IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

AMERICAN NATIONAL PROPERTY
AND CASUALTY COMPANY,

Plaintiff/Counter-Defendant,

v. No. 30,164

TINA CLEVELAND
and ADAM HUDSON,

Defendants/Counter-Plaintiffs,

Appeal from the Second Judicial District, County of Bernalillo
The Honorable Beatrice J. Brickhouse
D-202-CV-2008-10671

AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY'S BRIEF IN CHIEF

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I. SUMMARY OF PROCEEDINGS

A. Nature of the Case and Disposition Below.

This matter arises from an automobile collision on October 13, 2007. [1 Tr. 159-60] Defendants/Counter-Plaintiffs are Tina Cleveland and Adam Hudson. Hudson is the owner and driver, respectively, of one of the cars involved in the collision, a 1986 Porsche 944 Turbo. [1 Tr. 159-60; 2 Tr. 87] Hudson's mother, Cleveland, co-signed on the loan for the Porsche and also purchased insurance for it. [1 RP 8; 2 Tr. 87] For the purposes of this brief, unless specific reference is made to Cleveland or Hudson, Defendants/Counter-Plaintiffs will be referenced collectively as "Counter-Plaintiffs."

Counter-Plaintiffs' automobile was insured by American National Property and Casualty Company ("ANPAC"). [1 RP 8] After performing an investigation into the circumstances of the October 13, 2007 collision, ANPAC denied Counter-Plaintiffs' resultant insurance claim for property damage to the Porsche, as well as towing and storage fees, as a consequence of the "racing" exclusion contained in the subject ANPAC automobile insurance policy. [1 Tr. 178-80] Counter-Plaintiffs then initiated two lawsuits against ANPAC in the Bernalillo County Metropolitan Court, alleging that ANPAC wrongfully denied their claim. [2 Tr. 86]

Subsequently, ANPAC filed a complaint for declaratory judgment in the Second Judicial District Court. [1 RP 1-35] Counter-Plaintiffs answered and filed counterclaims against ANPAC and third-party claims against insurance agent Natalie Voskresensky. [1 RP 45-56] In their counterclaims and third-party claims, Counter-Plaintiffs alleged breach of contract, breach of the covenant of good faith and fair dealing, violation of the New Mexico Insurance Code, violation of the New Mexico Unfair Practices Act, and vicarious liability against ANPAC for the actions of Voskresensky. [*Id.*]

Rather than respond to a dispositive motion, Counter-Plaintiffs voluntarily dismissed Voskresensky from the case before trial. [1 RP 240-43] Robert Cleveland and Victoria Hudson, who, as named insureds were also Defendants and Counter-Plaintiffs, were voluntarily dismissed from the case during trial upon stipulation of the parties. [2 Tr. 11-12] Counter-Plaintiffs' claims for violation of the New Mexico Insurance Code and violation of the New Mexico Unfair Practices Act were dismissed at trial, following the close of evidence, upon ANPAC's motion for directed verdicts on those counts. [2 Tr. 213]

Following deliberation, the jury concluded that Hudson was not racing and that ANPAC breached its contract with Counter-Plaintiffs, and accordingly, awarded breach of contract damages in the amount of $8,260.08, comprising the actual cash value of the Porsche, as well as towing and storage charges. [2 RP

334] The jury also concluded that the breach of contract was in bad faith, and awarded compensatory damages for bad faith in the amount of $20,000.00. [2 RP 335] Additionally, the jury found that ANPAC's bad faith actions were malicious and/or willful and wanton, and awarded punitive damages of $50,000.00. [*Id.*]

B. Summary of Background Facts.

As noted above, this case arises from an automobile collision that took place in the early morning hours of October 13, 2007. [2 Tr. 70] At approximately 1 a.m., Albuquerque Police Department Officer Matthew McElroy was sitting in a police cruiser parked in the median of Jefferson NE near Interstate 25. [*Id.*; 2 Tr. 44] At the time, Officer McElroy was monitoring northbound traffic. [2 Tr. 44-45] Hudson was driving a 1986 Porsche 944 Turbo. [1 Tr. 160; Ex. B, pp. 1-2] He was traveling southbound when he struck Officer McElroy's cruiser at a high rate of speed. [2 Tr. 46-48, 74] A second vehicle, which was also headed southbound on Jefferson at the time of the collision, left the scene. [2 Tr. 53-54]

Officer Chris Compton subsequently investigated the collision and prepared a police report. [1 RP 159-61] In the report, Officer Compton indicated that Hudson stated that he was drag racing another vehicle—identified as a black Lincoln LS—before the crash. [1 RP 160] The Lincoln was not located by police. [1 RP 160] As a consequence of the collision, Hudson was charged with drag

racing and reckless driving. [2 Tr. 74] He was arrested and briefly incarcerated. [2 Tr. 125]

Hudson's Porsche was insured by ANPAC. [1 RP 8] Among other things, the automobile insurance policy contained excluded coverage for accidents "resulting from the use of **your insured car** in or in preparation for any race, speed contest, hill climbing exhibition, or any other contest or demonstration." [1 RP 24, 25, 28, 30]

Following the collision, Hudson notified ANPAC and made a claim under his automobile insurance policy. [2 Tr. 125] On October 15, 2007, the claim was assigned to ANPAC claims adjuster Evan Williams. [Tr. 156-60] Williams then initiated an investigation into the circumstances surrounding the collision. [Tr. 165-66] Initially, in conducting the investigation, Williams reviewed the policy at issue, examined the police report, and interviewed Hudson. [1 Tr. 166-69] In a recorded statement, Hudson stated that he had been ticketed by the APD for drag racing and reckless driving. [1 Tr. 167] The police report also indicated that Hudson was drag racing. [1 Tr. 169]

Upon learning that there was an allegation that Hudson was drag racing in connection with the accident, Williams contacted the insureds, both by telephone and in writing, and let them know that due to the racing exclusion in the policy, additional investigation was needed regarding their claim. [1 Tr. 169; Ex. 4]

