MONTANA THIRD JUDICIAL DISTRICT COURT, POWELL COUNTY

GAGE REAP, Plaintiffs, v. NATHAN WIGHT, THE ESTATE OF NATHAN WIGHT, PROGRESSIVE NORTHWESTERN INSURANCE COMPANY, and JOHN DOE ONE, Defendants.	No. DV-14-42 **ORDER ON MOTIONS FOR SUMMARY JUDGMENT**
HALI PISHION, Plaintiff, v. NATHAN WIGHT, THE ESTATE OF NATHAN WIGHT, PROGRESSIVE NORTHWESTERN INSURANCE COMPANY, and JOHN DOE ONE, Defendants.	No. DV-14-43

Defendant Progressive Northwestern Insurance Company ("Progressive") moved for summary judgment in both of these consolidated cases. Plaintiffs Gage Reap and Hali Pishion (collectively, "Plaintiffs") filed response briefs in opposition. Progressive filed reply briefs. The parties presented oral arguments at a hearing on June 30, 2017. The matter is ready for decision.

BACKGROUND

The following facts are undisputed. On June 13, 2011, 20-year-old Nathan Wight was driving his 1991 Ford Explorer west on Old Stage Road in Powell County, Montana with five teenage and pre-teenage passengers in the vehicle.[1] Approximately 8.3 miles west of Deer Lodge, while driving at excessive speeds, the vehicle crossed a cattle guard, went off the road to the right, and rolled multiple times before coming to rest upright, partially off the roadway. Wight was ejected from the vehicle, as were 12-year-old Hailey Pollard and 16-year-old Jonathan Sanderson. Wight later died from his injuries.

At the time of the accident, Wight maintained a policy of liability insurance with Progressive providing the minimum coverage required by law[2], $25,000 per person and $50,000 per accident. (Exh. 1). The policy requires the person seeking coverage to "promptly report each accident or loss" and to "provide any written proof of loss [Progressive] may reasonably require." (Exh. 1 at 22-23). On June 29, 2011, Progressive sent letters to each potential claimant requesting release of medical bills and records. (Exh. 3). Pollard and Sanderson returned the medical release forms, and both made substantial claims. However, the three other potential claimants, including Plaintiffs Reap and Pishion, did not respond to this first letter.

On July 22, 2011, Progressive sent a second letter, this time indicating its intent to tender its insured's policy limits to "all five injured parties" and again requesting a response from Plaintiffs Reap and Pishion. (Exh. 4). Again, Plaintiffs did not respond. (Exh. 4). Accordingly, on August 26, 2011, Progressive sent a third letter to Plaintiffs indicating Progressive's intent to

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[1] The details of the crash are taken from Progressive's Exhibit 2, a Montana Vehicle Crash Report prepared by the Montana Highway Patrol. Police reports are hearsay. *See State v. Nelson*, 172 Mont. 65, 72, 560 P.2d 897, 901 (1977). However, the details of the crash are not relevant to the insurance issue in this case and are not disputed by the Plaintiffs. The Court recites those details only to fill in details of facts agreed to by the parties in their briefs. *See Johnson v. Costco Wholesale*, 2007 MT 43, ¶ 33 fn 4, 336 Mont. 105, 152 P.3d 727 (considering hearsay in granting judgment as a matter of law when neither party objected).

[2] *See* 61-6-103(1)(b), MCA.

settle with only those parties for whom it had received medical bills "on or before August 2 unless we hear otherwise." (Exh. 5). Again, Plaintiffs did not respond.

On August 31, 2011, Progressive sent a fourth letter, this time directly asking the Plaintiffs to "[p]lease contact us upon receipt of this letter to advise if you intend to pursue an injury claim for the above accident." (Exh. 6). The letter postponed the August 2 settlement deadline set forth in the previous letter "pending responses from all effected (sic) parties." (Exh. 4). When the Plaintiffs again did not respond, Progressive retained the Williams Law Firm to assist in the settlement process.

