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3 **UNITED STATES DISTRICT COURT**
4 **DISTRICT OF ARIZONA**

5 **SCOTT LAMBERT,**

6 **Plaintiff,**

7 **vs.**

8 **LIBERTY MUTUAL FIRE INSURANCE**
9 **COMPANY; ELITHA STOCKETT,**

10 **Defendants.**

11 **2:14-CV-00521 JWS**

12 **ORDER AND OPINION**

13 **[Re: Motion at doc. 111]**

14 **I. MOTION PRESENTED**

15 Defendants Liberty Mutual Fire Insurance Company (“Liberty”) and Elitha
16 Stockett (“Stockett”; collectively “Defendants”) filed a motion for summary judgment at
17 docket 111, with supporting statement of facts at docket 112 and supporting
18 documentation at docket 117 and docket 118. Plaintiff Scott Lambert (“Plaintiff”)
19 responded at docket 140 with his responsive supporting statement of facts at docket
20 139 and supporting documentation at docket 161. Defendants’ reply is at docket 158,
21 and their response and objections to Plaintiff’s statement of facts is at docket 159. Oral
22 argument was requested, but it would not be of additional assistance to the court.

23 **II. BACKGROUND**

24 Plaintiff is a pilot who worked for Airline Training Center Arizona, Inc. (“ATCA”).
25 In late 2012 Plaintiff had surgery on his right knee and arm and was on medical leave
26 until the spring of 2013. Shortly after returning from leave, on April 28, 2013, Plaintiff
27 injured himself while stepping out of an aircraft following a training flight. No one
28 witnessed the incident. Plaintiff initially reported that the accident happened while
“stepping off the aircraft wing” and that “his knee gave out.”¹ He also filled out a lesson

¹Doc. 117-3 at p. 7.

1 cancellation report that day, noting that he “hurt [his] knee getting out of [a] plane.”² He
2 saw a nurse practitioner the next day, and her notes indicate his injury was to the right
3 knee.³ The injury was reported to Liberty, ATCA’s workers’ compensation insurance
4 provider. Stockett was the assigned adjuster.

5 Within a few days, Plaintiff later expounded on his injury when describing it to
6 doctors and to Stockett. He stated that the work incident involved a fall. Stockett’s
7 notes indicate that Plaintiff reported to her that his right knee buckled and he fell to the
8 ground on his right knee and wrist.⁴ One of his doctor’s reports from a visit shortly after
9 the incident indicates that Plaintiff thought his left knee may have hit the ground as
10 well.⁵ He complained of pain in his right knee, wrist, and elbow, as well as pain or
11 soreness in his left knee.⁶ He continued to see various doctors for the injuries
12 throughout May of 2013. On May 31, Stockett wrote in the case file notes that she was
13 denying the workers’ compensation claim because his reported injuries were prior
14 injuries, but she also indicated that her decision could be rescinded upon additional
15 investigation.⁷ She filled out an Industrial Commission of Arizona (“ICA”) form—a
16 “Notice of Claim Status”—to deny the claim, but she did not send the form to the ICA
17 that day.⁸

18 In early June, Plaintiff filled out another ICA injury report about the incident,
19 explaining that his right knee gave out and then he fell on his left knee and arm and
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21 ²Doc. 117-3 at p. 8.

22 ³Doc. 118-2 at pp.19-35, 37.

23 ⁴Doc. 161 at p. 69.

24 ⁵Doc. 161-3 at p. 30.

25 ⁶Doc. 161-3 at p. 30; Doc. 161 at p. 69; Doc. 118-4 at p. 23; Doc. 118-5 at p. 75.

26 ⁷Doc. 161 at p. 64.

27 ⁸Doc. 117-4 at p. 4 (dated May 31, 2013, but not faxed until June 28, 2013).

