UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LIBERTY MUTUAL INSURANCE CO.
Petitioner

v.

PROGRESSIVE CASUALTY INSURANCE CO.
Patent Owner

Case CBM2012-00003
Patent 8,140,358

PATENT OWNER'S OPPOSITION TO LIBERTY'S MOTION TO EXCLUDE EVIDENCE

Patent Owner Progressive Casualty Ins. Co. ("Progressive") hereby opposes the motion to exclude filed by Liberty Mutual Insurance Co. ("Liberty"). (Paper No. 58.)

I. SUMMARY OF ARGUMENT

Liberty has failed to demonstrate good cause to exclude evidence introduced by Progressive. Liberty bases its motion on a misunderstanding of the facts and a misapprehension of the law. The attacks lodged by Liberty in its motion go to the sufficiency of the Progressive evidence in question, *not* to its admissibility, and Liberty's motion to exclude should therefore be denied.

II. LEGAL STANDARD

A. Not Proper To Argue Weight Of Evidence In Motion To Exclude

"A motion to exclude must explain why the evidence is not admissible (*e.g.*, relevance or hearsay)[.]" 77 Fed. Reg. 48,756, 48,767 (Aug. 14, 2012). However, the Office Patent Trial Practice Guide makes clear that such a motion to exclude "may ***not*** be used to challenge the sufficiency of the evidence to prove a particular fact." *Id*. (emphasis added). Indeed, as set forth in the caselaw cited by Liberty, the "sufficiency of evidence relates *not* to admissibility but to the *weight* of the evidence and is a matter for the trier of fact to resolve." *SEC v. Guenthner*, 395 F. Supp. 2d 835, 842 n.3 (D. Neb. 2005) (emphasis added).

B. Liberty Argues That Progressive's Evidence Should Be *Admitted*

Notwithstanding that Liberty is moving to exclude evidence, it spends several pages of its 7-page motion, setting forth caselaw for the proposition that the Board should *not* exclude evidence. (Motion at 1-3.) Indeed, Liberty claims that there is *no* "need for formal exclusion," and it is "better for the Board" to admit evidence "than to exclude particular pieces." (Motion at 1, 2.) Progressive does not concede or agree that Liberty's characterization of the law applies in all instances, such as where new evidence is improperly submitted with a reply brief or cross-examination of a witness indicates that his or her prior testimony was unreliable. Nevertheless, since Liberty has not argued that, in evaluating Progressive's evidence, there is any reason to depart from the general principles favoring the admission of evidence, its motion should be denied under the very caselaw it cites.

III. ARGUMENT

A. Liberty Fails To Show Good Cause As To Expert Mr. Zatkovich

Liberty has failed to satisfy its burden of showing good cause that portions of Progressive's expert Mr. Ivan Zatkovich's declaration (Exhibit 2007) should be excluded. As demonstrated below, Liberty's argument is based on a misapprehension of the law and its erroneous speculation as to Mr. Zatkovich's

qualifications, which is the result of Liberty's own decision *not* to depose Mr. Zatkovich.

Liberty claims erroneously that Mr. Zatkovich lacks the necessary knowledge on "*insurance* and *telematics* issues pertinent to the '358 patent" and "has no basis to render the various opinions he provides[,]" but this allegation is unsupported by the record. (Motion at 5, emphasis in original.) Indeed, Liberty admits that Mr. Zatkovich opines about a POSITA having "*at least one…year[]* of experience with telematics systems for vehicles…including communications and locations technologies," but then claims that – in the same declaration – he also "*concedes*…he had no such experience[.]" (*Id*. at 6, emphasis in original.) Mr. Zatkovitch makes no such concession, and his Declaration and CV demonstrate otherwise.

Mr. Zatkovich received his Bachelor's degree in Computer science, with a minor in Electrical Engineering Digital Circuit Design, from the University of Pittsburgh in 1980, and he completed a master's thesis in Computer Networks. (Ex. 2007 at 3.) He has "over thirty-one years experience in computer science, network communications, and software development" and "more than 4 years experience ***designing and implementing vehicle telematics systems*** and ha[s] designed and implemented ecommerce computer systems ***for the insurance industry***, such as for Geico and Hartford." (*Id*. at 2, 4-5, emphasis added; *see*

generally Ex. 2008.) Liberty's attempt to read into Mr. Zatkovitch's Declaration a concession that "he has no such experience" concerning telematics and insurance is not supportable.

The only other basis Liberty cites for its erroneous claim is a statement by its own witness, Mr. Andrews. (Motion at 5, citing Ex. 1034 at ¶ 44.) Yet, Andrews's statement is based on the same CV by Mr. Zatkovich, which demonstrates the opposite – that Mr. Zatkovich has extensive experience and more than qualifies as an expert to opine on the ordinary skill in the art. Further, Andrews's statement relates to "generat[ing] a cost for the unit of risk," "use of an actuarial class within an insurance context," and "generating and using a rating factor," but these are not the same bases that Liberty claims in its motion that Mr. Zatkovich's experience is inadequate. Moreover, Andrews has admitted that he is "*not* an expert on whether or not Mr. Zatkovich's testimony is admissible." (Ex. 2019, Andrews Tr. at 311:20-22 (emphasis added); Ex. 1034 at ¶ 44.)

The reason both Liberty and Andrews are confused as to Mr. Zatkovich's background is that Liberty chose not to depose him. Indeed, Liberty noticed his deposition for July 15, 2013 but then decided to cancel it. (Paper No. 36.) If Liberty had wanted to understand the full extent of Mr. Zatkovich's experience in telematics and insurance, it could have asked him during the deposition. Having chosen not to cross-examine him, Liberty should not now be heard to argue that

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