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Appellant,

OREGON MUTUAL INSURANCE
COMPANY, DAVE SANDIN, AND
SANDIN & Co.,

Respondents.

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APPELLANT’S OPENING BRIEF

MARGARET A. MCLETCHIE
Nevada State Bar No. 10931
McLetchie Shell, LLC
701 E. Bridger Avenue, Suite 520
Las Vegas, NV 89101
(702) 728-5300

Attorney for Appellant,
O.P.H. of Las Vegas, Inc.

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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4 O.P.H. OF LAS VEGAS INC.,

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6 Appellant,

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8 vs.

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11 OREGON MUTUAL INSURANCE
12 COMPANY, DAVE SANDIN, AND
13 SANDIN & Co.,

14
15 Respondents.

No.: 68543

DC No.: A-12-672158

16 **NRAP 26.1 DISCLOSURE**

17 The undersigned counsel of record certifies that the following are persons
18
19 and entities as described in NRAP 26.1(a), and must be disclosed. No publicly
20 traded company has a material interest in this appeal. These representations
21 are made in order that the judges of this court may evaluate possible
22 disqualification or recusal.
23

24
25 ///

26
27 ///

1 MARGARET A. MCLETCHIE
2 Nevada Bar No. 10931
3 ALINA M. SHELL
4 Nevada Bar No. 11711
5 MCLETCHIE SHELL LLC
6 701 E. Bridger Avenue, Suite 520
7 Las Vegas, Nevada 89101
8 (702) 728-5300
9 *Attorneys for Appellant, O.P.H. of Las Vegas, Inc.*

10 Patricia M. Lee, Esq.
11 Michael S. Kelley, Esq.
12 Michael K. Wall, Esq.
13 HUTCHISON & STEFFEN LLC
14 10080 West Alta Drive, Suite 200
15 Las Vegas, NV 89145
16 *Attorneys for Respondent, Oregon Mutual Insurance Company*

17 Robert W. Freeman, Esq.
18 Priscilla L. O'Briant, Esq.
19 LEWIS BRISBOIS BISGAARD & SMITH LLP
20 6385 South Rainbow Blvd., Suite 600
21 Las Vegas, NV 89118
22 *Attorneys for Respondents Dave Sandin and Sandin & Co.*

23
24 DATED THIS 11th DAY OF APRIL, 2016.

25
26
27 /s/ Alina M. Shell

28 Margaret A. McLetchie
Nevada State Bar No. 10931
Alina M. Shell
Nevada State Bar No. 11711
MCLETCHIE SHELL LLC
701 E. Bridger Avenue, Suite 520
Las Vegas, Nevada 89101
Attorneys for Appellant, O.P.H. of Las Vegas, Inc.

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1 2. Whether the district court erred in granting summary judgment in
2 favor of OMI on O.P.H.’s claim that the July 31, 2012 Notice was ineffective
3
4 where—in denying O.P.H.’s motion for partial summary judgment—the
5 district court had previously held that whether the notice was effective was “a
6 question of fact.”
7

8 3. Whether the district court erred in granting summary judgment in
9 favor of the Sandin Defendants on O.P.H.’s negligence and breach of fiduciary
10 duty claims where the facts in the case demonstrated that, in the course acting
11 as insurance agents for O.P.H., the Sandin defendants had a custom and
12 practice of notifying O.P.H. when its insurance premiums were due, thereby
13
14 creating a *de facto* fiduciary duty.
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STATEMENT OF THE CASE

This is an appeal from three final orders entered by the Honorable Gloria Sturman, District Judge of the Eighth Judicial District Court, Clark County. The case arises from a suit filed by O.P.H against OMI and the Sandin Defendants after O.P.H attempted to submit a claim to its insurance provider, OMI, following an August 17, 2012 fire that destroyed the Original Pancake House restaurant in Las Vegas, Nevada. Unbeknownst to O.P.H., its insurance policy—which was procured on O.P.H.’s behalf by Dave Sandin of Sandin Insurance—had been canceled by OMI on August 16, 2012 for nonpayment. According to a notice generated by OMI and dated July 31, 2012 (the “July 31 Notice”), OMI canceled O.P.H.’s insurance policy effective as of 12:01 a.m., August 16, 2012. (Vol I at AA0116.)

OMI was required by both the Policy terms and Nevada law to provide notice to O.P.H. prior to the effective date of cancellation. According to the Policy, OMI was required to provide notice to O.P.H. at least “10 days before the effective date of cancellation if we cancel for nonpayment of premium.” (Vol. I at AA0112 (relevant portion of OMI policy terms).) According to Nevada law, OMI was required to send notice to O.P.H. ten days prior to termination for nonpayment of a premium. *See* Nev. Rev. Stat. § 687B.320(2) (“No cancellation under subsection 1 is effective until in the case of [failure to

1 pay a premium when due] at least 10 days ... after the notice is delivered or
2 mailed to the policyholder”).
3

4 O.P.H. never received the July 31, 2012 notice, nor any other notice or
5 communication that would have alerted O.P.H. of any pending cancellation
6 prior to the fire. (Vol. VIII at AA1192-AA1193 (deposition testimony of Linda
7 Snyder).) However, regardless of whether the July 31, 2012 notice was sent or
8 received, the notice did not comply with Nevada law. As a result, OMI did not
9 effectively cancel the policy with O.P.H. at 12:01 a.m. on August 16, 2012,
10 and the insurance remained in effect when the fire occurred.
11
12

