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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,

No. CV-17-04373-PHX-MTL

ORDER

11 v.

12 American Family Insurance Company, et
13 al.,
14 Defendants.

15
16 **I. Background**

17 Before the Court are Defendant American Family Insurance Company's Motion
18 for Summary Judgment (Doc. 48) and Plaintiffs Cathy, William and Tyler Jacobson's
19 Cross-Motion for Summary Judgment (Doc. 50). The Court adjudicated some of the
20 issues in those Motions in its January 31, 2020 Order. (Doc. 65.) The Court relies on the
21 factual recitation contained in that Order.

22 For the reasons expressed herein, the Court grants American Family summary
23 judgment on the negligence claims and denies the cross-motions for summary judgment
24 on the breach of contract claims of Cathy, William and Tyler Jacobson; the prior grant of
25 summary judgment for Cathy Jacobson is vacated.

26 **II. Legal Analysis**

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

28 Rule 56 of the Federal Rules of Civil Procedure governs motions for summary

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

13 **B. Negligence**

14 Plaintiffs initially certified that they needed to provide an expert opinion affidavit
15 to establish the insurance agent's liability. (Doc. 22-1 at 32.) The Plaintiffs argue,
16 however, that the affidavit was no longer necessary after dropping the insurance agent
17 and agency from the lawsuit and pursuing the negligence claim against American Family
18 under a vicarious liability theory. This Court rejected that argument, finding that the
19 preliminary expert report requirement of A.R.S. § 12-2602 applies. (Doc. 71.)

20 Section 12-2602(F) states that the Court shall dismiss a case, without prejudice,
21 when a plaintiff does not produce an expert opinion affidavit after a plaintiff has certified
22 that one is required. Additionally, § 12-2602(C) allows an application for extension of
23 time for compliance with the requirement under certain circumstances. Neither party has
24 timely availed itself to the rights and remedies provided under the statute. Additionally,
25 the Court cannot ignore that the statute seems to contemplate that this affidavit
26 requirement will be addressed at an early stage of the case. See A.R.S. § 12-2602(B)
27 ("the claimant shall serve [the] affidavit with initial disclosures. . .").

28 More than two years have passed since the initial filing of this case in state court.

1 (Doc. 1-1 at 13.) Thus, the lack of an expert opinion affidavit at this point of the case is
2 no longer a matter of gatekeeping. Rather, it shows a fundamental obstacle to proceeding
3 with a negligence trial: the lack of evidence to establish the insurance agent, Ms.
4 Melody's, duty vis-à-vis the Jacobsons, which is a lack of proof as to an essential element
5 of the claim. Without the expert opinion, no reasonable juror could find in favor of the
6 Jacobsons on the negligence claim. Thus, the Court interprets American Family's
7 argument concerning the lack of an expert opinion affidavit (Doc. 55 at 9-12) as a motion
8 for summary judgment on Plaintiffs' negligence claim, based on Plaintiffs' failure to
9 disclose a standard of care expert, and grants the Motion.

10 **C. Breach of Contract**

11 In its January 31, 2020 Order (Doc. 65), this Court granted Cathy Jacobson
12 summary judgment with respect to her breach of contract claim, altering the policy for
13 her purposes to meet what the Court found to be Ms. Jacobson's reasonable expectations.
14 Defendant argued in supplemental briefing (Doc. 72) and at oral argument (Doc. 71) that
15 "[w]hether or not Cathy's expectation of coverage was reasonable under the
16 circumstances relied on by the Court is a question for the finder of fact." (Doc. 72 at 5.)
17 Plaintiffs countered by arguing that, under these circumstances, the scenarios in which a
18 court will apply the reasonable expectations doctrine, as outlined in *Gordinier v. Aetna*
19 *Cas. & Sur. Co.*, 742 P.2d 277, 283-84 (Ariz. 1987), are applicable. (Doc. 74 at 8-11.)
20 Defendant points to contravening evidence in the record, including the inferences to be
21 drawn from Ms. Jacobson's asking for a full coverage quote for Tyler Jacobson's
22 motorcycle. (Doc. 75 at 4.)

23 After reviewing the parties' supplemental briefing, the Court is now persuaded
24 that while the actual terms of the policy are undisputed, a jury should decide whether the
25 policy should be reformed to be consistent with Cathy Jacobson's alleged reasonable
26 expectations.¹ See *Taylor v. State Farm Mut. Auto. Ins. Co.*, 854 P.2d 1134, 1145 (Ariz.

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28 ¹ This decision, which rests on the current record and the legal standard for a motion for
summary judgment, is without prejudice to Plaintiffs' moving for a directed verdict at the
close of evidence at trial.

1 1993) (“because the extrinsic evidence established controversy over what occurred and
2 what inferences to draw from the events, the matter was properly submitted to the jury.”).
3 Any derivative claim for benefits for William and Tyler Jacobson would have to stem
4 from a revision of the policy consistent with Ms. Jacobson’s alleged reasonable
5 expectations.

6 All three Jacobson’s breach of contract claims shall be tried to a jury.

7 **III. Conclusion**

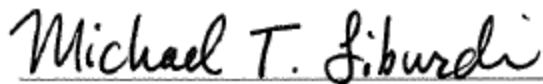
8 Accordingly,

9 **IT IS ORDERED** granting summary judgment to Defendant on the issue of
10 negligence, as raised in Doc. 55.

11 **IT IS FURTHER ORDERED** otherwise denying both Motions for Summary
12 Judgment. (Docs. 48 and 50.) All three Plaintiffs’ breach of contract claims shall be
13 tried to a jury.² This Court’s January 31, 2020 Order (Doc. 65) is amended to the extent
14 that it is inconsistent with this Order.

15 **IT IS FURTHER ORDERED** setting an in-person trial-setting conference for
16 Tuesday, March 10, 2020, at 2:00 P.M., in Courtroom 504, Sandra Day O’Connor U.S.
17 Federal Courthouse, 401 W. Washington St., Phoenix, Arizona 85003-2151. The parties
18 shall be prepared to discuss a proposed length of trial and potential trial dates.

19 Dated this 26th day of February, 2020.

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22 _____
23 Michael T. Liburdi
24 United States District Judge
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28 ² As stated in the January 31, 2020 Order, the issue of bad faith shall also be tried to the jury. The issue of punitive damages (see Doc. 10 at 11, ¶ 3) shall also be tried to the jury.