

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

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CLERMONT COUNTY, OHIO

RUTH FRISKNEY, ET. AL.	:	
	:	
Plaintiffs,	:	CASE NO. 2016 CVC 00031
	:	
vs.	:	Judge McBride
	:	
THEODORE SNIDER, ET. AL.	:	DECISION/ENTRY
	:	
Defendants.	:	

The Moore Law Firm, Donald C. Moore, Jr. and Daniel M. Moore, counsel for the plaintiffs Ruth Friskney and Stephen H. Friskney, executor of the estate of Thomas E. Friskney, 1060 Nimitzview Drive, Suite 200, Cincinnati, Ohio 45230;

Rendigs, Fry, Kiely & Dennis LLP, W. Jonathan Sweeten, counsel for the defendants Beverly Snider and Theodore Snider, 600 Vine Street, Suite 2650, Cincinnati, Ohio 45202;

Markesbery & Richardson Co., David G. Richardson, 2368 Victory Parkway, Suite 200, P.O. Box 6481, Cincinnati, Ohio 45206, and Law Office of Carl W. Zugelster, Carl W. Zugelster, 1285 Ohio Pike, Amelia, Ohio 45102, counsel for the defendant/cross-claimant, Lois Santel;

Ulmer Berne LLP, Jennifer Hageman, 600 Vine Street Suite 2800, Cincinnati, Ohio 45202, and Alyson Terrell, 65 East State Street, Suite 1100, Columbus, Ohio 43215, counsel for the defendant Aetna Life Insurance Company;

Reminger Co., L.P.A., Frank Leonetti, III and Holly Marie Wilson, counsel for the defendants The Hanover Insurance Company and Ohio Insurance and Financial Group, Inc., 101 West Prospect Avenue, Suite 1400, Cleveland, Ohio 44115-1093.

This cause is before the court for consideration of the motion filed by the defendants The Hanover Insurance Company and Ohio Insurance and Financial Group, Inc.'s (1) to bifurcate the plaintiffs' bad faith and punitive damages claims and (2) to stay discovery as to those claims.

The parties submitted written and oral arguments with respect to the motion. Upon consideration of the motion, the arguments of counsel, and the applicable law, the court renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

This case stems from a vehicular accident that occurred in January 2014. The plaintiff Ruth Friskney and her now deceased husband, Thomas E. Friskney, became involved in the accident when their vehicle, driven by the defendant Lois Santel, collided with a vehicle which was driven by the defendant Theodore Snider and which was owned by the defendant Beverly Snider. The plaintiffs Ruth Friskney and Stephen H. Friskney, the executor of the estate of Thomas E. Friskney, filed a complaint against the Sniders and against Santel on January 8, 2016. The plaintiffs also filed claims against The Hanover Insurance Company (hereinafter referred to as "Hanover"), Ohio Insurance and Financial Group, Inc. (hereinafter referred to as "Ohio Insurance"), and Aetna Life Insurance Company.

The complaint sets forth nine causes of action- negligence, negligent entrustment, agency, loss of consortium, wrongful death, automobile insurance subrogation, breach of contract, bad faith, and health insurance subrogation. As to the

defendants Hanover and Ohio Insurance in particular, the plaintiffs allege that the defendants breached their insurance contract by refusing insurance coverage to the plaintiffs and that that the denial of coverage was done in bad faith. In their bad faith claim, the plaintiffs are seeking both compensatory and punitive damages.

On March 24, 2016, the defendants Hanover and Ohio Insurance moved to bifurcate the plaintiffs' claims for bad faith and punitive damages and to stay discovery as to these claims. The plaintiffs filed a response in opposition on April 4, 2016, and the defendants replied on April 12, 2016. The court heard oral arguments on the motion at the time of the case management conference which was held on April 22, 2016.

