IN THE SUPREME COURT OF THE STATE OF NEVADA

O.P.H. OF LAS VEGAS, INC.,	)	Supreme Court No. 68543
	)	
Appellant,	)	
	)	
v.	)	
	)	
OREGON MUTUAL INSURANCE COMPANY; DAVE SANDIN; AND SANDIN & CO.,	)	
	)	
Respondents.	)	
	)	

RESPONDENTS DAVE SANDIN AND SANDIN & CO.'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(1), and must be disclosed:

Sandin & Co. has no parent company and is not publicly traded. There is no publicly traded company that owns more than 10% of the stock of Sandin & Co.

The attorneys who have appeared on behalf of respondents in this Court and in the district court are:

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These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 26 day of May, 2016.

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TABLE OF CONTENTS

AUTHORITIES CITED
RULES AND STATUTES

CASE LAW

OTHER

This answering brief is submitted on behalf of respondents Dave Sandin and Sandin & Co. (the "Sandin defendants") only. It is anticipated that Oregon Mutual Insurance Company ("Oregon Mutual") will submit its own answering brief addressing the issues peculiar to its defense.

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment. Appellant's notice of appeal and opening brief suggest that this is an appeal from three orders of the district court. This is not correct. Actually, only the third order, the one granting the Sandin defendants' motion for summary judgment–which constitutes the final judgment–is appealable as a matter of law. NRAP 3A(b)(1). Technically, entry of the final judgment does not render unappealable prejudgment orders appealable, but to the extent appropriate, prejudgment rulings may be reviewed as part of an appeal from a final judgment. *See Mardian v. Greenberg Family Trust*, 131 Nev. ___, ___ P.3d ___ (Adv. Op. 72, September 24, 2015). All of the issues raised in appellant's brief are properly before this Court as part of appellant's appeal from the final judgment.

The final judgment was entered on June 30, 2015. IX AA 1488.[1] Notice of entry of the final judgment was served on appellant electronically on July 1, 2015.

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[1]I will cite to the Appendix by volume and page numbers as follows: "I AA __."

IX AA 1486. Although the opening brief states that appellant's notice of appeal was filed on August 4, 2015 (which would have been late), AOB viii, the notice of appeal was actually filed on July 30, 2015. X AA 1497.

Therefore, these answering respondents are satisfied that the jurisdiction of this Court has been properly invoked.

ROUTING STATEMENT

This case is assigned to the Nevada Supreme Court under NRAP 17(a)(10) (case originating in business court).

STATEMENT OF THE CASE

This is an appeal from a final judgment. IX AA 1488. Eighth Judicial District Court, Clark County, Department XXVI, the Honorable Gloria Sturman, District Judge.

INTRODUCTION

Appellant neglected to pay its hazard insurance premium. Oregon Mutual, appellant's carrier, canceled appellant's policy after notice to appellant of the failure of payment. Appellant's business premises burned down. Oregon Mutual denied coverage for the loss. Appellant sued.

Appellant is looking for an escape from its own negligence and the cancellation of its insurance policy. One pocket appellant is seeking to pick is that

of Sandin & Co., appellant's independent insurance agent that previously assisted appellant in procuring the policy. Appellant's theory: Sandin & Co. had a duty to inform appellant that its policy was going to be canceled for non-payment of the premium. Because Sandin & Co. owed no such legal duty to appellant, appellant's claim failed below. This Court should affirm the summary judgment entered in Sandin's favor.

STATEMENT OF FACTS

Instead of presenting the facts in its statement of facts, appellant has presented argument, with some factual assertions intermingled therein. AOB 5-12.

I. Factual Background.

The essential facts as revealed by the record are as follows.

Appellant O.P.H. of Las Vegas, Inc., operated an Original Pancake House Restaurant at 4833 West Charleston Boulevard in Las Vegas, Nevada. I AA 4 (complaint ¶ 2). Stephan Freudenberger is the president of O.P.H. and Lynda Snyder is the corporate office manager of O.P.H. IV AA 526 (Appellant's Response to Interrogatories). Snyder reports to Freudenberger. *Id.*

Defendant Dave Sandin is an insurance agent or broker based in Oregon. IV AA 541-43 (Depo of Sandin). In the early 2000s, Sandin and a colleague began working with appellant and other Original Pancake House franchisees.

Sandin's colleague was initially the lead agent for appellant and Sandin was his assistant. In or around 2005, Sandin, then with a former company, became the insurance agent for appellant. He remained appellant's insurance agent through August of 2012, except for a period of just over two years when appellant was with a different agency.[2] IV AA 44-51.

Although they are based in Oregon, the Sandin defendants were licenced to sell insurance in Nevada. Dave Sandin first became licensed to sell insurance in Nevada in 2005. Dave Sandin, Anthony Sandin (a non-party), and Sandin & Co. were all licensed in Nevada when Sandin & Co. took over appellant's account from Dave Sandin's former employer in 2010. Dave Sandin, Anthony Sandin and Sandin & Co. have worked on appellant's account since 2010. Sandin & Co.'s and Anthony Sandin's respective Nevada licences expired on June 1, 2013. Dave Sandin's Nevada license expired on April 1, 2011. IV AA 567-68; 581.

In December 2011, on an urgent basis, the Sandin defendants were asked to obtain a new policy to cover the restaurant. Appellant's previous carrier, Fireman's Fund, charged high premiums and appellant expressed to Dave Sandin its displeasure with Fireman's Fund on multiple levels, most notably the cost of its

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[2] This is critical, because two of the three incidents relied on by appellant as creating a duty based on past conduct occurred during this two year period, when Sandin was not even appellant's agent.

premiums and its claims handling policies and procedures. Dave Sandin explained to appellant that Fireman's Fund's premium increases were significant and affected the entire hospitality industry, and that he had successfully moved several clients to Allied Insurance due to Allied Insurance's competitive rates and better long-term fit for appellant's coverage needs. Appellant decided to purchase a policy from Allied Insurance. IV AA 563-66; 580.

Appellant had a claim the first week of its policy with Allied Insurance. As a result of this claim, Allied Insurance reviewed appellant's credit history and cancelled appellant's policy due to appellant's poor credit. Allied Insurance's cancellation of this policy left Oregon Mutual as the next best alternative that was willing to accept appellant at a premium appellant was willing and able to pay and that was available to negotiate terms of the policy during the holiday season. As Sandin testified, his "top six carriers would not write [appellant's] insurance because of their loss history and their bad credit." *Id.*; IV AA 593 (30(b)(6) Deposition of Sandin). Therefore, in December 2011, the Sandin defendants recommended an Oregon Mutual insurance policy to appellant based on appellant's coverage needs. *Id.*

Oregon Mutual issued a Businessowner Protector Policy to appellant that covered the restaurant ("the Policy"). IV AA 597. The term of the Policy was

from December 26, 2011 through December 26, 2012. *Id.* Sandin & Co. is identified as the agent on the Policy. *Id.*

Appellant received monthly statements for the premiums directly from Oregon Mutual. V AA 708 (Deposition of Snyder); IV AA 513 (Deposition of Freudenberger). Oregon Mutual mailed a billing statement directly to appellant for the payment that was due on or before July 26, 2012. V AA 733. Appellant received the billing statement in July, 2014. V AA 709-10 (Deposition of Snyder).

Appellant failed to pay its monthly premium that was due on July 26, 2012. IV AA 514 (Deposition of Freudenberger). Indeed, Freudenberger never denied that the failure to make the monthly payment was not the fault of anyone except himself. Freudenberger testified regarding the missed premium:

> Had I done my work that I'm paying myself to do to make sure that all this stuff gets paid in a timely manner . . . we wouldn't be sitting here, either. So that is the procedure. I didn't do my job in that moment. That's all I can say about that. I mean, it's a mishap in the company. There is no, I'm not trying to blame anybody for that payment not being made on July 26th, you know?

