DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

AAA FULL TRANSPORTATION SYSTEM dba AAA CAB SERVICES, INC., an Arizona corporation, Plaintiff/Appellant/ Appellee, v. JOSEPH PATTERSON; RUSSELL WILSON, Defendants/Appellees, AMERICAN TRANSPORT INSURANCE CORPORATION; ROBERT OSMUNDSEN, Defendants/Appellants.	No. 1 CA-CV 09-0204 DEPARTMENT E MEMORANDUM DECISION Not for Publication - (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2006-011153

The Honorable Douglas L. Rayes, Judge

AFFIRMED

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G E M M I L L, Judge

¶1 Following a jury trial, the trial court entered a $4.3 million judgment in favor of AAA Full Transportation System ("AAA"). AAA argues the trial court erred when it entered judgment as a matter of law ("JMOL") in favor of Defendants/Appellees Russell Wilson and Joseph Patterson before it submitted to the jury the claims against them and when it denied AAA's motion for a new trial. Defendant/Appellant Robert Osmundsen cross-appeals from the trial court's denial of his motion for a new trial. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 AAA operates a large taxicab service in Arizona. In December 2002, it purchased a one million dollar insurance policy for its fleet from American Transport Insurance Corporation ("ATIC"), with a $100,000 self-insured retention ("SIR"). It renewed the policy in December 2003. Osmundsen was a director of ATIC, which at that time was not authorized to write one million dollar insurance policies.

¶3 In February 2004, AAA was named as a defendant in a lawsuit ("the Way claim"). AAA notified ATIC of the action and

requested defense and indemnification. In a letter dated March 9, 2004, ATIC's attorney informed AAA that United Guarantee Reassurance Limited ("UGRL") -- and not ATIC -- was AAA's insurer, and he instructed AAA to submit the SIR to Tri-Continental Exchange Limited ("TCE"), a third-party administrator. AAA submitted the SIR later that month to TCE, which apparently forwarded the claim to another third-party administrator, L & W Claims Management, LLC.

¶4 Patterson was a claims adjustor for L & W Claims. In March he began to investigate the Way claim; he met with a representative of AAA, reviewed the police and medical reports, inspected the accident scene, and obtained information about how AAA conducts its business. He then prepared a report of his findings.

¶5 In September 2004, AAA was advised by ATIC's attorney that AAA would not be provided a defense or indemnification because TCE's assets had been seized by the government of Saint Vincent. According to the affidavit of an FBI special agent, several companies, including TCE and UGRL, were part of a complex insurance fraud scheme. The affidavit stated that an individual named Robert Brown, in addition to others, had sold worthless insurance policies using these companies by falsely representing that the policies were backed by a pool of legitimate insurance companies.

¶6 AAA filed a complaint in July 2006 that named ATIC, Osmundsen, L & W Claims, and Patterson, inter alia, as defendants. The complaint also named defendant/appellee Russell Wilson, who had become a director of ATIC in June 2004. The complaint alleged, inter alia, negligent misrepresentation, fraudulent misrepresentation, constructive fraud, breach of covenant of good faith and fair dealing ("bad faith"), and civil RICO violations, and it asserted the defendants had been acting in concert.

¶7 On the eighth day of trial the court entered judgment as a matter of law in favor of Wilson on all counts. It also entered judgment as a matter of law in favor of Patterson on AAA's bad faith claim. At the conclusion of the trial, the jury found ATIC liable for negligent and fraudulent misrepresentation and constructive fraud, Osmundsen liable for violations of the RICO statutes, other defendants liable for these and other torts, and it determined that the defendants found liable had been acting in concert. Patterson was not found liable on any of the counts. The trial court entered judgment in AAA's favor, awarding $1.3 million in compensatory damages and $3 million in punitive damages.

