Filed 2/4/09; part. pub. order 2/26/09 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CEDRIC McCOY, Plaintiff and Respondent, v. PROGRESSIVE WEST INSURANCE COMPANY, Defendant and Appellant.	B199978 (Los Angeles County Super. Ct. No. BC331105)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael L. Stern, Judge. Affirmed.

Law Offices of Julia H. Azrael, Julia Azrael and John S. Curtis for Defendant and Appellant.

Andrews & Hensleigh and Joseph Andrews for Plaintiff and Respondent.

Progressive West Insurance Company (Progressive) appeals from the amended judgment on special verdict in favor of Cedric McCoy on his insurance bad faith action arising from denial of his vehicle theft claim. Based on our review of the record and applicable law, we affirm the judgment.

The trial court properly refused to give Progressive's requested genuine dispute instructions. The court did not abuse its discretion in excluding evidence of domestic violence and evidence of, and comment on, an automobile accident, both of which are unrelated to the car theft. The court acted within its discretion in denying admission of the entire claims file and evidence in the form of the tapes, transcripts, and summaries of all recorded investigative statements where no good cause was shown. Progressive fails to show prejudice flowing from its unsuccessful evidentiary claims. Substantial evidence supports the bad faith finding and award of punitive damages.

BACKGROUND

In his complaint, McCoy alleged: On or about March 31, 2004, his Ford Mustang was stolen in Las Vegas, Nevada, and when recovered, the Mustang, which had been burned and damaged, was "essentially of no value."[1] This theft was a covered loss under his policy, and McCoy promptly reported the loss to Progressive, his insurer. Progressive breached the insurance contract and violated the covenant of good faith and fair dealing by, among other things, failing "to promptly, fairly and fully investigate the claim" and by "unreasonably and without proper cause" withholding benefits owed him under the

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[1] The first amended complaint pleaded four causes of action for breach of contract, breach of the covenant of good faith and fair dealing, unfair business practices (Bus. & Prof. Code, § 17200), and conversion/trespass to chattels. A directed verdict in favor of Progressive was granted on the conversion/trespass to chattels cause of action. On its own motion, the trial court granted judgment on the pleadings as to the unfair business practices cause of action.

policy. Progressive answered with a general denial and asserted various affirmative defenses, including its investigation was "reasonable" and "within the standards for good claims handling."

At trial, McCoy testified he had been employed with the United States Navy for seven years as an air traffic controller and was a tower supervisor. On March 30, 2004, he went to a casino in Las Vegas. Upon his return about 3:00 or 3:30 the next morning, his car was missing from the casino parking lot. He notified the police and Progressive. McCoy denied he had anything to do with the theft or burning of his car. He denied calling and telling his then wife Katrina his car had been stolen. He further denied telling his brother Clinton numerous times prior to that day he wanted to get rid of his car. McCoy also denied telling Katrina and Clinton he wanted to upgrade to a Cobra Mustang. About 2 p.m. that afternoon, the police notified McCoy his car had been recovered. Progressive never paid his claim.

Charles Chipps Morin, a Progressive special unit investigator (SUI), testified McCoy's Mustang had sustained damage to the front bumper, the controls by the driver's side door had been ripped out, and wires were exposed. The car also had been partially burned. Morin, who believed McCoy was involved in the theft of his car, observed no obvious trauma to the ignition and thought it was unusual that the expensive tires were still on the car. A credit check ran by Morin revealed McCoy paid on time. As of 2006, Morin had no specific proof that McCoy was involved in the theft of his own car. He acknowledged that Mustangs were frequently stolen and that Las Vegas was one of the car theft capitals in the United States. He further acknowledged that he had not ruled out whether the car had been stolen by means of a tow truck or duplicate key.

Katrina telephoned Morin regarding the car theft. On April 6, 2004, Morin took Katrina's statement. She related that McCoy had talked about disposing of his car for some time, and she referred Morin to Clinton for more information. On May 5, 2004, Morin spoke with Clinton, who appeared credible. Clinton told Morin that McCoy wanted to buy an expensive Cobra Mustang. On October 5, 2004, Katrina again called Morin and stuck to her original story.

Katrina told Morin that Clinton and McCoy had a mixed relationship, i.e., Clinton loved McCoy but McCoy had some behavior problems. Morin knew Katrina might have some hostility or ill will toward McCoy because of their divorce, which occurred in July 2004. Morin wanted to examine McCoy under oath and to meet face-to-face with Katrina and Clinton to assess their credibility. Progressive did not give him authorization to do so.

