

FILED

MAR 07 2024

JAMES M. H.M. Court Executive Officer  
MARIN COUNTY SUPERIOR COURT  
By M. Murphy, Deputy

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF MARIN

MARK BENNETT, D.D.S.,

Plaintiff,

v.

OHIO NATIONAL LIFE ASSURANCE  
CORPORATION,

Defendants.

) Case No. CIV 1903075


**ORDER RE: MOTION FOR SUMMARY  
ADJUDICATION**

Before the Court is a motion for summary adjudication brought by Defendant Ohio National Life Assurance Corporation (“Defendant”). On March 4, 2024, the Court issued a tentative ruling denying the motion. (Attached as Exhibit 1 to this Order is a copy of the tentative.) Defendant contested the tentative and on March 5, 2024 the Court held a hearing in the matter. Terrence Coleman, Esq. appeared on behalf of Plaintiff. Misty Murray, Esq. appeared on behalf of Defendant. At the conclusion of the hearing, the Court took the matter under submission.

1 After considering the submissions of the parties and the arguments of counsel at the  
2 hearing, the Court now adopts its tentative ruling (Exhibit 1) as its decision in the matter.  
3 Accordingly, for the reasons set forth in Exhibit 1 and this Order, Defendant's motion for  
4 summary adjudication is hereby **DENIED**.  
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7 **IT IS SO ORDERED.**  
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9 Date: March 7, 2024

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12 STEPHEN P. FRECCERO  
13 Judge of the Superior Court  
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# **EXHIBIT 1**

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF MARIN

DATE: 03/05/24      TIME: 1:30 P.M.      DEPT: A      CASE NO: CV1903075

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER:

CLERK: Q. ROARY

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PLAINTIFF:      MARK BENNETT, D.D.S.

vs.

DEFENDANT:    OHIO NATIONAL LIFE  
ASSURANCE CORPORATION, ET AL

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NATURE OF PROCEEDINGS: MOTION – SUMMARY ADJUDICATION

RULING

Defendant Ohio National Life Assurance Corporation’s (“Defendant”) Motion for Summary Adjudication is **DENIED**.

*Background*

Plaintiff Dr. Mark Bennett, D.D.S. (“Plaintiff”), an oral and maxillofacial surgeon, suffered progressive limitation of movement, pain, numbness and tingling (paresthesia) to his left hand, which ultimately rendered him totally disabled to continue to practice. He sold his practice in 2013, when he was 60 years old.

The primary issue in this action is whether Plaintiff suffered his debilitating symptoms due to an injury from of being thrown from his horse in 2006, as Plaintiff claims and for which he is entitled to “lifetime” benefits pursuant to his disability insurance policies with Defendant; or whether his disability is due to an illness (e.g., a pinched cervical nerve caused by degenerative disc disease) as claimed by Defendant insurer and for which the policies limit benefits to age 65.

*Procedural History*

The court previously granted Defendant’s motion for summary judgment on statute of limitations grounds and Plaintiff appealed. In an opinion issued on June 20, 2023, the Court of Appeal reversed the grant of summary judgment after concluding that that Plaintiff’s breach of contract and breach of implied covenant of good faith and fair dealing claims were not barred by the applicable statute of limitations. After remittitur, both sides exercised peremptory challenges, and the matter was assigned to this Court.

The matter is now before the Court for consideration of Defendant's motion for summary adjudication as to the claims for breach of the implied covenant of good faith and fair dealing, as well as the claim for punitive damages.<sup>1</sup>

*Objections to Evidence*

Defendant's Objections to the Parker Declaration are OVERRULED.<sup>2</sup> Defendant's Objections to the Bennett Declaration are OVERRULED. Defendant's Objections to the Coleman Declaration are OVERRULED.

*Requests for Judicial Notice*

Plaintiff's Request for Judicial Notice No. 1 is GRANTED. (Evid. Code, § 452, subd. (d).)

*Legal Standard*

A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims of damages, or one or more issues of duty. (Code Civ. Proc., § 437c(f).) A summary adjudication motion is subject to the same rules and procedures as a summary judgment motion. (*Lomes v. Hartford Financial Service Group, Inc.* (2001) 88 Cal.App.4<sup>th</sup> 127, 131.)

The purpose of a motion for summary judgment or summary adjudication "is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4<sup>th</sup> 826, 843.) "Code of Civil Procedure section 437c, subdivision (c), requires the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4<sup>th</sup> 1110, 1119.)

