VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 20-CV-00703

Kristy Cote v. QBE Insurance Corporation

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This is a dispute over the right of a workers' compensation insurer to reimbursement from the proceeds of its insured's underinsured motorist coverage. Plaintiff Kristy Lee Cote filed this action, seeking a declaration that her workers' compensation insurer, Defendant QBE Insurance Corporation, is not entitled to such reimbursement. She also asserted claims for damages. The parties have crossed-moved for summary judgment—Ms. Cote only as to one of her claims for declaratory relief, and QBE as to all claims but a part of one of Ms. Cote's claims for declaratory relief. The court denies Ms. Cote's motion and grants QBE's.

Background

Ordinarily, the standard for summary judgment is so familiar that the court need not recite it. Here, however, the failure of Ms. Cote to apprehend and meet her burdens suggests the wisdom of belaboring the obvious. Under Rule 56, the initial burden falls on the moving party to show an absence of dispute of material fact. *E.g.*, *Couture v. Trainer*, 2017 VT 73, ¶ 9, 205 Vt. 319 (citing V.R.C.P. 56(a)). When the moving party has made that showing, the burden shifts to the non-moving party; that party may not rest on mere allegations, but must come forward with evidence that raises a dispute as to the facts in issue. *E.g.*, *Clayton v. Unsworth*, 2010 VT 84, ¶ 16, 188 Vt. 432 (citing *Alpstetten Ass'n, Inc. v. Kelly*, 137 Vt. 508, 514 (1979)). Where that party bears the burden of proof on an issue, if fairly challenged by the motion papers, it must come forward with evidence sufficient to meet its burden of proof on that issue. *E.g.*, *Burgess v. Lamoille Housing P'Ship*, 2016 VT 31, ¶ 17, 201 Vt. 450 (citing *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989)). The evidence, on either side, must be admissible. *See* V.R.C.P. 56(c)(2), (4); *Gross v. Turner*, 2018 VT 80, ¶ 8, 208 Vt. 112 ("Once a claim is challenged by a properly supported motion for summary judgment, the nonmoving party may not rest upon the allegations in the pleadings, but must come forward with admissible evidence to raise a dispute regarding the facts."). The court must view all evidence in the light most favorable to the non-

moving party and give that party the benefit of all reasonable doubts and inferences. *Carr v. Peerless Ins. Co.*, 168 Vt. 465, 476 (1998).

Rule 56(c) specifies the mechanism by which the parties meet their respective burdens. "A moving party asserting that a fact cannot genuinely be disputed must support the assertion by filing a separate and concise statement of undisputed material facts consisting of numbered paragraphs with specific citations to particular parts of materials in the record . . . ." V.R.C.P. 56(c)(1). Conversely, "[a] nonmoving party responding to a statement of undisputed material facts and asserting that a fact is genuinely disputed, that the materials cited do not establish the absence of a genuine dispute, or that the moving party cannot produce admissible evidence to support the fact, must file a paragraph-by-paragraph response, with specific citations to particular parts of materials in the record that the responding party asserts demonstrate a dispute . . . ." V.R.C.P. 56(c)(2). In either event, a party may rely on affidavits, but any "affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." V.R.C.P. 56(c)(6). If the moving party fails properly to set forth or support a fact, it has not met its initial burden, and its motion will be denied. *Couture*, 2017 VT 73, ¶ 9; *see also* V.R.C.P. 56(c)(1). If a non-moving party fails properly to controvert a fact, that fact may be deemed uncontroverted. V.R.C.P. 56(e).

In this case, QBE's motion papers adhere to the requirements of the rule. Ms.Cote's, however, do not. Her statement of undisputed facts is replete with statements that are far from factual; it is supported only by an affidavit from her attorney who is plainly not a competent witness as to many of the "facts" to which he attests. Accordingly, it falls well short of establishing as undisputed many of the facts on which her motion relies. Her response to QBE's statement in support of its cross-motion is even more problematic. Faced with a 6-page statement that is concise, strictly factual, and properly supported by references to admissible evidence contained in the record, Ms. Cote filed a 30-page response that is replete with assertions that fit no part of that description. Not only is Ms. Cote's response prolix and difficult to follow, the substantial portion of its "disputes" are semantic quibbles rather than genuine disputes. In short, Ms. Cote's statements fall well short of establishing her facts as undisputed or properly disputing QBE's.

