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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ERIC HEINE,

Plaintiff and Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY et al.,

Defendants and Respondents.

A138117

(Sonoma County
Super. Ct. No. SCV-249520)

Plaintiff Eric Heine appeals the trial court's grant of summary judgment in favor of State Farm Mutual Automobile Insurance Company (State Farm) and Arleen Jauregui (collectively defendants) in this action arising from the denial by State Farm, plaintiff's automobile insurer, of plaintiff's medical coverage and uninsured motor vehicle claims following a car accident. On appeal, plaintiff contends the trial court erred in granting summary adjudication in favor of State Farm on his causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing. We shall affirm the judgment.

PROCEDURAL BACKGROUND

On April 15, 2011, plaintiff filed a complaint for damages, in which he asserted causes of action for breach of contract against State Farm; breach of the implied covenant of good faith and fair dealing against State Farm; fraud against State Farm, Jauregui, and

Benchmark Medical Consultants, Inc. (Benchmark);¹ constructive fraud against State Farm and Jauregui; and conspiracy to commit fraud against State Farm, Jauregui, Benchmark, and Dr. Joseph McCoy.

On November 2, 2012, the trial court granted Dr. McCoy's motion for summary judgment after concluding that the cause of action for conspiracy to commit fraud failed because plaintiff had offered no evidence showing either that Dr. McCoy "had knowledge of a plan to defraud him and an intention to commit that tort" or that his medical examination of plaintiff was not fair, which demonstrated that there was no misrepresentation. The court also found that Dr. McCoy was "fully protected by the Agent's Immunity Rule." Judgment in favor of Dr. McCoy was also entered on November 2, 2012. Plaintiff has not appealed from that judgment.

On July 17, 2012, State Farm and Jauregui filed a motion for summary judgment or, in the alternative, summary adjudication. On December 28, 2012, the trial court granted State Farm and Jauregui's motion for summary judgment, as follows:

"First, State Farm paid all of the insurance contract benefits: Heine's UIM [uninsured motor vehicle] policy limits of \$85,000.00 and his MPC [medical payments coverage] limits of \$50,000.00. These facts are not in dispute. [Citation.] No interest accrued while coverage was unclear. And attorney fees are not provided by the contract or a statute. The contract cause of action fails as a matter of law.

"Second, there is no evidence that can be reasonably used to imply bad faith by the insurance company. State Farm was not required to seek a second opinion, to speak with Heine's physician, to obtain a biomedical expert, or to get intra-operative photographs sooner than it did. There is additionally no evidence to support a conclusion that State Farm was unreasonably slow in handling this claim; much of the delay is due to conduct by plaintiff. The undisputed facts here show that there was a genuine dispute about causation of the shoulder injury. The insurer relied upon the advice of counsel in that regard. [Citation.]

¹ On April 26, 2012, Benchmark was dismissed from the action, with prejudice.

“The interrelated fraud (third cause of action) and conspiracy to commit fraud (fifth cause of action) causes of action, have no factual support—only proffered suspicion and speculation. Those allegations are not subject to a factual dispute warranting a trial.

“Finally, there is no basis for a punitive damage award on these facts. The fraud allegations lack any merit. A jury could not find that such punishment would be warranted by clear and convincing evidence. [Citation.] There is no proffered evidence of a material misrepresentation that was relied upon to plaintiff’s detriment.”² Notice of entry of judgment in favor of State Farm and Jauregui was filed on January 4, 2013.

On March 1, 2013, plaintiff filed a notice of appeal. On appeal, he has not challenged the trial court’s grant of summary adjudication on either the fraud or conspiracy to commit fraud cause of action. Only plaintiff’s two remaining causes of action, for breach of contract and breach of the implied covenant of good faith and fair dealing, asserted against State Farm only, are at issue in this appeal.

FACTUAL BACKGROUND

On May 6, 2006, plaintiff was driving a 1998 Honda Accord when he was involved in an automobile accident for which he was not at fault. His was the first vehicle in a chain reaction accident involving three cars. The car he was driving sustained \$747.74 in damage. He submitted two first-party claims to State Farm: a claim for reimbursement brought pursuant to his medical payments coverage, and a claim for uninsured motor vehicle coverage.³ The uninsured motor vehicle claim was stayed until plaintiff’s liability claims against the two other drivers were concluded.

By September 2006, State Farm had paid \$4,377.25 in medical payments coverage for Heine’s medical treatment. On September 17, State Farm requested Heine’s medical

² On August 9, 2011, the trial court had sustained State Farm and Jauregui’s demurrer to the fourth cause of action for constructive fraud, with leave to amend, but plaintiff never filed an amendment. That cause of action was therefore dismissed.

³ Although the two other vehicles involved in the accident were insured, coverage under the uninsured motor vehicle was available because those vehicles were underinsured.

records to assess whether treatment was “reasonable and necessary.” On September 26, plaintiff advised State Farm that he was being sent for additional MRIs after an earlier MRI had revealed a torn ligament. He also would be seeing an orthopedic surgeon and a neurologist. He informed State Farm that he had not sustained an injury prior to the accident.

On October 13, 2006, plaintiff called and informed State Farm that he planned to have surgery on both shoulders due to the accident. Plaintiff said he wanted State Farm to pay for a second opinion, and the claims representative advised him that it was not certain State Farm would pay for that because it did not have any information about the recommendation for surgery.⁴ On October 20, plaintiff called State Farm and informed the claims representative that his surgeon, Dr. Weiss, would be performing surgery on his shoulder on November 15. The claims representative told plaintiff that State Farm had ordered his medical records for review to determine if his injuries were related to the accident. On October 31, State Farm informed Dr. Weiss’s office that there was medical payments coverage available, but that the treatment had to be related to the accident, as well as reasonable and necessary.

On November 10, State Farm sent plaintiff a letter informing him, inter alia, that “we are in the process of reviewing your records to determine that the injury to your shoulder is related to this auto accident” and reiterating “that under the Medical Payments Coverage, we cannot pre-authorize any treatment.” Plaintiff proceeded with the planned surgery.

