

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2001-002687

08/25/2003

HON. FRANK T. GALATI

CLERK OF THE COURT
C. Hernden
Deputy

FILED: 08/26/2003

MARK DURLING, et al.

CHARLES J MUCHMORE

v.

CITY OF PHOENIX, et al.

SHANNON M IVANYI

SUZANNE M DOHRER
RALPH E HUNSAKER

MINUTE ENTRY

ACIC's motion to strike the declarations of Rodney Ball was argued and taken under advisement on August 12, 2003.

IT IS ORDERED granting ACIC's motion to the extent that it moves to strike those portions of the affidavit which ACIC underlined in the copy of the affidavit which is attached to the motion with the following exceptions: (1) The sentence found at page 4, lines 4-6 is not objectionable upon excision of the words "in fulfilling its obligation of good faith and fair dealing." (2) Paragraph 10 of the affidavit is not objectionable upon the excision of the last sentence of that paragraph.

IT IS ORDERED, therefore, striking those words designated for excision.

ACIC's motion is then granted as to the one excised sentence in paragraph 5 ("The failure to offer this coverage...", lines 3-4), all the underlined portions of paragraphs 6, 7, 8 and 9 and the last sentence of paragraph 10.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2001-002687

08/25/2003

These declarations of the affidavit are ordered stricken because they either are not based upon personal knowledge or are legal opinions or conclusions which are not helpful to the jury or are outside the witness' field of expertise.

The court declines ACIC's invitation to preclude any trial testimony from Mr. Ball.

Motions and cross-motions for summary judgment were also argued and taken under advisement on August 12, 2003. They are ruled upon below.

1. The court finds that there is a material issue of fact concerning whether a dispute about "the value of the property or the amount of the loss" existed at the time of the initial demand by plaintiffs for appraisal. There also exists a material fact dispute as to whether both plaintiffs and ACIC mutually consented to putting the appraisal process on hold while settlement was explored.

Accordingly, IT IS ORDERED denying plaintiff's motion for partial summary judgment on the liability of ACIC for breach of the contract's appraisal provision.

2. ACIC's motion seeks summary judgment on plaintiffs' contract claims, bad-faith claims and punitive damages claim. The court finds that at a minimum material issues of fact exist over whether ACIC elected to repair or pay cash and that factual dispute precludes summary judgment on the contract claim. Only if ACIC elected to repair, does the Bush case come into play. Moreover, a material fact dispute exists over whether ACIC adequately informed the plaintiffs concerning additional living expenses coverage and that dispute precludes summary judgment on the bad-faith claim.

However, the court finds nothing in the record, either directly or circumstantially, which supports plaintiffs' claim for punitive damages against ACIC.

Accordingly, IT IS ORDERED granting ACIC's motion for summary judgment on the punitive damages claim and denying it on the contract and bad-faith claims.

3. Plaintiffs have also moved for partial summary judgment against the City of Phoenix on the issue of liability. At oral argument, the City of Phoenix withdrew its allegation of the affirmative defenses of immunity and failure to comply with the claims statute. At oral argument the parties also agreed that plaintiffs' motion against the City will await the completion of briefing on the City's motion for summary judgment, which was filed on July 30, 2003.