IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANGELICA RIOS, INDIVIDUALLY; AND REBECA VELASCO, INDIVIDUALLY,
Appellants,
vs.
PROGRESSIVE NORTHERN INSURANCE COMPANY,
Respondent.

No. 81006-COA

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting summary judgment in a case alleging breach of good faith and fair dealing. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

In September 2012, Angelica Rios and Rebecca Velasco (Appellants) were involved in a car accident with another driver.[1] Appellants settled with the negligent driver and filed an underinsured motorist claim (the UIM claim) with their insurance provider, Progressive Northern Insurance Company. Progressive offered to pay the claim, but Appellants and Progressive contested the value of the claim. Appellants filed a complaint alleging breach of the insurance contract (Rios 1).

Rios 1 proceeded to arbitration, and the arbitrator found in favor of Appellants. Progressive requested a trial de novo, and Rios 1 went to a short trial. The short trial judge also found in favor of Appellants, but awarded a substantially lesser amount than the arbitrator awarded. The short trial judge also found that Progressive was the prevailing party and

[1]We recount the facts only as necessary for our disposition.

awarded it attorney fees and costs. Appellants appealed the award of attorney fees and costs. After two appeals, Appellants ultimately prevailed and were awarded attorney fees and costs.[2]

Appellants subsequently filed a second complaint against Progressive (Rios 2) alleging breach of the covenant of good faith and fair dealing. The allegations exclusively focused on Progressive's litigation conduct in Rios 1. The complaint alleged "Progressive forced Plaintiffs to attend depositions, to attend an arbitration, to attend a trial, and to file and prosecute two (2) appeals in order to have a final determination about their claims."

A year after the complaint was filed, Progressive filed a motion for summary judgment. Progressive argued that the complaint was based only on litigation conduct, which was protected by the litigation privilege. Progressive also argued that Appellants made no allegations and could not provide any evidence that Progressive acted in bad faith before litigation in Rios 1. Appellants responded that the litigation privilege does not apply in insurance bad faith cases, without citing any relevant authority, and made new allegations not raised in the complaint, claiming Progressive engaged in a single scheme of bad faith conduct before and during litigation in Rios 1.

The district court granted Progressive's motion for summary judgment, concluding that the litigation privilege applied to the allegations of bad faith based on Progressive's litigation conduct in Rios 1. The court

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[2]*See Rios v. Progressive N. Ins. Co.*, Docket No. 68631 (Order of Reversal and Remand, Ct. App., May 9, 2016); *Rios v. Progressive N. Ins. Co.*, Docket No. 71225 (Order of Reversal and Remand, Ct. App., August 24, 2017).

rejected Appellants' new claims about pre-litigation conduct or a single scheme of bad faith because they were not alleged in the complaint and Appellants provided no evidence to support their claims. The court said it would consider allowing Appellants to amend the complaint if Appellants filed a motion for reconsideration and attached a proposed amended complaint to it. The court also denied Appellants' request to extend discovery under NRCP 56(d).[3] Appellants filed a motion for reconsideration, but did not seek to amend or attach a proposed amended complaint. The district court later denied the motion.

On appeal, Appellants argue the district court erred when it refused to consider claims of pre-litigation bad faith and an underlying scheme that were not alleged in the complaint, the litigation privilege does not apply to the other properly alleged conduct, and the court should have granted NRCP 56(d) relief. We disagree.

A district court's decision to grant summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); *see also Costello v. Casler*, 127 Nev. 436, 439, 254 P.3d 631, 634 (2011). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine dispute as to any material fact exists and that the moving party is entitled to judgment as a matter of law. *Wood*,

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[3]The Nevada Rules of Civil Procedure were amended in March 2019. *In Re: Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018). Because the motion for summary judgment was filed in December 2019, we cite to and apply the current version of the rule. Specifically, NRCP 56(f) (2017) was recodified as NRCP 56(d) (2019); the substance of the rule did not change.

121 Nev. at 729, 121 P.3d at 1029. All evidence must be viewed in a light most favorable to the nonmoving party. *Id.*

To withstand summary judgment, the nonmoving party cannot rely solely on general allegations and conclusions set forth in the pleadings, but must instead present specific facts demonstrating the existence of a genuine factual issue supporting his or her claims. NRCP 56(a); *see also Wood*, 121 Nev. at 731, 121 P.3d at 1030-31. The nonmoving party "is not entitled to build a case on gossamer threads of whimsy, speculation[,] and conjecture." *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713-14, 57 P.3d 82, 87 (2002) (internal quotation marks omitted).