Hudson subsequently sent Williams a sworn statement in which he stated that he had not been drag racing. [1 Tr. 171; Ex. F]

The claim was initially submitted to ANPAC's Claims Committee on October 30, 2007. [1 Tr. 175] The Claims Committee meets twice a week to review claims that involve severe or multiple injuries and those that may result in a denial of coverage. [1 Tr. 174] When Williams submits a claim to the Claims Committee, he provides the Committee with the claim number, description of accident at issue, and a list of reasons why the Committee needs to review the claim. [1 Tr. 175] Williams presented the claim at issue in this case to the Committee because a coverage determination was needed with respect to the allegation that Hudson had been racing, and the corresponding racing exclusion in the policy. [1 Tr. 175-76] Upon submission by Williams, the Claims Committee determined that further investigation into the Hudson claim was needed before a final coverage determination could be made. [1 Tr. 176] The Committee suggested that Williams seek statements from the investigating officer and the officer involved in the accident. [*Id.*]

On December 4, 2007, Officer Compton, who investigated the collision and prepared the police report, gave a recorded statement to Frontier Adjusters, the independent adjusters retained by ANPAC. [*Id.*; Ex. H] In his recorded statement, Officer Compton stated that upon arriving at the scene of the accident, Officer

McElroy explained that he was running radar when he heard two engines revving up, squealing tires, and the shifting of gears. [Ex. H, p. 4] Officer McElroy told Officer Compton that he looked in his rearview mirror and saw two sets of headlights coming up behind him. [*Id.*] Officer McElroy then saw one of the cars lose control and head straight for his car. [*Id.*, p. 5] Officer McElroy told Officer Compton that he thought that the second car—the one leaving the scene—was a black, newer model four-door. [*Id.*, p. 8]

After explaining to Frontier Adjusters what Officer McElroy told him after the accident, Officer Compton then explained his interaction with Hudson following the accident. [*Id.*] According to Officer Compton, Hudson initially denied that he was drag racing. [*Id.*] Subsequently, while Officer Compton discussed the accident with other officers, Hudson blurted out that the second car was a black Lincoln LS and that he had been racing it. [*Id.*]

Frontier Adjusters provided a copy of the interview with Officer Compton to ANPAC. [1 Tr. 176] Officer McElroy refused to provide a statement. [*Id.*]

On December 20, 2007, the Claims Committee met for a second time regarding Hudson's claim. [1 Tr. 177] At this time, the Committee reviewed the earlier submission from Williams, as well as the interview with Officer Compton. [*Id.*] Based on this information, the Committee decided to deny the claim on the basis of the racing exclusion in the policy. [1 Tr. 178; Ex. L, pp. 1-2]

On March 4, 2008, ANPAC was advised that the drag racing charge against Hudson was dismissed and that Hudson had instead pleaded guilty to careless driving. [1 Tr. 179] Williams testified that although the dismissal of the drag racing charge did not change the underlying facts surrounding the accident, he nonetheless believed that the Claims Committee should review the claim a third time. [*Id.*]

Williams presented information regarding Hudson's plea bargain to the Claims Committee in March 2008. [1 Tr. 180; Ex. N] The Claims Committee decided that the denial of the claim should stand. [1 Tr. 180; Ex. P]

1. The Parties' Respective Lawsuits.

Adam Hudson and Tina Cleveland sued ANPAC, Evan Williams, and Natalie Voskresensky in Metropolitan Court. [1 Tr. 86] ANPAC subsequently sought a declaratory judgment in the Second Judicial District Court that it had no duty under the Policy to provide coverage to Tina and Robert Cleveland and Adam and Victoria Hudson, the insureds and drivers named on the policy, for the collision. [1 RP 1-35] Tina and Robert Cleveland and Adam and Victoria Hudson asserted a counterclaim against ANPAC, asserting claims against ANPAC sounding in breach of contract, breach of the covenant of good faith and fair dealing, violation of the New Mexico Insurance Code, violation of the New Mexico Unfair Practices Act, and vicarious liability/respondeat superior for the

actions of agent Voskresensky. [1 RP 45-56] Counter-Plaintiffs also asserted a third-party claim for negligence against agent Voskresensky. [1 RP 52-53]

On September 14, 2009, ANPAC moved for summary judgment on Counter-Plaintiffs' claims of bad faith, violation of New Mexico Insurance Code, and violation of New Mexico Unfair Practices Act. [1 RP 137-68] In its motion for summary judgment, ANPAC argued that it had made a timely and complete investigation of Counter-Plaintiffs' insurance claim, and that its denial of the claim was neither unfounded nor frivolous. [1 RP 143-46] ANPAC further argued that Counter-Plaintiffs could not demonstrate a violation of the Insurance Code or the Unfair Practices Act. [1 RP 146] By letter decision, the district court denied ANPAC's motion, concluding that there were disputed issues of material fact and that the policy language was sufficiently ambiguous such that the bad faith claim should go to the jury. [2 RP 279] The court also indicated in its letter that there was a strong likelihood it would dismiss Counter-Plaintiffs' Insurance Code and Unfair Practices Act claims at trial if Counter-Plaintiffs did not present any additional evidence to support their claims. [*Id.*]