¶8 AAA filed a motion for a new trial on the issue of Patterson's liability for negligent misrepresentation. Osmundsen filed a motion for a new trial on the grounds AAA's

counsel committed misconduct during his closing argument, there was insufficient evidence the defendants were acting in concert, there was insufficient evidence to support liability for RICO violations, and the finding of RICO violations failed to comply with statutory requirements. The trial court denied both motions. AAA and Osmundsen both filed timely appeals. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

ANALYSIS

I. AAA's Appeal

Motion for New Trial

¶9 AAA first challenges the trial court's denial of its motion for a new trial. It contends the verdict in favor of Patterson on AAA's negligent misrepresentation claim was against the weight of the evidence. We review for an abuse of discretion the denial of a motion for a new trial on the ground the verdict is against the weight of the evidence. *Dawson v. Withycombe*, 216 Ariz. 84, 95, ¶ 25, 163 P.3d 1034, 1045 (App. 2007). We view the evidence in the light most favorable to affirming the verdict. *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶ 13, 961 P.2d 449, 451 (1998).

¶10 According to AAA, the evidence at trial showed that Patterson "created the false impression that the '[Way] claim' was being handled," and it claims he acted improperly when he

failed to disclose to AAA that the Way claim "had not been received" by the insurer. AAA argues Patterson created this impression when he contacted AAA about the Way claim, met with an AAA representative, and conducted his investigation. It also asserts that Patterson gave the false impression the claim was being accepted when he personally received the $100,000 SIR that AAA paid to TCE. It argues Patterson would have been found liable for negligent misrepresentation based on these facts had the jury not been confused.

¶11 Negligent misrepresentation occurs when a person negligently provides false information to another in the course of his business or employment and the other party, justifiably relying on this false information, incurs damages. *See PLM Tax Certificate Program 1991-92, L.P. v. Schweikert*, 216 Ariz. 47, 50, ¶ 18, 162 P.3d 1267, 1270 (App. 2007). Disclosing some facts while failing to provide others can convey a false impression that becomes the legal equivalent of a misrepresentation. *Hill v. Jones*, 151 Ariz. 81, 84-85, 725 P.2d 1115, 1118-19 (App. 1986). To be liable for negligent misrepresentation, the person charged with negligent misrepresentation must have owed a duty to the injured party. *See PLM Tax*, 216 Ariz. at 50, ¶ 18, 162 P.3d at 1270.

¶12 Here, the evidence showed Patterson was an employee of L & W Claims and he investigated the Way claim. The jury could

have reasonably found this investigation was an attempt to fulfill the insurer's legal duty to investigate the claim. *See Zilisch v. State Farm Mutual Auto. Ins. Co.*, 196 Ariz. 234, 238, ¶ 21, 995 P.2d 276, 280 (2000) (stating insurer has obligation to conduct an adequate investigation). Patterson testified that he made no representations to AAA about whether the claim would ultimately be covered by the insurer, and AAA has cited no authority for the proposition that Patterson had a duty to inform AAA whether its claim would be covered. We cannot say that Patterson, by accepting the SIR, necessarily misrepresented to AAA that the claim would be covered. And Patterson testified he did not have the authority to decide coverage issues. This issue was properly submitted to the jury and the trial court did not err in denying AAA's motion.

JMOL on AAA's Bad Faith Claim

¶13 AAA next argues the trial court erred by entering JMOL in favor of Patterson and Wilson on AAA's bad faith claim. We review de novo the trial court's decision to enter JMOL. *Shoen v. Shoen*, 191 Ariz. 64, 65, 952 P.2d 302, 303 (App. 1997). A trial court should enter JMOL "only if the facts presented in support of a claim have so little probative value that reasonable people could not find for the claimant." *Id*.

