

EVIDENCE OF FRAUD FOR STATEMENTS IN CATEGORY 6

Category 6. Liberty Mutual Falsely Denied That It Could Make And Had Made Policy Determinations Based On The Evidence

A. Representations from Exhibit A

Paragraph 28: Despite their conclusions at a May 8, 2000 internal meeting where Liberty Mutual personnel agreed that Liberty Mutual had insured Scotts under general liability policies and determined what year such coverage began, *see* Kostecki Depo. at 84:22–85:22; Yahia Oct. 10, 2007 Depo. at 108:2–110:22, at a subsequent meeting with Scotts on May 25, 2000, Liberty Mutual took the position that, because Scotts had not produced sufficient evidence of primary policies, Liberty Mutual would not provide coverage for Scotts’ environmental claims. *See* Armstrong Aff. at ¶ 6 (Ex. A-8).

Paragraph 30: During the 1998–2000 negotiations, Liberty Mutual told DRM that “they didn’t believe that they issued policies for Scotts during the time period that we were interested in.” Butler Sept. 18, 2007 Depo. at 186:20–187:23.

Paragraph 37: During the entire course of Scotts’ and DRM’s discussions with Liberty Mutual, multiple Liberty Mutual representatives continued to dispute having provided any general liability or public liability coverage to Scotts. *See* Butler Sept. 26, 2007 Depo. at 479:9–20; *see also* Armstrong Aff. (Ex. A-8); Feb. 7, 2008 Armstrong Aff. (Ex. A-26).

B. Falsity

Contrary to Liberty Mutual’s representations, Liberty Mutual had internally determined that it had insured Scotts and that Liberty Mutual had provided general liability coverage in the 50’s and 60’s. Mr. Merchant’s supervisor at the time of the 2000 settlement was Robert Kostecki. Mr. Kostecki testified that, prior to the last meeting held with Scotts on May 25, 2000, Mr. Merchant, Mr. Kostecki, Mr. Schlemmer, and Ms. Yahia met and determined *that Liberty Mutual had insured Scotts under general liability policies*. *See* Kostecki Depo. at 42:8–24; 66:8–12; 71:13–72:2; 73:2–6; 83:18–84:4; 84:22–85:22 (O.A. Tab 87; Doc. No. 183). At that meeting, Liberty Mutual also determined what year such coverage began, but Liberty Mutual has

since claimed “privilege” over those determinations. *See* Yahia Depo. at 108:2–110:22 (O.A. Tab 96; Doc. No. 192–93). To this day, Liberty Mutual has refused to disclose the terms of coverage agreed upon at that May 8 meeting, claiming privilege over those determinations, *id.*, but the internal evidence shows that Liberty Mutual determined that the first date of coverage was at least 1962 and more likely 1957. *See* Scotts’ Supp. Brief at 3 (citing evidence establishing that Liberty Mutual’s internal determinations go back to at least 1962 and internal spreadsheets show coverage going as far back as 1957).

Despite their agreement regarding coverage, Liberty Mutual then met with Scotts and *denied* finding policy information. Instead, Liberty Mutual represented that, because there was not sufficient evidence of primary policies, Liberty Mutual could not provide coverage for Scotts’ environmental claims. *See* Aug. 1, 2007 Armstrong Aff. at ¶ 4–6 (O.A. Tab 24; Feb. 8, 2008 Barnhart Decl. Ex. A-8 (Doc. No. 200)). Liberty Mutual never acknowledged at the May 25 meeting held with Scotts that it had issued general liability or public liability policies to Scotts in the 1950’s or 1960’s. *See* Butler Depo. at 479:1–7 (O.A. Tab 83; Doc. No. 178–79). During the course of Scotts’ and DRM’s discussions with Liberty Mutual, multiple Liberty Mutual representatives continued to dispute having provided any general liability or public liability coverage to Scotts. *See id.* at 479:9–20. As Ms. Butler testified:

Q. Ms. Butler, did anyone from Liberty Mutual ever tell you or acknowledge that Liberty Mutual had issued general liability or public liability policies to Scotts in the ‘50’s or ‘60’s?

...

THE WITNESS: No, they did not.

BY MR. JONES:

Q. During the course of your discussions with Liberty Mutual did Liberty Mutual representatives continue to dispute having provided any general liability or public liability coverage to Scotts?

...

THE WITNESS: Yes, they took that position the entire time we talked, and there were five or six different people all basically taking the same position.

Id. at 479:1–20 (emphasis added).

- Q. Didn't Liberty in the course of—didn't Liberty in the course of settlement negotiations concede coverage for a period of years?
- A. Never. Never. Even when we gave them our policy, the excess policy, they still said that we didn't have proof of the policy because they said it was only a partial policy.