On December 11, 2006, after reviewing plaintiff’s file, claims representative Jauregui noted in an activity log entry that she was “questioning causation as to the shoulder injury” and would “request authorization for a biomechanical expert and an

⁴ A State Farm activity log entry reflects that a claims representative noted that she responded to plaintiff’s statement by explaining that the “impact forces” in the accident “appear[ed] to be minor and to have sustained exact same injury in both shoulders would be something that would need to be addressed.” Plaintiff, however, disputes that the claims representative said this to him.

[independent medical examination (IME)].” Plaintiff lived in the town of Vineburg, which is located between the cities of Sonoma and Napa, and Jauregui contacted Benchmark, an expert witness service, for assistance in locating a local orthopedic surgeon to conduct an IME on plaintiff. Benchmark recommended Dr. McCoy, an orthopedic surgeon whose office was located in Napa, approximately 13 miles from Vineburg. In a January 25, 2007 letter confirming plaintiff’s appointment with Dr. McCoy on February 21, a Benchmark scheduler wrote: “It is pertinent [*sic*] that any and all copies of medical records and/or diagnostic studies pertaining to your case be received at Benchmark on behalf of Dr. McCoy, at least two weeks prior to the scheduled examination OR you may bring copies with you.”

Following the IME, in a February 26, 2007 report, Dr McCoy stated, *inter alia*, that “[i]t is very difficult for me to associate the shoulder findings [showing significant abnormality on the MRIs plaintiff provided] with the very minor rear-end motor vehicle accident noted above. It does appear clearly apparent in the medical record and specifically on the MRI that the claimant has significant degenerative rotator cuff disease in both shoulders It would also appear that the claimant has a long history of working as a plumber, which is a very strenuous job with frequent overhead lifting, pulling, and strenuous activities involving both upper extremities. This is a far more likely causative factor in the development of his bilateral shoulder difficulties rather than the very minor rear-end motor vehicle accident noted above. . . . [¶] In summary, I am unable to associate the need for right shoulder surgery with the subject accident in May 2006. Instead, I would conclude that the claimant’s shoulder difficulties are much more likely due to his occupation as a plumber.”

At the conclusion of his report, Dr. McCoy added: “It would be very helpful to review the operative photographs or video done at the time of the surgery. It certainly is the community standard to document surgical findings like a rotator cuff tear of both the subscapularis and supraspinatus justifying the above-noted surgical intervention. Furthermore, it is only reasonable to document the severe fraying involving ‘75% of his biceps tendon’ as suggested by Dr. Weiss, prior to proceeding with a biceps tenodesis.

All of this should be clearly documented in the operative photographs. I will be happy to review these records if indeed they are available. If they are not available, I would certainly question Dr. Weiss' involvement in this case and question him regarding the rather elaborate treatment that was undertaken with relatively benign MRI findings."

After State Farm requested that Dr. McCoy respond to certain questions that he had neglected to answer in his initial report, Dr. McCoy submitted a supplemental report on March 23, 2007, in which he stated, "It is impossible for me to come up with a logical and supportable link between the patient's shoulder pathology and the described subject MVA [motor vehicle accident]. Instead, it seems far more likely that the patient's shoulder complaints are related to pre-accident or post-accident injury or exposure. . . . [¶] Similarly, the treatment provided for the claimant's ongoing neck difficulties seems appropriate and justifiable, although the treatment provided for the bilateral shoulders appears unrelated to the subject MVA. My almost 20 years experience in the treatment of such injuries and my thorough consideration of the subject accident does not allow me to come up with any reasonable connection between the minor rear-end MVA and the substantial shoulder pathology noted on the MRIs."

On April 2, 2007, State Farm sent a copy of Dr. McCoy's report and his supplemental report to both Heine and his then-attorney, along with a letter in which Jauregui informed Heine, "Based on the report from Dr. McCoy, we are not in a position to pay for any treatment that you have received relating to your shoulder." Jauregui further wrote that if Heine had "any additional information you would like to submit for us to reconsider this position," he could call her or send her the documentation.

Neither Heine nor his attorney submitted any additional information to State Farm challenging Dr. McCoy's opinion for over two years. In the interim, the insurer for one of the drivers involved in the May 2006 accident retained Dr. Charles DiRaimondo, a board certified orthopedic surgeon, to conduct an IME of plaintiff. The examination took place on December 10, 2008, and, in a January 19, 2009 report, DiRaimondo opined that "[a]ll of the pathology identified during the right shoulder surgery was most reasonably related to degenerative pathology as a consequence of the work and recreational activities

pursued by [plaintiff].” He further stated that, “during a rear-end collision there is no basis for shoulder impingement, rotator cuff stretch injury, or rotator cuff exertion injury.” In Dr. DiRaimondo’s opinion, “the subject auto accident did not cause any injury to either shoulder [and] . . . was not responsible for any ongoing shoulder symptoms.”⁵

Then, on July 15, 2009, Dr. Weiss, who had performed plaintiff’s shoulder surgery, prepared a report, which plaintiff’s new attorney submitted to State Farm on August 6. In the report, Dr. Weiss pointed out several perceived errors in Dr. McCoy’s report and disagreed with Dr. McCoy’s opinion that Dr. Weiss’s intervention was aggressive and inconsistent with the MRI findings. In particular, he opined that the MRIs were not consistent with the pathology he actually found in plaintiff’s shoulder and stated that he had intra-operative photographs showing the rotator cuff tears. Dr. Weiss further stated that Dr. McCoy had apparently “based his report on the fact that the MR scans indicated degenerative ‘partial-thickness’ rotator cuff tears of the shoulders. Based on that information and that information only he seems to feel that Mr. Heine’s shoulder injuries did not occur as the result of his motor vehicle accident. Dr. McCoy ignores the fact that full-thickness rotator cuff tears were noted at the time of surgery. [¶] The full-thickness rotator cuff tears encountered during Mr. Heine’s surgery clearly would be debilitating and not something that one would be ‘living with’ for a long period of time. These were acute injuries. There is no evidence of any other trauma to Mr. Heine’s shoulders. He had worsening shoulder pain following this injury and I think the evidence is overwhelming that the motor vehicle accident of May 6, 2006, was the proximate cause for Mr. Heine’s rotator cuff tears and the need for subsequent surgery.”