¶14 A bad faith claim arises from the breach of an insurer's implied covenant of good faith and fair dealing, which

imposes a duty on the insurer to act in good faith in dealing with the insured on a claim. *Noble v. Nat'l Am. Life Ins. Co.*, 128 Ariz. 188, 190, 624 P.2d 866, 867 (1981). Bad faith occurs "when the insurer 'intentionally denies, fails to process or pay a claim without a reasonable basis.'" *Zilisch*, 196 Ariz. at 237, ¶ 20, 995 P.2d at 279 (quoting *Noble*, 128 Ariz. at 190, 624 P.2d at 868). Mere mistake and inadvertence are not sufficient to establish a bad faith claim. *Miel v. State Farm Mut. Auto. Ins. Co.*, 185 Ariz. 104, 110, 912 P.2d 1333, 1339 (App. 1995). If an insurer acts honestly and does not place paramount importance on its own interests, it should not be held liable. *Rawlings v. Apodaca*, 151 Ariz. 149, 157, 726 P.2d 565, 573 (1986).

a. Bad Faith Claim Against Patterson

¶15 AAA argues there was sufficient evidence for the jury to find Patterson liable for bad faith because Patterson "failed to adequately and promptly investigate the claim." It also contends there was evidence from which the jury could have found him liable for bad faith because he was the alter ego of L & W Claims.

¶16 The trial court properly entered JMOL in Patterson's favor. Under Arizona law, insurers are liable for bad faith when they breach their implied duty of good faith and fair dealing with an insured. There was no evidence Patterson was

himself an insurer. He testified he worked as a claims adjuster for L & W Claims, a third party administrator. AAA has not presented evidence to support its claim that Patterson was the alter ego of L & W Claims. And indepencent claims adjustors generally do not have sufficient contractual privity with or duty to insureds to be individually liable for a bad faith claim. *See* 14 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 208:10 (3d ed. West 2009); *cf. Gatecliff v. Great Republic Life Ins. Co.*, 170 Ariz. 34, 39-40, 821 P.2d 725, 730-31 (1991) (contractual privity not required to hold inter-related corporations liable for bad faith).

b. Bad Faith Claim Against Wilson

¶17 AAA next asserts there was evidence for the jury to find Wilson liable for bad faith because Wilson was responsible for issuing ATIC's checks to cover insureds' claims and because he testified that he believed ATIC was liable to AAA for at least $50,000 but did not issue AAA any money. AAA also argues JMOL was improper because the jury could have found that ATIC was Wilson's alter ego.

¶18 As with Patterson, there was no evidence that Wilson was himself an insurer. Wilson testified that he became a director of ATIC in June 2004. AAA has cited no evidence that Wilson was ATIC's alter ego and should therefore be personally liable for ATIC's actions. *See generally* 14 Lee R. Russ &

Thomas F. Segalla, *Couch on Insurance* § 198:17 (3d ed. West 2009) (insurer's agents generally may not be held personally liable to insured for bad faith). AAA asserts that it failed to present evidence supporting Wilson's alter ego status because "Wilson was not in front of the jury for any count. Had Wilson been in front of the jury and been found to have acted in bad faith, the next step would be to evaluate Wilson's liability as an individual or alter ego of ATIC. This never happened." We are unconvinced by this argument; to defeat a motion for JMOL, there must be some evidence from which the jurors could have found in AAA's favor. We find no evidence Wilson was ATIC's alter ego, and the court did not err by entering JMOL in favor of Wilson on this claim.

JMOL on AAA's Constructive Fraud Claim

¶19 Last, AAA argues the court erred by entering JMOL in favor of Wilson on AAA's constructive fraud claim. To establish a claim for constructive fraud, "one must prove the existence of a legal or equitable duty the breach of which, regardless of the intent of the party charged, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests." *Taeger v. Catholic Family and Community Services*, 196 Ariz. 285, 294, ¶ 27, 995 P.2d 721, 730 (App. 1999).

¶20 AAA argues the jury should have been permitted to determine Wilson's liability for constructive fraud because Wilson knew that ATIC was not authorized to write $1 million insurance policies but did not inform AAA of this fact. And AAA again points out that Wilson testified that he believed ATIC should have covered the Way claim, or at least covered $50,000 of the claim, but he did not pay AAA anything on the claim.

