

**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.

Electronically Filed  
Aug 25 2016 10:25 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court  
No.: 68543  
DC No.: A-12-672158

**APPELLANT'S CONSOLIDATED REPLY BRIEF**

MARGARET A. MCLETCHIE  
Nevada Bar No. 11711  
McLetchie Shell, LLC  
701 E. Bridger Avenue, Suite 520  
Las Vegas, Nevada 89101  
(702) 728-5300

*Attorney for Appellant O.P.H. of Las Vegas, In*

### **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. No publicly traded company has a material interest in this appeal. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

MARGARET A. MCLETCHIE

Nevada Bar No. 10931

ALINA M. SHELL

Nevada Bar No. 11711

MCLETCHIE SHELL LLC

701 E. Bridger Avenue, Suite 520

Las Vegas, Nevada 89101

(702) 728-5300

*Attorneys for Appellant*

Patricia M. Lee, Esq.

Michael S. Kelley, Esq.

Michael K. Wall, Esq.

HUTCHISON & STEFFEN LLC

10080 West Alta Drive, Suite 200

Las Vegas, NV 89145

*Attorneys for Respondent Dave Sandin and Sandin & Co.*

Robert W. Freeman, Esq.

Priscilla L. O'Briant, Esq.

LEWIS BRISBOIS BISGAARD & SMITH LLP

6385 South Rainbow Blvd., Suite 600

Las Vegas, NV 89118

*Attorneys for Respondent Oregon Mutual Insurance Co.*

///

DATED THIS 24<sup>th</sup> DAY OF AUGUST, 2016.

/s/ Margaret A. McLetchie

Margaret A. McLetchie

Nevada Bar No. 10931

MCLEATCHIE SHELL LLC

701 E. Bridger Avenue, Suite 520

Las Vegas, Nevada 89101

*Counsel for Respondent*

## TABLE OF CONTENTS

INTRODUCTION .....	1
ARGUMENT .....	1
A. This Court Should Accord Deference to the Nevada Department of Insurance’s Interpretation of NRS § 687B.360 as Requiring All Cancellation Notices to Include Information About a Policyholder’s Right to Submit a Written Request for Information About the Reasons for Cancellation.....	1
B. The Record is Devoid of Any Indication That the District Court’s Reversal of its Initial Position that the Effectiveness of OMI’s Cancellation Notice Was a “Question of Fact” Was the Result of the District Court Correcting a Clear Error. ....	4
C. The Special Relationship Between the Sandin Defendants and O.P.H. Created a <i>De Facto</i> Duty for the Sandin Defendants to Advise O.P.H. That Its Insurance Premiums Were Due. ....	5
CONCLUSION .....	10
CERTIFICATE OF COMPLIANCE.....	11

## TABLE OF AUTHORITIES

### Cases

<i>Boulder City v. Cinnamon Hills Assocs.</i> , 110 Nev. 238, 871 P.2d 320 (1989).....	3
<i>Cape Jasmine Court Trust v. Central Mortgage Co.</i> , 2014 WL 1305015 (D. Nev. 2014) .....	3
<i>CBC Financial, Inc. v. Apex Insurance Managers, LLC</i> , 291 Fed. Appx. 30 (9th Cir. Aug 14, 2008).....	6
<i>Dutchess Business Services, Inc. v. Nevada State Bd. Of Pharmacy</i> , 124 Nev. 701, 191 P.3d 1159 (2008).....	3
<i>Flaherty v. Kelly</i> , 2013 WL 7155078 (Nev. 2013).....	6
<i>Folio v. Briggs</i> , 99 Nev. 30, 33, 656 P.2d 842, 844 (1983).....	2,3
<i>Int’l Game. Tech., Inc. v. Second Jud. Dist. Court of Nevada</i> , 122 Nev. 132, 127 P.3d 1088 (2006).....	3
<i>Martinonis v. Utica Nat’l Ins. Group</i> , 65 Mass. App. Ct. 418, 421 840 N.E.2d 994 (2006) .....	7
<i>North Lake Tahoe Fire Protection District v. Washoe County Board of County Commissioners</i> , 129 Nev. Adv. Op. 72, 310 P.3d 583 (2013) .....	3
<i>Precision Mech. Servs., Inc. v. T.J. Pfund Associates, Inc.</i> , 109 Conn. App. 560, 952 A.2d 818, 822 (2008) .....	7
<i>Sadler v. Loomis Co.</i> , 139 Md. App. 374, 776 A.2d 25 (2001).....	7
<i>Sch. Dist. No. 1J, Multnomah Cnty., Or. V. ACandS, Inc.</i> , 5 F.3d 1255, 1236 (9th Cir. 1993).....	5
<i>Trotter v. State Farm Mut. Auto. Ins. Co.</i> , 297 S.C. 465, 377 S.E.2d 34 (1988) .....	7

