IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 15-cv-1838-WJM-MJW

DONALD O'SULLIVAN,

Plaintiff,

v.

GEICO CASUALTY COMPANY,

Defendant.

ORDER

This insurance dispute is pending under the Court's diversity jurisdiction, 28 U.S.C. § 1332, and set for jury trial to commence on April 10, 2017. Now before the Court are Defendant's Amended Disputed Jury Instructions (ECF No. 142), and Plaintiff's Objections thereto (ECF No. 150). Although not filed as a motion, the Court construes Defendant's filing, in part, as a Motion for Bifurcation and a Motion to Modify the Final Pretrial Order. To rule on those requests, and because the issues presented warrant resolution and clarification before trial begins, the Court enters this Order, denying Defendant's request for relief for the reasons explained below.[1]

I. BACKGROUND

The factual and legal background have been detailed in the Court's prior Orders. (*See generally* ECF Nos. 95, 99.) Familiarity with that background is presumed but a

[1] Consistent with the rulings in this Order, the Court will separately address the parties' requested jury instructions and objections at a jury instruction charging conference to be held at the close of evidence, in the usual course.

brief recitation of relevant procedural history is helpful here.

In short, Plaintiff alleges that when he purchased an insurance policy from Defendant in August 2013, Defendant did not provide an offer of uninsured/underinsured motorist ("UM/UIM") coverage in a manner that complied with Colorado law, specifically with the requirements of Colorado Revised Statutes § 10-4-609(2), as interpreted in *Allstate Insurance Co. v. Parfrey*, 830 P.2d 905 (Colo. 1992). As a result, Plaintiff claims that he is entitled to UM/UIM coverage up to a limit of $100,000 for injuries he suffered in an accident in 2014, while Defendant maintains that Plaintiff was entitled to only a $25,000 limit for UM/UIM coverage, as the amount written into Plaintiff's insurance policy.

In this lawsuit, Plaintiff pursued four claims for relief: (1) breach of contract; (2) breach of the duty of good faith and fair dealing; (3) unreasonable delay or denial of insurance benefits, Colo. Rev. Stats. §§ 10-3-11115 & -1116; and (4) exemplary damages. (*See* ECF No. 41.) Although not set out as a separate claim for reformation of contract, Plaintiff also pled that "Geico was required to reform its policy and extend $100,000 of underinsured motorist benefits to [Plaintiff]." (*Id.* ¶ 21; *see also id.* ¶ 36.) This claim that "Defendant had an obligation to reform the UIM policy to 100k UIM limits" remained in the Final Pretrial Order as entered July 26, 2016, and remains in the Amended Final Pretrial Order entered March 23, 2017. (ECF No. 87 at 2; ECF No. 136 at 2–3.)

At the summary judgment phase, Defendant acknowledged that it had "issued a Policy to [Plaintiff]," and that "Plaintiff . . . filed this action to reform his insurance policy."

(ECF No. 60 at 5; *id.* at 8 ¶ 1.)[2] However, Defendant moved for summary judgment, arguing that it was "entitled to summary judgment . . . as a matter of law, on [Plaintiff's] claim for contract reformation," because Defendant argued the Court should find its notification and offer of UM/UIM coverage had been sufficient as a matter of law under *Parfrey*. (*See id.* at 32.) The Court disagreed, ruling that Defendant had not shown its offer of UM/UIM coverage was sufficient as a matter of law, and leaving the issue for the jury to decide. (*See generally* ECF No. 95 at 4–21; *id.* at 22 n.5.)

The parties then entered a number of agreements which Defendant docketed with the Court as the "Parties' Stipulations." (ECF No. 100.) Most significantly for present purposes, the parties agreed to the following: (a) that the jury would decide whether Defendant extended a sufficient notification and offer of UM/UIM insurance to Plaintiff under § 10-4-609(2) and *Parfrey*; and (b) what consequences would follow from the jury's answer to that question:

> The parties agree the first issue for the jury to decide is whether GEICO extended an offer regarding uninsured/underinsured motorist benefits in a reasonable manner calculated to permit the insured to make an informed decision in compliance with Colorado law. If the Jury answers yes to this question the case is over and the Plaintiff loses. If the jury answers no to this question, then they will answer the next question as to whether the delay or denial was without a reasonable basis. If the jury answers no to the first question concerning whether a compliant offer was made, then the parties agree that GEICO will pay the disputed $75,000 uninsured/underinsured motorist benefit in full satisfaction of the breach/reformation of contract claim regardless of the jury's answer to the question concerning

[2] All citations to docket entries in this Order cite to the page number in the ECF header, which sometimes differs from a document's internal pagination, as where documents contain prefatory materials such as a table of contents.

