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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Thomas Scott Wood,
10 Plaintiff,

No. CV-17-02330-PHX-DGC

ORDER

11 v.

12 Provident Life and Accident Insurance
13 Company,

14 Defendant.

15 The Court held a final pretrial conference yesterday. This order will, in light of the
16 discussion during the conference and additional research, address some issues left open in
17 the Court's ruling on motions in limine. *See* Doc. 282.

18 **1. Defendant's MIL 2 (Doc. 246).**

19 Defendant sought to exclude six categories of documents on the basis of untimely
20 disclosure. The Court deferred decision on the Page Anesthesia tax returns. Plaintiff
21 initially argued that the tax returns became available to him only shortly before they were
22 disclosed on February 25, 2021. During the final pretrial conference, however, Plaintiff's
23 counsel stated that they had reviewed additional files and found that the records were
24 available earlier. Plaintiff conceded that Defendant's motion should be granted with
25 respect to these records.

26 **2. Defendant's MIL 3 (Doc. 247).**

27 Defendant sought to exclude several subjects of Plaintiff's testimony on the basis of
28 untimely disclosure. The Court deferred ruling on the third subject – a statement by the

1 western region CMO. Plaintiff conceded during the final pretrial conference that
2 Defendant's motion should be granted with respect to this statement.

3 **3. Defendant's MIL 4 (Doc. 248).**

4 Defendant sought to preclude Plaintiff from presenting evidence of Defendant's
5 litigation conduct in support of Plaintiff's bad faith claim. The Court resolved Defendant's
6 arguments regarding the untimely disclosure of Plaintiff's positions, and provided some
7 additional discussion on the issue of whether a bad faith claim can be premised on insurer
8 conduct during the course of litigation between the parties.

9 The Court noted:

10 "In Arizona, an insurer's contractual duty of good faith does not
11 terminate when the parties become litigation adversaries. An insurer has
12 continuing claims-handling responsibilities even while coverage litigation
13 proceeds." *Safety Dynamics Inc. v. Gen. Star Indem. Co.*, No. CV-09-00695-
14 TUC-CKJ, 2015 WL 10714048, at *12 (D. Ariz. Feb. 6, 2015) (citation
15 omitted). But there is a difference between a duty of continuing good faith
16 and litigation conduct. "Several out-of-state courts other than those in
17 Arizona have held that the insurer's conduct in the coverage litigation should
18 not be the basis of a bad-faith claim and that the relevant inquiry is the
19 insurer's decisions and actions at the time it made the decision to deny
20 coverage." *Id.* at *11 (citation omitted).

21 Doc. 282 at 5.

22 Following the final pretrial conference, the Court reviewed additional case law. The
23 Court found helpful guidance in *Lennar Corp. v. Transamerica Ins. Co.*, 256 P.3d 635
24 (Ariz. Ct. App. 2011). *Lennar* recognized "the principle that in the usual case, an insurer
25 that objects to coverage may not for that reason disregard its claims-handling
26 responsibilities pending resolution of the coverage issue." *Id.* at 642. *Lennar* rejected the
27 proposition that an insurer "has no claims-handling responsibilities while the coverage
28 litigation proceeds," and noted that, "depending on the circumstances, the insurer may have
continuing obligations under *Zilisch* in the meantime." *Id.* The *Zilisch* obligations
recognized in *Lennar* include the following:

1 The carrier has an obligation to immediately conduct an adequate
2 investigation, act reasonably in evaluating the claim, and act promptly in
3 paying a legitimate claim. It should do nothing that jeopardizes the insured's
4 security under the policy. It should not force an insured to go through
5 needless adversarial hoops to achieve its rights under the policy. It cannot
6 lowball claims or delay claims hoping that the insured will settle for less.
7 Equal consideration of the insured requires more than that.

8 *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 995 P.2d 276, 280 (Ariz. 2000) (quoted in *Lennar*
9 at 256 P.3d at 639).

10 Arizona law thus makes clear that Provident Life's good faith obligations did not
11 cease when this litigation commenced. *Lennar* recognizes "that an insured may suffer
12 injury" when the insurer "effectively ignores an obligation to reasonably investigate the
13 claim during the ensuing protracted legal proceedings." *Id.* at 643. The Court also
14 continues to recognize, however, that "the insurer's conduct in the coverage litigation
15 should not be the basis of a bad-faith claim[.]" *Safety Dynamics*, 2015 WL 10714048, at
16 *11. The Court views this latter statement as applying to the manner in which Provident
17 Life's counsel have conducted this litigation. In short, Plaintiff may argue at trial that
18 Provident Life breached the duty of good faith by not conducting an internal investigation
19 of the extent of his disability after the litigation was filed, but may not point to counsel's
20 conduct of the litigation as constituting bad faith. The Court will seek to apply this
21 distinction in its evidentiary rulings during trial.

22 **4. Plaintiff's MIL (Doc. 257).**

23 Plaintiff sought "an order barring Provident from presenting at trial any testimony
24 of a corporate representative . . . regarding any conclusions or determinations made by
25 Provident following the filing of the complaint in this action, to the effect that Plaintiff is
26 either 'residually disabled' or not 'totally disabled' for the purpose of Plaintiff's insurance
27 policy, other than testimony that is consistent with the deposition testimony given by
28 Provident's Rule 30(b)(6) designee regarding that subject, Carolyn Daniels." Doc. 257
at 3. The Court took the motion under advisement and directed the parties to address it at
the final pretrial conference.

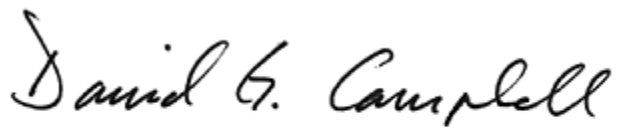
1 The conference discussion made clear that Defendant's position has not changed
2 since the testimony of Ms. Daniels – its claims department has not made a residual
3 disability decision, and Defendant instead is awaiting the outcome of this case where
4 Defendant is contending, through counsel, that Plaintiff is residually disabled. Plaintiff
5 will argue at trial that the claims department's failure to continue investigating his claim
6 constitutes bad faith, and Defendant will argue that it does not.

7 **IT IS ORDERED:**

8 1. Plaintiff is precluded from presenting the Page Anesthesia tax returns and the
9 statement by the western region CMO.

10 2. Plaintiff's MIL (Doc. 257) is **granted** to the extent it seeks to preclude
11 Defendant from presenting evidence regarding its internal investigation of Plaintiff's claim
12 that is contrary to the testimony of Ms. Daniels. Defendant is not precluded from arguing
13 that its decision to await the decision of the Court, while continuing to pay benefits to
14 Plaintiff, does not constitute bad faith.

15 Dated this 19th day of February, 2021.

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19 David G. Campbell
20 Senior United States District Judge
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