Appellants first contend the district court erred because it refused to consider pre-litigation conduct and their claim that Progressive engaged in a scheme of bad faith conduct. Appellants argue they presented proof of Progressive's gainsharing practice, which appears to be a compensation/bonus policy for Progressive's employees when the company is succeeding.[4] Appellants provided one unverified document about

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[4]Appellants claim this gainsharing policy showed Progressive created an incentive among its employees to avoid paying claims, which resulted in a single bad faith scheme. But the document, which was not produced in discovery, was without explanation as to its admissibility, does not explain how the gainsharing program works, nor does it indicate any connection between gainsharing and possible bad faith. Further, Appellants also failed to cite authority to support that this type of policy constituted bad faith. Rather, Appellants' case citations deal with the doctrine of claim preclusion. While the doctrine may apply in this case, neither party addressed this doctrine below, nor did the district court make any finding regarding claim preclusion, so we decline to address it here. *See Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 557 n.6, 170 P.3d 508, 512 n.6 (2007) ("The district court did not address this issue. Therefore, we need not reach the issue.").

gainsharing, which only generally explains the existence of the bonus policy. Progressive responds that Appellants cannot now raise allegations of pre-litigation bad faith conduct because they were not alleged in the complaint and only argued generally in Appellants' opposition. Progressive also asserts Appellants provided no evidence of any wrongful pre-litigation conduct.[5]

The Nevada Supreme Court has defined bad faith as "an actual or implied awareness of the absence of a reasonable basis for denying benefits of the [insurance] policy." *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 308, 212 P.3d 318, 324 (2009) (alteration in original) (internal quotation marks omitted). The summary judgment de novo standard of review "does not trump the general rule that [a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010) (alteration in original) (internal quotation marks omitted).

The only allegation in the Rios 2 complaint that involves pre-litigation conduct states "[t]he Plaintiffs were unable to resolve their UIM

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[5]Appellants also argue, without citing relevant authority, that any claim of pre-litigation bad faith conduct was tolled. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). Appellants did not make an argument about tolling below. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that issues not argued below are "deemed to have been waived and will not be considered on appeal"). Further, the district court made no finding regarding the relevant statute of limitations or tolling. *See Douglas Disposal, Inc.*, 123 Nev. at 557 n.6, 170 P.3d at 512 n.6. Therefore, we decline to address any of these arguments.

Motorist claims with Progressive." No other allegations involved pre-litigation conduct. Importantly, Appellants presented no evidence to support any allegations of pre-litigation bad faith conduct, or that contesting the value of a claim in and of itself constitutes bad faith. Appellants fail to identify any evidence in the record or make any arguments that Progressive did not timely open the UIM claim, that Progressive failed to consider the UIM claim, or that Progressive had no reasonable basis for contesting the amount of the UIM claim. All the documents provided in the record, other than the aforementioned gainsharing document, were created during Rios 1. Even when considering the pleadings and evidence in the light most favorable to Appellants, the district court did not err when it granted summary judgment because Appellants made no specific allegations of pre-litigation bad faith, nor did Appellants identify any evidence to support this claim.[6]

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[6]The district court did not abuse its discretion when it denied NRCP 56(d) relief. *See Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 118, 110 P.3d 56, 62 (2005) (referring to NRCP 56(f)). NRCP 56(d) provides that "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Here, Appellants did not file any affidavit or declaration to support their request for relief. *See Choy v. Ameristar Casinos, Inc.*, 127 Nev. 870, 872, 265 P.3d 698, 700 (2011). They also did not specify how further discovery would create a genuine dispute as to any material fact. *See Aviation Ventures, Inc.*, 121 Nev. at 118, 110 P.3d at 62. Though NRCP 56(d) relief may have been appropriate to discover the specifics of the gainsharing practice as argued, there were no allegations of pre-litigation bad faith conduct in the complaint, no amended complaint to include such allegations and, under the new proportionality requirement for discovery, no reason for the court to have permitted additional time to conduct this discovery absent such allegations. *See* NRCP 26(b)(1).

Appellants next argue that the litigation privilege does not apply in bad faith insurance cases, so the district court erred when it granted summary judgment. Appellants contend aggressive litigation tactics may demonstrate bad faith and that, even though Progressive's actions were permissive, Progressive ignored its duties to Appellants. Progressive responds that the litigation privilege applies in this case because the only bad faith conduct Appellants allege was standard litigation conduct, including taking depositions, defending at arbitration, requesting trial de novo, filing motions for fees and costs, and defending two appeals. Progressive also asserts Appellants provided no evidence or legal authority to show the conduct was aggressive, abusive, or otherwise not protected by the litigation privilege.