⁵ On July 16, 2009, plaintiff dismissed his lawsuit against that driver with prejudice, for a waiver of costs.

In his reply brief, plaintiff denies defendants’ claim that he concealed Dr. DiRaimondo’s IME from State Farm, stating that there is no evidence that either he or his attorneys had copies of the DiRaimondo report before it was requested by defendants and produced by plaintiff during discovery in the present action.

On October 12, 2009, at State Farm's request and after reviewing Dr. Weiss's report, Dr. McCoy prepared another supplemental report, in which he stated that his prior conclusions remained unchanged because it was "highly unlikely that Dr. Weiss encountered bilateral, full-thickness rotator cuff tears involving both the subscapularis and supraspinatus on the right side that were not noted on the MRI. The only way to resolve this conflict would be for Dr. Weiss to provide the digital photographs taken during that surgical procedure documenting Mr. Heine's alleged full-thickness tears. ¶¶ Having said that, however, I still do not believe that acute traumatic rotator cuff tears of the bilateral shoulders are compatible with the very minor rear-end motor vehicle accident noted above. I am not convinced that there was sufficient energy transferred to cause any significant injury to Mr. Heine's shoulder and suspect that his shoulder difficulties predated the subject accident."

On November 12, 2009, Jauregui sent plaintiff's attorney a copy of Dr. McCoy's supplemental report, explaining in a letter that, based on that report, State Farm would continue to refuse to pay for the surgery. Jauregui also wrote, "If you have any additional documentation that you think will make Dr. McCoy reconsider his position, please forward it and we will send it to Dr. McCoy."

On November 13, 2009, State Farm retained John Farmer as counsel in the anticipated uninsured motor vehicle and medical payments coverage arbitration. In his initial report, Farmer addressed evidentiary issues, stating, inter alia, that "[t]he precise issues impacting both the [medical payments and uninsured motor vehicle] claims are those of reasonability, necessity and causation, all of which are for the most part expert-driven issues. . . . Obviously, Drs. Weiss and McCoy, disagree on causation and . . . [their] depositions will be important in comparing the strength of the positions and arguments put forth by each." In his evaluation of the case, Farmer stated, "At this point, exposure as to both the unpaid medical expenses and on the UIM claim would appear to be questionable. . . . [A] significant dispute exists as to whether the shoulder condition, surgery and treatment therefor had a reasonable relationship to the accident in question."

In a January 14, 2010 letter to Farmer, plaintiff's attorney, Thomas Richards, described the question of whether "the shoulder surgery by Dr. Weiss [was] related to the accident or not" as one of the main issues in the case, and further opined that the case "will boil down to the simple question of the relative credibility of Dr. Weiss and Dr. McCoy. State Farm's position is very clear. Their claims people have chosen to believe Dr. McCoy rather than Dr. Weiss. Eric and I do not agree." The following day, Farmer responded that "[y]our statement of the issues appears reasonably accurate and we agree that both doctors should be deposed, to examine their opinions and bases for those opinions."

On February 4, 2010, Richards sent Farmer the 29 intra-operative photographs taken during plaintiff's surgery, which had been given to Richards by Dr. Weiss. In a supplemental report, dated March 15, 2010, Dr. McCoy set forth the conclusions he had reached after reviewing the intra-operative photographs. He found that the photographs were "difficult to interpret" and "inconclusive with regard to the issues raised." He believed "there still remain substantial inconsistencies between the claimant's MRI findings and the operative findings of Dr. Weiss. I do not believe that the intra-operative films satisfactorily demonstrate all the pathology and some of the surgery allegedly performed. [¶] It is still very difficult for me to believe that the very minor rear-end motor vehicle accident created any shoulder pathology that justified the surgical intervention as described."

Richards then retained an additional expert, Dr. Richard Marder, who prepared a report on August 26, 2010. Dr. Marder wrote, "My review of the surgical operative report as well as the arthroscopic photographs show a well done surgical procedure consistent with the findings of the operative report. The need for surgery is apparent based on a tear in a young, relatively active individual of the supraspinatus tendon, the subscapularis tendon, and a split of the intraarticular extraarticular portion of the biceps tendon with subluxation." Dr. Marder did not believe it was uncommon for an MRI scan to fail to show a full thickness tear, as occurred in this case. He further noted, "[i]n terms of causation[,] clearly the patient was not having any antecedent shoulder pain prior to

the automobile injury. While it can be debated as to what force is required to initiate a tear versus causing perhaps a pre-existing condition to become symptomatic[,] nonetheless, there is no evidence that the patient had any pre-existing symptoms of shoulder pain. Based on this, I would conclude the injury is more than likely responsible for his symptoms.”

On October 22, 2010, two weeks after deposing Dr. Marder, Farmer submitted a report to State Farm, in which he evaluated the case based on the deposition testimony of each of the three experts. He described Dr. Marder as “an extremely well qualified orthopedic expert. He came across as open, honest, and dignified. He did not agree with all of the positions advanced by Dr. Weiss and claimant’s counsel, which, to us, only served to accentuate his credibility. We believe he will make the strongest medical witness in this case, thus far.” He then explained that, “while this initially appeared to be a case involving a questionable mechanism for injury and dueling experts, with some valid criticisms seemingly raised by the defense examiner, the case has now changed character for a variety of reasons. Dr. Weiss makes a reasonably good case for the shoulder surgery and all other aspects of his opinion except his billing. Meanwhile, objectively speaking, Dr. McCoy makes a more combative and argumentative witness, who has overstated his position and has been demonstrated to have made a couple of mistakes which may affect how his opinion is perceived by the arbitrator. We now have an opinion from Dr. Marder, who seems to be the strongest of all of the medical witnesses, which seems to reasonably explain causation and mechanics and justifies necessity, although he is critical, along with Dr. McCoy, of the reasonability aspect of the claim in terms of Dr. Weiss’s billing practices.”