Viewed through this lens, the following facts emerge as undisputed. On November 1, 2018, Ms. Cote and her spouse were injured in a car accident while in the course of their employment. The at-fault driver was uninsured. Thereafter, QBE, as their employer's workers' compensation insurer, began to provide both with workers' compensation benefits.

On March 26, 2020, with no notice to QBE, Ms. Cote settled with her first party uninsured motorist (UM) carrier, Patriot Insurance, for $950,000. Her spouse was to receive an additional $50,000 as part of the settlement. In April 2020, Ms. Cote's counsel notified QBE, through its outside subrogation specialist Lauren Masotta, of the UM settlement with Patriot. Around that time, Masotta and Ms. Cote's counsel began to discuss QBE's lien rights against the Patriot UM settlement.

On May 6, 2020, Ms. Cote's counsel informed Ms. Masotta that he had located additional UM coverage under a separate policy issued by USAA Insurance that provided $100,000 each to Ms. Cote and her spouse. QBE agreed to waive its liens as to the spouse in exchange for a waiver of the spouse's ongoing workers compensation claim. Ms. Masotta explained, however, that the parties still needed to agree on QBE's lien regarding Ms. Cote's $950,000 Patriot settlement and the $100,000 USAA settlement.

Over the subsequent weeks and months, QBE and Ms. Cote's counsel continued to discuss QBE's lien rights. QBE provided Ms. Cote with logs of its benefits payment history, including wage and medical benefits. Throughout this time, Ms. Cote maintained that QBE had no lien rights. The parties mediated unsuccessfully on October 27, 2020 and, on November 3rd, Ms. Cote filed this action.

Discussion

On these facts, Ms. Cote asserts six claims. In the first three counts of her amended complaint, she asserts that QBE has no right to reimbursement from her UM recoveries: in Count I, because QBE waived or is estopped from asserting any such right; in Count II, because her UM insurance policies preclude such right; and in Count III, because 21 V.S.A. § 624(e) forecloses QBE's subrogation claim in whole or in part. In the next three counts, she asserts claims for damages: in Count IV, because of an alleged breach of the workers' compensation insurance contract; in Count V, because of an alleged breach of the covenant of good faith and fair dealing; and in Count VI, because of fraud. Except to the extent that 21 V.S.A. § 624(e) requires an allocation of Ms. Cote's damages, none of these claims survives summary judgment.[1]

I. Right to Reimbursement

In Counts II and III, Ms. Cote alleges that QBE has no cognizable reimbursement interests in her UM settlements for several reasons. Am. Compl. ¶¶ 35–47 (Feb. 18, 2021). Count III, in the alternative, contends that to the extent QBE does have a valid "subrogation interest and/or lien," it "is of a value lower than Defendant QBE's claimed subrogation interest in and/or lien against [Plaintiff's] 1st party Uninsured Motorist Proceeds." Am. Compl. ¶ 47. QBE does not seek summary judgment on

[1] The amended complaint also sets forth a "Count VII." That count, however, does not assert any claim for relief. Rather, by its express terms, it simply asserts "additional allegations in support of [the other] counts.

this alternative argument, but argues that this action should proceed as one for an allocation of the damages in Ms. Cote's UM settlements. *See* Def.'s Cross-Mot. for Summ. J. at 11.

Vermont's Workers' Compensation Act outlines an insurer's interest in subrogation or reimbursement from an employee's recovery from a third-party, including an employee's private UM insurance carrier. The relevant provisions provide:

> (1) In an action to enforce the liability of a third party, the injured employee may recover any amount that the employee or the employee's personal representative would be entitled to recover in a civil action. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under this chapter to date of recovery, and the balance shall forthwith be paid to the employee or the employee's dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits. Reimbursement required under this subsection, except to prevent double recovery, shall not reduce the employee's recovery of any benefit or payment provided by a plan or policy that was privately purchased by the injured employee, including uninsured-underinsured motorist coverage, or any other first party insurance payments or benefits.
>
> (2) Should the recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, be less than the full value of the claim for personal injuries or death, the reimbursement to the employer or workers' compensation insurance carrier shall be limited to that portion of the recovery allocated for damages covered by the Workers' Compensation Act. If a court has not allocated or the parties cannot agree to the allocation of the recovered damages, either party may request that the Commissioner make an administrative determination. Upon receiving a request, the Commissioner shall order mediation with a mediator selected from a list approved by the Commissioner. If mediation is unsuccessful, the Commissioner may adjudicate the dispute or refer the dispute to an arbitrator approved by the Commissioner. The determination of the Commissioner or of an arbitrator approved by the Commissioner shall be final. The cost of any mediation or arbitration shall be split equally by the parties.

