

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DREW EDWARD FRANQUEMONT,

No. 3:22-cv-00223-JR

Plaintiff,

ORDER

v.

SHELTER MUTUAL INSURANCE
COMPANY,

Defendant.

HERNÁNDEZ, District Judge:

Magistrate Judge Russo issued a Findings and Recommendation on November 7, 2022, in which she recommends that this Court grant in part Defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) and deny Defendant's motion under Rule 12(b)(1). F&R, ECF 26. The matter is now before the Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b).

Defendant Shelter Mutual Insurance Company filed timely objections to the Magistrate Judge's Findings and Recommendation. Def. Obj., ECF 28. When any party objects to any portion of the Magistrate Judge's Findings & Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1); *Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). After reviewing Defendant's objections, the legal principles, and the relevant facts *de novo*, the Court declines to adopt the Magistrate Judge's Findings and Recommendation.

BACKGROUND

Pro se Plaintiff Drew Franquemont brings this action against Defendant Shelter Mutual Insurance Company, seeking economic and non-economic damages for injuries caused by Defendant's "insured party to which equitable settlement has been refused or delayed by Shelter Mutual Insurance Company through 'bad faith' settlement negotiations." Am. Compl. 11, ECF 7. Plaintiff's claim stems from an automobile accident that occurred in Portland, Oregon on January 17, 2020, in which Plaintiff's car was struck from behind by a car driven by Amy Stinnett. Am. Compl. 6-7. Ms. Stinnett was insured under an automobile insurance policy issued by Defendant to Curtis Stinnett, an Oklahoma resident. Plaintiff entered direct negotiations with Defendant to settle his liability claim, but the parties have failed to reach a settlement.

Plaintiff alleges that due to his injuries from the accident, he suffered lost wages, medical costs, pain, and suffering. He brings this action against Defendant, alleging that Defendant failed to engage in reasonable negotiations to settle his claim. Plaintiff does not name as defendants or bring direct claims against either Amy Stinnett or Curtis Stinnett.

DISCUSSION

In its motion to dismiss, Defendant argues that (1) Plaintiff lacks standing because his injuries from the car accident are not fairly traceable to any action by Defendant; and (2) Plaintiff fails to state a claim because he is not a party to an insurance contract with Defendant. The Magistrate Judge agrees that Defendant cannot bring a negligence claim directly against Defendant for the accident caused by Ms. Stinnett. Thus, the Magistrate Judge recommends granting Defendant's motion "to the extent plaintiff seeks to recover damages associated with the accident itself[.]" F&R 7. The Court agrees.

But the Magistrate Judge construes Plaintiff's claim against Defendant as one for "[n]ot attempting, in good faith, to promptly and equitably settle claims in which liability has become reasonably clear" under Oregon Revised Statute § ("O.R.S.") 746.230(1)(f). F&R 2. The Magistrate Judge finds that whether Plaintiff, as a third party to the insurance contract, may bring a claim for bad faith against Defendant is not settled law and that Oregon jurisprudence suggests that an injured third party may pursue a tort claim directly against an insurance company under O.R.S. 746.230(1)(f). According to the Magistrate Judge, O.R.S. 746.230(1)(f) "provides a mechanism for an injured party to pursue a bad faith claim under the insured party's policy." F&R 5. Here, the Court respectfully disagrees.

O.R.S. 746.230 "prohibits unfair settlement practices and contemplates civil penalties for claims filed against an insurance company *by its insured* and claims filed *against the insured* by third parties." *Mayes v. Am. Hallmark Ins. Co. of Tex.*, No. 1:21-cv-01198-CL, 2021 WL 6127887, at *4 (D. Or. Nov. 15, 2021), *report and recommendation adopted*, 2021 WL 6125796 (D. Or. Dec. 28, 2021) (emphasis added). But no court has held that a third party to an insurance contract may bring bad faith claims directly against the insurance company in the absence of a

judgment against the insured who caused the plaintiff's injury. In *Mayes*, the court held that the plaintiff failed to establish a valid claim against the insurance company because he did not first secure a valid judgment against the insured. *Id.* at *1. Citing *Tashire v. State Farm Fire & Cas. Co.*, 363 F.2d 7, 10 (9th Cir. 1966), *rev'd on other grounds*, 386 U.S. 523 (1967), the court in *Mayes* noted that "[u]nder Oregon law, an injured party must first secure a judgment against the insured, before the injured party can file a lawsuit against the insurer." *Id.* at *3. Thus, "[O.R.S. 746.230] does not give rise to actions by third parties against *another party's* insurer." *Id.* at *4. The court in *Mayes*, found that the plaintiff could not bring any claims against the insurance company without first suing the party that allegedly caused damage to the plaintiff's vehicle. *Id.* at *5.

