

FILED DEC 28 2004

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

PHILIP G. URRY, CLERK  
*B. Toland*

ALAIN GARRIDO,  
  
Plaintiff-Appellant,  
Cross-Appellee,  
  
v.  
  
STAR INSURANCE COMPANY, a foreign  
corporation,  
  
Defendant-Appellee,  
Cross-Appellant.

)  
) 1 CA-CV 03-0648  
)  
) DEPARTMENT D  
)  
) **MEMORANDUM DECISION**  
) (Not for Publication -  
) Rule 28, Arizona Rules  
) of Civil Appellate  
) Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV. 03-007159

The Honorable J. Richard Gama, Judge

**REVERSED AND REMANDED**

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THOMPSON, Presiding Judge

¶1 Alain Garrido (Garrido) appeals the trial court's summary judgment in favor of Star Insurance Company (Star) on Garrido's insurance bad faith claim, and the court's entry of an order remanding Garrido's remaining surety bond claim to the Justice

Court, after finding that the claim was below the jurisdictional amount required to bring an action in Superior Court. For the following reasons, we reverse the trial court's order and remand for further proceedings.

#### FACTS AND PROCEDURAL HISTORY

¶2 On appeal from a summary judgment, we view the evidence in the light most favorable to the party against whom judgment was entered. *Pioneer Annuity Life Ins. Co. v. Rich*, 179 Ariz. 462, 464, 880 P.2d 682, 684 (App. 1994). In any event, most of the relevant facts are undisputed for purposes of this appeal.

¶3 In October 2001, Star issued a vehicle dealer surety bond to Continental Auto Sales (Continental) in the amount of \$25,000, pursuant to Arizona Revised Statutes (A.R.S.) § 28-4362(2)(e) (2003) (providing that bond is payable on "loss because of . . . the dealer's failure to deliver in conjunction with the sale of a vehicle a valid vehicle title.").

¶4 On July 28, 2002, Garrido purchased a used 1996 Ford Explorer for \$5663 from Continental in Phoenix, Arizona, pursuant to an installment agreement. He tendered a \$2000 down payment with his bank debit card, and paid \$1000 in cash as an additional down payment the next day. Garrido financed the \$2663 balance for a six month term, with the first payment due on August 28, 2002. Continental provided a temporary registration, valid for 45 days, to allow time for Continental to deliver title to Garrido.

Continental never provided the title to Garrido. Star contends this is because Garrido never provided adequate proof of insurance, in the form of a copy of the policy, as required by the installment sales contract; Garrido contends he provided proof of insurance to Continental's representative, in the form of a copy of his insurance ID card.

¶15 Unknown to Garrido, nine days after the sale, in August 2002, Continental administratively dissolved its Arizona corporation and moved to California. On August 22, Garrido made a \$490 payment by delivering it to Continental's representative at the lot where he purchased the car. He still had not received a title or registration documents from Continental.

¶16 On September 11, 2002, the temporary registration expired and Garrido could not legally drive the car. On September 18, 2002, Continental sent Garrido a certified letter advising him that it had relocated its "financial department," and providing a new payment address in California. Garrido did not attempt to mail his next payment to the new California address. He contends he did not mail his payment to Continental because he was concerned that Continental had "disappeared."

¶17 On September 22, 2002, the date the second payment was due, Garrido went to Continental's lot with cash to pay the balance due on the car and obtain title and registration documents. When he arrived, however, the lot was vacant and a single Continental

representative was present. Garrido called the Phoenix Police because he was concerned about having been defrauded. When Garrido explained to the representative that he wished to pay off the vehicle, the Continental representative issued a temporary three day registration and told Garrido that Continental would send him a billing statement. On October 4, 2002, Continental initiated repossession, and on October 8, 2002, it took the vehicle.

¶18 After receiving complaints from Garrido and other Arizona customers, Detective Tom Brice of the Arizona Motor Vehicle Division (Office of Special Investigations) investigated. Brice concluded that Continental had engaged in "widespread fraud against its customers" by illegally repossessing at least seven vehicles, including Garrido's, and by failing to deliver title to at least twelve customers, including Garrido.