¶21 We disagree with AAA that these facts amount to evidence of constructive fraud by Wilson. AAA's allegations pertain to actions Wilson allegedly performed as a director of ATIC. The jury found ATIC liable for constructive fraud. But as stated above, there is no basis for finding Wilson was an alter ego of ATIC and for holding Wilson personally liable for ATIC's liabilities. The court therefore did not err in entering JMOL in favor of Wilson on the constructive fraud claim.

II. Osmundsen's Cross-Appeal

¶22 Osmundsen cross-appeals from the judgment.[1] He argues the trial court erred by denying his motion for a new trial because the evidence at trial was insufficient to establish his liability for RICO violations. He also asserts there was insufficient evidence to support a finding that he violated the Arizona statute proscribing the unlawful transaction of

[1] Osmundsen's opening brief appears to be submitted on behalf of both Osmundsen and ATIC, but it contains arguments on behalf of Osmundsen only.

insurance, that his actions caused damage to AAA, and that the defendants were acting in concert.

¶23 These issues all pertain to the sufficiency of the evidence at trial and would require this court to review the entire record. Only portions of transcripts from two separate days of trial, however, are part of the record on appeal. The trial itself took place over the course of ten days. We must assume the remaining transcripts from the other eight days of trial, and the portions of the two trial days that were not provided on appeal, support the jury's verdict on these issues. *See Rapp v. Olivo*, 149 Ariz. 325, 330, 718 P.2d 489, 494 (App. 1986); *Biddulph v. Biddulph*, 147 Ariz. 571, 574, 711 P.2d 1244, 1247 (App. 1985).

¶24 Osmundsen also contends that the jury's verdicts are impermissibly inconsistent because the jury found him not liable on any counts of fraud but it found him liable for RICO violations. Osmundsen, however, should have objected to any inconsistency in the jury verdicts when they were rendered and then moved for resubmission to the jury under Rule 49(c), Arizona Rules of Civil Procedure. By failing to do so he has waived review of this issue on appeal. *See Trustmark Ins. Co. v. Bank One, Arizona, NA*, 202 Ariz. 535, 543, ¶ 38, 48 P.3d 485, 493 (App. 2002).

¶25 Osmundsen next argues the jury did not issue particularized findings as required by A.R.S. § 13-2314.04(L), part of Arizona's RICO statutes. Section 13-2314.04(L) provides, in relevant part: "A person or enterprise shall not be held liable in damages or for other relief pursuant to this section unless the fact finder makes particularized findings sufficient to permit full and complete review of the record, if any, of the conduct of the person." A.R.S. § 13-2314.04(L). Again, however, Osmundsen should have made this objection below and moved for resubmission to the jury under Rule 49(c) for proper findings. By failing to do so, he waived review of this issue on appeal. *See Trustmark*, 202 Ariz. at 543, ¶ 38, 48 P.3d at 493.

¶26 Osmundsen further argues Plaintiff's counsel engaged in improper conduct during his closing arguments to the jury. But we are unable to determine the merits of this assertion because we do not have a transcript of the closing arguments. And Osmundsen also contends the trial court's award of attorneys' fees and costs to AAA violates A.R.S. § 13-2314.04(M) (2010), which precludes the trial court from awarding costs and fees if doing so would be "unjust because of special circumstances, including the relevant economic position of the parties." Osmundsen has pointed us to no place in the record

that establishes the economic positions of the parties, and we therefore find no basis for relief on this issue.

¶27 Last, Osmundsen argues the verdicts were the result of passion and prejudice. But we cannot say that the verdict was without evidentiary support or is so excessive as to shock the conscience of the court. *See Sheppard v. Crow-Barker Paul No. 1 Ltd. Partnership*, 192 Ariz. 539, 549, ¶ 53, 968 P.2d 612, 622 (App. 1998).

CONCLUSION

¶28 For the foregoing reasons, the verdicts and judgment are affirmed.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

____/s/_____
SHELDON H. WEISBERG, Presiding Judge

____/s/_____
PHILIP HALL, Judge