13 Respondent Dave Sandin of Sandin Insurance (hereinafter “Sandin
14 Defendants”) acted as an agent for and sold OMI insurance in Nevada. (Vol. I
15 at AA085 (deposition testimony of Dave Sandin).) Throughout the course of
16 dealing with the Sandin Defendants, O.P.H. relied on Dave Sandin to warn it
17 when insurance premium payments were late, and likewise relied on Mr.
18 Sandin to recommend suitable insurance for its business needs. Despite this
19 custom and practice, the Sandin Defendants did not advise O.P.H. its payment
20 to OMI was late. The Sandin Defendants also failed to inform O.P.H. that OMI
21 intended to cancel its policy. (Vol. VIII at AA1302 (Sandin Defendants’
22 Responses to O.P.H.’s First Set of Requests for Admissions); AA1306 (Sandin
23 Defendants’ Answers to O.P.H.’s First Set of Interrogatories).)
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1 O.P.H. filed suit against OMI and the Sandin Defendants on November
2 27, 2012. (Vol. I at AA0001-AA0025.) In its complaint, O.P.H. lodged claims
3
4 against OMI for Breach of Contract (Vol. I at AA0010); Breach of the
5 Covenant of Good Faith and Fair Dealing/Bad Faith (Vol. I at AA0010-
6 AA0011). O.P.H. also raised claims for Fraud in the Inducement (Vol. I at
7
8 AA0011), unfair practices in settling claims in violation of Nev. Rev. Stat. §
9 686A.310 (Vol. I at AA0014-AA0015), and Negligence as to OMI and the
10 Sandin Defendants. (Vol. I at AA0016-AA0017.) O.P.H. also filed claims
11
12 against the Sandin Defendants for Fraud (AA0013) and Breach of Fiduciary
13 Duty. (Vol. I at AA0014.)
14

15 On November 27, 2013, O.P.H. filed a motion for partial summary
16 judgment. (Vol. I at AA0089.) In that motion, O.P.H. argued it was entitled to
17
18 judgment as a matter of law because OMI's July 31 Notice did not comply
19 with Nev. Rev. Stat. §§ 687B.320 and 687B.360. (*See generally id.*) On
20 February 19, 2014, the district court entered an order denying O.P.H.'s motion
21
22 for partial summary judgment. (Vol. X at AA1597.) In its brief order, the
23 district court held that the determination of whether the requirement of Nev.
24 Rev. Stat. § 687B.360 was triggered by OMI's purported July 31 Notice was
25
26 "a question of fact." (Vol. X at AA1600.)
27

28 On March 17, 2015, OMI filed a motion for summary judgment as to all

1 claims against it. (Vol. III AA0337.) The Sandin Defendants also filed a
2 motion for summary judgment on March 17, 2015. (Vol. IV at AA0481.)
3

4 Although the district court had previously denied O.P.H.'s motion for
5 summary judgment on its claim against OMI for its failure to conform its July
6 31 Notice with the requirements of Nev. Rev. Stat. §§ 687B.320 and 687B.360
7 on the grounds that the claim presented a question of fact, the district court on
8 June 26, 2015 entered an order granting OMI's motion for summary judgment
9 as to that claim. (Vol. IX at AA1476.) In its order, the district court found "as a
10 matter of law that the notice provided to [O.P.H.] by OMI satisfie[d] the
11 requirements of the policy and NRS 687B310, NRS 687B320, and NRS
12 687B360." (Vol. IX at AA1483.)
13
14

15
16 That same day, the district court entered an order granting the Sandin
17 Defendants' motion for summary judgment. (Vol. IX at AA1486.) The district
18 court found the Sandin Defendants were entitled to summary judgment on
19 O.P.H.'s breach of fiduciary duty claim because in Nevada, insurance agents
20 do not have a fiduciary relationship with their clients, and because the Sandin
21 Defendants had no affirmative duty to remind O.P.H. about its monthly
22 premiums. (Vol. IX at AA1491-AA1492.) The district court also granted
23 summary judgment for the Sandin defendants on O.P.H.'s remaining claims.
24 (Vol. IX at AA1493-AA1496.)
25
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1 O.P.H. timely appealed the district court’s orders. (Vol. X at AA1497.)

2 **STATEMENT OF FACTS**

3
4 **A. The Sandin Defendants’ Business Dealings with O.P.H.
Established a De Facto Fiduciary Duty.**

5 Prior to the instant litigation, O.P.H. operated an Original Pancake House
6 Restaurant in Las Vegas, Nevada. (Vol. IX at AA1489.) In 2002, Dave
7 Sandin—an insurance broker based in Oregon—became O.P.H.’s insurance
8 broker, and began procuring insurance for O.P.H. (*Id.*) When O.P.H. began
9 purchasing insurance with Mr. Sandin’s assistance, he worked for a series of
10 different insurance brokerages. (Vol. III at AA0353-AA0354; Vol. VIII at
11 AA1264.) On at least three different occasions, Mr. Sandin informed O.P.H.
12 they were late on a premium payment—on or about March 23, 2006 (Vol. VIII
13 at AA1268); on or about May 13, 2008 (*id.*); and on or about May of 2009.
14 (*Id.*; *see also* Vol. VIII at AA1198 (deposition testimony of Linda Snyder);
15 AA1268 (O.P.H.’s Answers to Dave Sandin’s First Set of Interrogatories).)

