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2 NOT FOR PUBLICATION

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6 IN THE UNITED STATES DISTRICT COURT

7 FOR THE DISTRICT OF ARIZONA

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9 Glenna Crosby,

No. CV-10-00064-PHX-GMS

10 Plaintiff,

ORDER

11 vs.

12 Life Insurance Company of the Southwest,
13 a foreign corporation; Cunningham
14 Financial Group, an Arizona business
entity,

15 Defendants.

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18 Pending before this Court are a Motion for Partial Summary Judgment (Doc. 21) filed
19 by Plaintiff Glenna Crosby and a Motion for Summary Judgment (Doc. 25) filed by
20 Defendant Life Insurance Company of the Southwest (“LSW”). For the reasons set forth
21 below, the Court denies Plaintiff’s Motion for Partial Summary Judgment and grants
22 Defendant’s Motion for Summary Judgment.

23 **BACKGROUND**

24 At issue here is a life insurance policy issued by Defendant LSW in the name of James
25 W. Crosby. (Doc. 1, Ex. A). Dr. Crosby applied for a \$2.5 million life insurance policy with
26 LSW in June 2008. (Doc. 21). Shortly thereafter, LSW discovered that Dr. Crosby had a \$1.1
27 million life insurance policy with Indianapolis Life Insurance Company. LSW informed Dr.
28 Crosby that he could either surrender the \$1.1 million policy with Indianapolis Life or LSW

1 would issue a policy in the amount of \$1.4 million because Defendant’s financial
2 underwriting guidelines would not permit more than \$2.5 million total coverage. Dr. Crosby
3 agreed to surrender the other policy, and LSW issued a \$2.5 million policy, which designated
4 Plaintiff Crosby as the beneficiary of the policy. Following Dr. Crosby’s death on October
5 11, 2008, Plaintiff asserted a claim for the life insurance proceeds. (Doc. 1, Ex. A).

6 Because the policy had been issued within two years of Dr. Crosby’s death, LSW
7 conducted an investigation into the statements made on the application pursuant to A.R.S.
8 § 20-1204 (2010). (Doc. 21). LSW subsequently learned that Dr. Crosby had a defined
9 benefit pension plan, in connection with his dental practice, that provided life insurance in
10 the amount of \$1.4 million through Lafayette Life Insurance Company. This life insurance
11 benefit was never disclosed by Dr. Crosby to LSW. In an August 20, 2009 letter, LSW
12 explained that had the company been aware of the Lafayette policy, it would have denied Dr.
13 Crosby’s application for coverage because “together with the Indianapolis Life coverage, he
14 was already at the limit of coverage of LSW’s underwriting guidelines.” (Doc. 22). LSW did
15 note that, assuming Dr. Crosby would have surrendered his Indianapolis Life policy, LSW
16 “may have offered him an LSW policy in an amount equal to” that policy. After discovering
17 the undisclosed policy, LSW refused to pay any benefits to Plaintiff, asserting that under
18 A.R.S. § 20-1109 (2010), Dr. Crosby’s failure to disclose the additional policy on his
19 application permits LSW to rescind the entire policy. Plaintiff challenges LSW’s position,
20 asserting claims of breach of contract and bad faith.¹

21 DISCUSSION

22 1. Legal Standard

23 Summary judgment is appropriate if the evidence, viewed in the light most favorable
24 to the nonmoving party, demonstrates “that there is no genuine issue as to any material fact
25 and that the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c)(2).

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27 ¹Plaintiff also asserted a claim of professional negligence against Defendant
28 Cunningham Financial Group. However, Plaintiff voluntarily dismissed that defendant (Doc.
11), and therefore count three—professional negligence—is dismissed.

1 Substantive law determines which facts are material and “[o]nly disputes over facts that
2 might affect the outcome of the suit under the governing law will properly preclude the entry
3 of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “A fact
4 issue is genuine ‘if the evidence is such that a reasonable jury could return a verdict for the
5 nonmoving party.’” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002)
6 (quoting *Anderson*, 477 U.S. at 248). Thus, the nonmoving party must show that the genuine
7 factual issues “‘can be resolved only by a finder of fact *because they may reasonably be*
8 *resolved in favor of either party.*”’ *Cal. Architectural Bldg. Prods., Inc. v. Franciscan*
9 *Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987) (quoting *Anderson*, 477 U.S. at 250).

10 **2. Plaintiff’s Motion for Partial Summary Judgment**

11 Plaintiff moves for summary judgment on the issue of whether Defendant is entitled
12 to total rescission of Dr. Crosby’s life insurance policy under A.R.S. § 20-1109. (Doc. 21).
13 Under § 20-1109, misrepresentations, omissions, concealment of facts and incorrect
14 statements shall not prevent recovery under the policy unless:

15 1. Fraudulent.

16 2. Material either to the acceptance of the risk, or to the hazard assumed by the
17 insurer.

