IN THE SUPREME COURT OF THE STATE OF NEVADA

O.P.H. OF LAS VEGAS INC., Appellant, vs. OREGON MUTUAL INSURANCE COMPANY; DAVE SANDIN; and SANDIN & CO., Respondents.	CASE NO.: 68543 District Court Case No.: A-12-672158-C

RESPONDENTS' 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(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Respondent Oregon Mutual Insurance Company ("OMI") is an independent mutual insurance company headquartered in McMinnville Oregon and licensed to do business in Nevada.

The following attorneys have appeared for the parties in this case:

1. O.P.H. of Las Vegas, Inc. ("O.P.H."): Margaret A. McLetchie and Alina M. Shell of the law firm of McLetchie Shell LLC; Daniel Heidtke and Robert Langford formerly of the law firm of Langford McLetchie LLC;

2. Oregon Mutual Insurance Company: Robert W. Freeman and Priscilla L. O'Briant of the law firm of Lewis Brisbois Bisgaard & Smith LLP; Kristen E. Meredith formerly of the law firm of Lewis Brisbois Bisgaard & Smith LLP; and

3. Patricia M. Lee, Michael S. Kelley, and Michael K. Wall of the law firm of Hutchison & Steffen, LLC.

DATED this 10 day of May, 2016

LEWIS BRISBOIS BISGAARD & SMITH LLP

By _____
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I.

ROUTING STATEMENT

This matter does not meet the criteria for presumptive retention by the Supreme Court; **nor** does it meet the criteria for presumptive assignment to the Court of Appeals under NRAP 17. This case did not originate in the business court, was not assigned to a business court judge and does not meet the criteria for assignment to the business court as it is not a "business matter" as defined by E.D.C.R. 1.61:

> (a) Business matters defined. "Business matters" shall be:
>
> (1) Matters in which the primary claims or issues are based on, or will require decision under NRS Chapters 78-92A or other similar statutes from other jurisdictions, without regard to the amount in controversy;
>
> (2) Any of the following:
>
> (i) Claims or cases arising under the Uniform Commercial Code, or as to which the Code will supply the rule of decision;
>
> (ii) Claims arising from business torts;
>
> (iii) Claims arising from the purchase or sale of (A) the stock of a business, (B) all or substantially all of the assets of a business, or (C) commercial real estate; or
>
> (iv) Business franchise transactions and relationships.

II.

ISSUES PRESENTED FOR REVIEW

1. Whether Nev. Rev. Stat. § 687B.360 requires an insurer to include in a cancellation notice a statement regarding a policyholder's right to request information

regarding the facts on which an insurer's decision to cancel the policy is based when the a cancellation notice states with reasonable precision the facts on which the insurer's decision is based.

2. Whether the District Court erred in entering an order that was inconsistent with it prior non-final order denying O.P.H.'s motion for summary judgment.

III.

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, two of which were entered in favor of OMI. (Volume ("Vol.") X, AA1546 and Vol. IX, AA1479).[1] The case arises from a fire which occurred at approximately 4:00 a.m. on August 17, 2012 (the "fire loss") and destroyed the Original Pancake House located on West Charleston in Las Vegas. (Vol. I, AA0009). The owner, O.P.H., had been insured by a Businessowners Protector Policy, policy no. BSP716685 (the "Policy") issued by Oregon Mutual Insurance Company which went into effect on December 26, 2011 and provided property coverage for the West Charleston location. (Vol. III, AA0421).

O.P.H. submitted a claim for the fire loss. (Vol. III, AA0465, AA0467). Upon receiving notice of the claim, OMI immediately undertook an investigation. (Vol. III,

[1] All references herein are to Appellant's Appendix.

AA0465, AA0468 to AA0471). However, it soon determined that the Policy had been canceled, in conformance with Nevada statutory requirements, effective December 16, 2012 at 12:01 a.m., the day prior to the fire loss. (Vol. III, AA0469). O.P.H. acknowledges that it did not pay the Policy premium (even though it knew it was late) (Vol. II at AA0261, 92:18-94:21) but alleges that OMI should nonetheless be responsible for the fire loss.

O.P.H. filed suit against OMI alleging causes of action against OMI for Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing/Bad Faith, Fraud in the Inducement, Violations of Nev. Rev. Stat. § 686A.310 and Negligence. (Vol. I, AA0003 to AA0019)

On November 27, 2013, O.P.H. filed a motion for partial summary judgment. (Vol. I, AA0089). In that motion, O.P.H. argued it was entitled to judgment as a matter of law because OMI's July 31 Notice did not comply with Nev. Rev. Stat. § 687B.320 and Nev. Rev. Stat. § 687B.360. (See generally id.). On February 19, 2014, the district court entered an order denying O.P.H.'s motion for partial summary judgment finding that whether the requirement of Nev. Rev. Stat. § 687B.360 was triggered by OMI's July 31 Notice was a question of fact. (Vol. X at AA1546).

