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Attorneys for Plaintiffs
Angela Toft and Jennifer Garnier

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

JENNIFER GARNIER, an individual; ANGELA TOFT, an individual,

Plaintiffs,

vs.

AMERICAN RELIABLE INSURANCE COMPANY, an Arizona corporation; and DOES 1-through 100, inclusive,

Defendants.

CASE NO: CIVDS2021219
CIVIL UNLIMITED

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR DIRECTED VERDICT AND CROSS MOTION FOR DIRECTED VERDICT ON BREACH OF CONTRACT

JUDGE: HON. JEFFREY R. ERICKSON
DEPT.: S14

ACTION FILED: SEPTEMBER 30, 2020
TRIAL DATE: MARCH 19, 2024

TO THE COURT, THE PARTIES, AND THEIR ATTORNEYS OF RECORD HEREIN:

Plaintiffs Jennifer Garnier and Angela Toft ("Plaintiffs"), by and through their attorneys of record, hereby respectfully submit the following Response to Defendants' Motion for Directed Verdict ("Motion") and Cross Motion for Directed Verdict on Plaintiffs' Claim for Breach of Contract.

I. PRELIMINARY STATEMENT

a. Timing

At this point in the trial, the jury is deliberating on Plaintiffs' causes of action for breach of contract and bad faith, and the question of whether Defendants' conduct constituted malice, such that Plaintiffs are entitled to punitive damages. If the jury makes such a finding, the bifurcated trial will enter the second phase on punitive damages ("Phase Two").

Previously, on April 15 (after almost four weeks of trial and the day before closing arguments began), Defendants sought leave to add an undisclosed witness in conjunction with the Court's denial of Defendants' Motion for Nonsuit. The Court precluded the surprise witness from testifying during the first phase of trial (now ostensibly concluded) and, because there may not be a Phase Two, deferred ruling on whether the witness could testify during Phase Two until the jury returns a verdict finding malice.[1]

Given the slightly unusual procedural posture of the case, counsel for Plaintiffs has, at the Court's urging, reviewed Cal. Code Civ. Proc. § 630. This rule appears to give the Court discretion to "specif[y] an earlier time for making a motion for directed verdict," other than "after all parties have completed the presentation of *all* of their evidence." CCCP § 630(a) (emphasis added). Given that both parties case-in-chief with respect to everything *other* than punitive damages has come in, Plaintiffs submit it would be proper for the Court to hear both parties' motions for directed verdict at this time.

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[1] Plaintiffs stand by their request that the Court preclude Defendants' undisclosed witness from testifying.

b. Defendants' Motion for Directed Verdict

After filing an unsuccessful Motion for Nonsuit on April 10, Defendants now seek a directed verdict ("Motion"). Defendants' Motion, like the evidentiary record, has hardly changed since last seeking judicial relief from the jury's scrutiny. And Defendants' arguments have not changed at all. Once again, Defendants allege:

- Plaintiffs' breach of contract claim cannot survive because Defendants paid the policy limits (albeit three years after the lawsuit was filed).
- Plaintiffs claim for breach of the implied covenant of good faith and fair dealing fails because:
    - 1) Ms. Gibbons made a reasonable mistake and
    - 2) Defendants did nothing wrong at all because they reasonably relied on the opinions of third-party vendors.
- Plaintiffs have presented no evidence that the named Global Defendant (Global Indemnity Group, LLC) had any direct involvement with handling Plaintiffs' claim or was the alter ego of the named insurer, American Reliable Insurance Company ("ARIC").