IV AA 519.

On August 1, 2012, Oregon Mutual sent a cancellation notice to appellant with an effective cancellation date of August 16, 2012. V AA 735. This notice was apparently generated late on July 31, 2012, and delivered on August 1, 2012.

Id. Therefore, in the record, it is alternatively referred to as the July 31 notice or the August 1 notice. Appellant maintained throughout this litigation that it never received a copy of the pre-cancellation notice and that the notice was not valid pursuant to the terms of the Policy and Nevada law. The Sandin defendants express no opinion in this brief as to the validity of Oregon Mutual's pre-cancellation notice or appellant's other arguments regarding the notice itself.

On August 13, 2012, prior to the cancellation of the Policy, appellant realized that it had not paid the monthly premium for July. Appellant, however, did not contact anyone at Oregon Mutual or the Sandin defendants regarding its failure to pay the July premium. V AA 715-720 (Deposition of Snyder). In fact, Appellant cut a check on August 13, 2012, to Oregon Mutual for the July premium but never mailed it before the Policy was cancelled. *Id.*; V AA 774 (Check to Oregon Mutual, never sent).

The Sandin defendants did not receive a copy of Oregon Mutual's pre-cancellation notice. V AA 778 (Dave Sandin's admission upon appellant's request that Sandin never received a copy of any notice prior to cancellation of the Policy). No party ever claimed that the Sandin defendants had notice of the cancellation of the policy prior to the time it was cancelled. Indeed, in the complaint, appellant affirmatively alleged that "Defendant OREGON MUTUAL

did not send a cancellation notice to Defendant DAVE SANDIN." I AA 7 (complaint ¶ 27; obnoxious capitalization in original).

Nevertheless, there was some confusion regarding whether the pre-cancellation notice was actually sent to the Sandin defendants. Specifically, Oregon Mutual's agency agreement with Sandin & Co. required Oregon Mutual to send copies of pre-cancellation notices to Sandin & Co. by mail or electronic transmission. III AA 350. In addition, the Policy stated that Oregon Mutual would send pre-cancellation notices to appellant, and that Oregon Mutual would "also provide a copy of the notice of cancellation . . . to the agent who wrote the policy." *Id*; III AA 426. Prior to June of 2010, by its own admission, Oregon Mutual provided such notices directly to its policy holder's agents. III AA 340. However, "on June 8, 2010 [Oregon Mutual] sent a Bulletin to its agents regarding provisional notices of cancellation. The Bulletin noted that as of June 14, 2010 [Oregon Mutual] was going to discontinue printing and mailing provisional Notices of Cancellation to agents. Instead, these notices would be available on-line through the BizLink profile under 'New Non-Payment Report'." *Id.*

The BizLink system is an electronic portal (like the Cloud) which Oregon Mutual now utilizes to provide agents with information relating to insurance policies. In other words, rather than providing notice as it did in the past, Oregon

Mutual now makes that information available to agents on its "cloud." The Sandin defendants express no opinion herein as to whether such "notice" satisfies the requirements of the agency agreement and/or of the Policy, and or of Nevada law.

In this case, the pre-cancellation notice was posted by Oregon Mutual on Bizlink on July 31, 2012, and a quick-link to this notice was available on Sandin's portal to Bizlink for a period of 24 hours. III AA 342 (Oregon Mutual's MSJ). It is undisputed that no one at Sandin & Co ever accessed the portal or discovered the existence of the pre-cancellation notice.

On August 13, 2012, appellant's representative, Linda Snyder, contacted defendant Dave Sandin to report a break-in that had occurred at the restaurant overnight between August 10, 2012 and August 11, 2012. V AA 781(Sandin admission); IV AA 528 (Appellant's Response to Interrogatory); V AA 714 (Deposition of Snyder). Sandin did not inform Snyder of the pre-cancellation notice because Sandin did not know about the notice.

On August 16, 2012, Snyder spoke with Dave Sandin to obtain a claim number for the break-in. V AA 781. Again, Sandin did not inform Snyder of the pre-cancellation notice because Sandin did not know about the notice.

On August 16, 2012, Oregon Mutual cancelled appellant's insurance policy. III AA 341. The Sandin defendants express no opinion as to the validity or

invalidity of the cancellation of the Policy.

On August 17, 2012, a fire completely destroyed the restaurant. V AA 725. Thereafter, the Sandin defendants became aware that the Policy had been cancelled. IV AA 569-70 (Deposition of Sandin); IV AA 577-79 (Sandin Answer to Interrogatories). On August 17, 2012, after the Sandin defendants became aware that the Policy had been cancelled, Dave Sandin contacted appellant and notified appellant that the Policy had been cancelled. *Id.*

As a result of the cancellation of the Policy for non-payment on August 16, 2012, Oregon Mutual denied coverage for the loss caused by the fire. V AA 795. The sole reason for cancellation of the Policy was appellant's failure to pay its July 26, 2012 premium on or before August 15, 2012. V AA 802-03 (Oregon Mutual's admission).

II. Procedural Posture.

On November 19, 2012, appellant filed its complaint, naming Oregon Mutual, Sandin & Co., and Dave Sandin as defendants. I AA 1. Against the Sandin defendants, appellant asserted claims for fraud in the inducement (third cause of action), fraud (fourth cause of action), breach of fiduciary duty (fifth

cause of action), violations of NRS 686A.310 (sixth cause of action),[3] and negligence (seventh cause of action). *Id.*[4] Underlying all of these claims is appellant's theory that Sandin owed appellant a duty to inform Sandin that it's insurance policy was about to be cancelled.

On December 21, 2012, Oregon Mutual filed its answer. I AA 26.

On December 26, 2012, the Sandin defendants filed a motion to dismiss the complaint as to them. I AA 36. The Sandin defendants argued that they had performed every duty they owed to appellant as appellant's insurance agent, and that they owed no duty to remind appellant to pay its premium. *Id.* On January 10, 2013, appellant opposed the motion to dismiss. I AA 47. On January 24, 2013, the Sandin defendants replied. I AA 65. The district court denied the motion to dismiss without prejudice. I AA 75. The Sandin defendants filed their answer on April 3, 2013. I AA 77.

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[3]Appellant abandoned its claim based on NRS 686A.310 against the Sandin defendants in the district court. VIII AA 1168, n. 1. It was not abandoned as against Oregon Mutual.

[4]Appellant abandoned its claim based on negligence against Oregon Mutual in the district court, VII AA 1091, n. 2, but maintained that claim as against the Sandin defendants. That claim was entitled "negligence," but the text of the complaint asserted violations of the deceptive trade practices act and a hodgepodge of other alleged statutory violations which, in appellant's view, constitute negligence *per se*. I AA 16-17.

On November 27, 2013, appellant filed a motion for partial summary judgment against Oregon Mutual only on issues of liability. I AA 89. The motion argued that the termination of appellant's insurance policy was wrongful because Oregon Mutual had not provided proper pre-cancellation notice of the failure to pay the premium as required by the Policy and by Nevada law. *Id.* As noted previously, the Sandin defendants express no opinion as to the validity of the pre-cancellation notice or the legality of the termination of the policy.

The motion was fully briefed and a hearing was conducted on January 22, 2014. II AA 316. Following the hearing, the district court orally denied the motion, finding that there were questions of fact regarding the validity of the pre-cancellation notice. II AA 335. A written order confirming this finding was filed on February 19, 2014. X AA 1546. The order finds that "whether the requirement of NRS 687B.360 was triggered by the July 31, 2013 notice, is a question of fact." *Id.* Although inartfully stated, this finding is essentially that the district court perceived questions of fact regarding whether the pre-cancellation notice was sufficient to satisfy the requirements of the statute.