1 right wrist.⁹ The insurance case file at this time noted that the claim status as “denial
2 pending complete investigation.”¹⁰ Plaintiff continued to see various doctors for his
3 injuries throughout June. He obtained a MRI of his right knee and elbow on June 24.
4 While there had been two doctors who had recommended a left knee MRI and
5 indicated as much in their medical reports, that MRI was not obtained. Liberty never
6 received a formal request for the left knee MRI authorization. In late June, Stockett
7 requested an independent medical examination (“IME”) of Plaintiff.¹¹ Before an IME
8 could take place, Stockett filed her Notice of Claim Status form with the ICA, officially
9 denying the claim.¹²

10 Plaintiff went back to modified work duty on July 1, 2013, after his orthopedic
11 surgeon issued a work release.¹³ In July, Plaintiff filed paperwork with the ICA to
12 request a hearing regarding his claim. Stockett was no longer working on Plaintiff’s
13 claim. Liberty again noted the need for an IME, which took place on July 23. The IME
14 doctor recommended a MRI of Plaintiff’s left knee and right wrist and a consult for his
15 left and right hands, but nonetheless indicated that Plaintiff could work unrestricted as
16 to his left knee and with modifications as to his right hand.¹⁴ He cleared Plaintiff as to
17 his right knee and right elbow.¹⁵ Liberty eventually authorized the left knee MRI in late
18 August after some back and forth between the new adjuster assigned to the claim,
19 Leona Fox, and Plaintiff regarding whether the left knee was appropriately included as
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21 ⁹Doc. 117-4 at p. 2.

22 ¹⁰Doc. 161 at p. 63.

23 ¹¹Doc. 161 at p. 63.

24 ¹²Doc. 117-4 at p. 4.

25 ¹³Doc. 161-3 at p. 28.

26 ¹⁴Doc. 161-2 at p. 7.

27 ¹⁵Doc. 161-2 at p. 7.

1 part of the work-place injury. The left knee MRI indicated that Plaintiff had suffered a
2 tear.¹⁶ He was again taken off work on September 3, 2013, and scheduled for surgery
3 on his knee.¹⁷ Liberty eventually filed notice with the ICA that it was accepting the
4 workers' compensation claim, and in September Liberty issued payment of temporary
5 disability benefits for the period of April 29, 2013 to June 30, 2013, as well as payment
6 for medical expenses incurred.¹⁸

7 Plaintiff filed a complaint against Liberty and Stockett for insurance bad faith.
8 Plaintiff alleges that Defendants denied timely payment of his workers' compensation
9 benefits without a reasonable basis or adequate investigation. Plaintiff concedes that
10 Liberty's handling of his workers' compensation claim as of September 4, following its
11 acceptance of the claim, complied with the covenant of good faith and fair dealing.¹⁹
12 Therefore, the dispute centers around Defendants' conduct from the date of injury,
13 April 28, 2013, to the time it filed its notice of claim acceptance with the ICA on
14 September 4, 2013.

15 **III. STANDARD OF REVIEW**

16 Summary judgment is appropriate where "there is no genuine dispute as to any
17 material fact and the movant is entitled to judgment as a matter of law."²⁰ The
18 materiality requirement ensures that "only disputes over facts that might affect the
19 outcome of the suit under the governing law will properly preclude the entry of summary
20 judgment."²¹ Ultimately, "summary judgment will not lie if the . . . evidence is such that
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22 ¹⁶Doc. 117-1 at p. 4.

23 ¹⁷Doc.161-3 at p. 26.

24 ¹⁸Doc. 139 at ¶¶ 72, 73, 88.

25 ¹⁹Doc. 139 at ¶ 77.

26 ²⁰Fed. R. Civ. P. 56(a).

27 ²¹*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

1 a reasonable jury could return a verdict for the nonmoving party.”²² However, summary
2 judgment is mandated “against a party who fails to make a showing sufficient to
3 establish the existence of an element essential to that party’s case, and on which that
4 party will bear the burden of proof at trial.”²³

5 The moving party has the burden of showing that there is no genuine dispute as
6 to any material fact.²⁴ Where the nonmoving party will bear the burden of proof at trial
7 on a dispositive issue, the moving party need not present evidence to show that
8 summary judgment is warranted; it need only point out the lack of any genuine dispute
9 as to material fact.²⁵ Once the moving party has met this burden, the nonmoving party
10 must set forth evidence of specific facts showing the existence of a genuine issue for
11 trial.²⁶ All evidence presented by the non-movant must be believed for purposes of
12 summary judgment, and all justifiable inferences must be drawn in favor of the
13 non-movant.²⁷ However, the non-moving party may not rest upon mere allegations or
14 denials, but must show that there is sufficient evidence supporting the claimed factual
15 dispute to require a fact-finder to resolve the parties’ differing versions of the truth at
16 trial.²⁸

21 ²²*Id.*

22 ²³*Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

23 ²⁴*Id.* at 323.