The Magistrate Judge finds that, to allege bad faith against an insurance company for failure to settle a claim, contractual privity between the parties is not required. But the duty of an insurance company to negotiate a settlement in good faith under the statute is a duty owed to the insured, not to an injured third party. *See Goddard ex rel. Est. of Goddard v. Farmers Ins. Co. of Or.*, 173 Or. App. 633, 638, 22 P.3d 1244, 1227 (2001) (emphasis added) ("[A]n insurer has an affirmative duty of care to its *insured*, which in an appropriate case requires the insurer to initiate settlement efforts."). The duty of good faith requires an insurance company to defend the insured and to attempt to negotiate a settlement agreement with the third party within the policy limits. *Id.* The reason for such a duty is to prevent excessive liability exposure for the insured beyond the policy limit amounts. *See Farris v. U.S. Fid. & Guar. Co.*, 284 Or. 453, 459, 587 P.2d 1015, 1018 (1978) (emphasis added) ("The terms 'good faith' and 'bad faith' have been used . . . in connection with the duty of an insurer to settle cases within the policy limits when the prayer of the complaint *against the insured* is greater than the policy limits."). To be sure, Oregon courts

have held that in narrow circumstances, an insured party may bring a tort claim (rather than a breach of contract claim) against their insurer for failure to conduct reasonable settlement negotiations with a third party. *Foraker v. USAA Cas. Ins. Co.*, No. 3:14-cv-87-SI, 2017 WL 3184716, at *7 (D. Or. July 26, 2017); *see Goddard*, 173 Or. App. at 641 (holding that “an insurer’s failure to conduct reasonable settlement negotiations with a third party” may constitute “actionable negligence”). But the duty that gives rise to a potential tort claim is one owed to the insured rather than the injured third party. *See id.* (“The respective rights and duties between an insurer and its insured arise out of the insurance contract that exists between them.”)

Under Oregon law, “insurance companies are not required to do anything concerning the [third-party] plaintiff until a judgment is entered in his favor against the [insured] and remains unsatisfied for 30 days.” *Hale v. Fireman’s Fund Ins. Co.*, 209 Or. 99, 113, 302 P.2d 1010, 1016 (1956). In finding that Plaintiff may bring a direct claim against Defendant without a judgment against the insured party, the Magistrate Judge states that “an injured party can file a lawsuit directly against the insurer once the insured’s liability has been established.” F&R 6. Under O.R.S. 746.230(1)(f), an insurer has a duty “to affirmatively attempt to settle claims when liability becomes reasonably clear.” *Goddard*, 173 Or. App. at 642. But in *Goddard*, the court was referring to the duty an insurer owes to the insured. *Id.* No court has previously held that an insurer owes a duty to an injured third party before a judgment has been entered against the insured. Allowing a direct suit by a third party against an insurer in this situation would be a significant expansion of Oregon law.

Thus, even under O.R.S. 746.230, Plaintiff cannot bring a tort claim directly against Defendant, an insurance company, without first securing a judgment against the party who caused Plaintiff’s injury. Accordingly, the Court declines to adopt the Findings and

Recommendation and grants Defendant's motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).¹

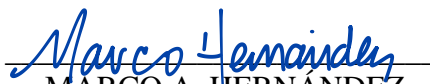
CONCLUSION

The Court declines to adopt Magistrate Judge Russo's Findings and Recommendation [26]. Defendant's Motion to Dismiss [17] is GRANTED and this action is dismissed.

Defendant's Motion to Strike Plaintiff's Sur-reply [25] is DENIED as moot.

IT IS SO ORDERED.

DATED: February 22, 2023.


MARCO A. HERNANDEZ
United States District Judge

¹ Because the Court dismisses this action, it declines to address Defendant's Motion to Strike reference to settlement negotiations from Plaintiff's Amended Complaint.