No 70504

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 13-17441 **Docketed:** 11/27/2013
Nature of Suit: 4110 Insurance
James Nalder, et al v. United Automobile Insurance Co
Appeal From: U.S. District Court for Nevada, Las Vegas
Fee Status: Paid

Case Type Information:
1) civil
2) private
3) null

Originating Court Information:
District: 0978-2 : 2:09-cv-01348-RCJ-GWF
Court Reporter: Felicia Zabin
Trial Judge: Robert Clive Jones, Senior District Judge
Date Filed: 07/24/2009

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
10/30/2013	10/30/2013	11/27/2013	11/27/2013

Prior Cases:
11-15010 **Date Filed:** 01/04/2011 **Date Disposed:** 12/17/2012 **Disposition:** Reversed, Remanded - Memorandum

11-15462 **Date Filed:** 02/24/2011 **Date Disposed:** 12/17/2012 **Disposition:** Reversed, Remanded - Memorandum

Current Cases:
None

JAMES NALDER, Guardian Ad Litem on behalf of Cheyanne Nalder Plaintiff - Appellant,	Thomas Christensen, Esquire, Attorney Direct: 702-870-1000 [COR LD NTC Retained] Christensen Law Offices, LLC 1000 South Valley View Boulevard Las Vegas, NV 89107
GARY LEWIS, individually Plaintiff - Appellant,	Thomas Christensen, Esquire, Attorney Direct: 702-870-1000 [COR LD NTC Retained] (see above)
v.	

UNITED AUTOMOBILE INSURANCE COMPANY Defendant - Appellee,	Matthew John Douglas, Esquire, Attorney Direct: 702-243-7000 [COR LD NTC Retained] Atkin Winner & Sherrod Firm: 702-243-7000 1117 South Rancho Drive Las Vegas, NV 89102 Susan M. Sherrod, Esquire, Attorney Direct: 702-243-7000 [LD NTC Retained] Atkin Winner & Sherrod Firm: 702-243-7000 1117 South Rancho Drive Las Vegas, NV 89102 Thomas E. Winner, Esquire, Attorney [COR LD NTC Retained] Atkin Winner & Sherrod Firm: 702-243-7000 1117 South Rancho Drive Las Vegas, NV 89102

JAMES NALDER, Guardian Ad Litem on behalf of Cheyanne Nalder; GARY LEWIS, individually,

Plaintiffs - Appellants,

v.

UNITED AUTOMOBILE INSURANCE COMPANY,

Defendant - Appellee.

06/01/2016	39	Filed Order for PUBLICATION (ALEX KOZINSKI, JOHN T. NOONAN and DIARMUID F. O'SCANNLAIN) Pursuant to Rule 5 of the Nevada Rules of Appellate Procedure, we certify to the Nevada Supreme Court the question of law set forth in Part II of this order. The answer to this question may be determinative of the cause pending before this court, and there is no controlling precedent in the decisions of the Nevada Supreme Court or the Nevada Court of Appeals. Further proceedings in this court are stayed pending receipt of an answer to the certified question. Submission is withdrawn pending further order. The parties shall notify the Clerk of this court within one week after the Nevada Supreme Court accepts or rejects the certified question, and again within one week after the Nevada Supreme Court renders its opinion. (SEE ORDER FOR FULL TEXT) The clerk of this court shall forward a copy of this order, under official seal, to the Nevada Supreme Court, along with copies of all briefs and excerpts of record that have

		been filed with this court. IT IS SO ORDERED. [9997579] (RMM) [Entered: 06/01/2016 08:32 AM]
01/11/2016	38	Filed order (ALEX KOZINSKI, JOHN T. NOONAN and DIARMUID F. O'SCANNLAIN) The Clerk is ordered to strike Exhibit B of Appellee's 28(j) letter filed on December 30, 2015. Rule 28(j) only permits the citation of "pertinent and significant authorities." See Fed. R. App. P. 28(j) (emphasis added). [9822097] (WL) [Entered: 01/11/2016 10:06 AM]
01/06/2016	37	ARGUED AND SUBMITTED TO ALEX KOZINSKI, JOHN T. NOONAN and DIARMUID F. O'SCANNLAIN. [9817040] (GB) [Entered: 01/06/2016 11:41 AM]
12/31/2015	36	Filed (ECF) Acknowledgment of hearing notice. Location: San Francisco. Filed by Attorney Mr. Thomas Christensen, Esquire for Appellants Gary Lewis and James Nalder. [9811651] [13-17441] (Christensen, Thomas) [Entered: 12/31/2015 10:55 AM]
12/30/2015	35	Filed (ECF) Appellee United Automobile Insurance Company citation of supplemental authorities. Date of service: 12/30/2015. [9810301] [13-17441]--[COURT UPDATE: Edited docket text to reflect correct filing type. 12/30/2015 by RY] --[COURT UPDATE: Exhibit B stricken per order [38]. 01/12/2016 by TYL] (Douglas, Matthew) [Entered: 12/30/2015 02:05 PM]
12/29/2015	34	revised Notice of Oral Argument on Wednesday, January 6, 2016 - 09:00 A.M. - Courtroom 1 - San Francisco CA. ** note change in time allotment ** View the Oral Argument Calendar for your case **here**. When you have reviewed the calendar, download the ACKNOWLEDGMENT OF HEARING NOTICE form, complete the form, and file it via Appellate ECF or return the completed form to: SAN FRANCISCO Office. [9809205] (AW) [Entered: 12/29/2015 04:28 PM]
12/23/2015	33	Filed clerk order (Deputy Clerk: PA): 60 Minutes/CBS News applied to video/audio record for later broadcast, the cases captioned above, scheduled to be heard at The James R. Browning, U.S. Courthouse in San Francisco, California, on Wednesday, January 6, 2016. C-Span's request to video/audio record for later broadcast is GRANTED. (PANEL) [9803695] [13-16909, 13-70156, 14-15684, 13-17441, 13-60113] (PA) [Entered: 12/23/2015 11:22 AM]
12/22/2015	32	Filed (ECF) Appellants Gary Lewis and James Nalder citation of supplemental authorities. Date of service: 12/22/2015. [9802149] [13-17441] (Christensen, Thomas) [Entered: 12/22/2015 11:48 AM]
11/03/2015	31	Filed (ECF) Acknowledgment of hearing notice. Location: San Francisco. Filed by Attorney Mr. Thomas Christensen, Esquire for Appellants Gary Lewis and James Nalder. [9743361] [13-17441] (Christensen, Thomas) [Entered: 11/03/2015 02:38 PM]
11/02/2015	30	Filed Acknowledgment of hearing notice. Location: San Francisco. Filed by Attorney Matthew John Douglas, Esquire for Appellee United Automobile