> whether the delay or denial was without a reasonable basis, subject to GEICO's appellate rights.

(*Id.* ¶ 1)

In the same stipulations, Plaintiff agreed to dismiss all claims "with the exception of breach of contract and his claim for Unreasonable Delay and Denial of Benefits," and Defendant agreed to dismiss certain defenses. (*Id.* ¶¶ 2–3; *see also* ECF No. 6 at 9–10; ECF No. 44 at 9–10.) The parties further "agree[d] not to try the issue of damages" (*id.* at 2) and that if the jury "determines that GEICO's conduct/offer . . . was delayed or denied without a reasonable basis the Court will apply the damages penalties on the [§] 10-3-1116 claim after the verdict based on the disputed benefit amount of $75,000." (*Id.* ¶ 6.) The parties also agreed Plaintiff would call only one of his two disclosed experts, and would do so in his case in chief. (*Id*. ¶¶ 4–5.) These stipulations were also reflected, with minimal changes, in the proposed Amended Final Pretrial Order, which the parties submitted at the Court's direction, and which the Court entered on March 23, 2017. (ECF Nos. 105, 113 at 4–5, 136 at 4–5.)

However, in the parties' subsequent filings, particularly Defendant's amended proposed jury instructions (ECF No. 142), the parties take different views of the effect and consequences of these stipulations. The parties' disputes implicate what questions remain to be put to the jury, how the Court should act on Plaintiff's reformation of contract claim, which party bears the burden of proof, and whether trial may proceed in one phase or must be bifurcated. (See ECF No. 142.) These issues require resolution before trial begins.

II. ANALYSIS

A. Status and Effect of the Parties' Stipulations

Defendant does not explicitly ask the Court to set aside the parties' stipulations, but the Court concludes that it could accept Defendant's positions only by doing so. Accordingly, the first question to resolve is whether the Court will enforce the stipulations. "A stipulation is an admission which cannot be disregarded or set aside at will." *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1097 (10th Cir. 1991). While stipulations may be withdrawn "to prevent manifest injustice," this Court is "vested with broad discretion in determining whether to hold a party to a stipulation or whether the interests of justice require that the stipulation be set aside." *Id.* at 1098.

Here, the Court will enforce the parties' stipulations. In addition to the fact that Defendant fails to candidly ask the Court to alter them, the parties' stipulations were not only signed by both parties and docketed with the Court but were plainly entered with the clear purpose of setting the scope and terms of trial. Accordingly, and by Court Order, the stipulations were then also incorporated into the Amended Final Pretrial Order. (ECF No. 136.) That Order is the controlling document for trial and can only be altered "to prevent manifest injustice." Fed. R. Civ. P. 16(e); *Wilson v. Muckala*, 303 F.3d 1207, 1215 (10th Cir. 2002). Defendant has not shown that manifest injustice would occur if the stipulations are enforced or the Pretrial Order is not altered.

Significantly, the parties' agreement included negotiated concessions by each side. Plaintiff agreed not to pursue certain of his previously-pled claims, and Defendant gave up certain defenses. The parties negotiated for a streamlined trial by simplifying the damages issues to be tried and reducing the number of expert witnesses. In short,

both parties gave up certain rights and gained certain benefits, including the benefits to both parties from reducing the anticipated time, complexity, and expense of trial. To put this in contract law terms, the Court finds that the parties' stipulations reflected their negotiated agreement to explicitly-recorded terms and were supported by adequate consideration. At the March 24, 2017 Final Trial Preparation Conference, counsel for both parties confirmed this understanding of the stipulations, articulating that the parties' stipulations reflected the result of the parties' settlement negotiations. Accordingly, the Court treats the stipulations not only as formal stipulations and the controlling Pretrial Order, but also as a partial settlement agreement. *See Yaekle v. Andrews*, 195 P.3d 1101, 1111 (Colo. 2008) (courts enforce settlement agreements where they constitute enforceable contracts).