On October 14, 2011, Attorney Nicholas J. Pagnotta with the Williams Law Firm wrote a fifth letter to the Plaintiffs. The letter informed them of Progressive's policy limits and explained, "[i]n order to assess an equitable distribution of available insurance limits, we need to determine who is making a claim and whether there are any damages for which you are seeking compensation." (Exh. 7). The letter continued,

> Therefore, please notify us (1) if you are making a claim for damages against Nathan Wight (deceased) arising out of the June 13, 2011 automobile accident; and (2) if you are making a claim, the amount of damages you are seeking. If you are seeking damages, please also provide documentation of such damages, such as copies of medical records and bills.
>
> ...
>
> Please be advised that if you are making a claim, you may be named in a court proceeding instituted by Progressive known as an interpleader, where a court will be asked to determine an appropriate allocation of policy limits among claimants.

(Exh. 7). Finally, the letter set a deadline to respond:

> In order to promptly respond to those who have already made claims, we must set a deadline for you to notify us of your claim. Please respond within 30 days of the date of this letter. If we do not receive a response within this time frame, we will assume that you are not making a claim against Mr. Wight.

(Exh. 7). Plaintiffs did not respond. After 30 days had expired, Progressive paid Pollard and Sanderson $25,000 each.

Nearly three years passed. Then on May 13, 2014, Plaintiffs each filed complaints naming "Nathan Wight" and "the Estate of Nathan Wight" as defendants. Neither person or entity, however, existed. Wight died in the accident and Wight's relatives never filed a probate action to actually create an "estate." Accordingly, Progressive hired attorney Paul R. Haffeman to seek a dismissal of the action on behalf its insured. Haffeman, acting as "Attorney[] for Nathan Wight...and the Estate of Nathan Wight," moved to dismiss the complaint and Judge Dayton[3] granted that motion but dismissed the complaint without prejudice. (Doc. 15).

In response to the motion to dismiss, Plaintiffs also moved to amend their complaint to add Progressive as a defendant and add "a claim for bad faith pursuant to the Montana Unfair Claim Practices Act." (Doc. 8). By giving Plaintiffs 30 days to file a claim, Plaintiffs argued, Progressive "effectively shortened [Plaintiffs'] statute of limitations right to 30 days." (Doc. 8). Plaintiffs argued this statement constituted a "misrepresent[ation of] pertinent facts or insurance policy provisions relating to coverages at issue" in violation of Montana's Unfair Trade Practices Act ("UTPA"). *See* § 33-18-201(1), MCA.

In response, Haffeman pointed to Section 33-18-242(6)(b) of the UTPA which prohibits a party from filing a bad faith claim until after settlement or adjudication of the "underlying claim." § 33-18-242(6)(b), MCA. Upon dismissal of the complaints, he argued, there would be no "underlying claim" to settle or adjudicate, thereby precluding a bad faith action and rendering the amendment futile. (Doc. 9 at 5-6). In granting leave to amend, however, the Court observed, Haffeman had "argue[d] to the contrary...in oral argument[,] positing that an insurer[4] can be sued without an underlying judgment if the conduct of the insurer prevented the Plaintiff from being able to obtain the judgment." (Doc. 15 at 2). The order does not indicate what authority

[3] This Judge was later substituted in place of Judge Dayton.
[4] Even when hired by the insurer, "the insured is the sole client of defense counsel." *In re Rules*, 2000 MT 110, ¶ 38, 299 Mont. 321, 2 P.3d 806. Therefore, Heffeman's statements do not bind Progressive.

the parties cited for this proposition, nor does it specify precisely what conduct allegedly prevented Plaintiffs from obtaining a judgment on the underlying claim.

Plaintiffs filed their First Amended Complaint on October 3, 2016 and a Second Amended Complaint on February 15, 2017. The Second Amended Complaint again purports to assert a negligence claim against both "Nathan Wight" and "The Estate of Nathan Wight," even though it does not clarify whether the latter entity even exists. (2d Am. Compl. at 1-3). As relevant to the present motion, the Second Amended Complaint also alleges Progressive "acted outside the terms of the Unfair Claim Settlement Practices Act" by "essentially shorten[ing] the statute of limitations of Plaintiff[s'] claims." (2d Am. Compl., ¶¶ X, XI). Plaintiffs do not assert any other claim against Progressive.

