

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 * * *

4 KATHRYN KINGHAM,

5 Plaintiff,

6 v.

7 STATE FARM MUTUAL AUTOMOBILE
8 INSURANCE COMPANY,

9 Defendant.

Case No. 2:15-cv-01555-APG-GWF

**ORDER GRANTING IN PART THE
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

(ECF No. 31)

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11 Plaintiff Kathryn Kingham was injured in a car accident when Samuel Mason, who was
12 intoxicated, rear-ended the vehicle in which Kingham was a passenger. Several other people
13 were injured in the accident, so Mason's insurance coverage was split amongst them, with
14 Kingham receiving \$6,180. Kingham then sought underinsured motorist payments from her own
15 insurer, defendant State Farm Mutual Automobile Insurance Company. Kingham initially sought
16 \$25,000 in benefits. State Farm initially offered \$3,900 and then increased its offer to \$5,900.
17 Kingham later increased her demand to the full \$50,000 policy limit after she continued treatment
18 and had neck surgery. State Farm never increased its offer. Kingham sued State Farm for breach
19 of contract, bad faith, and unfair claims practices.

20 State Farm moves for summary judgment on Kingham's claims for bad faith and unfair
21 claims practices, as well as her request for punitive damages. As to bad faith, State Farm
22 contends that because it offered to pay something on the claim, it cannot be said to have denied it,
23 and thus no bad faith claim lies. Alternatively, State Farm argues that its valuation of Kingham's
24 claim was reasonable and therefore no genuine dispute about bad faith remains. As to the unfair
25 claims practices, State Farm argues that Nevada law requires that a State Farm officer, director, or
26 department head know about the alleged unfair claims handling practice, and that Kingham has
27 provided no such evidence. State Farm also argues that, in any event, it did not engage in any
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1 unfair claims handling practices and that Kingham has no evidence of damages arising from any
2 such practices. Finally, State Farm argues there is no evidence to support punitive damages.

3 Kingham responds that there is a genuine dispute about State Farm's failure to conduct a
4 timely and thorough investigation into her claim because, for example, it did not timely request
5 medical records, it did not obtain a statement from her, and it did not request an independent
6 medical exam. She asserts the failure to investigate led to an unreasonably low valuation of her
7 claim. As to the unfair claims practices, Kingham asserts that the requirement of showing
8 knowledge by senior State Farm officials applies only to prosecutions of an insurer by the Nevada
9 Commissioner of Insurance. She also argues the same evidence of bad faith shows State Farm
10 engaged in unfair claims practices. Finally, Kingham argues that it is premature to rule on her
11 request for punitive damages.

12 I deny State Farm's motion on Kingham's bad faith claim. I grant State Farm's motion on
13 Kingham's claim for unfair practices and her request for punitive damages.

14 **I. ANALYSIS**

15 Summary judgment is appropriate if the movant shows "there is no genuine dispute as to
16 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a),
17 (c). A fact is material if it "might affect the outcome of the suit under the governing law."
18 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine if "the evidence
19 is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

20 The party seeking summary judgment bears the initial burden of informing the court of the
21 basis for its motion and identifying those portions of the record that demonstrate the absence of a
22 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden
23 then shifts to the non-moving party to set forth specific facts demonstrating there is a genuine
24 issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir.
25 2000). I view the evidence and reasonable inferences in the light most favorable to the non-
26 moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir. 2008).

1 **A. Bad Faith**

2 State Farm argues that because it paid something on Kingham's claim, it did not "deny" it,
3 and thus there can be no bad faith claim. State Farm's argument, taken to its logical conclusion,
4 would eviscerate bad faith claims. An insurer would need to pay only a nominal sum and then
5 claim that because it paid something it did not "deny" the claim. Moreover, Nevada law provides
6 that an unreasonable delay in payment can constitute bad faith. *See Guar. Nat'l Ins. Co. v. Potter*,
7 912 P.2d 267, 272 (Nev. 1996) ("Generally, this court has addressed an insurer's breach of the
8 implied covenant of good faith and fair dealing as the unreasonable denial or delay in payment of
9 a valid claim."). Thus, a partial payment does not insulate the insurer from a bad faith claim if it
10 delays or denies paying the entire loss. *See Pemberton v. Farmers Ins. Exch.*, 858 P.2d 380, 382
11 (Nev. 1993) ("An insurer fails to act in good faith when it refuses without proper cause to
12 compensate the insured for a loss covered by the policy." (quotation omitted)).