16
17 According to Mr. Sandin, it was his practice to inform clients of a pre-
18 cancellation notice “[t]o give them a chance to make payment” and avoid
19 having to find replacement insurance. (Vol. VIII AA1247; AA1248
20 (deposition of Dave Sandin).) The Sandin Defendants were required to notify
21 all customers of any pending cancellations because “... if [an insurance broker
22 has] a practice of notifying your insured, if you do it for one you have to do
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1 them for all[.]” (Vol. VIII at AA1290 (deposition testimony of O.P.H. expert
2 witness Neal Bordenave).) This is because “... contractually [insurance
3 brokers] pick up more liability. And the liability is the following: I have to do
4 it to all my clients. If I do it for one, I have got to do it for all.” (Vol. VIII at
5 AA1297-AA1298.)
6

7
8 Stephan Freudenberger, the President of O.P.H (Vol. VIII at AA1255),
9 came to rely on Dave Sandin to offer whatever support was necessary with
10 regard to O.P.H.’s insurance needs (Vol. VIII at AA1257), as did Linda
11 Snyder, O.P.H.’s office manager. (Vol. VIII at AA1199-1200.) As Mr.
12 Freudenberger explained, Mr. Sandin “was my buffer. . . . I absolutely a
13 hundred percent relied on my broker to be the buffer, like he had been in the
14 past.” (Vol. VIII at AA1257.)
15
16

17
18 **B. The Sandin Defendants Assisted O.P.H. with purchasing
19 an Insurance Policy With OMI.**

20 In December 2011, the Sandin Defendants recommended O.P.H. purchase
21 insurance from OMI. (Vol. IX at AA1489.) OMI issued a Business Owner
22 Protector Policy to O.P.H. that covered the Original Pancake House
23 Restaurant. (Vol. IV at AA0596-AA0693.) The policy’s term was from
24 December 26, 2011, through December 26, 2012. (Vol. IV at AA0596.)
25

26 Unbeknownst to O.P.H., Mr. Sandin was not a licensed non-resident
27 insurance agent in Nevada at the time he assisted O.P.H. with procuring the
28

1 policy from OMI. In order to legally sell insurance in Nevada, an individual
2 must possess either a resident or non-resident agent license. *See* Nev. Rev.
3 Stat. §§ 598.0623, 686A.201, 683A.310. At the time he procured the insurance
4 policy from OMI on behalf of O.P.H, however, Mr. Sandin was not a licensed
5 non-resident agent in Nevada as his Nevada licensure had lapsed. (Vol. VIII at
6 AA1242.)

7
8
9 The policy O.P.H. purchased from OMI provided in pertinent part that:

10
11 We [OMI] may cancel this policy by mailing or delivering to the
12 first Named Insured written notice of cancellation at least: [...] b.
13 10 days before the effective date of cancellation if we cancel for
nonpayment of premium.

14 (Vol. I at AA0171.) The policy further provided:

15
16 N. Notices (1) Notice of cancellation or nonrenewal will be mailed,
17 first class or certified, or delivered to the first Named Insured at the
18 last mailing address known to us and will state: (a) The specific
19 reason for cancellation or nonrenewal, and (b) The effective date of
20 nonrenewal. (2) We will also provide a copy of the notice of
21 cancellation, for both policies in effect less than 70 days and
policies in effect 70 days or more, to the agent who wrote the
policy.

22 (Vol. I at AA0114.)

23
24 **C. O.P.H. Attempts to Submit a Claim to OMI After a Fire
Destroys The Original Pancake House and Discovers OMI Had
25 Cancelled Its Policy.**

26 In the early morning hours of August 17, 2012, there was a fire at the
27 Original Pancake House restaurant located at 4833 West Charleston
28 Boulevard, in Las Vegas, Nevada. (Vol. VIII at AA1310-AA1311.) As a result

1 of the August 17, 2012 fire, the building at 4833 West Charleston Boulevard,
2 in Las Vegas, Nevada and its contents, were a total loss. (Vol. VIII at
3 AA1194.)
4

5 On that same day, O.P.H. submitted a claim to its insurance company,
6 Oregon Mutual Insurance Company (“OMI”), who issued a claim number for
7 the loss associated with the fire. (Vol. I at AA0140.) OMI assigned the claim
8 to its insurance adjuster, Jerry Masonheimer. (Vol. I at AA0142.)
9

10
11 On August 20, 2012, Mr. Masonheimer notified O.P.H. that at the time of
12 the fire, O.P.H.’s insurance policy was not in effect. (Vol. I at AA0142.)
13 According to Mr. Masonheimer, O.P.H.’s coverage had expired effective
14 August 16, 2012 at 12:01 a.m. due to nonpayment of the insurance premium.
15 (*Id.*; see also AA0145 (August 21, 2012 nonpayment cancellation notice).)
16

17
18 Unbeknownst to O.P.H., on July 31, 2012 OMI issued a notice of
19 cancellation to O.P.H. for nonpayment of its insurance premium. (Vol. I at
20 AA0116 (July 31, 2012 cancellation notice).) The notice stated in pertinent
21 part as follows:
22

23 We did not receive the required premium payment on your account
24 by the date it was due. We appreciate your business and hope we
25 can continue to serve your insurance needs. If we receive at least
26 the minimum due on this account by 08/15/12, we will continue
27 your coverage without interruption. If we do not receive the
28 minimum due by 08/15/12, each policy listed below will be
cancelled effective the time and date shown opposite that policy
number.

1
2 (*Id.*) The notice further indicated that the policy would be cancelled effective
3 August 16, 2012 at 12:01 a.m. (*Id.*)

4 O.P.H never received the July 31 Notice, nor did O.P.H ever receive any
5 notice from OMI or the Sandin Defendants that it had missed a payment until
6 the August 21, 2012. (Vol. I at AA0121 (OMI's answers to O.P.H.'s Second
7 Set of Requests for Admissions); *see also* Vol. VII at AA1306-AA 1307
8 (Defendant Dave Sandin's responses to O.P.H.'s First Set of Interrogatories).)
9 Moreover, O.P.H. never received an invoice for August 2012. (Vol. I at
10 AA0121.)

