SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

*** FILED ***
07/29/2002

07/24/2002

CLERK OF THE COURT
FORM V000A

HON. GARY E. DONAHOE

S. Yoder
Deputy

CV 1999-009432

FILED: _____

DANIEL B RIFLEY

RICHARD T TREON

v.

AMERICAN FAMILY INSURANCE GROUP, et al.

JAMES T ACUFF JR

SHARON M WOLFKIEL

ORAL ARGUMENT
RULING ON MOTION TO WITHDRAW
AND MOTIONS IN LIMINE

Note: These time formats represent real time, digital time, and videotape time respectively.

02:30:38 p.m. 00:03:06 00:03:38 This is the time set for oral argument on all pending motions *in limine*. Richard T. Treon and Sharon Wolfkiel appear on behalf of Plaintiff. James T. Acuff, Jr. and Dean Fink appear on behalf of Defendant.

02:30:39 00:03:08 00:03:40 The proceedings are electronically recorded in lieu of a court reporter.

02:32:00 00:04:29 00:05:00 Counsel review the Court's preliminary rulings.

02:36:00 00:08:28 00:09:00 Oral argument is presented by Mr. Treon.

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03:07:23 00:39:52 00:40:24 Oral argument is presented by Mr. Acuff.
03:31:55 01:04:24 01:04:55 Oral argument is presented by Mr. Fink on post-litigation issue.
03:33:32 01:06:01 01:06:32 Rebuttal argument is presented by Mr. Treon.
03:44:59 01:17:28 01:17:59 Oral argument is presented by Ms. Wolfkiel on Wade Harris issue.

03:45:47 01:18:16 01:18:47 Discussion is held regarding depositions of fire department personnel.
03:49:26 01:21:54 01:22:26 The Court requests Mr. Acuff to help facilitate the taking of depositions of fire fighters with Plaintiff's counsel.

03:51:28 01:23:56 01:24:28 **IT IS HEREBY ORDERED** taking all pending motions under advisement.

03:51:58 01:24:26 01:24:58 Hearing concludes.

Later

The Court has considered the pleadings and the argument of counsel.

IT IS HEREBY ORDERED granting Leon J. Brandriet’s motion to withdraw and denying Plaintiff’s motion to allow Mr. Brandriet to testify because (1) he was not timely disclosed as a witness, (2) other witness can testify about the Beanie Baby beads and rug residue, (3) the Court is not going to allow evidence from the attorneys involved in this case regarding post-litigation conduct, and (4) application of Rule 403 dictates exclusion of the evidence.

Rule 801(d)(1), Arizona Rules of Evidence, arguably would allow Mr. Brandriet to testify about an inconsistent statement made by Mr. Mussallem. However, if Mr. Brandriet is allowed to testify, then Mr. Acuff will want to introduce evidence about

Mr. Brandriet's credibility, his continuing financial interest in the case and about the facts and circumstances concerning the dissolving of the professional association between Mr. Brandriet and Ms. Wolfkiel. As he did during oral argument, Mr. Acuff will certainly want to testify about statements made by Mr. Mussallem that are consistent with his deposition testimony. Without a doubt based on what this Court has observed so far, the trial will then degenerate into yet another session of one lawyer accusing another of lying.

Rule 403, Arizona Rules of Civil Procedure, allows exclusion of otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The Court is of the opinion that the prejudice of having defense counsel become a witness substantially outweighs any probative value of testimony from Plaintiff's former counsel who stills has a financial interest in the outcome of this case. In addition, there appears to be other witnesses who can testify about the number of rugs Plaintiff owned at the time of the fire and allowing Mr. Brandriet to testify will simply result in undue delay and a waste of time pursuing a host of collateral issues with no bearing on whether Defendants engaged in bad-faith conduct.

Before addressing, the motions *in limine*, the Court wishes to caution Defendants' counsel from misstating the extent of the rulings of this Court. In the response to Plaintiff's motion *in limine* number 1, Defendants' counsel states:

> The Court granted that motion [Motion for Leave to Amend Answer and Add Counterclaim for breach of Contract] and has, therefore, disposed of plaintiff's argument.