24 ²⁵*Id.* at 323-25.

25 ²⁶*Anderson*, 477 U.S. at 248-49.

26 ²⁷*Id.* at 255.

27 ²⁸*Id.* at 248-49.

1 **IV. DISCUSSION**

2 “The tort of bad faith arises when the insurer ‘intentionally denies, fails to
3 process or pay a claim without a reasonable basis.’”²⁹ A bad-faith claim is a combination
4 of a negligence action and an intentional tort and therefore is comprised of an objective
5 and a subjective element. An insured must show that the insurer (1) acted
6 unreasonably, and (2) knew or recklessly disregarded the fact that its conduct was
7 unreasonable.³⁰

8 As to the objective element, the issue is whether “the insurance company [acted]
9 in a manner consistent with the way a reasonable insurer would be expected to act
10 under similar circumstances.”³¹ An insurer is liable for bad faith if it unreasonably
11 denies a clearly legitimate claim; that is, if it denies a claims that was “not fairly
12 debatable.”³² An insurer can also be liable for bad faith if it acted unreasonably in
13 processing the claim.³³ Therefore, even if a claim is ultimately accepted, an insurer can
14 nonetheless be liable for bad faith if it handled the claim in an unreasonable manner.³⁴
15 As for the subjective element, negligence or inadvertence is not enough.³⁵ The insurer
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20 ²⁹*Zilisch v. State Farm Mut. Auto. Ins. Co.*, 995 P.2d 276, 279-80 (Ariz. 2000) (citing
21 *Noble v. Nat’l Am. Life Ins. Co.*, 624 P.2d 866, 868 (Ariz. 1981)).

22 ³⁰*Lukes v. Am. Family Mut. Ins. Co.*, 455 F. Supp. 2d 1010, 1016 (D. Ariz. 2006).

23 ³¹*Id.*

24 ³²*Zilisch*, 995 P.2d at 279; see also *Young v. Liberty Mut. Grp. Inc.*, No. 12-cv-2302,
25 2015 WL 1209621, at *3(D. Ariz. 2015).

26 ³³*Zilisch*, 995 P.2d at 279-80; see also *Young*, 2015 WL 1209621, at *3-*4.

27 ³⁴*Zilisch*, 995 P.2d at 280.

28 ³⁵*Trus Joist Corp. v. Safeco Ins. Co. of Am.*, 735 P.2d 125, 134 (Ariz. Ct. App. 1986).

1 must intend the unreasonable act.³⁶ The subjective element is met if the insurer lacked
2 a “founded belief” in the propriety of its conduct toward the insured.³⁷

3 The question of whether an insurer was objectively reasonable is not
4 automatically a question of fact. On a motion for summary judgment, “the appropriate
5 inquiry is whether there is sufficient evidence from which reasonable jurors could
6 conclude that in the investigation, evaluation, and processing of the claim, the insurer
7 acted unreasonably and either knew or was conscious of the fact that its conduct was
8 unreasonable.”³⁸ However, the insurer’s “founded belief” in its conduct is more typically
9 an issue for the jury given the subjective nature of the inquiry, but the plaintiff must
10 nonetheless offer some probative evidence that calls into question the insurer’s belief in
11 the reasonableness of its conduct.³⁹ Evidence of a lack of founded belief consists of
12 evidence showing the insurer knew its position was baseless or evidence showing that
13 the insurer “fail[ed] to undertake an investigation adequate to determine whether its
14 position [was] tenable.”⁴⁰

15 The court has considered Liberty’s numerous objections to Plaintiff’s statement
16 of facts. The court has concluded that the evidence relevant to the pending motion is
17 the information Liberty acquired in processing the claim and the information that it
18 should have sought while processing the claim. In evaluating the parties’ arguments,
19 the court has applied that standard in its analysis. For example, many of Liberty’s
20 objections to Plaintiff’s declaration relate to the fact that it attempts to provide Plaintiff’s
21 own spin on what the medical diagnoses were and how the insurance claim was
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23 ³⁶*Id.*

24 ³⁷*Rawlings v. Apodaca*, 726 P.2d 565, 576 (Ariz. 1986).