In sum, the Court will enforce the unambiguous terms of the parties' stipulations. The necessary implications of those stipulations are mostly dispositive of the presently-disputed issues, as set out below.

B. Need for Plaintiff to Prove Existence of a Contract

Defendant argues that "the existence of a contract has not been stipulated to," and that Plaintiff therefore must prove by a preponderance of the evidence that a contract exists, before any question of contract reformation and/or breach of contract may arise. (*See* ECF No. 142 at 4–5.) This argument fails for two clear reasons.

First, the parties' stipulations and the Amended Final Pretrial Order expressly provide that "*the first issue* for the jury to decide is whether GEICO extended an [UM/UIM] offer . . . in a reasonable manner." (ECF No. 136 at 4 (emphasis added).) Defendant's new argument that the first issue for jury to decide is actually the existence

of a contract thus directly contradicts the parties' enforceable stipulations, as well as the controlling Pretrial Order.

Second, Defendant has repeatedly admitted the existence of its contract with Plaintiff (*i.e.*, the insurance policy) in this case, including in Defendant's Motion for Summary Judgment (ECF No. 60 at 3 ¶ 1 ("[Plaintiff] was insured under [a] GEICO Casualty Policy . . . in effect on the date of the accident")), and elsewhere in the operative Pretrial Order (*see* ECF No. 136 at 2–3). These statements constitute judicial admissions. *Asarco, LLC v. Noranda Mining, Inc.*, 844 F.3d 1201, 1212 n.3 (10th Cir. 2017) ("Judicial admissions are formal, deliberate declarations which a party or his attorney makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or of facts about which there is no real dispute."). Defendant's admission that a contract exists is thus "binding in the entirety of the case," *id.*, and has "the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Guidry v. Sheet Metal Workers Intern. Ass'n, Local 9*, 10 F.3d 700, 716 (10th Cir. 1993). Having previously admitted the existence of a contract, Defendant cannot argue, disingenuously and on the eve of trial, that Plaintiff must prove this long-conceded point, "about which there is no real dispute." *Asarco*, 844 F.3d at 1212 n.3.

C. Contract Reformation Claim

Defendant also argues that "Plaintiff's pleading does not assert a claim for contract reformation," and that defendant "does not waive its right to have the Court judicially reform the contract." (ECF No. 142 at 1–2.) This argument suggests that in addition to the two jury determinations to which the parties have stipulated, the trial of

this matter must incorporate a third step, that is, of the judicial determination of the equitable remedy of contract reformation.

Initially, the Court disagrees that Plaintiff has not pled a claim for contract reformation. Contract reformation, although not set out as a separate claim, was explicitly referenced in Plaintiff's complaint and amended complaint. Moreover, it is included in the Amended Final Pretrial Order, which is now the operative pleading. In addition, contract reformation was the central argument to which Defendant addressed its motion for summary judgment.

Defendant's argument is again foreclosed by the unambiguous terms and clear intent of the parties' stipulations. The parties stipulated that "If the jury answers no to . . . whether a compliant offer was made, *then the parties agree that GEICO will pay the disputed $75,000 . . . benefit in full satisfaction of the breach/reformation of contract claim.*" (ECF No. 100 ¶ 1.) This stipulation both acknowledges that there is a pending contract reformation claim, and also embodies an express agreement of what result will follow from the jury's first determination. Regardless of whether this obligation is understood as a new contractual agreement, a modification to the parties' insurance contract, or an enforceable stipulation as to how the equitable remedy of contract reformation will be tried and resolved, the result is the same: Defendant has agreed that it "will pay" the disputed amount, if the jury finds it did not make a sufficient UM/UIM offer. Further, if the jury concludes that Defendant did *not* make a sufficient UM/UIM offer, then Defendant has clearly agreed to have the jury go on to determine in this trial whether "UM/UIM benefits [were] delayed or denied without a reasonable basis." (ECF No. 100 ¶¶ 1, 6.) Since the Court finds that the parties' stipulations unambiguously

reduce the issues to be tried to two jury determinations, it rejects Defendant's argument that an additional step of contract reformation must be interjected between the two.

