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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Tyler Jacobson, et al.,
10 Plaintiffs,
11 v.
12 American Family Insurance Company, et al.,
13 Defendants.

No. CV-17-04373-PHX-MTL

ORDER

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15 Two Motions are currently pending before the Court: Defendant American Family
16 Insurance Company's Motion for Summary Judgment (Doc. 48) and Plaintiffs Cathy,
17 William and Tyler Jacobson's Cross-Motion for Summary Judgment (Doc. 50). The
18 Motions are fully briefed. For the reasons explained below, Plaintiffs' Motion is granted
19 with respect to the claim for breach of contract, as to Ms. Jacobson, only. Defendant's
20 Motion is denied with respect to the breach of contract and bad faith claims. The Court
21 reserves summary judgment on the negligence cause of action until after oral argument.¹

22 **I. FACTUAL BACKGROUND**

23 Plaintiffs are Cathy, William and Tyler Jacobson. Cathy and William Jacobson are
24 Tyler Jacobson's parents. The parents are, and at all relevant times were, named insureds

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26 ¹ The Court will hold oral argument on the issues not decided in this Order on February 6,
27 2020. Oral argument is not necessary for the issues decided in this Order because it would
28 not assist the Court. Additionally, the parties have had an opportunity to submit their
arguments to the Court in their motions and "any error can be rectified by an appeal of the
summary judgment." *Lake at Las Vegas Invs Grp., Inc. v. Pac. Malibu Dev. Corp.*, 933
F.2d 724, 729 (9th Cir. 1991); see also *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir.
1998).

1 on an automobile insurance policy with American Family Insurance Company. (See Doc.
2 49 at 5.) Ms. Jacobson added her minor son, Tyler Jacobson, to the policy shortly after he
3 turned 16. (Doc. 56 at 4.) No one disputes that Tyler Jacobson had coverage as a relative
4 at that time. (Id.)

5 Tyler Jacobson purchased a motorcycle in September 2016, a few months after his
6 20th birthday. (Doc. 49 at 1; and Doc. 51 at 6 and 8.) Neither Cathy nor William Jacobson
7 were listed on the title of that vehicle. (Doc. 49 at 4; Doc. 51 at 3.) Ms. Jacobson obtained
8 a quote for full coverage on the motorcycle. (Doc. 49 at 6; Doc. 51 at 4.) Tyler Jacobson
9 opted for a policy with a different insurance company, Progressive Insurance. (Doc. 49 at
10 2; Doc. 51 at 2.) The Progressive policy did not include underinsured motorist insurance.
11 (Doc. 49 at 2; Doc. 51 at 2.) The parents' insurance policy provided underinsured motorist
12 coverage for relatives. (Doc. 49 at 4.)

13 Another vehicle collided with 20-year-old Tyler Jacobson while he was riding his
14 motorcycle, causing him injuries. (Doc. 49 at 2; Doc. 51 at 2.) The insurance company for
15 the driver involved in the accident had a liability limit of \$100,000. (Id.) It paid Tyler
16 Jacobson \$75,000 for his injuries and paid Cathy and William Jacobson collectively
17 \$25,000 for loss of consortium. (See id.) Plaintiffs allege that Tyler Jacobson incurred more
18 than \$220,000 in medical bills. (Doc. 51 at 5.) This amount is less than what the other
19 driver's insurance company paid. The Jacobsons made a claim under their policy with
20 Defendant. (Doc. 49 at 2; Doc. 51 at 2.)

21 Prior to the accident that gave rise to the claims at issue in this suit, Ms. Jacobson
22 was the person who handled all of the interactions with the American Family insurance
23 agent. (Doc. 56 at 3.) No one disputes that Ms. Jacobson told the insurance agent that she
24 wanted her son to have coverage. (Doc. 56 at 4.)