25 ³⁸Zilisch, 995 P.2d at 280.

26 ³⁹*Milhone v. Allstate Ins. Co.*, 289 F. Supp. 2d 1089, 1102 (citing *Knoell v. Metro. Life*
27 *Ins. Co.*, 163 F. Supp. 2d 1072, 1077 (D. Ariz. 2001)).

28 ⁴⁰*Rawlings*, 726 P.2d at 576.

1 processed. The court relies on the medical reports and the insurance file. It only relies
2 on Plaintiff's declaration as to his averment of harm and his assertion that he placed
3 numerous calls to Liberty asking for a status update. Also, Liberty objects to Plaintiff's
4 expert's declaration, primarily as improperly offering his opinion as to the ultimate legal
5 issue. The court only relies on the expert's declaration and report as evidence of what
6 is standard conduct in a claim investigation, not as determinative of the ultimate legal
7 issue. As a result, the court finds it unnecessary to rule separately on each objection
8 made by Liberty.

9 **A. Objective reasonableness**

10 **1. Fairly debatable**

11 Liberty argues that an insurer's denial or delay in paying a claim "is not
12 unreasonable when the claim's validity is fairly debatable."⁴¹ It argues that the record
13 shows that Plaintiff indisputedly had a prior right knee surgery just months before the
14 incident at issue, and thus Plaintiff's claim for injury to that knee was at least fairly
15 debatable as a pre-existing condition. Furthermore, it argues that the record shows that
16 the left knee claim was also fairly debatable because Plaintiff's initial injury report did
17 not include his left knee and his account of the work incident and his injuries evolved
18 and was inconsistent. Indeed, given the record, Liberty's act of questioning the claim in
19 and of itself was not unreasonable, but that does not end the inquiry. "While it is clear
20 that an insurer may defend a fairly debatable claim, all that means is that it may not
21 defend one that is not fairly debatable. But, in defending a fairly debatable claim, an
22 insurer must exercise reasonable care."⁴² The insurer must act reasonably during its
23 investigation and processing of the claim. Thus, Liberty is incorrect to assert that "fair
24 debatability" of the merits of Plaintiff's claim is the beginning and the end of the
25 analysis.

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27 ⁴¹Doc. 111 at p. 10.

28 ⁴²*Zilisch*, 995 P.2d at 279.

1 doctors failed to send Liberty a formal request for the left knee MRI authorization, the
2 doctors' referrals were in their medical reports, and Liberty's claim file notes
3 acknowledge that there had been a diagnosis related to the left knee.⁴⁹ The record
4 shows that Stockett made her decision to deny the claim before discussing the injury
5 with doctors or following up on whether a left knee MRI had been conducted. Plaintiff
6 submits evidence from which a jury could infer that failure to consult with doctors before
7 denial based on the status of the insured's medical condition is not standard practice
8 and thus is unreasonable conduct.⁵⁰ Moreover, while Stockett indicated in her claim
9 notes that an IME would be necessary, she then filed her formal denial before that IME
10 happened. Drawing all inferences in favor of Plaintiff, a juror could conclude that
11 Stockett had predetermined her decision and failed to conduct a sufficient investigation.

12 Stockett's deposition testimony only raises further issues for the jury. Her claim
13 notes state that she was "denying [the] claim . . . [because Plaintiff alleges] he injured
14 all of the same body parts that he has been treating for just one month prior to his
15 injury, *other than the left knee*."⁵¹ There is no reason articulated as to why the left knee
16 injury did not support the workers' compensation claim. In her deposition, Stockett
17 mentions that she denied the claim subject to investigation because she needed more
18 medical records to make sure Plaintiff did not have a pre-existing injury to his left knee.
19 Again, there is nothing in the record to document efforts taken to resolve that issue.
20 Indeed, in her deposition she admitted that she did not think she found any evidence of
21 a pre-existing condition before her denial.⁵² Even if there had been a pre-existing
22 condition, Plaintiff presents evidence to support his theory that Stockett should have
23 contacted his doctors to determine whether his reported injuries had been aggravated

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25 ⁴⁹Doc. 161 at p. 65.

