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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PERMANENT GENERAL ASSURANCE CORPORATION,

Petitioner,

v.

THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

Respondent;

MARIA LUISA HERNANDEZ,

Real Party in Interest.

G033269

(Super. Ct. No. 02CC05511)

O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Derek Guy Johnson, Judge. Petition granted in part; writ issued.

Law Offices of Adrienne D. Cohen and Adrienne D. Cohen for Defendant and Petitioner.

No appearance for Respondent.

The Quisenberry Law Firm, John N. Quisenberry, Anthony F. Witteman, Heather M. McKeon and Daniel A. Crawford for Plaintiff and Real Party in Interest.

* * *

Permanent General Assurance Corporation (defendant) seeks relief from respondent's order compelling defendant to produce certain vehicle theft claims files to real party in interest, Maria Luisa Hernandez (plaintiff). We conclude plaintiff can discover the subject files because they could lead to information supporting plaintiff's discrimination theory, but she can do so only after obtaining authorizations from *all* of the insureds whose claims files are to be produced. Thus, we grant the petition in part, and issue a peremptory writ, directing the trial court to determine an appropriate procedure by which such authorizations may be obtained.

FACTS

Plaintiff is suing defendant for breach of insurance contract, breach of the implied covenant of good faith and fair dealing, and intentional and negligent infliction of emotional distress. Plaintiff contends the insurer wrongfully denied her claim for theft of her vehicle and failed to pay for all damages to her vehicle. She alleges she suffered loss of contract benefits, interest, time, use of a replacement vehicle, and mental distress.

During the course of discovery, plaintiff propounded a request for production on defendant, seeking all claims files for all of defendant's insureds who had submitted a claim for vehicle theft since January 1, 1998. Defendant objected to the request as unduly burdensome, overbroad, harassing, not calculated to lead to the discovery of admissible evidence, and seeking information protected under Insurance Code section 791 et seq., which prohibits an insurance company from disclosing personal

and private information regarding its insureds. Citing *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408 [123 S.Ct. 1513] (*Campbell*), defendant also argued that nothing about other insureds' claims and the handling of their files could be used to support plaintiff's punitive damages claim, and such evidence would not otherwise establish whether plaintiff's claim was denied in bad faith. Therefore, the materials were irrelevant and not designed to lead to the discovery of admissible evidence.

In her motion to compel production, and in response to defendant's objections, plaintiff argued defendant's counsel had a pattern of "stonewalling" which had been employed in the present case and in prior litigation "in an effort to hide evidence of [defendant's] racially discriminatory claims handling practices." Further, relying on *Colonial Life & Accident Ins. Co. v. Superior Court* (1982) 31 Cal.3d 785 (*Colonial Life*), plaintiff contended the claims files for "other insureds with claims similar to [plaintiff's] are relevant to demonstrating [defendant's] bad faith conduct, and may demonstrate that [defendant] has a pattern and practice of bad faith conduct toward its insureds, including [plaintiff]." Plaintiff also asserted that to the extent the information was privileged, the Insurance Code provided express procedures for discovery of the claims files.

The court granted plaintiff's motion to compel production of the files. But it failed to condition the order on plaintiff obtaining authorizations from the nonparty insureds in general, and it impliedly ruled that plaintiff need not obtain authorizations specifically for files as to which her attorney had already obtained authorizations in prior litigation involving a different client, *Bell v. Permanent General Assurance Corporation* (Super. Ct. Los Angeles County, No. BC279237) (*Bell*). Plaintiff waived discovery with regard to all claims files from January 1, 1998, through June 1, 1999.

In connection with its petition for writ of mandate, defendant sought a stay of discovery of the subject files, which this court granted and has extended pending disposition of the petition. Defendant asks us to set aside the order granting the motion

for production of all claims files concerning theft claims and direct the entry of an order denying the motion. As discussed more fully, *post*, plaintiff is entitled to discovery of the subject files, but must obtain authorizations for all files, including new authorizations for those files previously discovered in the *Bell* litigation.

DISCUSSION

Plaintiff seeks compensatory and punitive damages based on allegations of the insurer's bad faith handling of her claim. She intends the discovery to show a pattern and practice of like conduct toward other insureds. Inter alia, plaintiff believes, although she has not specifically alleged, that defendant discriminates against persons of minority background or low income by denying or unreasonably disputing their vehicle theft claims. She contends production of the claims files will produce evidence relevant to this claim.

Defendant asserts that in the wake of *Campbell, supra,* 538 U.S. 408, and *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738 (*Romo*), evidence of a defendant's pattern and practice cannot be used to support a punitive damages award, and the records have no other arguable relevance to plaintiff's case. Defendant further challenges the order in that it allows plaintiff in this case to reuse written authorizations provided by defendant's insureds in the *Bell* case. Defendant argues Insurance Code section 791 et seq., governs the insurer's duty to protect the private information of its insureds, and the court's order, by failing to expressly require plaintiff to obtain authorizations for all files to be produced in this case, and by impliedly, although not expressly, allowing plaintiff to reuse authorizations given in a different case, circumvents the law and violates the insureds' right to privacy. Finally, defendant contends plaintiff's attorney is using access to the insureds and the file information from the *Bell* case to solicit additional plaintiffs.

We disregard the last assertion. Whether or not grounded, it is a matter to be resolved through proper channels within the State Bar.