On March 17, 2015, after discovery had closed, Oregon Mutual filed a motion for summary judgment on all claims. III AA 337; 345. Essentially, Oregon Mutual argued that all of appellant's claims against it failed because it had

given proper notice under the statute and the Policy and had properly cancelled the Policy for failure of payment of a premium, among other arguments specific to the individual claims asserted. *Id.* Oregon Mutual's motion and exhibits comprises volume III of the appendix.[5] Appellant opposed the motion, arguing that notice had not been properly given. VII AA 1011. Interestingly, appellant stipulated that the facts as represented by Oregon Mutual were undisputed, making only two inconsequential observations regarding two of the facts asserted. VII AA 1013-14. Appellant's opposition to Oregon Mutual's motion for summary judgment comprises all of Volume VII of the appendix.

Also on March 17, 2015, the Sandin defendants filed their motion for partial summary judgment, seeking judgment in their favor on all claims asserted by appellant against them. IV AA 481. The Sandin's motion and exhibits comprises volumes IV and V of the appendix. Essentially, the Sandin defendants argued that they had performed every duty they owed appellant as appellant's insurance agent, and had no duty to warn appellant of the impending cancellation of the policy, especially in light of the fact that they did not know of the pre-cancellation notice and the cancellation until after the cancellation had occurred. *Id.* Appellant opposed the motion, arguing that the Sandin defendants had a duty to warn

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[5]Volume VI of the appendix is a repeat of Volume III.

appellant of the threatened cancellation notice based on past conduct of Dave Sandin on which it allegedly relied. VII AA 1157. Appellant's opposition to Sandin's motion for partial summary judgment comprises all of Volume VIII of the appendix.

The Sandin defendants filed a reply with numerous additional exhibits. IX AA 1321. A hearing was conducted by the district court on May 14, 2015. IX AA 1426. The district court orally granted both motions for summary judgment. IX AA 1473. On June 30, 2015, the district court entered an order granting summary judgment in favor of Oregon Mutual. IX AA 1479. Later that same day, the district court entered an order granting summary judgment in favor of the Sandin defendants. IX AA 1488. This appeal followed.

SUMMARY OF ARGUMENT

The Sandin defendants performed every duty required of them by law as the insurance agent of appellant. They undertook no additional duty based on past conduct to monitor appellant's premium payments or to warn appellant that its policy was about to be cancelled for failure of payment.

DISCUSSION

I. Standard of Appellate Review.

Summary judgment allows courts to avoid unnecessary trials where no

material factual disputes exist. *See Northwest Motorcycle Ass'n v. U.S. Dept. of Agriculture*, 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment under NRCP 56 is appropriate when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005).

A genuine issue of material fact is one that affects the outcome of the litigation and requires a trial to resolve differing versions of the truth. *See S.E.C. v. Seaboard Corp.*, 677 F.2d 1297, 1300-01 (9th Cir. 1982). There is no material issue of fact if the evidence is such that a reasonable jury could not return a verdict for the non-moving party. *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713, 57 P.3d 82, 87 (2002); *see also Wood v. Safeway*, 121 Nev. at 731, 121 P.3d at 1031 (abrogating the "slightest doubt" standard).

The district court must view all evidence, facts, and inferences in a light most favorable to the non-moving party. *See Sahara Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 214, 984 P.2d 164, 165 (1999). Although the moving party bears the initial burden of demonstrating the absence of a disputed material fact, the non-moving party must respond by demonstrating the existence

of a disputed material fact. *Id.; Premiere Digital Access, Inc. v. Central Telephone Co.*, 360 F. Supp.2d 1161, 1164 (D. Nev. 2005) (requiring a non-moving party to demonstrate "significant probative evidence" to defeat a motion for summary judgment). "[I]n order to defeat summary judgment, the nonmoving party must transcend the pleadings, and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact." *Cuzze v. University & Community College System of Nevada*, 123 Nev. 598, 603, 172 P.3d 131, 134 (2007). If the non-moving party fails to satisfy this burden, the district court must enter summary judgment and avoid a needless trial. *See Sahara Gaming Corp.*, 115 Nev. at 214, 984 P.2d at 165.

On appeal, this Court applies the same standards, and reviews the district court's determination *de novo*. *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005).

In this case, appellant manufactured five causes of action against the Sandin defendants, all of which arose due to appellant's own failure to pay its premium. Despite appellant's attempts to pass the blame to the Sandin defendants, only appellant was responsible for payment of its policy premium. As a result of appellant's failure to pay its premium to Oregon Mutual, Oregon Mutual cancelled the Policy and denied appellant's claim of loss occurring after the cancellation.

All of appellant's claims against the Sandin defendants are based on the claim that the Sandin defendants owed a fiduciary duty to babysit appellant regarding its premium payments. Because the Sanding defendants owed appellant no such duty, all of the claims fail as a matter of law. Therefore, the district court correctly granted summary judgment in favor of the Sandin defendants.

II. The District Court Did Not Err in Determining that the Sandin Defendant's Owed No Duty to Warn Appellant of the Impending Cancellation of the Policy Based on Appellant's Failure to Pay the Premium.

A. The Sandin Defendants Owed No *De Facto* Duty to Appellant.

The sole issue raised against the Sandin defendants in appellant's opening brief is whether the district court erred in granting summary judgment against appellant because the Sandin defendants allegedly breached some implied duty based on their past custom and practice of notifying appellant when its insurance premiums were due. Although an insurance agent's duties to the insured are general based on direct case law from this jurisdiction, *see* discussion of duty, *infra*., appellant seeks the imposition of yet another duty based on alleged past conduct, which appellant alternatively argues in terms of a contractual duty and a tort duty. But Appellant would not be content with the imposition of merely a new general duty, contractual or tort based. No. Appellant wants to aggrandize its

argument by declaring without law, reason, policy or logic on its side that the duty this Court should create must be fiduciary in nature. On appeal, for the first time, appellant ups the ante again by labeling this alleged duty a "*de facto* fiduciary duty." Repetition of the phrase "de facto fiduciary duty" permeates the opening brief, as if mere repetition could impart legitimacy. The argument is nonsense.

Duties are imposed by law. There is nothing *de facto* about a party's legal duties. The existence of a duty is a question of law, reviewed by this Court on appeal *de novo*. *See Estate of Smith ex rel. Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. ___, 265 P.3d 688 (Adv. Op. 76, 2011) (question of existence of legal duty determined as a matter of law); *Turner v. Mandalay Sports Entm't, LLC*, 124 Nev. 213, 180 P.3d 1172 (2008) (both majority opinion and dissent concluding that the determination of the existence and scope of a duty is a question of law); *Scialabba v. Brandise Constr. Co.*, 112 Nev. 965, 968, 921 P.2d 928, 930 (1996)) (whether a duty exists is a question of law for the court). Although the facts may be relevant to the determination of whether a legal duty created by law is applicable to a particular case and has been breached, the cute but nonsensical phrase "*de facto* fiduciary duty" is an oxymoron.[6]

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[6]In this characterization, the alleged fiduciary duty becomes the proverbial emperor without clothes. To give its argument that Dave Sandin voluntarily created a new duty for himself (and for Sandin & Co) by reminding appellant in

B. The Sandin Defendants Did Not Owe a Fiduciary Duty to Appellant to Warn of the Insurer's Intent to Cancel the Policy.

In Nevada, insurance agents do not have a fiduciary relationship with their clients. An "insurance agent is obliged to use reasonable diligence to place the insurance and seasonably to notify the client if he is unable to do so." *Keddie v. Beneficial Insurance, Inc.*, 94 Nev. 418, 420, 580 P.2d 955, 956 (1978).[7] This Court has long recognized these as the only duties owed by a procuring agent to an insured, and the duty imposed is to "exercise [] ordinary care for the rights and interests of the [insured]." *Havas v. Carter*, 89 Nev. 497, 499, 515 P.2d 397, 399 (1973). The Ninth Circuit has noted that "no Nevada court has imposed on insurance brokers a fiduciary duty toward insureds." *CBC Financial, Inc. v. Apex Insurance Managers, LLC*, 291 Fed.Appx. 30, *4 (9th Cir. Aug. 14, 2008) (unpublished).