Morin acknowledged that, pursuant to SUI standard operating procedures, he was required to determine a claim was fraudulent before reporting the claim to the Department of Insurance (DOI) and not to report the claim to the police or any regulatory authority until after a claim decision had been made. He admitted that although the claim was not denied until March 2005, he already had contacted the DOI and various law enforcement officers and regulatory agents as early as April 9, 2004, and through January 19, 2005. He acknowledged on February 24, 2005, by letter, the DOI advised Progressive there was insufficient evidence to support a criminal investigation.

Anthony Prieto, Jr., a Progressive fire and theft representative, testified that McCoy's policy covered theft and was in effect at the time of the theft. McCoy's car was a total loss. Prieto suspected fraud on the part of McCoy, because McCoy and his friend Angela had travelled to Las Vegas from California in separate cars.

McCoy provided Prieto with a recorded statement on April 1, 2004. Prieto admitted McCoy also provided other documents Progressive requested and that McCoy's claim was not denied until March 15, 2005, or nine months after McCoy's affidavit of theft had been received. Prieto testified that Progressive had the duty to affirm or deny a coverage claim within 40 days or, if fraud were suspected, within 80 days. He admitted that if doubts arose during an investigation they would be resolved in favor of coverage for the insured.

Prieto acknowledged that a signed consent was required to remove major components from an insured's car and that McCoy's consent was only received on June 9, 2004, a date after Progressive had removed the car's steering column assembly.

Eugene Evans, McCoy's expert, testified that Progressive's claim handling was "below the standard . . . in [the] insurance industry, and that it didn't meet certain [DOI] regulations." Specifically, Progressive "failed to give the insured the benefit of the doubt" and "the investigation was conducted largely to prove what they had already concluded in their own minds. And no investigation was conducted to show that Mr. McCoy's claim might be valid."

Evans further opined that Progressive should have concluded McCoy's claim was valid and it should have paid the claim. He explained that, after investigating its initial suspicions of fraud, Progressive did not have enough information or evidence to conclude McCoy was "an insurance fraud." Evans testified it appeared McCoy had no financial motive, because he owed more on the vehicle than it was worth if sold, and, thus, "any loss on the vehicle . . . would have been based upon the actual cash value of the vehicle at the time of the loss, and [McCoy] would have still owed money to the financing company" in addition to having "to get another car and [make] payments on that."

He opined that neither McCoy's ex-wife nor McCoy's brother was a reliable witness. Katrina recanted her statements, and, after reading the transcripts of Clinton's examination and watching a "CD" of the examination, Evans felt it was not conclusive. He agreed with a note from a supervisor in the claims file stating: "'We can't just rely on having two witnesses like this, because they are -- they are not conclusive. And if we don't come up with something else, we are going to have to pay the claim.'" He added "[a] tie goes to the insured. If you can't prove what is wrong, you pay the claim." Evans noted Progressive did not take into account the information favorable to McCoy, i.e., his long time employment with the Navy, his responsible job, his payment of his bills, and his schooling.

He pointed out "80 days is the maximum that you are supposed to take to make up your mind about a claim," and Progressive went "far beyond that." Progressive also failed to comply with the DOI regulations regarding correspondence to keep the insured up to date about the claim.

Evans opined Progressive failed to follow its own SUI guidelines by attempting to turn over McCoy's claim to policing agencies before completing its investigation. Progressive also violated insurance industry practice by removing the steering column from McCoy's car before receiving written permission. He noted Progressive "damaged it in the process so that any subsequent physical investigation that [McCoy] might have done would have been of no value."

Gene Peter Irizarry, Progressive's expert, opined Progressive had handled McCoy's claim reasonably and consistent with insurance industry practice standards.

Eric Schnitzler testified coverage would be denied for a fraudulent claim and it was his decision, as Progressive's branch claims manager, to deny McCoy's claim. In so doing, he relied on the statements of Katrina and Clinton. Schnitzler also based his decision on what he considered circumstances inconsistent with theft by someone other than McCoy. He concluded the use of two cars to drive to Las Vegas indicated "this whole thing was planned. It was a setup." McCoy knew he needed another car to return to Los Angeles. Also suspicious were these facts: McCoy's car did not show up on the casino video security tapes; "there was no evidence of point of entry"; the wheels on the recovered Mustang appeared to be original equipment; and the unaltered ignition meant the right type of key must have been used in order to drive away the car.