26 ⁵⁰Doc. 139-2 at pp. 18, 19.

27 ⁵¹Doc. 161 at p. 64 (emphasis added).

28 ⁵²Doc. 118-8 at p. 10 (Stockett deposition at p. 95).

1 by the work incident.⁵³ Stockett explains in her deposition that her denial was primarily
2 based on Plaintiff's inconsistent positions and not on any medical information.⁵⁴ She
3 does not describe, and the record does not otherwise show, efforts she took before
4 denial to investigate her suspicion that Plaintiff was being untruthful or to clarify any
5 inconsistencies. Plaintiff puts forth evidence to support his argument that failure to
6 clarify inconsistencies constitutes bad faith insurance practice.⁵⁵ Therefore, the record,
7 when viewed in favor of Plaintiff, could support a jury's finding of inadequate
8 investigation and unnecessary delay.

9 Liberty stresses that on the day of the incident, Plaintiff did not report any injury
10 to his left knee and otherwise highlights facts in the record that might call into doubt
11 Plaintiff's credibility regarding the injuries suffered as a result of the work incident.
12 Again, the issue here is not the ultimate merits of Plaintiff's claim, but rather, whether
13 Liberty's efforts in reviewing the merits of the claim were adequate given the
14 circumstances, and at this summary judgment stage the court does not make credibility
15 determinations but merely determines whether there are enough disputed issues of fact
16 to submit to the jury. While the facts related to Plaintiff's credibility in this matter might
17 sway a jury in favor of Liberty on the issue of reasonable investigation, the evidence
18 related to the investigation discussed above places reasonableness in dispute. That is,
19 there is support in the record from which a juror could conclude that Liberty, through
20 Stockett, failed to adequately investigate the left knee injury before her decision to deny
21 Plaintiff's claim.

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25 ⁵³Doc. 139-2 at p. 19. *Indus. Indem. Co. v. Indus. Comm'n of Ariz.*, 731 P.2d 90, 94
26 (Ariz. Ct. App. 1986) (explaining how workplace injuries can aggravate pre-existing injuries and
be compensable).

27 ⁵⁴Doc. 118-8 at pp. 13, 14, 18, 20 (Stockett deposition at pp. 98, 99, 106, 108).

28 ⁵⁵Doc. 139-2 at pp. 18-19.

1 **3. Left knee MRI authorization**

2 Plaintiff also argues that Liberty engaged in an act of bad faith when it denied
3 authorization of a diagnostic MRI on his left knee. As noted above, the record shows
4 that Liberty never received a request to authorize that particular procedure. It appears
5 from the record that while two doctors recommended a left knee MRI and indicated as
6 much in their reports, both sent the formal request for authorization to Plaintiff's health
7 insurance provider.⁵⁶ While there is a note in one of the doctor's records indicating that
8 the request was supposed to be rebilled to Liberty, nothing in the record shows that was
9 ever done.⁵⁷ Thus, the record shows confusion on the part of the doctors' offices as to
10 the proper way to obtain approval and payment for such a procedure. It does not
11 support a finding that Liberty ignored any specific request for authorization. However,
12 while the delayed authorization is not a separate ground for bad faith, the record
13 surrounding the left knee MRI is nonetheless relevant to whether Liberty adequately
14 followed up and investigated Plaintiff's left knee claim, as discussed above.

15 **4. Misrepresentations and responsiveness**

16 Plaintiff argues that Liberty was unresponsive to his inquiries regarding his claim
17 and failed to communicate honestly with him about his claim. Under Arizona law "the
18 duty of good faith encompasses some obligation to inform the insured about the extent
19 of coverage and his or her rights under the policy and to do so in a way that is not
20 misleading."⁵⁸ Plaintiff puts forth evidence to show that he called Liberty multiple times
21 to inquire about his claim status after his doctor had ordered a left knee MRI.⁵⁹ Liberty
22 again focuses on the fact that the MRI approval request was never formally made, but
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24 ⁵⁶Doc. 114-1 at p. 32; doc. 118-5 at pp. 39-45 (Knowles deposition at pp. 153-159).

25 ⁵⁷Doc. 117-1 at pp. 30.