2. Counter-Plaintiffs' Expert Witness.

Prior to trial, ANPAC moved to exclude the testimony of Counter-Plaintiffs' expert, Garth Allen. [1 RP 213-38] In its motion in limine, ANPAC pointed out that Counter-Plaintiffs failed to comply with the court's scheduling order, which

required that for each expert to be called at trial the party offering the expert provide in their expert witness list, "the expert's full name, mailing address and contact telephone number, professional qualifications which allow the witness to offer opinion testimony and a short summary of anticipated testimony." [1 RP 88-89, 214-16] Counter-Plaintiffs identified Allen as an expert, but failed to list his professional qualifications, which would allow him to offer opinion testimony, and similarly failed to provide a summary of his anticipated testimony. [1 RP 214, 225, 229] ANPAC further indicated that although it had repeatedly requested information regarding Allen in discovery, Counter-Plaintiffs had failed to provide such information. [1 RP 214-15, 225, 229] The first—and only—information regarding Allen's opinions that ANPAC received was an affidavit and curriculum vitae attached to Counter-Plaintiffs' response in opposition to ANPAC's motion for summary judgment. [1 RP 200-12, 216] ANPAC argued that it was greatly prejudiced by the late disclosure of Allen's affidavit, in that it did not have an opportunity to perform full discovery regarding the basis and nature of Allen's opinions, and that it was provided only with a conclusory affidavit signed by Allen, not with a report stating Allen's opinions and the bases therefore. [1 RP 216]

ANPAC further argued that Allen had not provided any basis for his opinions, and that such opinions should therefore be excluded in accordance with Rule 11-703 NMRA. [1 RP 216-18] ANPAC argued that, under New Mexico

law, expert testimony may only be admitted if the expert possesses such facts as would enable him to express a reasonably accurate conclusion as distinguished from mere conjecture. [1 RP 217] ANPAC asserted that the opinions offered by Allen in his affidavit were mere conjecture. [*Id.*]

For example, ANPAC pointed out that Allen provided no basis for his conclusion that ANPAC's racing exclusion runs contrary to industry standards (although, in his affidavit, Allen mistakenly referred to a "speeding" exclusion). [*Id.*; 1 RP 234] Rather, Allen stated that he reviewed an Insurance Services Office, Inc. ("ISO") sample personal automobile policy, and that the racing exclusion contained in that policy was different that the exclusion in the ANPAC policy at issue. [1 RP 233-34] ANPAC noted that Allen did not state who used the ISO model policy referenced in his affidavit, or where is the ISO model policy is utilized, other than making a general statement that it is widely utilized in the "industry." [1 RP 217, 233] Further, no copy of the ISO policy was produced with the affidavit. [1 RP 217]

Additionally, ANPAC observed that Allen stated that a "race is necessarily a contest" and that "it is impossible for a person to race against themselves." ANPAC noted that this was incorrect and unsupported by the facts of this case, and that Allen offered no basis for the statement. [*Id.*; 1 RP 234]

According to ANPAC, Allen also stated that ANPAC violated the Unfair Claims Practices Act by failing to adopt and implement reasonable standards for the prompt investigation and processing of insurance claims. [1 RP 218, 235] ANPAC pointed out that Allen did not state what ANPAC's standards for prompt investigation or processing of claims are, what claim information ANPAC failed to obtain, or what his basis was for asserting what such standards are. [1 RP 218] Additionally, Allen stated that ANPAC clearly and unequivocally favored its own interests to the detriment of its insureds' interests. [1 RP 235] ANPAC again argued that Allen gave no basis for this conclusion. [1 RP 218] ANPAC further argued that Allen's affidavit was defective because it was rife with unsupported and unfounded legal conclusions. [*Id.*] For these reasons, ANPAC asserted that Allen's testimony should be excluded at trial.

By letter decision, the district court noted that it would allow Allen to testify only as to the issues addressed in his affidavit. [2 RP 279] The court further indicated that Allen would not be allowed to testify as to ultimate facts, but could testify as to acceptable insurance practices, based on his training and experience. [2 RP 280] The court ordered Counter-Plaintiffs to turn over Allen's expert file and to permit Allen to be deposed, if ANPAC wished to do so. [*Id.*]

3. The Trial.

The case was tried before a jury on November 5, 6, and 9, 2009. At trial, ANPAC's main arguments were that Hudson was racing on October 13, 2007, that ANPAC employee Williams made a thorough investigation of the collision, obviating any bad faith by ANPAC, based upon which ANPAC made a reasonable determination that Hudson had been racing at the time of the collision, and was therefore not entitled to coverage as a consequence of the racing exclusion in the policy. [1 Tr. 134-44] ANPAC further argued that in no event should Counter-Plaintiffs be entitled to recover any damages on behalf of the City of Albuquerque or Officer McElroy. [*Id.*] Williams testified at length during the trial regarding the investigation he performed on behalf of ANPAC, and testified that this matter was submitted to Claims Committee twice before a denial was issued, and was submitted a third time when ANPAC learned of Hudson's plea bargain, resulting in a final denial of the claim. [1 Tr. 165-80]

Both Officers McElroy and Compton testified that they had no doubt in their minds that Hudson was drag racing on October 13, 2007, and that Hudson's plea bargain did not change the facts surrounding the collision or their opinion that Hudson was racing. [2 Tr. 50, 74] Officer McElroy testified that immediately before the collision, he heard two engines revving and squealing tires, and that he saw two sets of headlights heading toward him in his rear-view mirror. [2 Tr. 46-

47] Officer McElroy further testified that drag racing on Albuquerque streets is common on weekends and that while some of the races are organized events, drag racing also occurs informally on city streets. [2 Tr. 59] He rejected any suggestion that a person waving a flag to signal the start of a race was necessary for a drag race to occur as something that only happens in "Hollywood." [2 Tr. 58-59]

Officer Compton testified that during his investigation of the collision, Hudson admitted to him that he was racing a black Lincoln LS. [2 Tr. 73, 79] According to Officer Compton, drag racing was prevalent in the area of the crash. [2 Tr. 82] Officer Compton further stated that when a charge is dismissed as part of a plea agreement, the plea does not change the underlying facts. [2 Tr. 85] Thus, according to Officer Compton, the fact that the drag racing charge in this case was dismissed had no bearing on whether Hudson was actually drag racing on the night of the collision. [*Id.*]

At trial, Cleveland testified that she added Hudson's Porsche to the existing family automobile insurance policy with ANPAC. [2 Tr. 90] She acknowledged testifying inconsistently regarding whether she had reviewed the policy. [2 Tr. 91] Moreover, Cleveland also offered inconsistent testimony regarding whether she had reviewed identical automobile polices she received from ANPAC, and was impeached by introduction of her deposition testimony. [2 Tr. 117] Cleveland

testified that she believed that the racing exclusion meant that ANPAC would not insure race car drivers. [2 Tr. 101]