Progressive—this time acting through its own counsel, Randall G. Nelson—moved for summary judgment. Progressive argues Plaintiffs have confused a deadline to file a claim with the limitations period for filing a lawsuit. (Reply Br. at 8). Because the letter does not make any representation about the limitations period, Progressive argues it cannot be liable for misrepresentation under the UTPA. (Reply Br. at 8). Moreover, Progressive argues it could not have violated the UTPA because the Plaintiffs never filed a claim. The duty to file a claim, Progressive points out, rests with the claimant. (Opening Br. at 6). The insurer has "no duty to inform [the insured] of his duty to assert a separate claim." *Grenz v. Fire & Casualty of Connecticut*, 260 Mont. 60, 857 P.2d 730 (1993) ("*Grenz II*"). The insurer does have a duty, Progressive notes, to "promptly" settle with claimants who did make claims. § 33-18-201(6), MCA. Accordingly, after multiple attempts to solicit a claim from Plaintiffs and the passage of six months from the date of the accident, Progressive had an obligation to promptly pay the policy limits to Pollard and Sanderson as required by the UTPA. (Opening Br. at 8).

In response, Plaintiffs admit the letter "did not discuss [the plaintiffs] statute of limitations right." (Resp. Br. at 4). However, they argue this omission constituted a misrepresentation in light of the fact the letter gave them only 30 days to file a claim. (Resp. Br. at 5). Specifically, Plaintiffs fault Progressive's letter for failing to "explain that pursuant to Montana law ... 'there are exceptions to the general statute of limitations when the person entitled to bring the action is afflicted with singular or multiple disabilities,'" including the person's status as a minor. (Resp. Br. at 4) (citing *Murphy for L.C. v. State*, 229 Mont. 342, 344, 748 P.2d 907, 908 (1987)). Plaintiffs argue they had "three years after [their] 18th birthday[s] to either settle [the] matter or file a complaint." (Resp. Br. at 6) (citing § 27-2-401(1), MCA). "By paying out the policy limits to two claimants," Plaintiffs argue, "Progressive ... has committed bad faith..." (Resp. Br. at 6-7).

SUMMARY JUDGMENT STANDARD

Summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(c)(3), M.R.Civ.P. "A material fact is a fact that involves the elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact." *Krajacich v. Great Falls Clinic, LLP*, 2012 MT 82, ¶ 8, 364 Mont. 455, 276 P.3d 922. Where, as here, the parties do not dispute the material facts, the question whether summary judgment should be granted is one of law. *Mesa Communs. Group, LLC v. Yellowstone Cnty.*, 2002 MT 73, ¶ 11, 309 Mont. 233, 45 P.3d 37; *Helena Aerie No. 16, F.O.E. v. DOR*, 251 Mont. 77, 80, 822 P.2d 1057, 1058 (1991); *Cape-France Enters. v. Estate of Peed*, 2001 MT 139, ¶ 14, 305 Mont. 513, 29 P.3d 1011.

DISCUSSION

Under the UTPA, an insurer may not "misrepresent pertinent facts or insurance policy provisions relating to coverages at issue." § 33-18-201(1), MCA. The UTPA gives insureds and third-party claimants an "independent cause of action" against the insurer for violation of this provision. § 33-18-242(1), MCA. This means a UTPA claim is "separate and distinct" from the underlying "coverage action." *Graf v. Continental Western Ins. Co.*, 2004 MT 105, ¶ 15, 321 Mont. 65, 89 P.3d 22; *Fisher v. State Farm Gen. Ins. Co.*, 1999 MT 308, ¶ 28, 297 Mont. 201, 991 P.2d 452. Even before the enactment of this provision in 1987, the Supreme Court recognized the "undue leverage" created by forcing insurance companies to defend two lawsuits at the same time. *Fode v. Farmers Ins. Exch.*, 221 Mont. 282, 287, 719 P.2d 414 (1986). Thus, although the Court allowed claimants to file bad faith claims simultaneously with the coverage claim in order to toll the statute of limitations, the Court indicated district courts should "suspend" adjudication of the UTPA claim "until the liability issues of the underlying case have been determined by either settlement or judgment." *Fode*, 221 Mont. at 287.