26 ⁵⁸*Nardelli v. Metro. Grp. Prop. and Cas. Ins. Co.*, 277 P.3d 789, 800 (Ariz. Ct. App.
27 2012).

28 ⁵⁹Doc. 139-1 at p. 2.

1 that fails to address the argument that Liberty did not respond to Plaintiff's inquiry and
2 at least inform him that it did not have request for authorization from the doctor and
3 that Liberty did not inform Plaintiff as to what was needed to properly request
4 authorization. Plaintiff also points to the fact that Stockett had decided to deny the
5 claim on May 31, but she nonetheless told Plaintiff that she had not made a decision
6 yet.⁶⁰ Looking at all the evidence in the record and drawing all inferences in favor of
7 Plaintiff, a reasonable juror could conclude that Liberty failed to accurately
8 communicate its denial or reasons supporting the denial to Plaintiff.

9 **B. Subjective reasonableness**

10 As noted above, the tort of bad faith also requires Plaintiff to prove a subjective
11 element of unreasonableness. He must show that Liberty knew or was reckless as to
12 whether its conduct was reasonable. This element can be proven with evidence that
13 Liberty either actually knew its position was baseless or that it "fail[ed] to undertake an
14 investigation adequate to determine whether its position [was] tenable."⁶¹ Therefore,
15 "[a] failure to investigate theory may result in some overlap in the first two elements of
16 the bad faith analysis."⁶² Evidence that supports objective unreasonableness in failing
17 to investigate a claim also supports the existence of the subjective element of bad
18 faith.⁶³ Consequently, there is sufficient evidence from which a jury could conclude that
19 Stockett's conduct constituted bad faith.

20 **C. Damages and causation**

21 While Plaintiff has presented sufficient evidence to sustain a claim of
22 unreasonable conduct, the tort of bad faith, like any tort, also requires proof of
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25 ⁶⁰Doc. 161 at p. 64; doc. 139-1 at p. 3.

26 ⁶¹*Rawlings*, 726 P.2d at 576.

27 ⁶²*Demetrulias*, 917 F. Supp. 2d at 1006-07.

28 ⁶³*Id.*

1 causation and damages.⁶⁴ Liberty argues that Plaintiff has failed to put forth any
2 evidence of harm. Liberty points to the undisputed fact that all of Plaintiff's medical bills
3 and compensation for the period he was off work was ultimately paid in September of
4 2013. They argue that the delay did not cause him financial harm because the record
5 shows that his wife had a good salary.⁶⁵ Plaintiff does not respond specifically to this
6 argument. His complaint and affidavit simply state that he experienced added pain and
7 suffering from the delay.⁶⁶ One of his treating doctors, Dr. Dewanjee, testified at his
8 deposition that given the type of left knee injury Plaintiff suffered, a delay would not
9 make the injury worse but would nonetheless extend Plaintiff's pain.⁶⁷ Plaintiff also
10 asserts that he experienced financial harm because of the delay, but he did not provide
11 evidence demonstrating any specific financial harm, except by averring that he had to
12 hire a lawyer to obtain his benefits.⁶⁸ This court finds the question of damages to be a
13 close call and notes that Plaintiff's case for damages is certainly weak. However, the
14 court finds that Plaintiff's assertion that he suffered extended pain and pecuniary losses
15 from the delay and the doctor's supporting testimony is sufficient to withstand a motion
16 for summary judgment.⁶⁹

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19 ⁶⁴*Id.* at 1010.

20 ⁶⁵Doc. 117-6 at p. 2 (McBride deposition at p. 112).

21 ⁶⁶Doc. 1 at p. 5; doc. 139-1 at p. 6.

22 ⁶⁷Doc. 139-7 at p. 4 (Dewanjee deposition at p. 72). Liberty has filed a motion *in limine*
23 challenging Dr. Dewanjee's ability to offer his opinion as to causation because of Plaintiff's
24 failure to comply with Rule 26(a)(2)(C). The court relies on Dr. Dewanjee's deposition only for
25 evidence on the type of tear Plaintiff suffered and what the consequences would be for failing to
treat such a tear. The motion *in limine* does not challenge this opinion, and the court finds that
it is properly considered here.

26 ⁶⁸Doc. 139-1 at p. 6.