		Insurance Company. [9741605] (RR) [Entered: 11/02/2015 02:38 PM]
10/27/2015	29	Notice of Oral Argument on Wednesday, January 6, 2016 - 09:30 A.M. - Courtroom 1 - James R Browning US Cthse, 95 7th St, San Francisco, CA. View the Oral Argument Calendar for your case **here**. When you have reviewed the calendar, download the ACKNOWLEDGMENT OF HEARING NOTICE form, complete the form, and file it via Appellate ECF or return the completed form to: SAN FRANCISCO Office. [9734139] (GEV) [Entered: 10/27/2015 11:32 AM]
10/08/2015	28	Terminated Jason A. Gordon for James Nalder and Gary Lewis in 13-17441 (due to incorrect account info) [9711545] (JT) [Entered: 10/08/2015 10:18 AM]
10/06/2015	27	This case is being considered for the January 2016 oral argument calendar. The exact date of your oral argument has not been determined at this time. The following is a link to the upcoming court sessions: http://cdn.ca9.uscourts.gov/datastore/uploads/calendar/sitdates_2016.pdf. Please review these upcoming dates *immediately* to determine if you have any conflicts with them. If you do have conflicts, please inform the Court immediately by sending a letter to the Court using CM/ECF (**Type of Document**: File Correspondence to Court; **Subject**: regarding availability for oral argument). The Court discourages motions to continue after this 7-day period. The clerk's office takes conflict dates into consideration in scheduling oral arguments but cannot guarantee that every request will be honored. Your case will be assigned to a calendar approximately 10 weeks before the scheduled oral argument date. In addition, if parties are discussing settlement or would like to discuss settlement before argument, they should contact the mediation unit immediately (ca09_mediation@ca9.uscourts.gov). Once the case is calendared, it is unlikely that the court will postpone argument for settlement discussions. [9708238] (KS) [Entered: 10/06/2015 10:31 AM]
06/11/2014	26	Received 7 paper copies of Reply brief [24] filed by Gary Lewis and James Nalder. [9128022] (SD) [Entered: 06/11/2014 10:47 AM]
06/04/2014	25	Filed clerk order: The reply brief [24] submitted by Gary Lewis and James Nalder is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [9119892] (CT) [Entered: 06/04/2014 01:44 PM]
06/04/2014	24	Submitted (ECF) Reply Brief for review. Submitted by Appellants Gary Lewis and James Nalder. Date of service: 06/04/2014. [9119780] (Christensen, Thomas) [Entered: 06/04/2014 01:06 PM]
05/23/2014	23	Filed Appellee United Automobile Insurance Company paper copies of supplemental excerpts of record [20] in 4 volumes. [9107860] (CT) [Entered:

		05/23/2014 04:06 PM]
05/23/2014	22	Received 7 paper copies of Answering brief [20] filed by United Automobile Insurance Company. [9107330] (SD) [Entered: 05/23/2014 01:41 PM]
05/21/2014	21	Filed clerk order: The answering brief [20] submitted by United Automobile Insurance Company is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. The Court has reviewed the supplemental excerpts of record [20] submitted by United Automobile Insurance Company. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [9105027] (CT) [Entered: 05/21/2014 04:47 PM]
05/21/2014	20	Submitted (ECF) Answering Brief and supplemental excerpts of record for review. Submitted by Appellee United Automobile Insurance Company. Date of service: 05/21/2014. [9104883] (Douglas, Matthew) [Entered: 05/21/2014 03:50 PM]
04/02/2014	19	Filed Appellants Gary Lewis and James Nalder paper copies of excerpts of record [11] in 4 volume(s). [9041988] (CT) [Entered: 04/02/2014 03:34 PM]
04/02/2014	18	Received correctly bound excerpts of record from Appellants Gary Lewis and James Nalder. [9041977] (CT) [Entered: 04/02/2014 03:33 PM]
03/27/2014	17	Received 7 paper copies of Opening brief [10] filed by Gary Lewis and James Nalder. [9035737] (SD) [Entered: 03/28/2014 01:27 PM]
03/27/2014	16	Received Appellants Gary Lewis and James Nalder excerpts of record [11] in 4 volumes. Deficiencies: excerpts are bound improperly. Notified counsel (See attached notice). [9033823] (CT) [Entered: 03/27/2014 11:20 AM]
03/26/2014	15	Mail returned on 03/26/2014 addressed to Susan M. Sherrod, Esquire for United Automobile Insurance Company, re: Order filed 12/10/2013. Resending to: 1117 South Rancho Drive, Las Vegas, NV 89102. [9032489] (AF) [Entered: 03/26/2014 02:38 PM]
03/24/2014	14	Filed clerk order (Deputy Clerk: AMT): Appellee's motion for an extension of time to file the answering brief is granted. The answering brief is due May 22, 2014. Appellee's counsel is reminded that all filings must be served on all parties and be accompanied by proof of service. See Fed. R. app. P. 25(b); 9th Cir. R. 25-5(f). The optional reply brief is due within 14 days after service of the answering brief. This order was issued prior to the expiration of time within which a response may be filed. See Fed. R. App. P. 27(b). [9028849] (BJB) [Entered: 03/24/2014 03:04 PM]
03/21/2014	13	Filed (ECF) Appellee United Automobile Insurance Company Motion to extend time to file a response until 05/22/2014. Date of service: 03/21/2014. [9026754] (Douglas, Matthew) [Entered: 03/21/2014 03:58 PM]

1	MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 12/04/2013. Transcript ordered by 12/27/2013. Transcript due 01/27/2014. Appellants Gary Lewis and James Nalder opening brief due 03/07/2014. Appellee United Automobile Insurance Company answering brief due 04/07/2014. Appellant's optional reply brief is due 14 days after service of the answering brief. [8882091] (RT) [Entered: 11/27/2013 04:07 PM]

SAN FRANCISCO
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CASE NO. 13-17441

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES NALDER, Guardian Ad Litem on Behalf of Cheyanne Nalder and GARY LEWIS, individually,

Appellants,

vs.

UNITED AUTOMOILE INSURANCE COMPANY,

Respondent.

No. 13-17441

D.C. No. 2:09-cv-01348-RJC-GWF
District of Nevada,
Las Vegas

APPELLANTS' OPENING BRIEF

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TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

CERTIFICATION AS TO INTERESTED PARTIES

The undersigned certified that there are no other interested parties other than those currently named in the action that have an interest in the outcome of this appeal.

Dated this 6th day of March, 2014.

CHRISTENSEN LAW OFFICES, LLC

By: */s/ Thomas Christensen, Esq.*
THOMAS CHRISTENSEN, ESQ.
Nevada Bar No. 2326
1000 S. Valley View Blvd.
Las Vegas, NV 89107
Attorneys for Appellant

CERTIFICATION AS TO RELATED CASES

The undersigned certifies that the following are known related cases and appeals before this Court which address the subject matter of the foregoing appeal or are otherwise related which Appellants are aware:

US District Court of Nevada Case No. 2:09-cv-01348-RCJ-GWF

Dated this 6th day of March, 2014

CHRISTENSEN LAW OFFICES, LLC

By: */s/ Thomas Christensen, Esq.*
THOMAS CHRISTENSEN, ESQ.
Nevada Bar No. 2326
1000 S. Valley View Blvd.
Las Vegas, NV 89107
Attorneys for Appellant

INTRODUCTION[1]

Insurance companies have strayed from their beginnings in pursuit of greater profits by using the large pool of money from all policy holders to attack the unfortunate few instead of compensate them, to delay instead of timely compensate, and to purchase favorable legislation and influence public opinion against the unfortunate few. The only thing the unfortunate few can do in the face of delay -- is sue -- which causes more delay – often years – not the insurance company, but their friends or spouse. Then sue the insurance company – more delay – more years. This is what has happened in this case.

In this case in particular, the insured has the financial power and expertise to defend under a reservation of rights while doing its investigation or filing a declaratory relief action; however, the insured and the claimant has no power. UAIC chose this method, deciding not to defend at all, which posed the most severe downsides for them because it has the most severe downside for the insured. However, they picked it. They should have paid the policy or at the least defended under a reservation of rights and filed a declaratory relief action. Because of UAIC's decisions, its insured has a

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[1] In this Introduction, there are no citations to the appendix as this section constitutes counsel's summary of the events and is thus intended as argument. The facts supporting this introduction are set forth in the Statement of Facts and each statement of fact is supported by an appropriate citation to the appendices.

judgment against it, and its insured and the claimant were forced to incur substantial attorneys fees and costs to receive the insurance proceeds that should have been paid many years ago. The measure of damages for this is, at a minimum, the excess judgment. Further, interest, attorneys fees and costs, and all consequential damages should have been awarded for this.

Respondent's liability for breaching its duty to defend, misrepresenting coverage, breaching its duty to investigate, breaching its duty to inform, and violating N.R.S. 686A.310 is, at the very least, an issue of fact to be determined by a jury. As such, this case should be reversed and remanded.

JURISDICTIONAL STATEMENT

The district court had jurisdiction of this action by virtue of 28 U.S.C. § 1332(a). This court of appeals has jurisdiction under 28 U.S.C. § 1291 as an appeal from a final judgment. The district court Order on Motion for Summary Judgment (#102) and Clerk's Judgment (#103) were entered on October 30, 2013. Appellants filed their Notice of Appeal on November 27, 2013.