The legislature adopted a version of this rule the following year. As such, the UTPA now explicitly provides, "A third-party claimant may not file an action under this section until after the underlying claim has been settled or a judgment entered in favor of the claimant on the underlying claim." § 33-18-242(6)(b), MCA. This provision, the Supreme Court has subsequently explained, "serves to ... protect insurers from frivolous claims and facilitate judicial economy" by extinguishing meritless UTPA claims "before a claim is ever filed." *Safeco Ins. Co. v. Mont. Eighth Jud. Dist. Ct.*, 2000 MT 153, ¶ 28, 300 Mont. 123, 2 P.3d 834. In a series of cases, the Supreme Court has applied this provision to dismiss UTPA claims filed before settlement or adjudication of the underlying claim. *See Grenz v. Orion Group, Inc.*, 243

Mont. 486, 795 P.2d 444 (1990) ("*Grenz I*"); *Poteat v. St. Paul Mercury Ins. Co.*, 277 Mont. 117, 918 P.2d 677 (1996); *DuBray v. Farmers Ins. Exch.*, 2001 MT 251, 307 Mont. 134, 36 P.3d 897; *Hop v. Safeco Ins. Co.*, 2011 MT 215, 361 Mont. 510, 261 P.3d 981.

In *Grenz I*, an insurer reduced a workers' compensation claimant's benefits, causing the worker to seek their reinstatement through mediation. *Grenz I*, 243 Mont. at 487. Even though the mediation was successful and the insurer did reinstate his benefits retroactive to the date of their reduction, the worker sued the insurer for bad faith. *Id* at 488-89. The district court dismissed his bad faith claim, holding "[t]here has been no determination from the Worker's Compensation Court or any other court that the disability rating from the Northwest Panel and the subsequent (temporary) reduction in benefits was improper." *Id.* at 489. The Supreme Court affirmed, agreeing Section 33-18-242(6)(b) barred the worker's bad faith claim pending a settlement or adjudication of the underlying claim. *Id.* at 490-91.

In *Poteat*, the insurer and the insured entered into a "full and final compromise settlement agreement" as to the insured's claims for coverage. *Poteat*, 277 Mont. at 118. However, the settlement agreement did not address future claims. *Id.* The insured subsequently filed suit against the insurer for bad faith arising from conduct that occurred after the settlement agreement. Citing Section 33-18-242(6)(b), the district court dismissed those claims, and the Supreme Court affirmed. *Id.* at 121. The Court reasoned, "Since the underlying claim must be settled or adjudicated before a party is permitted to bring an independent action under UTPA, Poteat cannot proceed with any claim which encompasses unfair trade practices committed *after* settlement unless or until she obtains a judgment or settlement of unresolved future medical benefits..." *Id.* at 120 (emphasis in original).

In *DuBray*, the third party brought a declaratory judgment action to recover, in part, for "pain and discomfort, mental distress, inconvenience and embarrassment, punitive damages, costs of suit and interest." *DuBray*, ¶ 5. Although the insurer had already admitted its insured "was primarily liable for the accident," the third-party's underlying suit against the insured to determine and recover damages for negligence "had not been resolved." *Id.* at ¶¶ 4-5. The district court granted the insurer's motion to dismiss and the Supreme Court affirmed in relevant part. *Id.* at ¶¶ 7, 16. Citing Section 33-18-242(6)(b), the Court held a third-party claimant may not sue "to determine the insurer's liability prior to resolution of the underlying claim on which the insurer's liability is premised." *Id.* at ¶ 13.

Finally, in *Hop*, the third party sued the insurer for payment of "residual diminished value"—the difference between the value of the vehicle before the accident and after post-accident repairs. *Hop*, ¶ 5. Although the insured admitted her negligence had caused the accident, the third party had not yet served the insured with a complaint for the additional residual diminished value damages. *Id.* at ¶¶ 4, 13. Accordingly, the Court enforced the procedural bar set forth in Section 33-18-242(6)(b) and dismissed the action without prejudice. *Id.* at ¶¶ 17, 21.