Hudson testified at trial that he had squealed his tires while sitting at the traffic light on Jefferson Street and admitted that he had been driving "really fast." [2 Tr. 120-21] He denied, however, racing a black Lincoln LS. [2 Tr. 121] Hudson testified that his statements to Officer Compton following the accident were misconstrued during questioning by Officer Compton. [2 Tr. 124-25] However, Hudson was impeached regarding this statement on cross-examination, as he previously testified in his deposition that he did not recall being questioned by Officer Compton. [2 Tr. 132-33]

Insurance agent Voskresensky testified that she was an agent for the sale of ANPAC insurance, but was not an employee of ANPAC. [2 Tr. 141] She also testified that she was aware of the racing exclusion, but stated that it was not specifically discussed with Cleveland when she purchased the insurance policy. [2 Tr. 137, 142] Voskresensky also testified that she had no role in making coverage determinations, and that if she had a question regarding the meaning of an exclusion in the policy, she would contact the underwriting department at ANPAC. [2 Tr. 142] Opposing counsel attempted to have Voskresensky testify that she believed the racing exclusion was ambiguous; but, after an objection, was ultimately unable to lay the foundation for such testimony. [2 Tr. 137-40]

Counter-Plaintiffs' expert witness, Garth Allen, testified that in his opinion, the racing exclusion was ambiguous; and, because it differed from an ISO sample policy, fell below insurance industry standards. [2 Tr. 156-62, 165-67] Allen (who admitted that he was unaware that ANPAC is a member of ISO), testified that the term "race"—as used in the policy—could be construed so broadly that nearly any act of driving could be considered "racing," and that the standard in the insurance industry was to exclude only sanctioned or organized racing. [2 Tr. 165-67, 192] Allen conceded, however, that there is no legal requirement that an insurance company conform to the ISO sample policy. [2 Tr. 193]

Although Allen testified that certain aspects of the initial investigation into Hudson's claim were deficient, he nonetheless testified that he believed that ANPAC's denial of Counter-Plaintiffs' claim was "borderline" until after ANPAC received information that Hudson entered a plea bargain resulting in the dismissal of the drag racing charge. [2 Tr. 175-77, 182-83, 187, 190] With regard to the plea bargain, Allen testified that "up until that happened, I could not testify that the denial was frivolous or unfounded on the damages to the Porsche. There was a basis to think maybe there was it race," but after ANPAC received the information regarding the dropped drag-racing charge, its denial of the claim became frivolous and unfounded. [2 Tr. 177]. Allen based this opinion on his belief regarding the difficulty of obtaining a conviction for drag racing. [*Id.*] However, on cross-

examination, Allen reiterated that until the drag racing charges were dropped, he did not think ANPAC's denial of Hudson and Cleveland's first party claim would be frivolous or unfounded. [2 Tr. 190]. Allen, who is a lawyer, then admitted that the burden of proof for obtaining a criminal conviction for drag racing was much different than the burden of proof relevant to a civil case. [2 Tr. 191].

At the close of evidence, ANPAC moved for a directed verdict on all claims by Counter-Plaintiffs. [2 Tr. 211-12] Counter-Plaintiffs presented a motion for directed verdict as against ANPAC. [2 Tr. 212-13] ANPAC's motion was granted with respect to Counter-Plaintiffs' claims for violation of the New Mexico Insurance Code and violation of the New Mexico Unfair Practices Act. [2 Tr. 213] Counter-Plaintiffs' motion was denied. [2 Tr. 214] Consequently, the jury was instructed that it must initially determine whether Hudson was racing at the time of the collision. [2 RP 300] The jury was also instructed to determine whether racing was excluded by the policy, whether ANPAC had breached its insurance contract with Counter-Plaintiffs, and whether ANPAC had acted in bad faith. [2 RP 300, 302]

On a special verdict form, the jury indicated that it found that Hudson had not been racing on October 13, 2007. [2 RP 333] The jury did not make a determination as to whether the policy contained a racing exclusion because of this finding. [*Id.*] The jury then concluded that ANPAC had breached its contract with

Counter-Plaintiffs, and awarded breach of contract damages in the amount of $8,260.08. [2 RP 334] The jury also concluded that ANPAC's denial of Counter-Plaintiffs' claim was "frivolous or unfounded." [*Id.*] The jury awarded compensatory damages for bad faith in the amount of $20,000.00. [2 RP 335] The jury also concluded that ANPAC's bad faith conduct was malicious and/or willful and wanton, and awarded punitive damages of $50,000.00. [*Id.*]

II. ARGUMENT

The judgment against ANPAC should be reversed, at least in part, for two reasons. First, Counter-Plaintiffs' bad faith claim was not supported by substantial evidence and did not reach the legal threshold for bad faith under New Mexico law. Second, the court abused its discretion in allowing Plaintiff's expert, Garth Allen, to testify at trial, and it was his unsupported and erroneously-permitted testimony alone that was allowed as the basis for the jury's determination of bad faith. Both issues are discussed below.

A. In New Mexico, an insurer who denies a first-party claim acts in bad faith when its reasons for denying a claim are frivolous or unfounded. In this case, there was conflicting evidence as to whether Hudson was drag racing and, therefore, a reasonable question as to whether the exclusionary provision of the automobile contract applied. Under such circumstances, did the district court err in denying ANPAC's motion for a directed verdict?

This issue presents a mixed question of law and fact. *See Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶ 7, 129 N.M. 698, 12 P.3d 960. This

Court reviews the underlying facts under a substantial evidence standard. *Id.* In so doing, this Court will "review all evidence in the light most favorable to the verdict and resolve all conflicts in the light most favorable to the prevailing party." *Weststar Mortgage Corp.*, 2003-NMSC-002, ¶ 8 (citation omitted). This Court reviews "de novo the trial court's application of the law to the facts in arriving at its legal conclusions." *Ponder*, 2000-NMSC-033, ¶ 7.