¶19 On October 16, Garrido made a claim on the vehicle dealer's bond issued by Star. In the letter, Garrido sought payment of \$5469, to cover the \$3000 in down payments he had made, the \$490 payment, costs incurred for new tires and repairs to the vehicle, interest, attorneys' fees, and "all losses incurred . . . due to Continental's failure to deliver a valid title." He stated that he would sue Star if Star failed to respond within forty-eight hours of receiving the letter.

¶10 On October 22, Star's claims administrator, Forcon International Nevada, Ltd. (Forcon) wrote Continental requesting

information to determine whether the claim was valid. Also on October 22, Forcon wrote Garrido's attorney, requesting additional information including a proof of claim form, and copies of supporting documents such as contracts, invoices, payments, and correspondence.

¶11 On November 3, Continental responded to Forcon's inquiry, alleging that Garrido had failed to provide a copy of his insurance policy as requested; that Continental had attempted to contact Garrido at the telephone numbers provided in his application, but that the numbers appeared to be invalid; that Continental did not receive the payment due September 28, 2002; and that it initiated repossession proceedings on October 4.

¶12 Meanwhile, on October 16, Garrido's attorney wrote Forcon, advising that Continental had not yet processed the \$2000 debit slip that Garrido had provided as a down payment, and that Garrido intended to stop payment on the item. Nevertheless, Garrido stated that he believed he was entitled to the sum as statutory damages from Continental pursuant to A.R.S. § 47-9609, and therefore he believed he was still entitled to collect the \$2000 from Star for the bond claim. On October 30, Garrido's attorney responded to Forcon's request for additional information by providing a copy of the initial demand letter, plus contract documents, and requesting additional damages of \$20 per day for "loss of use" of the vehicle. And, on November 12, Garrido

canceled the \$2000 debit transaction by withdrawing his funds from the bank account and closing the account so that Continental could not process the debit transaction.

¶13 Relying on the information Continental had provided, Star denied Garrido's claim in a letter dated November 14, stating that the vehicle had been legally repossessed because Garrido had failed to make the September 28 payment and failed to provide insurance coverage information. Forcon advised that the claim file had been closed, but that Garrido could submit additional information "and we may re-evaluate our position."

¶14 On November 18, 2002, Garrido sued Star in Justice Court, seeking payment of his surety claim. He later moved to amend the complaint to add an insurance bad faith claim, and moved to transfer the case to Superior Court because, with the addition of the bad faith claim, the case would exceed the jurisdictional limits of the Justice Court. The Justice Court granted both motions, and the case was transferred to Superior Court.

¶15 Meanwhile, in December 2002, Star's attorney wrote Continental, asking whether it had, in fact, provided a certificate of title to Garrido. In January 2003, Star offered to settle Garrido's claim for \$3490 and to allow the court to decide whether Garrido's attorney was entitled to fees; Garrido refused the offer. Star subsequently issued a check in the amount of \$3490 to Garrido, stating that it was tendered "unconditionally except for the

requirement that it be applied to [Garrido's] claim for actual out-of-pocket damages as set forth in his complaint." Star's attorney stated his understanding that these damages would include the \$2000 debit charge, the \$1000 cash payment made in July, and the \$490 payment made in August. Garrido did not cash this check. In June 2003, Garrido revealed that he had withdrawn the \$2000 and closed the account so that Continental never received the \$2000 down payment.

¶16 Garrido filed his amended complaint with the Superior Court in April 2003. Star moved for summary judgment on both claims. The trial court ruled that there was "no legal basis" for the bad faith claim, and that absent the bad faith claim, the total value of Garrido's claim fell below the jurisdictional amount required to maintain an action in superior court. The court therefore found that it lacked jurisdiction over Garrido's surety claim, and remanded the case to Justice Court. Garrido timely appealed the dismissal of the bad faith claim, and Star timely cross-appealed, arguing that the trial court erred in finding that it lacked jurisdiction to address the underlying surety claim. We have jurisdiction.