The present case is indistinguishable. As in *Poteat*, *DuBray*, and *Hop*, Plaintiffs here seek damages from the insurer prior to a settlement or adjudication of their claims against the insured. Like the plaintiff in *Grenz I*, who sought bad faith damages even though there had been "no determination" that his "reduction in benefits was improper," Plaintiffs here seek bad faith damages from Progressive even though there has been no determination that Progressive's alleged shortening of the claims filing period was improper. This is precisely the type of dual litigation Section 33-18-242(6)(b) was designed to prevent.

The Plaintiffs' right to coverage in this case necessarily depends upon a number of factors: (1) the insured's negligence, (2) the causal relationship between that negligence and the injuries claimed, and (3) whether the Plaintiffs made a timely claim with Progressive. The Second Amended Complaint sidesteps these coverage issues entirely. Instead, it requests damages under the UTPA for an alleged "misrepresentation" of the deadline to make a claim without alleging Plaintiffs even made a claim. If Plaintiffs' failure to make a timely claim with Progressive precludes them from obtaining coverage, then the issue of the alleged misrepresentation becomes moot. Section 33-18-242(6)(b) promotes judicial economy by requiring Plaintiffs to put the horse before the cart.

Plaintiffs argue this reasoning does not apply where the conduct of the insurer prevents the plaintiff from being able to obtain a judgment. Plaintiffs cite *Graf* for this proposition. In *Graf*, the insured was unable to stop at a red light and crashed into a vehicle driven by Steven Cloutier, pushing Cloutier's vehicle into a vehicle driven by the plaintiff, Karen Graf. *Graf*, ¶ 6. Both Cloutier and Graf filed separate actions against the insured for negligence. *Id.* Graf's case went to trial first. After the presentation of the evidence, the district judge denied Graf's motion for a directed verdict. *Id.* The jury then returned a verdict in favor of the insured. *Id.* Graf appealed. *Id.* During the pendency of the appeal, the judge in Cloutier's case granted Cloutier's motion for a directed verdict against the insured. *Id.* Apparently believing Graf would likely succeed on appeal, the insured settled with Graf before the reply brief became due. *Id.*

Graf then filed a bad faith action against the insurer. *Id.* The district court granted the insurer's motion for summary judgment on the ground the unfavorable jury verdict in the underlying case precluded a bad faith claim. *Id.* at ¶ 8. The Supreme Court disagreed. The Court emphasized the disjunctive nature of Section 33-18-242(6)(b), MCA, which allows the

plaintiff to proceed with a bad faith action after obtaining *either* a favorable judgment *or a settlement*. *Id.* at ¶ 15. Since Graf settled the underlying case, she satisfied the prerequisites for maintaining a bad faith action against the insurer. *Id.* In a concurring opinion, Justice Warner clarified the reasoning by explaining an underlying case is not "final," for purposes of Section 33-18-242(6)(b), until after the appeal process has been exhausted. *Id.* at ¶ 34.

Nothing in *Graf* stands for the proposition argued by Plaintiffs. The insurer in that case did not "prevent" the insured from obtaining a judgment. In fact, the insurer was not even a party to the underlying case. Unlike the Plaintiffs here, Ms. Graf actually settled the underlying claim prior to pursuing a UTPA claim against the insurer. If anything, *Graf* only lends further support to the application of Section 33-18-242(6)(b) in this case.

Nevertheless, the Court understands Plaintiffs' position. And while the Court agrees actions taken by the insurance company to prevent Plaintiffs from obtaining a settlement or judgment should not be tolerated, the undisputed facts show Progressive did not take any such actions in this case. The Plaintiffs could have obtained a judgment against Wight's estate regardless of whether Wight's family chose to open an estate. Under the Uniform Probate Code, all "persons interested in decedent's estate" may petition for probate. *See* §§ 72-3-105 & -301, MCA. "Interested persons" include "creditors." § 72-1-103(25), MCA. The Code specifically allows "any creditor" to serve as personal representative if persons with higher priority decline to serve. § 72-3-502(8), MCA.

On the motion to dismiss, Progressive argued the nonclaim statute would bar an action against Wight's Estate. That statute bars "[a]ll claims against a decedent's estate that arose before the death of the decedent ... unless presented ... (a) within 1 year after the decedent's death..." § 72-3-803(1), MCA. However, the statute further provides:

> This section does not affect or prevent:
> (b) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which the decedent or the personal representative is protected by liability insurance...

