

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

WILLIAM GIBSON WILSON, *et al.*,

Plaintiffs,

v.

BRISTOL WEST INSURANCE GROUP,
et al.,

Defendants.

Case No. 2:09-CV-00006-KJD-GWF

ORDER

Presently before the Court is Plaintiffs’ Motion for Remand (#5). Plaintiffs filed a Supplement to their Motion for Remand (#6). Defendant Coast National Insurance Company (“CNIC”) filed a response in opposition (#11) to which Plaintiffs replied (15). Also before the Court is Defendants’ Motion for Partial Summary Judgment (#10). Plaintiffs filed a response in opposition (#13) to which Defendants replied (#16). Finally, before the Court is the Report and Recommendation (#29) of Magistrate Judge George W. Foley entered June 2, 2009. Though the time for doing so has passed, no objections to the Report and Recommendation have been filed.

I. Procedural Background

Plaintiffs William Gibson and Aaron Cromer have brought the instant lawsuit against CNIC for statutory violations, breach of contract and insurance bad faith based on its alleged failure to

1 settle an underlying bodily injury claim brought by Cromer against Defendant's insured, William
2 Gibson Williams. The underlying claim and lawsuit arose out of a single vehicle accident. Mr.
3 Wilson was operating the vehicle and Mr. Cromer was the passenger. On February 14, 2008, Mr.
4 Cromer, represented by attorney Thomas F. Christensen, obtained a judgment in excess of \$7 million
5 against Wilson in Nevada state court. Wilson thereafter entered into an agreement ("the
6 Agreement") to pursue his claims against "Bristol West Insurance" while permitting Christensen
7 Law Offices to represent him and to pay the proceeds of the claims to Cromer in exchange for
8 Cromer's agreement not to execute on the judgment against Wilson obtained in state court.

9 However, Cromer appealed the underlying judgment to the Nevada Supreme Court on the
10 grounds that the jury should not have been permitted to assess comparative negligence against
11 Cromer. That appeal is currently pending before the Nevada Supreme Court. In January 2009,
12 Plaintiffs filed the present action in Nevada state court. Defendants then removed the action.
13 Plaintiffs have moved to remand the action alleging a lack of diversity jurisdiction. Furthermore,
14 Defendants have filed a motion for partial summary judgment alleging that Cromer lacks standing
15 and without his presence diversity exists.

16 On June 2, 2009, the magistrate judge recommended (without holding that the Agreement
17 between Cromer and Wilson was an assignment of rights) that the Agreement should not be set aside
18 or voided. Additionally, Judge Foley found that Christensen and his law office have a non-waivable
19 conflict of interest representing both Cromer and Wilson during the pendency of the appeal of the
20 underlying action. Rather than disqualify Christensen and his law firm, the magistrate judge stayed
21 the action pending the Court's resolution of the pending motions. No parties filed objections to the
22 magistrate judge's report and recommendations.

23 II. Standard for Summary Judgment

24 Summary judgment may be granted if the pleadings, depositions, answers to interrogatories,
25 and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any
26 material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ.

1 P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the
2 initial burden of showing the absence of a genuine issue of material fact. See Celotex, 477 U.S. at
3 323. The burden then shifts to the nonmoving party to set forth specific facts demonstrating a
4 genuine factual issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
5 587 (1986); Fed. R. Civ. P. 56(e). Summary judgment shall be entered “against a party who fails to
6 make a showing sufficient to establish the existence of an element essential to that party’s case, and
7 on which that party will bear the burden of proof at trial.” Celotex, 477 U.S. at 322. Summary
8 judgment shall not be granted if a reasonable jury could return a verdict for the nonmoving party.
9 See Anderson, 477 U.S. at 248.

10 III. Analysis

11 A. Motion for Summary Judgment

12 Cromer, at best, is a third-party claimant under the insurance contract between CNIC and
13 Wilson. No private right of action as a third-party claimant is created under NRS 686A.310. See
14 Gunny v. Allstate Ins. Co., 108 Nev. 344, 466, 830 P.2d 1335, 1336 (1992). See also, Crystal Bay
15 General Imp. Dist. v. Aetna Cas. & Sur., 713 F.Supp. 1371, 1377 (D. Nev. 1989). Further, a third-
16 party claimant has no contractual relationship with an insurance company. See Tweet v. Webster,
17 610 F.Supp. 104 (D. Nev. 1985). Thus, where a party has no contractual relationship with an
18 insurance company, he lacks standing to sue. See Gunny, 108 Nev. at 345.

19 Nevada law requires a contractual relationship to assert a bad faith claim against an insurer.
20 See Bergerud v. Progressive Cas. Ins., 453 F.Supp.2d 1241, 1246 (D. Nev. 2006). Under Nevada
21 law, third-party claimants do not have a contractual relationship with insurers, and thus have no
22 standing to claim bad faith. See id. at 1247 (citing Gunny, 108 Nev. 344).

23 Here, Plaintiff Cromer is a third-party claimant, and therefore has no contractual relationship
24 to the insurer, CNIC. Specifically, Cromer originally sued Wilson for injuries sustained in a single
25 vehicle accident and obtained a jury verdict for over \$7,000,000.00. Wilson admittedly carried an
26 insurance policy through CNIC with policy limits of \$15,000. Cromer, however, was not a party to

1 the contract. As such, Cromer lacks standing to sue CNIC for the alleged breaches of contract or for
2 bad faith.