In the first phase of the bifurcated trial, the jury returned a unanimous verdict in favor of McCoy on all the special verdict questions, including whether Progressive acted in bad faith and whether it acted with malice or oppression. In the second phase, which involved the sole issue of the amount of punitive damages, nine jurors agreed to an award of $100,000.

In denying Progressive's motion for a new trial and for judgment notwithstanding the verdict, the trial court reasoned: Ample evidence supported the jury's verdicts that "in the colloquial sense . . . McCoy got a raw deal" and that, under the clear and convincing evidence standard, the award of punitive damages was justified. The court rejected Progressive's claim that it was "shortchanged in terms of admissible evidence" and found Progressive had "ample opportunity to explain" its handling of McCoy's

claim. The court disagreed with Progressive's attack on its rulings excluding evidence under Evidence Code section 352, "be it parts of the claim file or our other evidence, and particularly this other accident situation" and stated "I would make the same rulings right now once again if we had it before us. And essentially we do."

After awarding McCoy fees in an uncontested amount and agreed upon costs, the trial court entered an amended judgment on special verdict. This appeal followed.

DISCUSSION

1. Special Genuine Dispute Instructions Properly Refused

Progressive contends the trial court committed prejudicial error by refusing to give its proposed instructions 5 and 6 on the "genuine dispute" doctrine.[2] There was no error.

Progressive requested special instructions 5 and 6 based on the "genuine dispute" holding of *Chateau Chamberay Homeowners' Association v. Associated International Insurance Company* (2001) 90 Cal.App.4th 335 (*Chateau Chamberay*). The trial court refused, finding the genuine dispute doctrine was subsumed within the concept of what is reasonable and unreasonable as set forth in CACI 2331.

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[2] Proposed instruction 5 read: "When an insurer denies or delays payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability, the insurance company will not be liable in bad faith even though it may be liable for breach of contract."

Proposed instruction 6 read: "In determining whether or not an insurance company had a genuine dispute as to whether or not a loss was covered, you may consider among the following: (1) Whether the insurance company was guilty of misrepresenting the nature of the investigation; (2) Whether the insurance company adjusters and investigators lied during their depositions or to the insured; (3) Whether the insurance company dishonestly selected its experts; (4) Whether the insurance company experts were unreasonable; and, (5) Whether the insurance company failed to conduct a thorough investigation."

"The law implies a covenant of good faith and fair dealing in every insurance contract. (Citation.) Therefore, when an insurer unreasonably and in bad faith withholds payment on a claim of its insured, it is subject to liability in tort. (Citation.) An insurer may also breach the covenant of good faith and fair dealing when it fails to properly investigate its insured's claim. (Citation.) Under this implied promise, in determining whether to settle a claim, the insurer must give 'at least as much consideration to the welfare of its insured as it gives to its own interests.' (Citation.)" (*Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1096; see also, *Chateau Chamberay, supra*, 90 Cal.App.4th at p. 345; see also, *Century Surety Co. v. Polisso* (2006)139 Cal.App.4th 922, 948.)

The linchpin of a bad faith claim is that the denial of coverage was unreasonable. "Before an insurer can be found to have acted in bad faith for its delay or denial in the payment of policy benefits, it must be shown that the insurer acted unreasonably or *without proper cause*." (*Jordan v. Allstate Ins. Co.* (2007)148 Cal.App.4th 1062, 1072 (*Jordan*).) "Where there is a *genuine issue* as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute. (Citation.)" (*Ibid*.)

"The 'genuine dispute' doctrine may be applied where the insurer denies a claim based on the opinions of experts." (*Fraley v. Allstate Ins. Co.* (2000) 81 Cal.App.4th 1282, 1292.) Reliance on an expert, on the other hand, "will not automatically insulate an insurer from a bad faith claim based on a biased investigation." (*Chateau Chamberay, supra*, 90 Cal.App.4th at p. 348.) Although an insurer may rely on experts, summary judgment on a bad faith claim must be denied where the evidence shows "the insurer dishonestly selected its experts[,] the insurer's experts were unreasonable[,][or] the insurer failed to conduct a thorough investigation." (*Id.* at pp. 348-349.)

