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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JUDITH T. SKACH,)
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 Plaintiff,)
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 vs.)
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 AAA NORTHERN CALIFORNIA, NEVADA &)
 UTAH INSURANCE EXCHANGE,)
)
 Defendant.)
 _____)

3:12-cv-00464-RCJ-VPC

ORDER

This is a first-party insurance action arising out of an automobile accident. Pending before the Court are four motions for summary judgment and a motion for an adverse inference instruction. The Court previously entered an order denying Motions Nos. 50, 53, and 54, granting Motion No. 52 in part, and denying Motion No. 51. Defendant has asked the Court to reconsider. The Court hereby reconsiders in part. The entry of the order was in error as to Motions Nos. 50, 53, and 54. That is, a proposed order drafted by a law clerk was inadvertently entered. The Court, however, had rejected that proposed order and approved the rewritten proposed order embodied herein. The present motion to reconsider is therefore granted under Rule 60(a).

I. FACTS AND PROCEDURAL HISTORY

On or about September 16, 2010, Plaintiff Judith Skach was involved in a car accident caused by a non-party who was found to be at fault. (Am. Compl. ¶ 5, Aug. 29, 2012, ECF No. 1, at 6). Plaintiff sustained permanent injuries; her medical expenses exceed \$27,000, and

1 treatment is ongoing. (*Id.*). The non-party tortfeasor’s insurance company tendered the policy
2 limits of \$50,000. (*Id.*). Plaintiff, believing that her eventual expenses would exceed \$50,000,
3 tendered a claim for an unspecified amount of Underinsured Motorist (“UIM”) benefits to
4 Defendant AAA Northern California, Nevada & Utah Insurance Exchange (“AAA”) under a
5 policy she had with AAA. (*See id.* ¶¶ 4–5). Defendant rejected the claim. (*Id.* ¶ 7).

6 Plaintiff sued Defendant in state court on three causes of action: (1) breach of contract;
7 (2) insurance bad faith; and (3) violations of Chapter 686A of the Nevada Revised Statutes
8 (“NRS”) and Chapter 686A of the Nevada Administrative Code (“NAC”). Defendant removed
9 the Amended Complaint (“AC”). The Court denied summary judgment to Defendant as to the
10 bad faith claim but dismissed the claim, with leave to amend. The Court noted that under
11 Nevada law, Plaintiff would have to prove fault by the tortfeasor in order to recover upon her
12 breach of bad faith claims based upon her UIM policy. Upon amendment, Defendant moved to
13 dismiss because Plaintiff had not included any claim for declaratory judgment as to the issue of
14 the tortfeasor’s fault. The Court refused to dismiss but noted that Plaintiff would indeed have to
15 prove the tortfeasor’s fault as part of the breach and bad faith claims. Defendant has now filed
16 for motions for summary judgment and a motion for an adverse inference instruction.

17 **II. LEGAL STANDARDS**

18 **A. Summary Judgment**

19 A court must grant summary judgment when “the movant shows that there is no genuine
20 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
21 Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *See Anderson v.*
22 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there
23 is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* A
24 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
25 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). In determining summary

1 judgment, a court uses a burden-shifting scheme:

2 When the party moving for summary judgment would bear the burden of proof at
3 trial, it must come forward with evidence which would entitle it to a directed verdict
4 if the evidence went uncontroverted at trial. In such a case, the moving party has the
initial burden of establishing the absence of a genuine issue of fact on each issue
material to its case.