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the past that a payment had been missed, appellant has attempted to dress this theory up in the clothes of legalese, by labeling it *de facto*, forgetting Spock's immortal words, "a label is not an argument, Doctor." But duty is a question of law, so attempting to establish duty as a matter of fact truly leaves Emperor Fiduciary Duty without clothes.

[7]*See also Havas v. Carter*, 89 Nev 497, 499-500, 515 P.2d 397, 399 (1973) ("the general rule [is] that an insurance agent or broker who undertakes to procure insurance for another owes an obligation to his client to use reasonable diligence in attempting to place the insurance and to seasonably notify the client if he, the agent or broker, is unable to obtain the insurance").

The Sandin defendants satisfied their only duty as appellant's insurance broker by procuring a policy for appellant that included (among other things) fire loss coverage. Appellant's expert testified that the Sandin defendant had satisfied their duty in placing the Policy with Oregon Mutual:

> Q. Do you agree that the Sandin defendants procured the proper type of insurance that was requested by the insured?
>
> A. Yes.
>
> Q. By placing that policy with OMI?
>
> A. Yes.

V AA 822, ln. 17-22.

It has never been disputed that the Oregon Mutual Policy would have covered appellant's loss if appellant had paid its July premium in a timely manner. In fact, appellant's claim was denied solely because of non-payment; it was not denied based on lack of fire coverage or for any other reason. Had appellant paid its July 26, 2012 premium by August 15, 2012, the Policy would have been in full force and effect on August 16, 2012 and August 17, 2012. V AA 803 (Oregon Mutual admission 8). Had the Policy not been cancelled, Oregon Mutual would have continued to adjust the claim for the fire and Oregon Mutual would have paid losses covered under the Policy subject to the terms, conditions, exclusions and

limitations of the Policy. V AA 803 (Oregon Mutual admissions 9 & 10).

Because the Sandin defendants recommended an insurer and secured a policy for appellant that met all of its coverage needs, the Sandin defendants satisfied their only legal duty to appellant as appellant's broker.

The case of *GlobalNet Financial.Com, Inc. v. Frank Crystal & Co.*, 449 F.3d 377 (2d Cir. 2006) is instructive. In *GlobalNet*, an insured filed claims against the insurance broker for professional negligence, breach of fiduciary duty, and breach of contract based on the broker's alleged failure to notify the insured of the notice of intent to cancel and the cancellation notice for nonpayment of premium. The district court granted the broker's motion for summary judgment on all the claims. On appeal, the Second Circuit affirmed the order of the district court. In stating that the district court properly granted summary judgment to the broker, the appellate court reasoned:

> GlobalNet is unable to prevail on its claims because Crystal was not the cause of the cancellation of coverage. The Financing Agreement between AICCO and GlobalNet, which Crystal was not a party to, set forth AICCO's right to cancel GlobalNet's coverage for non-payment of premiums in explicit terms. Thus, GlobalNet was fully aware of the monthly payment schedule, its obligations to make the monthly premium payments, and the consequences of its failure to pay the premiums each month in accordance with the Financing Agreement. The Notice of Intent to Cancel and the Cancellation Notice were both sent to GlobalNet at the address that GlobalNet had requested its mail to be sent to, to wit, the Mizner address. That the mail was not

> forwarded to GlobalNet at its London office was not Crystal's failure. Indeed, the District Court found that GlobalNet's own concession bolsters the proposition that it was negligent in missing the premium payment: "Global[N]et acknowledges that because of the confusion surrounding the completion of the tender offer, Global[N]et 'inadvertently . . . missed premium payment' on its D & O coverage." It was GlobalNet's negligence that caused the cancellation of the insurance coverage.

GlobalNet, 449 F.3d at 388. The same is true here. The cause of appellant's loss is appellant's own negligence. The Sandin defendants had no duty, fiduciary or otherwise, to protect appellant from its own negligence.

C. The Sandin Defendants Did Not Owe Appellant a Fiduciary Duty to Remind Appellant to Pay its Premium.

There is no contractual agreement between appellant and the Sandin defendants that requires the Sandin defendants to provide notice to appellant of a pending policy cancellation. IX AA 1490 ¶18. The Sandin defendants had no affirmative duty to ensure that appellant paid its monthly premium in accordance with its contractual obligations to Oregon Mutual. It is not the duty of the broker to ensure that the insurer (Oregon Mutual) and the insured (appellant) are complying with the terms of their contract, to which the broker is not a party.

NRS 687B.320 requires the insurer to provide notice to the insured of the pending cancellation. N.A.C. 687B.530 provides that "[e]ach insurer shall also provide a copy of the notice of cancellation of a policy to the agent who wrote the

policy." Thus, Nevada law imposes a burden of notification on Oregon Mutual, but there is no corresponding requirement that the Sandin defendants provide additional notice to appellant of a pending notice of cancellation. Appellant asserts that such obligation is implied by the requirement that the agent be notified by the insurer, but had the Legislature wanted to impose such an obligation, these statutes demonstrate that it knew how to do so. It did not.

As much as it might be a good thing for an agent who is aware that his client is facing possible cancellation to give the client a heads up, the law does not impose that as a duty on an agent, for a number of policy and logistical reasons, not the least important of which is that after the policy is issued, the insured's relationship is with the insurer, not with the agent, and agency relationships are not necessarily maintained after a policy is issued. Further, following proper notice, the insurer has a right to cancel a policy; that right should not be clouded by arguments that an agent failed to give the insured additional notice of the pending cancellation.

Appellant claims that it would have paid the July premium had the Sandin defendants informed it of the pending cancellation. Appellant does not explain, however, how the Sandin defendants could have notified appellant of the pending cancellation when the Sandin defendants had no knowledge of the pending

cancellation. On the other hand, appellant was aware as of August 13, 2012 (three days prior to cancellation) that it had not yet paid its July premium. Appellant cut a check on August 13, 2012, for the premium, but made a conscious decision not to send it. V AA 715 (Deposition of Snyder). These facts were never disputed by appellant. Appellant, not the Sandin defendants, had knowledge of the late premium. Despite this knowledge, appellant took no action to determine the status of the Policy and the late premium (such as simply calling or emailing the Sandin defendants or Oregon Mutual). Therefore, appellant bears the legal responsibility for failing to pay its monthly premium, not the Sandin defendants.

D. Nothing in the Relationship Between Dave Sandin and Appellant Created a Separate Duty Not Otherwise Recognized in Nevada Law.

Although some jurisdictions have recognized that insurance brokers may, based on conduct on which an insured comes to rely, assume additional duties in special circumstances, *see, e.g.*, Gary Knapp, Annotation, *Liability of Insurer or Agent of Insurer for Failure to Advise Insured as to Coverage Needs*, 88 A.L.R.4th 249, 256–263 (1991); Barbara A. O'Donnell, *An Overview of Insurance Agent/Broker Liability*, 25 The Brief, Summer 1996, at 35–36; 44, For example, a broker's representations, see Wallman v. Suddock, 200 Cal.App.4th 1288, 134 Cal.Rptr.3d 566, 582 (Ct.App.2011), Nevada has never recognized such a duty.