ISSUES PRESENTED FOR REVIEW

A. Whether a valid state court judgment is the minimum measure of damages as a matter of law in a failure to defend case.

B. Whether, on summary judgment, the Court can disregard a valid state court judgment, interest, attorney fees and costs as contractual or bad faith damages.

C. Whether all consequential damages should be awarded for Appellee breaching the duty to defend.

D. Whether the reasonableness of the insurers conduct is a question of fact that precludes summary judgment on bad faith issues where the insured wins on the coverage issue by summary judgment.

E. Whether Plaintiffs are entitled to the opportunity to present evidence to a jury on the non-contractual claims.

STATEMENT OF THE CASE

This action arose when GARY LEWIS ran over CHEYANNE NALDER, a nine year old girl at the time, with GARY LEWIS's truck. CHEYANNE was nearly killed as a result of the truck running over her head on July 8, 2007.

Plaintiff JAMES NALDER, on behalf of his daughter Cheyanne, brought a claim for the proceeds of the UAIC policy. UAIC claimed there was no policy in effect. Suit was then brought against Mr. Lewis with notice being provided to UAIC. UAIC took no steps to defend the lawsuit and did nothing to investigate. Because UAIC took no steps to protect Gary,

judgment was entered against Gary in the amount of $3,500,000.00 on June 2, 2008. *See* AA I:0075.

Action was instituted in July of 2009 in the Eighth Judicial District Court of the State of Nevada and removed by Defendant based on diversity jurisdiction. Summary judgment was entered against Plaintiffs in favor of Defendant on December 20, 2010. Plaintiff appealed that decision, and the Ninth Circuit Court of Appeals reversed the District Court's grant of summary judgment with respect to whether there was coverage by virtue of the way the renewal statement was worded. *See* AA I:0002.

Upon remand, the District Court found that there was in fact coverage and that UAIC breached its duty to defend. *See* AA IV:0734. However, the court entered summary judgment on behalf of UAIC finding that there was no bad faith. *See* Id.. Further, the court failed to award any damages for UAIC's failure to defend. *See* Id.. Appellants now appeal the District Court's refusal to grant summary judgment for contractual damages in appellants favor, grant of summary judgment on behalf of UAIC on the issue of bad faith and its finding of no damages for the failure to defend.

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STATEMENT OF FACTS

On July 8, 2007, GARY LEWIS ran over CHEYANNE NALDER, a nine year old girl at the time, with GARY LEWIS's truck. CHEYANNE was nearly killed as a result of the truck running over her head.

At the time of the incident Mr. Lewis was insured with Defendant UAIC. Mr. Lewis first purchased insurance through UAIC on March 29, 2007. The period of the policy was March 29, 2007 through April 29, 2007. *See* AA I:0028. The records from UAIC specifically list the policy as "New Business". *See* AA I:0033. In mid-April 2007 (Invoice Date April 26, 2007) UAIC sent Gary Lewis a "Renewal Statement" offering to "Renew" Gary's policy with UAIC for from April 29, 2007 through May 29, 2007. *See* AA I:0042. The "Renewal Statement" indicates that payment to "Renew" the policy had to be made by May 6, 2007, which was seven days after the policy's "Effective Date" of April 29, 2007". The "Renewal Statement" also stated "To avoid lapse in coverage, payment must be received prior to (sic) expiration of your policy." The only expiration date listed on the "Renewal Statement" is "May 29, 2007". Gary Lewis made the payment and renewed the policy. The records from UAIC specifically list the policy as "RENEWAL". AA I:0052.

In mid-May 2007 (Invoice Date May 9, 2007) UAIC sent Gary Lewis a "Renewal Statement" offering to "Renew" Gary's policy with UAIC for from May 29, 2007 through June 29, 2007. *See* AA I:0054. The "Renewal Statement" indicates that payment to "Renew" the policy had to be made by May 29, 2007. The "Renewal Statement" also stated "To avoid lapse in coverage, payment must be received prior to (sic) expiration of your policy." The only expiration date listed on the "Renewal Statement" is "June 29, 2007". Gary Lewis made the payment on May 31, 2007, two days after the "Due Date" of "May 29, 2007", and renewed the policy. The records from UAIC specifically list the policy as "RENEWAL". *See* AA I:0059.

In mid-June 2007 (Invoice Date June 11, 2007) UAIC sent Gary Lewis a "Renewal Statement" offering to "Renew" Gary's policy with UAIC for from June 30, 2007 through July 31, 2007. *See* AA I:0060. The "Renewal Statement" indicates that payment to "Renew" the policy had to be made by June 30, 2007. The "Renewal Statement" also stated "To avoid lapse in coverage, payment must be received prior to (sic) expiration of your policy." The only expiration date listed on the "Renewal Statement" is "July 31, 2007". Gary Lewis made the payment on July 10, 2007, and renewed the policy. The records from UAIC specifically list the policy as "RENEWAL". *See* AA I:0065.

UAIC continued to "Renew" Gary's policy in August 2007, *See* AA I:0071, and September 2007 through September 2008. *See* AA I:0027-0074.