5 *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations
6 and internal quotation marks omitted). In contrast, when the nonmoving party bears the burden
7 of proving the claim or defense, the moving party can meet its burden in two ways: (1) by
8 presenting evidence to negate an essential element of the nonmoving party’s case; or (2) by
9 demonstrating that the nonmoving party failed to make a showing sufficient to establish an
10 element essential to that party’s case on which that party will bear the burden of proof at trial. *See*
11 *Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary
12 judgment must be denied and the court need not consider the nonmoving party’s evidence. *See*
13 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

14 If the moving party meets its initial burden, the burden then shifts to the opposing party to
15 establish a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
16 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party
17 need not establish a material issue of fact conclusively in its favor. It is sufficient that “the
18 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
19 versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
20 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary judgment
21 by relying solely on conclusory allegations unsupported by facts. *See Taylor v. List*, 880 F.2d
22 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and
23 allegations of the pleadings and set forth specific facts by producing competent evidence that
24 shows a genuine issue for trial. *See Fed. R. Civ. P. 56(e); Celotex Corp.*, 477 U.S. at 324.

25 At the summary judgment stage, a court’s function is not to weigh the evidence and

1 determine the truth, but to determine whether there is a genuine issue for trial. *See Anderson*, 477
2 U.S. at 249. The evidence of the nonmovant is “to be believed, and all justifiable inferences are
3 to be drawn in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely
4 colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.

5 **B. Adverse Inference Instructions**

6 “If a party or a party’s officer, director, or managing agent—or a witness
7 designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or
8 permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where
9 the action is pending may issue further just orders. They may include the following:

- 10 (i) directing that the matters embraced in the order or other designated facts
11 be taken as established for purposes of the action, as the prevailing party
12 claims

13 Fed. R. Civ. P. 37(b)(2)(A), (A)(1). Rule 37 thus governs the common law “adverse inference
14 rule.”

15 **III. ANALYSIS**

16 **A. Summary Judgment Motions**

17 **1. Motions No. 50, 53, and 54**

18 Defendant asks the Court to grant it summary judgment as against Plaintiff’s bad faith
19 and statutory claims and also as to her prayer for punitive damages. The motions are largely
20 redundant, focusing on the argument that a reasonable disagreement over the value of Plaintiff’s
21 claims precludes recovery on the tort claims. Punitive damages are not available on the breach of
22 contract claim, but only potentially on the insurance bad faith and Unfair Claims Practices Act
23 (“UCPA”) claims. *See Nev. Rev. Stat. § 42.005(1)*. Defendant argues that Plaintiff has produced
24 no evidence of bad faith or that Defendant “has been guilty of oppression, fraud or malice,
25 express or implied,” as required under the statute. *Id.*

The Court grants the motions. Plaintiff attaches a transcript of the deposition testimony
of Mr. Thomas Carter, an expert witness as to insurance claims practices who owns Carter,

1 Yarborough Associates. (*See* Carter Dep. 22, Oct. 24, 2013, ECF No. 68-1). He consults on ten
2 to fifteen bad faith cases per year. (*See id.* 28). Carter first testified that in cases like the present
3 one, where the at-fault driver was drunk, juries tend to award higher damage amounts, including
4 punitive damages. (*See id.* 14–16). However, even assuming Mr. Carter’s past experience would
5 be relevant and otherwise admissible as to a putative claim by Plaintiff against the tortfeasor in
6 the present case—and it probably wouldn’t be—the malicious or oppressive behavior of the
7 tortfeasor in injuring Plaintiff is totally irrelevant to whether the tort victim’s insurance company
8 itself acted maliciously or oppressively as to (non)payment of the tort victim’s insurance claims.
9 After discussing the fact that the tortfeasor’s insurance carrier (State Farm) had indicated to
10 Defendant in this case that there was not likely any UIM exposure, i.e., that the tortfeasor’s
11 liability coverage was expected to cover all of Plaintiff’s injuries, Carter testified that there was
12 no basis to find that Defendant acted in bad faith based upon its alleged failure to investigate the
13 UIM claim before Plaintiff’s counsel made a UIM demand. (*See id.* 42–44). Carter testified that
14 Plaintiff’s counsel never provided Defendant in his demand letter or his follow-up letter with
15 dollar amounts for future medical damages or pain and suffering, except for the total demand of
16 \$210,000, but that he demanded an explanation for Defendant’s refusal to compensate the total
17 amount. (*See id.* 45–47). There was no letter from any doctor with estimations of future medical
18 care. (*See id.* 47–48). He testified that independent medical examinations (“IME”) are usually
19 appropriate for an insurer to request even where the fact of harm is not disputed, because an IME
20 is helpful in calculating the expected cost of future medical harms, but that in some cases a
21 demand for an IME could indicate foot-dragging by an insurer. (*See id.* 48–50 (“If the injury that
22 they accept has a future component to it then an IME might be useful in determining the extent
23 and/or the cost of that future component.”)). He opined that an IME would be appropriate in the
24 present case because of the indication of uncertain future harms. (*See id.* 50–51). Carter then
25 testified that in his opinion certain questions asked of the doctors by Defendant in the present