25 Page 25 of the policy at issue says that relatives are given underinsured motorist
26 coverage. (Doc. 56 at 6.) Page 7 of the policy says that people who own their own motor
27 vehicles (other than off-road vehicles) are not relatives for coverage purposes. (Doc. 56 at
28 7.) The insurance company notes that "relative" is a term of art in the policy, defined in a

1 separate definitions section. (Doc. 49 at 4; Doc. 51 at 3.) In the coverage section of the
2 policy, the word “relative” appears in bold print. (Doc. 49-6 at 25.)

3 Ms. Jacobson says that the definition of relative seemed self-evident, not requiring
4 reference to the definitions section. (Doc. 51 at 9.) Additionally, Ms. Jacobson told the
5 insurance agent, Nicole Melody, that she wanted Tyler to have the same coverage as she
6 and William Jacobson. (Doc. 51 at 7; Doc. 56 at 4.) Despite their denying coverage for the
7 claims arising out of Tyler Jacobson’s accident, Ms. Jacobson continues to use American
8 Family as her insurance provider. (Doc. 56 at 15.)

9 **II. PROCEDURAL BACKGROUND**

10 On October 30, 2017, Tyler Jacobson filed a lawsuit against American Family
11 Insurance Company as well as a number of corporations whose names were not then
12 known. (Doc. 1-1.) On November 29, 2017, American Family Insurance Co. removed the
13 case to federal court. (Doc. 1.)

14 Tyler Jacobson’s parents – Cathy and William Jacobson – later added themselves
15 as plaintiffs via an amended complaint. (Doc. 10.) The Plaintiffs added and later dropped
16 the insurance agent and agency from the suit. (Id.) When the insurance agency and agents
17 were defendants, this Court lost diversity (and thus remanded the case to state court). (Doc.
18 21.) When they were dropped from the case, diversity was restored, and the case was
19 removed to federal court again. (Doc. 22.)

20 On May 17, 2019, American Family filed a Motion for Summary Judgment. (Doc.
21 48.) On June 17, 2019, the Jacobsons filed a Response as well as a Cross-Motion for
22 Summary Judgment. (Doc. 50.) On July 17, 2019, American Family filed a Reply to the
23 Response and Response to the Jacobsons’ Cross-Motion for Summary Judgment. (Doc.
24 55.) On August 1, 2019, the Jacobsons filed a Reply to the Response to the Cross-Motion
25 for Summary Judgment. (Doc. 57.) Thus, the Cross-Motions for Summary Judgment are
26 fully briefed.

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1 **III. LEGAL ANALYSIS**

2 **A. Legal Standard on a Motion for Summary Judgment**

3 Rule 56 of the Federal Rules of Civil Procedure governs motions for summary
4 judgment. The Court may grant summary judgment when the movant shows that (1) there
5 are no genuine issues of material fact; and (2) when the evidence is viewed in the light
6 most favorable to the non-moving party, the movant is entitled to a favorable judgment as
7 a matter of law. Fed.R.Civ.P. 56(a); see also *Adickes v. S. H. Kress & Co.*, 398 U.S. 144,
8 157 (1970). Material facts are those which might affect the outcome of the suit. *Anderson*
9 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of fact does not arise solely from
10 allegations in pleadings; the non-moving party also has to produce affirmative evidence to
11 rebut the moving party’s motion. *Id.* at 257. When deciding a defendant’s motion for
12 summary judgment, the “mere existence of a scintilla of evidence in support of the
13 plaintiff’s position will be insufficient; there must be evidence on which the jury could
14 reasonably find for the plaintiff” in order to deny a defendant’s motion. *Id.* at 252.