11
12
13
14 **D. The July 31, 2012 Cancellation Notice Did Not Comport**
15 **With the Requirements of Nev. Rev. Stat. § 687B.360**

16 According to Nevada law, OMI was required to send notice to O.P.H ten
17 days prior to termination for nonpayment of a premium. *See* Nev. Rev. Stat. §
18 687B.320(2) ("No cancellation under subsection 1 is effective until in the case
19 of [failure to pay a premium when due] at least 10 days ... after the notice is
20 delivered or mailed to the policyholder.") In addition to sending notice within
21 a certain time frame prior to cancellation, certain terms concerning pre-
22 cancellation notice are required by Nevada law. *See* Nev. Rev. Stat. §
23 687B.360. Nev. Rev. Stat. § 687B.360 provides:

24
25
26
27 If a notice of cancellation or nonrenewal under NRS 687B.310 to
28 687B.420, inclusive, does not state with reasonable precision the
facts on which the insurer's decision is based, the insurer shall

1 supply that information within 6 days after receipt of a written
2 request by the policy holder. *No notice is effective unless it contains*
3 *adequate information about the policyholder's right to make such a*
4 *request.*

5 Nev. Rev. Stat. § 687B.360 (emphasis added).

6 The July 31, 2012 notice OMI sent to O.P.H. did not contain any
7 information about O.P.H.'s right to make a written request for information to
8 OMI. (*Compare* Vol. I at AA0116 (July 31, 2012 notice) *and* AA0157 (notice
9 of cancellation from Amco Insurance Company which states "You have a right
10 to make a written request to us for more explicit detail on the reason your
11 policy has been terminated.").)

14 **E. The Proceedings in the District Court**

15 On November 27, 2013, O.P.H. filed a motion for partial summary
16 judgment. (Vol. I at AA0089.) In that motion, O.P.H. argued it was entitled to
17 judgment as a matter of law because OMI's July 31 Notice did not comply
18 with Nev. Rev. Stat. §§ 687B.320 and 687B.360. (*See generally id.*) The
19 district court conducted a hearing on O.P.H.'s motion for partial summary
20 judgment on January 22, 2014. (Vol. II at AA0316.)

23 On February 19, 2014, the district court entered an order denying
24 O.P.H.'s motion for partial summary judgment. (Vol. X at AA1597.) In its
25 brief order, the district court held that the determination of whether the
26 requirement of Nev. Rev. Stat. § 687B.360 was triggered by OMI's purported
27
28

1 July 31 Notice was “a question of fact.” (Vol. X at AA1600.)

2 On March 17, 2015, OMI filed a motion for summary judgment as to all
3
4 claims against it, including O.P.H.’s claim regarding OMI’s defective Notice
5 of cancellation. (Vol. III at AA0337.) The Sandin Defendants also filed a
6
7 motion for summary judgment on March 17, 2015. (Vol. IV at AA0481.) The
8 district court conducted a hearing on OMI’s and the Sandin Defendants’
9 motions on May 14, 2015. (Vol. IX at AA1426.)

10
11 Although the district court had previously denied O.P.H.’s motion for
12 summary judgment on its claim against OMI for its failure to conform its July
13
14 31 Notice with the requirements of Nev. Rev. Stat. §§ 687B.320 and
15 687B.360 on the grounds that the claim presented a question of fact, the
16 district court on June 26, 2015 entered an order granting OMI’s motion for
17
18 summary judgment as to that claim. (Vol. IX at AA1476.) In its order, the
19 district court found “as a matter of law that the notice provided to [O.P.H.] by
20
21 OMI satisfie[d] the requirements of the policy and NRS 687B310, NRS
22 687B320, and NRS 687B360.” (Vol. IX at AA1483.) The court also granted
23
24 summary judgment in favor of OMI on all of O.P.H.’s other claims. (Vol. IX
25 at AA1484-AA1485.)

26 Also on June 26, 2015, the district court entered an order granting the
27
28 Sandin Defendants’ motion for summary judgment. (Vol. IX at AA1486.)

1 Significantly, the district court found the Sandin Defendants were entitled to
2 summary judgment on O.P.H.'s breach of fiduciary duty claim because in
3 Nevada, insurance agents do not have a fiduciary relationship with their
4 clients, and because the Sandin Defendants had no affirmative duty to remind
5 O.P.H. about its monthly premiums. (Vol. IX at AA1491-AA1492.) The
6 district court also granted summary judgment for the Sandin defendants on
7 O.P.H.'s remaining claims. (Vol. IX at AA1493-AA1496.)

8 **SUMMARY OF ARGUMENT**

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10
11 In this case, the district court erred in granting summary judgment to
12 OMI on O.P.H.'s claim that OMI's July 31 Notice of cancellation did not
13 comply with Nev. Rev. Stat. §§ 687B.320 and 687B.360 where—just months
14 earlier—it had denied O.P.H.'s motion for partial summary judgment on that
15 claim. In its order denying O.P.H.'s motion for partial summary judgment, the
16 district court held that whether the July 31 Notice of cancellation complied
17 with Nevada law was “a question of fact.”

18
19 Pursuant to Nev. Rev. Stat. § 687B.360, a notice of cancellation is not
20 effective “unless it contains adequate information about the policyholder's
21 right” to request information regarding the facts which support the insurer's
22 decision to cancel a policy. The July 30 Notice from OMI, however, did not
23 inform O.P.H. of this right. As a result, contrary to the district court's
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1 decision, the July 31 Notice did not effectively cancel O.P.H.’s policy.

2 The California Court of Appeal, First District, considered the same issue
3
4 in *Ilene Lee v. Industrial Indemnity Company, Inc., et al.*, 177 Cal. App. 3d
5 921 (1986). At the time the California Court of Appeal considered Ilene Lee,
6
7 California Insurance Code 667, which governed notices of cancellation was
8 substantially similar to Nev. Rev. Stat. § 687B.360. *See, e.g., Ilene Lee*, 177
9 Cal. App. 3d at 923, n.1.