In an October 27, 2010 State Farm activity log entry, Jauregui noted that “Farmer has secured new information through the deposition of Dr. Marder who stated that there have been studies of cadavers in which they had the same degenerative changes that [insured] had in their shoulders and they were asymptomatic. Dr. Marder stated that [insured] was asymptomatic per his medical records, no mention of shoulder [symptoms]; therefore there is no other event that would have caused [insured] to become

symptomatic other than this MVA. Also [insured] had right arm extended on the stick shift.”

Based on Farmer’s report and advice, on November 4, State Farm paid plaintiff the unpaid balance of his medical payments policy limit in the amount of \$38,021.74, for a total of \$50,000, and on November 16, 2010, it paid him the unpaid balance of the uninsured motor vehicle policy limit in the amount of \$61,000, for a total of \$85,000.

DISCUSSION

I. Summary Judgment Rules and Standard of Review

A motion for summary judgment “shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code of Civ. Proc., § 437c, subd. (c).)⁶ A defendant moving for summary judgment has the initial burden of showing either that one or more elements of the cause of action cannot be established or that there is a complete defense. (§ 437c, subd. (p)(2).) If that initial burden is met, the burden shifts to the plaintiff to show the existence of a triable issue of fact with respect to that cause of action or defense. (§ 437c, subd. (p)(2); see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-853; accord, *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 720 (*Wilson*).)

On appeal, “ ‘we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.] “ ‘We review the trial court’s decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.’ ” [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party. [Citation.]’ [Citation.]” (*Wilson, supra*, 42 Cal.4th at pp. 716-717.)

⁶ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

II. *Breach of the Implied Covenant of Good Faith and Fair Dealing*

“The law implies in every contract, including insurance policies, a covenant of good faith and fair dealing. ‘The implied promise requires each contracting party to refrain from doing anything to injure the right of the other to receive the agreement’s benefits. To fulfill its implied obligation, an insurer must give at least as much consideration to the interests of the insured as it gives to its own interests. When the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort.’ [Citation.]” (*Wilson, supra*, 42 Cal.4th at p. 720.)

While an insurer is of course not obligated to pay every claim an insured makes, it “cannot deny the claim ‘without fully investigating the grounds for its denial.’ [Citation.] . . . [Citation.] By the same token, denial of a claim on a basis unfounded in the facts known to the insurer, or contradicted by those facts, may be deemed unreasonable.” (*Wilson, supra*, 42 Cal.4th at pp. 720-721.) Moreover, “an insurer’s obligations extend beyond simply paying the benefits to which its insured is entitled: ‘[W]hen benefits are due an insured, “delayed payment based on inadequate or tardy investigations, oppressive conduct by claims adjusters seeking to reduce the amount legitimately payable and numerous other tactics may breach the implied covenant because” they frustrate the insured’s right to receive the benefits of the contract in “prompt compensation for losses.”’ [Citations.]” (*Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225, 1236 (*Brehm*).

Nonetheless, as our Supreme Court has explained, “ ‘an insurer denying or delaying the payment of policy benefits due to the existence of a *genuine dispute* with its insured as to the existence of coverage liability or the amount of the insured’s coverage claim is not liable in bad faith even though it might be liable for breach of contract.’ [Citation.]” (*Wilson, supra*, 42 Cal.4th at p. 723, quoting *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 347 (*Chateau Chamberay*), italics added.) This genuine dispute or genuine issue rule does not, however, “relieve an insurer from its obligation to thoroughly and fairly investigate, process and evaluate the insured’s claim. A *genuine dispute* exists only where the

insurer's position is maintained in good faith and on reasonable grounds. [Citations.]” (*Wilson*, at pp. 723-724, fn. omitted.)

“Nor does the rule alter the standards for deciding and reviewing motions for summary judgment. ‘The genuine issue [or dispute] rule in the context of bad faith claims allows a [trial] court to grant summary judgment when it is undisputed or indisputable that the basis for the insurer’s denial of benefits was reasonable—for example, where even under the plaintiff’s version of the facts there is a genuine issue as to the insurer’s liability under California law. [Citation.] . . . On the other hand, an insurer is not entitled to judgment as a matter of law where, viewing the facts in the light most favorable to the plaintiff, a jury could conclude that the insurer acted unreasonably.’ [Citation.]” (*Wilson*, *supra*, 42 Cal.4th at p. 724.)

A. *Genuine Dispute/Good Faith*

Plaintiff likens the present case to *Wilson*, in which an insured submitted medical evidence to her insurer indicating she had been injured in an accident involving an underinsured motor vehicle. (*Wilson*, *supra*, 42 Cal.4th at pp. 717-718.) The insurer failed to investigate the claim before denying it on the ground that the injury was preexisting. As in this case, although the insurer ultimately paid the full policy limits, the insured alleged she had been harmed by the insurer’s initial bad faith denial of benefits. (*Id.* at pp. 719-720.)

The Supreme Court agreed: “[The insurer], of course, was not obliged to accept [the treating physician’s] opinion without scrutiny or investigation. To the extent it had good faith doubts, the insurer would have been within its rights to investigate the basis for [the insured’s] claim by asking [the treating physician] to reexamine or further explain his findings, having a physician review all the submitted medical records and offer an opinion, or, if necessary, having its insured examined by other physicians (as it later did). What it could not do, consistent with the implied covenant of good faith and fair dealing, was *ignore* [the physician’s] conclusions without any attempt at adequate investigation, and reach contrary conclusions lacking any discernable medical foundation.” (*Wilson*, *supra*, 42 Cal.4th at p. 722.) The court therefore concluded that a

triable issue of fact existed regarding whether it was reasonable for the insurer to deny the claim on the grounds stated without any further medical investigation. (*Id.* at p. 723.)