#### DISCUSSION

¶17 We review the trial court's conclusions of law de novo. *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 254, ¶ 10, 63 P.3d 282, 285 (2003). We will affirm the trial court's judgment if it

can be "sustained on any theory framed by the pleadings and supported by the evidence," even if the reasons actually given by the trial court are in error. *General Elec. Cap. Corp. v. Osterkamp*, 172 Ariz. 191, 193, 836 P.2d 404, 406 (App. 1992).

**A. Bad Faith Claim**

¶18 Garrido asserts that the trial court erred in concluding there was no legal basis for a bad faith claim and in granting Star's motion for summary judgment on that claim. Star argues that the trial court correctly ruled that Garrido could not bring a bad faith claim against Star. Alternatively, Star contends that, even assuming a customer may maintain a bad faith cause of action against a vehicle dealer's surety bond company, Garrido failed to present adequate evidence of Star's bad faith to avoid summary judgment. We examine each of these issues separately.

**1. Existence of Bad Faith Claim**

¶19 Garrido first contends that the trial court erred in finding no legal basis for a bad faith claim against Star. We agree with Garrido.

¶20 In *Dodge v. Fidelity and Deposit Co. of Maryland*, the Arizona Supreme Court held that a surety on a contractor's performance bond may be liable for the tort of bad faith. 161 Ariz. 344, 778 P.2d 1240 (1989). The *Dodge* court reasoned that sureties are insurers and, "as insurers, sureties have the same duty to act in good faith that we recognized in *Noble and Rawlings*



v. Apodaca[.]” *Id.* at 345-46, 778 P.2d at 1241-42 (citing *Noble v. National American Life Ins. Co.*, 128 Ariz. 188, 624 P.2d 866 (1981) and *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986)).

¶21 The Dodge court explained that the two “most important factors” that create a special relationship, “for which we would recognize a tort action” for breach of the duty to act in good faith are “(1) whether the plaintiff contracted for security or protection rather than for profit or commercial advantage, and (2) whether permitting tort damages will provide a substantial deterrence against breach by the party who derives a commercial benefit from the relationship.” *Id.* at 346, 778 P.2d at 1242 (quoting *Rawlings*, 151 Ariz. at 159, 726 P.2d at 575).

¶22 We find the analysis of the factors set forth in *Dodge* controlling, and conclude that a bad faith tort claim is available to Garrido based on the implied duty of good faith and fair dealing. First, the purpose of the statutory bond is to provide “security or protection” for persons financially injured by a dealer’s breach of the obligation to provide title to a vehicle, not to provide any “profit or commercial advantage” to either the purchaser of the bond or the claimant.

¶23 Second, “permitting tort damages will provide a substantial deterrence against breach by the party who derives a commercial benefit from the relationship.” *Id.* In this case, Star derives a commercial benefit from issuing vehicle dealers surety

contracts. Permitting tort, rather than only contract, damages deters sureties from breaching their obligations to investigate and pay claims to persons who have "suffered loss" because of the dealer's failure to deliver title. As the court in *Dodge* noted, "the whole purpose of insurance is defeated if an insurance company can refuse or fail, without justification, to pay a valid claim. .

. . Permitting a surety to withhold performance of its obligations without reason would defeat the purpose for which surety insurance is intended." *Id.* at 347, 778 P.2d at 1243.

¶24 Star contends the *Dodge* rationale is inapplicable because Garrido did not directly contract with Star to provide the bond to protect him from calamity; instead, Continental contracted with Star to provide a bond to satisfy its statutory obligation. Star cites *Beaudry v. Insurance Company of the West*, 203 Ariz. 86, 92-93, ¶¶ 24-25, 30, 50 P.3d 836, 842-43 (App. 2002), for the principle that few third-party relationships give rise to bad faith tort claims because the contract damages adequately protect the plaintiff's interests.

¶25 While we agree with the holding in *Beaudry*, we find it inapplicable here. *Beaudry* was a case where the plaintiff contracted for commercial advantage rather than protection from loss. The pertinent contractual breach was the insurer's alleged bad faith failure to pay dividends on a worker's compensation policy at the expected rate. *Id.* at 92, ¶ 25, 50 P.3d at 842.

