

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2001-019327 (CONSOL.)

05/01/2006

HONORABLE PAUL J. MCMURDIE

CLERK OF THE COURT
C.I. Miller
Deputy

FILED: 05/05/2006

NICHOLA TAVILLA, et al.

RICHARD T TREON
DANIEL B TREON

v.

EMPLOYERS MUTUAL CASUALTY
INSURANCE COM, et al.

WILLIAM H DOUGLAS

FINAL TRIAL MANAGEMENT CONFERENCE

8:32 a.m. This is the time set for Final Trial Management Conference and hearing argument on the parties' various motions. Plaintiffs are represented by co-counsel, Richard Treon and Daniel Treon. Defendant Employers Mutual Casualty Insurance Company is represented by counsel, William Douglas.

Lorraine Chalkey, Court Reporter, is present.

IT IS ORDERED denying plaintiffs' motion to strike defendant's motions for summary judgment #1-3.

IT IS FURTHER ORDERED denying plaintiffs' rule 56(f) motion.

Argument is heard on the parties' following motions:

Defendant employers mutual casualty insurance company's motion for summary judgment #1 re punitive damages.

Defendant employers mutual casualty insurance company's motion for summary judgment #2 re partial summary judgment on contract claims.

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Defendant employers mutual casualty insurance company's motion for summary judgment #3 re plaintiff's claim for intentional infliction of emotional distress.

Defendant employers mutual casualty insurance company's motion for summary judgment #4 re standing of plaintiffs.

IT IS ORDERED denying Defendant employers mutual casualty insurance company's motions for summary judgment #s 2, 3 and 4 for the reasons stated on the record.

IT IS FURTHER ORDERED deferring the court's ruling on Defendant employers mutual casualty insurance company's motion for summary judgment #1 re punitive damages until after having heard the evidence presented at trial. At the conclusion of Plaintiff's case, the court will consider the motion at the time argument is heard on Defendant's motions for judgment as a matter of law. Plaintiffs shall not present evidence regarding Defendant's financial worth until the court rules on the punitive damages issue.

Argument is heard on plaintiffs' motion to compel and for sanctions.

IT IS ORDERED granting in part plaintiff's request regarding the external or large loss report, same should be disclosed; and denying in part the remaining requests.

The court not having received copies of responses to the motions in limine, the court will consider oral argument on the motions. The court's ruling on all motions in limine will be made later.

Pretrial matters are discussed.

Plaintiffs give notice that they are withdrawing their intentional infliction of emotional distress claim. No objection by Defendant,

IT IS ORDERED dismissing Plaintiffs' emotional distress claim.

IT IS FURTHER ORDERED as follows:

1. The parties stipulate that any juror insured now or previously insured by employers mutual casualty shall be excused;
2. A panel of 45 jurors, prescreen for time, will be summoned;
3. Granting defense counsel's request to give mini-openings at time of voir dire; Plaintiffs' counsel concur. The mini-openings will be limited to 5 minutes per side;
4. Four (4) alternate jurors (each side will be allowed 6 peremptory challenges);
5. Defense counsel invokes the rule of exclusion; and
6. The court will allow experts to remain in the courtroom during the giving of testimony and the court will so notify the jury.

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FILED: Defendant Employers Mutual Casualty Insurance Company's Supplemental Requested Jury Instructions.

IT IS ORDERED affirming the trial date of **May 16, 2006, at 9:30 a.m., fourteen (14) days to a jury**, in this division.

10:39 a.m. Conference concludes.

* * *

LATER:

After considering the various motions in limines, and the responses thereto, the court orders as follows:

PLAINTIFFS' MOTION NO. 1.

Plaintiffs move to prohibit the cross-examination of James O'Toole regarding his settlement in the *Peters* case. Defendant claims it is admissible to show that O'Toole has a "practice in having insureds misrepresent facts." The court finds that the evidence is inadmissible for the purpose stated. *See* Rule 404. The court likewise finds the evidence's probative value is substantially outweighed by the potential for unfair prejudice. *See* Rule 403.¹

IT IS ORDERED granting the motion.

PLAINTIFFS' MOTION NO. 2.

Plaintiffs move to prohibit any reference to the existence of the *Damron* agreement between Plaintiffs and William Kelty. Defendant maintains that because Kelty is a witness who will give key testimony against it, Kelty's favorable settlement with Plaintiffs is admissible to show motive and bias. The court agrees with Defendant that the agreement is admissible.

IT IS ORDERED denying the motion.

PLAINTIFFS' MOTION NO. 3.

Plaintiffs move to prohibit any reference to lawsuits filed by them. Defendant maintains that as there is a claim for emotional harm or distress based on the alleged bad faith handling of

¹ At oral argument on the motions, counsel for Plaintiffs withdrew the request for ruling on whether Defendants could cross-examine O'Toole on whether the claim was fraudulent.