Appellant, apparently believing this Court will recognize such a duty, argues that the Sandin defendants through their past conduct voluntarily accepted and now have a duty to warn of impending cancellation for lack of payment, and that this duty is not general, it is fiduciary. Appellant has not addressed the policy implications of adopting such a duty by court declaration, instead simply assuming that such a duty already exists in Nevada. Appellant's arguments do not make clear whether appellant believes this duty this Court should adopt should be based in contract or tort principles. In short, appellant has not thought its proposed remedy out very clearly. Instead, it simply hopes it has found a life-line to save it from its precipitous fall occasioned by its own negligence.

Assuming this Court were inclined to expand the duty of an insurance agent based on past conduct, nothing in the history of the relationship between appellant and Dave Sandin would justify imposing such a duty on the Sandin defendants. Below, appellants identified only three occasions on which Dave Sandin allegedly had previously notified appellant that it was late in paying a premium. V AA 712; 723-24; 726; 728 (Deposition of Snyder). Specifically, appellant alleged that "[o]n at least three occasions Dave Sandin informed [appellant] they were late on a premium: on or about March 23, 2006, on or about May 13, 2008, and on or about

May 2009." VIII AA 1165, ¶ 6.[8]

Snyder's testimony with respect to two of the three alleged occurrences was incorrect. Between February 2006 and October 2008, Dave Sandin was employed by Heffernan Insurance Brokers and was subject to a non-compete agreement. During this time, Dave Sandin was not the broker for appellant. Two of the three alleged occurrences fell within this period (and the third predated Dave Sandin's employment with Sandin & Co.). Therefore, Dave Sandin could not have notified appellant of any late or missed payments or anything related to appellant's insurance policy. Dave Sandin did not broker any policies for appellant during this time period either. V AA 861-63.

Indeed, on February 21, 2006, the President of Heffernan of Oregon ("HRH") (Dave Sandin's former employer) wrote Sandin a letter regarding HRH's intention to enforce the employee agreement and non-compete provision after Sandin terminated his employment with HRH. IX AA 1363. Over two years later, on July 24, 2008, Sandin wrote Snyder, stating, "When I switched firms I had to

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[8]Below and on appeal, appellant also suggests that Dave Sandin has given notice to other clients of their late payments. How such notices, if they even exist, unknown to appellant before this litigation, could create past conduct as to appellant warranting imposition of a fiduciary duty is not addressed by appellant, other than in the assertion of their expert that if an agent has provided such a service to one client, the agent owes it to all. There is no law to support this obviously flawed opinion.

stay away for two years so now that is up and I would love an opportunity to handle your insurance again." IX AA 1365. On August 27, 2008, Linda Snyder responded, "We need to get quotes for our general liability insurance as soon as possible. We renew in November. . . . As you know, HRH is also working on this." *Id.* Thus, from February 2006 to October 2008, Dave Sandin was not appellant's agent.[9] During this time, appellant's agent remained HRH; Dave Sandin could not have notified appellant of late or missed payments. V AA 61-63.

As a matter of fact, in March and May 2008, two separate notices of pending cancellation of insurance were sent to HRH for appellant. IX AA 1377; 1380. Also, on April 1, 2008, Kelli Orleck at HRH wrote an email to Snyder stating, "I received the attached notice from your finance company, AICCO, Inc. If you have not already done so, please remit payment today." IX AA 1380-93. That same day, Snyder responded, "I spoke with them last week. The payment has been sent." *Id.* On May 28, 2008, Kelli Orleck at HRH sent Snyder another cancellation warning, notifying appellant that a payment had been missed and the policy was in danger of cancellation. *Id.* Thus, HRH, not Dave Sandin, notified

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[9]Appellant left HRH in October 2008. *See* IX AA 1372-75. Appellant left HRH and purchased a policy through Dave Sandin in October 2008 because the policy procured by Dave Sandin was about half the premium of the HRH policy, not because of any special relationship or trust appellant had in Dave Sandin. *Id.*

appellant of pending cancellations from February 2006 through October 2008.

The district court concluded as a matter of law that appellant had provided evidence of "at most" one prior occurrence when Dave Sandin allegedly warned appellant about a missed premium. IX AA 1493 ¶ 9. On appeal, appellant assigns as error that the district court did not rely on the other two incidents, but suggests no evidentiary support for this assertion of error. AOB 22, ln. 18.

Even if Dave Sandin notified appellant on one occasion (or on three or more occasions) of pending cancellations, the Sandin defendants did not have a legal obligation to notify appellant of future cancellations. Dave Sandin's one-time (or sporadic, at best) notice to appellant of a pending cancellation does not create a legal obligation on the Sandin defendants to continually notify appellant of missed payments and pending cancellations. Appellant does not cite any case law to support its argument that the Sandin defendants established a legal obligation to notify appellant of the pending cancellation based on the prior course of dealing between the parties. We suggest that if this Court were inclined to recognize such a legal duty, the Court would set a standard for past conduct that would far surpass the minimal evidence of past conduct in this case.

Also, if an insurance agent by conduct has undertaken a duty or obligation to notify an insured of a pending cancellation, that duty must necessarily terminate

when the insurance agent moves to a different agency. An agency that has not reaffirmed such a duty by express agreement or repeated conduct surely could not inherit the duty simply because it employs an agent whose former firm had voluntarily undertaken the duty. In this case, assuming Dave Sandin established a duty to notify appellant. of pending cancellation notices while he was at Heffernan, that duty did not carry with him to Sandin & Co. *Id.* Appellant has suggested no evidence that would support imposition of this imagined duty against Sandin & Co.

E. The Sandin Defendants Had No Knowledge of the Pending Cancellation, and Thus Could Not Have Warned Appellant.

Even assuming all three incidents occurred and that such conduct would be sufficient to establish a special duty as a matter of common law, the duty could only arise upon the Sandin defendants' receipt of notice from Oregon Mutual that the Policy was in danger of cancellation for non-payment. But the Sandin defendants were never notified of the impending cancellation, as appellant admitted in its complaint: "Defendant OREGON MUTUAL did not send a cancellation notice to Defendant DAVE SANDIN" and "Defendant DAVE SANDIN did not receive a cancellation notice." *See* I AA 7-8 (complaint, ¶¶ 27 and 28). Absent this notice, any purported duty to inform appellant of its failure to

pay never arose. To this point, Freudenberger testified:

> Q. If Dave Sandin did not actually receive notice of the late payment and pending cancellation, did you still expect him to notify you?
>
> . . . .
>
> THE WITNESS: It's a foolish question. How could he inform me about something he doesn't know about?
>
> . . . .
>
> Q. Do you not have that expectation if Mr. Sandin doesn't have the information about the late payment? Does that expectation go out the window?
>
> A. How can he inform me about something he doesn't know about? How can you ask that question? If I find out that a man doesn't know something, then how can I expect him to tell me about it? You cannot seriously ask me that?
>
> Q. Yes, I am asking you that.
>
> A. I don't, it's a foolish question. He cannot inform me about something he doesn't know about.
>
> Q. That –
>
> A. So how could I have the expectation he's going to tell me about something that he doesn't know about?

IV AA 514-16. Linda Snyder further testified that "no notice was given, not only to us, but to Dave Sandin as well." V AA 730. Appellant's expert further testified that the Sandin defendants did not have actual notice of the provisional policy

cancellation and if an agent does not have notice of a pending cancellation, the agent cannot inform the insured of the pending cancellation. V AA 815; 817.

