

FILED

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

2018 FEB 20 PM 3: 13

BARBARA A. WOOD JENKINS
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OHIO

KEVIN DUNFORD, ET AL.

:

Plaintiffs

:

CASE NO. 2017 CVH 01228

vs.

:

Judge McBride

**TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA, ET AL.**

:

DECISION/ENTRY

Defendants

:

The Moore Law Firm, Daniel N. Moore, Donald C. Moore, and Ginger S. Bock, counsel for the plaintiffs Kevin Dunford and Joshua Dunford, 1060 Nimitzview Drive, Suite 200, Cincinnati, Ohio 45230.

Gallagher Sharp, John T. Murphy and Rema A. Ina, counsel for the defendant Travelers Property Casualty Company of America, 1501 Euclid Avenue, 6th Floor, Cleveland, Ohio 44115.

Garvey Shearer Nordstrom PSC, John J. Garvey III, counsel for the defendant Traa Dameron, 300 Buttermilk Pike, Suite 260, Ft. Mitchell, Kentucky 41017

This cause is before the court for consideration of the motion filed by the defendant Travelers Property Casualty Company of America's on December 1, 2017 to (1) bifurcate the plaintiffs' bad faith and punitive damages claims and (2) to stay discovery of those claims, filed on December 1, 2017. Counsel made oral arguments as to the motion on January 5, 2018, and upon the conclusion of those arguments, the court took the motion under advisement.

Upon consideration of the motion, the record of the proceedings, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

This case stems from a vehicular accident that occurred in October 10, 2015. The defendant Traa Dameron struck the plaintiff Kevin Dunford's vehicle from behind while the plaintiff was stopped at a red light. On September 28, 2017, the plaintiffs, Kevin Dunford and his son Joshua Dunford, filed a complaint against the defendant Dameron and against the defendant Travelers Property Casualty Company of America (hereinafter referred to as "Travelers"), Kevin Dunford's insurance provider.

The complaint alleges five causes of action. The claims filed against Travelers are claims for breach of contract and failure to act in good faith (bad faith)/breach of fiduciary duties. With respect to their bad faith claim, the plaintiffs are seeking both compensatory and punitive damages.

On December 1, 2017, Travelers moved to bifurcate the plaintiffs' claims for bad faith and punitive damages and to stay discovery on those claims. The plaintiffs filed a memorandum in opposition on December 20th, and Travelers replied on December 29th. Oral arguments as to the motion were then held on January 5, 2018, and the court then took the motion under advisement.

LEGAL ANALYSIS

(I) BIFURCATION AND STAY OF DISCOVERY FOR PUNITIVE DAMAGES

In the instant case, the plaintiffs pled for punitive damages in relation to their bad faith claim against Travelers. Punitive damages may be available in claims of bad faith against insurers who breach a duty of good faith in refusing to pay a claim of its insured.¹

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

¹ *Motorists Mut. Ins. Co. v. Sald*, 63 Ohio St.3, 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, 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, at the syllabus; R.C. 2315.21(B)(1).

³ R.C. 2315.21(B)(1). See *Stewart v. Siciliano*, 985 N.E.2d 226, 2012-Ohio-6123, ¶ 18 (11th Dist.).

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

Courts have held that a claim for bad faith sounds in tort, and that as a result punitive damages that are sought in association with a bad 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 Travelers's motion to bifurcate the punitive damages issue and to stay discovery related to the punitive damages issue.

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

Travelers also moves to bifurcate the plaintiffs' bad faith claim and related discovery. Travelers argues that this will promote efficiency because, if it is found not to

⁴ R.C. 2315.21(B)(1).

⁵ R.C. 2315.21(A)(1).

⁶ *Stewart*, 2012-Ohio-6123 at ¶ 36.

have breached the underlying insurance contract, then it cannot be found to have denied insurance coverage in bad faith. It also argues that the bad faith claim will require discovery of ordinarily non-discoverable materials in the claim file and that producing these materials before resolving the underlying breach of contract claim will prejudice Travelers.

The plaintiffs counter that the claims for breach of contract and bad faith are "inextricably intertwined," and thus bifurcating the bad faith claim and related discovery will prejudice the plaintiffs. Additionally, the plaintiffs posit that bifurcation is inefficient and will significantly lengthen litigation, possibly for years, placing a burden on the plaintiffs.

