

Nos. 07-15326, 07-15356, 07-15541

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

AMERICAN COLOR GRAPHICS, INC.,

Plaintiff-Appellee-Cross-Appellant,

vs.

TRAVELERS PROPERTY CASUALTY INSURANCE COMPANY,

Defendant-Appellant-Cross-Appellee.

On Appeal from the United States District Court
for the Northern District of California, Oakland Division
Case No. CV-04-03518-SBA
Hon. Sandra Brown Armstrong, Presiding

RESPONSE AND REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

ACG's opening and answering brief ("AAB") avoids directly addressing issues raised by Travelers. As a result, the parties' arguments do not cross as typically occurs on appeal. Nevertheless, the record here raises and resolves a number of focused issues:

- 1) Are nominal damages the correct measure of damage for this breach of contract? *Yes, the parties agree it is.*
- 2) Can a breach of the duty to investigate, without denial of payment due for defense or indemnity, form the basis for a bad faith claim? *No, it cannot.*
- 3) Is \$140,000 supported by the record? *No, it is not.*
- 4) Does the record show evidence of harm caused by Travelers' purported breach of its duty to investigate the Custodio claim? *No.*
- 5) Is ACG entitled to punitive damages? *No.*
- 6) *If ACG is entitled to punitive damages, what is the correct ratio? 1:1, and it does not include any fees or costs awarded to ACG as costs.*
- 7) Can ACG, which withheld evidence of its fees until after trial, recover attorneys' fees under *Brandt v. Superior Court*, 37 Cal. 3d 813 (1985)? *No.*
- 8) Can ACG rely on California Civil Code section 1717 and the fees provision in the 2005-2006 finance agreement to obtain its fees incurred to enforce the 2002-2003 Policy? *No.*

Only two issues involve factual disputes, issues 3) and 4). Regarding issue 3), ACG's CFO's bald assertion that ACG paid "approximately \$140,000" is without foundation, and the numbers ACG refers to do not add up to \$140,000. Regarding issue 4), the evidence demonstrates the amounts shown at trial, such as the cost of Custodio's AOE/COE examination and the settlement of her WCAB proceeding were not caused by a breach of the duty to investigate, and there is no

evidence ACG reimbursed Travelers for any amount.

The other issues all turn on questions of law. Yet, ACG's brief is light on the law, instead relying on statements as facts which either have no reference to the excerpts of the record or misrepresent the evidence. Factual accuracy is foundational. Much of ACG's foundation is nonexistent or contrary to ACG's assertions.

II. ACG PRESENTS A SMOKE SCREEN AND IGNORES FACTS

ACG misrepresents and ignores material facts in its brief and fails to support many of its factual contentions with citations. "Every assertion in briefs regarding matters in the record shall be supported by a reference to the location, if any, in the excerpts of record where the matter is to be found." Circuit Rule 28-2.8; *N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145, 1146-1147 (9th Cir. 1997). Many of ACG's factual contentions, with or without citations, are not supported by the record. ACG's factual statements, where not supported by references or inaccurate, should be disregarded. Travelers urges that the basis for each statement be carefully examined.¹

For example, an essential element of ACG's breach claim is that if Travelers had denied Custodio's claim, ACG would not have made any payments. Specifically, *ACG argues Travelers' purported breach of the duty to investigate caused the harm proven at trial because, had Travelers denied the claim, Custodio would have dismissed her WCAB proceeding.* AAB 40. This is a fabrication. ACG can cite no testimony of Custodio or any witness to support ACG's assertion of what Custodio would have done had Travelers denied her claim. In fact, ACG ignores three contrary facts: 1) Custodio retained an attorney to represent her in the

¹ Travelers' anticipates filing a motion to strike ACG's factual inaccuracies.

WCAB proceeding before Travelers accepted the claim (RT 591:17-20/ER01691); 2) Urban accepted the claim based on Dr. Leonard's "YES" and "NO" finding and "Trier of fact" conclusion (RT 405:2-9/ER01667; ER 01584); and 3) Custodio filed an "Application for Adjudication of Claim" after Travelers accepted the claim (ER01593). *See* Travelers' Opening Brief ("AOB") 6-8; Section VI.C., *infra*. ACG also ignores Dr. Bernhoft's and Dr. Cremata's opinions finding industrial causation after ACG filed suit against Travelers and before ACG authorized the settlement of the WCAB claim for \$35,000. RT 1236:23-1237:21, 1049:12-1050:20/ER01735-36, 1762-63; ER01510-16, 1621-22, 1623-38. No doctor opined that Custodio lacked a valid claim.

Similarly, ACG must prove its damages are not speculative and the amount of damages. To support the \$140,000 award, *ACG argues*, "*While Mr. Kellick testified that he did not know to whom Travelers paid all \$140,000.00, those payments are found within the claim history exhibit introduced by Travelers at trial.*" AAB 25. This is simply not true. AOB 33-34; Section VI.A., *infra*. ACG does not cite amounts totaling \$140,000 and ignores the district court's conclusion that "American's evidence of damages is skimpy." AAB 34-39; RT 1596:3-16/ER00106.

ACG also must prove malice, oppression or fraud to be entitled to punitive damages. *ACG attempts to prove malice by claiming that Chris Nelson, a Field Services Director for Travelers, "admitted that he secretly removed a copy of a report questioning the validity of the Custodio claim from the claim file" before it was produced to Travelers.* AAB 23. There is no evidence Nelson or anyone else at Travelers "secretly" or wrongfully withheld any documents from the claim file. Travelers merely withheld the Camp Investigations report, which confirmed there was "some handling of empty pallets" and at least one woman at ACG lifted