This court held that the insured could seek only contract remedies, not tort remedies, for bad faith breach of the contract because the alleged breach underlying the bad faith claim did not deprive the employer of the "contracted for security or protection" from the insured risk of claims by an injured employee." See *id.* (citation omitted). The court specifically distinguished cases in which an insured or claimant seeks coverage under the policy, rather than collateral contractual benefits such as the "refund of a portion of the premium paid" at issue in that case." *Id.* Our supreme court has recognized a third-party bad faith claim even in the face of an "exclusive" statutory remedy. See *Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 275, 872 P.2d 668, 679 (1994) (holding an injured worker may pursue bad faith claim against employer's workers' compensation insurer which unjustifiably denied coverage).

¶26 In this case, by contrast, Garrido does seek to recover for the "contracted for security or protection" - the risk of loss by a customer who has not received title to the vehicle. Garrido was the intended beneficiary of the surety and the statute specifically provides that the bond "[i]nures to the benefit of a person who suffers loss because of either: (i) Nonpayment by the dealer of customer prepaid title, registration or other related fees or taxes[; or] (ii) The . . . dealer's failure to deliver in conjunction with the sale of a vehicle a valid vehicle title certificate . . . ." A.R.S. § 28-4362 (2003) (emphasis added).

And Garrido is to have the benefit of the bond merely upon "suffer[ing] loss." See *id.*

¶27 Further, the relationship between Garrido and Star is not so distant as asserted by Star. Our supreme court previously held that a bond surety stands in the shoes of the principal and that the surety's contractual liability is co-extensive with that of the principal to the amount of the bond. *Tri-State Ins. Co. v. Maxwell*, 104 Ariz. 574, 578, 457 P.2d 251, 255 (1969).

¶28 For the above stated reasons, we conclude that Garrido is not limited to the statutory remedy and that a bad faith tort claim is available to vindicate his rights under the vehicle dealer's bond.<sup>1</sup> The trial court erred in concluding that such a claim could not be brought.

## 2. Evidence of Bad Faith

¶29 Star argues that we should, nevertheless, uphold summary judgment in favor of Star because Garrido failed to present adequate evidence from which a jury could conclude that Star acted in bad faith in denying the claim. We disagree.

¶30 "The tort of bad faith arises when the insurance company intentionally denies, fails to process or pay a claim without a reasonable basis for such action." *Noble*, 128 Ariz. at 190, 624 P.2d at 868 (emphasis added). "To establish bad faith, [Garrido

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<sup>1</sup>This holding is specifically limited to the surety bond situation presented in conjunction with A.R.S. § 28-4362.

was] required to present evidence that [Star] lacked a reasonable basis for denying the claim and that [Star] either knew about or recklessly disregarded that lack of a reasonable basis." *Brown v. U.S. Fidelity & Guar. Co.*, 194 Ariz. 85, 93, ¶ 45, 977 P.2d 807, 815 (App. 1998). In determining whether the insurer acted reasonably, courts consider the insurer's "investigation and its evaluation and review of the investigative results." *Id.* "If the insurer conducted a reasonable investigation, it can safely and in good faith deny claims that are fairly debatable." In general, the issue whether an insurer acted in bad faith is a question of fact for the jury to resolve. See *Rowland v. Great States Ins. Co.*, 199 Ariz. 577, 585, ¶ 21, 20 P.2d 1158, 1166 (App. 2001) ("[I]n the context of a motion for summary judgment, '[t]he appropriate inquiry is whether there is sufficient evidence from which reasonable jurors could conclude that . . . the insurer acted unreasonably and either knew or was conscious of the fact that its conduct was unreasonable.'" (quoting *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 196 Ariz. 234, ¶ 22, 995 P.2d 276 (2000))).

¶31 In this case, it is undisputed that the full extent of Star's investigation consisted of contacting its insured, Continental, to ask for its explanation, and requesting that Garrido provide additional information by filling out a claim form and submitting additional documents. Star does not contend, and the evidence presented to the trial court does not show, that Star

attempted independently to verify any of the information it was provided from either party. Additionally, Star did not even ask Continental whether it had delivered title to Garrido - the basis for Garrido's claim. Thus, Garrido presented sufficient evidence from which a trier of fact could conclude that Star's investigation was inadequate.

