unfair claims settlement practices portion of the Arizona Administrative Code. *Id.* ¶ 55. Also, two MetLife employees testified that the company should have alerted the Nardellis to both provisions if they applied. MetLife's training manual likewise

told employees to inform policyholders of contract rights, specifically referencing the appraisal right. *Id.* at 603-04, ¶ 56, 277 P.3d at 800-01.

> This is the Arizona Administrative Code provision that *Nardelli* referenced:
>
> 1. No insurer shall fail to fully disclose to first party claimants all pertinent benefits, coverages or other provisions of an insurance policy or insurance contract under which a claim is presented.
>
> 2. No agent shall conceal from first party claimants benefits, coverages or other provisions of any insurance policy or insurance contract when such benefits, coverages or other provisions are pertinent to a claim.

A.A.C. R20-6-801(D). A "first party claimant" is "an individual, corporation, association, partnership or other legal entity *asserting a right to payment* under an insurance policy or insurance contract arising out of the occurrence of the contingency of loss covered by such policy or contract." A.A.C. R20-6-801(B)(4) (emphasis added). A "third party claimant" asserts a claim *against* one "insured under an insurance policy . . . ." A.A.C. R20-6-801(B)(10). Thus, there are differences between first-party and third-party claims.

La Patisserie often cited *Lennar Corp. v. Transamerica Insurance Co.*, 227 Ariz. 238, 256 P.3d 635 (App. 2011). A developer brought bad faith claims against insurers that failed to defend it against liability claims by homebuyers. The trial court granted summary judgment for the insurers, finding the alleged defects were not an "occurrence" under the CGL policy. The Court of Appeals reversed. While proceedings continued over several years, the insurers still had a duty to investigate the claims in good faith. *Id.* at 245-46, ¶¶ 23-31, 256 P.3d at 642-43. The insurers denied coverage based on an exclusion for soil subsidence. But the developer presented "compelling evidence" that the alleged defects were not related to soil. *Id.* at 246, ¶ 27, 256 P.3d at 643. The developer also informed the insurers of the "homeowners' allegations of poor construction" and "expert witnesses' conclusions that construction defects contributed to the damage . . . ." *Id.* ¶ 28. The developer invited the insurers to discuss the experts' findings and explore settlements without success.

Lennar explained that an insurer's claim-handling responsibilities toward the insured do not stop with filing a declaratory judgment action. But that does not address whether it is bad faith to fail to suggest coverage under first-party property damage provisions when the policyholder presented a third-party liability claim. This case also differs from *Lennar*. La Patisserie did not provide Truck with evidence (expert or lay) of covered damage under the liability provisions before the *SFS* trial, that a first-party property damage claim existed, etc.

La Patisserie argued (at 2:25-3:1) that the offered evidence is "admissible to prove an overall pattern of conduct by Truck that a reasonable jury could find to be a breach of Truck's extra-contractual obligations to investigate facts, make reasonable disclosures and generally play fairly with its insureds." But an insurance bad faith allegation addresses how the insurer responded to *a claim*. Arizona Rule of Evidence 404(b) generally precludes evidence of other crimes, wrongs, or acts. Evidence of an insurer's other improper claims handling practices may be admissible when punitive damages are at issue; such evidence may show the absence of mistake or accident. *See, e.g., Hawkins v Allstate Ins. Co.*, 152 Ariz. 490, 499, 733 P.2d 1073, 1082 (1987) (testimony regarding past claims handling practices admissible for punitive damages); *but see Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 266-67, ¶¶ 46-54, 92 P.3d 882, 896-97 (App. 2004) (trial court properly excluded evidence of how insurer handled other claims). Punitive damages are not an issue here. Likewise, the Court concluded that Truck responded appropriately to the liability claim regarding SFS. It would be inappropriate to allow La Patisserie to challenge to the liability claim indirectly by framing that attack as showing "an overall pattern" by Truck.

The Court addresses La Patisserie's offer with the foregoing framework in mind. This ruling describes the evidence that is *inadmissible*. Of course, the Court is not ruling that the remaining items conclusively are admissible; the Court must evaluate that proposed evidence in context during trial. The Court also emphasizes that La Patisserie cannot present evidence to suggest that Truck improperly investigated or handled the third-party liability claim. The summary judgment rulings disposed of such allegations. Today's ruling also is not a comment on whether evidence is sufficient to withstand a motion for judgment as a matter of law; the Court obviously cannot rule on those legal issues in this context on this briefing.

Offers 3, 7, 9, 10, 13, and 15 are inadmissible. The described evidence relates to the third-party liability claim and how Truck investigated/handled it. It would impose on Truck a duty to inquire about damage to Wal-Mart or SFS property that the Court concluded did not exist. The evidence also would attempt to revive the rejected promissory estoppel claim.

Aspects of Offer No. 8 are inadmissible. La Patisserie and its expert cannot suggest that Truck should have done something more to investigate the third-party liability claim. Admittedly, the full contours of Fairbourn's proposed testimony are not clear from this Offer. This ruling excludes evidence/opinion suggesting that Truck should have interviewed more witnesses, obtained/reviewed more documents, or inspected property/premises when evaluating the third-party liability claim. It also excludes evidence/opinion that Truck would have uncovered information supporting a first-party property damage claim if it interviewed more witnesses, obtained/reviewed more documents, or inspected property/premises when evaluating the third-party liability claim.

It is La Patisserie's obligation to ensure its witnesses abide by these evidentiary rulings.

The Proposed Limiting Instruction.

La Patisserie recognized the propriety of a limiting instruction in its Offer of Proof (at 4:17-5:14). The Court intends to give this instruction:

> You may receive evidence about two insurance claims in this case. One is a liability claim and the second is a property damage claim. You are deciding issues relating only to the property damage claim.
>
> A company named Strictly From Scratch contracted with La Patisserie to bake bread for Wal-Mart delis. Strictly From Scratch alleged that La Patisserie owed Strictly From Scratch money because of metal shavings in bread from La Patisserie; this is the liability claim. La Patisserie submitted a claim to Truck/Farmers regarding those allegations in mid-2014. The Court ruled that Truck/Farmers complied with its duties and did not act in bad faith regarding that liability claim. That ruling binds you. You may consider evidence regarding the Strictly From Scratch liability claim only to the extent it may be relevant to the allegation that Truck/Farmers acted in bad faith regarding La Patisserie's property damage claim.
>
> La Patisserie first made a formal property damage claim to Truck/Farmers in February 2016. La Patisserie alleges, however, that Truck/Farmers should have considered a possible property damage claim when La Patisserie told Truck/Farmers about reports of metal shavings in bread in mid-2014.

"[T]he failure to object to the content of the limiting instruction given, or to suggest an alternate instruction, operates as a waiver of objections to the instruction given." DANIEL J. MCAULIFFE & SHIRLEY J. MCAULIFFE, ARIZONA PRACTICE: ARIZONA CIVIL RULES HANDBOOK 1238 (2018).