In *Jordan*, the *Chateau Chamberay* court again addressed the genuine dispute doctrine in the context of motions for summary judgment. The court concluded "Allstate's bad faith conduct cannot be resolved on summary judgment," because Jordan had presented "evidence sufficient to support the conclusion that Allstate did indeed fail

to conduct a full, fair, thorough and timely investigation of Jordan's claim," but "Allstate may well be able to produce evidence that all or part of Jordan's factual assertions are false, or that Allstate's acts or omissions as claimed by Jordan were justified or reasonable in the circumstances." (*Id.* at pp. 1076-1077)

Chateau Chamberay and *Jordan*, neither of which involved a jury trial, thus do not constitute authority for a jury instruction on the genuine dispute doctrine. (*In re Chavez* (2003) 30 Cal.4th 643, 656 ["As is well established, a case is authority only for a proposition actually considered and decided therein"].) Progressive has cited no applicable authority, nor have we found any, which would compel such instruction.

Our Supreme Court explained: "The genuine dispute rule does not relieve an insurer from its obligation to thoroughly and fairly investigate, process and evaluate the insured's claim. A *genuine* dispute exists only where the insurer's position is maintained in good faith and on reasonable grounds. (Citations.)[ ] Nor does the rule alter the standards for deciding and reviewing motions for summary judgment. 'The genuine issue rule in the context of bad faith claims allows a [trial] court to grant summary judgment when it is undisputed or indisputable that the basis for the insurer's denial of benefits was reasonable - for example, where even under the plaintiff's version of the facts there is a genuine issue as to the insurer's liability under California law. (Citation.) . . . On the other hand, an insurer is not entitled to judgment as a matter of law where, viewing the facts in the light most favorable to the plaintiff, a jury could conclude that the insurer acted unreasonably.' (Citation.) Thus, an insurer is entitled to summary judgment based on a genuine dispute over coverage or the value of the insured's claim only where the summary judgment record demonstrates the absence of triable issues (Code Civ. Proc., § 437c, subd. (c)) as to whether the disputed position upon which the insurer denied the claim was reached reasonably and in good faith." (*Wilson v. 21st Century Ins. Co*. (2007) 42 Cal.4th 713, 723-724; see *Fraley v. Allstate Ins. Co.*, *supra*, 81 Cal.App.4th at p. 1293 [bad faith claim fails as matter of law where genuine dispute shown]; see also, *Brehm v. 21st Century Ins. Co*. (2008) 166 Cal.App.4th 1225, 1240, fn

7 [whether genuine dispute exists as matter of law not subject to resolution at pleading stage].)

Moreover, the trial court properly instructed the jury on the issue of reasonableness pursuant to CACI 2331 and 2332.[3] Both parties agreed that these instructions be given. No further instruction in this regard was necessary.

2. Exclusion of Evidence Not Abuse or Denial of Due Process

a. Standard of Review

"As a general proposition, the ordinary rules of evidence do not infringe on a defendant's right to present a defense. (Citation.) Trial courts possess the 'traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.' (Citation.) The trial court's rulings . . . will not be overturned on appeal unless it can be shown that the trial court abused its discretion. (Citation.)" (*People v. Frye* (1998) 18 Cal.4th 894, 945.)

"The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "Prejudice for purposes of Evidence Code section 352 means evidence that tends to evoke an emotional bias against the defendant." (*People v. Crew* (2003) 31 Cal.4th 822, 842.)

"[E]vidence is probative if it is material, relevant, and necessary. '[H]ow much "probative value" proffered evidence has depends upon the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the importance of

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[3] CACI 2331 read in pertinent part: McCoy "must prove all of the following: . . . Progressive . . . unreasonably failed to pay policy benefits . . ." CACI 2332 read in pertinent part: McCoy "must prove all of the following: . . . Progressive . . . unreasonably failed to properly investigate the loss and denied coverage/failed to pay insurance benefits . . ."

the issue to the case (degree of materiality), and the necessity of proving the issue by means of this particular piece of evidence (degree of necessity).' (Citation.)" (*People v. Thompson* (1980) 27 Cal.3d 303, 318, fn. 20.) "'While collateral matters are admissible for impeachment purposes, the collateral character of the evidence reduces its probative value and increases the possibility that it may prejudice or confuse the jury.' [Citation.]" (*Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1029.)