§ 72-3-803(3), MCA. The Montana Supreme Court has held subsection (3)(b) creates an exception the nonclaim statute "and as such ... would allow a claim against an estate to continue for the purpose of determining dollar damages." *Goettel v. Estate of Ballard*, 2010 MT 140, ¶ 26, 356 Mont. 527, 234 P.3d 99.

Progressive also argued Plaintiffs would be unable to take advantage of the exception in this case because it applies only "to the limits of the insurance protection" and because Progressive had already exhausted its policy limits by paying Pollard and Sanderson. But as the Supreme Court held in *Goettel*, "this phrase should be read in the context of a liability insurer's waiver of limits or its responsibility for an excess judgment." *Goettel*, ¶ 20. Since an insurer's violation of the UTPA constitutes a waiver of its liability limits, the mere fact the insurer paid its policy limits does not prevent the third-party from suing the insured's estate under Section 72-3-803(3)(b), MCA to determine the amount of damages before pursuing a bad faith action. *Goettel*, ¶ 27. Progressive simply did not prevent Plaintiffs from filing a claim against the estate.

Finally, although the Supreme Court has recognized an exception to the procedural bar enacted by Section 33-18-242(6)(b), that exception does not apply in this case. The UTPA requires insurers to "attempt in good faith to effectuate *prompt*, fair, and equitable settlements of claims in which liability has become reasonably clear." § 33-18-201(6), MCA (emphasis added). Accordingly, in *Ridley v. Guaranty National Ins. Co.*, 286 Mont. 325, 951 P.2d 987 (1997), the Court held Section 33-18-242(6)(b), MCA would not bar a declaratory judgment action against the insurer prior to settlement or adjudication of the underlying claim when the claimant seeks recovery for medical expenses or other out-of-pocket damages the liability for which "is

reasonably clear." *Ridley*, 286 Mont. at 334; *see also Safeco*, ¶¶ 31-32; *DuBray*, ¶ 14; *Hop*, ¶ 17. Plaintiffs have not filed a declaratory judgment action. Therefore, their claim does not fall within the exception.

Moreover, the *Ridley* exception has its roots in the need to compensate innocent victims for their injuries promptly—i.e. before a party could be reasonably expected to fully litigate the underlying claim. As the Court explained:

> One of the most significant obligations that innocent victims of automobile accidents incur and for which mandatory liability insurance laws were enacted, is the obligation to pay the costs of medical treatment. If the insurer has no obligation to pay those expenses in a timely fashion, even though liability is reasonably clear, then the protection provided by Montana's mandatory liability laws would be of little value. Medical expenses from even minor injuries can be devastating to a family of average income. The inability to pay them can damage credit and, as alleged in this case, sometimes preclude adequate treatment and recovery from the very injuries caused.

Ridley, 286 Mont. at 335.

Unlike the victims in *Ridley* and its progeny, the Plaintiffs in this case waited nearly three years to seek compensation for their medical expenses, despite Progressive's multiple attempts to contact them in the months following the accident. By their delay, Plaintiffs have waived any claim to urgency. Moreover, the parties dispute whether liability for medical expenses is "reasonably clear" in light of Plaintiff's failure to file a claim. For these reasons it is not clear Plaintiffs' action would qualify for the *Ridley* exception even if they amended their complaint to assert a declaratory judgment claim.

CONCLUSION

Section 33-18-242(6)(b) requires a third party claimant to "wait until after the underlying claim has been settled or a judgment is entered in [his] favor ... on the underlying claim" before pursuing a bad faith claim against the insurer. *Safeco*, ¶ 28. Plaintiffs have not obtained a

settlement or judgment in the underlying case. Because the Court can resolve the present motion on this narrow ground, the Court need not address Progressive's remaining arguments. The UTPA claim should be dismissed without prejudice.

NOW THEREFORE IT IS HEREBY ORDERED as follows:

1. Progressive's motion for summary judgment is granted. The UTPA claim is dismissed without prejudice.

2. The Clerk of Court will please file this order and distribute a copy to the parties.

Dated: July 21, 2017

LUKE BERGER
District Judge