This result is consistent with, and compelled by, the operation of Colorado law on this issue. As the Court previously ruled, "when a policy is violative of a statute, reformation is . . . *required*." (ECF No. 95 at 4 (emphasis added) (citing *Clark v. State Farm Mut. Auto Ins. Co.*, 433 F.3d 703, 710 (10th Cir. 2005) and *Thompson v. Budget Rent-A-Car Sys., Inc.* 940 P.2d 987, 990 (Colo. App. 1996)); *cf. Morris v. Travelers Indem. Co. of Am.*, 518 F.3d 755, 758 (10th Cir. 2008) ("Failure to make a compliant offer of APIP [enhanced personal insurance protection] benefits violates the statute and results in *automatic reformation of the contract to include such additional coverage*." (emphasis added)).

Thus, given the parties' stipulations and the procedural history, no separate phase of judicial proceedings is required to enter contract reformation. It is the required and automatic consequence of a jury finding that Defendant's UM/UIM offer was legally deficient. Even if, as an abstract legal matter, a contract reformation has taken place, the parties' stipulations and Colorado law both establish that this follows automatically, and no separate judicial action or proceeding is required to effect this remedy.

D. Bifurcation

Related to the argument addressed above, Defendant also argues that a contract reformation must precede any jury trial on the issue of unreasonable delay or denial, and further that "if the policy is reformed Defendant must be provided the time allowed by [Colo. Rev. Stat.] § 10-4-642 to pay the additional benefits due under the

reformed contract." (ECF No. 142 at 2.) Therefore, Defendant argues, the trial must be bifurcated. (*Id.*)

The Court has twice previously rejected Defendant's requests for bifurcation in this case (ECF Nos. 91, 98), and now does so again, for many reasons. First, as explained above, the Court rejects Defendant's argument that a separate judicial determination of contract reformation must be interjected between the two jury determinations. Given the parties' stipulations and the procedural history, no separate judicial proceeding is required to reform the contract before the jury can address Plaintiff's unreasonable delay/denial claim under §§ 10-3-1115 & -1116.

Second, the parties' stipulations evince a clear intention for a single jury trial to address both: (1) whether Defendant made a sufficient notification and offer regarding UM/UIM coverage, and (2), if not, whether Defendant unreasonably delayed or denied paying benefits. (*See* ECF No. 100 ¶¶ 1 & 6.) Defendant's last-ditch request for bifurcation appears to be little more than an expression of buyer's remorse and an attempt to back out of the clear terms of its binding stipulation.

Third, Defendant's request is grossly untimely and procedurally improper. At the Final Trial Preparation Conference, Defendant never mentioned bifurcation. The Court granted leave for the parties to file additional disputed jury instructions relating to the burden of proof. (*See infra*, part II.E; *see also* ECF No. 138.) Without first seeking leave, Defendant submitted, for a third time, its request that "bifurcation . . . must take place" but without filing a separate motion, instead lodging the request in its brief regarding jury instructions. (ECF No. 142 at. 2.) This request is entirely untimely, coming one week before trial, and was also filed in an improper fashion. *See*

D.C.COLO.LCivR 7.1(d) ("A motion shall be filed as a separate document.").

Finally, given the Court's prior denial of the request for bifurcation, Defendant fails to raise an argument that either cites or meets the controlling standard for reconsideration. In this Circuit, grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice. *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). Defendant's request neither addresses nor meets any of these standards.

E. Burden of Proof

Finally, the Court turns to the issue which the parties had identified at the Final Trial Preparation Conference as the justification for allowing an additional round of proposed jury instructions and authorities, namely, which party bears the burden of proof on the question of whether Defendant provided an adequate notification and offer regarding UM/UIM coverage under § 10-4-609(2) and *Parfrey*. Defendant contends that the burden remains on Plaintiff as the party who must prove his breach of contract/contract reformation claim and the party seeking relief (*see* ECF No. 142 at 4–7), while Plaintiff contends the burden is on Defendant to show that it complied with the statutory requirement and fulfilled its duty under *Parfrey* (*see* ECF No. 150 at 5–7).