10
11 In *Ilene Lee*, the plaintiff was mailed a bill for \$73.00, generated as a
12 result of an increase in coverage. *Id.* at 255. Without realizing the mailing was
13 a bill, Ms. Lee put the bill away without reading it or paying the amount due.
14
15 *Id.* After that time, no additional bills were sent to Ms. Lee. *Id.* In December
16 1981, the insurer mailed a notice of cancellation to Ms. Lee. *Id.*

17
18 Similar to this case, the cancellation notice mailed by the insurer to Ms.
19 Lee indicated the insurance coverage would cease in the future. *Id.* at 923. The
20 court found the “notice did not contain the statement required by Insurance
21 Code section 677 that [the Plaintiff] could, upon written request, obtain a
22 statement of facts upon which cancellation was based.” *Id.* The Court of
23 Appeals found the lower court’s denial of summary judgment was error,
24
25 because the insurer’s failure to include the mandatory language required by
26 Insurance Code section 677 “rendered the purported cancellation of [the
27
28

1 policy] . . . null and void.” *Id.* at 926.

2 Likewise here, O.P.H. was entitled to summary judgment in its favor
3
4 because the July 31 Notice was null and void. Thus, the district court erred in
5 denying O.P.H.’s motion for partial summary judgment. Moreover, the district
6 court’s denial of O.P.H.’s motion of partial summary judgment was erroneous
7
8 given that it later granted summary judgment to OMI on the same claim it had
9 earlier determined was a “question of fact.”

10
11 The court also erred in granting Summary Judgment to the Sandin
12 Defendants with regards to O.P.H.’s claim that the defendants’ failure to
13 inform O.P.H. of the impending cancellation was negligent and constituted a
14 breach of the Sandin Defendants’ fiduciary duty to O.P.H. Although Nevada
15 law may dictate insurance agents have neither a fiduciary relationship with
16 their clients nor a duty to inform clients about monthly premiums, the Sandin
17 Defendants created a de facto duty to O.P.H. because the Sandin Defendants
18 regularly notified O.P.H. about premium due dates over the course of their
19 relationship, thereby creating an expectation on the part of O.P.H. that the
20 Sandin Defendants’ practice of notification was a part of its duties to O.P.H.
21

22 Given these facts, the district court’s granting of summary judgment in
23 favor of the defendants, as well as its denial of partial summary judgment to
24 O.P.H., constitutes reversible error.
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STANDARD OF REVIEW

“This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court.” *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); accord *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 957, 194 P.3d 96, 100 (2008).

ARGUMENT

A. The District Court Erred in Granting Summary Judgment in Favor of OMI on O.P.H.’s Claim that the July 31, 2012 Notice of Cancellation Was Ineffective Where Genuine Issues of Material Fact Existed As to Whether OMI’s July 31, 2012 Notice Was Legally Sufficient to Provide O.P.H. Adequate Notice of Cancellation.

Summary judgment is appropriate when the moving party is entitled to judgment as a matter of law, and no genuine issue remains for trial. *Shepard v. Harrison*, 100 Nev. 178, 678 P.2d 670 (1984); see also NRCP 56. Nev. R. Civ. P. 56(c) states, in pertinent part, “[a] summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.” NRCP 56(c).

“[T]he nonmoving party is entitled to have the evidence and all reasonable inferences accepted as true.” *Wiltsie v. Baby Grand Corp.*, 105 Nev. 291, 292, 774 P.2d 432, 433 (1989) (citing *Johnson v. Steel, Inc.*, 100 Nev. 181, 678 P.2d 676 (1984)). “The trial judge should exercise great care in granting motions for summary judgment.” *Short v. Hotel Riviera*, 79 Nev. 94, 103, 378

1 P.2d 979, 984 (1963); *see also* *McColl v. Scherer*, 73 Nev. 226, 231-32, 315
2 P.2d 807 (1957). Where an issue, or a trial, can turn on the credibility of a
3 witness, summary judgment is improper. *Short*, 79 Nev. at 100, 378 P. 2d at
4 983.

5
6 ***1. There Was No Genuine Issue of Material Fact Regarding***
7 ***Whether OMI Provided Legally Sufficient Pre-Cancellation***
8 ***Notice to O.P.H.***
9

10 As discussed above, Nevada law required OMI to send pre-cancellation
11 notice to O.P.H at least 10 days prior to the date of termination. *See* Nev. Rev.
12 Stat. § 687B.320. The pre-cancellation notice was also subject to Nev. Rev.
13 Stat. § 687B.310(6), which provides:

14
15 6. Any notice to an insured required pursuant to NRS 687B.320 to
16 687B.350, inclusive, must be personally delivered to the insured or
17 mailed first class or certified to the insured at the address of the
18 insured last known by the insurer. The notice must state the
19 effective date of the cancellation or nonrenewal and be
20 accompanied by a written explanation of the specific reasons for the
cancellation or nonrenewal.

21 Last, and most importantly, the pre-cancellation notice also had to conform to
22 Nev. Rev. Stat. § 687B.320. Nev. Rev. Stat. § 687B.360 provides:

23
24 If a notice of cancellation or nonrenewal under NRS 687B.310 to
25 687B.360, inclusive, does not state with reasonable precision the
26 facts on which the insurer's decision is based, the insurer shall
27 supply that information within 6 days after receipt of a written
28 request by the policyholder. *No notice is effective unless it contains*
adequate information about the policyholder's right to make such a
request.