**Statutes**

NRS § 687B.360 ..... passim

NRS § 687B.320 .....1, 2

## INTRODUCTION

This Consolidated Reply Brief addresses arguments raised by Respondents Oregon Mutual Insurance Company (“OMI”) and Dave Sandin and Sandin & Co. (“Sandin Defendants”).

As discussed in Appellant O.P.H.’s Opening Brief, O.P.H.’s appeal challenges three final orders entered by the Honorable Gloria Sturman, District Judge of the Eighth Judicial District Court, Clark County: one order denying partial summary judgment to O.P.H. against OMI on its claim that OMI’s notice of insurance cancellation did not comply with NRS §§ 687B.320 and 687B.360 on the grounds that the claim presented a question of fact for the jury to consider (Vol. X at AA1597); a subsequent order granting summary judgment to OMI on that same claim (Vol. IX at AA1479); and a third order granting summary judgment to the Sandin Defendants on all of O.P.H.’s claims.

## ARGUMENT

**A. This Court Should Accord Deference to the Nevada Department of Insurance’s Interpretation of NRS § 687B.360 as Requiring All Cancellation Notices to Include Information About a Policyholder’s Right to Submit a Written Request for Information About the Reasons for Cancellation.**

Pursuant to Nev. Rev. Stat. § 687B.360, a notice of cancellation is not effective “unless it contains adequate information about the policyholder’s right” to request information regarding the facts which support the insurer’s decision to

cancel a policy. The July 31, 2012 notice from OMI, however, did not inform O.P.H. of this right. (*See* Vol. I at AA0116.) As a result, contrary to the district court’s decision, OMI’s notice did not effectively cancel O.P.H.’s policy.

In its Answering Brief, OMI asserts that its July 31, 2012 midterm cancellation notice to O.P.H. complied with NRS §§ 687B.320 and 687B.360 because it informed O.P.H. that it was terminating O.P.H.’s insurance policy for nonpayment. (OMI Answering Brief at pp. 14-15, 22-23.) In reaching that conclusion, OMI argues in part that the Court should grant no deference to the Nevada Department of Insurance’s interpretation of NRS § 687B.360 as requiring all cancellation notices to contain information informing the insured of its right submit a written request for the specific reasons for cancellation. (*See* Vol. I at AA0160.) This position, however, ignores longstanding precedent from this Court that courts must accord substantial weight to an agency’s interpretation of Nevada statutes. *See, e.g., Folio v. Briggs*, 99 Nev. 30, 33, 656 P.2d 842, 844 (1983).