The litigation privilege provides that "communications uttered or published in the course of judicial proceedings are absolutely privileged, rendering those who made the communications immune from civil liability." *Greenberg Traurig, LLP v. Frias Holding Co.*, 130 Nev. 627, 630, 331 P.3d 901, 903 (2014) (internal quotation marks omitted). The litigation privilege also applies to litigation conduct.[7] *See Searcy v. Esurance Ins. Co.*, 243 F. Supp. 3d 1146, 1155 (D. Nev. 2017) (holding that "forc[ing]" the plaintiff to attend a deposition and arbitration is protected by the litigation privilege). Whether the litigation privilege applies is a question of law reviewed de novo. *Clark Cty. Sch. Dist. v. Virtual Educ. Software Inc.*, 125 Nev. 374, 382, 213 P.3d 496, 502 (2009).

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[7]*See generally Bullivant Houser Bailey PC v. Eighth Judicial Dist. Court*, Docket No. 57991 at *5 (Order Granting Petition, March 30, 2012) ("[T]here is 'no reason to distinguish between *communications* made during the litigation process and *conduct* occurring during the litigation process.'" (quoting *Clark v. Druckman*, 624 S.E.2d 864, 870 (W. Va. 2005)).

Appellants point to several cases for the assertion that Progressive's litigation conduct was done in bad faith. A federal district court in California recently recognized an exception to California's litigation privilege statute that applies when an insured attempts to introduce evidence of an insurer's bad faith litigation conduct. *Harman v. Golden Eagle Ins. Co.*, No. 17-cv-2328-AJB-MDD, 2018 WL 1791915, at *3-4 (S.D. Cal. April 16, 2018). Describing California law, another federal district court also stated "an insured can introduce evidence of the insurer's conduct during the litigation to support a claim of bad faith, *but the claim cannot be based exclusively on the insurer's pleadings*." *Evanston Ins. Co. v. OEA, Inc.*, No. CIVS021505DFLPAN, 2005 WL 3500799, at *4 (E.D. Cal. Dec. 20, 2005) (emphasis added).

In this case, Appellants' bad faith claims are based exclusively on standard litigation conduct like filing pleadings, taking depositions, participating in arbitration, requesting trial de novo, filing motions for fees and costs, and participating in appeals, all of which require a party to file papers. *See Cal. Physicians' Serv. v. Superior Court*, 12 Cal. Rptr. 2d 95, 100 (Ct. App. 4th 1992) ("Defensive pleading, including the assertion of affirmative defenses, is communication protected by the absolute litigation privilege. Such pleading, even though allegedly false, interposed in bad faith, or even asserted for inappropriate purposes, cannot be used as the basis for allegations of ongoing bad faith."). Here, Appellants point to no evidence to show that Progressive's actions during Rios 1 were unreasonable, aggressive, or abusive.

Appellants claim that after they initiated Rios 1, Progressive should have complied with their settlement demands. Thus, because Progressive disagreed with the UIM claim value, it acted in bad faith.

However, Appellants make no argument, or provide any evidence, to show that Progressive unreasonably disputed the UIM claim value. Appellants also imply that when Progressive requested trial de novo, it acted in bad faith because it delayed payment of their UIM claim. However, "any party to the action is entitled to the benefit of a timely filed request for trial de novo." NAR 18(D). The fact that the short trial judge awarded substantially less than the arbitrator awarded indicates that Progressive's litigation stance was reasonable as to the value of the Appellants' claim.

Next, Appellants argue Progressive acted in bad faith because it filed motions for fees and costs. However, Progressive filed these motions pursuant to the short trial judge's order, which found that Progressive was the prevailing party. Therefore, Progressive did not act unreasonably. Appellants subsequently filed, and succeeded, on two appeals to reverse that decision. Appellants do not argue that Progressive's position was unreasonable or meritless, and they point to no evidence in the record to show that Progressive acted unreasonably while defending these appeals, based on its reasonable assessment of the value of the appellants' claim.

Finally, Appellants assert that applying the litigation privilege to this case will provide insurers with an absolute privilege from claims of breach of good faith and fair dealing. Conceivably, insureds may file a subsequent breach of good faith and fair dealing claim against their insurer for conduct that arose during litigation of a first claim, so long as the insured alleges actual bad faith conduct rather than legitimate conduct during litigation. Here, Appellants' Rios 2 claim is based only on Progressive's standard litigation conduct in relation to Rios 1, so the litigation privilege applies. Viewing the pleadings and evidence in the light most favorable to Appellants, the district court did not err when it applied the litigation

privilege and granted summary judgment, as Appellants failed to raise a genuine dispute as to any material fact regarding Progressive's bad faith conduct, other than conduct protected by the litigation privilege. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Linda Marie Bell, Chief Judge, Eighth Judicial District Court
Department II, Eighth Judicial District Court
Law Offices of James J. Ream
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