On March 17, 2015, OMI filed a motion for summary judgment as to all claims against it. (Vol. III AA0337.) On May 7, 2015 filed a reply in support of its motion for summary judgment. (Vol. VIII, AA1312). In its Reply, OMI included additional

briefing supporting its position that the interpretation of Nev. Rev. Stat. § 687B.360 is not a question of fact for the jury, but a question of law for resolution by the court. (Vol. VIII. AA1314 to AA1316). The court agreed and determined that under Nev. Rev. Stat. § 687B.360, if a notice of cancellation does not state with reasonable precision the facts on which an insurer's decision is based, the notice must contain information about the policyholder's right to request the insurer provide this information. (Vol. IX, AA1483, 11-13). The court then found the notice satisfied the requirement of Nev. Rev. Stat. § 687B.360 because it stated with reasonable precision the facts on which the insurer's decision to cancel was based. (Vol. IX, AA1483, 26 to AA1484, 5). This Appeal followed.

IV.

STATEMENT OF FACTS

OMI issued a "Businessowner Protector Policy" to O.P.H. of Las Vegas, Inc. ("O.P.H." or "insured") at 4170 South Fort Apache Road, Las Vegas, Nevada, Policy No. BSP71668 (the "policy") which provided coverage for the O.P.H. Restaurant at 4833 West Charleston Boulevard, Las Vegas, effective December 26, 2011. (Vol. III, AA0421).

On July 9, 2012, OMI generated a billing statement to O.P.H. which was received by O.P.H. in July which stated that the minimum amount due was $2,814.75 and the due date was July 26, 2012. (Vol. III, AA0431, AA0433).

Having received no payment, on the night of July 31, 2012, OMI produced a "Notice of Cancellation" (the "notice") dated July 31, 2012 which stated:[2]

Minimum Due 2,822.00

We did not receive the required premium payment on your account by the date it was due.

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

Policy type	Policy number	Effective time and date of cancellation
Businessowner Policy	BSP716685	This policy is cancelled as of: 12:01 a.m. standard time on 08/16/12
Package Policy	OM0914045	This policy is cancelled as of: 12:01 a.m. standard time on 08/16/12

If you have any questions, please contact your agent SANDIN INSURANCE GROUP immediately at (503) 381-5570.

(Vol. III, AA442, AA450).

On the reverse side of the July 31, 2012 notice, OMI advised the insured to call or write with any questions regarding its billing account:

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[2] For the sake of clarity, OMI points out that the minimum due stated on the Notice of Cancellation differs from the July billing statement due to a $7.25 "late fee."

> Billing Customer Service: Call 1-800-409-3814 for assistance with questions regarding your billing account during business hours 7:00 AM to 5:00 PM Pacific Time or mail written billing inquiries to: PO Box 7500 McMinnville, OR 97128-7500.

(Vol. III, AA451).

OMI mailed the notice via first class mail to O.P.H. at 4170 South Fort Apache Road, Las Vegas, Nevada, the corporate office of O.P.H.. he notice was mailed on August 1, 2013 more than 10 days before the effective date of August 16, 2012. (Vol. III, AA0455, 5 to AA0458; AA0460; AA0461). O.P.H. claims that it never received the notice sent August 1, 2012. (Vol. III, AA0476).

On August 13, 2013, prior to the cancellation and the fire loss, O.P.H. knew it had not made its payment pursuant to the terms of the July billing statement, but did not contact their agent or OMI to advise that the payment would be late. Remarkably, despite knowing that the July payment had not been made, realizing that it needed to go in the mail to be received timely, O.P.H. cut a check and placed it in the mail but intentionally did not mail the check. (Vol. II at AA0261, 92:18-94:21). There is no dispute that O.P.H. did not pay the premium by August 15, 2012.

