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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Alberto Guzman,

Plaintiff,

v.

Liberty Mutual Insurance Company,

Defendant.

No. CV-16-00530-PHX-NVW

ORDER

Plaintiff Alberto Guzman (“Guzman”) brought this action against his insurance company Liberty Mutual Insurance Company (“Liberty Mutual”). He alleged breach of contract and bad faith. On September 29, 2017, this Court granted summary judgment in favor of Defendant Liberty Mutual. (Doc. 34.) Now before the Court are Defendant’s Motion for Attorneys’ Fees (Doc. 37), the Response, and the Reply.

I. BACKGROUND

Guzman was in an accident on I-10 in which he sustained various injuries. There are two stories about the accident. The second story is Guzman’s by the time this lawsuit began. He now claims an unidentified phantom vehicle cut him off, forcing him to apply the brakes on his motorcycle. The brakes locked up, he lost control, and he fell off. The first story was everyone else’s—and Guzman’s original story, too. Traffic was stop and go at the time of the accident. The officer on the scene visited Guzman at the hospital and reported what Guzman told him: he was unable to brake in time when traffic suddenly stopped and he needed to lay his bike down to avoid a collision. Nowhere does the officer’s report mention a phantom vehicle. (In addition, the officer cited Guzman for

1 traveling at an unsafe speed.) Both witnesses interviewed at the scene, including witness
2 Kovasky Aguiar, confirmed the story of braking and laying down the bike to avoid a rear-
3 end collision. No one said anything about a phantom vehicle cutting into the lane.

4 Liberty Mutual paid for Guzman's property damage under his casualty coverage.
5 It did not, however, pay his medical expenses under his uninsured motorist coverage,
6 which were paid by AHCCCS, the Arizona Medicaid program. Guzman's uninsured
7 motorist coverage provided, "If there is no physical contact with the hit-and-run vehicle,
8 the facts of the accident must be proved. The person making the claim shall provide
9 corroboration that the unidentified motor vehicle caused the accident." (Doc. 29, Ex. K
10 at LMIC 000097.)

11 Despite the coverage's clear requirement that he do so, Guzman never
12 corroborated testimony of a phantom vehicle that cut him off. After multiple delays,
13 Liberty Mutual obtained a legible police report. Liberty Mutual learned of the two
14 witnesses and attempted to contact them. One reaffirmed her earlier statement that no car
15 had cut Guzman off. The other, Aguiar, never responded to repeated phone calls and
16 messages.

17 Guzman filed this action for breach of contract and bad faith, and the Court found
18 for Liberty Mutual on summary judgment. The Arizona Uninsured Motorist Act requires
19 corroborating evidence in the form of "additional and confirming testimony." A.R.S.
20 § 20-259.01(M). Guzman's policy with Liberty Mutual had the same requirement.
21 Guzman had no "additional and confirming testimony." He offered only an alleged
22 hearsay statement by Aguiar, who never responded to Liberty Mutual's calls or subpoena.
23 Aguiar's account to the investigating officer contradicted Guzman's account of what
24 Aguiar later said to him. Because Guzman had only his own statement to support his
25 changed story, and because all other admissible evidence contradicted that story, Liberty
26 Mutual neither breached its contract with Guzman nor acted in bad faith in denying his
27 claim.

28 Liberty Mutual now seeks attorneys' fees under A.R.S. § 12-341.01(A).

1 **II. ANALYSIS**

2 **A. Whether to Award Attorneys’ Fees**

3 A.R.S. § 12-341.01(A) provides, “In any contested action arising out of a contract,
4 express or implied, the court may award the successful party reasonable attorney fees.”
5 An award of fees under § 12-341.01 is discretionary. *Fulton Homes Corp. v. BBP*
6 *Concrete*, 214 Ariz. 566, 569, 155 P.3d 1090, 1093 (Ct. App. 2007). The statute does not
7 establish a presumption that attorney fees be awarded in contract actions. *Associated*
8 *Indem. Corp. v. Warner*, 143 Ariz. 567, 569, 694 P.2d 1181, 1183 (1985). In determining
9 whether attorneys’ fees should be granted under § 12-341.01, courts may consider the
10 following nonexclusive factors: the merits of the unsuccessful party’s case, whether the
11 litigation could have been avoided or settled, whether assessing fees against the
12 unsuccessful party would cause an extreme hardship, the degree of success by the
13 successful party, any chilling effect the award might have on other parties with tenable
14 claims or defenses, the novelty of the legal questions presented, and whether such claim
15 had previously been adjudicated in this jurisdiction. *Id.* at 570, 694 P.2d at 1184.