The present case plainly differs in significant respects from *Wilson*. Here, State Farm not only requested plaintiff's medical records related to the accident, it also promptly arranged for plaintiff to participate in an IME with Dr. McCoy, an orthopedic surgeon in nearby Napa, to assist it in determining whether plaintiff's shoulder injuries were in fact caused by the accident and whether the subsequent surgery was reasonable and necessary. (Compare *Wilson, supra*, 42 Cal.4th at p. 722.) State Farm found such further investigation necessary in light of the high degree of injury plaintiff suffered as compared to the minimal damage to his car. (See *id.* at p. 722 [insurer is not obliged to accept treating physician's opinion without scrutiny or investigation].)

Then, once Dr Weiss responded to Dr. McCoy's report with a report of his own, State Farm asked Dr. McCoy to review the new information and reconsider his opinion. In his supplemental report, Dr. McCoy stated that his opinion remained unchanged. That State Farm believed McCoy's opinion that Heine's shoulder issues were not caused by the accident, rather than Weiss's contrary opinion, does not demonstrate bad faith. (See *Wilson, supra*, 42 Cal.4th at p. 722; cf. *Fraley v. Allstate Ins. Co.* (2000) 81 Cal.App.4th 1282, 1293 ["Where the parties rely on expert opinions, even a substantial disparity in estimates for the scope and cost of repairs does not, by itself, suggest the insurer acted in bad faith"].) Indeed, as Richards, counsel for plaintiff, stated in a pre-arbitration letter to State Farm's attorney, Farmer, the issue to be decided "will boil down to the simple question of the relative credibility of Dr. Weiss and Dr. McCoy. State Farm's position is very clear. Their claims people have chosen to believe Dr. McCoy rather than Dr. Weiss. Eric and I do not agree."

Plaintiff argues that State Farm should have communicated with Dr. Weiss before denying his claim. The evidence shows, however, that State Farm did request and review plaintiff's medical records, including his records from Dr. Weiss, as part of its investigation of his claim. In addition, Dr. McCoy both reviewed the medical records that plaintiff had submitted to State Farm and/or to him and examined plaintiff. These

actions were consistent with *Wilson's* directive that an insurer with good faith doubts about an insured's claim would be "within its rights" to investigate the claim's basis by, inter alia, "having a physician review all the submitted records and offer an opinion, or, if necessary, having its insured examined by other physicians" (*Wilson, supra*, 42 Cal.4th at p. 722.)

We likewise reject plaintiff's assertion that State Farm "ignored" the intra-operative photographs Dr. Weiss took during his surgery by failing to give them to Dr. McCoy before denying plaintiff's claim. At the outset, State Farm requested that Dr. Weiss provide it with plaintiff's medical records, which it then forwarded to Dr. McCoy. Dr. Weiss did not send the intra-operative photographs to State Farm at that time. Then, in the letter confirming plaintiff's appointment with Dr. McCoy, Benchmark advised plaintiff that plaintiff need to provide Dr. McCoy with all pertinent "medical records and/or diagnostic studies" before or at the time of his IME. Also, at the conclusion of his initial report, Dr. McCoy wrote that "[i]t would be very helpful to review the operative photographs or video done at the time of the surgery." Finally, in his first supplemental report, Dr. McCoy wrote that "[t]he only way to resolve this conflict [between Dr. Weiss's claim of the extent of the injury he found during surgery and Dr. McCoy's doubt about those findings] would be for Dr. Weiss to provide the digital photographs taken during that surgical procedure documenting Mr. Heine's alleged full thickness tears."

Shortly thereafter, Jauregui requested, in a letter to plaintiff's attorney in which she enclosed McCoy's supplemental report, that "[i]f you have any additional documentation that you think will make Dr. McCoy reconsider his position, please forward it and we will send it to Dr. McCoy." Plaintiff did not provide the photographs to State Farm until some three years after his IME was completed. Thus, the record reflects that State Farm and Dr. McCoy repeatedly requested that plaintiff provide him with all medical records and, in particular, the intra-operative photographs, but that plaintiff failed to do so until years after the first request.

Plaintiff also maintains that his medical records revealed no history of shoulder problems, which he believes underscores the disingenuousness of Dr. McCoy's

conclusion that the car accident did not cause his shoulder injuries. Dr. McCoy, in his report, observed that plaintiff's medical records and MRI reflected that he had "significant degenerative rotator cuff disease in both shoulders." Dr. McCoy believed that plaintiff's "long history of working as a plumber, which is a very strenuous job with frequent overhead lifting, pulling, and strenuous activities involving both upper extremities," was "a far more likely causative factor in the development of his bilateral shoulder difficulties rather than the very minor rear-end motor vehicle accident" Whether correct or not, Dr. McCoy's opinion is not, on its face, unreasonable, and State Farm was entitled to rely on it. It is notable that, in his 2009 report for the insurer of one of the other drivers involved in the accident, Dr. DiRaimondo expressed a remarkably similar opinion as to causation. Although plaintiff points out that the question at issue is whether State Farm's denial of his claim was reasonable at the time of the denial, in 2007, the DiRaimondo report does speak to the reasonableness of Dr. McCoy's opinion, as well as the reasonableness of State Farm in relying on that opinion.

In addition, after plaintiff hired Dr. Marder as an expert, Dr. Marder provided a credible rationale for plaintiff's injuries having resulted from the minor collision and explained that it was not unusual for intra-operative photographs to show damage not visible in an MRI, as occurred here.⁷ Following Dr. Marder's deposition, State Farm's attorney, Farmer, immediately informed State Farm that he believed Dr. Marder was the most credible of the three experts, and therefore recommended that State Farm pay the full policy limits to plaintiff, which State Farm did.⁸ That State Farm ultimately

⁷ Dr. Marder also opined that "it can be debated as to what force is required to initiate a tear versus causing perhaps a pre-existing condition to become symptomatic," although he observed that no evidence showed that plaintiff had pre-existing shoulder pain.