Appellant's claim for breach of fiduciary duty is partly based on the allegation that the Sandin defendants had a duty "to ensure that PLAINTIFF was warned regarding notices of cancellation." I AA 14 (complaint, ¶¶ 69 & 70). But appellant's claim, to use Freudenberger's own word, is "foolish," because appellant admits the Sandin defendants were never notified of appellant's delinquency in the payment of rent, or of the impending cancellation of the Policy. The Sandin defendants' lack of notice of the pending cancellation absolves them of any liability for any breach of the manufactured "affirmative duty to inform" appellant of the impending cancellation for non-payment.

In a similar case based on allegations of the agent's failure to notify the insured of missed premiums and pending cancellation, the Court of Appeals of Texas ruled that summary judgment was appropriately granted to the insurance agent. That court stated, "[b]ecause there is no proof that [the agent] had notice of premiums due or policy termination, we hold that [the agent] had no duty, as a matter of law, to give notice to appellants." *Shindler v. Mid-Continent Life Ins. Co.*, 768 S.W.2d 331, 334 (Tex. App. 1989). The Sandin defendants' lack of notice of the pending cancellation absolves them of any liability for the breach of

fiduciary duty or negligence claims based on the manufactured duty to inform appellant of the impending cancellation for non-payment.

Consequently, talking from both sides of its proverbial mouth, appellant complains that Oregon Mutual did not provide notice to the Sandin defendants and that the notice provided–which they characterize as "akin to posting a notice on a bulletin board at Oregon Mutual," I AA 92, n. 1,–was not effective. At the same time, appellant argues that Sandin's alleged special duty not only included the obligation to warn, it encompassed also a duty to monitor Oregon Mutual's "bulletin board" for potential breaches by appellant and notices from the insurer. In short, because Dave Sandin allegedly reminded appellant on one (or three) prior occasions before he worked for Sandin & Co that appellant had missed a payment when Dave Sandin learned of the dereliction, appellant asks this Court to impose on the Sandin defendants a fiduciary duty to monitor appellant's premium payments and the insurers notices, *and* to warn appellant regarding appellant's own misconduct. Multiply this obligation by every insurance agent in Nevada who has ever given a friendly "head's up" to a client, to monitor the activities of every client and of every insurance company for which the agent writes applications of insurance, and you have imposed on the industry a massive and unworkable duty unwarranted by any possible policy consideration *not* identified

by appellant in its brief.

In short, the Sandin defendants had no affirmative duty to ensure that appellant timely pay its monthly premiums to preserve its status as an insured under its Policy with Oregon Mutual. Even if an insurance broker had an affirmative duty to advise an insured of pending cancellation for non-payment, such duty would arise only on the broker's receipt of notice by the insurer. This precondition never occurred. Therefore, no such duty existed.

F. This Court Should Not Create a Duty to Warn Under the Facts of this Case.

Imposing a duty to warn of possible cancellation of a policy on agents as a practical matter would be unworkable. For example, if a person purchased automobile insurance through an agent and then maintained that policy for many years, that person's relationship should be with the insurer. The contract exists and sets out the obligations of the parties thereto. The agent is not party to the contract. Should the person fail to make a premium payment, it strains reason to suggest that the agent who helped to procure the policy years earlier would have to monitor the payments and policy and give warning of an impending cancellation. No one argues for such a result, not even appellant.

Instead, appellant argues that such a duty may arise in circumstances where some sort of special relationship has been created and maintained between the insured and the agent based on past conduct and reasonable reliance. A strong policy argument could be made that even if such a relationship exists, the imposition of a legal duty to warn as a matter of common law would not be advisable. The contractual relationship exists between the insurer and the insured, and all parties could enter into contracts setting forth all of their duties. Foraging into the area of implied duty or tort duty and responsibility infuses a variety of issues and concerns into this traditionally contract based relationship. Line drawing as to what does or does not create such a quasi-contractual or extra-contractual responsibility would be difficult, at best, and might lead to uncertainty, inconsistency and instability. *Cf. Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66, 75, 206 P.3d 81, 87 (2009) (discussing the economic loss doctrine, and drawing distinction between contract expectations and limited circumstances where imposition of tort liability into a contractual relationship is warranted); *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1262, 969 P.2d 949, 959 (1998), as amended (Feb. 19, 1999) (generally, only the parties to a contract are bound by it, recognizing limited exceptions based on the bad faith of related outsiders); *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226,

232, 808 P.2d 919, 922 (1991) (discussing difference between contractual breach of the covenant of good faith and fair dealing and limited scope of tortious breach of the covenant of good faith and fair dealing). Should this Court introduce such implied-duty-based elements by judicial fiat into this area of insurance agency contracts absent proof of bad faith or fraud? To date, this Court has not done so, and it should not.

The obligation to pay premiums rests and should remain with the insured. Allowing an insured to shift the burden of monitoring its own compliance with its insurance contract in this or any other matter covered by the contract introduces an element of tort law into a contractual relationship where it can only do mischief. But this Court need not reach that far. In this case, there is no evidence of a past course of conduct so significant that it should warrant the imposition of such a duty. No matter where the implied duty line is drawn, it would not reach the facts of this case. So the question of whether such a duty should ever be imposed can be, and should be, reserved for a more deserving case.

Not only did appellant not cite any Nevada authority to support its arguments that the Sandin defendants had a legal obligation to notify appellant of the pending cancellation, appellant did not cite any case law from other jurisdictions to support its claims based on the failure to notify. Appellant's brief

is devoid of legal authority to support its breach of the manufactured duty to inform appellant of impending cancellation for non-payment. But case law from other jurisdictions supports the Sandin defendants' position that no such duty should be imposed in this case.

In *Quintana v. Tennessee Farmers Mut. Ins. Co.*, 774 S.W.2d 630 (Tenn. Ct. App. 1989), the court held that the insurance agent did not have an obligation to inform the insured of cancellation of the insurance policy even though the insured and the agent had been doing business for 20 years. In that case, in 1966, the plaintiffs purchased property owner's insurance from Tennessee Farmers Mutual Insurance Company through agent Harold Willis. The plaintiffs purchased other Tennessee Farmers insurance policies through Willis during the ensuing years, including their car insurance and several life insurance policies. In 1984, the plaintiffs enlarged their home and obtained a revised homeowner's policy with increased policy limits through another agent at the same firm as Willis.

In November, 1986, the plaintiffs informed Willis that they were leaving for Texas to visit their son. On November 10, 1986, the same day the plaintiffs left for Texas, Tennessee Farmers mailed cancellation letters by registered mail to the plaintiffs' home address and also sent copies to Willis, the insurance agent. The reason for the cancellation was the numerous claims that had been made over the

years. The plaintiffs were not home when the cancellation letters arrived and the post office did not forward the notices because the plaintiffs had requested that their mail be held. Willis did not attempt to contact the plaintiffs when he received the cancellation letter. While the plaintiffs were still away, an arson fire damaged their home. Upon returning home, the plaintiffs discovered that Tennessee Farmers had cancelled their insurance. The plaintiffs sought out Willis who told them that everything had been cancelled. *Id.* at 632.

On appeal, the plaintiffs argued "that their long association with Mr. Willis gave rise to a duty on his part to notify them of the cancellation because he knew they were out of town." *Id.* at 633. Rejecting these arguments, the court reasoned:

> The Quintanas' long business relationship with Mr. Willis did not require him to notify them of the policy's cancellation. In the absence of an agreement creating continuing responsibilities, an insurance agent's obligation to a client ends when the agent obtains the insurance for the client. Thus, an agent has no duty to inform a client of a policy's cancellation if the client knew or should have known of the cancellation by other means.
>
> Mr. Willis knew that Tennessee Farmers was contractually obligated to notify the Quintanas directly if it cancelled their insurance. He also knew that Tennessee Farmers had notified the Quintanas that it had cancelled their insurance because he received copies of the cancellation letters. While he knew that the Quintanas had decided to visit their son, he did not know how long they would be gone or whether they had made arrangements to forward their mail. He had no express or implied agreement with the Quintanas to contact them if Tennessee Farmers cancelled their insurance.