1
2 Nev. Rev. Stat. § 687B.360 (emphasis added). Thus, a plain reading of Nev.
3 Rev. Stat. § 687B.360 requires an insurer to provide information about a
4 policyholder's right to make a request for information about the facts upon
5 which the insurer has decided to cancel an insurance policy. *See id.* Whether
6 the insurer must reply to that request for information may be discretionary;
7 however, based upon a plain reading of the statute, an insured always has the
8 right to request additional information. *See id.* Most importantly, an insurer
9 always must inform its insured about that right to request additional
10 information. *Id.* The July 31, 2012 notice issued by OMI failed to comport
11 with this requirement. Thus, it was not effective to cancel O.P.H.'s policy.
12

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14
15
16 There is no Nevada case which squarely address this issue. The California
17 Court of Appeal, First District, however, considered the same issue in *Ilene*
18 *Lee v. Industrial Indemnity Company, Inc., et al.*, 223 Cal. Rptr. 254, 177 Cal.
19 App. 3d 921 (1986) ("*Ilene Lee*"). In *Ilene Lee*, Ms. Lee, the plaintiff, was
20 mailed a bill for \$73.00, generated as a result of an increase in coverage. *Id.* at
21 255. Without realizing that the mailing was a bill, Ms. Lee put the bill away
22 without reading it or paying the amount due. *Id.* After that time, no additional
23 bills were sent to Ms. Lee. *Id.* In December 1981, the insurer mailed a notice
24 of cancelation to Ms. Lee that stated:
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1 You are hereby notified in accordance with the terms and
2 conditions of the above mentioned policy that your insurance will
3 cease at and from the hour and date mentioned above due to
4 nonpayment of premium. Premium adjustment, if any, will be made
as soon as practicable.

5 *Id.*

6
7 Similar to the July 31, 2012 notice OMI sent to O.P.H., the notice mailed
8 by the insurer to Ms. Lee indicated that the insurance coverage would cease in
9 the future. *See Ilene Lee*, 177 Cal. App. at 923. Significantly, the Court found
10 that the “notice did not contain the statement required by Insurance Code
11 section 677 that [the Plaintiff] could, upon written request, obtain a statement
12 of facts upon which cancellation was based.” *Id.*

13
14
15 At the time *Ilene Lee* was decided, California Insurance Code section 677
16 provided as follows:

17
18 All notices of cancellation shall be in writing, mailed to the named
19 insured at the address shown in the policy, or to his last known
20 address, and shall state, with respect to policies in effect after the
21 time limits specified in Section 676, (a) which of the grounds set
22 forth in Section 676 is relied upon, and (b) that, upon written
request of the named insured, the insurer shall furnish the facts on
which the cancellation is based.

23 *Ilene Lee*, 177 Cal. App. 3d at 923, n. 1. While it has since been amended, at
24 the time the Court considered California Insurance Code Section 677 in *Ilene*
25 *Lee*, it was substantially similar to Nev. Rev. Stat. § 687B.360’s requirement
26 that, if a cancellation notice does not provide sufficient information regarding
27
28

1 the insurance company's decision to cancel a policy, the insurer shall supply
2 that information regarding the facts it relied on in cancelling a policy within 6
3 days after receipt of a written request by the policyholder.
4

5 Just like the prior version of the California Insurance Code, no notice is
6 effective in Nevada unless it contains adequate information about the
7 policyholder's right to make such a request. Nev. Rev. Stat. § 687B.360. As a
8 result, the July 31, 2012 cancellation notice, was ineffective to cancel O.P.H.'s
9 policy.
10
11

12 In *Ilene Lee*, the court held that the lower court erred in failing to
13 grant summary judgment in favor of the insured because the insurer's failure to
14 include the mandatory language required by Insurance Code section 677
15 "rendered the purported cancellation of [the policy] ... null and void." *Id.* at
16 926. Similarly here, the district court erred in granting summary judgment to
17 OMI on this claim because the July 31, 2012 notice failed to provide O.P.H. of
18 its right to request information regarding OMI's cancellation decision.
19
20
21

22 In its June 26, 2015 order granting OMI summary judgment on this claim,
23 the district court found that the July 31, 2012 notice was sufficient under
24 Nevada law because: "1) the notice was based on non-payment of a premium .
25 . . 2) was mailed first class to the insured at [its] last known address, 3) state[d]
26 the effective date of the cancellation, 4) included the reason for the
27
28

1 cancellation, 5) was effective no earlier than 10 days after it was mailed . . . ,
2 and 6) stated with reasonable precision the facts on which the insurer's
3 decision to cancel was based.” (Vol. IX at AA1483-AA1484.)
4

5 This was error, however, because there is a genuine dispute regarding
6 whether the failure to inform O.P.H. of its right to request information about
7 the cancellation rendered the notice ineffective. In particular, the Nevada
8 Department of Insurance has advised that a cancellation notice is ineffective if
9 it does not include this advisement. The Department has explained Nev. Rev.
10 Stat. 687B.360's requirements as follows: “No notice is effective unless it
11 contains adequate information about the policyholder's right to make such a
12 request even if the notice does include the reason for cancellation or
13 nonrenewal. Adequate information includes the address to write to receive the
14 reasons for cancellation.” (Vol. I at AA0160 (Property and Casualty Review
15 Standards Checklist, 3rd Ed.).)
16
17

18 Given this guidance, the July 31, 2012 notice was legally deficient. Thus,
19 there was no genuine issue of material fact as to whether OMI's failure to send
20 pre-cancellation notice resulted in a breach of the Policy and a violation of
21 Nevada law. The district court's granting of summary judgment on this claim
22 therefore constitutes reversible error.
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1 **B. The District Court Erred in Granting Summary**
2 **Judgment in Favor of OMI on O.P.H.’s Claim That the July 31,**
3 **2012 Cancellation Notice Was Ineffective After Previously**
4 **Denying O.P.H.’s Motion for Partial Summary Judgment On**
5 **the Grounds That the Effectiveness of the Notice Was a**
6 **“Question of Fact.”**

7 As discussed above, on February 19, 2014, the district court found that the
8 effectiveness of the July 31, 2012 cancellation notice OMI issued to O.P.H.
9 was “a question of fact.” (Vol. X at AA1600.) When OMI subsequently filed
10 its motion for summary judgment on March 17, 2015, there had been no
11 change in the core facts surrounding this claim. There had also been no change
12 in Nevada law regarding the requirements of Nev. Rev. Stat. § 687B.360.