"[T]he latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad." (*People v. Wheeler* (1992) 4 Cal.4th 284, 296.) Exclusion of impeachment evidence is reviewed for abuse of discretion. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 207-208.) Abuse arises where "'the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' (Citation.)" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

b. Preclusion of Unrelated Automobile Accident Not Abuse

Progressive contends the trial court committed reversible error by excluding evidence of a November 2003 automobile accident offered to show McCoy had submitted an earlier fraudulent claim. No abuse occurred.

Progressive's attorney indicated at the motion in limine hearing that the insurer in the November 2003 accident settled McCoy's personal injury claim for $5,000. In excluding evidence of that accident, the trial court noted it was just "a regular automobile accident" and ruled it was not going to try a separate accident along with McCoy's insurance bad faith claim.[4]

Progressive argues the reported facts about the earlier accident gave rise to "grave doubts as to McCoy's veracity. These doubts were compounded when McCoy initially denied any previous accident claims." Its denial of McCoy's theft claim was based

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[4] At the new trial motion hearing, Progressive's attorney argued its evidence reflected "McCoy was committing insurance fraud, albeit against [insurer] Zurich, by taking money for an accident [in November 2003] in which he was not physically present."

largely on McCoy's lack of credibility. Evidence regarding the November 2003 accident thus was relevant on the issue of McCoy's credibility.[5]

The trial court did not abuse its discretion in excluding evidence of the November 2003 accident as more prejudicial than probative (Evid. Code, § 352). This evidence was clearly collateral to McCoy's theft claim. Admission of this evidence of marginal impeachment value therefore would have entailed undue consumption of time and might have misled the jury as to the actual issues to be decided. (See, e.g., *Kopfinger v. Grand Central Public Market* (1964) 60 Cal.2d 852, 861 [trial court well within its discretion in excluding "proffered accidents dissimilar to the facts of this case"]; *Laurenzi v. Vranizan* (1945) 25 Cal.2d 806, 812-813 [exclusion of prior accidents evidence proper where such evidence not confined to accidents caused by this particular hole in the sidewalk]; see also, *People v. Brown* (2003) 31 Cal.4th 518, 545.)

c. Exclusion of Domestic Violence Incident Not Abuse

Progressive contends the trial court abused its discretion in excluding evidence of domestic violence by McCoy against his ex-wife. We disagree.

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[5] In its reply brief, Progressive contends evidence of the November 2003 accident was "admissible to show preexisting damage to the right front bumper" of McCoy's car. This ground for admission is forfeited, because it was not raised before the trial court. (See *People v. Huggins* (2006) 38 Cal.4th 175, 248 [failure to preserve claim of error where party omitted to specify the reason or reasons for exclusion of evidence at trial].)

Moreover, Progressive acknowledges: The State of Nevada Traffic Accident Report for the November 2003 accident indicated the impact was to the left rear of McCoy's car; Progressive's repair estimate with supplement gave no estimate for damage to the right front of the car; "The Estimate and Repair Order from Airport Collision Repair Center indicate[d] that the repairs were done in accordance with Progressive's estimate"; and McCoy "included a reference to 'Airport Collision Repair (repaired rear-end for my accident in November 03'" when he forwarded various documents to Progressive in connection with his car theft claim.

In the face of such strong evidence of no damage to the right front of McCoy's car, the significance to McCoy's theft claim of the drawing indicating damage to the right front of the car in the Airport Collision Repair Center Pre-Entry Damage Report would necessitate a trial within a trial. The trial court therefore would be acting well within its discretion in excluding this evidence about the November 2003 accident.

In her declaration opposing the motion in limine, Progressive's attorney indicated documents from the Supreme Court for Clark County, Nevada, reflected Katrina had complained about physical abuse at McCoy's hands. Counsel argued this evidence was relevant to explain why Katrina recanted after having told Progressive McCoy had made up his claim to get money to which he was not entitled.

Evidence of domestic violence is irrelevant to any of the substantive issues in this case. The risk of creating confusion and misleading the jury about the issues to be decided far outweighed the minimal impeachment value of evidence that McCoy had physically abused his ex-wife. The trial court therefore acted well within its discretion in excluding such evidence. (See, e.g., *People v. Ayala* (2000) 23 Cal.4th 225, 301 ["Impeaching [witness] Lewis with inquiries into his own violent conduct - an inquiry that would not have borne on any question of veracity or honesty - would have been collateral," and thus, evidence properly excluded as confusing in that it would "appear to place Lewis on trial with side issues regarding credibility"].)