> Therefore, he did not have a duty to try to contact the Quintanas when he received his copies of the cancellation letters.

Id. at 634.

Similarly, in *Guardian Life Ins. Co. of Am. v. Goduti-Moore*, 36 F. Supp. 2d 657 (D.N.J. 1999) *reversed on other grounds*, 229 F.3d 212 (3d Cir. 2000), the court held that the broker did not have the duty to inform the insured of the pending cancellation. In 1994, Guardian Life issued a life insurance policy to Kevin Moore. The policy was procured by insurance broker Robert Beckett. The premiums were initially set up to be paid by automatic payment through Moore's bank account. Guardian Life was unable to withdraw the premium due in August 1996 because the bank account had been closed. Guardian Life issued a statement to Moore notifying him that the automatic payment could not be processed and the due date for the premium. The premium was not paid and Moore died as a result of a car accident.

Thereafter, Guardian Life filed an action against the beneficiary seeking a declaration of the parties' rights and obligation under the policy. The beneficiary filed a third-party complaint against the broker alleging "that insurance broker Robert Beckett and his agency NPC breached a duty to keep Moore informed as to the status of the Policy." *Id.* at 661. Specifically, the beneficiary under the policy

"alleges that Beckett had a duty to provide notice to Moore that the Policy was lapsing." *Id.* at 665. The court granted summary judgment in the broker's favor, holding that the broker did not owe a duty to the insured under either New York or New Jersey law. *Id.* at 665-666. In granting summary judgment, the court stated:

> It would be unduly onerous for brokers to warn every client who misses a monthly premium due date that the client must pay the amount by the end of the grace period or face forfeiture. . . . [The beneficiary] alleges that Beckett should have alerted Moore that the Policy would lapse if he did not pay the premium. [The beneficiary] has not pointed to any authority establishing such a duty. In accordance with our analysis of New Jersey and New York law, we find that Beckett did not have a duty to inform Moore that the Policy would lapse at the end of the grace period.

Id.

In *Rocque v. Coop. Fire Ins. Ass'n of Vermont*, 438 A.2d 383 (Vt. 1981), the Vermont Supreme Court held that the insurance agent did not owe a duty to notify the insured of a pending cancellation. In that case, the plaintiffs owned and operated a dairy farm in Vermont. The farm had been in their family for over thirty years, and throughout that entire period the farm had been insured against fire under a policy procured by the Nye Insurance Agency. The plaintiffs applied for a renewal of the policy in August 1976. As was customary, a representative of the Nye Agency met with plaintiffs at their home and forwarded the application to the carrier. The carrier approved the application and sent plaintiffs a statement for

the first premium under the renewal policy. When payment was not made on the due date, the carrier sent the plaintiffs a cancellation notice with copies to Nye Agency and also to the bank that held the mortgage on the property.

The cancellation notice stated that cancellation of the policy would be effective November 4, 1976, if no payment was received. After November 4, 1976, a notice was sent to plaintiffs informing them of the cancellation with copies to Nye Agency and the bank. "Both the Nye Agency and the Federal Land Bank received their copies of the notices, but the Rocques claim that due to repeated disruption of their rural mail service during this period of time they never received any of these notices." *Id.* at 385. On November 27, 1976, a fire completely destroyed the plaintiffs' farm. "When the Rocques called [the Nye Agency] to report the disaster, he advised them that their insurance had been cancelled for nonpayment of premium." *Id.* The plaintiffs filed claims against the carrier, the insurance agency, and the bank claiming "that all three defendants breached their duty to notify the Rocques of any cancellation of the fire insurance policy." *Id.*

The Vermont Supreme Court rejected these arguments. The court reasoned:

> Both Nye and Land Bank admitted receipt of copies of the notices of cancellation which [the carrier] claims to have mailed to the Rocques on two separate occasions. Appellants maintain as to both of these defendants that receipt of the notices, coupled with their prior course of dealing with the Rocques, was sufficient to create a

> duty in each to notify the Rocques of Co-operative's action. We find this claim without merit and affirm the decision of the trial court dismissing the action against these two parties.
>
> The duty of an insurance agent is to use reasonable care and diligence to procure insurance that will meet the needs and wishes of the prospective insured, as stated by the insured. Absent special facts not present here, it is generally well settled that once a policy has been procured as requested, the relationship terminates and no further duty is owed the insured by the insurance agent in respect to such insurance. Specifically, where an insurance company is required to give direct notice of cancellation to the insured, as is the case here, an insurance agent is not liable for a failure to notify, since he is justified in assuming that the insured would be made aware of the cancellation from other sources.

Id. at 386.[10]

These cases are well reasoned and stand for the bedrock principle that the rights and duties of insureds, their agents and their insurers are matters of contract, not tort. Implying additional duties on a case by case basis can only lead to confusion and instability. Appellant has not cited any legal authority in Nevada or from any other jurisdiction to support its theory that the Sandin defendants had a legal duty to inform appellant of the pending notice of cancellation. Instead,

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[10]*See also Honeycutt v. Kendall*, 549 F. Supp. 802, 805-06 (D. Del. 1982) ("Plaintiff raises the claim that a broker also has the duty to provide notice of cancellation. . . . The law does not impose a duty upon brokers to inform insureds of a notice of cancellation if the insured knew or should have known about the cancellation. Where the insurer is required to give direct notice of the cancellation, the broker is not liable for a failure to notify. Plaintiff's claim that defendant breached a duty to provide notice of cancellation is not well founded.").

appellant has cited general negligence and fiduciary duty law not specific to the question presented, AOB 23, and cases involving violation of an agent's primary functions, *i.e.*, to insure that the policy procured meets the needs of the client and to procure policies. AOB 24. These cases, appellant's general arguments, and appellant's reliance on the opinions of the alleged experts who opined below (AOB 24-26) cannot create the duty on which appellant relies. Only the Legislature or this Court could impose such a duty. The Legislature has not, and this Court should not.

G. The Sandin Defendants Were Entitled to Judgment as a Matter of Law on Appellant's Negligence Based Claims.

In their complaint, and in their motion papers below, appellant brought a number of specific claims against the Sandin defendants. On appeal, appellant has argued only that the Sandin defendants owed it "a *de facto* fiduciary duty" to warn it of its own negligence, and that its failure so to do amounts to negligence. Appellant's negligence claims should fail.

Appellant has asserted a claim against the Sandin defendants for violation of NRS 686A.310, contending that "Defendant Dave Sandin engaged in unfair insurance practices, for example, when he misrepresented to appellant facts relating to coverage at issue, including whether Defendant Oregon Mutual would

provide the notice required." I AA 15 (complaint, ¶ 75). Appellant's argument is sophistry fueled by hindsight. First, Oregon Mutual did provide notice. Whether or not that notice satisfied the law and the contract is a hotly disputed legal issue between appellant and Oregon Mutual. That issue does not concern the Sandin defendants. Assuming for the sake of argument that the notice provided by Oregon Mutual was not in compliance with law (and, again, the Sandin defendants express no opinion on this purely legal issue), the Sandin defendants made no representation to appellant that Oregon Mutual would provide notice in compliance with the law and the policy, any more than they made representations to Oregon Mutual that appellant would timely pay its premium. The Sandin defendants could not have foreseen, are not responsible for, and did not warrant against the parties' future breaches of contract. This type of pleading merely emphasizes how far appellant is willing to creatively stretch to find a deep pocket and a theory to save it from its own negligence.