13 Given this holding, the district court committed reversible error in
14 granting summary judgment to OMI on this claim because, by its own
15 indication in the February 19, 2014 order, there was an issue of material fact
16 regarding whether the July 31, 2012 complied with the requirements of Nev.
17 Rev. Stat. § 687B.360. Given that there was no change in the law or material
18 facts of the case, it cannot follow that summary judgment in favor of OMI was
19 appropriate.
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1 **C. The District Court Erred in Granting Summary**
2 **Judgment in Favor of the Sandin Defendants on O.P.H.’s**
3 **Negligence and Breach of Fiduciary Duty Claims Because the**
4 **Sandin Defendants’ Custom and Practice of Notifying O.P.H.**
5 **When its Insurance Premiums Were Due Created a De Facto**
6 **Fiduciary Duty.**

7 In its June 26, 2015 order granting the Sandin Defendants summary
8 judgment, the district court first noted that under Nevada law, insurance agents
9 do not have a fiduciary relationship with their clients. (AA1491 (citing *Keddie*
10 *v. Beneficial Insurance, Inc.*, 94 Nev. 418, 420, 580 P.2d 955, 956 (1978) and
11 *Havas v. Carter*, 89Nev. 497, 499-500, 515 P.2d 397, 399 (1973)). The district
12 court found that because there was no express or implied agreement between
13 O.P.H. and the Sandin Defendants that required the Sandin Defendants to
14 notify O.P.H. of a late premium or pending cancellation. (AA1492.)

15 The district court also found that Dave Sandin had only notified O.P.H. of
16 a pending cancellation in May of 2009. (AA1493.) This ruling, however,
17 ignored evidence of two other instances in which Mr. Sandin had notified
18 O.P.H. of pending cancellations. (*See, e.g.*, AA1268).

19 Given these conclusions, the district court found that the Sandin
20 Defendants were entitled to summary judgment on O.P.H.’s breach of
21 fiduciary duty claim. (AA1495.) Further, the district court held that O.P.H.’s
22 negligence claim based on the Sandin Defendants’ duty to notify O.P.H. of
23 pending cancellations was barred by the economic loss doctrine. (*Id.* (citing
24
25
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27
28

1 *Terracan Consultants Western, Inc. v. Mandalay Resort Group*, 125 Nev. 66,
2 602 P.3d 81 (2009)).) These conclusions were erroneous, however, because
3
4 there are genuine issues of material fact regarding whether the relationship
5 between the Sandin Defendants and O.P.H. differed from the typical broker-
6 client relationship, thereby creating a *de facto* obligation for the Sandin
7 Defendants to inform O.P.H. of the pending cancellation of its policy with
8 OMI.
9

10
11 ***1. The Sandin Defendants' Negligence in Failing to Inform***
12 ***O.P.H. of the Pending Cancellation Proximately Caused O.P.H.'s***
13 ***Losses.***

14 Negligence and proximate cause are questions of fact, and therefore are
15 for the jury to determine. *Nehls v. Leonard*, 97 Nev. 325, 328, 630 P.2d 258,
16 260 (1981) (quoting *Merluzzi v. Larson*, 96 Nev. 409, 610 P.2d 739 (1980));
17 *see also Klasch v. Walgreen Co.*, 127 Nev. Adv. Rep. 74, 19, 264 P.3d 1155,
18 1161 (2011) (reversing the district court's granting of summary judgment;
19 "Breach of duty and causation are classically questions of fact.").

20
21
22 "[A] fiduciary relation exists between two persons when one of them is
23 under a duty to act for or to give advice for the benefit of another upon matters
24 within the scope of the relation." *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d
25 838, 843 (2009) (quotation omitted). A fiduciary relationship exists between
26 two persons when one has gained the confidence of the other and purports to
27
28

1 act or advise with the other's interest in mind. *Brzica v. Trustees of Dartmouth*
2 *College*, 147 N.H. 443, 447-48, 791 A.2d 990 (2002). "Once a person becomes
3
4 a fiduciary, the law places him in the role of a moral person and pressures him
5 to behave in a selfless fashion while contract law does not go beyond the
6 morals of the market place where self-interest is the norm." *Id.* at 448, 791
7
8 A.2d 990.

9 As noted above, insurance agents do not typically have a fiduciary
10 relationship with their clients. "Nevertheless, in an action against the agent for
11 negligence, the insured may show that special circumstances prevailed that
12 gave rise to a duty on the part of the agent to ensure that adequate insurance
13 was obtained." *Martinonis v. Utica Nat'l Ins. Group*, 65 Mass. App. Ct. 418,
14
15 420, 421 840 N.E.2d 994, 996 (2006); accord *GE HFS Holdings, Inc. v.*
16
17 *National Union Fire Ins. Co. of Pittsburgh, PA*, 520 F. Supp. 2d 231, 237 (D.
18 Mass. 2007); cf. *Constr. Planners, Inc. v. Dobax Ins. Agency, Inc.*, 31 Mass.
19 App. Ct. 672, 676-77, 583 N.E.2d 255, 258 (1991) (award of summary
20 judgment in favor of broker reversed where genuine issues of material fact
21 existed as to whether broker negligently failed to renew builder's risk policy
22 following a conversation with the insured and considering the parties' past
23 history together).