ANPAC preserved the issue addressed below by moving for a directed verdict at the close of trial. [2 Tr. 211-12]

1. ANPAC's insurance policy unambiguously excludes coverage for the alleged conduct of Hudson on October 13, 2007.

At trial, the parties argued at length regarding whether the racing exclusion in ANPAC's policy excluded coverage for Hudson's conduct in allegedly racing a black Lincoln LS in the moments leading up to the collision on October 13, 2007. Counter-Plaintiffs argued below that the racing exclusion was ambiguous and only covered officially-sanctioned races. As demonstrated below, however, the language in the racing exclusion is unambiguous and application of its plain meaning excludes coverage for the type of informal racing that Hudson was alleged to have engaged in.

In New Mexico, "[e]xclusionary provisions in an insurance policy are enforceable so long as their meaning is clear and they do not conflict with statutory law." *Castorena v. Colonial Life & Accident Ins. Co.*, 107 N.M. 460, 461, 760

P.2d 152, 153 (1988). Accordingly, when the language in an insurance policy is unambiguous, a court must enforce the policy as written. *Truck Ins. Exchange v. Gagnon*, 2001-NMCA-092, ¶ 7, 131 N.M. 151, 33 P.3d 901.

The policy provision at issue in this case reads as follows:

> There is no coverage under PART I – LIABILITY:
>
> . . .
>
> (18) for **bodily injury** or **property damage** resulting from the use of **your insured car** in or in preparation for, any race, speed contest, hill climbing exhibition, or any other contest or demonstration.

[1 RP 24] Identical racing exclusions also appear in policy sections dealing with medical payments, comprehensive coverage, and uninsured motorist coverage. [1 RP 25, 28, 30]

Below, Counter-Plaintiffs argued that the racing exclusion at issue was ambiguous and only covered races that were officially sanctioned. At trial, Counter-Plaintiffs' expert, Garth Allen, testified that the term "race" in the insurance policy could be construed so broadly that nearly any act of driving could be considered "racing," and that the standard in the insurance industry was to exclude only sanctioned or organized racing. [2 Tr. 165-67, 192] Counter-Plaintiff's arguments regarding the racing exclusion are not reasonable, however, and are contrary to the plain and ordinary meaning of the term "race."

The term "race" is not defined in the policy. However, "an insurance policy is not rendered ambiguous merely because a term is not defined; rather, the term

must be interpreted in its usual, ordinary, and popular sense." *Battishill v. Farmers Alliance Ins. Co.*, 2006-NMSC-004, ¶ 8, 139 N.M. 24, 127 P.3d 1111 (internal quotation marks and citation omitted); *see also Estate of Galloway v. Guaranty Income Life Ins. Co.*, 104 N.M. 627, 628, 725 P.2d 827, 828 (1986) ("[W]hen a word is not defined in the insurance policy, it must be interpreted in its usual, ordinary and popular sense.").

As a general matter, an exclusionary clause in an insurance contract is construed narrowly. *Knowles v. United Servs. Auto. Ass'n*, 113 N.M. 703, 705, 832 P.2d 394, 396 (1992). However, this general rule "cannot be utilized to override the clear and unambiguous terms of an exclusion." *Grisham v. Allstate Ins. Co.*, 1999-NMCA-153, ¶ 13, 128 N.M. 340, 992 P.2d 891. The question therefore becomes whether the term "race" has a plain and ordinary meaning. *See id.* ¶ 8.

New Mexico courts have yet to construe any of the terms in the racing exclusion at issue in this case. Other jurisdictions considering similar policy exclusions hold that the term "race" is not ambiguous and may be plainly defined.

In *Continental Insurance Company v. Collingsworth*, 898 So.2d 1085 (Fla. Dist. Ct. App. 2005), the court addressed a similar policy exclusion. In that case, the insurance company denied coverage following a boating accident on the

grounds that the insured boat was racing another boat. *Id.* at 1087. The policy at issue excluded coverage for accidents arising out of "any speed race." *Id.* at 1086.

The insured argued that the exclusion was ambiguous and that "any speed race" only covered "officially-sanctioned speed races." *Id.* at 1087. Continental, on the other hand, argued that the term was unambiguous and included all races, whether "sanction or unsanctioned, official or unofficial." *Id.*

The court agreed with Continental. *Id.* Recognizing, like New Mexico courts, that undefined policy terms should be given their plain and ordinary meaning, the court endeavored to define "speed race." *Id.* at 1088. The court observed that other jurisdictions have defined similar terminology. *Id.* Looking at these other jurisdictions, the court in *Continental* concluded that "in order to have a speed race it is not necessary that it be officially sanctioned or even prearranged." *Id.* at 1088-89. Rather, the unambiguous term simply means "any contest of speed regardless of whether it is sanctioned, unsanctioned, official or unofficial." *Id.* at 1089; *accord Ala. Farm Bureau Mut. Cas. Ins. Co. v. Goodman*, 188 So.2d 268, 271-72 (Ala. 1966).

The definition adopted in *Continental* is in line with Webster's New Collegiate Dictionary, which similarly defines "race" as a "contest of speed." The New Mexico statute dealing with racing on highways, NMSA 1978, § 66-8-115 (1978), likewise recognizes that a "race" means "the use of one or more vehicles in

a manner to outgain or outdistance another vehicle, prevent another vehicle from passing, arrive at a given destination of another vehicle or test the physical stamina or endurance of drivers over long-distance routes." In other words, a race is contest of speed or endurance.