21 V.S.A. § 624(e).

In *Progressive Cas. Ins. Co. v. Est. of Keenan*, the Vermont Supreme Court recognized that under the statute, "as a general rule . . . a workers' compensation insurer is entitled to first-dollar reimbursement from an injured employee's recovery of damages from a third party, regardless of whether this recovery represents economic or noneconomic damages and regardless of whether the employee has been made whole." 2007 VT 86, ¶ 7, 182 Vt. 298 (quotations omitted). In 1999, however, the Legislature amended § 624(e) to protect workers' recoveries from their own personal insurers from the operation of the general rule. The amendment stated: "Reimbursement required under

this subsection, except to prevent double recovery, shall not reduce the employee's recovery of any benefit or payment provided by a plan or policy that was privately purchased by the injured employee, including uninsured-under insured motorist coverage, or any other first party insurance payments or benefits." 21 V.S.A. § 624(e)(1). This amendment "changed the general rule . . . by protecting an employee's recovery of first-party insurance payments or other benefits from the insurer's right to first-dollar reimbursement." *Keenan*, 2007 VT 86, ¶ 8. That does not mean, though, that "the injured employee [is] therefore entitled to exempt such recoveries from the reimbursement obligation" or that "an employee [is] entitled to be 'made whole' before a double recovery could occur." *Id.* Rather, it means that "to prevent a 'double recovery' within the meaning of 21 V.S.A. § 624(e), first-party insurance awards *must* be apportioned between economic and noneconomic damages, with the insurer having a right to reimbursement out of the economic damages portion." *Id.* ¶ 9 (emphasis in original).[2]

In Count II, Ms. Cote contends that QBE has no reimbursement rights for three reasons. First, she asserts that her UM policies exclude coverage that would "directly or indirectly benefit an insurer under any workers' compensation law." Next, she asserts that she and her UM carriers structured the settlements to include only "compensatory damages not accounted for by workers' compensation benefits." Finally, she asserts that her damages that are not covered by workers' compensation exceed the settlement amounts. None of these arguments defeats QBE's statutory right to reimbursement.

The first two assertions fly in the face of settled Vermont jurisprudence. Both the insurance policy exclusions and the attempt between Ms. Cote and her UM insurers to allocate the settlements exclusively to damages not covered by workers' compensation are bald-faced attempts to contract around the workers' compensation carrier's statutory right to reimbursement. Our Court has clearly rejected such efforts. As the *Keenan* Court observed, in *Travelers Ins. Co. v. Henry*,

> [w]e specifically recognized the possibility that an employee and UIM carrier could attempt to structure a settlement agreement that would prevent the insurer from exercising its right to reimbursement. For this reason, we held that, in addition to other safeguards, the insurer has a right to seek judicial review of settlement agreements to ensure that the apportionment of damages was fair and that it fairly reflected the injured party's actual economic and noneconomic losses.

Keenan, 2007 VT 86, ¶ 10 (citing *Travelers Ins. Co. v. Henry*, 2005 VT 68, ¶ 25, 178 Vt. 287)) (internal citation omitted). Moreover, in direct contravention to Ms. Cote's efforts here, "[a]llocating

[2] "Double recovery occurs when the employee recovers economic damages from two sources, including first-party sources, and thus, the insurer has a right to reimbursement out of the portion of the first-party award that is equal to the proportion of the injured employee's total economic loss to the total damages sustained." *Est. of Keenan*, 2007 VT 86, ¶ 9.

an entire UIM award to noneconomic damages is inconsistent with [the] approach" outlined in *Henry*, as "[s]uch an allocation does not fairly reflect the injured party's actual economic and noneconomic losses, and it is not fair or reasonable from the perspective of the workers' compensation insurer." *Id.* ¶ 11. As a practical matter, and as the Court recognized in *Keenan*, "[i]n cases where an employee has incurred significant noneconomic damages, the employee will also likely have incurred significant economic damages, and it is likely that, taken together, both types of damages will greatly exceed a UIM award." *Id.* In short, QBE plainly and unequivocally has a statutory right to reimbursement, notwithstanding Ms. Cote's attempts to contract around it.