18 3. The insurer in good faith would either not have issued the policy, or would not have
19 issued a policy in as large an amount, or would not have provided coverage with
respect to the hazard resulting in the loss, if the true facts had been made known to the
insurer as required by the application for the policy or otherwise.

20 Plaintiff argues that § 20-1109(3) should be interpreted as permitting total rescission only
21 under the first fact scenario—where an insurer in good faith would not have issued *any* policy
22 but for the material misrepresentation.

23 Arizona courts apply “‘fundamental principles of statutory construction, the
24 cornerstone of which is the rule that the best and most reliable index of a statute’s meaning
25 is its language and, when the language is clear and unequivocal, it is determinative of the
26 statute’s construction.’” *Backus v. State*, 220 Ariz. 101, 104, 203 P.3d 499, 502 (2009)
27 (internal quotation marks omitted) (quoting *Deer Valley Unified Sch. Dist. No. 97 v. Houser*,
28 214 Ariz. 293, 296, 152 P.3d 490, 493 (2007)). Section 20-1109 provides that

1 “[m]isrepresentations, omissions, concealment of facts and incorrect statements shall not
2 *prevent a recovery* under the policy unless” three elements have been met. (emphasis added).
3 The plain meaning of the statute is that once the listed elements have been established, an
4 insurance company is no longer required to pay the benefits under the policy.

5 Consistent with the plain language of the statute, Arizona case law makes clear that
6 “rescission” of an insurance policy is permitted if “all three subparagraphs of § 20-1109 are
7 satisfied.” *Greves v. Ohio State Life Ins. Co.*, 170 Ariz. 66, 72, 821 P.2d 757, 763 (App.
8 1991); *see also Smith v. Republic Nat’l Life Ins. Co.*, 107 Ariz. 112, 115, 483 P.2d 527, 530
9 (1971) (concluding that “in order for recovery to be *prevented* under a policy”, the elements
10 of all three subparagraphs must be met (emphasis added)); *Valley Farms, Ltd. v. Transcon.*
11 *Ins. Co.*, 206 Ariz. 349, 353, 78 P.3d 1070, 1074 (App. 2003) (“An insurer may not deny
12 coverage under a policy unless the insurer can prove that all three conditions of § 20-1109
13 have been satisfied.”); *State Comp. Fund v. Mar Pac Helicopter Corp.*, 156 Ariz. 348, 352,
14 752 P.2d 1, 5 (App. 1987) (noting that all three subsections of the “*rescission statute*” must
15 be satisfied (emphasis added)). The Court has not found a single Arizona case that makes a
16 distinction between the three scenarios described in § 20-1109(3) in terms of the
17 consequences of making a material, fraudulent statement on an insurance application.
18 Arizona courts speak of rescission and avoiding liability, rather than partial rescission or
19 some other qualified denial of benefits. One Arizona court explained that “[i]f the insurer
20 would have issued the policy with some changes, rescission is available only if the changes
21 are one of the two listed in § 20-1109(3).” *Greves*, 170 Ariz. at 73, 821 P.2d at 764. Those
22 changes include issuing a policy in a smaller amount or denying coverage with respect to the
23 hazard resulting in the loss. § 20-1109(3).

24 Plaintiff compares the circumstances presented in *Greves* with the present facts. In
25 *Greves*, the insurance company stated that it would have provided the same coverage to the
26 insured, however, it would have charged a higher premium. 170 Ariz. at 69, 821 P.2d at 760.
27 Nevertheless, the insurance company argued that the first clause of § 20-1109(3) applied—that
28 it would not have issued the policy—because “charging a higher premium means that it would

1 not have issued the policy for which” the decedent had applied. *Id.* at 74, 821 P.2d at 765.
2 The court rejected that argument. It first noted that a difference in premium was not a change
3 listed in the statute, and therefore, could not serve as the basis for rescission. *Id.* at 73–74,
4 821 P.2d at 764–65. Furthermore, the court reasoned that if any difference in the policy,
5 including a change in the premium charged, satisfied the first clause of § 20-1109(3), then
6 the remaining clauses would be “meaningless.” *Id.* at 74, 821 P.2d at 765. In contrast, the
7 facts of this case fall squarely within the “changes” contemplated by the statute. If LSW had
8 discovered the Lafayette policy during Dr. Crosby’s application process, at most, it would
9 have issued a \$1.1 million policy based on its underwriting guidelines. Thus, it would have
10 either issued a policy of a smaller amount or no policy at all.

11 There is simply no support either in the plain language of the statute itself or in
12 Arizona case law for Plaintiff’s argument that § 20-1109(3) should be interpreted as limiting
13 an insurance company to partial rescission under certain circumstances. Accordingly,
14 Plaintiff’s Motion for Partial Summary Judgment is denied.