Gary Lewis, having been insured with UAIC for several months and UAIC having renewed Mr. Lewis insurance through UAIC on multiple occasions as noted above. It was Gary's understanding that he had insurance covering the damages done to Cheyenne Nalder. After the incident however UAIC claimed Mr. Lewis was not its insured, and that there was no coverage for the incident. UAIC nevertheless continued to renew Mr. Lewis' policy for another year, but claimed that the policy had lapsed from July 1, 2007 through July 10, 2007.

Plaintiff JAMES NALDER, on behalf of his daughter Cheyanne, brought a claim for the proceeds of the UAIC policy. UAIC claimed there was no policy in effect. Suit was then brought against Mr. Lewis with notice being provided to UAIC. UAIC took no steps to defend the lawsuit and did nothing to investigate coverage or to determine whether Gary's payment on July 10, 2007, long before the expiration of the policy, warranted Gary being covered under the policy UAIC renewed with Gary. Because UAIC took no steps to protect Gary, judgment was entered against Gary in the amount of $3,500,000.00. *See* AA I:0075. After Judgment Mr. Lewis, along with

NALDER on behalf of Cheyanne, the real party in interest, initiated this action against UAIC.

UAIC was granted Summary Judgment on all of Plaintiff's claims. However, on Appeal, the Ninth Circuit Court of Appeals reversed the District Court's grant of summary judgment with respect to whether there was coverage by virtue of the way the renewal statement was worded. The Court found that

> Plaintiffs came forward with facts supporting their tenable legal position that a reasonable person could have interpreted the renewal statement to mean that Lewis's premium was *due* by June 30, 2007, but that the policy would not *lapse* if his premium were 'received prior to the expiration of [his] policy,' with the 'expiration date' specifically stated to be July 31, 2007.

See AA I:0002.

Upon remand, the District Court found that there was in fact coverage and that UAIC breached its duty to defend. *See* AA IV:0734. However, the court entered summary judgment on behalf of UAIC finding that there was no bad faith. *See* Id. Further, the court failed to award any damages for UAIC's failure to defend. *See* Id. Appellants now appeal the District Court's grant of summary judgment on behalf of UAIC on the issue of bad faith and its finding of no damages for the failure to defend.

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SUMMARY OF ARGUMENT

Because the District Court found that there was coverage and that UAIC breached its duty to defend, damages should have been awarded to Appellants. Appellants should have been awarded consequential and compensatory damages of the state court judgment, attorneys fees and costs, and interest.

Additionally, the District Court erred in granting summary judgment on behalf of UAIC finding that there was no bad faith as a matter of law. Appellants presented evidence, which construed in the light most favorable to them as the non-moving party, provided a question of fact, and because bad faith is a question of fact for the jury, summary judgment is precluded. As such, this case should be reversed and remanded.

ARGUMENT

A. A VALID STATE COURT JUDGMENT IS THE MINIMUM MEASURE OF DAMAGES IN A FAILURE TO DEFEND CASE

The district court's legal conclusion that damages are available is reviewed de novo. *See Hemmings v. Tidyman's, Inc.*, 285 F.3d 1174, 1197 (9th Cir. 2002); *EEOC v. Wal-Mart Stores, Inc.*, 156 F.3d 989, 992 (9th Cir. 1998). Whether the district court selected the correct legal standard in computing damages is also reviewed de novo. *See Mackie v. Rieser*, 296 F.3d

909, 916 (9th Cir. 2002); *Neptune Orient Lines, Ltd. v. Burlington Northern and Santa Fe Ry Co.*, 213 F.3d 1118, 1119 (9th Cir. 2000); *Evanow v. M/V NEPTUNE*, 163 F.3d 1108, 1113-14 (9th Cir. 1998). The district court's award of damages is reviewed for an abuse of discretion. *See McLean v. Runyon*, 222 F.3d 1150, 1155 (9th Cir. 2000) (Rehabilitation Act); *Rolex Watch, U.S.A., Inc. v. Michel Co.*, 179 F.3d 704, 712 (9th Cir. 1999) (Lanham Act).

1. As a Matter of Law, the Valid State Court Judgment, Including Pre- and Post- Judgment Interest, was Proximately Caused by the Failure to Provide Coverage

Primary liability insurance policies create a duty to defend and the duty to indemnify. *Miller v. Allstate*, 212 P.3d 318 (Nev., 2009) citing *Crawford v. Weather Shield Mfg. Inc.*, 44 Cal.4th 541, 79 Cal.Rptr.3d 721, 187 P.3d 424, 427 (2008). The duty to defend is a "legal duty that arises under the law, as opposed to a contractual duty arising from the policy." *Miller v. Allstate*, 212 P.3d 318 (Nev., 2009).

"If there is any doubt about whether the duty to defend arises, this doubt must be resolved in favor of the insured." *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 120 Nev. 678 (Nev., 2004) citing *Aetna Cas. & Sur. Co. v. Centennial Ins. Co.*, 838 F.2d 346, 350 (9th Cir. 1988). "The purpose behind construing the duty to defend so broadly is to prevent an

insurer from evading its obligation to provide a defense for an insured without at least investigating the facts behind a complaint." *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 120 Nev. 678 (Nev., 2004) See also *Helca Min. Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1090 (Colo. 1991). A potential for coverage only exists when there is **arguable or possible coverage.** (emphasis added) *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 120 Nev. 678 (Nev., 2004) See also *Morton v. Safeco Ins. Co.*, 905 F.2d 1208, 1212 (9th Cir. 1990).

