

2014 WL 8107355 (Or.Cir.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Oregon.
Multnomah County

Jesus Domingo FELIX, Plaintiff,

v.

COUNTRY PREFERRED INSURANCE COMPANY, Defendants.

No. 130811648.
August 13, 2014.

Claim not Subject to Mandatory Arbitration Prayer: \$180,000

Defendant's Response in Opposition to Plaintiff's Motion to Amend Complaint

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Defendant Country Preferred Insurance submits the following Response in opposition to plaintiffs Motion for Leave to Amend the Complaint. In support of this Response, defendant relies upon the documents and pleadings contained in the trial court file; ORCP 23A; and the Points and Authorities set forth below.

POINTS AND AUTHORITIES

A. Factual Background

Defendant outlines the following pertinent events as factual background in this breach of contract claim for alleged improper denial of payment of medical bills under the PIP policy:

October 14,2011 - Motor Vehicle Accident

On October 14, 2011, plaintiff was rear-ended by a vehicle driven by Carlos Macias, On the date of the accident, plaintiff was insured under an automobile insurance policy issued by defendant Country Preferred Insurance Company which provided "Personal Injury Protection" (PIP) and "Uninsured-Underinsured Motorist" (UIM) coverage.

Plaintiff started treating at First Choice Chiropractic for neck, back, and [headache](#) pain. Plaintiff was also seen by Frances Verzosa, M.D., Therapeutic Associates and Jordi Kellogg, M.D. Country Preferred paid PIP medical benefits to or on behalf of plaintiff in the total amount of \$13,163.67.

March 12.2012- IME Report

On March 12, 2012, plaintiff was seen for an independent medical examination (IME) at the request of Country Preferred. The IME was conducted by Geary Michels, D.C., and Mitchell Weinstein, M.D. They made an assessment that plaintiff sustained cervical, thoracic, and [lumbar strains](#) from the car accident. The IME report stated that plaintiff was not medically stationary, that he would benefit from *a short term work conditioning program*, and that the course of re-habilitation was *expected to last between about six weeks*. The IME report stated that further chiropractic treatment was not reasonable or necessary.

Country Preferred sent a letter to plaintiff's attorney dated March 16, 2012 enclosing a copy of the IME report. The letter stated, among other things, that plaintiff's injuries appeared to be resolving, but that plaintiff had not yet reached pre-accident status, and that the IME doctors recommended *a short-term aggressive working conditioning program for six weeks provided by a physical therapist or in a hospital environment*. The letter stated that any treatment received by plaintiff after the date of the letter that was not recommended as outlined above could not be considered reasonable, necessary and related to the accident.

After the IME, plaintiff treated at Therapeutic Associates ten times through May 8, 2012, and Country Preferred paid the bills for that treatment. After the IME, plaintiff was seen by Dr. Verzosa on March 20, 2012, and Country Preferred paid the bill for that treatment.

After the IME, plaintiff was also seen by Dr. Verzosa on April 20, 2012, May 17, 2012, June 29, 2012, and August 10, 2012. Dr. Verzosa, who is a family practitioner, examined plaintiff but did not provide any "conditioning program" type of treatment to plaintiff and plaintiff incurred medical expenses of \$560.32 for those dates of service. Dr. Verzosa submitted medical bills in the amount of \$560.32 for those dates of service to Country Preferred for payment. Country Preferred timely denied payment of those medical expenses under the PIP coverage on the basis that the treatment was not within the IME treatment recommendation guidelines.

July 22, 2013 - UIM Arbitration Proceeding

Having received a total of 821,867.40 from defendant under the PIP coverage and \$25,000 from Macias' insurer Progressive, plaintiff then sought to obtain additional compensation under the UIM coverage of the Country Preferred policy. Plaintiff and Country Preferred agreed to submit plaintiff's UIM claim to binding arbitration.

At the UIM arbitration hearing which was held on July 22, 2013, plaintiff had the full and fair opportunity to present evidence to prove the full extent of his injuries and the full extent of economic and noneconomic damages from the accident. The arbitrators did not prevent plaintiff from introducing any evidence at the arbitration hearing concerning the amount of plaintiff's economic or noneconomic damages.

