

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2004-004534

05/19/2009

HON. ROBERT H. OBERBILLIG

CLERK OF THE COURT  
A. Marquis  
Deputy

CLIFFORD PETTINGILL, et al.

STEPHEN E SILVERMAN

v.

FRANK CONSULTING LTD, et al.

KERRY M GRIGGS

COURT ADMIN-CIVIL-CCC  
DOCKET-CIVIL-CCC

**FINAL PRETRIAL MANAGEMENT CONFERENCE**

Courtroom 202 - OCH

10:01 a.m. This is the time set for the Final Pretrial Management Conference. Plaintiffs are represented by counsel, Stephen E. Silverman, Daniel B. Treon, and Douglas G. Shook. Defendants are represented by counsel, Kerry M. Griggs.

Court Reporter, Sandy Ong-Wolf, is present. A record of the proceedings is also made by audio and/or videotape.

**LET THE RECORD REFLECT** that Plaintiffs' counsel withdraws its claim for intentional infliction of emotional distress against Defendant Frank Consulting, Ltd., on the record, in open court.

**IT IS THEREFORE ORDERED** dismissing this case as to Defendant Frank Consulting, Ltd. ONLY, with prejudice, effective this date.

**THE COURT FINDS** that Defendant's Motion to Strike Plaintiffs' Motions in Limine is unnecessary and is therefore denied.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2004-004534

05/19/2009

Trial procedures are discussed.

The following Motions are argued and the Court enters its rulings as follows:

**1) Plaintiffs' Motion *in Limine* #1: Defendant should be precluded from denying the existence of damage caused by the Rodeo-Chediski fire:**

For the reasons stated on the record,

**IT IS ORDERED denying the Motion.**

**2) Plaintiffs' Motion *in Limine* #2: Defendant should be precluded from arguing that it acted with subjective good faith in the adjustment of the Pettingills' claim:**

Defense counsel has indicated that it is not planning to introduce subjective good faith through questioning nor planning to refer to documents that have not been produced in discovery; therefore,

**IT IS ORDERED granting the Motion.**

**3) Plaintiffs' Motion *in Limine* #3: Fraud referrals of other insurance carriers:**

**IT IS ORDERED granting the Motion to preclude the defense from referring to fraud referrals of other insurance companies; however, the Court cautions Plaintiffs regarding how they present their case in chief regarding this issue.**

**4) Plaintiffs' Motion *in Limine* #4: Defendant should be precluded from improperly impeaching John Tartaro's testimony that he had no contact with Stephen Baselice after December 11, 2002:**

For the reasons stated on the record,

**IT IS ORDERED denying the Motion.**

**5) Plaintiffs' Motion *in Limine* #5: Defendant should be estopped from relying upon evidence acquired after it breached the insurance contract by refusing Plaintiffs' May 6, 2003 appraisal demand and subsequent appraisal demands:**

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2004-004534

05/19/2009

**IT IS ORDERED** that the Court will neither grant nor deny the Motion; Defendant shall not make reference to the amount of any of the appraisals or the sales price in the presence of the jury until further evaluation by the Court.

10:58 a.m. Court stands at recess.

11:03 a.m. Court reconvenes with counsel present.

Court Reporter, Sandy Ong-Wolf, is present. A record of the proceedings is also made by audio and/or videotape.

Argument continues on the following Motions and the Court enters its rulings as follows:

**1) Defendant's Motion *in Limine* No. 1: Re: excluding post-complaint conduct of Defendants and/or their counsel as evidence of bad faith:**

**IT IS ORDERED** denying the Motion as it lacks specificity; the clarifications in court have not permitted a ruling. The Court cautions Plaintiffs to proceed carefully regarding the post-Complaint conduct of Defendants and/or their counsel. The Court is sensitive, however, to defense counsel's concern that litigation tactics for conduct be co-opted to be part of a bad faith analysis.

**2) Defendant's Motion *in Limine* No. 2: Re: Allowing Defendants to admit testimony of John Hall's prior opinions, his deposition testimony, and Plaintiffs' withdrawal of him as their expert:**

For the reasons stated on the record,

**IT IS ORDERED** denying the Motion.

**3) Defendant's Motion *in Limine* No. 3: Re: Excluding unfounded and/or speculative expert testimony:**

**IT IS ORDERED** granting the Motion to the extent of precluding the Plaintiffs from making any reference to Heber Overguard Fire Chief Mel Epp's statements, as related to and relied upon by Mr. Paxon, until further order of the Court.

**4) Defendant's Motion *in Limine* No. 4: Re: Excluding Navajo County Prosecutor's decision not to prosecute and results of other Rodeo-Chedeski claims:**

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2004-004534

05/19/2009

**IT IS ORDERED** granting the Motion; the fact that the prosecutor denied prosecution will be precluded from opening statements.

**IT IS FURTHER ORDERED** that the Department of Insurance witnesses and the defense will not present any evidence that probable cause was warranted for making a fraud referral in the first instance.

**5) Defendant's Motion *in Limine* No. 5: Excluding Expert Opinion and Conclusions on the Issue of "Bad Faith":**

**IT IS ORDERED** granting the Motion; neither party will ask their experts opinion questions referencing the phrases "bad faith" or "breach of contract"; however, counsel will have the opportunity for a properly qualified expert to ask questions relating to the definitional language of such a determination that the jury needs to make, as discussed.