Because there was "arguable or possible coverage" under the policy, UAIC had a duty to defend GARY LEWIS. Further, as explained in detail above, there was actual coverage under the policy. As such, UAIC has a duty to indemnify GARY LEWIS. *See United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 120 Nev. 678 (Nev., 2004).

UAIC's failure to provide coverage and their breach of their duty to defend was the proximate cause of the Judgment being entered against GARY LEWIS. "When the insurer refused to defend and the insured does not employ counsel and presents no defense, it can be said the ensuing default judgment is proximately caused by the insurer's breach of the duty to defend." *Pershing Park Villas v. United Pac. Ins. Co.*, 219 F.3d 895 (9th Cir. 2000).

As, such, the full judgment is the minimum measure of damages for both the contractual claims and the bad faith claims, as a matter of law.

2. Appellant is Entitled to Costs, Attorney's Fees, and interest on the policy limits that were withheld.

The District court in granting summary judgment to UAIC regarding the amount of damages. First, Appellants were not given the ability to submit the amount of damages for consideration. Therefore, there is a question of fact remaining as to the damages.

Further, if an insurer breaches the duty to defend, the insured is entitled to at least attorney's fees and costs as damages incurred by the insured to defend the action. *See Home Sav. Ass'n v. Aetna Cas. & Sur. Co.*, 854 P.2d 851, 855 (Nev. 1993) (holding that an insured was not barred from further pursuing recovery from insurance company for fees and costs incurred in defending an action). The California Supreme Court held that once an insurer violates its duty of good faith and fair dealing, it is liable to pay all compensatory damages proximately caused by its breach. *Neal v. Farmers Ins. Exchange,* 21 Cal.3d 910, 148 Cal.Rptr. 389, 582 P.2d 980, 986 (1978). The insurer may challenge the reasonableness of a damages amount, but its breach of duty is a proximate cause of the insurer's reasonable damages. *Noya v. A.W. Coulter Trucking,* 49 Cal.Rptr.3d 584, 589-90 (Ct. App. 2006).

As the District Court found that UAIC breached its duty to defend, Appellants are entitled to all compensatory damages, which at a minimum include Costs, Attorney's Fees, and interest on the policy limits that were withheld.

3. All consequential damages should be awarded for Appellee breaching the duty to defend

"When the insurer refused to defend and the insured does not employ counsel and presents no defense, it can be said the ensuing default judgment is proximately caused by the insurer's breach of the duty to defend." *Pershing Park Villas v. United Pac. Ins. Co.*, 219 F.3d 895 (9th Cir. 2000). Further the California Court of Appeals held that a carrier who breached the duty to defend may be liable for consequential damages above policy limits. *Carlson v. Century Surety Co.*, 2012 U.S. Dist. LEXIS 23119 (N.D. Cal. Feb 23, 2012). In *Carlson*, the Court held that because "a judgment in excess of the policy limits is a foreseeable outcome of the breach of the duty to defend," even if the insurance company did not violate the implied covenant of good faith and fair dealing, if the insurer violated its duty to defend, it may be liable for the default judgment, even if in excess of the policy limit. *Id.*

Because there was "arguable or possible coverage" under the policy, UAIC had a duty to defend GARY LEWIS. Further, as explained in detail above, there was actual coverage under the policy. If an insurer breaches the

duty to defend, the insured is entitled to at least attorney's fees and costs as damages incurred by the insured to defend the action. *See Home Sav. Ass'n v. Aetna Cas. & Sur. Co.*, 854 P.2d 851, 855 (Nev. 1993) (holding that an insured was not barred from further pursuing recovery from insurance company for fees and costs incurred in defending an action). As such, the District Courts order denying any consequential damages should be reversed and the action remanded for a determination of the appropriate amount of consequential damages.

B. SUMMARY JUDGMENT SHOULD BE REVERSED ON THE NON-CONTRACTUAL CLAIMS

1. Standard for Granting Summary Judgment

A district court's decision to grant, partially grant, or deny summary judgment or a summary adjudication motion is reviewed de novo. *See, e.g., Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004). A district court's decision on cross motions for summary judgment is also reviewed de novo. *See Travelers Prop. Cas. Co. of Am. V. ConocoPhillips Co.*, 546 F.3d 1142, 1145 (9th Cir. 2008); *Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir. 2002). The appellate court's review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). *See Suzuki Motor Corp. v. Consumers Union, Inc.*, 330 F.3d 1110, 1131 (9th Cir.), *cert. denied*, 540 U.S. 983 (2003).

Summary judgment under Fed. R. Civ. P. 56 may be granted only if the evidence presented shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The party moving for summary judgment has "the burden of showing the absence of a genuine issue as to any material fact . . ." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 (1970).

"[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (citation omitted). "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Id.* at 249.

The law is well established that in reviewing a motion for summary judgment, the evidence "must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-160 (1970). "[T]he inferences to be drawn from the underlying facts contained in [the moving party's materials] must be viewed in the light most favorable to the party opposing the motion." *Id.*, quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Therefore, this Court must view the evidence presented

by both parties and the inferences to be drawn there from in the light most favorable to the Plaintiffs.

The standard for summary judgment is essentially the same as the standard for granting a directed verdict or judgment notwithstanding the verdict under Fed. R. Civ. P. 50. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The inquiry under each is "[W]hether the evidence presents a sufficient disagreement to require submission to a jury." *Id.* Summary judgment is only appropriate if "the evidence . . . is so one-sided that one party must prevail as a matter of law." *Id.* If there are facts sufficient to support a jury verdict for the Plaintiff, the Court is not to interfere with the jury's role as the finder of fact. To do so would deny the Plaintiff's right to a jury trial.