Additionally, the court was entitled to exclude evidence of domestic violence as likely to provoke emotional bias against McCoy and create the danger that the jury might prejudge the issues based on extraneous factors. (See *People v. Minifie* (1996) 13 Cal.4th 1055, 1070-1071 [under section 352, unduly prejudicial evidence is evidence that would evoke an emotional bias against one party]; *People v. Zapien* (1993) 4 Cal.4th 929, 958 ["prejudice" as used in section 352 signifies harm of prejudging on the basis of extraneous factors]; see generally, *Winfred D. v. Michelin North America, Inc., supra*, 165 Cal.App.4th 1011, 1029-1035 [proper exercise of discretion to exclude collateral impeaching facts about personal and extramarital affairs where evidence had no tendency to prove or disprove any disputed fact about vehicle accident cause and evidence highly prejudicial in its adverse impact on motorist's second wife, mistress, and illegitimate children].)

d. Exclusion of Recorded Statement Evidence Not Abuse

Progressive contends the trial court erred in excluding the tapes, transcripts, and summaries of all the recorded statements taken during the investigation of McCoy's claim. There was no error.

The record reflects the trial court afforded Progressive ample opportunity to make an offer of proof as to why these challenged items should be admitted. Progressive's showing fell flat. It offered the tapes and tape transcripts in their entirety without regard to hearsay and matters covered by the in limine motions.

Contrary to Progressive's claim, these items were not admissible under the business records exception to the hearsay rule.[6] Prieto failed to lay the requisite foundation to establish this exception. He was not a party to the conversations and did not prepare the documents. Nor were these matters offered to prove the existence or nonexistence of an act, condition or event recorded or not recorded.

Progressive's alternative argument is these "recorded statements are not hearsay," because they are admissible on the issue of reasonableness rather than for the truth of the matter stated. This argument also is unsuccessful. Progressive did not establish the

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[6] Under the "hearsay rule," "'[h]earsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated" and "[e]xcept as provided by law, hearsay evidence is inadmissible." (Evid. Code, § 1200.)

"Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: (a) The writing was made in the regular course of a business; (b) The writing was made at or near the time of the act, condition, or event; (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1271; see also Evid. Code, § 1270.) "The proponent of the evidence has the burden of establishing trustworthiness. (Citations.) The trial court, however, has '. . . wide discretion in determining whether sufficient foundation is laid to qualify evidence as a business record. On appeal, exercise of that discretion can be overturned only upon a clear showing of abuse.' (Citation.)" (*People v. Beeler* (1995) 9 Cal.4th 953, 978-979; see also, *People v. Jones* (1998) 17 Cal.4th 279, 308 [abuse of discretion review of ruling on admissibility of business record exception].)

necessary foundation for admission of these items for this purpose. Contrary to its claim, the mere reliance of its investigative or claim agents on these recorded statements in resolving the coverage issue does not satisfy the requisite foundation showing. Moreover, as Progressive concedes, one purpose for admission of the unedited tapes and transcripts was to present evidence of the 2003 automobile accident, which subject the trial court already had excluded from the jury's consideration.

e. Exclusion of Entire Claim File Not Abuse

Progressive contends the trial court abused its discretion in excluding the entire claim file. No abuse transpired.

At trial, Progressive's attorney argued "the entire claim file has been identified and qualified as a business record and should come in as a business record. So we would move the entire exhibit in." In denying the request, the trial court announced: "We are going to take it piece by piece."

The trial court allowed the parties to offer individual pages, groups of pages, or portions of pages into evidence, which was done. However, Progressive also sought to admit into evidence its entire 337 page claim file without any attempt to establish the relevance of the entire file or particular pages in the file. Nor did Progressive even attempt to establish the entire file was admissible under the business record exception to the hearsay rule.

We have no quarrel with Progressive's general position that the jury is entitled to know about the information in the insurer's claim file. Nonetheless, that the insurer's agent reviewed the "entire claim file" in determining whether coverage exists does not signify everything in the claim file is material and admissible. Rather, the burden remains with the insurer to show the relevance of each item in that file and that its probative value outweighs any prejudice that might flow from its admission.