In Count III, Ms. Cote asserts that the Legislature's 2014 amendment of 21 V.S.A. § 624(e) to include subsection (e)(2) somehow nullifies QBE's reimbursement rights under subsection(e)(1). The plain language of the statute, however, does not support this assertion. Rather, subsection (e)(2) makes express the interpretation adopted in *Henry* and reaffirmed in *Keenan*: the statute "requires apportionment in every case to prevent a double recovery," and "the first step in the reimbursement process is apportioning a UIM award between economic and noneconomic damages." *Id.* ¶14. The statute then limits a workers' compensation carrier's reimbursement to that part of the recovery allocated to "damages covered by the Workers' Compensation Act." 21 V.S.A. § 624(e)(2).

Rather than limiting the right recognized in *Henry* and *Keenan*, subsection (e)(2) extends the benefits to the employee created by the 1999 amendment—the exception to a first-dollar right of reimbursement now found in the final sentence of subsection (e)(1)—to *all third-party recoveries*, not just recoveries from an employee's private insurance plan. Because the third-party recovery here was against Ms. Cote's private UM insurance carriers, subsection (e)(1) already limits QBE's reimbursement to an allocation of that part of the settlement that represents economic damages, even without the addition of (e)(2). *See Keenan*, 2007 VT 86, ¶ 9. In such a case, subsection (e)(2) simply adds a procedural mechanism allowing either party to petition the Department of Labor for an apportionment of the employee's third-party recovery. Importantly, this mechanism is optional and does not affect the workers' compensation insurer's right to reimbursement. In short, the teachings of *Keenan* and *Henry* continue to control here. QBE is entitled to summary judgment on Count II in its entirety and Count III to the extent it claims that QBE is not entitled to reimbursement. All that remains of that claim is a judicial apportionment of Ms. Cote's UM recoveries.

II. Estoppel/Waiver

In Count I, Ms. Cote alleges that QBE failed to provide her with a "plausible" subrogation or lien amount or evidence demonstrating the validity of such a lien, and alternatively that any subrogation or lien interest was "not timely and properly made." Am. Compl. ¶¶ 9–34. Thus, she claims, QBE has

waived any such lien interest and is now estopped from asserting that interest against her. The facts, however, fall far short of making out a claim for either waiver or estoppel.

Equitable estoppel, well established in the case law, "precludes a party from asserting rights which otherwise may have existed as against another party who has in good faith changed his or her position in reliance upon earlier representations." *In re Langlois/Novicki Variance Denial*, 2017 VT 76, ¶ 12 (citing *My Sister's Place v. City of Burlington*, 139 Vt. 602, 609 (1981)) (quotations omitted). It is based upon grounds of "public policy, fair dealing, good faith, and justice," and its purpose is "to forbid one to speak against his or her own act, representations or commitments to the injury of one to whom they were directed and who reasonably relied thereon." *Id.* (citing *Dutch Hill Inn, Inc. v. Patten*, 131 Vt. 187, 193 (1973)) (quotations and brackets omitted). "To establish a claim of estoppel, a party must demonstrate that (1) the party to be estopped knew the facts; (2) the party to be estopped intended that its conduct would be acted upon; (3) the party seeking estoppel was 'ignorant of the true facts'; and (4) the party seeking estoppel relied to his or her own detriment upon the conduct of the party to be estopped." *In re Grundstein*, 2018 VT 10, ¶ 26, 206 Vt. 575.

In contrast, a waiver is the "intentional relinquishment or abandonment of a known right, and the act of waiver may be evidenced by express words as well as by conduct." *Lynda Lee Fashions, Inc. v. Sharp Offset Printing, Inc.*, 134 Vt. 167, 170 (1976); *see also Anderson v. Coop. Ins. Companies*, 2006 VT 1, ¶ 10, 179 Vt. 288 ("A waiver is a voluntary relinquishment of a known right, and can be express or implied.") (citation omitted). Our Supreme Court has urged caution in assessing the implied waiver theory, which "blurs the line between the doctrines of waiver and estoppel," and which requires "some act or conduct . . . that was unequivocal in character." *Anderson*, 2006 VT 1, ¶ 11.