As plaintiff's counsel was about to rest his case, the arbitrators noted that plaintiff had failed to present any evidence as to the amount of medical bills incurred by plaintiff. Defense counsel Bill Sime conferred with plaintiff's counsel and agreed to stipulate that plaintiff had incurred past medical expenses in the amount of \$13,163 and that such medical expenses were reasonable and necessary.

The stipulation at the UIM arbitration hearing that plaintiff incurred past medical expenses of \$13,163 did NOT include the charges of \$560.32 by Dr. Verzosa for April 20, 2012, May 17, 2012, June 29, 2012, and August 10, 2012. As a result of mistake or inadvertence or some other reason, plaintiff's lawyer did not offer evidence concerning the amount of Dr. Verzosa's charges for those dates of service. However, plaintiff had the full and fair opportunity to introduce evidence of the bills in the amount of \$560.32 at the UIM arbitration hearing and there is no question that such evidence would have been received if plaintiff had offered such evidence.

After reviewing the testimony and other evidence, as well as the parties' stipulation, the arbitrators considered the issues presented, and made an arbitration award finding that plaintiff was entitled to recover the following damages as a result of the accident: \$13,163.00 for past medical expenses, \$9,000 for future physical therapy, \$8,640.00 for lost wages, and \$25,000 in non-economic damages, for a total award of \$55,803.

August 6, 2013 - Plaintiff files this action for Breach of Contract

On or about August 6, 2013, Plaintiff filed this current action against Country for Breach of Contract for denial of PIP benefits. Specifically, plaintiff alleges that....defendant breached its policy with Mr. Felix (which must comply with [ORS 742.524](#)) by refusing to pay the “reason-able and necessary” medical expenses incurred by Mr. Felix on April 20, 2012 May 17, 2012 June 29, 2012 and August 10, 2012 and by denying further treatment without investigation when benefits were due and available under the policy.” In the complaint, plaintiff is seeking econom-ic damages of \$30,000, non-economic damages of \$150,000 plus attorney fees under [ORS 742.061](#).

October 9, 2013- Defendant provides plaintiff with copy of the PIP file. January 2014- Defendant's Motion for Summary Judgment

In January 2014, defendant Country filed a Motion for Summary Judgment on the grounds that plaintiffs claim herein is barred under the doctrine of issue preclusion. In sum-mary, plaintiff has already litigated the issue of economic and non-economic damages for bodily injury arising out of the subject car accident and plaintiff's counsel should have included all medical bills in the UIM proceeding. Judge Durham agreed that issue preclusion was a viable defense but since the UIM proceeding was not recorded, he could only speculate as to whether plaintiff had a full and fair opportunity to present evidence concerning the amount of medical expenses incurred by plaintiff and therefore denied defendant's motion for summary judgment.

As a result of the court's ruling, defense counsel Bill Sime withdrew as counsel of record for defendant as he will necessarily be a witness at trial of this matter as to what transpired dur-ing the UIM Arbitration proceeding. This would specifically include conversations he had with plaintiff's counsel regarding the stipulation as to medical expenses and what plaintiffs counsel presented in the way of evidence and what was not presented as evidence. Defendant anticipates that plaintiff's counsel will be a witness in this matter as well.

May 2014- Discovery Requests and Defendant's Motion for Protective Order

On May 5, 2014, plaintiffs counsel submitted Notices of Deposition of Country Pre-rred employees Don Bevins, Julie Annen, Valerie Bauer, Taunya Frances and defense attorney Bill Sime for May 27 and 28, 2014. Plaintiff also submitted a Second Request for Production requesting all documents and communications between defendant Country Preferred Insurance Company and the defense firm of Parks, Bauer, Sime, Winkler & Fernety LLP. On May 27, 2014, defendant filed Motions for Protective Order precluding and/or limiting requested discov-ery from plaintiff and Motion for Order allowing testimony regarding the UIM proceedings.

June 6, 2014- Plaintiff filed Motion to Amend Complaint to Add Punitive Damages

On June 6, 2014, Plaintiff filed a Motion to Amend the Complaint to add a claim of puni-tive damages. Defendant filed a response objecting to any such amendment.