In this case, the district court failed to consider that the Nevada Department of Insurance has interpreted NRS § 687B.360 as requiring all cancellation notices to include information about a policyholder’s right to make a written request for specific information about the reasons for cancellation “*even if the notice does include the reason for cancellation or nonrenewal.*” (Vol. I at AA0160) (emphasis added). Ignoring this interpretation was error because, as noted above, this Court has



repeatedly held that courts must defer to an agency's interpretation of its own governing statutes. *See Dutchess Business Services, Inc. v. Nevada State Bd. Of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008); *see also Int'l Game. Tech., Inc. v. Second Jud. Dist. Court of Nevada*, 122 Nev. 132, 157, 127 P.3d 1088, 1106 (2006); *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 247, 871 P.2d 320, 326 (1989) (city's interpretation of its own laws is cloaked with a presumption of validity). This Court has also explained that the judicial branch should refrain from stepping into the shoes of the State and making decisions for it. *North Lake Tahoe Fire Protection District v. Washoe County Board of County Commissioners*, 129 Nev. Adv. Op. 72, 310 P.3d 583, 585-587 (2013). Because agencies such as Nevada Department of Insurance have discretion to construe the statutes under which they operate, courts "are obliged to attach substantial weight to the agency's interpretation." *Folio*, 99 Nev. 30, 33, 656 P.2d 842, 844; *accord Cape Jasmine Court Trust v. Central Mortgage Co.*, 2014 WL 1305015 at \*6 (D. Nev. 2014).

In this instance, despite OMI's protestations to the contrary, the Nevada Department of Insurance has interpreted NRS § 687B.360 as requiring all cancellation notices to include information regarding a policyholder's right to submit a written request for an explanation of the reasons for cancellation—even if, as here, the cancellation notice indicates the insurer is canceling the policy for a specific reason.

Although O.P.H. maintains that it is entitled to summary judgment on this claim, the dispute over the weight this Court must accord to the Nevada Department of Insurance's interpretation of NRS § 687B.360 demonstrates that there may be a genuine issue of material fact in dispute regarding the adequacy of OMI's July 31 cancellation notice to O.P.H. Accordingly, the Court erred in granting summary judgment to OMI on this claim.

**B. The Record is Devoid of Any Indication That the District Court's Reversal of its Initial Position that the Effectiveness of OMI's Cancellation Notice Was a "Question of Fact" Was the Result of the District Court Correcting a Clear Error.**

As set forth in the Opening Brief, the district court erred in entering what were essentially incompatible orders. On February 19, 2014, the district court denied O.P.H.'s motion of partial summary judgment on its claim against OMI for failure to comply with the notification provisions codified in Chapter 687B of the Nevada Revised Statutes on the grounds that this was a "question of fact." (Vol. X at AA1597, AA1600.) On June 26, 2015, however, the district court reversed course, holding that the interpretation of the relevant statutes was "not a question of fact for the jury, but a question of law for resolution by the court." (Vol. IX at 1483.)

In its Answering Brief, OMI asserts that the district court "simply realized that [its order denying summary judgment to O.P.H.] was erroneous" and corrected that error with its subsequent order granting summary judgment to OMI. (OMI Answering Brief at p. 26; *see also id.* at p. 24-25 (citing *Sch. Dist. No. 1J, Multnomah*

*Cnty., Or. V. ACandS, Inc.*, 5 F.3d 1255, 1236 (9th Cir. 1993).) However, the district court's order is devoid of any indication that is this case; in fact, the court's June 26, 2015 order does not even acknowledge its prior order denying O.P.H. summary judgment on this claim. Instead, the district court decided to reverse its position without specifically articulating the grounds for its reversal. Absent some clear indication from the district court that it was correcting an error in its prior order, it is impossible for any party to divine the district court's rationale for reversing its position.

Moreover, as discussed above, the district court's grant of summary judgment to OMI on this claim is erroneous in light of the Nevada Department of Insurance's interpretation of NRS § 687B.360. Accordingly, the district court erred in granting summary judgment to OMI after previously denying O.P.H. summary judgment on the same claim because it had found that the adequacy of the notice was an "issue of fact."

**C. The Special Relationship Between the Sandin Defendants and O.P.H. Created a *De Facto* Duty for the Sandin Defendants to Advise O.P.H. That Its Insurance Premiums Were Due.**

Throughout this case, O.P.H. has asserted that the Sandin Defendants had a duty to remind O.P.H. about its monthly insurance premiums due to the specifics of the relationship between the Sandin Defendants and O.P.H. (*See, e.g.*, Vol. I at AA0014-15 (O.P.H.'s claims against the Sandin Defendants for breach of fiduciary

duty and negligence).) Although insurance agents do not typically have a fiduciary relationship with their clients, O.P.H. maintains that, consistent with law from other jurisdictions, Dave Sandin's relationship with O.P.H. created a *de facto* fiduciary duty to O.P.H.