Here, the undisputed facts plainly demonstrate that QBE consistently and unequivocally asserted its right to reimbursement from Ms. Cote soon after it learned of her UM settlements. On this record, there is no indication that QBE represented to anyone that it did not have a right to reimbursement, nor is there evidence that it ever intended to waive its reimbursement right or even suggested that it would do so. As noted above, Ms. Cote's attempts to generate a genuine dispute of fact on these issues fall far short of the mark.

In her reply to QBE's opposition to her motion, Ms. Cote highlights her counsel's communication to QBE (just one day before filing suit) that it was his "understand[ing]" that "QBE had waived its claimed lien" because it did not provide "proper verification" of medical payments. Pl.'s Resp. at 8 (filed Apr. 22, 2021). In that communication, Ms. Cote's counsel claimed that the lien amount could not be verified because QBE's medical payment printout did not show particular information nor was it in the specific order that he had requested. *Id.* Even if QBE's printout suffered from these

inadequacies, however, that would not be evidence of an intentional relinquishment of a known right, and counsel's bold proclamation of a waiver does not make it so. Accordingly, QBE is entitled to summary judgment on Count I.

III. Breach of Contract

In Count IV, Ms. Cote alleges that QBE breached its worker's compensation insurance contract by failing to "waive its claimed subrogation interest and/or lien, or diminish the same under its contract of insurance." Am. Compl. ¶ 50. Assuming that an employee is a "party" to a workers' compensation policy issued to an employer, as Ms. Cote claims, *see id.* ¶ 49, Ms. Cote articulates no rational basis to explain how QBE might have breached that contract here by failing to waive or lower the amount of its claimed lien. Notably, the workers' compensation policy expresses gives QBE the right to recover payments "from anyone liable for the injury":

> **G. Recovery From Others**
> We have your rights, and the rights of persons entitled to the benefits of this insurance, to recover our payments from anyone liable for the injury. You will do everything necessary to protect those rights for us and to help us enforce them.

Insurance Policy, p. 2 of 6 (Ex. A to Havens Aff.). Ms. Cote suggests in her opposition that this provision somehow limits QBE's ability to seek such recovery to subrogation asserted directly against liable third parties only—and not reimbursement from a plaintiff's recovery from a third party. This notion is meritless and, frankly, preposterous. The Texas case cited by QBE, albeit involving an express waiver of a workers' compensation carrier's right to recover from liable third parties, is on point:

> [T]he waiver of a carrier's "right to recover" from the third party . . . includes both a direct recovery from the third party and an indirect recovery from proceeds the third party pays to an injured employee. There is no meaningful difference between the two. Under either scenario, the reimbursement the carrier attains flows from the third party. True, the waiver speaks to the carrier's right to recover from liable third parties, not injured employees. But any settlement the employee receives from the carrier *is* a recovery from a liable third party. Once paid, the money belongs to the employee, but it did not exist before the third party made the payment to dispose of the employee's lawsuit. The waiver's language does not compel us to ignore the source of the proceeds the carrier seeks to capture simply because they flowed through the employee.

Wausau Underwriters Ins. Co. v. Wedel, 557 S.W.3d 554, 558 (Tex. 2018) (emphasis in original); *see also Trejo v. Alter Scrap Metal, Inc.*, No. 2:08CV257KS-MTP, 2010 WL 2773397, at *10 (S.D. Miss. July 13, 2010) (same). Thus, the contract here tracks the statute, and clearly supports QBE's assertion of the right to reimbursement. QBE is entitled to summary judgment on this claim.

IV. Breach of Implied Covenant

In Count V, Ms. Cote claims that QBE breached the implied covenant of good faith and fair dealing. She alleges that QBE owed "a duty to construe their contractual obligations fairly and to act on claims in a prompt, fair, and equitable manner consistent with the terms of the contract of insurance." Am. Compl. ¶ 53. She alleges further that QBE violated this duty by "arbitrarily and capriciously fail[ing] and refus[ing] to resolve its claimed subrogation interest and/or lien in a prompt, fair and equitable manner under its contract of insurance." *Id.* ¶ 54. She concludes: "As a result of the aforementioned breach of insurance contract by [] QBE, [she] was damaged." *Id.* ¶ 55. This claim fails as a matter of both fact and law.