Importantly, NRS 686A.310(2) provides that "an insurer is liable to its insured for any damages sustained by the insured as a result of the commission of any act set forth in subsection 1 as an unfair practice." The Sandin defendants are not insurers, and are thus not subject to NRS 686A.310(2). *See Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1263, 969 P.2d 949, 959 (1998) (as amended

(Feb. 19, 1999) ("From a plain reading of [the statute], there is no indication that the legislature intended NRS 686A.310 to apply to other entities beyond insurers.").

Like the policy administrator in *Bartgis*, the Sandin defendants are not insurers. Rather, they are insurance agents and cannot be liable for violation of NRS 686A.310 pursuant to the statute's plain terms and the Supreme Court's holding in *Bartgis*. Accordingly, the Sandin defendants were entitled to judgment as a matter of law on appellant's claim for violation fo NRS 686A.310.

Below, appellant attempted to find wrongdoing (which it labeled as negligence, fraud, and fraud in the inducement) in the fact that Dave Sandin had allowed his Nevada insurance license to expire before he brokered the policy in this case. Appellant has again raised this issue in its statement of fact, AOB 6-7, although appellant has not made any legal argument in the brief regarding this non-issue. The state of Sandin's license is not relevant to any issue in this case. There is no connection between defendant Dave Sandin's failure to be licensed as a non-resident procurer of insurance and appellant's damages. For every cause of action appellant pleaded, there must be a nexus between the alleged bad act (Dave Sandin's lack of a current non-resident license) and the alleged damages. *See Nelson v. Heer*, 123 Nev. 217, 225-26, 163 P.3d 420, 426 (2007) ("Proximate

cause limits liability to foreseeable consequences that are reasonably connected to both the defendant's misrepresentation or omission and the harm that the misrepresentation or omission created."); *see also Foster v. Dingwall*, 126 Nev. Adv. Op. 6, 227 P.3d 1042, 1052 (2010) ("[B]oth intentional and negligent misrepresentation require a showing that the claimed damages were caused by the alleged misrepresentations."); *Yamaha Motor Co., USA v. Arnoult*, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998) ("This court has long recognized that to establish proximate causation 'it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'") (internal citations omitted).

Here, the nexus is lacking because Dave Sandin's license status did not cause or contribute to appellant's alleged damages, nor did any alleged misrepresentations concerning his licensing status result in appellant's failure to pay its policy premium, Oregon Mutual's subsequent cancellation of the Policy, or Oregon Mutual's denial of appellant's claim. *See Equity Diamond Brokers, Inc. v. Transnational Insurance Co.*, 785 N.E.2d 816, 822 (Ohio Ct. App. 2003) ("[A]ny alleged negligence by appellees in failing to obtain the proper licenses was not the proximate cause of EDB's loss and the trial court did not err in granting summary judgment in favor of appellees.").

Despite the total irrelevance of the status of Sandin's license, appellant has asserted a claim against the Sandin defendants for negligence, asserting that "DAVE SANDIN conducted business in Nevada as an insurance agent without being licensed as such, in violation of Nev. Rev. Stat. § 683A.201." I AA 17 (complaint, ¶ 84). How this would amount to a negligence cause of action is anyone's guess. But appellant asserts that Dave Sandin's failure to comply with the license statute constitutes negligence *per se*. *Id.*, ¶ 88.

Although it is true that Dave Sandin's Nevada license was expired at the time the Oregon Mutual policy was issued, Anthony Sandin and Sandin & Co's Nevada licenses were still valid. The Policy identifies Sandin & Co. as the agent for the appellant, not Dave Sandin. IV AA 597. Additionally, NRS 683A.201 does not provide for a private right of action. NRS 683A.201(1) & (3) states,

> 1. A person shall not sell, solicit or negotiate insurance in this state for any class of insurance unless the person is licensed for that class of insurance
> . . . .
>
> 3. A person required to be licensed in this state who transacts insurance without a license is subject to an administrative fine of not more that $1,000 for each violation.

Therefore, appellant's negligence claim was properly dismissed as a matter of law because NRS 683A.201 does not provide for a private right of action.

Rather, it provides for an administrative fine. *Cf. Hinegardner v. Marcor Resorts, L.P.V.*, 108 Nev. 1091, 1095-96, 844 P.2d 800, 803 (1992) ("[W]e note that in the absence of evidence of legislative intent to impose civil liability, a violation of a penal statute is not negligence *per se*.").

More fundamentally, appellant misconstrues the doctrine of negligence *per se*. That doctrine does not apply to establish the liability element of a claim of negligence every time any statute is violated, no matter how unrelated the claim is to the statutory violation. The elements of a claim of negligence *per se* are:

> To prevail under a negligence per se claim, a plaintiff must prove that (1) he or she belongs to a class of persons that a statute is intended to protect, (2) the plaintiff's injuries are the type the statute is intended to prevent, (3) the defendant violated the statute, (4) the violation was the legal cause of the plaintiff's injury, and (5) the plaintiff suffered damages.

Anderson v. Baltrusaitis, 113 Nev. 963, 965, 944 P.2d 797, 799 (1997); *see Sagebrush Ltd. v. Carson City*, 99 Nev. 204, 660 P.2d 1013 (1983) ("[V]iolation of a statute may constitute negligence *per se* only if . . . the injury is of the type that the statute was intended to prevent."). Appellant cannot contend with a straight face that the injury it suffered–the cancellation of its policy due to its own failure to pay its premium–was the type of injury NRS 683A.201(1) was intended to protect against. Equally obvious, Dave Sandin's expired license did not cause

appellant's injuries (assuming the word "injury" in the standard can be broadly construed to include non-physical damage, an unlikely assumption, at best). Appellant's actual damages were caused by the fire, which had nothing to do with Dave Sandin's licensure, and appellant was harmed by Oregon Mutual's cancellation of the Policy. Whether that cancellation was rightful or wrongful (the Sandin defendants express no opinion on this question), Dave Sandin's lack of an active license had nothing to do with it.

"Whether a legislative enactment provides a standard of conduct in the particular situation presented by the plaintiff is a question of statutory interpretation and construction for the court." *Sagebrush*, 99 Nev. at 208, 660 P.2d at 1015. Oregon Mutual's cancellation of appellant's insurance policy due to appellant's failure to pay the premium is not the type of injury NRS 683A.201 is intended to prevent. *See, e.g., Equity Diamond Brokers, Inc. v. Transnational Insurance Co.*, 785 N.E.2d 816, 822 (Ohio Ct. App. 2003) ("Further, even if we were to hold that appellees' alleged violations of Ohio's insurance licensing statutes were negligence *per se*, EDB was still not entitled to judgment as a matter of law. Proof of negligence *per se* is not proof of liability *per se*. EDB was still required to demonstrate that the appellees' negligence was the proximate cause of its damages.").

The Sandin defendants–licensed or otherwise–procured a policy that, but for appellant's failure to pay, would have been in effect at the time of the fire. Therefore, the district court properly granted summary judgment in favor of the Sandin defendants on appellant's negligence claim.

The remainder of appellant's claims below, which have not been specifically pursued in this appeal, fail for the simple reason that the Sandin defendants owed no fiduciary duty to appellant, and because appellant cannot identify any misrepresentation relevant to the cancellation of the policy that could support its fraud based claims. Appellant will rely on its briefing of these issues below, since they have not been raised with any kind of particularity on appeal, rather than to further burden this brief. All of appellant's claims against the Sandin defendants below were frivolous. The district court did not err in granting summary judgment in favor of the Sandin defendants.

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CONCLUSION

This Court should dismiss this appeal.

DATED this 26 day of May, 2016.

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ATTORNEY'S CERTIFICATE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14 point Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 11,461 words.

3. Finally, I 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 NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event the

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 26 day of May, 2016.

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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this date **RESPONDENTS DAVE SANDIN AND SANDIN & CO.'S ANSWERING BRIEF** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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