In addressing the appropriate sequence of expert disclosures, the Court previously noted that "[a]s to the adequacy of Geico's offer of UM/UIM benefits under *Parfrey*, this appears to be an issue on which Geico bears the burden of proof." (ECF No. 99 at 25 (citing *Morris*, 518 F.3d at 761 and *Johnson v. State Farm Mut. Auto Ins.*

Co., 158 Fed. App'x 119 (10th Cir. 2005)). In *Morris*, the Tenth Circuit also cited favorably to *Hill v. Allstate Insurance Co.*, 479 F.3d 735, 742 (10th Cir. 2007), which in turn had cited to *Johnson*, 158 Fed. App'x at 122. All of these decisions, however, arose at the summary judgment phase.[3] The parties have not cited any prior cases which have gone to trial on the question of the adequacy of an insurer's UM/UIM offer under the *Parfrey* standard, and the Court has not located any.

While the analysis of burdens differs at the summary judgment phase, the Tenth Circuit's analysis in *Johnson*—since favorably cited in two published decisions—is the most informative starting point. In *Johnson,* the parties had filed cross-motions for summary judgment as to the adequacy of the insurer's offer of insurance under statutory requirements. In affirming summary judgment for the insurer, the Tenth Circuit noted without criticism that the parties had "agree[d] that *[the insurer] would bear the ultimate burden of persuasion at trial*." 158 Fed. App'x at 121 (emphasis added). Thus, at the summary judgment phase, the insurer had the initial burden to make an affirmative showing that its offer had been sufficient. *See Id.* at 121, 122. In *Morris*, the Tenth Circuit recapitulated that *Hill* had "cited *Johnson* favorably in concluding that [the insurer] had met *its burden to show that it made a compliant offer*." 518 F.3d at 761. Although this statement does not explicitly distinguish between the burdens at summary judgment or at trial, the Court now concludes that *Johnson, Hill*, and *Morris*, taken together, reflect that the insurer bears the ultimate burden at trial on the question of whether its notification and offer regarding a statutorily-required option of insurance

[3] The Court addressed these and related cases in detail in denying summary judgment. (See ECF No. 95 at 6–14.)

coverage complied with the relevant law (here, § 10-4-609(2) and *Parfrey)*. Especially given the lack of any contravening authority on this point, the Court must follow this published authority from the Tenth Circuit, namely *Hill* and *Morris.*

Moreover, this allocation of the burden of proof as to the *Parfrey* question is consistent with the general principles allocating the burdens of proof between insureds and insurers, including as to UM/UIM coverage disputes. "The issue of whether an effective offer of UM/UIM coverage was made is a factual one. Likewise, the validity of a waiver or rejection of UM/UIM coverage is normally a question of fact to be determined by a jury. *The insurer has the burden of proving that an adequate offer was made and that the insured intelligently and knowingly waived uninsured motorist coverage*." 9 Steven Plitt *et al.*, *Couch on Insurance* § 122:40 (Dec. 2016 update) (collecting cases) (emphasis added); *see also, e.g., id.* § 30:19 (on issue of whether a policy of insurance has been cancelled, the burden of proof by a preponderance of the evidence "generally applies," but "[a]n insurer . . . clearly bears the burden of proof of compliance with the applicable statute").

To the extent Defendant argues for a different result based on general principles regarding burdens of proof (ECF No. 142 at 5–7), the Court finds those arguments are predicated on the arguments rejected above, namely that Plaintiff must first prove the existence of a contract and/or that a separate judicial act reforming the contract is required. Moreover, as between the more specific authority discussed above and the general authority regarding burdens of proof relied upon by Defendant, the more specific authority controls.

In sum, the Court now explicitly holds that at trial Defendant bears the burden of showing by a preponderance of the evidence that its notification and offer regarding UM/UIM coverage were legally sufficient under § 10-4-609(2) and *Parfrey*.

III. CONCLUSION

For the reasons explained herein, the Court FINDS and ORDERS as follows:

1. Defendant's request for bifurcation of trial and/or for reconsideration of the Court's previous denials of bifurcation (*see* ECF No. 142 at 2) is DENIED;
2. The Court construes Defendant's Amended Disputed Jury Instructions With Authority (ECF No. 142) as a request to set aside or modify the parties' previously-entered stipulations and/or to modify the final pretrial order; as construed, that request is DENIED; and,
3. This matter remains set for a jury trial to commence on April 10, 2017. The Court's jury instructions and trial procedures will be consistent with Court's rulings in this Order.

Dated this 10th day of April, 2017

BY THE COURT:

William J. Martínez
United States District Judge