Id. at 344:19–345:3 (emphasis added). *See also* Aug. 1, 2007 Armstrong Aff. at ¶ 4–6 (O.A. Tab 24; Feb. 8, 2008 Barnhart Decl. Ex. A-8 (Doc. No. 200)).¹

C. Materiality

Liberty Mutual's representations were material to Scotts' decision to settle with Liberty Mutual on the agreed upon terms. Liberty Mutual represented that it could not find secondary evidence and could not determine whether policies had been issued. Liberty Mutual's false denials were a key factor in Scotts' decision to settle. *See* Feb. 7, 2008 Armstrong Aff. at ¶ 2 (O.A. Tab 23; Feb. 8, 2008 Barnhart Decl. Ex. A-26 (Doc. No. 200)). That is why Scotts sought such information from Liberty Mutual. Had Scotts known that Liberty Mutual confirmed general liability coverage—particularly going back to 1962 or 1957—that would have significantly altered Scotts' analysis of the strength of its position on the “lost policy” defense and changed Scotts' position with respect to the terms in the 2000 settlement and release. *See Id.* at ¶ 6. *See also* “Materiality” section in Category 1 § C, which sets forth additional evidence

¹ Liberty Mutual argues that “a fraud claim requires concealment of a fact, not a conclusion or determination made by one party to the subject transaction.” Reply at 8 (Doc. No. 205) (citing *Groob v. KeyBank*, 843 N.E.2d 1170, 1178 (Ohio 2006)). But the Ohio Supreme Court in *Groob* merely noted that one element of fraud is “a representation or, where there is a duty to disclose, concealment of a fact.” *Groob*, 843 N.E.2d at 1178. Nothing in the decision supports Liberty Mutual's extrapolation that the “conclusion or determination” of a party is not such a “fact.” In this case, Liberty Mutual misrepresented the “facts” regarding Scotts' policies, the “facts” regarding secondary evidence of policies, and the “facts” regarding what Liberty Mutual had determined.

supporting materiality here. (To minimize any duplication, Scotts refers the Court to that section in lieu of reproducing that evidence again here.)

D. Knowledge

Ms. Yahia's and Mr. Kostecki's testimony that they had internally agreed that Liberty Mutual had insured Scotts establishes that they knew their later representations to Scotts at the May 2000 meeting were false. *See infra* § B. In direct contrast to what they had decided at the earlier internal meeting, Liberty Mutual representatives disputed having provided coverage to Scotts in their last meeting with Scotts. *Id.* Moreover, during the negotiations, Liberty Mutual falsely denied the existence of Scotts' insurance coverage despite the voluminous secondary evidence of which Liberty Mutual knew (but did not disclose to Scotts or DRM). *See* Category 1 §§ B–D.

E. Intent

Liberty Mutual knew Scotts was trying to establish that Liberty Mutual had, in fact, insured Scotts and under what policies. *See, e.g.*, Aug. 14, 1998 Armstrong letter, LYBTY-03137 (O.A. Tab. 1; Jan. 15, 2008 Francisco Decl. Ex. J (Doc. No. 167)); Dec. 28, 1998 Armstrong letter, LMIC 005474–76 (O.A. Tab 3; Jan. 15, 2008 Francisco Decl. Ex. M (Doc. No. 167)). And Liberty Mutual knew the truth—*i.e.*, that Liberty Mutual had insured Scotts and that such insurance included general liability policies. *See supra* § D. All of that evidence supports Liberty Mutual's intent to mislead.

Liberty Mutual knew that Scotts was relying on Liberty Mutual's misrepresentations and omissions, and Liberty Mutual made its misrepresentations and omissions with the intent that Scotts would rely on them. That evidence is set forth in detail in the discussion of false statements under Category 1. To avoid unnecessary duplication, Scotts refers the Court to the

evidence described in greater detail under “Intent” in Category 1 § E. All of that evidence supports Liberty Mutual’s intent to mislead here as well.