At approximately 4:00 a.m. on August 17, 2012, a fire broke out at the O.P.H. Restaurant at 4833 West Charleston Boulevard (the "fire loss") (Vol. I, AA0009). O.P.H., through its agent, submitted a claim for the fire loss to OMI. (Vol. III, AA0465, AA0467). On August 20, 2012, OMI mailed a claim denial letter to O.P.H., stating that the policy had been cancelled prior to the date of loss, and that OMI

therefore had no obligation to indemnify O.P.H. for the fire loss. (Vol. III, AA0432; AA0434). OMI sent a Non-Payment Cancellation notice to O.P.H. on August 21, 2012. (Vol. III, AA0442, AA0448 to AA0449). Thereafter, Plaintiff initiated this litigation against OMI on November 19, 2012. (Vol. I, AA0003).

V.

SUMMARY OF ARGUMENT

From a purely legal standpoint, this case is about the interpretation of Nevada's Insurance code, and more specifically the notice and cancellation provisions of Nev. Rev. Stat. § 687B.310, et. seq. The overriding question is whether Nev. Rev. Stat. § 687B.360 requires an insurer to include in a cancellation notice a statement regarding a policyholder's right to request information regarding the facts on which an insurer's decision to cancel the policy is based when the cancellation notice states with reasonable precision the facts on which the insurer's decision is based.

From a practical matter, this case is about whether an insured who knowingly doesn't pay its premium is entitled to coverage through an alleged technical defect in a notice which it claims to have never received.

The notice provision of Nevada Insurance Code were put in place to protect policyholders from unfair and short-notice cancellations not to prevent an insurer from canceling a policy. In fact, the legislature specifically allowed for mid-term cancellation of insurance policies for non-payment of premiums – a breach of the

policyholder's most basic of duties. Plaintiff now asks this court to do exactly the opposite, consider only a single sentence within Nev. Rev. Stat. §687B.360 ("[n]o notice is effective unless it contains adequate information about the policyholder's right to make such a request) in isolation from the language preceding it and separate from the statutory scheme. The district court properly interpreted the various statutory notice provisions harmoniously with one another to avoid an unreasonable and absurd result. The district court's grant of summary judgment should be affirmed.

VI.

ARGUMENT

A. Standard of Review

An order granting or denying summary judgment generally is reviewed de novo. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029-31 (2005). The reviewing court must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. See Fink v. Oshins, 118 Nev. 428, 432 (Nev. 2002). Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." N.R.C.P. 56; Wood, 121 Nev. at 729, 121 P.3d at 1029-31.

B. The Court Properly Determined that OMI's July 31, 2012 Notice was Legally Sufficient to Effectively Cancel the Insurance Policy as it Complied with Nevada Statutes

Statutory interpretation is a question of law. Vanguard Piping Sys. v. Eighth Judicial Dist. Court, 309 P.3d 1017, 1020 (Nev. 2013). If a statute is clear and unambiguous, the court will give effect to the plain meaning of the words, without resort to the rules of construction. Id. However, when the "[L]egislature has failed to address a matter or ... addressed it with imperfect clarity, [it becomes the responsibility of the court] to discern the law." Baron v. District Court, 95 Nev. 646, 648, 600 P.2d 1192, 1193-94 (1979). Similarly when a statute is susceptible to more than one reasonable but inconsistent interpretation, the statute is ambiguous, and this court will resort to statutory interpretation in order to discern the intent of the Legislature. Gallagher v. City of Las Vegas, 114 Nev. 595, 599, 959 P.2d 519, 521 (1998).

"When construing an ambiguous statute, legislative intent is controlling, and we look to legislative history for guidance." Washoe Med. Ctr. v. Dist. Ct., 122 Nev. 1298, 1301, 148 P.3d 790, 793 (2006). When construing various statutory provisions, which are part of a "scheme," a court must interpret them harmoniously with one another to avoid an unreasonable or absurd result. Horizons at Seven Hills

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Homeowners Ass'n v. Ikon Holdings, LLC, 132 Nev. Adv. Op. 3, 2016 Nev. LEXIS 364 (2016).

A court is not relieved of this duty simply because the statute includes the word "reasonable." Not only do courts frequently determine reasonableness as a matter of law, but courts have determined that insurance cancellation notices are reasonably precise as a matter of law. See e.g. Kolob Heating & Cooling v. Ins. Corp., 154 Fed. Appx. 569, 571 (9th Cir. Nev. 2005) ("[t]he notice also stated the reasons for cancellation with 'reasonable precision.' See N.R.S. § 687B.360."); See also Industrial Risk Insurers v. West Bend Mut. Ins. Co., 162 Wis. 2d 631 (Wis. Ct. App. 1991) (notice advising that policy was cancelled due to "poor housekeeping" satisfied the "reasonable precision" requirement). Moreover, the Nevada Supreme Court has held that "[w]hen there is a genuine dispute regarding an insurer's legal obligations, the district court can determine if the insurer's actions were reasonable." Allstate Ins. Co. v. Miller, supra, 212 P.3d at 330.