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 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

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

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

⁹ *Id.* at ¶ 26.

¹⁰ Civ.R. 42(B).

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 Travelers will face for the bad faith claim is helpful in understanding whether Travelers 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 insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefore."¹⁴ "A cause of action for bad faith can also arise from an insurer's 'foot-dragging' in the handling of a claim * * *."¹⁵ If the reason the insurer denied coverage was correct, then it is "per se reasonable," and thus the decision was not in bad faith.¹⁶

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.

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). See *Toman v. State Farm Mut. Auto Ins. Co.*, 8th Dist. Cuyahoga No. 102483, 2015-Ohio-3351, citing *Hoskins*, 6 Ohio St.3d 272 ("An insurer has a duty to act in good faith in the handling of an insured's claim.").

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, 87 N.E.2d 347 (1949).

¹⁵ *Toman*, 2015-Ohio-3351 at ¶ 29, citing *Drouard v. United Servs. Auto. Assn.*, 6th Dist. Lucas No. L-06-1275, 2007-Ohio-1049, ¶ 16.

¹⁶ *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).

However, with regard to 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.”¹⁷ Hence, “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.”¹⁸ Further, “work-product materials are subject to disclosure during discovery on bad-faith claims.”¹⁹

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.”²⁰ 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.²¹ Prejudice can result when an insurer-defendant must divulge ordinarily privileged information in its claim file before other claims against it regarding insurance coverage are resolved.²²

When a trial court bifurcates a bad faith claim, it may also “stay related production of discovery pending the outcome of the underlying claim.”²³ Allowing

¹⁷ *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 213, 744 N.E.2d 154 (2001).

¹⁸ *Id.* at the syllabus.

¹⁹ *Garg v. State Auto. Mut. Ins. Co.*, 155 Ohio App.3d 258, 2003-Ohio-5960, 800 N.E.2d 757, ¶ 16 (2d Dist.).

²⁰ *Boone*, 91 Ohio St. at 214

²¹ *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).

²² *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).

²³ *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

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.²⁴

The risk of prejudice to Travelers 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, Travelers will likely face great prejudice if the plaintiffs have access to its 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. The complaint alleges multiple grounds for the plaintiffs' breach of contract claim, including an allegation that Travelers breached the insurance contract by wrongfully denying Dunford the full amount of medical payments coverage under the insurance policy.²⁵

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. Additionally, the court expects that the time period between the trial of the underlying claims and the bad faith claim would be a matter of weeks, and not years, as the plaintiffs believe. If possible, the court will use the same jurors for both

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.").

²⁴ See *DeVito v. Grange Mut. Cas. Co.*, 996 N.E.2d 547, 2013-Ohio-3435, ¶ 15 (8th Dist.).

²⁵ Compl., ¶ 27.

stages of the trial, which will therefore not require the parties to duplicate their presentations of evidence and witnesses.

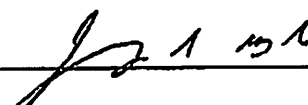
In summary, although the court recognizes that a stay and bifurcation may extend the length of litigation, perhaps causing extra expense, the court finds that potential prejudice to Travelers outweighs any decrease in judicial economy or efficiency. Therefore, after careful consideration of the parties' arguments, the court finds that the bad faith claim should be bifurcated and related discovery should be stayed.

CONCLUSION

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

IT IS SO ORDERED.

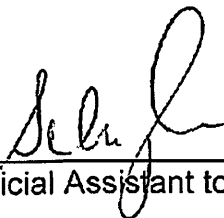
DATED: 2-9-18



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order were sent on this 20th day of February 2018 by e-mail to Daniel N. Moore, Attorney for the Plaintiffs, at danmoore@moorelaw.com; to John T. Murphy, at jmurphy@gallaghersharp.com, and John K. Hurd, at jkhurd@mimlaw.com, and Rema A. Ina, at rina@gallaghersharp.com, Attorneys for the Defendant Travelers Property Casualty Company of America; and to John J. Garvey, Attorney for the Defendant Traa Dameron, at jgarvey@garveyshearer.com.



Judicial Assistant to Judge McBride