Hopefully, Defendants' counsel knows that motions for amendment of pleadings are to be liberally granted. This Court did not

rule on the merits of Defendants' fraud claim, but only ruled that it could be presented. To state otherwise, extends the Court's ruling beyond what it actually was.

Again, in Defendants' first motion in limine, Defendants' counsel states:

> Furthermore, this Court has already closed the book on that aspect of the case by denying plaintiff's earlier motion for sanctions for alleged litigation bad faith.

The fact that this Court denied Plaintiff's motion for sanctions does not mean that the Court ruled on the admissibility of the post-litigation evidence at trial. Using Defendants' logic, one could jump to the conclusion that by denying Defendants' various motions for summary judgment, this Court has ruled in favor of Plaintiff's bad faith claim. Such is not the case and Defendants' counsel is cautioned about incorrectly reciting the extent of this Court's rulings.

With regard to Plaintiff's Motions *in Limine*,

IT IS FURTHER ORDERED as follows:

- Plaintiff's Motion *in Limine* No.1: The Court agrees with Defendants that this motion is an untimely motion for summary judgment with respect to the arson defense. The motion also raises issues based on demolition of the fire scene. The Court will rule on the latter issues, but not the former.

Plaintiff contends that Defendants are barred from asserting the arson defense and are estopped to assert a fraud defense because both the arson and fraud defenses were asserted after the fire scene was demolished. The fire occurred on December 28, 1997 and, accordingly to the pleadings, the fire scene was demolished some sixteen months later. Based on the information presented, the Court is of the opinion that Plaintiff had sufficient notice that Defendant disputed his

personal property claim before destruction of the burned house that Defendants should not be estopped to assert that Plaintiff misrepresented ownership and values of certain property. On February 5, 1998, Plaintiff presented a personal property claim to American Family in the amount of $233,723.82. On March 13, 1998, American Family paid $71,972.25 on that claim. Following that payment and before the demolition of the fire scene, there appears to have been at least two letters from American Family to Plaintiff disputing the personal property claim. The circumstances indicate that Plaintiff had sufficient notice of American Family's dispute over the personal property claim to have given Plaintiff an incentive to investigate further the fire scene if he desired.

The Court is of the same opinion regarding the arson defense. How demolition of the fire scene prejudiced Plaintiff is not clear in view of the fact that Plaintiff hired a fire investigator, Tom Pugh, who inspected and scene, investigated the fire and rendered a favorable opinion. Also available to Plaintiff is Captain Bernie Caviglia who viewed the scene, investigated the fire and rendered an opinion favorable to Plaintiff. Therefore, the Court is of the opinion that Defendants are not estopped to assert an arson defense.

Accordingly, Plaintiff's Motion *in Limine* No. 1 is denied. Whether Defendants have sufficient evidence to support an arson claim will abide presentation of the evidence.

- Granting Plaintiff's Motion *in Limine* No. 2 regarding evidence of plaintiff's post-fire financial affairs. However, should plaintiff claim he suffered any financial distress during the claims handling period, defendant is not precluded from including evidence to prove otherwise.

- Granting Plaintiff's Motion *in Limine* No. 3 regarding David Adler as an expert witness.

- Granting Plaintiff's Motion *in Limine* No. 4 regarding evidence of other litigation that Mr. Rifley has been involved in. The Court has no intention of relitigating the divorce proceeding; to do so would result in lengthy collateral proceeding to determine whether any false claims were made in the divorce proceeding.

- Granting Plaintiff's Motions *in Limine* Nos. 5 and 7 regarding Paula Stapley's testimony regarding Mr. Rifley's alleged traffic tickets, etc., testimony regarding the divorce and evidence of the litigation file of their divorce. However, Defendants are not precluded from asking any witness if she or he was threatened or intimidated by Plaintiff.

- Denying Plaintiff's Motion *in Limine* No. 6 regarding testimony and evidence concerning the appraisal process and/or the appraisal award because Plaintiff has put at issue the conduct of Defendants during the appraisal process.