In sum, that evidence demonstrates that Liberty Mutual assigned a “lost policy” discount to the settlement negotiations, precisely because Liberty Mutual representatives claimed that Liberty Mutual could not find policies or evidence of policies sufficient to determine coverage, and Liberty Mutual *told Scotts* that Scotts should *discount* its settlement demands as a result of the “lost policy” defense. *See* Merchant Depo. at 79:12–17 (O.A. Tab 89; Doc. No. 185); Schlemmer Depo. at 211:24–212:7 (O.A. Tab 94; Doc. No. 190); Prouty Depo. at 152:3–6 (O.A. Tab 93; Doc. No. 189); Butler Depo. at 492:9–16 (O.A. Tab 83; Doc. No. 178–79). Liberty Mutual knew that Scotts and DRM were seeking any and all information about any Scotts’ policies to determine Scotts’ settlement position. *See* O’Brien Depo. at 72:19–23 (O.A. Tab 91; Doc. No. 187); Prouty Depo. at 189:19–190:3 (O.A. Tab 93; Doc. No. 189). If Liberty Mutual failed to convince Scotts to settle its claims inexpensively, Liberty Mutual knew it faced the risk of expensive litigation and significant exposure. *See, e.g.,* Schlemmer Depo. at 74:11–75:4 (O.A. Tab 94; Doc. No. 190); Merchant Depo. at 86:19–87:9; 295:16–296:2 (O.A. Tab 89; Doc. No. 185). Liberty Mutual wanted to eliminate that risk and “avoid . . . getting involved in expensive declaratory judgment litigation.” Merchant Depo. at 299:2–16 (O.A. Tab 89; Doc. No. 185); *see also* Schlemmer Depo. at 27:12–29:7 (O.A. Tab 94; Doc. No. 190). That is why Liberty Mutual made the representations that it made.

F. Justifiable Reliance

Liberty Mutual argued that it “conceded that at least some of the alleged policies had been issued.” Reply in Support of Summary Judgment at 8 (Doc. No. 205). That allegation only highlights the significant and material disputed issues of fact underlying this case. Scotts disputes that very argument. *See* Scotts’ Supp. Brief at 3–6. Moreover, given the fact that

Liberty Mutual knew or should have known that Scotts had *ten* years of general liability coverage and *three* years of umbrella excess liability coverage, the argument that Liberty Mutual “conceded” the possibility of just *two* years of coverage hardly serves as a basis for exonerating Liberty Mutual. Scotts presented an actual policy for one year, which was apparently renewed from the prior year. Thus, Liberty Mutual’s contention that it “conceded” two years of coverage would, at best, be nothing more than acknowledging the evidence that Scotts had already presented to Liberty Mutual. All the while, Liberty Mutual continued to conceal the other evidence from Scotts pointing to a decade of coverage.

Moreover, Liberty Mutual cannot have it both ways. During oral argument, Liberty Mutual’s counsel contended that Liberty Mutual had “recogni[zed] that there were two CGL and two umbrella policies” during the negotiations. O.A. Tr. at 95:15–16 (O.A. Tab. 90). Yet, Liberty Mutual has taken inconsistent positions elsewhere. In response to Scotts’ motion for partial summary judgment seeking to establish the existence of Scotts’ insurance coverage, Liberty Mutual refused to concede two years of general liability and two years of excess liability policies. There, Liberty Mutual argued that it “does not dispute (nor did it during the parties’ negotiations leading to the 2000 Settlement and Release) that there is evidence suggesting that it issued at least some policies to Scotts,” but “*disputes exist as to the period of time for which any such policies were issued*, as well as the terms, conditions, and limits thereof.” Liberty Mutual’s Opp. To Scotts’ Motion for Partial Summary Judgment at 7 (Doc. No. 196) (emphasis added).

Scotts justifiably relied on all of Liberty Mutual’s representations regarding the existence, meaning, and significance of secondary evidence of coverage. *See* Feb. 7, 2008 Armstrong Aff. at ¶¶ 3–6 (O.A. Tab 23; Feb. 8, 2008 Barnhart Decl. Ex. A-26 (Doc. No. 200)). That evidence is set forth in detail in the discussion of false statements under Category 1. To avoid unnecessary

duplication, Scotts refers the Court to the evidence described in greater detail under “Justifiable Reliance” for Category 1 § F.

In sum, that evidence demonstrates that Scotts could not determine what other evidence Liberty Mutual had internally, could not determine what searches Liberty Mutual had done internally, and could not know Liberty Mutual’s own determinations regarding such evidence. *Id.* Scotts was at the mercy of Liberty Mutual to disclose the truth regarding those matters. Both Ms. Armstrong and Ms. Archangeli testified that had Liberty Mutual been truthful about the extent, significance, and meaning of the secondary evidence that Liberty Mutual had in its files, Scotts would not have settled under the terms that it did. *See, e.g.*, Feb. 7, 2008 Armstrong Aff. at ¶ 6 (O.A. Tab 23; Feb. 8, 2008 Barnhart Decl. Ex. A-26 (Doc. No. 200)); Butler Depo. at 491:19–492:7; 493:11–19 (O.A. Tab 83; Doc. No. 178–79). Even Liberty Mutual’s own witnesses acknowledged that it was reasonable for Scotts to expect Liberty Mutual to be up front and honest in its dealing with Scotts. *See* Schlemmer Depo. at 79:7–10 (O.A. Tab 94; Doc. No. 190).