LEGAL ANALYSIS

(I) BIFURCATION AND STAY OF DISCOVERY ON CLAIM FOR PUNITIVE DAMAGES

In the instant case, the plaintiffs are seeking punitive damages in relation to their bad faith claim against the defendants Hanover and Ohio Insurance. Punitive damages may be available in claims of bad faith against insurers who fail in bad faith to pay claims to their insureds.¹

Parties in a tort action have an enforceable right to have compensatory and punitive damages bifurcated.² If the jury determines that the plaintiff is entitled to compensatory damages in the first phase of the trial, then the plaintiff may move onto

¹ *Motorists Mut. Ins. Co. v. Said*, 63 Ohio St.3d, 690, 696, 590 N.E.2d 1228 (1992), overruled on other grounds in *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 664 N.E.2d 397 (1994), citing *Columbus Finance v. Howard*, 42 Ohio St.2d 178, 71 O.O.2d 174, 327 N.E.2d 654 (1975).

² *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, 963 N.E.2d 1270, syllabus; R.C. 2315(B)(1).

the second stage of the bifurcated trial regarding punitive damages.³ Specifically, pursuant to R.C. 2315.21:

"(B)(1) In a tort action that is tried to a jury and in which a plaintiff makes a claim for compensatory damages and a claim for punitive or exemplary damages, upon the motion of any party, the trial of the tort action shall be bifurcated as follows:

(a) The initial stage of the trial shall relate only to the presentation of evidence, and a determination by the jury, with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant. During this stage, no party to the tort action shall present, and the court shall not permit a party to present, evidence that relates solely to the issue of whether the plaintiff is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

(b) If the jury determines in the initial stage of the trial that the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant, evidence may be presented in the second stage of the trial, and a determination by that jury shall be made, with respect to whether the plaintiff additionally is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant."⁴

A tort action, as defined within R.C. 2315.21, is "a civil action for damages for injury or loss to person or property * * * but does not include a civil action for damages for a breach of contract or another agreement between persons."⁵

Although the plaintiffs argue otherwise, courts have held that a claim for bad faith sounds in tort, and therefore punitive damages that are sought in association with a bad

³ R.C. 2315(B)(1). See *Stewart v. Siciliano*, 985 N.E.2d 226, 2012-Ohio-6123, ¶ 18 (11th Dist.).

⁴ R.C. 2315.(B)(1).

⁵ R.C. 2315(A)(1).

faith claim fall within the purview of R.C. 2315.21(B).⁶ Accordingly, the court finds that R.C. 2315.21(B) applies in the case at bar and requires the bifurcation of the presentation of evidence of compensatory and punitive damages. As such, the court grants the defendants Hanover and Ohio Insurance's motion to bifurcate the punitive damages issue and to stay related discovery.

(II) BIFURCATION AND STAY OF DISCOVERY AS TO THE BAD FAITH CLAIM

The defendants Hanover and Ohio Insurance also move to bifurcate the plaintiffs' bad faith claim and related discovery. The defendants argue that this will promote efficiency because, if the defendants are found not to have breached the underlying insurance contract, then they cannot be found to have denied insurance coverage in bad faith. They also argue that the bad faith claim will require discovery of ordinarily privileged materials in the claim file before resolving the underlying breach of contract claim will prejudice them.

The plaintiffs counter that the claims for breach of contract and bad faith are "naturally linked," but that the defendants will face no prejudice because they have separate elements. The plaintiffs also argue that bifurcating the bad faith claim and related discovery will be burdensome on the plaintiffs and will be inefficient.

Like R.C. 2315.21(B), Civ.R. 42 also deals with bifurcation.⁷ However, unlike R.C. 2315.21, Civ.R. 42(B) "vests a trial court with *discretion* to order a separate trial of

⁶ *Stewart*, 2012-Ohio-6123 at ¶ 36.