⁸ Plaintiff challenges the trial court's finding that State Farm's reliance on advice of counsel demonstrated that there was a genuine dispute about causation of the shoulder injury. While it is true that Farmer was not brought into the case until plaintiff exercised his right to arbitration two years after the initial denial of benefits, once Farmer became

determined, following its investigation and receipt of additional information, that plaintiff's claim should be paid does not in itself show that the investigation was unreasonable or that its dispute with plaintiff regarding causation was not genuine. (See, e.g., *Chateau Chamberay*, *supra*, 90 Cal.App.4th at p. 350 [question is not whether insurer's view as to proper outcome of adjustment process was correct, but only whether its position as to disputed points was reasonable].)⁹ Instead, the record reflects only that a genuine dispute existed as to the cause of plaintiff's injuries, and State Farm's initial denial of benefits was therefore reasonable. (See *Wilson*, *supra*, 42 Cal.4th at p. 724.)

B. Alleged Bias

Plaintiff further maintains that there is a triable issue of fact regarding the good faith of State Farm's investigation because Dr. McCoy was not competent and was biased in favor of State Farm. (See *Chateau Chamberay*, *supra*, 90 Cal.App.4th at p. 348 ["an expert's testimony will not *automatically* insulate an insurer from a bad faith claim based on a biased investigation"]; accord, *Brehm*, *supra*, 166 Cal.App.4th at p. 1239.)

Plaintiff relies on *Brehm*, in which the insured, who had suffered a shoulder injury in a motor vehicle accident, made a claim for full uninsured motor vehicle benefits under his policy based on medical reports, bills, and test results from his treating doctor, which allegedly showed that his injury was severe and required costly surgery. (*Brehm*, *supra*,

involved, the undisputed evidence shows that State Farm relied on Farmer's advice both before and after plaintiff retained Dr. Marder as an expert witness.

⁹ In his reply brief, plaintiff asserts that the "genuine dispute doctrine" should be abolished because it is used by insurance companies "as a way to obtain summary adjudication in bad faith cases without adhering to the normal evidentiary rules; i.e. by using IMEs to 'sanitize' or 'insulate' them from bad faith." In addition to the fact that plaintiff did not raise this point in his opening brief (see *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.* (2008) 158 Cal.App.4th 1061, 1072), our Supreme Court, in *Wilson*, confirmed the continuing viability of this rule and cautioned that "[a] genuine dispute exists only where the insurer's position is maintained in good faith and on reasonable grounds." (*Wilson*, *supra*, 42 Cal.4th at pp. 723-724.) As discussed, plaintiff has not raised a triable issue of fact regarding the good faith of State Farm's position in this case.

166 Cal.App.4th at p. 1231.) The insurer denied the claim after the doctor who performed an IME concluded that the insured had only subjective complaints, without objective evidence of injury, and therefore did not need surgery. (*Id.* at pp. 1231, 1239.) In his complaint, the insured alleged that the IME was a sham and that the insurer had retained the doctor to prepare a report that falsely minimized the seriousness of the insured's injury so that it could maintain that there was a genuine dispute as to the value of the claim. (*Id.* at p. 1239.) The appellate court reversed the trial court's order sustaining the insurer's demurrer, explaining: "Although we may entertain some skepticism as to the nature of the competent and credible proof [the insured] will be able to offer in support of these allegations, the issue before us is not whether his evidence will be sufficient but whether his allegations of intentional misconduct and bad faith are." (*Id.* at p. 1240.)

Plaintiff's reliance on *Brehm* is misplaced. The proceedings in *Brehm* were at the demurrer stage, and the question the court addressed was whether the insured had sufficiently *alleged* bad faith and bias in his complaint. (*Brehm, supra*, 166 Cal.App.4th at p. 1240; see *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [“ ‘We treat the demurrer as admitting all material facts properly pleaded’ ”].) This case, on the other hand, is at the summary judgment stage, at which time the plaintiff is required to raise triable issues of material fact to successfully avoid a grant of summary judgment. (*Wilson, supra*, 42 Cal.4th at pp. 716-717, 724.) Hence, plaintiff must point to evidence supporting his allegations of bias and bad faith.

Plaintiff observes that Dr. McCoy testified at his deposition that approximately 40 percent of his practice involved doing “medicolegal” work. Over half of that 40 percent was in the area of workers' compensation. Approximately 75 percent of his medicolegal work was for the defense side and the remaining 25 percent was for the plaintiff side. McCoy also testified that, while the majority of Benchmark's clients were on the defense side, it had referred plaintiff side cases to him. These statistics, which reflect that Dr. McCoy did more defense side work, but also did medicolegal work for plaintiffs, do not demonstrate a pro-defense bias on the part of Dr. McCoy. Plaintiff also asserts that Dr.

McCoy was not qualified to conduct an IME in this case because he had had much less experience with shoulder surgeries than did Dr. Weiss. Dr. McCoy testified that he had performed approximately 100 shoulder surgeries in his career, which constituted about one-third of his total arthroscopic interventions. While his experience with shoulder surgery may not have been as extensive as that of Dr. Weiss, this evidence does not demonstrate that he was not qualified to perform an IME on plaintiff.

Hence, there is no evidence in the record that creates a triable issue of material fact from which a jury could conclude that State Farm intentionally chose Benchmark to hire a doctor who would disingenuously support State Farm's position or that Dr. McCoy's IME and subsequent reports were shams. (Compare *Brehm, supra*, 166 Cal.App.4th at p. 1240 ["The reasonableness of [insurer's] settlement counteroffer at the time it was made is simply not a question that can be resolved at the pleading stage"].)¹⁰ As the trial court stated in its order granting summary judgment in favor of Dr. McCoy, "There is no evidence that Dr. McCoy's exam was not both fair and unbiased."