13 "Bad faith is established where the insurer acts unreasonably and with knowledge that
14 there is no reasonable basis for its conduct." *Potter*, 912 P.2d at 272. An insurer lacks proper
15 cause to deny a claim when it has an "actual or implied awareness" that no reasonable basis exists
16 to deny the claim. *Am. Excess Ins. Co. v. MGM Grand Hotels, Inc.*, 729 P.2d 1352, 1354 (Nev.
17 1986); *see also Falline v. GNLV Corp.*, 823 P.2d 888, 891 (Nev. 1991) (stating bad faith is "the
18 absence of a reasonable basis for denying benefits . . . and the defendant's knowledge or reckless
19 disregard of the lack of a reasonable basis for denying the claim") (quotation omitted)). The
20 quality of the insurer's investigation may be evidence of an insurer's knowledge or "reckless
21 disregard as to the reasonableness of its denial." *Pioneer Chlor Alkali Co. v. Nat'l Union Fire Ins.*
22 *Co. of Pittsburgh, Penn.*, 863 F. Supp. 1237, 1249 (D. Nev. 1994). Summary judgment should be
23 denied "when relevant facts are in dispute or when facts permit differing inferences as to the
24 reasonableness of insurer's conduct." *United Fire Ins. Co. v. McClelland*, 780 P.2d 193, 197
25 (Nev. 1989).

26 Viewing the facts in the light most favorable to Kingham, genuine disputes remain about
27 whether State Farm unreasonably refused to offer a higher amount and recklessly disregarded the
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1 lack of a reasonable basis for not increasing its top offer of \$5,900. State Farm contends its offer
2 was reasonable because there were gaps in treatment, Kingham had pre-existing degenerative disk
3 disease, and Dr. Rosen conducted a records review and concluded the injections and neck surgery
4 were not related to the accident. However, State Farm never took a statement from Kingham, nor
5 did it request an independent medical exam (IME) despite considering an IME multiple times.
6 ECF Nos. 31-21 at 131-32, 134-35, 137-38; 36-1 at 14-15, 24-25; 36-4 at 2. A reasonable jury
7 could find that had it done so, it could have cleared up some of its questions about the gaps in
8 Kingham's treatment, whether Kingham had any pre-existing conditions, and whether Kingham's
9 surgery and other treatment were causally connected to the accident. ECF Nos. 31-21 at 138, 142;
10 36-1 at 15, 24; 36-4 at 2; 36-5 at 12-19, 24 (Kingham deposition testimony explaining gaps in
11 treatment, continuing pain, efforts at home therapy exercises, and impacts on life activities). A
12 reasonable jury also could conclude that State Farm chose not to further investigate because,
13 based on what it did know, it did not want answers to its questions.

14 State Farm questioned the gaps in treatment but a genuine dispute remains about whether notes in
15 the medical records explained the gaps. *See, e.g.*, ECF Nos. 31-4 at 11-12 (Dr. Rosen's review of
16 medical records reflecting doctor's notes of independent home exercise programs); 31-8 at 141
17 (indicating Kingham "self-discharged" after contracting the flu but was referred back to physical
18 therapy due to "lack of resolution of symptoms"); 31-24 at 60 (continued pain). A genuine
19 dispute remains about whether State Farm unreasonably concluded that the gaps in treatment
20 meant Kingham had fully recovered even though medical records showed Kingham was
21 attempting to treat herself through home exercise programs but still had pain and limited range of
22 motion. ECF Nos. 31-24 at 68-69; 36-1 at 22. Dr. Rosen noted that it was "unclear" why there
23 were gaps in treatment. ECF No. 31-4 at 14. But instead of clearing up any confusion, State Farm
24 stuck to its offer without further investigation. A reasonable jury could conclude State Farm did
25 not interview Kingham or conduct an IME because it did not want answers to its questions,
26 particularly given that it already had some indication from the medical records of what those
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1 answers would be. A jury could find State Farm wanted a basis to keep its offer unreasonably
2 low by citing a concern about gaps in treatment.

3 Likewise, if State Farm had questions about Kingham's pre-accident medical history, it
4 could have interviewed her to determine the names of her pre-accident doctors and to ask why she
5 had taken some medication in the past. State Farm had an authorization from Kingham to obtain
6 her medical records, so once it obtained the names of her doctors, it could have acquired her
7 records. But instead of investigating Kingham's pre-accident condition, it relied on a single
8 notation in a post-accident x-ray that showed degenerative disk disease. ECF No. 31-24 at 61. A
9 reasonable jury could conclude that State Farm avoided learning about Kingham's pre-accident
10 medical history because it did not want to risk learning she had no relevant pre-existing condition.

11 Kingham also has presented evidence that State Farm did not consider all elements of her
12 damages, including the impact on her daily life activities and future pain and suffering, despite
13 notations in the medical records about these losses. ECF Nos. 36-1 at 21; 36-4 at 2-3; 36-5 at 8-
14 10; 36-6 at 1, 5. State Farm did not interview Kingham about these topics. State Farm relies on
15 notations in the medical records that Kingham had reached maximum medical improvement and
16 stopped treating. But maximum medical improvement does not mean that the injury has healed.
17 A reasonable jury could find that State Farm recklessly disregarded notations in the medical
18 records that Kingham still suffered from pain and mobility issues that may never resolve,
19 resulting in her inability to enjoy activities (such as golf) like she did before the accident. ECF
20 Nos. 31-8 at 131; 31-24 at 60, 68; 36-1 at 29-30.