¶32 Moreover, in February 2003, after Garrido filed his complaint in Justice Court, but before the parties undertook additional discovery in connection with the bad faith claim, Star "unconditionally" sent Garrido a check for \$3490 for his "out of pocket costs," without requiring that the amount be treated as a settlement of Garrido's claims. The only information Star had before it in February that it apparently had not considered in November was confirmation from Continental that it had not, in fact, delivered the title to Garrido. A jury reasonably could find that Star knew or should have known this information in November, when it denied Garrido's claim, and thus did not adequately investigate the claim. Alternatively, a jury reasonably could conclude that if Star, in reviewing the information before it in February, believed that it owed Garrido \$3490 "unconditionally," then it should have reached the same conclusion in November, when it reviewed essentially the same information and denied Garrido's claim. See *Rowland*, 199 Ariz. at 586, ¶ 24, 20 P.3d at 1167 (fact that insurer eventually endorsed and returned check for costs of

independent medical exam could suggest that insurer knew it had no right to recover those costs and acted unreasonably when it attempted to do so). Thus, a jury reasonably could conclude that Star failed to properly process or pay the claim.

¶33 Star next contends that Garrido's claim must fail because Garrido did not present expert testimony to support his contention that Star committed bad faith by initially denying the claim. Star cites no authority for its proposition that expert testimony is required to defeat a summary judgment motion in all cases.<sup>2</sup> Although expert testimony can be helpful in establishing the industry standards for claim processing, or in refuting a witness's testimony that the company complied with industry standards, it is not required in every case to establish a bad faith claim. See, e.g., *Rowland*, 199 Ariz. 577, 20 P.3d 1158 (finding that trial court erred in granting summary judgment on bad faith claim; parties presented no expert testimony); cf. *Schwab v. Ames Constr. Co.*, 207 Ariz. 56, 61, ¶ 20, 83 P.3d 56, 61 (App. 2004) (trial court did not err in finding expert testimony regarding standard of care not required to defeat summary judgment motion). In this case, Garrido provided some evidence of the standard to be applied, in the form of a copy of Star's own claims settlement manual's "bad faith" section. The manual included as signs of bad faith items

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<sup>2</sup> We note that Star presented no expert testimony to show that it did not breach the standard of care for claims handling in the surety industry.

such as "inadequate investigation," "delays in payment," and "forcing insureds to go to court or arbitration." This was sufficient to withstand the motion for summary judgment.

¶34 Finally, Star argues that Garrido never provided Continental with evidence that he had obtained comprehensive and collision coverage with a deductible of not more than \$500, as required by the sales contract and that Garrido admits that he never made the payment due on September 28. Thus, Star argues, the repossession and corresponding failure to deliver title were legal and reasonable as a matter of law. We disagree.

¶35 The facts, taken in a light favorable to Garrido, show that Continental's failure to deliver the title may have precipitated Garrido's failure to make the payment due on September 28: Garrido stated that he was becoming concerned because Continental seemed to have "disappeared" without providing the title and registration documents promised. It is at least arguable that, after the dealer failed to deliver the title within forty-five days as promised, still had not delivered title after ninety days, failed to deliver payment vouchers as promised, and appeared to be simply "vacating" the lot where the car was purchased, a customer might reasonably be reluctant to mail a payment to a new, California address, with no assurance that he would ever receive the title to the vehicle. Certainly the Phoenix Police Detective's conclusion that Continental had engaged in widespread fraud



supports this conclusion. Moreover, given the promise in Continental's letter that late fees would be waived during September, and given that the payment was only six days late when Continental initiated repossession, a jury certainly could question whether the repossession was "reasonable" or justified as a matter of law.

¶36 Additionally, although Garrido apparently never delivered a copy of his insurance policy, he did deliver a copy of his insurance card. And Garrido had paid more than fifty percent of the purchase price by the time the vehicle was repossessed. In these circumstances, a jury could reasonably conclude that, if not waived by Continental's actions, strict enforcement of the requirement to provide a copy of the entire insurance policy, and strict enforcement of the payment deadline, via repossession of the vehicle, was not reasonable.