27 ⁶⁹*See Rawlings*, 726 P.2d at 577 (a bad faith claimant "may recover all the losses
28 caused by [the] defendant's conduct, including damages for pain, humiliation and
inconvenience, as well as for pecuniary losses.").

1 Liberty also argues that Plaintiff cannot demonstrate that it was the cause of his
2 harm. It again points to the fact that his doctors failed to properly file a request for the
3 left knee MRI and, therefore, the failure to diagnose and treat the left knee was the
4 result of his medical care providers and not a result of Liberty's conduct. It also points
5 to the fact that his doctors released him for work at the end of June. Indeed, there are
6 facts that support Liberty's argument that it did not cause Plaintiff any harm and, again,
7 Plaintiff's case on the causation element is weak given the record, but it is nonetheless
8 disputed as to whether Stockett's investigation was reasonable, and viewing the
9 evidence in favor of Plaintiff, a jury could possibly infer that Liberty's conduct in
10 investigating the claim and communicating with Plaintiff was a substantial contributing
11 factor to the treatment delay.

12 **D. Punitive damages**

13 Punitive Damages are appropriate "when, *and only when*, the facts establish that
14 defendant's conduct was aggravated, outrageous, malicious or fraudulent."⁷⁰ A plaintiff
15 seeking punitive damages for insurance bad faith must put forth evidence that "reflects
16 'something more' than the conduct necessary to establish the tort."⁷¹ While facts
17 showing a failure to investigate can establish the tort of bad faith, those same facts
18 alone will not support a claim for punitive damages. Punitive damages require
19 additional evidence showing that the insurer was "guided by an evil mind which either
20 consciously sought to damage the insured or acted intentionally, knowing that its
21 conduct was likely to cause unjustified, significant damage to the insured."⁷² Such
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25 ⁷⁰*Id.* at 578.

26 ⁷¹*Id.* (citing *Farr v. Transamerica Occidental Life Ins. Co.*, 699 P.2d 376, 380 (Ariz. Ct.
27 App. 1984)).

28 ⁷²*Id.*

1 evidence is usually shown through circumstantial evidence, such as evidence showing
2 a pattern of similar practices on the part of the insurer.⁷³

3 Here, there is no direct evidence of Liberty's intent to harm Plaintiff. Plaintiff
4 argues that all the circumstantial evidence presented in the record taken in total
5 demonstrates that there is at least a disputed issue regarding Liberty's "evil mind."
6 Plaintiff cites to *Mendoza v. McDonald's Corporation*,⁷⁴ *Newman v. Select Specialty*
7 *Hospital-Arizona, Inc.*,⁷⁵ and *Temple v. Hartford Insurance Co. of Midwest*⁷⁶ in support.
8 The court agrees with Liberty that these three cases involve much more egregious
9 conduct than has been presented here. In *Mendoza*, there was evidence of intentional
10 doctor shopping to find a doctor who would support a denial. In *Temple*, there was
11 evidence of the insurer trying to persuade medical providers to remove work restrictions
12 and the insurer hiring surveillance and asking the investigator to look for a reason to
13 deny the workers' compensation claim. In *Newman*, there was evidence that the
14 defendants ignored explicit medical orders despite knowing that the plaintiff's condition
15 could worsen and could place the plaintiff at risk of serious harm. The court concludes
16 that the evidence Plaintiff presents in support of his bad-faith claim does not sustain a
17 reasonable inference that Liberty acted egregiously and with the requisite intent to
18 harm. Moreover, Plaintiff has not provided any evidence to show that Liberty has a
19 pattern of similar unfair practices from which a jury could infer malicious intent.

20 **V. CONCLUSION AND RECOMMENDATION**

21 Based on the preceding discussion, Defendant's motion for summary judgment
22 is GRANTED IN PART AND DENIED IN PART. It is denied as to Plaintiff's claim for
23 bad faith, but granted as to Plaintiff's claim for punitive damages.

24 ⁷³*Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073, 1081 (Ariz. 1987).

25 ⁷⁴213 P.3d 288, 307-08 (Ariz. 2009).

26 ⁷⁵No. 13-cv-0665, 2016 WL 1377634, at *3-*4 (Ariz. Ct. App. April 7, 2016).

27 ⁷⁶40 F. Supp. 3d 1156, 1171 (D. Ariz. 2014).