16 Liberty Mutual was entirely successful in this action. The case was not novel; in
17 fact, the dispositive contract and statutory language were entirely clear. This entire case
18 turned on whether Guzman had corroborating evidence. Guzman’s later account of a
19 phantom vehicle and of Aguiar having changed his story is subject to serious doubt.
20 Guzman is an insurance professional, having previously sold personal lines of insurance.
21 He would have known later exactly what was needed for his policy to cover medical
22 expenses under the uninsured motorist coverage. But the Court does not decide whether
23 Guzman’s later inconsistent story was fabricated. Guzman’s counsel was entitled to rely
24 on that story and use the coercive powers of the Court to obtain evidence from Aguiar.
25 Yet at the end of discovery, Guzman did not file a Rule 56(d) motion for a continuance to
26 obtain Aguiar’s testimony. Having failed to obtain cooperative or subpoenaed testimony
27 from Aguiar, Guzman had no reasonable basis to persist in the claim and to force Liberty
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1 Mutual to incur the expense of a motion for summary judgment.¹ It is not necessary to
2 find unreasonableness to award fees under the statute, but actual unreasonableness in
3 bringing or continuing the litigation is a powerful factor in favor of an award of fees. Just
4 as an insurer's unreasonable denial of coverage strongly favors assessment of fees, an
5 insured's unreasonable persistence in a claim strongly favors assessment of fees.

6 Guzman contends that awarding fees to Liberty Mutual "would discourage
7 insureds from seeking relief that is necessary to deter bad faith conduct by insurers."
8 (Doc. 43 at 4.) That contention is simply false. There was not even a hint of bad faith
9 here.

10 Insurance companies that perform thorough and diligent investigations of a claim,
11 as Liberty Mutual did in this case, should not be forced to pay to defend a lawsuit once it
12 becomes clear the lawsuit is meritless. When evaluating chilling effects, the factor to be
13 considered is whether an insured would be deterred from bringing a claim that is
14 sufficiently debatable to warrant neutral decision. After discovery, Guzman's claim was
15 ultimately neither meritorious nor colorable. It became the type of lawsuit that *should* be
16 discouraged. Although the statute's purpose is to compensate the defendant for the
17 burden of the cost of a just defense, awarding fees here could have the collateral benefit
18 of chilling litigation once it becomes unreasonable.

19 Guzman further contends that an award of fees in this case would constitute
20 extreme hardship. (*Id.*) Guzman's essential living requirements leave little or no
21 discretionary income for him and his wife and their three dependent children. (Doc. 43,
22 Ex. A.) Further, Guzman has no savings (*id.* at ¶ 8.) and owes \$20,000-\$30,000 in credit
23 card debt.

24 Arizona law is not specific on whether undue hardship by itself precludes a fee
25 award. Rather, the inquiry under the statutory text and the cases is at the general level of

26 ¹ Guzman's counsel avowed for the first time at the attorneys' fees hearing that he
27 also spoke to Aguiar, who affirmed the phantom vehicle story. Assuming Aguiar said
28 that, the Court notes that it too was hearsay and did not justify persisting in this action to
summary judgment.

1 discretion. Distinct circumstances favoring or disfavoring discretion may usually result
2 in denial or grant of a fee award.

3 For example, in commercial disputes between moneyed corporations, the fact that
4 the dispute is of that character may usually weigh in favor of a fee award to the prevailing
5 party, absent a strong factor to the contrary. All other things being equal, when only
6 competing balance sheets are in play, even though the merits are close, there is much to
7 be said for leaving the loss on the company that gambled and lost. Otherwise the winner
8 will always lose in part. In an action between a consumer and a business, that factor may
9 weigh for an award to a successful consumer but not an award against an unsuccessful
10 consumer. In routine cases, such factors may end the inquiry, not because they are
11 presumptions or absolute rules, but because recurring discretion usually plays out that
12 way in similar circumstances.