July 21, 2014- Court Rulings on Motions

On July 8, 2014, this court heard oral argument on the various motions and on July 21, 2014 Judge Silver signed orders as follows:

- Denying plaintiffs Motion to Amend Complaint to Add Punitive Damages;
- Granting plaintiffs request for deposition of Country employees with limited scope;
- Denying plaintiffs Request for copy of defense counsel's file:

● Granting defendant's motion to allow counsel and arbitrators at the UIM proceeding to be made available as witnesses for deposition, as well as trial.

Also, just days prior to scheduled depositions, plaintiffs counsel requested that Country employees bring their entire claim file to their depositions. Plaintiff filed a motion with the court requesting production of the entire claim file or in camera review by the court. Oral argument was heard on July 22, 2014 by telephone before Judge Silver who denied plaintiffs request.

August 5, 2014- Plaintiff files Motion to Amend Complaint

Plaintiff has now filed this Motion to Amend the Complaint to include the following additional claims: Breach of Fiduciary Duty; Breach of Implied Covenant of Good Faith; Fraudulent Misrepresentation; intentional Infliction of Emotional Distress; Financial **Elder Abuse**; and Punitive damages of \$5 million. Defendant strongly objects to plaintiff's request to amend the complaint for the following reasons.

ARGUMENT

A. Plaintiffs Counsel Misrepresents Facts to the Court in its Motion.

The "facts" set forth in plaintiffs motion are inaccurate in many respects to include the plaintiffs assertions that defendant denied plaintiff medical treatment without investigation. As defendant explained in correspondence to plaintiffs counsel, the 4 medical bills were declined because they were charges for treatment which did not comport with the recommendation of the IME physicians. Plaintiff's counsel was provided with a copy of the IME report along with the correspondence from defendant setting forth the specific reason why the charges were declined.

Plaintiff argues that he could not have alleged the additional claims prior to receiving the court ordered discovery and taking deposition testimony. Plaintiff argues that "defendant created the delay by failing to participate in discovery as reflected in the court signing two orders requiring them to provide documents and be present for deposition." This statement is inaccurate and misleading.

Plaintiff filed this lawsuit in August 2013. The PIP file was produced to plaintiff by former defense counsel Mr. Sime on October 10, 2013. As noted above, this court granted defendant's Motion for Protective Order precluding discovery of the defense file and the claim file beyond what was already produced to plaintiff by former defense counsel Mr. Sime in October 2013. Defendant did not object to depositions of Sime or Country employee Tanyia Frances. Plaintiff had received the PIP file and could have scheduled all of these depositions months before. A closer look at the allegations in the proposed Amended Complaint reveals that plaintiff could have made these assertions months ago but didn't. To blame defendant for any "delay" or to use as an excuse for late filing of a motion to amend the complaint is simply inaccurate.

B. Standard for Leave to Amend Pleadings

ORCP 23A states that "a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." The trial court's discretion in determining when justice requires amendment of pleadings is broad. *Jackson Cntv. Jackson Educ. Serv. Dist.*, 90 O App. 299, 303, 752 P.2d 1224, 1227 (1988) ("Jackson Cntv."); *See also. Contractors. Inc. v. Form-Eze Systems, Inc.*, 68 Or. App. 124, 129, 681 P.2d 148, rev. den. 297 Or. 824, 687 P.2d 797 (1984).

Generally, the later the request for leave to amend, the greater the chance of prejudice to the opposing party, and consequently, the greater the reluctance of the trial court to permit an amendment. *See, Gibson Bowles, inc. v. Montgomery*, 51 Or. App. 313,

319, 625 P.2d 670 (1981); *See also, Oregon Post Office Bidg. Corp. v. McVicker*, 246 Or. 526, 529, 426 P.2d 458, 460 (1967). The Supreme Court has indicated that one factor to be considered is whether a movant knew or should have known of the need to amend pleadings earlier in the case. *Cutsforth v. Kinzua Corp.*, 267 Or. 423, 431-435, 517 P.2d 640 (1973).