When an insurance company wants to limit a racing exclusion to only those races that are prearranged or officially sanctioned, it can certainly do so. For example, in *Detroit Automobile Inter-Insurance Exchange v. Bishop*, 180 N.W.2d 35, 36 (Mich. Ct. App. 1970), an insurance policy excluded coverage for accidents arising out of "any *prearranged* race or speed contest." (emphasis added). In that case, a teenager borrowed his father's car and bet two other teenagers that he could drive the car down a two-mile stretch of highway in a certain amount of time. *Id.* While accelerating down the highway, the teenager struck and killed a child. *Id.*

The insurer argued that the teenager engaged in a prearranged race and that the racing exclusion in the policy therefore applied. *Id.* The court rejected this argument. *Id.* at 37. Rather, the court held that the race was not "prearranged" as required under the policy, but was instead an "impulsive, spur-of-the-moment" race. *Id.* The court observed that had the insured wanted to exclude coverage for such races, it could have phrased the exclusionary provision to cover "any race and or speed test," not simply those that were prearranged. *Id.* at 36 (quoting *County Mut. Ins. Co. v. Bergman*, 185 N.E.2d 513, 517 (Ill. Ct. App. 1962)).

In the policy at issue in this case, the pertinent language includes "*any* race, speed contest, hill climbing exhibition, or any other contest or demonstration." [1 RP 24 (emphasis added)] There is no language in this exclusion to suggest that it is somehow limited to prearranged races or official races. Rather, as in *Continental*, the plain language of the exclusion covers all races, including the informal race that Hudson was alleged to have engaged in.

There is similarly no reason to adopt Counter-Plaintiffs' argument that the term "race" is so broad that nearly any act of driving could be excluded from coverage under the policy. According to Allen, under a broad definition of "race," an individual "could say they were racing to work or they were racing to the airport or they were racing over to a friend's house," and that would result in the denial of coverage if such acts resulted in an accident. [2 Tr. 166] Such a strained construction is contrary to the plain meaning of the term "race," as defined in case law, New Mexico statutes, and the above-cited dictionary definition. *Safeco Ins. Co. of Am.*, 90 N.M. 516, 520, 565 P.2d 1033, 1037 (1977) ("Resort will not be made to a strained construction for the purpose of creating an ambiguity where no ambiguity in fact exists.").

Moreover, Counter-Plaintiffs' broad construction of the term is also contrary to the purpose for the exclusion itself:

> The purpose of the exclusion is to remove from coverage situations in which an automobile is not usually found and which may present

> additional hazards; [i].e., contests in which speed is involved and in which preoccupation with the contest may result in the taking of chances which would not otherwise have been taken.

Yosemite Ins. Co. v. Meisner, 561 P.2d 185, 187 (Ore. 1977); *see also Ala. Farm Bureau Mut. Cas. Ins. Co.*, 188 So.2d at 270 ("The risk sought to be excluded here was an 'automobile race or competitive speed test.' These words express excessive speed and an increased risk and situations in which an automobile is not usually found or entered by the ordinary owner or driver."). Allen's hyperbolic contention that "race," as used in ANPAC's policy, is broad enough to cover all acts of driving is simply contrary to the ordinary meaning of the term and the purpose behind the policy exclusion, which is to exclude from coverage such unusual and dangerous uses of an automobile as Hudson was alleged, and reasonably believed to have been engaged in, at the time of collision at issue.

2. Reasonable minds could differ as to whether Hudson was racing at the time of the accident.

In New Mexico, an insurer acts in bad faith in denying a first-party claim when its reasons for denying the claim are frivolous or unfounded. *Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004-NMSC-004, ¶ 18, 135 N.M. 106, 85 P.3d 230; *see also* UJI 13-1702 NMRA. In defining "unfounded" in this context, the New Mexico Supreme Court has stated that

> "Unfounded" . . . does not mean "erroneous" or "incorrect"; it means essentially the same thing as 'reckless disregard," in which the insurer utterly fail[s] to exercise care for the interests of the insured in

> denying or delaying payment on an insurance policy. It means an utter or total lack of foundation for an assertion of nonliability—an arbitrary or baseless refusal to pay, lacking any arguable support in the wording of the insurance policy or the circumstances surrounding the claim. It is synonymous with the word with which it is coupled: "frivolous."

Jackson Nat'l Life Ins. Co. v. Receconi, 113 N.M. 403, 419, 827 P.2d 118, 134 (1992) (internal quotation marks and citation omitted).

The "frivolous or unfounded" standard is also explained in *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 709 P.2d 649 (1985). There, the Supreme Court held that the insurer's denial of the insured's claim was not in bad faith, despite determining that the insurer had to pay the claim, stating that there "were legitimate questions regarding the amount of [the insured's] claimed damages." *Id.* at 485, 709 P.2d at 654. Consequently, the insurer's failure to pay was not unfounded, and, therefore, not in bad faith. *Id.* This holding is best summarized in Justice Bivens' special concurrence: "Where a claim is fairly debatable, the insurer is entitled to debate it, whether the issue concerns a question of law or fact." *Id.* at 492, 709 P.2d at 661.

Suggs v. State Farm Fire & Cas. Co., 833 F.2d 883 (10th Cir. 1987) is factually analogous to the case at bar. In *Suggs*, State Farm denied benefits to the owners of a mobile home that burned down. *Id.* at 885. One of the reasons that State Farm denied the claim was that it believed that the fire that destroyed the mobile home was intentionally set by one of the owners. *Id.* While the owner

denied starting the fire, a private investigator and the State Fire Marshall concluded that the fire was intentionally set. *Id.* Experts hired by the owner concluded otherwise, stating that the fire was likely caused by an electrical malfunction. *Id.* The owner was charged with arson, but that charge was later dismissed. *Id.*

Subsequently, the mobile home owners sued State Farm alleging, among other claims, that State Farm's denial of benefits was in bad faith. *Id.* At trial, the jury found in favor of the mobile home owners. *Id.* at 884.