2. Background on Bad Faith

In general, there are a few different areas of litigation that involve "bad faith" by an insurance company. All of these actions, regardless of the parties involved, however, are founded in the general principle of contract law that in every contract, including policies of insurance, there is an implied covenant of good faith and fair dealing that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. *Comunale v. Traders & General Insurance Company*, 50 Cal.2d 654, 328 P.2d 198, 68

A.L.R.2d 883. Most courts, including Nevada, have held that an insurance company always acts in bad faith whenever it breaches its duty to settle by failing to adequately consider the interest of the insured. Windt, Allan D., *1 Insurance Claims & Disputes 5th*, Section 5:13 (Updated March, 2009). This is true whether there is a "genuine dispute" as to whether payment of the third-party policy limits is warranted or not.

The Nevada Supreme Court recently defined bad faith by holding that "an insurer must give equal consideration to the insured's interests" and "the nature of the relationship [between insured and insurer] requires that the insurer adequately protect the insured's interests." *Miller v. Allstate*, 212 P.3d 318 (2009). There is no question that the rejection of a settlement offer within the policy limits is an element of a bad faith claim. *Id.* The *Miller* Court held that the rejection by an insurer of a settlement offer within the policy limits is indeed an element making up a bad faith claim, but also noted that a bad faith claim can be based on far more than just the rejection of such an offer. *Id.* The Court specifically noted that "an insurer's failure to adequately inform an insured of a settlement offer is a factor for the trier of fact to consider when evaluating a bad-faith claim." *Id* at 325; see also *Allen v. Allstate Ins. Co.*, 656 F.2d 487, 489 (9th Cir. 1981) (recognizing that under California law "What is `good faith' or `bad faith' on an insurer's part has not yet proved

The *Crisci* Court recognized that the insured's expectation of protection provides a basis for imposing strict liability in failure to settle cases because it will always be in the insured's best interest to settle within the policy limits when there is any danger, no matter how slight, of a judgment in excess of those limits. *Crisci v. Security Insurance Company of New Haven, Conn.*, 426 P.2d 173, 66 Cal.2d 425, 58 Cal. Rptr. 13, (1967). *Crisci* recognized there is more than a small amount of elementary justice in a rule that would require that, in this situation, where the insurer's and insured's interests necessarily conflict, the insurer, which may reap the benefits of its determination not to settle, should also suffer the detriments of its decision. *Id.*

This standard makes sense, as Chief Justice Neely concurred with the *Shamblin* Court:

> Can you honestly imagine a situation where an insurance company fails to settle within the policy limits, the policyholder gets stuck with an excess judgment, and this court *does not* require the insurance company to indemnify the policy holder? That will happen the same day the sun rises in the West! As far as I am concerned, even if the insurance company is run by angels, archangels, cherubim and seraphim, and the entire heavenly host sing of due diligence and reasonable care, I will *never*, under any circumstances, vote that a policyholder instead of an insurer pays the excess judgment when it was possible to settle a case within the coverage limits.
>
> When I buy insurance, I buy protection from untoward events. I do not object to an insurance company's vigorous defense of a claim, including going to jury trial and exhausting every appeal. Furthermore, as a policyholder, I will diligently assist my insurer

> to vindicate its rights and protect its reserves. However, I draw the line when the insurer decides that in the process of protecting its reserves, it will play "you bet *my* house." The insurance company can bet as much of its own money as it wants, and it can bet its own money at any odds that it wants, but it cannot bet one single penny of my money even when the odds are ten million to one in its favor!

Id. at 780.

The California Court has implemented a reasonableness or negligence aspect to its standard when it expanded on this rule, giving the following analysis:

> The only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer. Such factors as the limits imposed by the policy, a desire to reduce the amount of future settlements, or a belief that the policy does not provide coverage, should **not** affect a decision as to whether the settlement offer is a reasonable one.

Johansen v. California State Automobile Association Inter-Insurance Bureau, 15 Cal.3d 9, 123 Cal.Rptr. 288, 538 P.2d 744, (1975) (emphasis added). Moreover, in deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. *Id.*, citing *Crisci*.

Nevada has long recognized that there is a fiduciary relationship between the insurer and the insured. *Powers v. USAA*, 114 Nev. 690, 962 P.2d 596 (1998), citing, *Ainsworth v. Combined Ins. Co.*, 104 Nev. 587, 763 P.2d

673 (1988). Nevada has also established standards for applying in other types of bad faith situations. In *Pemberton v. Farmers Insurance Exchange*, 109 Nev. 789, 858 P.2d 380 (1993), the Nevada Supreme Court established standards to apply when an action is brought related to bad faith denial of first-party benefits under uninsured or underinsured coverage. There, the court noted numerous appellate court decisions that hold an insurer's failure to deal fairly and in good faith with an insured's UM claim is actionable. *Id.* at 794 (citations omitted).

The Nevada Supreme Court and Federal District Court of Nevada articulated a negligence or reasonableness standard in bad faith cases. "To establish a prima facie case of bad-faith refusal to pay an insurance claim, the plaintiff must establish that there was no reasonable basis for disputing coverage." *Powers v. United Services Auto. Ass'n*, 962 P.2d 596, 604 (Nev. 1998), citing *Falline v. GNLV Corp.*, 823 P.2d 888 (Nev. 1991). *See* also *Pemberton v. Farmers Ins. Exch.*, 858 P.2d 380, 384 (Nev. 1990).