⁷ *Havel*, 2012-Ohio-552 at ¶ 3; Civ.R. 42(B).

any * * * issue.”⁸ Hence, the main distinctions between R.C. 2315.21 and Civ.R. 42 are (1) R.C. 2315.21 eliminates “judicial discretion” to bifurcate compensatory and punitive damages in a tort action when a party requests it and (2) Civ.R. 42(B) allows for bifurcation of any issue, not strictly damages.⁹

Specifically, Civ.R. 42(B) provides: “For convenience, to avoid prejudice, or to expedite or economize, the court may order a separate trial of one or more separate issues, claims, cross-claims, counterclaims, or third-party claims. When ordering a separate trial, the court shall preserve any right to a jury trial.”¹⁰ Thus, under Civ.R. 42(B), the trial court enjoys the “discretionary power to order a separate trial of any claim or issue either on its own motion or on the motion of plaintiff or defendant, if to do so would further ‘convenience’ or ‘avoid prejudice’ or ‘be conducive to expedition and economy.’”¹¹ “A trial court is in the best position to ascertain whether bifurcation of the issues is necessary and that court, therefore, has broad discretion in doing so.”¹²

Examining the discovery production that the defendants will face as to the bad faith claim is helpful in understanding whether they will be prejudiced absent bifurcation and a stay. Under Ohio law, an insurer has a duty to “act in good faith in the handling and payment of the claims of its insured * * *.”¹³ A plaintiff may bring a claim of bad faith when an insurer has failed “to exercise good faith in the processing of a claim of its

⁸ (Emphasis original.) *Havel*, 2012-Ohio-552 at ¶ 3.

⁹ *Havel*, 2012-Ohio-552 at ¶ 26.

¹⁰ Civ.R. 42(B).

¹¹ 1970 Staff Note to Civ.R. 42. See *Sanders v. Nationwide Mut. Ins. Co.*, 8th Dist. Cuyahoga No. 95228, 2011-Ohio-1933, ¶ 61, citing *Thomas v. Nationwide Mut. Ins. Co.*, 177 Ohio App.3d 502, 2008-Ohio-3662, 895 N.E.2d 217 (8th Dist.) (“Whether to grant or deny a motion to bifurcate is within the sound discretion of the trial court.”).

¹² *Thomas*, 2008-Ohio-3662 at ¶ 125, quoting *Fraysure v. A-Best Products Co.*, 8th Dist. No. 83017, 2003-Ohio-6882, ¶ 14.

¹³ *Stewart*, 2012-Ohio-6123 at ¶ 12, citing *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 452 N.E.2d 1315 (1983).

insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor.”¹⁴ If the reason the insurer denied coverage was correct, then it is “per se reasonable,” and thus the decision was not in bad faith.¹⁵

Ordinarily documents covered by the attorney-client privilege or that are work product are not discoverable, including those in an insurer-defendant’s claim file. However, in a bad faith claim the materials in the insurance claim file that “show an insurer’s lack of good faith in denying coverage are unworthy of protection.”¹⁶ Hence, in “the insured is entitled to discover claim file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage.”¹⁷ Further, “work-product materials are subject to disclosure during discovery on bad-faith claims.”¹⁸

If a trial court finds that releasing privileged information from an insurance claim file will “inhibit the insurer’s ability to defend the underlying claim, it may issue a stay of the bad faith claim and related production of discovery pending the outcome of the underlying claim.”¹⁹ Indeed, a trial court can abuse its discretion and prejudice an insurer-defendant by failing to bifurcate a bad faith claim or failing to stay discovery on that claim.²⁰ Prejudice can result when an insurer-defendant must divulge ordinarily

¹⁴ *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 664 N.E.2d 397 (1994), at paragraph one of the syllabus, citing *Hart v. Republic Mut. Ins. Co.*, 152 Ohio St. 185, 39 O.O. 465, 87 N.E.2d 347 (1949).

¹⁵ *Han’s Elec. Co. v. Cochran*, 10th Dist. Nos. 01AP-1391, 01AP-1394, 2002-Ohio-5009, ¶ 42, quoting *Pasco v. State Auto. Mut. Ins. Co.*, 10th Dist. Franklin No. 99AP-430 (Dec. 21, 1999).