1 case indicated bad faith. (*See id.* 51). In particular, he opined that Defendant’s questions to three
2 of Plaintiff’s doctors about “malingering” and “gain” by the Plaintiff were “unusual” based upon
3 the 2000–3000 cases he had examined in his career. (*See id.* 51–52). He indicated that questions
4 concerning malingering would perhaps be appropriate if a doctor had indicated such suspicions
5 in a report that the insurer had read, but that was not the case here. (*See id.* 52). Carter explained
6 that he viewed bad faith as “a wall built out of bricks.” (*See id.* 53). If there were enough
7 “bricks,” there was bad faith, and although he could not definitively say whether there was bad
8 faith in the present case, there was “a brick or two in this case” based upon his expertise. (*See id.*
9 53–54). Another “brick” was Defendant’s characterization of Plaintiff’s injuries as “soft tissue”
10 injuries. (*See id.* at 63).

11 This is not enough to preclude summary judgment on the bad faith issue. Defendant is
12 correct that because non-economic damages have no objective measure, a defendant in most
13 cases cannot be liable for bad faith purely due to failing to pay these alleged damages. In a case
14 where it should be clear to an insurer that the covered incident resulted in *some* pain and
15 suffering, an offer of \$0 could result in a finding of bad faith. But Defendant notes that Plaintiff
16 had already received over \$32,000 for her pain and suffering when Defendant refused to pay
17 more, and that this amount, although a jury might eventually award more under the breach of
18 contract claim, is not so low as to implicate a bad faith claim.

19 As to Defendant’s argument that Plaintiff must prove the fault of the tortfeasor to
20 maintain a bad faith claim against Defendant, the Court has already adjudicated this issue in
21 Defendant’s favor.

22 As to the UCPA claim, there are also no material issues of fact concerning whether
23 Defendant failed to effectuate a prompt and equitable settlement of future medical and pain and
24 suffering damages after it became reasonably clear that some amount was due in this regard.

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1 **2. Motion No. 52**

2 Defendant seeks summary judgment against any claims for damages beyond the policy
3 limits for medical care, i.e., consequential or incidental damages, non-economic damages, and
4 fees and costs. Defendant bases the motion upon Plaintiff’s alleged failure to provide any such
5 computations of damages as required by Rule 26. As Defendant notes, the rule requires an
6 automatic initial disclosure of, *inter alia*:

7 a computation of each category of damages claimed by the disclosing party—who
8 must also make available for inspection and copying as under Rule 34 the documents
9 or other evidentiary material, unless privileged or protected from disclosure, on
which each computation is based, including materials bearing on the nature and
extent of injuries suffered.

10 Rule 26(a)(1)(A)(iii). Such disclosures must be supplemented if the initial disclosure becomes or
11 is discovered to have been “incomplete or incorrect” and if the corrective information has not
12 been otherwise provided to the other parties during discovery. Fed. R. Civ. P. 26(e)(1)(A).

13 Defendant argues that Plaintiff has never disclosed any computation of attorney’s fees,
14 costs, or any other consequential damages resulting from Defendant’s alleged bad faith.