The Nevada Insurance Code, which included the notice statutes at issue herein, was passed into law in 1971. The notice provisions of the insurance code were drafted to prevent "short-notice and arbitrary cancellation and nonrenewal" not to eliminate an insurer's right to cancel. (Vol. II, AA0283, A288) OMI's notice of pending cancellation was not arbitrary and ample notice of the pending cancellation was mailed to the policyholder in conformance with the requirements of Nev. Rev. Stat. §

687B.320. When construing various statutory provisions, which are part of a "scheme," a court must interpret them harmoniously with one another to avoid an unreasonable or absurd result. Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, LLC, 132 Nev. Adv. Op. 3, 2016 Nev. LEXIS 364 (2016).

1. OMI's Notice Complied with the Clear Language of the Nevada Statutes

Nevada statutes govern cancellation and non-renewals of insurance policies and require that notice of cancellation be provided to the insured prior to cancellation. Nev. Rev. Stat. § 687B.310 sets forth the requirements for notice that an insurer must meet to effectively cancel a policy of insurance:

> NRS 687B.310 Cancellations and nonrenewals; scope of application.
> 6. Any notice to an insured required pursuant to NRS 687B.320 to 687B.350, inclusive, must be personally delivered to the insured or mailed first class or certified to the insured at the address of the insured last known by the insurer. The notice must state the effective date of the cancellation or nonrenewal and be accompanied by a written explanation of the specific reasons for the cancellation or nonrenewal.

Nev. Rev. Stat. § 687B.310(6) (emphasis added). Under the express terms of the statute, these requirements apply to all notices. Thereafter, the statutory scheme sets out additional notice requirements which apply in specific circumstances.

Nev. Rev. Stat. § 687B.320 describes when and how an insurer may cancel an insurance policy before the policy's expiration; it requires the insurer to give adequate notice of cancellation, and necessitates a triggering event in order for the insurer to be

able to cancel the insurance policy. Griffin v. Old Republic Ins. Co., 122 Nev. 479, 486 (Nev. 2006). In other words, mid-term cancellation may only occur as a result of, and as a condition subsequent to, an event that violates the insurance policy. Id. Non-payment of premiums was one of the triggering events which the legislature found warranted cancellation prior to the end of the policy terms. Nev. Rev. Stat. § 687B.320 provides:

> NRS 687B.320 Midterm cancellation; exception.
>
> 1. Except as otherwise provided in subsection 3, no insurance policy that has been in effect for at least 70 days or that has been renewed may be cancelled by the insurer before the expiration of the agreed term or 1 year from the effective date of the policy or renewal, whichever occurs first, except on any one of the following grounds:
>
> (a) Failure to pay a premium when due;
> (b) Conviction of the insured of a crime arising out of acts increasing the hazard insured against;
> (c) Discovery of fraud or material misrepresentation in the obtaining of the policy or in the presentation of a claim thereunder;
> (d) Discovery of:
> (1) An act or omission; or
> (2) A violation of any condition of the policy,
> which occurred after the first effective date of the current policy and substantially and materially increases the hazard insured against;
> (e) A material change in the nature or extent of the risk, occurring after the first effective date of the current policy, which causes the risk of loss to be substantially and materially increased beyond that contemplated at the time the policy was issued or last renewed;
> (f) A determination by the Commissioner that continuation of the insurer's present volume of premiums would jeopardize the insurer's solvency or be hazardous to the interests of policyholders of the insurer, its creditors or the public; or

(g) A determination by the Commissioner that the continuation of the policy would violate, or place the insurer in violation of, any provision of the Code.

2. No cancellation under subsection 1 is effective until in the case of paragraph (a) of subsection 1 at least 10 days and in the case of any other paragraph of subsection 1, at least 30 days after the notice is delivered or mailed to the policyholder.

Nev. Rev. Stat. § 687B.320(1) – (2).

When an insurer cancels an insurance policy mid-term for non-payment of premiums, Nev. Rev. Stat. § 687B.320 sets out an additional requirement for the notice to be effective – notice must be mailed at least 10 days prior to the cancellation date - a requirement applicable only in that specific circumstance.

Nev. Rev. Stat. § 687B.360 requires an insurer to provide the reason for its decision or supply that information within 6 days of receipt of a written request:

> NRS 687B.360 Information about grounds. If a notice of cancellation or nonrenewal under NRS 687B.310 to 687B.420, inclusive, does not state with reasonable precision the facts on which the insurer's decision is based, the insurer shall supply that information within 6 days after receipt of a written request by the policyholder. No notice is effective unless it contains adequate information about the policyholder's right to make such a request.