The present Motion should be denied for the same reasons Defendants' Motion for Nonsuit was denied. Put simply, a jury could reasonably find that Defendants, including and specifically Global Indemnity Group, LLC ("Defendant Global"), knowingly refused – for years – to properly investigate the claim and pay benefits owed under Plaintiffs' homeowners' policy ("Policy"). First, paying what was owed under the contract (roughly three years after the lawsuit was filed and shortly before trial) is not a defense to breach of contract, it is an admission. Regardless, Plaintiffs have presented evidence of additional damages resulting from Defendants' breach of their contractual obligations under the Policy. Second, on Plaintiffs' bad faith claim, the evidence presented overwhelmingly supports the finding that Defendants' nearly five-year delay in paying what was owed was not a mistake, but quite deliberate. Finally, substantial evidence supports a finding that Defendant Global was directly responsible for the handling of Plaintiffs' claim and, alternatively, is the alter ego of ARIC. By simply denying the

existence of this evidence, Defendants' Motion offers no basis for dismissing Global from the lawsuit. Moreover, Defendants have conceded Defendant Global's direct involvement with the claim handling – a concession supported by substantial evidence.

c. Plaintiffs' Motion for Directed Verdict on Breach of Contract

In fact, Defendants' breach of contract has been established as a matter of law. Defendants have conceded, in myriad ways, that Plaintiffs were owed additional benefits under the Policy that had not been paid when Plaintiffs filed the instant lawsuit. Defendants' primary defense appears to be that Ms. Gibbons *mistakenly failed to satisfy Defendants' contractual obligations* (*i.e.*, failing to inspect and/or pay for damage to and/or within the crawlspace). Mistakenly breaching a contract is no defense to breach of contract, and Defendants do not argue otherwise. Even if Defendants disputed their breach of contractual obligations, the evidence clearly confirms it.

II. ANALYSIS

Defendants are correct, "the mere fact that the court in the instant case denied a motion for a nonsuit would not prevent it from subsequently directing a verdict for the defendant *if the condition of the evidence so warranted.*" Hoppe v. Bradshaw, 42 Cal. App. 2d 334, 342–43, 108 P.2d 947, 951 (1941) (emphasis added). "In considering a motion for a directed verdict, the evidence of the adverse party must be deemed to have been true, together with all fair and rational inferences and deductions which may reasonably be drawn therefrom." *Id.*

Since the denial of Defendants' Motion for Nonsuit, the only additional witness testimony came from Defendants' construction expert (Christopher Morgan), the "Donan" engineer Defendants sent to evaluate structural damage in 2019 (Matthew Stocking – presented by video deposition), the field adjuster (Jeffrey Haynes), and Defendants' bad faith expert (Mr. Reilly). The testimony of the first two witnesses is hardly relevant to the dispute, certainly of no help to Defendants, and understandably is not cited in Defendants' Motion. The remaining two witnesses add nothing to the analysis of Defendants' breach of contract or Defendant Global's liability, and very little to the defense to bad faith.

Defendants' arguments continue to be conclusory, self-defeating, and contradicted by the record. An insurer can defend its failure to pay benefits-owed by claiming "mistake" (no matter how hollow it might ring), but cannot also claim to have done everything required of it under the insurance policy. Regardless, a reasonable jury could find Defendants, including and specifically Defendant Global, performed an inadequate investigation followed by a knowingly unreasonable refusal to pay benefits. And that it knowingly continued this unreasonable conduct for *years*.

a. Plaintiffs have proven breach of contract as a matter of law

Despite the Court's earlier ruling on Defendants' Motion for Nonsuit, Defendants continue to argue their belated payment of Policy benefits precludes a finding of breach of contract. But putting the proverbial cookie back in the cookie jar, years after being sued for refusing to do so, is not a defense. Were it otherwise, insurers (and any other party to a contract) could violate their contractual obligations with impunity, secure in the knowledge that paying what was owed in the first place will grant them immunity. On the contrary, paying the benefits sought by Plaintiffs' lawsuit, which Defendants contend were not paid due to an oversight, concedes the only remaining elements in dispute must be resolved in Plaintiffs' favor: "Defendants fail[ed] to pay all or part of a loss covered by the policy" and "the amount of the covered loss that Defendants failed to pay" is at least $142,146.38 (the amount of Defendants' October 2023 payment).[2] That Defendants vitiated the need for Plaintiffs to actually collect on this amount does not change the fact that Defendants owed – but wrongfully failed to pay – this amount. This is especially true considering the facts that (1) Plaintiffs are also entitled to prejudgment interest on this amount, which the parties have stipulated is to be resolved by the Court and (2) Plaintiffs are otherwise only seeking $1 in damages for breach of contract.