15 Defendant attaches a copy of Plaintiff’s responses to Defendant’s Requests for Production
16 (“RFP”). (*See* Resp. to RFP, Feb. 5, 2013, ECF No. 52-2). The third RFP asked for “documents
17 evidencing all costs allegedly incurred as a result of the incident . . . including . . . receipts, bills,
18 invoices or other evidence . . .” (*See id.* 2). Plaintiff responded that she did not know or recall
19 each and every expense and “does not know what future costs or expenditures she may incur.”
20 (*See id.*). However, Plaintiff alleged to have previously provided such information and promised
21 to supplement that information. (*See id.*). The demand letter from Plaintiff’s attorney to
22 Defendant, also attached, and which is presumably the prior disclosure to which Plaintiff referred
23 in her answer to the third RFP, provides a calculation of past medical expenses (\$27,406.50) and
24 past lost wages (\$1056), as well as a settlement offer of \$150,000 unaccompanied by any other
25 calculations. (*See* Demand Letter, May 4, 2012, ECF No. 52-3). Plaintiff’s response to

1 Defendant's second set of interrogatories includes no further calculations. (*See* Resp., Nov. 15,
2 2013, ECF No. 52-4). Plaintiff was herself unable to explain the basis for the demand of
3 \$150,000 or that she had any consequential damages resulting from Defendant's failure to pay
4 \$150,000. (*See* Skach Dep. 169–72, Dec. 14, 2012, ECF No. 52-1).

5 Plaintiff's response is mostly unresponsive to the Rule 26(a) issue, consisting mainly of a
6 reiteration of the response to the previous motion, focusing on the *Wilson* case. On page ten of
7 the response, Plaintiff correctly notes that non-economic damages are not susceptible to precise
8 damages calculations under Rule 26(a). This fact cuts both ways: (1) it protects defendants from
9 bad faith claims predicated upon a failure to pay non-economic damages under a policy so long
10 as some non-negligible amount is paid in cases where some non-economic damages are apparent,
11 *see supra*; and (2) it protects plaintiffs from Rule 26(a) claims based upon a failure to disclose a
12 calculation of this measure of damages. Apart from this, however, Plaintiff rests her argument
13 upon the bare fact of her counsel's \$150,000 settlement offer. Plaintiff provides only a transcript
14 of Mr. Carter's deposition as evidence, which contains no indication that Plaintiff disclosed
15 damages calculations or related documents to Defendant beyond what Defendant has provided in
16 its own motion. Carter simply testified that he believed Plaintiff's counsel had reasonably
17 evaluated the total value of Plaintiff's claim. (*See* Carter Dep. 80–81, Oct. 24, 2013, ECF No. 62-
18 1).

19 The Court finds that Plaintiff has not provided evidence that she has produced any
20 damage calculations or related documentation as to consequential or incidental damages, i.e.,
21 missed debt payments, etc. The Court therefore grants summary judgment in part as to that
22 measure of damages. However, Plaintiff sufficiently disclosed pain and suffering damages,
23 which, because they are not susceptible to a numerical calculation, are not required to be
24 disclosed to the level of precision required for other categories of damages under Rule 26(a).

25 Plaintiff also argues that she need not have disclosed a calculation of attorney's fees.

1 Plaintiff argues that because her fees will be largely based upon pain and suffering damages that
2 cannot be calculated, attorney's fees cannot be calculated either. The Court rejects this argument.
3 The percentage basis of fees would provide Defendant a useful basis to better assess the overall
4 value of the lawsuit by multiplying an estimated verdict by a factor of 1.X, where X equals the
5 fraction of the recovery to be paid in fees by Plaintiff. Defendant also argues that even if
6 attorney's fees are generally available, Plaintiff cannot claim attorney's fees incurred based upon
7 the attorney(s) she initially retained after the accident to prosecute her claims against the
8 tortfeasor and the third-party insurance company, but only those fees she incurred because of
9 Defendant's alleged bad faith, i.e., the fees she incurred in prosecuting the present case. The
10 Court agrees and grants the motion in this regard. Plaintiff cannot seek fees unrelated to
11 Defendant's alleged bad conduct as a measure of damages in the present case. And because the
12 Court grants the summary judgment motion as to the bad faith claim, it grants the motion as to
13 attorney's fees based thereupon. Although the Court rules that Plaintiff cannot seek fees as a
14 measure of damages, the Court makes no ruling as to whether Plaintiff can obtain fees qua fees
15 under the contract if she prevails at trial.