With regard to the issue of authorizations in general, the need for obtaining the insured's authorization for release of claims information to be produced in this case is clear. (Ins. Code, § 791.13 ["An insurance institution . . . shall not disclose any personal or privileged information about an individual collected or received in connection with an insurance transaction unless the disclosure is: [¶] (a) With the written authorization of the individual"].) As for the authorizations specifically obtained in the *Bell* lawsuit, plaintiff's counsel's April 24, 2003 letter to those insureds soliciting their authorizations is captioned with the *Bell* case, alludes repeatedly to it, identifies its Los Angeles Superior Court case number, refers to the alleged mishandling and wrongful denial of Ms. Bell's claim, and notes the potential use of the information sought in the scheduled trial of Ms. Bell's case. Moreover, the authorization form itself seeks release of information for the *Bell* case. We do not so lightly dismiss the privacy interests of those insureds as to disregard the express limitations that govern their prior authorizations. We unhesitatingly conclude plaintiff's reuse of those authorizations for a new and different purpose exceeds the parameters of the insureds' knowing consent, violates their right to privacy, and runs counter to the purpose of the Insurance Code protections.

With regard to the central issue, discoverability of the claims files, the question to be answered is whether the matter sought is relevant to the subject matter of this lawsuit and whether "the matter . . . itself [is] admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017, subd. (a).) Plaintiff offers four arguments why discovery is justified. Three of those require little discussion.

First, plaintiff asserts discovery of the claims files is allowed under *Colonial Life, supra,* 31 Cal.3d 785. But that case involved a private claim for insurance bad faith settlement practices as defined in Insurance Code section 790.03, subdivision

(h), and such causes of action were eliminated in *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287 (third party claims), extended to first party claims in *Zephyr Park v. Superior Court* (1989) 213 Cal.App.3d 833, 836-838. Thus, the evidence sought cannot be justified by reference to *Colonial Life* or to Insurance Code section 790.03, subdivision (h).

Plaintiff next argues the discovery order is proper because she intends to amend her complaint to allege the unfair settlement tactics in a cause of action under Business and Professions Code section 17200. We do not decide hypothetical cases, and whether such an amendment would be viable remains to be seen. That said, however, we observe it is well established "the Business and Professions Code provides no toehold for scaling the barrier of *Moradi-Shalal*." (*Safeco Ins. Co. v. Superior Court* (1990) 216 Cal.App.3d 1491, 1494; see also *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, 1070 ["parties cannot plead around *Moradi-Shalal*'s holding by merely relabeling their cause of action as one for unfair competition"]; *Maler v. Superior Court* (1990) 220 Cal.App.3d 1592, 1598 ["plaintiffs cannot circumvent [*Moradi-Shalal*'s] ban by bootstrapping an alleged violation of section 790.03 onto Business and Professions Code section 17200 so as to state a cause of action"].)

Plaintiff's third argument is that she can enhance her proof of reprehensibility as a basis for punitive damages by showing defendant's pattern and practice of bad faith in denying auto theft claims. But after *Campbell*, a defendant can be punished only for the harm done to *plaintiff*. (*Campbell, supra,* 538 U.S. at p. 423 ["Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis"]; see also *Romo, supra*, 113 Cal.App.4th at p. 749 ["the result [of *Campbell*] is a punitive damages analysis that focuses primarily on what defendant did to the present plaintiff, rather than the defendant's . . . general incorrigibility"]; and *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1054

[under *Campbell*, the defendant's conduct toward others "cannot provide a legitimate basis for the plaintiff's punitive damages award"].) The pattern and practice evidence would be irrelevant to and inadmissible for the purpose of assessing punitive damages.

However, plaintiff's fourth argument supporting discovery has merit. In large part, plaintiff's bad faith cause of action is predicated on an unpleaded theory that defendant has a pattern and practice of a discriminatory claims handling practice, under which the auto theft claims filed by Hispanic, African-American, and/or low income insureds are singled out for bad faith denial or extraordinary contest. Plaintiff contends production of the claims files is the only avenue by which she may discover evidence supporting her discrimination theory, and thus her bad faith cause of action. We agree that an insurer making decisions about auto theft claims on such bases may well be engaging in bad faith conduct, and that evidence of repeated or habitual discriminatory denial or handling of claims could be used to support plaintiff's theory that, as an Hispanic, she was subjected to the same bad faith practice. (See Evid. Code, § 1105.) We are not sure plaintiff can expect to find information about ethnicity, race, or income level set forth in the claims files. Nonetheless, plaintiff's counsel will no doubt have direct contact with those claimants who authorize release of their files, and such contacts may disclose the existence of a common thread of discrimination in defendant's claims, and thus support plaintiff's theory that she herself was the victim of discrimination.

DISPOSITION

The petition is granted in part. Let a writ of mandate issue directing respondent court to conduct a hearing to determine an appropriate procedure for plaintiff to obtain authorizations from California insureds[1] for release of their files pertaining to

[1] Respondent court's order does not expressly limit discovery to California insureds. However, we infer the limitation from the reference to the *Bell* order, which

auto theft claims, and for defendant's production of those files, and to determine, in view of this court's opinion that authorizations obtained in the *Bell* litigation may not be used in this case, whether claims made by other insureds during the period January 1, 1998, to June 1, 1999, are relevant to the subject matter of this action.

This court's order to show cause, and stay order, having served their purpose, are discharged and vacated.

In the interest of justice, each party shall bear its own costs incurred in this proceeding. (Cal. Rules of Court, rule 27(a)(4).)

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.

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does so limit discovery. Since neither party has argued the issue on appeal or referenced it as having arisen in the court below, we presume plaintiff is seeking the files of California insureds only, and therefore we express no opinion on whether discovery can be ordered in other jurisdictions.