NOT FOR PUBLICATION

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LIBERTY MUTUAL FIRE INSURANCE COMPANY, Plaintiff-Counter-Defendant - Appellee, v. DRAKE FORSBERG; ESTATE OF DAVID FORSBERG, Defendant-Counter-Claimants - Appellants.	No. 24-5229 D.C. No. 2:23-cv-00188-SAB MEMORANDUM[*]

Appeal from the United States District Court
for the Eastern District of Washington
Stanley Allen Bastian, District Judge, Presiding

Submitted July 9, 2025[**]
Seattle, Washington

Before: HAWKINS, GRABER, and BENNETT, Circuit Judges.

[*] 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).

Defendants Drake Forsberg ("Drake") and the Estate of David Forsberg ("the Estate") appeal from the summary judgment entered in favor of Plaintiff Liberty Mutual Fire Insurance Co. ("Liberty Mutual").

We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's grant of summary judgment. *See Progressive Cas. Ins. v. Owen*, 519 F.3d 1035, 1037 (9th Cir. 2008). "We review for abuse of discretion the district court's decision to grant or deny a motion for reconsideration," *Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950, 954 (9th Cir. 2013), and the district court's denial of Defendants' motion to compel discovery, *Stevens v. Corelogic, Inc.*, 899 F.3d 666, 677 (9th Cir. 2018). We affirm.

1. The district court did not err in concluding that Drake was not covered under either the personal liability policy ("Liability Policy") or the automobile policy ("Auto Policy") issued by Liberty Mutual to David and Darden Forsberg.

Washington law applies in this diversity action. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). "The interpretation of insurance policy language is a question of law, reviewed de novo." *Vasquez v. Am. Fire & Cas. Co.*, 298 P.3d 94, 96 (Wash. Ct. App. 2013). "The policy language is to be given the same 'fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.'" *Butzberger v. Foster*, 89 P.3d 689, 692 (Wash. 2004) (quoting *Overton v. Consol. Ins.*, 38 P.3d 322, 325 (Wash. 2002)).

The Liability Policy promised to defend and pay excess sums only for "insured" persons. The "insured" persons under the Liability Policy were "you" and, "with respect to the ownership, use, loading, or unloading of a motor vehicle:" (1) a person "listed in the Drivers Section of [the] Policy Declarations [who] has a valid drivers license;" or (2) a family member with a recently acquired driver's license if the policy holder notified Liberty Mutual within 30 days of acquiring the license. Drake fits neither category. Drake was not listed under the Policy Declarations, and he did not have a valid driver's license at the time of the accident.[1]

The Auto Policy excludes "[l]iability [c]overage for the ownership, maintenance, or use of" "[a]ny vehicle, other than 'your covered auto, which is . . . owned by any 'family member;' or . . . furnished or available for the regular use of any 'family member.'" The Auto Policy defines "[y]our covered auto" as "[a]ny vehicle shown in the Declarations" or "[a]ny of the following types of vehicles on the date you become owner . . . a pickup or van that . . . is not used for the delivery or transportation of goods and materials."

The truck that Drake was driving at the time of the crash was not a "covered auto." The truck was not listed under the Auto Policy Declarations. Drake was the

[1] According to the Washington State Department of Licensing, Drake's license was suspended on October 12, 2020. Drake's license was not reinstated before the accident in November 2021.

owner of the truck, and there is no triable issue of fact that he wasn't the owner. Drake testified that *he* bought the truck, which was confirmed by the October 8 bill of sale. Defendants argue that the October 28 bill of sale proves that Darden was the owner of the truck, but Drake testified that he forged that bill of sale. Drake's testimony that the bill of sale was forged was confirmed by Darden and Tracy Gibson. Because Drake was the owner of the truck, it could not have been a "covered auto" under the Auto Policy.

The truck was also "furnished or available for [Drake's] regular use." Regular use is not a high bar under Washington state law. *See Grange Ins. Ass'n v. MacKenzie*, 694 P.2d 1087, 1090 (Wash. 1985) (describing irregular use as "sporadic, isolated incidence" and finding that the use of a car "at least 4 to 6 times per month" is regular use). Drake had regular use of the truck to move his belongings and run errands. Because Drake had regular use of the truck and it was not a "covered auto," the district court did not err in determining that he was not covered under the Auto Policy.

2. The district court did not err in granting summary judgment in favor of Liberty Mutual on Defendants' bad-faith counterclaim. Defendants argue that Liberty Mutual "acted in bad faith in its duty to defend Drake" by not providing a defense until November 2023. Under Washington state law, "[t]he triggering event [of the duty to defend] is the filing of a complaint alleging covered claims." *Griffin*

v. Allstate Ins., 29 P.3d 777, 780–81 (Wash. Ct. App. 2001). A covered party must tender a claim to the insurer to trigger the duty to defend. *See Unigard Ins. v. Leven*, 983 P.2d 1155, 1160 (Wash. Ct. App. 1999).

Liberty Mutual's duty to defend attached no earlier than October 2023, when Drake's attorney sent Liberty Mutual a letter stating that "[t]he Estate of David Forsberg [wa]s pursuing a claim against Drake Forsberg for the . . . Crash." This was the first time there was any indication that the Estate, or anyone, was pursuing a claim against Drake. In response, Liberty Mutual sent Drake a letter on November 1 informing him that it agreed to provide a defense "subject to a full reservation of rights." An insurer may provide a defense subject to a reservation of rights under Washington law. *See Truck Ins. Exch. v. Vanport Homes, Inc.*, 58 P.3d 276, 282 (Wash. 2002). Liberty Mutual therefore did not act in bad faith.

3. The district court did not err by granting summary judgment on Defendants' remaining counterclaims, all of which were premised on Liberty Mutual's purported bad faith.

4. The district court did not abuse its discretion in denying the Estate's motion to compel discovery. David was an insured of Liberty Mutual, but the files that the Estate sought pertained to Drake, not David or the Estate. The exception to attorney client privilege under Washington law, *see Cedell v. Farmers Ins. Co. of Wash.*, 295 P.3d 239, 245–47 (Wash. 2013), does not apply to a "stranger" to Drake's bad faith

claim. The Estate recognized that its request came "through Drake Forsberg's [alleged] interest as an insured."

AFFIRMED.