15 **B. Cross-Motions for Summary Judgment on Breach of Contract**

16 A breach of contract claim requires (1) the existence of a contract; (2) breach of that
17 contract; and (3) damages. *Thomas v. Montelucia Villas, LLC*, 302 P.3d 617, 621 (Ariz.
18 2013). “An insurance policy is a contract.” *Tolifson v. Globe American Cas. Co.*, 672 P.2d
19 983, 984 (Ariz. Ct. App. 1983); see also *Moore v. Smotkin*, 283 P.2d 1029, 1031 (Ariz.
20 1955) (defining a contract as “the expression by two or more persons of the common
21 intention to effect their legal relations.”). If Defendant breached the contract, Plaintiffs
22 suffered damages because of Defendant’s failure to pay the money to which Plaintiffs were
23 entitled. Whether the Court will grant summary judgment on this claim thus depends on
24 whether there is a genuine issue of material fact as to whether American Family breached
25 its contract with the Jacobsons.

26 Arizona’s reasonable expectations doctrine sets forth the circumstances that allow
27 “[c]ourts [to] construe the written terms of insurance contracts to effectuate the parties’
28 intent.” *Liberty Ins. Underwriters, Inc. v. Weitz Co., LLC*, 158 P.3d 209, 212 (Ariz. Ct.

1 App. 2007). Only a party to a contract can invoke the reasonable expectations doctrine.
2 Cullen v. Koty-Leavitt Ins. Agency, Inc, 168 P.3d 917, 925 (Ariz. Ct. App. 2007) (vacated
3 in part on other grounds by Cullen v. Auto-Owners Ins. Co., 189 P.3d 344 (Ariz. 2008)).

4 In Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388 (Ariz.
5 1984), the Arizona Supreme Court adopted the Restatement (Second) of Contracts
6 § 211(3), which provides that “[w]here [a] party has reason to believe that the [other] party
7 manifesting [] assent would not do so if he knew that the writing contained a particular
8 term, the term is not part of the agreement.” Id. at 396. Restatement (Second) § 211(3)
9 Cmt.(f), adopted in Darner, further provides that customers “are not bound to unknown
10 terms which are beyond the range of reasonable expectation. . . .” Id. at 396.

11 When a customer asks for full coverage and the agent is silent about an exclusion,
12 that can be evidence that the policy does not comport with a customer’s reasonable
13 expectations. See Do by Minker v. Farmers Ins. Co. of Ariz., 828 P.2d 1254, 1258 (Ariz.
14 Ct. App. 1991). Further, Gordinier v. Aetna Cas. & Sur. Co., 742 P.2d 277 (Ariz. 1987)
15 provides a comprehensive synthesis of when “Arizona courts will not enforce even
16 unambiguous boilerplate terms in standardized insurance contracts” because they might
17 frustrate a party’s reasonable expectations.

- 18 1. Where the contract terms, although not ambiguous to the
19 court, cannot be understood by the reasonably intelligent
20 consumer who might check on his or her rights, the court will
21 interpret them in light of the objective, reasonable expectations
22 of the average insured;
- 23 2. Where the insured did not receive full and adequate notice
24 of the term in question, and the provision is either unusual or
25 unexpected, or one that emasculates apparent coverage;
- 26 3. Where some activity which can be reasonably attributed to
27 the insurer would create an objective impression of coverage
28 in the mind of a reasonable insured;
- 29 4. Where some activity reasonably attributable to the insurer
has induced a particular insured reasonably to believe that he
has coverage, although such coverage is expressly and
unambiguously denied by the policy.

Gordinier, 742 P.2d at 283-84 (Ariz. 1987) (internal citations omitted).

1 The text of the policy at issue here includes underinsured motorist insurance
2 coverage for relatives of the named insured living in the same household. (Doc. 49-6 at 25.)
3 Notwithstanding this presumed coverage, the definition of relative excludes from coverage
4 relatives of the named insured who own a motor vehicle titled solely in the relative's name.
5 (Id. at 7.) In her deposition, Ms. Melody testified that when Tyler Jacobson was first added
6 to the policy at age 16, Ms. Jacobson asked that he have the same coverage as his parents.
7 (Doc. 56 at 4.) Ms. Melody further testified that uninsured motorist coverage was
8 consistent with Ms. Jacobson's desire. (Id. at 5). American Family does not dispute any of
9 this. (Id. at 4-5.)