For a contrary conclusion, Progressive relies on *2,022 Ranch, LLC v. Superior Court* (2003) 113 Cal.App.4th 1377 and *Reavis v. Metropolitan Property & Liability Insurance Company* (S.D. Cal. 1987) 117 F.R.D. 160. Its reliance is misplaced on these

cases, which involve motions to compel discovery of claim file documents, not admission of an entire claim file at trial.

In general, the trial court regularly and carefully articulated appropriate reasons for the exclusion of evidence as irrelevant or excludable under Evidence Code section 352.

3. No Prejudice Where No Error Shown

Progressive contends the judgment should be reversed because of the cumulative prejudicial effect of the trial court's evidentiary errors. No error has been established. The cumulative effect of the assigned errors therefore is nil. (See, e.g., *People v. Loewen* (1983) 35 Cal.3d 117, 129; see also, *People v. Calderon* (2004) 124 Cal.App.4th 80, 93 [where "court did not err at all," "effect of [claimed] errors, even if multiplied, remains zero"].)

4. Bad Faith Finding Supported by Abundant Evidence

Progressive contends there was no evidence of bad faith on its part against McCoy, because, under the genuine dispute doctrine, "as a matter of law, . . . an insurer's denial of a claim is not unreasonable even if the court concludes that policy benefits are due" and citing as authority *Feldman v. Allstate Ins. Co.* (9th Cir. 2003) 322 F.3d 660, 670.) We are not persuaded.

Initially, we point out we are not bound by lower federal court case law, nor need we find such case authority persuasive on a matter pertaining to state rather than federal law. (See, e.g., *Tully v. World Savings & Loan Assn.* (1997) 56 Cal.App.4th 654, 663.)

On the merits, we find Progressive misapprehends the applicable standard. The issue of bad faith was before the jury, as the trier of fact. Our Supreme Court explained "[i]n the insurance bad faith context, a dispute is not 'legitimate' unless it is founded on a basis that is reasonable under all the circumstances" and found "potentially misleading the statements in some decisions that under the genuine dispute rule bad faith cannot be

established where the insurer's withholding of benefits "'"is reasonable *or* is based on a legitimate dispute as to the insurer's liability."' [Citations.]" (*Wilson, supra*, 42 Cal.4th at p. 724, fn. 7, italics added.) In the special verdict, the jury expressly found Progressive breached the implied covenant of good faith and fair dealing in the handling of McCoy's claim. Implicit in this finding is the further finding that Progressive's denial of his claim was unreasonable. Abundant evidence sustains these findings. Progressive does not challenge the sufficiency of the material evidence supporting the findings and points to no evidence in the record which would compel an inference that its denial of the claim was not unreasonable.

5. Punitive Damage Award Challenge Unsuccessful

Progressive contends: "Since the only potentially viable cause of action is for breach of contract, punitive damages are not available." Although correctly pointing out punitive damages are not available in a simple breach of contract action (Civ. Code, § 3294, subd. (a)), Progressive's position is fatally flawed.

Punitive damages are proper in an insurance bad faith action. (See, e.g., *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co., supra*, 189 Cal.App.3d 1072, 1097.) Where benefits are denied unreasonably, the insurer is exposed to the full panoply of tort remedies, including potential punitive damages. (*Jordan, supra*, 148 Cal.App.4th 1062, 1073.) The jury's finding of bad faith thus supports an award of punitive damages in favor of McCoy.[7]

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[7] Progressive does not attack the sufficiency of the evidence to support the jury's findings that Progressive acted in bad faith and "Progressive committed oppression, malice or fraud" in doing so, nor does it challenge the amount of the punitive damage award as excessive. We therefore do not reach these matters. (Cf. *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co., supra*, 189 Cal.App.3d at pp. 1096-1099.)

DISPOSITION

The judgment is affirmed. Respondent shall recover costs of appeal.

BAUER, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Filed 2/26/09

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CEDRIC McCOY, Plaintiff and Respondent, v. PROGRESSIVE WEST INSURANCE COMPANY, Defendant and Appellant.	B199978 (Los Angeles County Super. Ct. No. BC331105) CERTIFICATION AND ORDER FOR PUBLICATION

The opinion in the above-entitled matter filed February 4, 2009 was not certified for publication in the Official Reports. For good cause it now appears the opinion should be published in the Official Reports, with the exception of parts 2 through 5, and it is so ordered.

MALLANO, P. J. ROTHSCHILD, J. BAUER, J.*

* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.