16 Defendant also argues that attorney's fees are not available under section 686A.310.
17 Although the Court does not agree that the recent refusal of the Nevada Legislature to amend the
18 statute to add attorney's fees is relevant to whether the statute already provides for them
19 implicitly—because the Legislature could simply be wrong that attorney's fees are not already
20 implied therein—the Court agrees that availability of attorney's fees cannot be implied from the
21 statute. *See Tracey v. Am. Family Mut. Ins. Co.*, No. 2:09-cv-1257, 2010 WL 5477751, at *4–5
22 (D. Nev. Dec. 30, 2010) (Navarro, J.). The Court therefore grants the motion in this regard, even
23 if the underlying cause of action survived, which it does not.

24 **B. Adverse Inference Motion**

25 Defendant asks the Court to issue an adverse inference instruction to the jury for

1 Plaintiff's counsel's alleged failure to preserve litigation-related voicemails containing offers and
2 requests for additional information. Defendant argues that evidence of voicemails left for
3 Plaintiff's counsel by Defendant is relevant to the bad faith issue, and that Plaintiff's counsel
4 should have preserved this evidence. Defendant requests an adverse inference instructing the
5 jury to assume that the voicemails were unfavorable to Plaintiff's case on the issue of
6 Defendant's reasonableness.

7 The Court denies the motion, without prejudice. The Court agrees that an
8 attorney—especially one who routinely litigates bad faith cases—should be mindful of his duty
9 to retain evidence of communications to him from an insurer that will surely be relevant to the
10 bad faith issue. But there is still potentially evidence of the content of the voicemails that can be
11 adduced. The content of the voicemails would be offered to show that the communications were
12 made, not to prove their truth. They are therefore not hearsay, and the employee who left the
13 messages may testify directly as to their content. Alternatively, Defendant may adduce the
14 contents of the claims file as to the contents of the voicemails via a records custodian under the
15 business records exception to the hearsay rule. If Plaintiff were to impeach the evidence for bias
16 or otherwise, an adverse inference instruction might then be appropriate if direct examination of
17 Plaintiff's counsel by Defendant's counsel as to Plaintiff's counsel's failure to retain the
18 voicemails does not sufficiently cure the prejudice.

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1 **CONCLUSION**

2 IT IS HEREBY ORDERED that the Motion to Reconsider (ECF No. 86) is GRANTED,
3 and the Order (ECF No. 83) is VACATED and STRICKEN.

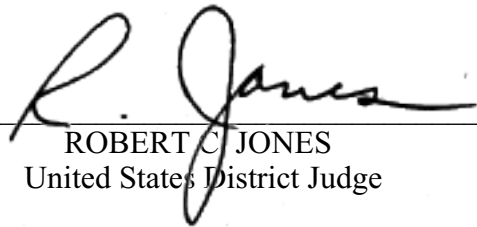
4 IT IS FURTHER ORDERED that the Motions for Summary Judgment (ECF Nos. 50, 53,
5 54) are GRANTED. Only the breach of contract claim remains for trial.

6 IT IS FURTHER ORDERED that the Motion for Summary Judgment (ECF No. 52) is
7 GRANTED IN PART and DENIED IN PART. The Court grants the motion as to all issues
8 except the exclusion of damages for pain and suffering.

9 IT IS FURTHER ORDERED that the Motion for an Adverse Inference Instruction (ECF
10 No. 51) is DENIED.

11 IT IS SO ORDERED.

12 Dated this 17th day of October, 2014.

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15 ROBERT C. JONES
16 United States District Judge
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