10 Despite knowing Ms. Jacobson's desire that Tyler Jacobson have full coverage,
11 neither American Family nor its agents gave Ms. Jacobson a clear disclaimer that Tyler
12 Jacobson's coverage would vanish if he bought a vehicle of his own. Ms. Melody's failure
13 to warn Ms. Jacobson about the exclusion under these circumstances was an activity
14 reasonably attributable to the insurer that created both an objective impression of coverage
15 in the mind of a reasonable insured and more specifically, the silence induced Ms. Jacobson
16 to believe that her son had underinsured motorist coverage.

17 Defendant relies heavily on *Beaver v. Am. Family Mut. Ins. Co.*, 324 P.3d 870 (Ariz.
18 Ct. App. 2014) for the proposition that courts have upheld the Policy's definition of
19 relative. (Doc. 48 at 16.) This reference is inapposite since that case turned on the policy
20 scope of the Arizona uninsured motorist statute, rather than the reasonable expectations
21 doctrine. Defendant also notes that this Court held in *Abbass v. Am. Fam. Ins. Group*, 2013
22 WL 3805147 (D. Ariz. July 19, 2013), that the policy's definition of relative does not
23 violate public policy. That is true as far as it goes. But the Court specifically declined to
24 address the reasonable expectations doctrine in that case. *Abbass*, at *3. The Court does
25 not find that those cases rescue Defendant from consequences of the agent's failure to
26 apprise the Jacobsons of the consequences that would come about if Tyler Jacobson bought
27 a vehicle of his own.

28 The Court reforms the contract to meet the reasonable expectations of Ms. Jacobson

1 and grants Plaintiffs' Cross-Motion for Summary Judgment on the breach of contract
2 claim, as to Ms. Jacobson only. The parties are directed to address, at oral argument, how
3 the court should proceed with respect to the breach of contract claim as asserted by William
4 and Tyler Jacobson under the reasonable expectations doctrine.

5 **C. Defendant's Motion for Summary Judgment on Bad Faith**

6 A claim for bad faith arises when an insurer intentionally denies or fails to process
7 or pay a claim without a reasonable basis. *Zilisch v. State Farm Mutual Auto. Ins. Co.*, 995
8 P.2d 276, 279 (Ariz. 2000) (citing *Noble v. Nat'l Am. Life Ins. Co.*, 624 P.2d 866, 868
9 (Ariz. 1981)). In other words, the insurance company must immediately conduct an
10 adequate investigation into the claim, act reasonably in evaluating that claim, and promptly
11 pay a legitimate claim. *Zilisch*, 995 P.2d at 280. A court is likely to find that an insurance
12 company acted reasonably when a claim is fairly debatable. *Id.* at 279. The insurance
13 company's belief in whether something is fairly debatable is a question of fact for the jury.
14 *Id.* Even assuming fair debateability, which is necessary to find in an insurer's favor but is
15 not always dispositive, the key question is "whether there is sufficient evidence from which
16 reasonable jurors could conclude that in the investigation, evaluation and processing of the
17 claim, the insurer acted unreasonably and either knew or was conscious of the fact that its
18 conduct is unreasonable." *Id.* at 280.

19 Genuine issues exist on the bad faith claim. These issues include whether the insurer
20 acted reasonably in its evaluation and processing of the claim, given Ms. Jacobson's
21 statements to her insurance agent about wanting to be covered and the agent's failure to
22 notify the Jacobsons of what circumstances would result in a change of coverage. The
23 Court denies Defendant's Motion for Summary Judgment with respect to the Jacobsons'
24 bad faith claim. This issue shall be tried to a jury.

25 **IV. CONCLUSION**

26 **Accordingly,**

27 **IT IS ORDERED granting in part** Plaintiffs' Cross-Motion for Summary
28 Judgment (Doc. 50) on breach of contract, with respect to Ms. Jacobson only.