In their Answering Brief, the Sandin Defendants criticize O.P.H.'s used of the phrase "*de facto* fiduciary duty." (*See, e.g.,* Sandin Defendants Answering Brief at pp. 17-18.) However, the Sandin Defendants' critique of O.P.H.'s nomenclature does not address O.P.H.'s larger point: that, even in the absence of a statutory or legal obligation to advise O.P.H. of pending policy cancellations, Mr. Sandin's practice of advising O.P.H. of such issues created a special relationship between Mr. Sandin and O.P.H. This special relationship carried with it duties that exceed the scope of the typical insurance agent-insured relationship.

As the Sandin Defendants point out in their Answering Brief, the United States Court of Appeals for the Ninth Circuit has noted that this Court has not yet imposed a fiduciary duty on insurance brokers towards insureds. (Sandin Defendants Answering Brief at p. 19 (quoting *CBC Financial, Inc. v. Apex Insurance Managers, LLC*, 291 Fed. Appx. 30 at \*3 (9th Cir. Aug 14, 2008).) However, as this Court has previously noted, other courts have recognized that even in the absence of an explicit fiduciary duty, "insurance brokers may *assume* additional duties in special circumstances." *Flaherty v. Kelly*, 2013 WL 7155078 at \*2 (Nev. 2013)

(unpublished) (compiling case law and publications finding a special relationship between insurance agents and insureds created additional duties).

Indeed, several other jurisdictions have recognized that a “special relationship” between a broker and an insured triggers additional duties. As the Connecticut Court of Appeals explained in *Precision Mech. Servs., Inc. v. T.J. Pfund Associates, Inc.*, 109 Conn. App. 560, 565–66, 952 A.2d 818, 822 (2008), “inherent in the obligation to seek continuation of an insurance policy is the duty to notify the applicant if the insurer declines to continue [to insure] the risk, so the applicant may not be lulled into a feeling of security or put to prejudicial delay in seeking protections elsewhere.” (citations and punctuation omitted); *see also Martinonis v. Utica Nat’l Ins. Group*, 65 Mass. App. Ct. 418, 420, 421 840 N.E.2d 994, 996 (2006) (Finding that “in an action against the agent for negligence, the insured may show that special circumstances prevailed that gave rise to a duty on the part of the agent to ensure that adequate insurance was obtained”); *Sadler v. Loomis Co.*, 139 Md. App. 374, 392–93, 776 A.2d 25, 35–36 (2001) (holding that under Maryland law, an insurance broker’s responsibilities to the insured ends with the procurement of an appropriate policy unless there is a “special relationship: between the agent and the insured or applicant); *Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465, 377 S.E.2d 34 (1988) (holding that a special relationship exists where there is a course of dealing over an extended period of time which would have put objectively

reasonable insurance agents on notice that their advice was being sought and specially relied on).

Dave Sandin first started working with O.P.H. as their insurance agent while employed with another insurance company. (Vol. V at AA0861-62.) Linda Snyder, O.P.H.'s office manager, testified that O.P.H. first retained the services of Dave Sandin in the late 1990's while he was employed with another firm, and continued to use him as an agent as he moved to other firms. (Vol. VIII at AA1187, AA1189.) Ms. Snyder also testified that Dave Sandin and/or the firms he worked for had previously notified O.P.H. of late payments on insurance premiums on three prior occasions. (Vol. VIII at AA1198; *see also* AA1199 (“[W]e had a ten-plus year relationship with Dave Sandin specifically, regardless of what company he worked for. Our relationship was with Dave Sandin.”).) Relatedly, former O.P.H. president Stephan Freudenberger testified that he relied on Dave Sandin to provide him with information when a policy premium was late. (Vol. VIII at AA1257.) Additionally, Dave Sandin's testimony establishes that he imposed a duty on himself to inform clients about missed payments and cancellations, even though this is beyond the scope of his duties under Nevada law. (*See* Vol. VIII at AA1247-48.)