It bears observing at the outset that while Ms. Cote captions this count as one for breach of the implied covenant, the conduct she alleges is the same as underlies her breach of contract claim. No claim for breach of the implied covenant of good faith and fair dealing can succeed, however, when it is based on the same conduct as a breach of contract claim. *Tanzer v. MyWebGrocer, Inc.*, 2018 VT 124, ¶ 33, 209 Vt. 244. Thus, this observation alone is fatal.

Even could Ms. Cote surmount this hurdle, she has failed to come forward with evidence sufficient to support a claim for breach of the implied covenant. "An underlying principle implied in every contract is that each party promises not to do anything to undermine or destroy the other's rights to receive the benefits of the agreement." *Carmichael v. Adirondack Bottled Gas Corp. of Vermont*, 161 Vt. 200, 208 (1993). While the Supreme Court has not yet had an opportunity to apply these teachings in the context of a dispute over rights and obligations under 21 V.S.A. § 624(e), its teachings in the first party bad faith context are instructive. To establish a bad faith claim, "a plaintiff must show that (1) the insurance company had no reasonable basis to deny benefits of the policy, and (2) the company knew or recklessly disregarded the fact that no reasonable basis existed for denying the claim." *Bushey v. Allstate Ins. Co.*, 164 Vt. 399, 402 (1995). An insurance company may challenge claims that are "fairly debatable" and "will be found liable only where it has intentionally denied (or failed to process or pay) a claim without a reasonable basis." *Id*. (quotations omitted). Thus, recovery is limited to instances where an insurer "not only errs in denying coverage but does so unreasonably." *Id*. Here, of course, as discussed above, QBE plainly had a reasonable basis to seek reimbursement. It did not act in bad faith by seeking to enforce its statutory lien. *See Davis v. Liberty Mut. Ins. Co.*, 19 F. Supp. 2d 193, 203 (D. Vt. 1998), *aff'd*, 267 F.3d 124 (2d Cir. 2001) (holding that workers' compensation carrier did not act in bad faith by asserting lien interests under 21 V.S.A. § 624(e)).

In opposing QBE's cross-motion for partial summary judgment, Ms. Cote asserts that QBE also acted in bad faith by "not promptly providing information[,] documents, and law . . . to show the

validity of the amount of its claimed lien," by "providing false and misleading information in its medical spreadsheets to claim an unwarranted . . . lien," and by not reducing its claimed lien amount by its share of recovery costs. Pl.'s Opp'n at 15–16. The undisputed material facts, however, amply demonstrate that QBE regularly asserted its position that it was entitled to reimbursement from Ms. Cote's UM settlements, provided documentation to Ms. Cote or her counsel showing its payments to her, and clarified that the lien amount would be reduced by recovery costs. *See* Aff. of Krystn Perettine and accompanying exhibits. Moreover, QBE's communications with and representations to Ms. Cote's counsel appropriately tracked the legal procedure established by 21 V.S.A. § 624(e). *See id.* Ms. Cote's quibbling with the precise language of Attorney Perettine's emails does not suffice to establish a genuine dispute of fact in this regard. Any disputes or discrepancies as to specific amounts detailed in QBE's payment logs similarly fail to establish bad faith; rather, these can be addressed as part of the judicial allocation process.