Finally, that Plaintiffs have sufficiently proven their right to at least $1 for breach of contract is undeniable. As counsel for Plaintiffs pointed out during closing argument, defense

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[2] *See* Special Verdict Form at 2 (Nos. 3-4).

expert David Reilly testified the cost of excavating Plaintiffs' crawlspace was something Defendants should have paid for as part of the cost of investigating Plaintiffs' claim, rather than an item of damages to be counted against their policy limits; Defendants have paid the ostensible Policy limits and no more, and thus have not paid their fair share for excavating the crawlspace. The jury also heard evidence that Plaintiffs were entitled to additional coverage for personal property damaged by the flood, including property for which they submitted evidence, but for which Defendants unreasonably refused to pay. The jury also heard evidence that Defendants' breach of contract caused Plaintiffs financial harm by forcing them to hire and pay for attorneys and public adjusters. Defendants have now rested and did not offer evidence – or even argument – contesting the foregoing.

b. Bad faith

Could the jury find, based on the evidence presented, find "Defendants unreasonably or without proper cause fail[ed] to pay or delay[ed] in payment of policy benefits," or "unreasonably fail[ed] to conduct a full, fair, prompt, and thorough investigation of all the bases of Plaintiffs' claim," and that the failure was *not* the product of "a genuine dispute as to the amount owed?"[3] Clearly, the answer is "yes."[4]

Defendants baldly insist that the nearly five-year delay in paying Plaintiffs' claim was the product of an innocent mistake and "it is entirely reasonable for insurers to base their treatment of a claim on the opinions of independent experts, such as contractors in the case of property damage to a home." (Motion at 7 (citing *Fraley v. Allstate Ins. Co.* (2000) 81 Cal.App.4th 1282).) The *Fraley* court appropriately held that, "[w]here the parties rely on expert opinions, even a substantial disparity in estimates for the scope and cost of repairs does not, by itself, suggest the insurer acted in bad faith." *Fraley*, *supra*, 81 Cal.App.4th at p. 1293. Defendants' recycled argument fails, for several reasons.

First, the jury has been given substantial reasons for finding Defendants' "mistake" defense

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[3] *See* Special Verdict Form at 3 (Nos. 4-5).

[4] Counsel for Plaintiffs feels compelled to acknowledge that making this argument while the jury is actively deliberating the case feels like very bad luck.

is not only disingenuous, but dishonest. Evidence of such includes, but is not limited to: Ms. Gibbons' shifting explanations for what exactly the mistake was (*e.g.*, the need for excavation of the crawlspace, and/or the electrical, and/or the plumbing); Defendants' contradictory arguments (*e.g.*, there was no mistake at all because Defendants paid the HVAC estimate, reasonably thought doing so included excavation of the crawlspace and thus would restore the home to pre-loss condition, and had no reason to know the HVAC estimate did not include excavation of the crawlspace); the evidence that Ms. Gibbons was notified time and time again that there had been an "oversight"; the testimony of independent adjuster Mr. Haynes, which exposed the dishonesty in Defendants' claim that he advised them nothing more than the $5000 paid in benefits to repair the home was owed; evidence (primarily from Defendants' written discovery responses) that Defendants repeatedly took the position that they were right to withhold any additional benefits due to a Policy exclusion.

Second, Defendants continue to ignore that this dispute was never about a "disparity in estimates for the scope and cost of repairs." (*Fraley v. Allstate Ins. Co.* (2000) 81 Cal.App.4th 1282) Rather, Plaintiffs submitted an estimate for over $160,000 in damage and Defendants paid *nothing*. Further, while Defendants may "rely on expert opinions" and their estimates, the evidence shows Defendants' expert (Mr. Haynes) submitted a competing estimate for roughly $27,000, Defendants disregarded it, and instead paid *nothing*.

Third, Defendants' Motion "fails to acknowledge an important limitation on the genuine dispute rule….