3 While Plaintiffs point to Hall v. Enterprise,¹ arguing that a third-party has standing to sue
4 only after judgment has been entered against the insured, that argument is misplaced and is
5 distinguishable from the present action. Specifically, in Hall, the insurance policy at issue was a
6 liability policy for a short-term lessee, which is required by statute for all rental car companies. 137
7 P.3d at 1109. In that case, the tortfeasor carried a personal liability insurance policy, from which the
8 plaintiff accepted an Offer of Judgment for policy limits. See id.

9 The plaintiff then sued Enterprise, arguing that Enterprise was statutorily bound to
10 compensate him for damages that exceeded the tortfeasor's personal insurance policy. See id.
11 Enterprise, as the rental car company, was required by statute to provide a minimum liability policy
12 for all short-term lessees, which it did. See id. The court went on to state that a short-term lessor
13 fulfills that duty by providing the insurance coverage and only becomes liable when the coverage is
14 not provided. See id. Accordingly, the holding in Hall is limited to situations arising under the state
15 statute involving short-term lessees and does not apply to the facts of this case. Therefore, Cromer
16 does not have standing to raise the claims alleged in this action.

17 Cromer also asserts that he has an assignment of Wilson's rights arising from the Agreement.
18 An assignment is a "transfer of rights or property". Black's Law Dictionary 115 (7th ed. 1999). For
19 an assignment to be effective, it must terminate the assignor's interest in the property and transfer it
20 to the assignee. See id. Here, the Agreement does not contain an assignment of any rights. Instead,
21 Wilson agrees to pursue his rights and share the proceeds of any action with Cromer. Cromer agrees
22 not to execute on his judgment against Wilson. Wilson's rights to pursue his claims are neither
23 terminated, nor transferred to Cromer. Accordingly, Cromer does not have an effective assignment
24 of rights. Nevada does not recognize a right of action by a third-party claimant against an insurance
25

26 ¹ 137 P.3d 1104 (Nev. 2006).

1 company for bad faith without a proper assignment of rights. Hall v. Enterprise, 137 P.3d 1104
2 (Nev. 2006)(specifically limiting holding of case allowing liability to short term rental insurance
3 contemplated by NRS §§ 482.295, 482.305); Pasina v. Cal. Cas. Indem. Exch., 2008 WL 508381 (D.
4 Nev. 2008); Hunt v. State Farm Ins., 655 F. Supp. 284 (D. Nev. 1987)(citing Tweet v. Webster, 610
5 F. Supp. 104 (D. Nev. 1985)). Therefore, Cromer lacks standing as a real-party-in-interest and must
6 be dismissed from this action.

7 B. Motion to Remand

8 Since Cromer, a California citizen and resident, lacks standing, complete diversity exists
9 between Plaintiff Wilson and Defendant CNIC. Removal jurisdiction based on diversity is
10 determined at the time the complaint is filed *and the removal is effected*. See Strotek Corp. v. Air
11 Transp. Ass'n of Am., 300 F.3d 1129, 1131-32 (9th Cir. 2002)(italics added). Diversity must exist
12 when the action is removed. See Newcombe v. Adolf Coors Co., 157 F.3d 686, 690 (9th Cir. 1998).
13 The defendant in a removal action has the burden of proving all jurisdictional facts and establishing
14 that removal is proper. See, e.g., Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992); Abada v.
15 Charles Schwab & Co., 68 F. Supp. 2d 1160, 1162 (S.D. Cal. 1999). Accordingly, the motion to
16 remand is denied because CNIC has met its burden in demonstrating that diversity existed at the time
17 the complaint was filed and removal was effected.

18 C. Report and Recommendation

19 Pursuant to Local Rule IB 3-2, any objections to the Findings and Recommendations (#29) of
20 Magistrate Judge George W. Foley entered June 2, 2009 had to be filed within ten (10) days of the
21 entry of his order. No party filed objections and the time for doing so has passed. Therefore, the
22 parties have waived their right to appeal the Court's order and to appeal factual issues in the order of
23 the Court. See Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir. 1991); Britt v. Simi Valley United
24 Sch. Dist., 708 F.2d 454, 454 (9th Cir. 1983). The Court has conducted a *de novo* review of the
25 record in this case in accordance with 28 U.S.C. § 636(b)(1) and LR IB 3-2. The Court determines
26 that the Findings and Recommendations (#29) of the United States Magistrate Judge entered June 2,

1 2009, should be **ADOPTED** and **AFFIRMED**, but only to the extent that they do not conflict
2 with this order.

3 Given the egregious conflict in the representation of Wilson and Cromer in this action while
4 the parties are on opposing sides on appeal, the Court orders that the this action be dismissed without
5 prejudice pending a final judgment in the underlying action. Wilson must file a new complaint when
6 the underlying action is resolved.

7 IV. Conclusion

8 Accordingly, IT IS HEREBY ORDERED that Defendants' Motion for Partial Summary
9 Judgment (#10) is **GRANTED**;

10 IT IS FURTHER ORDERED that Plaintiff Cromer's claims are **DISMISSED** because
11 Plaintiff Cromer lacks standing;

12 IT IS FURTHER ORDERED that Plaintiffs' Motion for Remand (#5) is **DENIED**;

13 IT IS FURTHER ORDERED that the Magistrate Judge's Findings and Recommendations
14 (#29) entered June 2, 2009, are **ADOPTED** and **AFFIRMED**, but only to the extent that they do
15 not conflict with this order;

16 IT IS FURTHER ORDERED that the remaining claims are **DISMISSED without prejudice**.

17 DATED this 21st day of September 2009.

18
19 

20 _____
21 Kent J. Dawson
22 United States District Judge
23
24
25
26