"On a motion for summary judgment, the initial burden is always on the moving party to make a prima facie showing that there are no triable issues of material fact." (*Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4<sup>th</sup> 1510, 1519.) A defendant moving for summary judgment or summary adjudication "has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action ... cannot be established, or that there is a complete defense to the cause of action." (Code Civ. Proc., § 437c(p)(2).) "Once the defendant... has met that burden, the burden shifts to the plaintiff... to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto."

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<sup>1</sup> Defendant's motion for summary judgment is denied for the reasons set forth in the opinion of the Court of Appeal dated June 20, 2023.

<sup>2</sup> Counsel's failure to consecutively number their objections makes resolution of those objections very difficult. Counsel is instructed to review California Rules of Court, rule 3.1354 and to comply with its requirements in any future proceedings.

(Code Civ. Proc., § 437c(p)(2).) “If the plaintiff cannot do so, summary judgment should be granted.” (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 467.)

“When deciding whether to grant summary judgment, the court must consider all of the evidence set forth in the papers (except evidence to which the court has sustained an objection), as well as all reasonable inferences that may be drawn from that evidence, in the light most favorable to the party opposing summary judgment.” (*Avivi, supra*, 159 Cal.App.4th at 467; Code Civ. Proc., §437c(c).) The moving party's evidence must be strictly construed, while the opposing party's evidence must be liberally construed. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 838.) Any evidentiary doubts are resolved in favor of the opposing party (*City of Santa Cruz v. Pacific Gas & Elec. Co.* (2000) 82 Cal.App.4th 1167, 1176.)

### *Discussion*

Defendant argues that it is entitled to summary adjudication on two grounds. First, it contends that Plaintiff cannot prove its claim for breach of the implied covenant of good faith because Defendant acted reasonably or, at the very least, a genuine issue as to coverage exists that precludes liability for bad faith. Second, Defendant contends that the prayer for punitive damages fails as a matter of law because Plaintiff cannot demonstrate “by clear and convincing evidence” that “oppression, fraud or malice” exists, as required by Civil Code section 3294(a).

Defendant cites to its Separate Statement Facts (“SS”) numbers 1-49 in support of both arguments.

#### *Good Faith*

Defendant has met its initial burden to establish that it acted reasonably and that a genuine issue as to coverage exists that precludes liability for bad faith. (See SS Nos. 18-28, 32-48.) The burden therefore shifts to Plaintiff to demonstrate that one or more triable issues of material fact exist.

Plaintiff has satisfied his burden of demonstrating the existence of triable issues of material facts. (See Plaintiff's Response to Separate Statement (“PSS”) Nos. 7, 18, 20, 23-26; Plaintiffs Additional Material Facts (“PAMF”) Nos. 29-32, 36-42, 45-195.) Specifically, Plaintiff contends that Defendant assigned the claim to its analyst John Erdman and on August 2, 2014, Defendant retained Daniel MacGowan, M.D., a board-certified neurologist, to review the claim and the medical records, and to interview the treating physicians. (PAMF Nos. 60, 120-121.) However, when Erdman spoke to Plaintiff he never asked about the horseback riding accident or how Plaintiff was able to keep working afterwards. (PAMF Nos. 68-69.) Dr. MacGowan never interviewed Plaintiff, nor did he or anyone hired by Defendant conduct a separate physical examination. (PAMF Nos. 129-130.) Plaintiff further contends that MacGowan unreasonably discounted not only Plaintiff's own doctors' opinion on the causation of the injury, but that of two other insurance carriers as well. (PAMF No. 192.)

Although Defendant cites to case law for the proposition that it cannot be held liable for bad faith liability if it bases its determination on expert opinion under the “genuine dispute doctrine,” this principle is not absolute. Where an insurer is relying on the advice and opinions of independent

experts, then a basis *may* exist for invoking the doctrine and summarily adjudicating a bad faith claim in the insurer's favor. However, an expert's testimony will not automatically insulate an insurer from a bad faith claim based on a biased investigation. (*Fadeeff v. State Farm Gen. Ins. Co.* (2020) 50 Cal.App.5th 94, 102–03, as modified on denial of reh'g (July 1, 2020). Internal citations omitted. Emphasis added.) There are several circumstances where a biased investigation should go to jury: (1) the insurer was guilty of misrepresenting the nature of the investigatory proceedings; (2) the insurer's employee lied during the depositions or to the insured; (3) the insurer dishonestly selected its experts; (4) the insurer's experts were unreasonable; and (5) the insurer failed to conduct a thorough investigation. (*Ibid.*)

Here, Plaintiff sets out facts demonstrating that Defendant withheld pertinent information from MacGowan (PAMF No. 186), that Defendant lied to Plaintiff's counsel when it represented that other physicians verified the condition was a result of sickness and not injury (PAMF Nos. 181-182), that Defendant knew MacGowan gave his opinion without completing field visits that had been ordered (PAMF No. 139), and without speaking to or examining Plaintiff (PAMF Nos. 129-130).