> In [*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713] the Supreme Court emphasized the genuine dispute rule cannot be invoked to protect an insurer's denial or delay in payment of benefits unless the insurer's position was both reasonable and reached in good faith: "The genuine dispute rule does not relieve an insurer from its obligation to thoroughly and fairly investigate, process and evaluate the insured's claim. A genuine dispute exists only where the insurer's position is maintained in good faith and on reasonable grounds."

Brehm v. 21st Century Ins. Co. (2008) 166 Cal.App.4th 1225, 1238, as modified (Oct. 6, 2008); *see Pyramid Technologies, Inc. v. Hartford Cas. Ins. Co.* (9th Cir. 2014) 752 F.3d 807, 824 (finding insurer's inadequate investigation and unreasonable delay in paying benefits – based on that inadequate investigation – precluded summary judgment on bad faith).

Mr. Jarvie testified – unequivocally – that Defendants failed to timely pay for excavation of the crawlspace (*i.e.*, the cardinal damage in need of repair).

Additionally, the jury has now heard the testimony of Mr. Haynes, the "independent expert" whose "cost of repair estimates" Defendants purportedly relied on. (Motion at 7:21-27). If there was one portion of Mr. Haynes's testimony that was entitled to credibility, it was his repeated and unequivocal assertions that he was not qualified – or even expected – to evaluate the damage to Plaintiffs' home. For example:

Q. And the crawl space underneath the home was full of mud too?

A. I don't know.

(Trial Transcript ("TT") April 11, 2024, 51:20-22).

Q. Okay. So you don't have an opinion on whether or not the crawl space needed to be excavated?

A. I don't have that opinion.

Q. You don't have any opinion on that subject?

A. Well -- well, I didn't inspect it because it wasn't accessible. Let me back up and tell you, my role as an independent adjustor is I would typically go to a job where everything was completely exposed so I can see it. In this case, the exterior was not exposed at all….

Q. And so is that to say a lot more needed to be done?

A. That's -- that's not for me to decide. As I said, I go out, and I assess what I can physically see, and I write an estimate for it.

(*Id.* at 55:16-56:7). Mr. Haynes testified he was not "qualified to investigate electrical systems," HVAC, the "even functionality of a furnace," "appliances…. [o]r fire suppression systems." (*Id.* at 58:26-59:10).

The jury has been given myriad reasons for finding Defendants violated their duty of good faith and fair dealing.

c. Plaintiffs presented sufficient evidence of Global's direct liability.

At the close of Plaintiffs' case-in-chief, the Court properly ruled Plaintiffs had provided sufficient evidence on Global's liability for the question to reach the jury. After close of

Defendants' case-in-chief, the analysis is utterly unchanged. Defendants offered no evidence or argument to rebut Plaintiffs' evidence. Defendants did not even offer a witness that *could* address the issue.

Defendants Motion for Nonsuit argued (at 8) Plaintiffs "offered no evidence that Global Indemnity Group, LLC, as opposed to another Global entity, handles claims or employs the people who handled Plaintiffs' claim." Now, Defendants make the same argument, but simply add the clarification that the testimony from "Sarah Gibbons, Traci Anderson and Will Jarvie [that they] were employed by 'Global' or 'Global Indemnity'" is not sufficient because they did not testify to working specifically for Defendant Global. (Motion at 8). Simply pointing to a portion of Plaintiffs' compelling, valid evidence and asserting it is insufficient, without having presented any evidence – or even the identity of this mysterious alternative Global entity – is not sufficient to support a directed verdict for Defendants.

Defendants' Motion (at 8) also adds the conclusory argument that Plaintiffs "produced no evidence that [Defendant Global] should be liable for a judgment against ARIC, *e.g.*, on an 'alter ego' theory by 'piercing the corporate veil.'"