13 Extreme hardship weighs against a fee award. In many circumstances that will
14 end the examination of sound discretion. The circumstances in which it will not end the
15 inquiry may be rare. But the inquiry proceeds further in this case. Here Guzman and his
16 counsel persisted unreasonably after discovery failed to produce any confirming evidence
17 of Guzman's later story.

18 Where, as here, all other factors favor awarding fees, excusing a litigant from the
19 consequences of unreasonable litigation because of hardship would create a clear moral
20 hazard. Once the litigation shows itself finally and conclusively to be unreasonable, it
21 would be perverse to empower counsel with impunity as to his own client to continue
22 failed litigation for its extortion value. The Court's sound discretion in the detailed
23 circumstances of this litigation is to assess attorney fees against Guzman in the amount of
24 \$11,000.00.

25 **B. Amount to be Awarded**

26 "The award of reasonable attorney fees pursuant to [§ 12-341.01] should be made
27 to mitigate the burden of the expense of litigation to establish a just claim or a just
28 defense. It need not equal or relate to the attorney fees actually paid or contracted, but

1 the award may not exceed the amount paid or agreed to be paid.” A.R.S. § 12-341.01(B).
2 “[T]he touchstone under § 12-341.01 is the reasonableness of the fees.” *Assyia v. State*
3 *Farm Mut. Auto. Ins. Co.*, 229 Ariz. 216, 222, 273 P.3d 668, 674 (Ct. App. 2012).

4 The reasonable attorneys’ fees in commercial litigation begins with the actual
5 billing rate that the lawyer charged. *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183,
6 187, 673 P.2d 927, 931 (Ct. App. 1983). If persuaded that the contracted hourly rates are
7 unreasonable, courts may use a lesser rate. *Id.* at 188, 673 P.2d at 931.

8 Under the Arizona Supreme Court’s Rules of Professional Conduct, factors to be
9 considered in determining the reasonableness of an attorney fee include the following:

- 10 (1) the time and labor required, the novelty and difficulty of the questions
11 involved, and the skill requisite to perform the legal service properly;
- 12 (2) the likelihood, if apparent to the client, that the acceptance of the
13 particular employment will preclude other employment by the lawyer;
- 14 (3) the fee customarily charged in the locality for similar legal services;
- 15 (4) the amount involved and the results obtained;
- 16 (5) the time limitations imposed by the client or by the circumstances;
- 17 (6) the nature and length of the professional relationship with the client;
- 18 (7) the experience, reputation, and ability of the lawyer or lawyers
19 performing the services; and
- 20 (8) the degree of risk assumed by the lawyer.

21 A.R.S. Sup. Ct. Rules, Rule 42, Rules of Prof. Conduct, ER 1.5. In addition, this Court’s
22 Local Rules require consideration of whether the fee contracted between the attorney and
23 the client is fixed or contingent, the “undesirability” of the case, and awards in similar
24 actions. LRCiv 54.2(c).

25 Liberty Mutual requests \$36,360.00 in fees—the total amount incurred in litigating
26 the action. (Doc. 37 at 5.) Guzman does not dispute the hourly rates or the general
27 reasonableness of Liberty Mutual’s fee request. The Court finds those amounts
28 reasonable.

This litigation became unreasonable no later than the close of discovery.
Therefore, the benchmark of reasonable fees that may be awarded is the amount Liberty

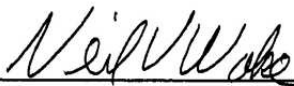
1 Mutual incurred in preparing its motion for summary judgment. Allowable fees began on
2 about September 19, 2016, although most were incurred beginning December 1, 2016.
3 With respect to items expressly related to summary judgment only, the Court calculates
4 that Liberty Mutual was billed for 74.1 hours at varying rates. The total is \$11,265.00.
5 This computation may not be exact, but the award will be rounded down to \$11,000.00.

6 IT IS THEREFORE ORDERED that Defendant's Motion for Attorneys' Fees
7 (Doc. 37) is granted in the amount of \$11,000.00.

8 IT IS FURTHER ORDERED that the Clerk enter judgment in favor of Defendant
9 Liberty Mutual Insurance Company against Plaintiff Alberto Guzman in the amount of
10 \$11,000.00 for attorneys' fees pursuant to A.R.S. § 12-341.01(A), plus interest thereon at
11 the federal rate of 2.24% per annum from the date of judgment until paid.

12 Dated this 8th day of May, 2018.

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Neil V. Wake
Senior United States District Judge