

**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**

CASE SUMMARY

**AMERICAN PEPPER SUPPLY CO. v. FEDERAL INSURANCE
COMPANY, CV-03-0290-PR**

Parties and Counsel:

Petitioner: Defendant/appellee Federal Insurance Company, represented by Robert J. Bruno and Mark R. Gilling of Sanders & Parks.

Respondent: Plaintiff/appellant American Pepper, represented by Keith B. Forsyth and Evan S. Goldstein of Herman, Goldstein & Forsyth.

Facts:

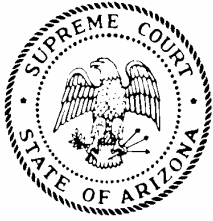
This is a suit for breach of contract and bad faith by an insured (American Pepper) against the insurer (Federal Insurance, called Chubb in the briefs). American Pepper submitted a theft claim. After lengthy investigation the insurer denied the claim citing the dishonesty exclusion and the concealment and misrepresentation exclusion. The insurer's position was that the items had never been stolen, a position Chubb has maintained through trial and in its petition for review. The trial court granted partial summary judgment to the insurer on the bad faith and related punitive damage claims, and the breach of contract claim went to trial. The jury returned a verdict in favor of American Pepper for \$15,000. The Court of Appeals affirmed the jury verdict in a published opinion and reversed the summary judgment in a memo decision.

The primary issue in the opinion was whether the insurer had burden of proving its defense of concealment and misrepresentation by a preponderance or by clear and convincing evidence. The trial court instructed the jury with a clear and convincing standard. The Court of Appeals approved the clear and convincing standard. In the memo decision, the court ruled that the evidence raised questions of fact whether the claim was fairly debatable and whether the insurer acted unreasonably in investigating and processing the claim.

Issues:

- A1. Is an insurer required to establish the contract defense of misrepresentation in a first-party insurance claim by a preponderance of the evidence or the heightened standard of clear and convincing evidence?
2. Should the trial court's summary judgment ruling in favor of Federal on the claim of bad faith be affirmed?@

This Summary was prepared by the Arizona Supreme Court Staff Attorney's Office solely for educational purposes. It should not be considered official commentary by the court or any member thereof or part of any brief, memorandum or other pleading filed in this case.



ARIZONA SUPREME COURT
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CASE SUMMARY

KENNETH PHILLIPS v. HON. LOUIS ARANETA, CV-03-0351-PR

Parties and Counsel:

Kenneth Phillips is represented by Maria L. Schaffer, Deputy Legal Advocate. The State is represented by Paul M. McMurdie, Deputy Maricopa County Attorney.

Facts:

Kenneth Phillips is charged with first-degree murder and the State is seeking the death penalty. Pursuant to Rule 15.2(g)(1)(c), Ariz. R. Crim. P., Mr. Phillips notified the State that he intends to call certain mental health experts to testify in the mitigation phase of the sentencing proceeding (if he is convicted). Mr. Phillips refused the State's requests for an examination by its own experts. The State filed a "Motion to Compel Disclosure and to Require the Defendant to Submit to Mental Health Exam." The trial court granted the State's motion, in part, stating:

The Court finds that while other horizontal courts have considered this issue with varying outcomes, this Court relies upon A.R.S. ' 13-703(D). Under that subsection, the State and the defendant shall be permitted to rebut any information received at the aggravation or penalty phase of the proceeding. This Court finds that the State's opportunity to rebut mitigation information already identified to be in the form of reports and testimony from Dr. Mark Walters and Dr. Anthony Decker results in the State being allowed to not only cross-examine those mental health experts, or in Dr. Decker's case an addictionologist, but the State is entitled to seek to rebut such information by calling it[s] own experts. A mental health expert called by the State would be limited in his or her ability to render testimony or opinion without the evaluation and examination of the Defendant. Such State expert should not be limited to reviewing the reports and conclusions of other experts called by the Defendant to testify or to rendering opinions regarding the neuropsychological history or condition of the Defendant or any other addiction history without examination of the Defendant.

IT IS ORDERED, over the Defendant's objection, granting the State's Motion to Compel Disclosure [and] to Require the Defendant to Submit to Mental Health Exam. The Defendant shall submit to a mental health exam with a mental

health expert identified by the State to be Dr. Blackwood on a date and time to be agreed to by the parties. Defense counsel's request to be present for such exam is denied.

Defense counsel advises that Defendant will refuse to cooperate in any examination by the State's expert. The Defendant confirms his refusal. Further discussion is held.

IT IS FURTHER ORDERED taking under advisement the ruling on the proper remedy should the Defendant refuse to voluntarily cooperate with Dr. Blackwood for the exam and evaluation pending review of case law as to such issue.

Later, the trial court issued another Minute Entry setting forth further support for its prior order for examination, and ordering "precluding the Defendant from calling the mental health expert Dr. Marc Walters and addictionologist Dr. Anthony Dekker at the mitigation phase given the Defendant's refusal to cooperate in a mental health examination by the State's expert."

Mr. Phillips filed a special action petition in the Court of Appeals, which declined jurisdiction. Mr. Phillips filed a Petition for Review by the Arizona Supreme Court.

Issues:

1. Whether the respondent judge abused his discretion in holding that the petitioner, a capital defendant in the action before the trial court, must submit to a mental health examination by the real party in interest's (hereinafter referred to as the state) chosen doctor.

2. Whether the respondent judge abused his discretion in holding that preclusion of petitioner's mental-health related mitigation at the penalty phase of a capital case is the appropriate remedy for petitioner's refusal to undergo an evaluation by the state's doctor.

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