It is not disputed that Defendant Global Indemnity Group, LLC is the parent corporation of ARIC, or that ARIC has no employees. (Ex. 101 at 4.) Sarah Gibbons admitted that she is employed by Global. She is also Global's chosen corporate representative, and the corporate representative of ARIC (reflecting alter ego). Ms. Gibbons' supervisor (Traci Anderson), and Ms. Anderson's supervisor (Will Jarvie), also admitted to being employed by Global.[5] Put simply: All individuals responsible for handling the claim were employed by Global. This alone precludes granting Defendants' Motion for nonsuit. Ms. Gibbons testified:

> Q Okay. So was it not you, the claims handler, who was in charge of deciding how to respond to these things at that point?
>
> A Right, not just me, but my managers.
>
> Q That would be Global, correct?

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[5] March 28 TT at 152:25-154:7; Ex. 108 at 4 (reflecting "Traci Anderson at Global Indemnity Group" prepared the responses to Plaintiffs' form interrogatories); Ex. 110 at 11 (same)

A Yes, my managers at Global.

(March 28, 2024 TT at 89:14-19)

Ms. Gibbons testified that Global and ARIC were "the same company."[6] Throughout trial, practically all Defendants' employee-witnesses, and even Defendants' attorneys, have referred to Defendants' as simply "Global." Mr. Jarvie, who used "American Reliable and Global Indemnity" interchangeably, was the Vice President of Claims for Global.[7] Mr. Flood, who reviewed multiple corporate filings by both Defendants, press releases, and internal documents, testified that all the individuals who handled Plaintiffs' claim were employed by Defendant Global. When asked about the parties' relationship and corporate structure, Mr. Flood explained "obviously, it was Global employees are handling claims on behalf of all of the subsidiaries companies that they own and control[,] so it's an insurance group."[8]

Global Indemnity Group, LLC is the entity responsible for "satisfying all, or any portion of, a judgment in this action or to indemnify or reimburse a party for payments made by the party to satisfy the judgment." (Ex. 105 at 5.) Global Indemnity Group, LLC's "Form 10-K" reflects Global's Trading Symbol is "GBLI."[9] GBLI, along with "Global Indemnity," is found throughout the claim file, beginning on page one. (Ex. 2 at 1, 1807-1811, 1875 (reflecting "Global Indemnity Group" paid, or at least administrated payment of, the costs of Plaintiffs' claim).) Importantly, it also reflects that Defendants file a consolidated tax return, all ARIC's profits are up streamed to Global, and Global pays ARIC's operating expenses. These facts

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[6] TT March 28 at 49:12-50:11

[7] TT April 2 at 29:5-23

[8] TT April 2 at 145:10-26

[9] Pursuant to Defendants' written discovery responses and correspondence, the authenticity of Global's Form 10-K (including multiple versions from different years) is not disputed. These documents (as well as other Global Indemnity Group, LLC financial filings) were authenticated by Kate Wilkinson, a purported ARIC employee. (Ex. 97 at 5, 9.) Though Global's current Form 10-K or those from past years (*see* Ex. 69 at 539) is not yet in evidence due to the bifurcation of the trial, Mr. Flood reviewed these documents in forming his opinions. And Defendants' admissions, as well as judicial estoppel, preclude Defendants from denying the validity and import of these publicly filed documents. Doing so would constitute a continuing act of bad faith warranting their immediate admission.

demonstrate both Global's direct control and its use of ARIC as an alter ego.

Plaintiffs have presented substantial evidence of Global's involvement in the alleged tortious conduct. Moreover, throughout the trial, and in their current Motion, Defendants have outright failed to challenge this evidence.

DATED: April 17, 2024.

DAWSON & ROSENTHAL

/s/ Aaron Dawson
Aaron Dawson
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. My business address is 421 W Broadway, Unit 380, San Diego, CA 92101. On April 17, 2024, I served Plaintiffs' Response to Defendants' Motion for Directed Verdict and Cross Motion for Directed Verdict On Breach of Contract on:

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as follows:

[X] By Electronic Mail. Pursuant to an agreement of the Parties, California Rules of Court 2.251 and Code of Civil Procedure §1010.6, I caused the above referenced documents to be sent electronically from aaron@dawsonandrosenthal.com to the persons listed above at their electronic mail addresses as denoted.

Date: April 17, 2024

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