In their Answering Brief, the Sandin Defendants assert that Dave Sandin was not O.P.H.'s broker between February 2006 and October 2008. (*See* Sandin Defendants Answering Brief at p. 26.) During that time period, however, Mr.

Sandin's son, Anthony Sandin, acted as the broker for O.P.H. at Mr. Sandin's direction. Thus, the Sandins' longstanding relationship with O.P.H. created a special duty on the part of Mr. Sandin to notify O.P.H. regarding pending cancellations, overdue premium payments, and other matters relevant to the insurance policies he had procured for O.P.H.

Thus, despite the district court's findings to the contrary, there are numerous genuine issues of material fact regarding the Sandin Defendants' duty to notify O.P.H. of the impending cancellation of their policy with OMI.<sup>1</sup> The Court therefore erred in granting summary judgment in favor of the Sandin Defendants on this claim.

///

///

///

///

///

///

///

---

<sup>1</sup> In their Answering Brief, the Sandin Defendants assert that Dave Sandin never received notification from OMI regarding the pending cancellation of O.P.H.'s policy. (*See* Sandin Defendants Answering Brief at pp. 29-31.) However, OMI has asserted that it did provide Mr. Sandin notice of the pending cancellation. (Vol. VIII at AA 1208-10.)

## CONCLUSION

Based upon the above and foregoing, and for the reasons set forth in Appellant O.P.H.'s Opening Brief, the district court erred in denying O.P.H.'s motion for partial summary judgment, and also erred in granting OMI's and the Sandin Defendants' motions for summary judgment. In this case, there remain genuine issues of material fact which must be resolved by a jury. Accordingly, O.P.H. respectfully requests that this Court reverse the district court's orders disposing of this case, and remand the matter to the district court for further proceedings.

Respectfully submitted this 24<sup>th</sup> day of August, 2016,

/s/ Margaret A. McLetchie

Margaret A. McLetchie

Nevada Bar No. 10931

MCLETCHE SHELL LLC

701 E. Bridger Avenue, Suite 520

Las Vegas, Nevada 89101

*Counsel for Respondent*



## **CERTIFICATE OF COMPLIANCE**

Pursuant to Nev. R. App. P. 28.2, I hereby certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P. 32(a)(6) because the Reply Brief has been prepared in a proportionally spaced typeface (14 point Times New Roman font).

I further certify that this Reply Brief complies with the type-volume limitation of Nev. R. App. P. 32(a)(7)(A)(ii) because it contains 2,235 words.

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

///

///

///

///

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 24<sup>th</sup> day of August, 2016.

/s/ Margaret A. McLetchie  
MARGARET A. MCLETCHIE  
Nevada Bar No. 10931  
MCLETCHIE SHELL LLC  
701 E. Bridger Avenue, Suite 520  
Las Vegas, Nevada 89101

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPELLANT’S REPLY BRIEF was filed electronically with the Nevada Supreme Court on the 24<sup>th</sup> day of August, 2016. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Patricia M. Lee, Esq.  
Michael S. Kelley, Esq.  
Michael K. Wall, Esq.  
HUTCHISON & STEFFEN LLC  
10080 West Alta Drive, Suite 200  
Las Vegas, NV 89145  
*Attorneys for Respondent Dave Sandin and Sandin & Co.*

Robert W. Freeman, Esq.  
Priscilla L. O’Briant, Esq.  
LEWIS BRISBOIS BISGAARD & SMITH LLP  
6385 South Rainbow Blvd., Suite 600  
Las Vegas, NV 89118  
*Attorneys for Respondent Oregon Mutual Insurance Co.*

/s/ Alina M. Shell  
McLetchie Shell LLC