Applying New Mexico law, the Tenth Circuit reversed. *Id.* at 891. The court observed that there was "substantial conflicting evidence" regarding how the fire was caused and that there was at least "some evidence" to suggest arson. *Id.* Under such circumstances, the court held that State Farm did not deny the claim in bad faith. *Id.*

The result should be no different in this case. ANPAC was faced with conflicting evidence regarding whether Hudson was drag racing at the time of the accident at issue. While Hudson denied drag racing in a sworn statement, there was also evidence suggesting that he had admitted to drag racing at the time of the accident. [Ex. F; Ex. H, p. 8; 1 Tr. 175; 73, 79] Moreover, ANPAC also possessed evidence that the officer involved in the accident, Officer McElroy, saw two sets of headlights in his rearview mirror, heard engines revving and tires squealing, and

two cars appearing to race down the road behind where he was parked. [Ex. H, p. 8; 2 Tr. 46-47]

In denying Counter-Plaintiffs' motion for a directed verdict on the breach of contract claim, the district court itself observed that reasonable minds could differ on the question of whether the facts supported such a claim. [2 Tr. 213-14] This ruling by the court should be absolutely dispositive of Counter-Plaintiff's bad faith claim as well. If reasonable minds could differ on whether or not the facts supported a breach of contract claim—which is precisely what the district court determined in denying Counter-Plaintiffs' motion—then it necessarily follows that ANPAC had a reasonable basis for denying Counter-Plaintiffs' claim; and therefore, as a matter of law, said denial could not have been in bad faith. *See* Douglas G. Houser, *Good Faith as a Matter of Law: The Insurance Company's Right to Be Wrong*, 27 Tort & Ins. L.J. 665, 668 (1992) ("If an insurer can produce sufficient evidence to create a jury issue on the question of coverage, then there is clearly a 'fairly debatable' coverage question, and a court should dismiss any accompanying bad faith claim."). This being the case, Counter-Plaintiff's bad faith claim must fail as a matter of law.

As quoted above, "[w]here a claim is fairly debatable, the insurer is entitled to debate it, whether the issue concerns a question of law or fact." *United Nuclear Corp*, 103 N.M. at 492, 709 P.2d at 661 (Bivens, J., concurring); *accord Knutilla v.*

Auto-Owners Ins. Co., 578 So.2d 1359, 1361 (Ala. Civ. App. 1991); *Dirks v. Farm Bureau Mut. Ins. Co.*, 465 N.W.2d 857, 861 (Iowa 1991). Here, by Counter-Plaintiffs' experts' own admission, this was a fairly debatable claim until Hudson plea bargained the drag-racing charge. [2 Tr. 177, 190] However, as Officer Compton, who was responsible for the plea agreement with Hudson testified, the plea bargain in no way changed the facts of the case. [2 Tr. 85] If the denial of Counter-Plaintiffs' claim was fairly debatable—as it must logically be, given the district court's ruling regarding Counter-Plaintiffs' breach of contract claim—then, as a matter of New Mexico law, ANPAC cannot have committed bad faith in denying it. Given the district court's reasoning, and the evidence adduced at trial, Counter-Plaintiffs' bad faith claim should not have gone to the jury, and ANPAC's motion for directed verdict regarding the bad faith claim should have been granted.

3. The dismissal of Hudson's criminal drag racing charge is irrelevant to the question of whether ANPAC acted in bad faith.

In *Suggs*, the Tenth Circuit flatly rejected any assertion that the dismissal of the arson charge was relevant to State Farm's decision. 833 F.2d at 891. The court recognized that the decision not to prosecute is based on different criteria than those applying in civil cases, and accordingly did not believe that the dismissal of the charge had any bearing on whether State Farm acted in bad faith. *Id.*

"At best, the evidence of non-prosecution is evidence of an opinion by the prosecutor." *Am. Home Assur. Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321,

324 (3d Cir. 1985); *see also State v. Brule*, 1999-NMSC-026, ¶ 14, 127 N.M. 368, 981 P.2d 782 (stating that the decision regarding whether to prosecute rests entirely in the discretion of the prosecutor). The prosecutor's decision in that regard may be based on any number of different factors, including the higher standard of proof required in criminal cases. *Rabon v. Great Southwest Fire Ins. Co.*, 818 F.2d 306, 309 (4th Cir. 1987). Moreover, as testified by Officer Compton and Williams, ANPAC's claims adjuster, the dismissal of the drag-racing charge did not change the underlying facts giving rise to collision at issue. [2 Tr. 82, 85] Accordingly, courts routinely hold that the non-prosecution of a criminal charge has no bearing on whether an insurance company's denial of coverage was in bad faith. *See, e.g., Munoz v. State Farm Lloyds of Tex.*, 522 F.3d 568, 572-73 & n.3 (5th Cir. 2008); *Suggs*, 833 F.2d at 891; *Kelly's Auto Parts, No. 1, Inc. v. Boughton*, 809 F.2d 1247, 1252 (6th Cir. 1987); *Rabon*, 818 F.2d at 309; *Am. Home Assur. Co.*, 753 F.2d at 324.

For these reasons, Counter-Plaintiffs failed to demonstrate that ANPAC's denial of coverage following the dismissal of the drag racing charge constituted bad faith, and ANPAC's motion for directed verdict regarding Counter-Plaintiff's bad faith claim should have been granted as a matter of New Mexico law.

B. In New Mexico, an expert must provide a satisfactory explanation of how his or her opinions were reached. In this case, Counter-Plaintiffs' expert, Garth Allen, did not satisfactorily explain the bases for his opinions at trial and relied on erroneous factors in providing this testimony. Under such circumstances, did the district court abuse its discretion in allowing such testimony?

This Court reviews the admission of expert testimony under an abuse of discretion standard. *State v. Torrez*, 2009-NMSC-029, ¶ 9, 146 N.M. 331, 210 P.3d 228. "An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Sims v. Sims*, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 930 P.2d 153.