Nev. Rev. Stat. § 687B.360 (emphasis added). In other words, if a notice does not state the reason for cancellation with sufficient prevision, then the insurer must advise the policyholder of the reasons within 6 days after receipt of a written request. Thus, a notice which does not state the reason for cancellation, must include information regarding the insured's right to request this information.

The notice was mailed via first class mail to O.P.H., stated that the required premium had not been received by the due date, and stated that if the required premium was not received by August 15, 2012, the policy would be cancelled. (Vol. III, AA442, AA450). The notice included the effective date of cancellation which was more than 10 days after the notice was mailed to O.P.H.. Id. Thus, OMI fully complied with the notice requirements of Nevada law to effectively cancel the policy on August 16, 2001 at 12:01 a.m.

2. Accepting Plaintiff's Interpretation Requires Ignoring the Statutory Scheme and Would Lead to an Absurd Result

Plaintiff has argued that Nev. Rev. Stat. § 687B.360 requires every notice to include information regarding the insured's right to request the facts on which the insurer's cancelation decision is based, even if the notice clearly states the facts on which the insurer's decision is based. However, looking at the act as a whole, it is clear that general notice requirements are set out in Nev. Rev. Stat. § 687B.310, while requirements specific to certain circumstances are set out separately. Additionally, Nev. Rev. Stat. § 687B.360 is clearly distinguishable from Nev. Rev. Stat. § 687B.310 which by its terms applies to "[a]ny notice to an insured required pursuant to NRS 687B.320 to NRS 687B.350, inclusive." Should the legislature have intended Nev. Rev. Stat. § 687B.360 to apply to "all" notices required under Nev. Rev. Stat. 687B.320 to Nev. Rev. Stat. § 687B.350 it would have said so, as it specifically does throughout

the notice provisions of the insurance code, and would have included the requirement that every notice contain information regarding the insured's rights in Nev. Rev. Stat. § 687B.310. Its failure to do so indicates that the notice referred to in Nev. Rev. Stat. § 687B.360 applies only in the circumstances described therein, when the notice does not state the reason for cancellation. Interpreting Nev. Rev. Stat. § 687B.360 within the statutory scheme as a whole demonstrates that the requirements therein apply only in specific circumstances.

Interpreting Nev. Rev. Stat. § 687B.360 as a whole also makes clear that the insurer's obligations thereunder are conditional and apply only ***if*** the notice does not state the fact on which the insurer's decision is based with reasonable precision. Here the notice clearly states that "[OMI] did not receive the required premium payment on your account by the date it was due." It is difficult to imagine how this does not state with reasonable specificity the facts on which the insurer's decision is based.

Nev. Rev. Stat. § 687B.320 sets forth other allowable reasons that a policy of insurance may be cancelled mid-term. A brief review of these makes clear why the legislature enacted Nev. Rev. Stat. § 687B.360 – e.g. if a policy is canceled for "fraud" (Nev. Rev. Stat. § 687B.320(c)) or a "material change in the nature or extent of the risk" (Nev. Rev. Stat. § 687B.320(e)), an insured is entitled to know the facts supporting the insurer's determination that there was "fraud" or a "material change in the nature or extent of the risk." However, the legislature recognized the substantial

difference between cancelation for failure to pay a premium and the other allowable reasons for mid-term cancellation when it provided that no notice of mid-term cancellation - ***other than for failure to pay a premium*** – is effective until 30 days after the notice is delivered.

Finally, accepting Plaintiff's interpretation of Nev. Rev. Stat. § 687B.360 leads to an absurd result. Under the plain language of the statute, OMI is only obligated to respond to an insured's written request for additional information regarding the cancellation ***if*** the notice does not state with reasonable precision the facts on which the insurer's decision is based. OMI's notice precisely stated the facts on which the cancellation was based. Thus, under the express terms of Nev. Rev. Stat. § 687B.360, OMI is not obligated to respond to an insured's written request regarding cancellation. Yet, Plaintiff's interpretation would require OMI to advise a policyholder of the right to submit such a written request. A policyholder's rights and an insurer's obligations are two sides of the same coin - one does not exist without the other. In other words, a policyholder's right can only exist where there is a corresponding obligation on the part of the insurer – here, Plaintiff's right to submit a written request for information is dependent on the insurer's obligation to respond to that written request within a certain timeframe.