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the Plaintiffs' claim, Defendant should be able to impeach Plaintiffs with their other lawsuits wherein they have alleged emotional harm.² The court finds that so long as Plaintiffs only present a general emotional harm claim that would arise from someone being displaced from their home, then evidence that there was emotional harm caused by these other incidents will be excluded. However, should Plaintiffs open the door by claiming such things as loss of sleep, distress, hopelessness, poor job performance, etc., then Defendant would be allowed to present evidence that there may be other reasons besides this case contributing to such abnormalities. Such evidence would include the other lawsuits.

IT IS ORDERED granting the motion subject to the court revisiting the motion based on the evidence presented at trial.

PLAINTIFFS' MOTION NO. 4.

Plaintiffs move to preclude Defendant from introducing any evidence regarding Plaintiffs' decision to seek appraisal after filing the complaint.

IT IS ORDERED denying the motion.

PLAINTIFFS' MOTION NO. 5.

Plaintiffs move to preclude the testimony of Michael Jordan regarding the lack of mold smell.

IT IS ORDERED denying the motion.

PLAINTIFFS' MOTION NO. 6.

Plaintiffs move to preclude the testimony of a witness who heard that the owner of O & M Environmental Remediation was in jail. The court finds that evidence, without more, is inadmissible.

IT IS ORDERED granting the motion.

PLAINTIFFS' MOTION NO. 7.

Plaintiffs move to preclude the felony record of William Kelty. According to the court's records, William Kelty, DOB 6/26/63, has two felony convictions: CR2003-013013—Possession

² As noted above, Plaintiffs have withdrawn their claim for intentional infliction of emotional distress. However, Plaintiffs are still pursuing damages for emotional harm caused by the alleged bad faith handling of their insurance claim.

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of Drug Paraphernalia, designated a felony on January 14, 2005 for failing to comply with the terms of the probation by committing another crime. (See order filed 1/18/05.) CR2004-042589—Possession of Drug Paraphernalia, an undesignated offense for which Mr. Kelty is still on probation. (See sentencing M.E. dated 2/14/2005.) While both convictions are felonies, it appears that they are subject to the limitations of proposition 200 and, therefore, are inadmissible under Rule 609. *State ex rel. Romley v. Martin*, 205 Ariz. 279 (2003).

IT IS ORDERED granting the motion.

PLAINTIFFS' MOTION NO. 8.

Plaintiffs move to preclude the introduction of pictures taken by Mr. Daley in January of 2006.³

IT IS ORDERED denying the motion.

PLAINTIFFS' MOTION NO. 9.

Plaintiffs move to preclude the testimony of Douglas Dieker, Plaintiffs' former counsel in this matter. The confidential communication between Plaintiffs and Mr. Dieker is not admissible unless waived by Plaintiffs. However, relevant non-privileged testimony is admissible.

IT IS ORDERED denying the motion.

PLAINTIFFS' MOTION NO. 10.

Plaintiffs move to preclude documents regarding Plaintiffs' business licenses and a quit claim deed based on a claim that Defendant has failed to disclose such documents.

IT IS ORDERED denying the motion.

PLAINTIFFS' MOTION NO. 11.

Plaintiffs move to preclude the defense of non-party at fault of Bell Drapery.

IT IS ORDERED denying the motion.

PLAINTIFFS' MOTION NO. 12.

³ Plaintiffs also requested the exclusion of some ski-trip photos, which Defendant acknowledged would not be offered. Therefore, the motion on that point is moot.

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Plaintiffs move to preclude Defendant from eliciting testimony from its claims handling expert regarding additional bases for denying Plaintiffs' claim.

IT IS ORDERED denying the motion.

PLAINTIFFS' MOTION NO. 13.

Plaintiffs move to preclude the testimony of William Stinson as it relates to the Defendant's advice of counsel defense.

IT IS ORDERED denying the motion.

PLAINTIFFS' MOTION NO. 14.

[This motion was previously granted by the court.]

PLAINTIFFS' MOTION NO. 15.

Plaintiffs move to preclude photographs taken by Thad Eaton. The court finds that the motion should be raised when and if Defendant offers such evidence.

IT IS ORDERED denying the motion.

PLAINTIFFS' MOTION NO. 16.

Plaintiffs move to restrict the testimony of Defendant's claims handling expert. The court finds that the motion should be raised when and if Defendant offers evidence that Plaintiffs believe is outside of the experts qualifications.

IT IS ORDERED denying the motion.

PLAINTIFFS' MOTION NO. 17.

Plaintiffs move to preclude the telephonic voicemail message left by Mr. Tavilla. The court finds that the motion should be raised when and if Defendant offers such evidence. Assuming that it is offered, and the court admits the message, Plaintiffs shall not attempt to offer evidence regarding their subsequent financial difficulties without first addressing it with the court.

IT IS ORDERED denying the motion.

DEFENDANT'S MOTION NO. 1.

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Defendant moves to restrict the testimony of Plaintiffs' expert Charles Miller. The court notes that Defendant previously asked the court to permit a second deposition of Mr. Miller based on the fact that he was listed as a rebuttal expert. Plaintiffs objected and the court sustained the objection. To the extent that Mr. Miller now wishes to opine about matters that he indicated in his first deposition that he would not testify about, the court will preclude such testimony.