Ms. Cote further suggests that QBE acted in bad faith by "set[ting] forth its lien" for $400,000. Pl.'s Opp'n at 18. The undisputed facts do not support this contention. Rather, QBE informed Ms. Cote that the amount of workers' compensation benefits it had paid had risen over $400,000, and that it would accept $400,000 to settle the lien. Perettine Aff. ¶¶ 6–7 and attached Ex. B and C. The facts similarly do not support Ms. Cote's contention that QBE also acted in bad faith by claiming a lien in the "full gross amount" of her UM recovery—$1.05 million. *See* Pl.'s Opp'n at 21. Again, QBE plainly informed Ms. Cote that it was entitled to an allocation from her UM settlements that represented economic damages, less costs of recovery. Perettine Aff. ¶¶ 6–7 and attached Ex. B and C. Moreover, when asked point-blank by Ms. Cote's counsel "what claimed lien amount do you have?" QBE's counsel responded that, as of April 10, 2020, QBE "had paid $382,391.58 in wages and medicals." Perettine Aff. ¶ 16 and attached Ex. K. The summary judgment record does not support Ms. Cote's assertion that QBE claimed a lien against the full gross amount of her UM recovery. In short, Ms. Cote has failed to come forward with evidence to support her bad faith claim. QBE is entitled to summary judgment on this claim.

V. Fraud

In Count VI, Ms. Cote claims that QBE is liable for fraud because it delivered documents to her concerning medical payments made on her behalf, and that these documents "provided false information." Am. Compl. ¶59. This claim fails as a matter of law for the simple and obvious reason that Ms. Cote has not pled fraud with particularity as required by V.R.C.P. 9(b). "Rule 9(b) requires that plaintiffs identify the particular statements or acts by particular defendants that they claim were fraudulent." *Sutton v. Vermont Reg'l Ctr.*, 2019 VT 71A, ¶ 73, 212 Vt. 612; *see also Cheever v. Albro*,

138 Vt. 566, 570 (1980) (Rule 9(b) requires "that all of the elements [of fraud] be specifically pled"); *Standard Packaging Corp. v. Julian Goodrich Architects, Inc.*, 136 Vt. 376, 381 (1978) ("Fraud must be stated 'with particularity,' and it must consist of some affirmative act, or of concealment of facts by one with knowledge and a duty to disclose.") (citation omitted); *Silva v. Stevens*, 156 Vt. 94, 105 (1991) ("The rule requires that the facts and circumstances sufficient to satisfy all of the elements of fraud be specifically pled."). Plainly, Ms. Cote's allegation that QBE delivered documents regarding medical payments that "provided false information" comes nowhere close to meeting this standard.

Even had Ms. Cote pled fraud with particularity, she has failed on this summary judgment record to demonstrate the requisite elements. "To maintain a cause of action for fraud, [a] plaintiff must demonstrate five elements: (1) intentional misrepresentation of a material fact; (2) that was known to be false when made; (3) that was not open to the defrauded party's knowledge; (4) that the defrauded party act[ed] in reliance on that fact; and (5) is thereby harmed." *Felis v. Downs Rachlin Martin PLLC*, 2015 VT 129, ¶ 13, 200 Vt. 465 (quotation omitted). Fraud must be proved by clear and convincing evidence. *Kneebinding, Inc. v. Howell*, 2018 VT 101, ¶ 141, 208 Vt. 578. Significantly, it is undisputed that soon after receiving the medical payment logs, Ms. Cote raised her concerns about their accuracy to QBE. *See* Pl.'s Statement of Disputed Facts ¶¶ 19–20. Thus, she cannot show that the alleged fraud was not open to her knowledge. See *Felis*, 2015 VT 129, ¶ 14 (fraud complaint failed where facts demonstrated that plaintiff knew of defendant's allegedly fraudulent "fee building" and discovery practices early on). Moreover, exactly half an hour after she expressed these concerns to QBE, QBE responded: "I am happy to review those entries if you would like to point them out." Ex. J to Perettine Aff. (filed Apr. 5, 2021). Such an offer to address Ms. Cote's concerns about accuracy undermines any claim of deceptive intent.

There is also no evidence of detrimental reliance. Again, Ms. Cote asserted that the documents were false soon after receiving them. Moreover, while Ms. Cote alleged that QBE provided "false" information to "influence" her to "make an unfair, unjust[,] and inequitable . . . settlement" and "extort an unfair resolution" of the workers' compensation claim, Am. Comp. ¶¶ 61–62, the parties never actually settled the lien. This, in turn, raises the question of how Ms. Cote could have possibly "suffer[ed] damages" from a nonexistent resolution to the workers' compensation claim. *See id.* ¶ 62.