Applying Plaintiff's interpretation would require insurers to advise policyholder's of rights they do not in fact have, as the insurer is not obligated to

provide any response to the request. This is an absurd result, would surely only frustrate policyholders and could not have been the intent of the legislature. Thus, the statute should logically be interpreted to only require that a notice advise policyholders of their right to request information on the insurer's decision when the notice does not state with reasonable precision the facts on which an insurer's decision is based.

3. Plaintiff's Reliance on California Law is Misplaced

Plaintiff's assertion that the California Insurance Code section analyzed by the court in Ilene Lee v. Industrial Indemnity Company, Inc., et al., 223 Cal. Rptr. 254, 177 Cal. App. 3d 921 (1986) is substantially similar to Nev. Rev. Stat. § 687B.360 does not hold up to scrutiny. At the time the Lee case was decided, California Insurance Code section 677 provided as follows:

> All notices of cancellation shall be in writing, mailed to the named insured at the address shown in the policy, or to his last known address, and shall state, with respect to policies in effect after the time limits specified in Section 676, (a) which of the grounds set 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.

Lee, 177 Cal. App. 3d at 923, n. 1.17 Section 677 by its express terms, is mandatory ("shall") while Nev. Rev. Stat. § 687B.360 is conditional ("if"). Likewise, by its express terms Section 677 applies to "all notices of cancellation". Finally, Section 677 clearly requires both notice of the grounds "and" notice of the insured's right to request additional information. This simply is not present in Nev. Rev. Stat. § 687B.360, which

governs if and when an insurer is required to respond in writing to an insured's request for information. Rather, California Insurance Code section 677 is similar to Nev. Rev. Stat. § 687B.310 which sets forth the mandatory notice requirement, not Nev. Rev. Stat. § 687B.360.

It should also be noted that the year following the Lee decision, the California legislature statutorily overturned it – amending the statute to read:

> All notices of cancellation shall be in writing, mailed to the named insured at the address shown in the policy, or to his or her last known address, and shall state, with respect to policies in effect after the time limits specified in Section 676, (a) which of the grounds set forth in Section 676 is relied upon, and (b) that, upon written request of the named insured, mailed or delivered to the insurer within 15 days of the date of cancellation, the insurer shall specify the reason for the cancellation except where the reason is for nonpayment of premium and is so stated in the cancellation notice.

1987 Cal ALS 800; 1987 Cal SB 517; 1987 Cal Stats. ch. 800, *2 (1987) (emphasis added). In other words, California has essentially recognized that cancelation for non-payment of premium is self-explanatory. Like Nevada, it has recognized that mid-term cancellation for failure to pay a premium is substantially different then mid-term cancellation for other allowable reasons.

4. The Division of Insurance Checklist Relied Upon by Plaintiff Deserves no Deference

In support of its interpretation of the statute, Plaintiff cites to the comments section of the Property and Casualty Review Standards Checklist ("checklist") obtained

from the Nevada Division of Insurance (DOI) website. (Vol. 1 at AA0160). Plaintiff asserts that the court should use this as "guidance" in finding that OMI's July 31, 2012 notice was legally deficient for failing to include information about the policyholder's right to request information about the cancelation.[3]

(a) Administrative Deference

Although in the past, courts have given considerable deference to an administrative agency's interpretation of the statutes it is charged with enforcing, the United State Supreme Court has recently clarified the circumstances in which such deference is due. See United States v. Mead Corp., 533 U.S. 218, 237 (U.S. 2001). The Mead case arose after the headquarters office of the U.S. Customs Service issued a "ruling letter" stating that certain imported articles fell under a classification subject to a tariff. Mead filed suit in the Court of International Trade, a specialized tribunal, which granted the government summary judgment. The Federal Circuit Court reversed, finding that ruling letters should not be treated like Customs regulations, which receive the highest level of deference, because they are not preceded by notice-and-comment rulemaking, do not carry the force of law and are not intended to clarify importers' rights and obligations beyond the specific case. The Federal Circuit gave neither deference nor weight to the ruling letter. Mead appealed to the Supreme Court.

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[3] In the "comments" section of the checklist, it reads "[n]o notice is effective unless it contains adequate information about the policyholder's right to make such a request even if the notice does include the reason for cancellation or nonrenewal."