21 Kingham also has presented evidence from which a reasonable jury could conclude that
22 State Farm's reliance on Dr. Rosen's review of Kingham's medical records was unreasonable.
23 Dr. Rosen could not link the cervical injections and surgery to the accident because he concluded
24 Kingham had pre-existing degenerative disk disease (even though he noted the accident likely
25 exacerbated any pre-existing degenerative disease). ECF No. 31-41 at 7-8. However, Kingham's
26 doctors found a causal link. ECF Nos. 31-5 at 10, 21, 27, 41; 31-8 at 131; 31-24 at 68-69; 36-1 at
27 25; 36-12. Those doctors actually examined Kingham. Dr. Rosen did not. State Farm
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1 nevertheless did not interview Kingham or request an IME. A jury may find this puzzling in the
2 face of evidence that, when determining whether to make payment under the medical payments
3 coverage of Kingham's policy, State Farm found the injections were related to the accident. ECF
4 No. 31-4 at 55-73; 36-2 at 2. Yet when State Farm was evaluating Kingham's underinsured
5 motorist claim (under which it faced greater financial exposure), it found those same injections
6 were not related to the accident. State Farm asserts the difference arises from the two types of
7 coverage being evaluated differently, but both would require a causal connection to the car
8 accident. *See* ECF No. 31-7 at 63 (State Farm stating to a treatment provider that for the medical
9 payments, it would consider treatment that was related to the car accident).

10 Finally, the evidence may support an inference that State Farm was determined to stick to
11 its \$5,900 offer regardless of what was presented to it. State Farm's October 31, 2013 offer stated
12 that State Farm was "unable to relate treatment after 9/16/09 including the injections and surgery
13 directly to the motor vehicle accident" ECF No. 31-20. State Farm reiterated its \$5,900
14 offer. *Id.* Dr. Rosen conducted his record review approximately a year later. ECF No. 31-41. Dr.
15 Rosen concluded that Kingham's treatments through June 2010 were related to the accident. *Id.* at
16 8. Despite its own expert concluding that Kingham was still suffering from injuries and properly
17 obtained treatment nine months beyond what State Farm had previously concluded, State Farm
18 did not budge on its offer. ECF No. 31-21 at 111.

19 In sum, viewing the evidence in the light most favorable to Kingham, a reasonable jury
20 could find that State Farm had an actual or implied awareness that its offers were unreasonably
21 low based on the evidence State Farm had, as well as a reckless disregard for obtaining evidence
22 that may have undercut the reasoning for its offer. I therefore deny State Farm's motion for
23 summary judgment on the bad faith claim.

24 **B. Unfair Claims Practices**

25 Nevada Revised Statutes § 686A.310 identifies certain conduct as unfair practices for
26 which an insured may sue "for any damages sustained by the insured as a result of the
27 commission of any [such] act" State Farm contends Kingham has no evidence of damages
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1 arising from State Farm's alleged unfair practices, as opposed to damages arising from the auto
2 accident. Kingham did not respond to that argument. Kingham thus has not identified particular
3 practices, what damages arose from those practices, and what evidence raises a genuine dispute
4 precluding summary judgment on the issue of damages arising from those practices. I will not
5 guess what damages Kingham claims arise from State Farm's alleged unfair practices nor search
6 the record for evidence in support. *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026,
7 1029-31 (9th Cir. 2001). I therefore grant State Farm's motion on this claim.

8 **C. Punitive Damages**

9 "[P]roof of bad faith, by itself, does not establish liability for punitive damages."
10 *McClelland*, 780 P.2d at 198. Rather, to recover punitive damages, a plaintiff must also show
11 evidence of "oppression, fraud, or malice, express or implied." *Id.* (quotation omitted).

12 Kingham does not identify on what basis she seeks punitive damages. Nor does she
13 identify what evidence would support a finding of fraud, malice, or oppression. Kingham
14 suggests State Farm's motion is premature but nothing precludes State Farm from moving for
15 summary judgment on the issue of whether there is sufficient evidence to support punitive
16 damages. Kingham has failed to point to evidence raising a triable issue of fact on punitive
17 damages. I therefore grant this portion of State Farm's motion.

18 **II. CONCLUSION**

19 IT IS THEREFORE ORDERED that defendant State Farm Mutual Automobile Insurance
20 Company's motion for summary judgment (**ECF No. 31**) is **GRANTED in part**. The motion is
21 granted as to plaintiff Kathryn Kingham's claim for unfair claims handling practices and her
22 request for punitive damages. The motion is denied as to Kingham's bad faith claim.

23 DATED this 28th day of September, 2017.

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26 _____
27 ANDREW P. GORDON
28 UNITED STATES DISTRICT JUDGE