C. Defendant Will Be Extremely Prejudiced If New Claims Are Allowed at This Late Date.

Plaintiffs proposed Amended Complaint seeks to add FIVE new claims PLUS a claim for punitive damages for \$5 million. Plaintiffs original complaint filed in August 2013 was for breach of contract and attorney fees. Plaintiff is now seeking to add the following: Breach of fiduciary duty; breach of implied covenant of good faith; fraudulent misrepresentation; intentional infliction of emotional distress; financial **elder abuse** and punitive damages of \$5 million.

1. Defendant Would Have No Opportunity to File Motions or Conduct Discover Against New Substantially Different Claims.

Trial of this matter is currently set for date certain trial date of October 6, 2014. Plaintiff filed this motion to amend the complaint on August 5, 2014. Hearing on plaintiffs motion has not yet been set. Plaintiff anticipates it will be heard the week of September 22nd which is two weeks before trial The claims and assertions made by plaintiff in the proposed Amended Complaint are inaccurate, unfounded and constitute an inappropriate form of pleading subject to various motions. if the court were to allow plaintiff to file the amended complaint at this late date, defendant would not have an opportunity to file Motion for Summary Judgment, Rule 21 Motions or other motion practice against these serious, albeit meritless claims, due to the juxtaposition to the pending trial date of October 6, 2014.

Moreover, defendant would not have an opportunity to conduct any discovery as it relates to these new, questionable claims whether by additional requests for production, depositions or retention of experts. This last minute attempt by plaintiff to incorporate substantially different claims would cause extreme prejudice to the defendant by limiting the time it would have to prepare a proper defense.

2. Issues are limited.

Plaintiff is trying to turn a breach of contract claim into something it is not. What's really is at issue in this matter is whether or not defendant improperly declined payment of 4 medical bills incurred by Mr. Felix on April 20, 2012, May 17, 2012, June 29, 2012 and August 10, 2012 and, if so, if plaintiff is entitled to attorney fees. Defendant Country will argue that not only did it have a valid reason to decline payment based upon the IME recommendations but also that that plaintiffs claims are barred by issue preclusion. Specifically, plaintiff had the full and fair opportunity to present alt medical bills at the UIM arbitration but failed to do so.

Also, plaintiff was represented by Counsel James Davis throughout this matter. The letters explaining the basis for denial of PIP benefits were mailed to Mr. Davis. At no time did Mr. Davis object to the IME report, request a second IME or take any other action. Plaintiff is attempting to assert additional claims to defeat an issue preclusion defense and deflect criticism of his own conduct in failing to present evidence at the UIM hearing.

3. Plaintiffs Inclusion of Claim for Punitive Damages Improper; This Court Already Denied Plaintiffs Motion to Amend Complaint to Add Punitive Damages.

For the Seventh Claim for Relief in Plaintiff's proposed Amended Complaint. plaintiff asserts a claim for punitive damages in the amount of \$5 million. However plaintiff's inclusion of a claim for punitive damages in the proposed complaint is improper. ORS 31. 725 sets forth the proper procedure for pleading a claim for punitive damages:

(1) A pleading in a civil action may not contain a request for an award of punitive damages except as provided in this section.

(2) At the time of filing a pleading with the court, the pleading may not contain a re-quest for an award of puniti damages. At any te the pleading is filed a party may move the court to allow the pa to amend the pleading to assert a claim for punitive damages The party making the motion may submit affidavits and documentation supporting the claim for punitive damages. The party or parties opposing the motion may submitopposin affidavits and documentation, (emphasis added)

Accordingly, plaintiff's proposed amended complaint including a claim for punitive damages is procedurally prohibited under [ORS 31.725\(1\)](#) and [\(2\)](#).

Also, as noted above, plaintiff already filed a Motion to Amend the Complaint to Add Punitive Damages back on June 6, 2014 which was DENIED by this court. As noted in defendant's response to plaintiff's motion filed at that time, the defendant had a legitimate basis to decline payment of the 4 medical bills at issue based upon the language of the PIP policy and the IME report. The plaintiff had the opportunity to object to the IME report and to submit the medical bills at issue to the arbitration panel for consideration as part of his damages. The basic facts of this claim have not changed. Plaintiff cannot now claim -again- that defendant "acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others" as required under the statute.

For the reasons set forth above defendant respectfl! requests that plaintiff's motion to amend the complaint be denied

DATED this 13th day of August, 2014.

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