The Mead court first held that an agency's statutory interpretation qualifies for Chevron (or considerable) deference[4] only if the interpretation was promulgated during the exercise of statutory authority to prescribe norms carrying the force of law, i.e., adjudication, notice-and-comment rulemaking or some comparable law-making method. Mead, 533 US at 230-231. Noting that there was no "indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law," the Mead court found that the ruling letter was not due Chevron deference. Id. at 231 – 232. The Mead court rather, stated that the ruling was best treated like "interpretations contained in policy statements, agency manuals, and enforcement guidelines." Id. Interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law -- do not warrant Chevron-style deference. Christensen v. Harris County, 529 U.S. 576, 587 (U.S. 2000).

However, the court noted that although an agency's interpretation does not warrant Chevron-style deference, it may merit some deference. The Mead court remanded the case to the Federal Circuit court for determination of whether the ruling was entitled any deference under Skidmore v Swift & Co., 323 US 134, 89 L Ed 124,

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[4] Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984). Chevron is considered the Supreme Court's clearest articulation of the doctrine of "administrative deference," to the point that in more recent decisions the Court itself has used the phrase "Chevron deference" to denote the "considerable deference" to be afforded administrative decisions. 467 U.S. at 844.

65 S Ct 161 (1944). The amount of weight given to an agency's statutory interpretation under Skidmore depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors which give it power to persuade, if lacking power to control."

(b) The Comment Warrants no Deference

The comment does not warrant "considerable" deference as there is no indication that the checklist was promulgated during the exercise of statutory authority to prescribe norms carrying the force of law, i.e., adjudication, notice-and-comment rulemaking or some comparable law-making method. In order to determine the weight of deference the comment should be given, this court must look at the "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors which give it power to persuade, if lacking power to control." The checklist does not include any information about its author or the review process it underwent within the Division of Insurance and thus, there is no thoroughness evident in its consideration. Although the checklist does not explain the reasoning behind the comment, that interpretation of the statute creates an absurd result. The facts and circumstances of the comment in the checklist are such that it warrants no deference.

Moreover, the checklist itself refers insurers to the statutes related to each topic. The "comment" in the "checklist" obtained from the DOI website is, at most,

someone's interpretation of the statute. However, the Nevada Division of Insurance is not charged with interpreting statutes – under Nevada law, that is the job of this court. As outlined above, the facts and circumstances of the comment in the checklist are such that it warrants no deference.

5. Even if this Court Accepts Plaintiff's Interpretation of the Statute, Judgment in Favor of OMI was Proper

If this court finds as a matter of law that Nev. Rev. Stat. § 687B.360 creates a requirement of providing the insured adequate information to obtain additional information about the cancellation in order for a notice to be effective, then it should also find as a matter of law that OMI complied with this requirement.

It is the Court's function to interpret what is meant by the statute, thereby establishing the legal standard against which the sufficiency of any particular notice can be measured. See e.g. Kujbida v. Horizon Ins. Agency, 260 Ill. App. 3d 1001, 1006 (Ill. App. Ct. 1st Dist. 1994). Once this legal standard is established, the question still remains whether the language used in the notice meets that standard. Id. If the sufficiency of the notice is ascertainable merely by reference to the legal standard, or if only one conclusion may reasonably be drawn, it is a question of law. Id. On the other hand, if application of the legal standard to the information stated in the notice could allow more than one conclusion to reasonably be drawn, there is a question of fact for the jury to resolve. Id.

The notice mailed by OMI specifically advised the insured to call or write with any questions regarding its billing account and provided the address to which the insured could write for this information. (Vol. III, AA451). The notice also advised that the insured could contact its agent with any questions. (Vol. III, AA451). Thus, the notice provided the insured with adequate notice of how it could receive additional information on the reasons for cancellation (by contacting its agent, by calling OMI directly, or by sending a written request) sufficient to effectively cancel the policy. (Pursuant to the comments section of the DOI checklist upon which Plaintiff so heavily relies states, "[a]dequate information includes the address to write to receive the reasons for cancellation." (Vol. 1 at AA0160).)

Application of the legal standard to the language of the notice leads to only one reasonable conclusion, that the insured was provided adequate information to request additional information on the reasons for cancellation. Thus, even if the court finds that Plaintiff's interpretation of Nev. Rev. Stat. § 687B.360 is correct, it should also find that OMI's notice sufficiently complied with the statute as a matter of law to effectively cancel the policy.

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C. The District Court Did not Err in Granting Summary Judgment in Favor of OMI Even Though this Finding was Inconsistent with a Prior Order.

