**NOT FOR PUBLICATION**

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JENNIFER M. WALKER, Individually and as Surviving Spouse and as Administrator and Heir; and as Parent and Natural Guardian on behalf of Estate of Travis J. Walker on behalf of Carter Walker on behalf of Nolan WalkerIndividually and as Surviving Spouse and as Administrator and Heir; and as Parent and Natural Guardian on behalf of Estate of Travis J. Walker on behalf of Carter Walker on behalf of Nolan Walker,

Plaintiff-Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

No. 17-16102

D.C. No.
2:16-cv-00986-JCM-PAL

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Submitted February 11, 2019**
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: McKEOWN, W. FLETCHER, and MURGUIA, Circuit Judges.

Travis Walker was riding an ATV on sand dunes in Nevada when his ATV stalled. He kneeled beside the ATV to inspect the problem, and was hit by a sandrail.[1] Walker died at the scene.

Appellant, Jennifer Walker, is Travis Walker's widow. Ms. Walker opened a claim under her own policies with State Farm Mutual Automobile Insurance Company ("State Farm") because the driver of the sandrail was uninsured. Though State Farm authorized payment for Travis Walker's funeral costs, it denied coverage for uninsured motorist benefits based on the policy's off-road vehicle exclusion. Ms. Walker sued State Farm for (1) breach of contract; (2) violation of the Unfair Claims Settlement Practices Act; (3) breach of the covenant of good faith and fair dealing; (4) breach of fiduciary duty; (5) misrepresentation; and (6) punitive damages. State Farm moved for summary judgment in its favor on all claims, which the district court granted. Ms. Walker appeals the district court's order.[2] We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

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[1] It appears that a sandrail is much like a dune buggy.

[2] In her opening brief, Ms. Walker does not argue her breach of contract claim or breach of fiduciary duty claim. Therefore, we limit our attention to the remaining claims for violation of the Unfair Claims Settlement Practices Act, breach of the covenant of good faith and fair dealing, and misrepresentation. *Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1046 n.7 (9th Cir. 1999).

We review a district court's order granting summary judgment de novo. *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011). In diversity actions, federal courts apply state substantive law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

State Farm did not waive its right to the exclusion defense based on its payment of funeral costs because it did not intentionally relinquish a known right. *Prime Ins. Syndicate, Inc. v. Damaso*, 471 F. Supp. 2d 1087, 1098 (D. Nev. 2007) (citing *Santino v. Great Am. Ins. Co.*, 9 P.2d 1000, 1004 (Nev. 1932)). From the outset, State Farm questioned whether the sandrail qualified as an uninsured motor vehicle under the policy because it appeared to be an off-road vehicle and the accident occurred off public roads. Indeed, State Farm issued a letter reserving its rights to deny coverage because it had a concern regarding the nature of the sandrail. *See also Havas v. Atl. Ins. Co*., 614 P.2d 1, 2 (Nev. 1980) ("Where . . . the insurer asserts the [specific] defense from the outset via a non-waiver agreement, a subsequent denial of coverage on other grounds does not constitute a waiver of the [specific] defense.").

State Farm conducted a reasonable investigation and therefore is not liable under the Unfair Claims Settlement Practices Act. Nev. Rev. Stat. § 686A.310(1)(c); *see Zurich Am. Ins. Co. v. Coeur Rochester, Inc*., 720 F. Supp. 2d 1223, 1237 (D. Nev. 2010) (applying Nevada law). State Farm investigated the

sandrail and the nature of the accident, and considered whether the sandrail fell within the policy's exclusion for off-road vehicles. Ms. Walker argues that State Farm should have conducted a more thorough investigation but does not argue that a more thorough investigation would lead to the conclusion that the sandrail was *not* primarily an off-road vehicle. *See Zurich Am. Ins. Co.*, 720 F. Supp. 2d at 1237 ("[Insurance company] did not fail to investigate [insured's] claim appropriately; rather, [insurance company] rejected [insured's] reasoning in support of its claim.").

State Farm did not violate the covenant of good faith and fair dealing. "To establish a prima facie case of bad-faith refusal to pay an insurance claim, the plaintiff must establish that the insurer had no reasonable basis for disputing coverage, and that the insurer knew or recklessly disregarded the fact that there was no reasonable basis for disputing coverage." *Powers v. United Servs. Auto. Ass'n*, 962 P.2d 596, 604 (Nev. 1998). Ms. Walker does not raise a genuine issue of material fact as to whether State Farm had a reasonable basis for denying coverage. Ms. Walker's policy clearly rejects coverage for an accident involving an off-road vehicle if the accident occurred off public roads. State Farm's reasonable investigation revealed that Travis Walker was involved in an accident with an off-road vehicle while on a sand dune. *See Am. Excess Ins. Co. v. MGM Grand Hotels, Inc.*, 729 P.2d 1352, 1354-55 (Nev. 1986) ("Bad faith involves an

actual or implied awareness of the absence of a reasonable basis for denying benefits of the policy.").

State Farm is not liable for fraudulent misrepresentation. *See Bulbman, Inc. v. Nev. Bell*, 825 P.2d 588, 592 (Nev. 1992) (stating the elements required to prove a claim for fraudulent misrepresentation). Nowhere does Ms. Walker point to a false representation made by State Farm. *See id*. Ms. Walker may have misunderstood her policy in that she did not realize an exception for off-road vehicles existed, but she offered no evidence showing that this misunderstanding was due to an alleged false representation. *See Farmers Ins. Exch. v. Young*, 832 P.2d 376, 379 n.2 (Nev. 1992) (consumers are responsible for reading and understanding their insurance policies).

The district court did not abuse its discretion by denying Ms. Walker's request for additional discovery under Federal Rule of Civil Procedure 56(d). *See Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008).[3] Even if Ms. Walker was able to pursue additional discovery, she did not show that any additional information exists that would be essential to oppose summary judgment. *Id*.

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[3] Federal Rule of Civil Procedure 56(d) was previously numbered 56(f), thus some previous case law refers to 56(f). For the sake of clarity it is referred to herein as 56(d). *See* 2010 Amendment to Fed. R. Civ. P. 56 ("Subdivision (d) carries forward without substantial change the provisions of former subdivision (f)").

**AFFIRMED**.