In opposing summary judgment, Ms. Cote now contends that she was harmed by being unable to access money in her counsel's IOLTA account. Pl.'s Opp'n at 20, 29–30. In essence, she claims that "false" information provided by QBE caused her to place more money in the IOLTA account than was necessary. Notably, however, the purported discrepancy she highlights is about $3,000, a nominal sum compared to the hundreds of thousands of dollars paid in total. *See* Martin Aff. ¶¶ 4–5 and attached

Exs. 16 and 17 (filed Apr. 22, 2021). In any event, it appears QBE did not, in fact, provide false information in its payment ledgers. The discrepancies are instead apparently explained by the fact that third party intermediaries facilitated payment to medical providers in certain cases. *See* QBE's Sur-Reply at 2–3; Tayrien Aff. ¶¶ 4–12. Any such discrepancies can be explored further, if necessary, during the judicial allocation process. Ms. Cote's fraud claim fails.

Ms. Cote now also argues that QBE is liable for "constructive fraud" if not "actual fraud." Pl.'s Opp'n at 28. This shift to a constructive fraud theory, however, does not save her fraud claim. "Where there is no intent to mislead or defraud, *but the other elements of fraud are met*, we have held that a seller may be liable for constructive fraud. Actual fraud is deceitful misrepresentation or concealment with evil intent, while constructive fraud is wrongdoing without bad faith." *Sugarline Assocs. v. Alpen Assocs.*, 155 Vt. 437, 444 (1990) (citing *Proctor Trust Co. v. Upper Valley Press, Inc.,* 137 Vt. 346, 354 (1979)) (quotations omitted) (emphasis added). Even taking intent out of the picture, Ms. Cote presents no competent evidence in support of the other elements of fraud—as discussed above—sufficient to survive summary judgment; nor has she pled constructive fraud with particularity. *See Sutton v. Vermont Reg'l Ctr.*, 2019 VT 71A, ¶ 73, 212 Vt. 612 ("Rule 9(b) requires that '[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.' ") (quoting V.R.C.P. 9(b)).

Moreover, as QBE correctly observes, while the Amended Complaint seeks damages for fraud, "[c]onstructive fraud is an equitable claim that typically has not afforded relief in the form of monetary damages." *Hardwick-Morrison Co. v. Albertsson*, 158 Vt. 145, 150 (1992); *but see* Retail Pipeline, LLC v. Blue Yonder Grp., Inc., No. 2:17-CV-00067, 2021 WL 3891648, at *15 (D. Vt. Aug. 31, 2021) (noting that "the Vermont Supreme Court has not adopted a per se rule."). Further, Ms. Cote and QBE do not share the kind of "confidential relationship" that many courts around the country have held is required to support a constructive fraud claim. *See Murphy v. Patriot Ins. Co.*, 2014 VT 96, ¶ 13, 197 Vt. 438 ("the relationship between insurer and insured is fundamentally contractual"); *Lauzon v. State Farm Mut. Auto. Ins. Co.*, 164 Vt. 620, 622 (1995) ("An insurer owes no fiduciary duty to its insured in a claim arising under an uninsured motorist provision."); *Am. Driver Serv., Inc. v. Truck Ins. Exch.*, 10 Neb. App. 318, 325–27 (2001) ("other jurisdictions which have addressed the issue have rejected the contention that an insurer, as a contracting party, constitutes a 'fiduciary' with respect to the insured," including in the workers' compensation process) (collecting cases); *Maryland Env't Tr. v. Gaynor*, 370 Md. 89, 99 (2002) (failure to show constructive fraud claim where "[t]here was no fiduciary or confidential relationship existing between" the parties).. Thus, Ms. Cote's newly conceived constructive fraud claim fails along with her more conventional claim.

ORDER

The court denies Ms. Cote's motion for partial summary judgment and grants QBE's cross-motion. QBE is entitled to judgment as a matter of law on all claims except the part of Count III that seeks a judicial allocation of her UM recoveries as between damages covered by the Workers' Compensation Act and those not covered. As noted in its earlier entry, the court invites a motion to amend the complaint to assert a claim in this regard with respect to Ms. Cote's most recent UM settlement. The clerk will then set a status conference.

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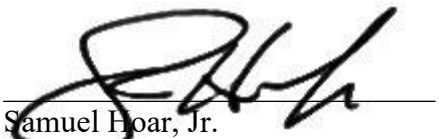

Samuel Hoar, Jr.
Superior Court Judge