C. Alleged Delay

Nor has plaintiff presented evidence demonstrating a triable issue of fact based on State Farm's delay in paying him the full policy benefits. Plaintiff cannot complain about

¹⁰ In his briefing, plaintiff also makes several allegations about Benchmark (the company that hired Dr. McCoy on State Farm's behalf) being known as a "defense oriented" company, that Dr. McCoy was "unqualified," and that the IME was "fraudulent." The trial court, however, sustained State Farm's objections to the purported evidence supporting these assertions, which was contained in plaintiff's counsel's declaration. Plaintiff failed to challenge the trial court's ruling on these objections in his opening brief. In his reply brief, plaintiff has offered a single sentence in which he avers that the trial court erred in sustaining the objection to counsel's statement in his declaration that Benchmarks was a "very defense and insurance oriented" firm. He therefore asks "this court to overrule this objection on the grounds that this declaration has a valid foundation." We will not address this conclusory assertion, raised only in plaintiff's reply brief and lacking any substantive argument or citation to authority. (See, e.g., *In re Marriage of Falcone* (2008) 164 Cal.App.4th 814, 830 [treating contentions not supported by "cogent legal argument or citation of authority" as waived]; see also, e.g., *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.*, *supra*, 158 Cal.App.4th at p. 1072 [points raised for first time in reply brief will generally not be considered].)

the several years delay in payment when it was he who waited more than two years after receiving Dr. McCoy's report and State Farm's denial of his medical coverage claim to respond with a written report by Dr. Weiss.¹¹ It then took another six months for plaintiff's attorney to obtain the intra-operative photographs from Dr. Weiss and forward them to State Farm. Thereafter, as the parties prepared for arbitration, it became clear to State Farm's counsel, Farmer, that plaintiff's position had been greatly strengthened by the newly retained Dr. Marder's opinion as to causation. After Farmer communicated this to State Farm, the company paid plaintiff the full policy benefits. There was no unreasonable delay on the part of State Farm. (See *Wilson, supra*, 42 Cal.4th at p. 723; *Chateau Chamberay, supra*, 90 Cal.App.4th at p. 347.)

D. Alleged Violation of Insurance Code Section 790.03

Plaintiff also claims that State Farm's conduct violated the Unfair Insurance Practices Act. (Ins. Code, § 790, et seq.) "[N]either the Insurance Code nor regulations adopted under its authority provide a private right of action. [Citation.]" (*Rattan v. United Services Automobile Assn.* (2001) 84 Cal.App.4th 715, 724.) A violation of the statutes or regulations may, however, be used as evidence supporting an insured's contention that the insurer's actions were unreasonable and therefore breached the implied covenant of good faith and fair dealing. (*Ibid.*; accord, *Reid v. Mercury Insurance Co.* (2013) 220 Cal.App.4th 262, 276.)

Here, plaintiff argues that State Farm violated certain acts described in subdivision (h) of Insurance Code section 790.03, under which "[k]nowingly committing or performing with such frequency as to indicate a general business practice" certain listed unfair claims settlement practices constitutes an "unfair and deceptive act[] or practice[] in the business of insurance." (See § 790.03, subs. (h)(1) ["Misrepresenting to claimants pertinent facts or insurance policy provisions relating to any coverages at

¹¹ Defendants also point out, with respect to the uninsured motor vehicle claim, that plaintiff "could not, and did not, pursue that claim until the lawsuit he filed against the at-fault driver was dismissed." (See Ins. Code, § 11580.2, subd. (p)(3); *Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1059.)

issue”]; (h)(3) [“Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies”]; (h)(13) [“Failing to provide promptly a reasonable explanation of the basis relied on in the insurance policy, in relation to the facts or applicable law, for the denial of a claim or for the offer of a compromise settlement”].)

Plaintiff first asserts that State Farm violated subdivision (h)(1) of Insurance Code section 790.03 by informing him “that he could go ahead with the right shoulder surgery and State Farm would pay for it.” The record reflects that, after plaintiff informed a State Farm claims representative of his plan to have shoulder surgery, the claims representative noted in the activity log that State Farm would have to review his medical records to determine whether the shoulder injuries were related to the accident. The only other evidence in the record on this point is in plaintiff’s declaration, in which he stated that he was told State Farm would pay for the surgery. To the extent this would otherwise create a triable issue of fact, the record reflects that, on November 10, 2006, before the surgery took place, State Farm sent plaintiff a letter informing him that it was in the process of reviewing his records to determine whether the shoulder injuries were related to the accident and further informing him “that under the Medical Payments Coverage, we cannot pre-authorize any treatment.” This letter would have necessarily put plaintiff on notice that State Farm had not yet authorized the surgery, regardless of what he may have understood the claims representative to have said during an earlier conversation.

Plaintiff also claims that State Farm’s statements that it did not pay for second opinions and that it could not pre-authorize any treatment were misrepresentations because State Farm’s manual permits a “utilization review.” The manual makes clear, however, that “[a] utilization review may be used to address the appropriateness of the health care services proposed for or provided to a person or to address questions concerning the mechanisms of an injury” Thus, a utilization review, like an IME, may be used if State Farm has questions about treatment that is proposed or has already been provided. Here, plaintiff had surgery before State Farm had thoroughly reviewed

his medical records and decided whether to make a referral for a utilization review or IME.

With respect to the alleged violations of Insurance Code section 790.03, subdivisions (h)(3) and (h)(13), plaintiff asserts that State Farm “failed to ever, much less promptly, communicate with [Dr.] Weiss about his reasons for relating the right shoulder to the accident,” but instead sent plaintiff to the IME with Dr. McCoy. We have already discussed and rejected plaintiff’s claim that there is a triable issue of fact regarding whether State Farm promptly asked for relevant medical information from Dr. Weiss. Hence, that same allegation cannot support any claimed violation of subdivisions (h)(3) and (h)(13) of Insurance Code section 790.03.

E. Alleged Violations of State Farm’s Claims Manual

Plaintiff further argues that State Farm failed to follow its own claims manual in its handling of his claim. In particular, he directs our attention to the portion of the manual that addresses the possibility of obtaining a biomechanical analysis, which provides: “A bio-mechanical analysis focuses on the physical forces generated during a particular motor vehicle accident and how these forces acted upon the occupants of the vehicle in order to determine whether these forces were sufficient to have caused the claimed injury.” The manual further provides: “If, after reviewing the investigative information of a particular claim, questions remain regarding whether there may have been sufficient forces generated in the motor vehicle accident to cause the claimed injury, document the claim file and bring these questions to the attention of claim management for further evaluation. If the questions of causation remain unresolved following this review, claim management should document the claim file and consider obtaining a biomechanical analysis.”