24
25
26
27 As described above, Mr. Sandin testified that it was the business practice
28

1 of the Sandin Defendants to notify their customers of missed payments or
2 impending cancellation, “[t]o give them a chance to make a payment.” (Vol.
3 VIII at AA1247; *see also* AA 1248 (testimony regarding practice of contacting
4 clients to inform them of cancellation notices).) Because the Sandin
5 Defendants were in the practice of notifying at least some of their customers of
6 missed payments or impending cancellations, they created for themselves an
7 obligation to continue doing so, in spite of the fact that ordinarily this would
8 not be a requirement of the ordinary standard of care for an insurance agent.
9

10
11
12 The district court’s ruling also completely ignored the testimony of both
13 OMI and the Sandin Defendants’ experts which created a genuine dispute
14 about the nature of the Sandin Defendants’ obligations to O.P.H. For example,
15 the Sandin Defendants’ expert, Paul Burkett, testified on this issue, and
16 concluded: “... the liability is the following: I have to do it to all my clients. If
17 I do it for one, I have got to do it for all.” (Vol. VIII at AA1297-AA1298) In
18 the words of OMI’s expert, Don Way, by “... consistently, over time,
19 provid[ing] that duplicate notice,” the Sandin Defendants voluntarily created a
20 duty to continue providing such notices to O.P.H. (Vol. VIII at AA1277-
21 AA1280.) Dave Sandin did not inform O.P.H of the impending cancellation of
22 their insurance policy, and thereby breached the duty he owed O.P.H to do so.
23
24

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27 Additionally, the district court’s ruling ignored the practice Mr. Sandin
28

1 has established on notifying O.P.H. in particular regarding pending
2 cancellations. Both Mr. Freudenberger and Ms. Snyder testified that they had
3
4 relied on Mr. Sandin in the past to advise them that they had missed payment
5 on insurance premiums. (Vol. VIII at AA1257; AA1199-1200.)

6
7 Thus, despite the district court's findings to the contrary, there are
8 numerous genuine issues of material fact regarding the Sandin Defendants'
9 duty to notify O.P.H. of the impending cancellation of their policy with OMI.
10
11 Thus, the Court erred in granting summary judgment in favor of the Sandin
12 Defendants on this claim.

13
14 ***2. There are Genuine Issues of Material Fact About Whether***
15 ***the Sandin Defendants' Unique Relationship with O.P.H. Created***
a De Facto Fiduciary Duty.

16 As the district court noted, insurance agents are *typically* required to use
17 reasonable diligence to procure appropriate insurance for their clients, or to
18
19 notify the client when they are unable to. *See e.g., Keddie v. Beneficial Ins.*, 94
20 Nev. 418. However, based on the evidence adduced during discovery, the
21
22 relationship between the Sandin Defendants and O.P.H. was not a typical one.

23 As discussed above, the Sandin Defendants created greater liability and
24 more duties than the "typical" insurance broker has with his or her clients by
25
26 routinely contacting their customers whenever they missed a payment or were
27 facing an impending cancellation. Thus, there exists several genuine issues of
28

1 material fact regarding the claim for breach of fiduciary duties that should not
2 have been resolved on summary judgment. The district court therefore erred in
3
4 granting summary judgment in favor of the Sandin Defendants on this claim.

5
6 **CONCLUSION**

7 Based upon the above and foregoing, the district court erred in denying
8 O.P.H.'s motion for partial summary judgment, and also erred in granting
9 OMI's and the Sandin Defendants' motions for summary judgment. In this
10 case, there remain genuine issues of material fact which must be resolved by a
11 jury. Accordingly, O.P.H. respectfully requests that this Honorable Court
12 reverse the district court's orders disposing of this case, and remand the matter
13
14 to the district court for further proceedings.
15

16
17 DATED THIS 11th DAY OF APRIL, 2016.
18

19 /s/ Alina M. Shell

20 Margaret A. McLetchie

21 Nevada State Bar No. 10931

22 Alina M. Shell

23 Nevada State Bar No. 11711

24 MCLECHIE SHELL LLC

25 701 E. Bridger Avenue, Suite 520

26 Las Vegas, Nevada 89101

27 *Attorneys for Appellant, O.P.H. of Las Vegas, Inc.*
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Pursuant to Nev. R. App. P. 28.2:

I hereby certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P. 32(a)(6) because the Opening Brief has been prepared in a proportionally spaced typeface (14 point Times New Roman font).

I further certify that this Opening Brief complies with the type-volume limitation of Nev. R. App. P. 32(a)(7)(A)(ii) because it contains 7,996 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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1 I understand that I may be subject to sanctions in the event that the
2 accompanying brief is not in conformity with the requirements of the Nevada
3 Rules of Appellate Procedure.
4

5 DATED THIS 11th DAY OF APRIL, 2016.
6

7
8 /s/ Alina M. Shell

9 Margaret A. McLetchie

10 Nevada State Bar No. 10931

11 Alina M. Shell

12 Nevada State Bar No. 11711

13 MCLEATCHIE SHELL LLC

14 701 E. Bridger Avenue, Suite 520

15 Las Vegas, Nevada 89101

16 *Attorneys for Appellant, O.P.H. of Las Vegas, Inc.*
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Patricia M. Lee, Esq.
Michael S. Kelley, Esq.
Michael K. Wall, Esq.
HUTCHISON & STEFFEN LLC
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
Attorneys for Respondent, Oregon Mutual Insurance Company

Robert W. Freeman, Esq.
Priscilla L. O'Briant, Esq.
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 South Rainbow Blvd., Suite 600
Las Vegas, NV 89118
Attorneys for Respondents Dave Sandin and Sandin & Co.

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