The genuine dispute doctrine 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. (*Fadeeff, supra*, at pp. 101-102.) Ordinarily, reasonableness is a factual issue to be decided by a jury. (*Ibid.*) Here, the disputed facts of the case fall squarely within circumstances that should not be decided on summary adjudication under *Fadeeff*.

#### *Punitive Damages*

The standard for a motion for summary adjudication on a claim for punitive damages is whether clear and convincing evidence exists to support that claim. (*Szarowicz v. Birenbaum* (2020) 58 Cal.App.5th 146, 171. Internal citations omitted.) While a plaintiff need not prove his or her case for punitive damages to defeat summary adjudication, “[i]n ruling on a summary judgment or summary adjudication motion, ‘the judge must view the evidence presented through the prism of the substantive [clear and convincing] evidentiary burden....’” (*Ibid.*) To defeat summary adjudication, plaintiff must “demonstrate the existence of sufficient evidence to establish a prima facie case for punitive damages, having in mind the higher clear and convincing standard of proof.” (*Ibid.*)

Here too, the Court finds that Defendant has met its initial burden and that the burden therefore shifted it to Plaintiff to demonstrate the existence of triable issues of material fact. The Court again concludes that Plaintiff has done so. (See PSS Nos. 7, 18, 20, 23-26; PAMF Nos. 29-32, 36-42, 45-195.)

For example, Plaintiff puts forth facts showing that Defendant withheld pertinent information from MacGowan (PAMF No. 186), Defendant lied to Plaintiff's counsel when it represented that other physicians verified the condition was a result of sickness and not injury (PAMF Nos. 181-182), Defendant knew MacGowan gave his opinion without completing field visits that had been ordered (PAMF No. 139), and without speaking to or examining Plaintiff (PAMF Nos. 129-130),

and that Defendant purposefully ignored reports supporting a conclusion that the injury was due to accident and not illness. (PAMF Nos. 107-117.)

An insurer is not permitted to rely selectively on facts that support its position and ignore those facts that support a claim; doing so may constitute bad faith. (*Mazik v. Geico Gen. Ins. Co.* (2019) 35 Cal.App.5th 455, 470. Internal citations omitted.) When sufficiently egregious, an insurer's intentional disregard of facts supporting a claim also meets the standard for punitive damages. (*Ibid.*)

In viewing the facts set forth by Plaintiff under a substantial evidence standard, a reasonable finder of fact could determine that Defendant's conduct was sufficiently egregious, and that Plaintiff is entitled to punitive damages.

For these reasons, the Motion for Summary Adjudication is denied.

***All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.***

***The Zoom appearance information for February, 2024 is as follows:***

***<https://www.zoomgov.com/j/1602925171?pwd=NUdsaVlabHNrNjZGZjFsVjVSTUVqOT09>***

***Meeting ID: 160 292 5171***

***Passcode: 868745***

***If you are unable to join by video, you may join by telephone by calling (669) 254-5252 and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: <https://www.marin.courts.ca.gov>***



MARIN COUNTY Superior Court  
3501 Civic Center Drive  
P.O. Box 4988  
San Rafael, CA 94913-4988

**MARK BENNETT, DDS**

**vs.**

**OHIO NATIONAL LIFE ASSURANCE  
CORPORATION, ET AL**

**CASE NO. CIV1903075**

**PROOF OF SERVICE BY  
FIRST CLASS MAIL**

*Code of Civil Procedure Sections  
1013a and 2015.5*

I am an employee of the Marin County Superior Court. I am over the age of 18 years and not a party to this action. My business address is 3501 Civic Center Drive, Hall of Justice, San Rafael, California.

On March 7, 2024, I served the following document(s): **ORDER RE: MOTION FOR SUMMARY ADJUDICATION** in said action to all interested parties, by placing the envelope for collection and mailing on the date shown thereon, so as to cause it to be mailed on that date following standard court practices.

I am readily familiar with the court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

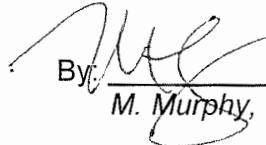
TERRENCE J. COLEMAN, ESQ.  
100 GREEN STREET  
SAN FRANCISCO, CA 94111

MISTY A. MURRAY, ESQ.  
10100 SANTA MONICA BLVD., #550  
LOS ANGELES, CA 90067

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

JAMES M. KIM  
Court Executive Officer

Executed at San Rafael, California

By:   
M. Murphy, DEPUTY