On February 19, 2014, the district court denied O.P.H.'s motion for summary judgment finding that the effectiveness of the July 31, 2012 cancellation notice OMI issued to O.P.H. was a question of fact. (Vol. X at AA1546). O.P.H. asserts that summary judgment in favor of OMI was inappropriate because the district court had previously found that there was an issue of material fact regarding whether the July 31, 2012 order complied with the requirements of Nev. Rev. Stat. § 687B.360. Plaintiff cites no legal support for the contention that the Court cannot issue an order that is inconsistent with a prior order if it comes to believe that the prior order was in error. In fact the opposite appears to be true.

A court "possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient" so long as it has jurisdiction. City of L.A., Harbor Div. v. Santa Monica Baykeeper, 254 F.3d 882, 885 (9th Cir. 2001) (quotation and emphasis omitted); see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 12, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) (citing Fed. R. Civ. P. 54(b)) . "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in

controlling law." Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).

After additional briefing by the parties, the district court made the following legal findings in its June 30, 2015 order granting summary judgment to OMI:

> 2. . . . .If a notice of cancellation does not statute with reasonable precision the facts on which the insurer's decision is based, the notice must contain information about the policyholder's right to request the insurer provide this information. NRS 687B.360.
>
> 3. In applying the above statute to the undisputed facts of this case and terms of the policy, the Court is guided by the following standards governing interpretation of statutes. The interpretation of a statute is not a question of fact for the jury, but a question of law for resolution by the court. W. v. Cal., 181 Cal. App. 3d 753, 762 (Cal. App. 1st Dist. 1986); see also State v. Schumacher, 136 Idaho 509 (Idaho Ct. App. 2001) (allowing juries to independently interpret [statute] would be an abdication of this Court's duty to construe legislative language to determine the law). It is a court's duty to interpret statutes consistent with the intent of the legislature. Rose v. First Fed. Sav. & Loan Ass'n, 105 Nev. 454, 457 (Nev. 1989). To do so, the court must give a statute's terms their plain, ordinary and usual meaning. O'Neal v. Slaughter (In re Estate of Murray), 344 P.3d 419, 421 (Nev. 2015). When construing various statutory provisions, which are part of a "scheme," a court must interpret them harmoniously and in accordance with their general purpose. Zahavi v. State, 343 P.3d 595, 600 (Nev. 2015).
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> 4. The Court finds as a matter of law that the notice provided to the insured by OMI satisfies the requirements of the policy and NRS 687B.310, NRS 687B320, and NRS 687B360. The notice satisfies the statutory and policy requirements because the notice 1) the notice was based on non-payment of premium a permissible basis for midterm cancellation of a policy, 2) was mailed first class to the insured at his last known address, 3) state the effective date of the cancellation, 4) included the reason for cancellation, 5) was effective no earlier than 10 days after

it was mailed to the policyholder, and 6) stated with reasonable precision the facts on which the insurer's decision to cancel was based.

(Vol. IX, AA1483, 11 to AA1484, 5).

The district court found that the meaning of Nev. Rev. Stat. § 687B.360 was properly determined by the court as a matter of law, applied Nevada's principles of policy interpretation and determined that Nev. Rev. Stat. § 687B.360 requires that if a notice of cancellation does not statute with reasonable precision the facts on which the insurer's decision is based, the notice must contain information about the policyholder's right to request the insurer provide this information. While the district court did not specifically state that she was reversing or rescinding the February 19, 2015 order, the findings contained with the June 30, 2015 order are a clear repudiation of the finding of the February 19, 2015 order.

The district court did not err in entering an order that was inconsistent with it prior non-final order denying O.P.H.'s motion for summary judgment. The June 30, 2015 order granting summary judgment to OMI includes specific findings of fact and law which indicate that the district court simply realized that the February 19, 2015 order was erroneous. This does not provide a basis for reversing the June 30, 2015 order granting summary judgment to OMI. Rather, the June 30, 2015 order effectively rescinded the non-final February 19, 2014 Order.

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VII.

CONCLUSION

Based on the foregoing, OMI urges this Court to affirm the judgment of the district court.

DATED this 26 day of May, 2016

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ATTORNEY CERTIFICATE PURSUANT TO NRAP 28.2

1. I hereby 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, size 14.

2. I further certify that this brief complies with the page- or 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 or more, and contains **6,516** words.

3. 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 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 and volume number, if any, 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 that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 4 day of May, 2016

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and N.E.F.C.R. 4(b)(1), 5(k) and 10(b), I hereby certify that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH LLP and that on this 25th day of February 2016, I did cause a true and correct copy of **RESPONDENTS' ANSWERING BRIEF** to be served via the Court's electronic filing and service system (EFlex) to all parties on the current service list.

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