Opinions regarding standards for public adjusters. Plaintiffs agree that Miller is not qualified to offer an opinion in this area, therefore the motion is granted.⁴

Opinions regarding the insureds' standard of conduct. The court finds Mr. Miller did offer opinions regarding the obligations of an insured. (See TR 5/2/05 at pp 55-61.) The court finds that Miller may offer opinions in this area at trial.

Opinions regarding EMC's policy complying with Arizona law. Plaintiffs concede that they will not be offering such opinions through this witness.

Opinions regarding water extraction companies and how they respond to insureds' calls. The court will defer ruling on this issue until hearing the expert's qualifications in this area.

Opinions regarding bad faith. Miller told Defendant during his deposition that he had not testified in other cases about the issue of bad faith, and that he was not offering an opinion about bad faith in this case. (*Id.* at 18-19, 215.) In the "corrections to deposition" Mr. Miller changed his testimony and stated "I will offer opinions that the conduct was in bad faith. . . ." (Exhibit 3 to the Response.) Plaintiffs cannot "correct" a new opinion into a deposition and then object when Defendant asks to re-depose the witness. The witness is precluded from rendering a bad faith opinion.

IT IS ORDERED granting the motion in part and denying the motion in part consistent with this order.

DEFENDANT'S MOTION NO. 2.

Defendant moves to enforce previous orders of the court. Plaintiffs recognize that they may not assert economic damages claims; however they maintain that they can present evidence of how Defendant's conduct affected "Plaintiffs' lives, their ability to concentrate on, perform and enjoy their work" as evidence of their general damages. The court will not preclude the general evidence, but such evidence would allow the Defendant to present evidence of other lawsuits as noted above.

⁴

Plaintiffs attempt to expand the motion to include Defendant's witness Eaton. The court does not rule on whether Mr. Eaton has the qualifications to opine about the standards for public adjusters.

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IT IS ORDERED granting the motion in part, and denying it in part. The previous orders of the court are affirmed.

DEFENDANT'S MOTION NO. 3.

Defendant moves to preclude evidence or testimony regarding the medical effects of the alleged mold on Plaintiffs. Without medical testimony supporting Plaintiffs claim that their ailments were caused by the mold, the evidence is inadmissible.

IT IS ORDERED granting the motion.

DEFENDANT'S MOTION NO. 4.

Defendant moves to preclude the opinion testimony of James O'Toole as violating the one independent expert rule. The court has insufficient evidence to conclude that Mr. O'Toole qualifies as an independent expert.

IT IS ORDERED denying the motion.

DEFENDANT'S MOTION NO. 5.

Defendant moves to exclude testimony or evidence based upon Arizona's unfair claims settlement practices act. The court finds that while the act does not establish a standard of care actionable as a private action, the act may be used as non-conclusive evidence of industry standards in Arizona.

IT IS ORDERED denying the motion.

DEFENDANT'S MOTION NO. 6.

Defendant moves to exclude Plaintiffs from "offering evidence or testimony, or referring to, other claims handled by EMC Insurance Companies." Defendant specifically references Stockett and Grovich. Regarding the specific claims, Plaintiffs argue that "Rick Stockett" should be allowed to testify. The court has reviewed the proffered testimony outlined by Plaintiffs regarding Mr. Stockett, and the court will allow the witness to testify about his dealings with EMC limited to whether EMC employees encouraged Mr. Stockett to fire Mr. O'Toole.

Plaintiff makes no attempt to justify the introduction of evidence from Mr. Grovich. The court is unaware if this is an oversight by Plaintiffs or a concession that Grovich's testimony should be excluded. The court will not hold that it is excluded or admissible until Plaintiffs address its admissibility.

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The court has insufficient evidence to rule on the admissibility of the "compensation plan." Plaintiffs shall not offer such evidence until further review by the court.

The court has insufficient evidence to rule on the admissibility of other evidence mentioned in the pleadings. Such evidence shall not be offered or referred to until presented to the court.

IT IS ORDERED denying the motion pending further evidence and argument to the court.

DEFENDANT'S MOTION NO. 7.

Defendant moves to exclude evidence from its website and personnel files. The court finds that the motion should be raised when and if Plaintiff offers such evidence.

IT IS ORDERED denying the motion.

DEFENDANT'S MOTION NO. 8.

Defendant moves to exclude evidence as cumulative. The court will exclude cumulative evidence presented by either side. However, the court is not in a position to find evidence cumulative at this time.

IT IS ORDERED denying the motion.

DEFENDANT'S MOTION NO. 9.

Defendant moves to have the court direct the Plaintiffs to be responsive to questions asked. The court will require all witnesses to be responsive, will not allow narrative testimony, and will strike evidence that is non-responsive. Likewise, a witness who is habitually non-responsive will be admonished by the court. Either party wishing to avoid having their witness so admonished in front of the jury, should educate the witness about appropriate courtroom testimony. However, at this time no witness has violated the rule.

IT IS ORDERED denying the motion.