¹⁶ *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 213, 744 N.E.2d 154 (2001).

¹⁷ *Id.* at the syllabus.

¹⁸ *Garg v. State Auto. Mut. Ins. Co.*, 155 Ohio App.3d 258, 2003-Ohio-5960, 800 N.E.2d 757, ¶ 16.

¹⁹ *Boone*, 91 Ohio St. at 214

²⁰ *Garg*, 2003-Ohio-5960 at ¶ 29. See *Brummitt v. Seeholzer*, 6th Dist. Erie No. E-13-035, 2015-Ohio-71, ¶ 21 (finding that the trial court did not abuse its discretion when it bifurcated a trial for breach of contract and bad faith claims involving an insurer’s denial of coverage).

privileged information in its claim file before other claims against it regarding insurance coverage are resolved.²¹

When a trial court bifurcates a bad faith claim, it may also “stay related production of discovery pending the outcome of the underlying claim.”²² Allowing discovery to proceed on a bifurcated bad faith claim can inhibit an insurer-defendant’s ability to defend the underlying claims for breach of contract, which would be highly prejudicial to the insurer-defendant.²³

The risk of prejudice to the defendants Hanover and Ohio Insurance warrants bifurcating the bad faith claim and staying related discovery. Although staying the bad faith claim and discovery will lengthen the trial and discovery period, the defendants will likely face great prejudice if the plaintiffs have access to their privileged documents from the insurance claim case files. The plaintiffs would potentially have access to the attorneys’ work product and their impressions of the insurance claim’s merits, which relates to the underlying breach of contract claim, as well as other communications between counsel and the defendants regarding insurance coverage.

Moreover, the court finds that delaying the bad faith claim and discovery will not be greatly inefficient. First, as discussed in Section I, the court is already required to bifurcate the plaintiffs’ claim for punitive damages and stay discovery irrespective of the bad faith claim.

²¹ *Garg*, 2003-Ohio-5960 at ¶ 29. See *Sanders*, 2011-Ohio-1933 at ¶ 63 (permitting bifurcation of bad faith and contract claims because the insurer-defendant would be prejudiced by providing discovery information for the bad faith claim that would otherwise be protected under the attorney-client privilege).

²² *Cochran*, 2002-Ohio-5009 at ¶ 46, citing *Boone*, 91 Ohio St.3d at 213-14. See Civ.R. 26(C)(2) and (4) (a trial court may order “that discovery may be held only on specified terms and conditions, including a designation of a time or place * * * [and] that certain matters not be inquired into or that the scope of the discovery be limited to certain matters.”).

²³ See *DeVito v. Grange Mut. Cas. Co.*, 996 N.E.2d 547, 2013-Ohio-3435, ¶ 15 (8th Dist.).

Additionally, as the court discussed with the parties in a hearing on June 3, 2016, the court expects that the time period between the trial of the underlying claims and the bad faith claim would be approximately two weeks. Thus, this is not a case where the additional discovery period will be prolonged for months. Furthermore, the court intends on using the same jurors for both stages of the trial, which will therefore not require the parties to duplicate their presentations of evidence and witnesses.

In addition, the plaintiffs' ability to pursue the bad faith claim will depend on the outcome of the underlying contract claim. If the plaintiffs fail, then there will be no additional discovery or second stage of the trial. Therefore, after careful consideration of the parties' arguments, and to avoid prejudice and promote judicial economy, the court finds that the bad faith claim should be bifurcated and related discovery should be stayed.

CONCLUSION

For the foregoing reasons, the defendants' motion to bifurcate the plaintiffs' bad faith and punitive damages claims and to stay discovery as to those claims is well-taken and granted.

IT IS SO ORDERED.

DATED: 6-21-16



Judge Jerry R. McBride