Court and counsel discuss a potential jury statement/instruction regarding the "breach of contract" issue.

**IT IS ORDERED** that neither party shall reference in opening statements that the Court has already determined there was a breach of contract.

Discussion is held regarding the Preliminary Jury Instructions that are now provided to counsel, in open court.

11:51 a.m. Discussion continues, off the record.

12:01 p.m. Court stands at recess.

12:03 p.m. Court reconvenes with counsel present.

Discussion continues, off the record.

12:08 p.m. Court stands at recess until 1:15 p.m.

1:15 p.m. Court reconvenes with counsel present.

Pursuant to stipulation,

A record of the proceedings is made by audio and/or videotape in lieu of a court reporter.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2004-004534

05/19/2009

Discussion continues regarding jury instructions.

Objections to deposition testimony are addressed.

Plaintiff's counsel makes an oral motion for protective order regarding witness testimony of Cecil Daniels, Ralph Brekan, and Sean Forrester.

The Court will not enter a ruling on Plaintiff's motion this date; the issue may be re-urged after the Court has the opportunity to review previous rulings entered regarding this matter.

Trial instructions are discussed and listed below:

1. The length of the trial is discussed. In that regard, the Court is advised the trial is anticipated to last **eight (8)** days beginning **Wednesday, June 3, 2009 at 9:30 a.m.** **Counsel are instructed to appear at 9:00 a.m. on the first day of trial.**
2. The parties stipulate to invoke the rule of exclusion of witnesses.
3. The jury shall consist of eight (8) jurors and one (2) alternates for a total of ten (10) jurors. Counsel stipulate that an agreement of six (6) of the eight (8) jurors will be necessary to return a verdict in this matter. Counsel further stipulate to accept a verdict of five (5) out of seven (7) if only seven (7) jurors remain when deliberations begin.
4. The parties are to meet and confer to create a set of proposed final jury instructions. The jury instructions shall be submitted to the Court in the order in which they are to be read to the jury. With each instruction, counsel shall annotate whether the instruction is agreed upon or objected to, and, if there is an objection, the basis of that objection. Proposed verdict forms should also be submitted.

The parties shall submit the completed package to the Court in hard copy as well as on disk as a Microsoft Word document, by no later than **9:00 a.m. on the first day of trial.**

5. Counsel are advised that the Court's trial hours generally are as follows:

Tuesday through Friday, 9:30 a.m. to 4:30 p.m. with a lunch recess from noon to 1:30 p.m. daily, and two 15-minute breaks: one in the morning and one in the afternoon, with the exception of Jury Selection, which will begin at 9:00 a.m.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2004-004534

05/19/2009

6. Counsel shall meet and confer regarding authenticity, foundation and admission of exhibits to expedite the process during trial. Counsel shall also confer to eliminate any duplicate exhibits. Counsel are advised that exhibits should be received into evidence prior to asking witnesses to testify regarding the substance of the exhibit. Exhibits shall be delivered to the clerk no later than **5:00 p.m., May 22, 2009**. For instructions regarding submission of exhibits, please contact the division clerk at **(602) 506-8946**.
7. Counsel shall provide at least 24 hours notice to each party of the witnesses each party intends to call, and any exhibits they plan to use during examination of those witnesses to which the other side has made an objection.
8. The Court advises counsel that the entire Jury Panel will participate in Voir Dire. **Counsel anticipate they will each spend approximately thirty (30) minutes for follow up after the Court's initial voir dire.**
9. Counsel are directed to draft and submit a short joint summary of the case to the Court no later than the morning of the first day of trial. The Court will read the joint summary to the prospective jurors at the beginning of jury selection; **counsel stipulate they will each do a mini opening statement, no more than 2-3 minutes in length, after the Court reads the joint summary.**
10. Counsel shall not make speaking objections; counsel shall only state the legal basis for the objection.
11. Counsel do not need to request permission to approach the witness or the clerk for retrieval of exhibits.
12. Counsel shall request permission to approach the bench.
13. Bench conferences are discouraged, however, if necessary, conferences will be held at the side of the bench outside of the jury's hearing. More optimally, conferences will be held prior to the start of trial for the day, or after trial adjourns for the evening.
14. The Court provides the jurors with notebooks containing preliminary jury instructions, Court contact information and paper for note-taking. Copies of stipulated exhibits received in evidence prior to trial may be incorporated in the juror notebooks. Counsel are directed to provide sufficient copies to Court staff for placement in the notebooks prior to distribution.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2004-004534

05/19/2009

15. Counsel shall provide to the Court, on the first day of trial, hardcopies of all Rule 26.1 disclosures as to each expert witness being called by either side. The statements shall include the opinion of the expert witness as well as the basis for the opinion.
16. Counsel are advised that if either side intends to make a claim that expert testimony is cumulative, a motion *in limine* in that regard should be made before trial.
17. One day's jury fees will be assessed unless the court is notified of settlement before 2:00 p.m. on the judicial day before the trial. Counsel are reminded to promptly notify the court of any settlement pursuant to Rule 5.1(c), Ariz.R.Civ.P.

2:35 p.m. Matter concludes.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>