ANPAC preserved this issue by filing a motion in limine to exclude the testimony of Counter-Plaintiffs' expert, Mr. Allen. [1 RP 213-38]

1. Counter-Plaintiffs failed to properly disclose the substance and grounds for Garth Allen's testimony.

Below, Counter-Plaintiffs failed to comply with the district court's scheduling order which, among other things, required Counter-Plaintiffs to identify expert witnesses and provide information regarding each expert's professional qualifications and a summary of anticipated testimony. [1 RP 88-89] In discovery responses, Counter-Plaintiffs' identified Allen as an expert, but failed to provide a list of professional qualifications or a summary of his anticipated testimony. [1 RP 215, 225, 229] In one discovery response, Counter-Plaintiffs indicated instead that Allen's report would be "forthcoming." [1 RP 225] In a subsequent discovery

response, Counter-Plaintiffs stated that Allen would "provide a copy of his file." [1 RP 229]

Despite their repeated promises, Counter-Plaintiffs never provided an expert report to ANPAC. [1 RP 215] The first and only information regarding Allen's opinions in this matter received by ANPAC was an affidavit and curriculum vitae attached to Counter-Plaintiffs' response in opposition to a motion for summary judgment. [1 RP 200-12, 216] These items were served on ANPAC on October, 2, 2009, one month after the close of discovery. [1 RP 89, 188] In addition to being late, the affidavit was wholly deficient for the reasons explained below.

Under New Mexico law, an expert's testimony is inadmissible if he fails to properly explain the bases for his opinions, which must be based on facts before the jury. *Harrison v. ICX, Illinois-California Express, Inc.*, 98 N.M. 247, 250, 647 P.2d 880, 883 (Ct. App. 1982), *abrogated on other grounds by Martinez v. Friede*, 2004-NMSC-006, 135 N.M. 171, 86 P.3d 596. If an expert fails to give an adequate explanation of how he arrived at his opinions or if the opinions are based on erroneous factors, such testimony should be excluded from trial. *Dahl v. Turner*, 80 N.M. 564, 568, 458 P.2d 816, 820 (Ct. App. 1969); *see also Galvan v. City of Albuquerque*, 85 N.M. 42, 44-45, 508 P.2d 1339, 1342-42 (Ct. App. 1973) ("An expert witness must be able to give a satisfactory explanation as to how he

arrives at his opinion. Without such an explanation the opinion is not competent evidence." (citation omitted)).

Allen's proffered affidavit included opinions that are not based on facts in evidence. For example, Allen stated that the ANPAC speeding exclusion ran contrary to insurance industry standards. [1 RP 234] However, the speeding exclusion was not at issue in this case. Likewise, Allen stated that a "race is necessarily a contest" and that "it is impossible for a person to race against themselves." [*Id.*] This, however, was contrary to the evidence known to the parties, i.e., that Hudson was alleged to have been racing a black Lincoln LS. *See, e.g., Shamalon Bird Farm, Ltd. v. United States Fid. & Guar. Co.*, 111 N.M. 713, 715, 809 P.2d 627, 629 (1991) (observing that an expert is properly excluded from testifying at trial when he fails to "take the time to familiarize himself with the facts [of the case]").

Allen's affidavit also failed to provide a basis for his conclusion that ANPAC's racing exclusion was contrary to industry standards. [1 RP 233-34] In his affidavit, Allen stated that he reviewed an ISO automobile policy, and that the racing exclusion contained in that policy was different than the exclusion in the ANPAC policy at issue. [*Id.*] However, Allen did not state who uses this ISO policy, or where it is utilized, other than making a general statement that it is widely utilized in the "industry." [1 RP 233] *See, e.g., Harrison*, 98 N.M. at 250,

647 P.2d at 883 (stating that an expert witness must give "a satisfactory explanation as to how he arrived at his opinion").

Additionally, while Allen claimed that ANPAC failed to adopt and implement reasonable standards for the prompt investigation and processing of insurance claims, he did not state what ANPAC's standards for prompt investigation or processing of claims are, what claim information ANPAC failed to obtain, or what his basis was for asserting what such standards are. [1 RP 235] The affidavit also asserted that ANPAC "clearly and unequivocally" favored its own interests to the detriment of its insureds' interests. [*Id.*] Again, however, Allen gave no basis for this conclusion. [*Id.*] *See, e.g.*, *Four Hills Country Club v. Bernalillo County Property Tax Protest Bd.*, 94 N.M. 709, 714, 616 P.2d 422, 427 (Ct. App. 1979) ("[E]xperts must satisfactorily explain the steps followed in reaching a conclusion, and without such an explanation the opinion is not competent evidence.").

Despite the deficiencies outlined above and Counter-Plaintiffs' failure to comply with the court's scheduling order, the district court nonetheless allowed Allen to testify as to the issues addressed in his affidavit. [2 RP 279] Such a decision constitutes an abuse of discretion and should therefore be reversed by this Court. *See Shamalon Bird Farm, Ltd.*, 111 N.M. at 715, 809 P.2d at 629; *see also Hauff v. Petterson*, No. 1:09-cv-00639, 2010 WL 2978060, at *7 (D.N.M. Jul. 22,

2010) (excluding testimony of Allen on the grounds that his opinions lacked a sufficient basis).

In the absence of Allen's testimony, Counter-Plaintiff's bad-faith claim lacks any basis, and ANPAC's motion for directed verdict regarding Counter-Plaintiff's bad-faith claim should have been granted as a matter of New Mexico law notwithstanding Allen's testimony.

III. CONCLUSION

For the foregoing reasons, ANPAC respectfully requests that this Court reverse the bad-faith judgment below, and remand this matter with directions to enter judgment on the breach of contract claims only. Consequently, the district court should be directed to obviate all damages awarded to Counter-Plaintiffs predicated on the finding of bad faith, including the bad-faith compensatory damages, punitive damages, the award of attorneys' fees and costs, and the award of all pre- and post-judgment interest predicated on the award of damages for bad faith. In the alternative, ANPAC respectfully requests that this matter be remanded for a new trial on all issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2010, I caused a true and correct of ANPAC's Brief in Chief to be served via U.S. Mail, postage prepaid, to:

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