¶37 In light of the facts presented to the trial court, reasonable minds could differ regarding whether Garrido's actions and inactions justified Continental's failure to deliver the title and subsequent repossession of the vehicle. Additionally, reasonable minds could differ regarding whether Star adequately investigated those facts before denying Garrido's claim.

¶38 Finally, Star contends that Garrido did not disclose or provide evidence of any tort damages resulting from Star's alleged bad faith. Garrido contends that, if he can prove his bad faith

claim, he is entitled to recover the attorneys' fees incurred in prosecuting the claim as tort damages for bad faith. We agree.

¶39 "Our courts have held that attorney's fees incurred to obtain the benefits of a contract of insurance are recoverable in a bad faith action." *Schwartz v. Farmers Ins. Co.*, 166 Ariz. 33, 35, 800 P.2d 20, 22 (App. 1990). "The recoverable attorney's fees are, of course, limited to those incurred to pursue the contract claim and may not include any fees or costs incurred in the bad faith claim." *Id.* at 36, 800 P.2d at 23. As Garrido explains, if Star had paid his claim in November, the lawsuit would not have been necessary. Thus, if Garrido can show that Star unreasonably refused to pay the claim in order to force him to litigate, he can recover as damages the attorneys' fees he has incurred in prosecuting the claim.<sup>3</sup>

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<sup>3</sup> Star contends that Garrido fraudulently inflated the amount of the claim, by stating that he had paid \$2000 down when, in fact, Continental never processed the \$2000 debit and never received the \$2000 down payment. Garrido has presented facts that, if believed, would show that there may have been some confusion about what was paid and when and/or that his new attorney may not have realized that Garrido had recovered the \$2000, but Garrido did not intend to defraud Star. Additionally, although Star claims that Garrido, at least, should have been aware of the true facts, regardless of his attorney's alleged confusion, we note that Garrido apparently does not speak or read English since his affidavit had to be translated from Spanish, and thus he may not have fully understood all of the statements in all of the pleadings that were filed in the trial court. Absent an actual determination by the trial court that Garrido attempted to defraud Star, we decline to attempt to determine whether Garrido's explanations are credible or to resolve these factual conflicts on appeal. We therefore decline to find that fraud or deceit is a basis for upholding the trial court's  
(continued...)

¶40 Because Garrido presented adequate evidence from which a jury could determine the applicable standard of care, and could conclude that Star breached the standard and acted in bad faith in denying Garrido's claim, we decline to uphold the trial court's dismissal of Garrido's claim on the alternative ground that it was not supported by sufficient evidence to withstand a summary judgment motion.

**B. Surety Bond Claim**

¶41 In its cross-appeal, Star contends that the trial court erred by remanding the underlying surety bond claim to Justice Court. Because reinstatement of the bad faith claim brings the total damages sought back up to the jurisdictional limit of the Superior Court, we need not consider whether the trial court properly remanded the claim; the remand order is reversed so that the trial court may consider both claims together.

**C. Attorneys' Fees on Appeal**

¶42 Garrido requests an award of attorneys' fees on appeal pursuant to A.R.S. § 12-341.01 - presumably pursuant to subsection (A), which allows an award of fees to the prevailing party in an action arising out of a contract. In our discretion, we deny Garrido's request for attorneys' fees pursuant to A.R.S. § 12-341.01(A) because the merits of Garrido's claim are still


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<sup>3</sup>(...continued)  
summary judgment. Nothing prevents the trial court from considering this theory upon remand.

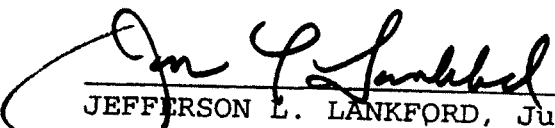
unresolved. He is, however, entitled to an award of taxable costs.  
See A.R.S. § 12-341.

**CONCLUSION**

¶43 For the foregoing reasons, we reverse the trial court's order and remand for further proceedings consistent with this decision.

  
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JON W. THOMPSON, Presiding Judge

CONCURRING:

  
\_\_\_\_\_  
JEFFERSON L. LANKFORD, Judge

  
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SUSAN A. EHRLICH, Judge