15 **3. Defendant’s Motion for Summary Judgment**

16 Defendant moves for summary judgment on Plaintiff’s two remaining claims: breach
17 of contract and bad faith. (Doc. 25). LSW asserts that there are no genuine issues as to any
18 material fact with regard to its right to rescind Dr. Crosby’s policy. LSW must establish that
19 no reasonable jury could find in favor of Plaintiff with regard to any of the three elements
20 listed in § 20-1109. *See Villiarimo*, 281 F.3d at 1061 (quoting *Anderson*, 477 U.S. at 248).

21 Plaintiff admitted that the statement regarding Dr. Crosby’s “amount of currently in-
22 force life insurance was material” to LSW’s decision to issue the policy. (Doc. 24, Ex. 2).
23 Therefore, element two has been established. Moreover, in her Motion for Partial Summary
24 Judgment, Plaintiff acknowledges that had Dr. Crosby informed LSW of his Lafayette policy,
25 LSW would have issued a \$ 1.1 million policy, rather than the \$2.5 million policy actually
26 issued. (Doc. 21). Plaintiff included with her statement of facts a letter from LSW, explaining
27 that at most LSW “may have offered [Dr. Crosby] an LSW policy in an amount equal to the
28 Indianapolis Life policy.” Accordingly, element three has also been established.

1 As to element one, a “showing of either legal or actual fraud can satisfy the fraud
2 requirement of § 20-1109.” *James River Ins. Co. v. Schenk*, 523 F.3d 915, 921 (9th Cir.
3 2008) (citing *Russell v. Royal Maccabees Life Ins. Co.*, 193 Ariz. 464, 471, 974 P.2d 443,
4 450 (1998)). Because LSW’s question asking Dr. Crosby to list any life insurance he had at
5 the time was designed to elicit, and in fact did elicit, a factual answer, rather than an opinion,
6 the answer constitutes legal fraud. *See Stewart v. Mut. of Omaha Ins. Co.*, 169 Ariz. 99, 103,
7 817 P.2d 44, 48 (App. 1991). “Legal fraud occurs when (1) a question asked by the insurer
8 seeks facts that are ‘presumably within the personal knowledge of the insured,’ (2) the
9 insurer would naturally contemplate that the insured’s answer represented the actual facts,
10 and (3) the answer is false.” *James River*, 523 F.3d at 921 (quoting *Russell*, 193 Ariz. at 471,
11 974 P.2d at 450); *see also Valley Farms*, 206 Ariz. at 353, 78 P.3d at 1074.

12 LSW’s question regarding Dr. Crosby’s life insurance sought facts of which Dr.
13 Crosby presumably would have had knowledge. In this case, it would be particularly
14 surprising that a person would not be aware of a \$1.4 million life insurance policy that he had
15 obtained as a part of a defined benefit pension plan. After Dr. Crosby amended his
16 application, stating that the only life insurance policy he had at the time was the \$1.1 million
17 Indianapolis Life policy and providing supporting documentation, LSW would reasonably
18 believe that Dr. Crosby’s answers represented the actual facts. Finally, Plaintiff previously
19 admitted that Dr. Crosby’s Lafayette policy was in force at the time he applied for insurance
20 with LSW, and that he did not disclose the existence of that policy. (Doc. 24, Ex. 2).²
21 Therefore, Dr. Crosby’s response on his amended application was false. LSW has thus met
22 its burden of demonstrating that there is insufficient evidence in the record to raise a genuine
23 dispute with regard to the legal fraud element.

24 Because there are no issues of material fact pertaining to LSW’s right to rescind the
25 policy, LSW is entitled to summary judgment on the claim of breach of contract. For similar
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27 ²Plaintiff failed to respond to Defendant’s motion, and therefore has not presented any
28 evidence contradicting Defendant’s statement of facts or evidence.

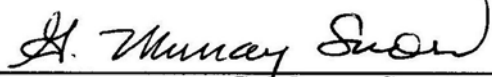
1 reasons, LSW is also entitled to summary judgment on the bad faith claim. Bad faith requires
2 a showing that the insurer acted unreasonably in denying benefits of a policy. *Prieto v. Paul*
3 *Revere Life Ins. Co.*, 354 F.3d 1005, 1009 (9th Cir. 2004) (citing *Noble v. Nat'l Am. Life Ins.*
4 *Co.*, 128 Ariz. 188, 190, 624 P.2d 866, 868 (1981)). The Court has determined that LSW had
5 the right to rescind Dr. Crosby's policy pursuant to § 20-1109, and therefore, no reasonable
6 jury could conclude that LSW acted unreasonably in denying Plaintiff the benefits of that
7 policy.

8 **IT IS THEREFORE ORDERED** that Plaintiff's Motion for Partial Summary
9 Judgment (Doc. 21) is **DENIED**.

10 **IT IS FURTHER ORDERED** that Defendant's Motion for Summary Judgment
11 (Doc. 25) is **GRANTED**.

12 The Clerk of the Court is directed to terminate this action.

13 DATED this 21st day of December, 2010.

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16 G. Murray Snow
17 United States District Judge
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