First, the language of this section of the manual makes clear that a biomechanical analysis is not mandatory. Rather, it provides only that *if* after an investigation of the claim, questions remain regarding causation, claim management should review the questions and only *if* questions of causation remain unresolved after that review, claim management *should consider* obtaining a biomechanical analysis. Second, in this case,

after reviewing plaintiff's medical records and Dr. McCoy's IME report, Jauregui and State Farm concluded (correctly or not) that the accident was not the cause of plaintiff's shoulder injuries. Thus, because questions did *not* remain at that point regarding whether the accident could have caused the injuries, there was no need to ask claim management to evaluate whether a biomechanical analysis would be useful.¹²

Plaintiff also argues that State Farm did not follow the rules set forth in its claims manual related to "Initial Review Activities," and "Utilization Review." First, as we have already discussed, *ante*, State Farm *did* request additional relevant information from plaintiff and Dr. Weiss for its review. Second, also as previously discussed, *ante*, the phrase "utilization review" does not, as plaintiff asserts, mandate a second opinion before treatment. Instead, the claims manual concludes the "Initial Review Activities" section with the following provision: "After the above processes are followed, any remaining questions or concerns regarding the medical services or the patient's condition shall be documented in the claim file. At this juncture, *it may be necessary to obtain a utilization review or an IME for assistance in resolving the outstanding questions.*" (Italics added.) The manual further provides, in the "Utilization Review" section, that "[a] utilization review *may* be used to address the appropriateness of the health care services proposed for or provided to a person or to address questions concerning the mechanism of an injury . . . within the reviewer's clinical specialty. [¶] The utilization reviewer may also comment on whether the diagnosed injury is related to the event described in the records. . . ." (Italics added.) Here, once plaintiff went forward with his surgery, State Farm reasonably determined that it was necessary to obtain an IME "for assistance in resolving the outstanding questions" related to causation.

In conclusion, and in contrast to *Wilson*, plaintiff did *not* present sufficient evidence for a jury to conclude defendants' initial denial of benefits related to plaintiff's

¹² That a claims representative initially suggested in the activity log that a biomechanical analysis be done does mean that such an evaluation was required by the claims manual.

shoulder surgery was unreasonable and done in bad faith. (*Wilson, supra*, 42 Cal.4th at p. 726.) Moreover, there are no triable issues of fact as to whether State Farm’s investigation was reasonable and whether there was a genuine dispute about the causation of plaintiff’s shoulder injuries. The trial court therefore properly granted summary adjudication on plaintiff’s cause of action for breach of the implied covenant of good faith and fair dealing.¹³

III. Breach of Contract

Plaintiff contends State Farm breached its contract with plaintiff “by unreasonably delaying payment of benefits for over 3 years. [Plaintiff] is not claiming that those benefits are recoverable as damages in this action.” Thus, plaintiff appears to be asserting only that he is owed accrued interest and attorney’s fees as a result of State Farm’s alleged breach of contract.

The trial court found that plaintiff’s breach of contract cause of action failed as a matter of law because it was undisputed that State Farm had paid all of the insurance contract benefits. The court further found that no interest accrued while coverage was unclear and that attorney’s fees were not provided by the contract or a statute. We agree.

First, with respect to prejudgment interest, which plaintiff claims he is owed pursuant to Civil Code section 3302, we have already concluded that no triable issue of fact exists regarding the reasonableness of State Farm’s investigation. A genuine dispute existed as to the cause of plaintiff’s shoulder injuries, with conflicting opinions about the amount owed to him from the time he made his claim until shortly before full benefits were paid in November 2010. Once there was agreement between State Farm and plaintiff on the amount owed under the applicable policy, State Farm paid that amount. Hence, there was no breach of contract and no interest accrued. (Cf. *Levy-Zentner Co. v. Southern Pac. Transportation Co.* (1977) 74 Cal.App.3d 762, 798 [“where a defendant

¹³ Given this conclusion, we need not address plaintiff’s claim that the trial court improperly rejected his claim for punitive damages. (See *Chateau Chamberay, supra*, 90 Cal.App.4th at p. 349, fn. 10 [punitive damage claim was an integral part of, and fell with, appellate court’s rejection of plaintiff’s bad faith cause of action].)

does not know what amount he owes and cannot ascertain it except by accord or judicial process, he cannot be in default for not paying it”].)¹⁴

Second, with respect to attorney’s fees, plaintiff “contends that he was owed attorney’s fees . . . under the authority of *Brandt v. Superior Court* (1985) 37 Cal.3d 813, not because of any language in the policy or statute.” *Brandt* fees, however, are only available as tort damages. (*Id.* at p. 817; accord, *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1079.) Given our conclusion that the trial court properly granted summary adjudication on plaintiff’s bad faith cause of action, plaintiff is not entitled to attorney’s fees under *Brandt*.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to defendants.

¹⁴ Plaintiff cites *Oil Base, Inc. v. Transport Indem. Co* (1957) 148 Cal.App.2d 490, 492, in which the appellate court found that the insurer’s “liability was created by its contract and, under its contract, it was obligated to pay the \$100,000 that was paid by [the insured]. The fact that it misconceived and put an erroneous construction upon this contract in no way affected its liability to pay the \$100,000 at the time the Smith claim was settled, and its obligation to reimburse [the insured] attached the moment [the insured] made the payment which [the insurer] was obligated under its policy to make, and, the amount being certain, interest commenced to run from that date.” Here, as we have explained, unlike in *Oil Base, Inc.* there was no breach of contract and State Farm paid full policy benefits once an agreement was reached as to the amount owed.

Kline, P.J.

We concur:

Richman, J.

Miller, J.