With regard to Defendants' Motions *in Limine*,

IT IS FURTHER ORDERED as follows:

- Granting Defendants' Motion *in Limine* No. 1 (Post-Litigation Conduct) to the extent that post-litigation conduct will not be admitted to prove damages for alleged post-litigation bad-faith conduct, but denying the motion to the extent it seeks to absolutely preclude any evidence of post-litigation events without prejudice to Defendants' right to object should any of the evidence not be relevant on some issue. The Court agrees with those cases that hold that post-complaint conduct cannot form the basis of a bad faith claim for damages and should not be admitted unless the conduct is relevant to the insurer's pre-litigation handling of the claim. To hold otherwise would deprive an insurer sued for bad faith of the ability to mount a vigorous defense, to require the plaintiff to prove his or her case, to question Plaintiff's evidence and to

present evidence contrary to the plaintiff's evidence. It would also turn the attorneys into witnesses in the case.

It is the Court's opinion that a blanket exclusion of all the events that occurred subsequent to the filing of the lawsuit is not warranted. The Court has no intention of allowing any attorney involved in this case to testify. However, to the extent post-litigation conduct proves or tends to prove that American Family engaged in bad-faith conduct prior to the complaint being filed, it will be admitted.

Most of the post-complaint evidence highlighted in Plaintiff's response deals with Mr. Smith's arson analysis. The Court is of the opinion that the evidence regarding the timing of the hiring of Mr. Smith, his prior connections to American Family and the Lewis & Roca law firm, the contrary opinions of Mr. Dimond, and the information given and not given to Mr. Smith certainly is admissible for the purpose of evaluating the basis and credibility of his opinions.

During oral argument, Mr. Treon highlighted other evidence he wishes to introduce. In this Court's opinion, that evidence is admissible to prove Defendants' bad faith during the claims handling process. For example, if American Family withheld information from its insured that should have been revealed to him before the complaint was filed and such conduct is alleged to constitute bad faith, then evidence that the information was not disclosed until after the complaint was filed is certainly admissible. Damages, if any, will be based on actions constituting bad faith occurring before the complaint was filed, not on the conduct occurring during the litigation phase.

- Regarding Defendants' Motion *In Limine* No. 2 (Testimony of Charles Miller), Defendants' counsel stated during oral argument that he has no objection to Mr. Miller rendering opinions about the arbitration and appraisal clauses and any other admissible opinions that Mr. Shughart actually held prior to his withdrawal as an expert witnesses. Defendants object to

Mr. Miller testifying to opinions that either were not disclosed or were disclosed, but not actually going to be rendered by Mr. Shughart. Defendants request an evidentiary hearing on this issue. Accordingly, before Mr. Miller is called to testify, the Court will hear testimony from Mr. Shughart concerning the opinions that he was prepared to render. Mr. Miller will be limited to those opinions. Accordingly, Defendants' Motion *In Limine* No. 2 (Testimony of Charles Miller) is denied, but Mr. Miller will be limited to the opinions of Mr. Shughart that were properly disclosed and that Mr. Shughart was prepared to render.

- Granting Defendants' Motion *in Limine* No. 3 (Untimely Disclosed Witnesses) as to Leon Brandriet only. As to witnesses Harris, Miller and Bellanger, the motion is denied. According to the response, Mr. Harris was first disclosed as a witness by Defendants; therefore, the Court fails to see how Defendants can now complain about him being called as a witness. Mr. Miller is addressed above.

Regarding Mr. Bellanger, he was disclosed as a witness on May 6, 2002. Counsel has avowed that the disclosure was done promptly upon Plaintiff's counsel learning that Mr. Bellanger had inspected the fire scene in anticipation of being hired as a public adjuster. Plaintiff has no objection to Mr. Bellanger being deposed. Therefore, Defendants are granted leave to depose him if they wish and the motion to preclude Mr. Bellanger as a witness is denied.

- Granting Defendants' Motion *in Limine* No. 4 (Kim Radford) in that Plaintiff has withdrawn her as a witness.

- Denying Defendants' Motions *In Limine* No. 5 (Delayed Claim Damages) and No. 6 (Replacement Cost Contents Claim). Plaintiff is, however, limited to the figures, facts and analysis disclosed.