One of the more instructional cases in Nevada, however, on the standard to be applied when dealing with negative effects resulting from an insurer's failure to settle a claim prior to litigation is *Landow v. Medical Ins. Exchange*, 892 F.Supp. 239 (D.Nev. 1995). The *Landow* Court, following the rationale of California courts in excess verdict situations accepted that, "the

litmus test for bad faith is whether the insurer, in determining whether to settle a claim, gave as much consideration to the welfare of its insured as it gave to its own interests," citing, *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d. 809, 818, 169 Cal.Rptr. 691, 620 P.2d 141 (1979).

The above-noted principles were most recently codified and adopted by the Nevada Supreme Court in *Miller v. Allstate*, 212 P.3d 318 (2009). In *Miller*, the court held that "an insurer must give equal consideration to the insured's interest". The court further stated that the insurer's duty to its insured is "similar to a fiduciary relationship" and noted "the nature of the relationship requires that the insurer adequately protect the insured's interest." The court's conclusion mirrored that in *Landlow* as the *Miller* court recognized "at a minimum, an insurer must equally consider the insured's interests and its own." The court also recognized the wisdom from decisions from California holding that "the insurer must give the interests of the insured at least as much consideration as it gives its own interests, and the insurer must act as a prudent insurer without policy limits." *Id.* There is no question that the rejection of a settlement offer within the policy limits is an element of a bad faith claim. *Id.* The *Miller* Court held that the rejection by an insurer of a settlement offer within the policy limits is indeed an element making up a bad faith claim, but also noted that a bad faith claim can be based on far more

than just the rejection of such an offer. *Id.* The Court specifically noted that "an insurer's failure to adequately inform an insured of a settlement offer is a factor for the trier of fact to consider when evaluating a bad-faith claim." *Id* at 325; see also *Allen*, 656 F.2d at 489 (recognizing that under California law "What is `good faith' or `bad faith' on an insurer's part has not yet proved susceptible to [definitive] legal definition. An insurer's `good faith' is essentially a matter of fact."). *Id.*

3. UAIC Breached its Duty to Defend

Primary liability insurance policies create a duty to defend and the duty to indemnify. *Miller v. Allstate*, 212 P.3d 318 (Nev., 2009) citing *Crawford v. Weather Shield Mfg. Inc.*, 44 Cal.4th 541, 79 Cal.Rptr.3d 721, 187 P.3d 424, 427 (2008). The duty to defend is a "legal duty that arises under the law, as opposed to a contractual duty arising from the policy." *Miller v. Allstate*, 212 P.3d 318 (Nev., 2009).

"If there is any doubt about whether the duty to defend arises, this doubt must be resolved in favor of the insured." *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 120 Nev. 678 (Nev., 2004) (emphasis added) citing *Aetna Cas. & Sur. Co. v. Centennial Ins. Co.*, 838 F.2d 346, 350 (9th Cir. 1988). "The purpose behind construing the duty to defend so broadly is to prevent an insurer from evading its obligation to provide a defense for an

insured without at least investigating the facts behind a complaint." *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 120 Nev. 678 (Nev., 2004) See also *Helca Min. Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1090 (Colo. 1991). A potential for coverage only exists when there is **arguable or possible coverage.** *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 120 Nev. 678 (Nev., 2004) (emphasis added); see also *Morton v. Safeco Ins. Co.*, 905 F.2d 1208, 1212 (9th Cir. 1990). "The duty to defend arises when there is a potential for coverage based on the allegations in a complaint and the duty to indemnify arises when there is actual coverage under an insurance policy. *Id.* at 1155.

Here, UAIC evaded "its obligation to provide a defense for an insured without at least investigating the facts behind a complaint." *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 120 Nev. 678 (Nev., 2004). UAIC received a copy of the complaint in October, 2007. *See* AA I:0001. UAIC did not investigate the facts of the complaint. Further, UAIC's failure to provide coverage and their breach of their duty to defend was the proximate cause of the Default Judgment being entered against GARY LEWIS.

Although the District Court found that UAIC breached its duty to defend, it found that there was no bad faith. As a failure to defend can be bad faith, this presents a question of fact for the jury which prevents summary

judgment. As such, the District Court's order should be reversed and remanded.

4. UAIC Misrepresented Coverage

UAIC misrepresented to its insured that there was no coverage under his policy. An insurance policy, which would include the renewal statements of the policy, is a contract and is governed by contract law. *United Insurance Co., v. Frontier Insurance Company, Inc.*, 120 Nev. 678 684, 99 P.3d 1152, 1156 (2004). Under general contract law, the Nevada Supreme Court has noted, "When a contract is ambiguous, it **will** be construed against the drafter." *Glenbrook Homeowners Ass'n v. Glenbrook Co.,* 111 Nev. 909, 917, 901 P.2d 132, 138 (1995) (emphasis added). The Court has gone even further in its discussion of insurance contracts, holding, "Contracts of insurance are **always** construed most strongly against the insurance company. Stated another way, a policy of insurance **is** to be construed liberally in favor of the insured and **strictly against the insurer.**" *Hartford Ins. Group v. Winkler*, 89 Nev. 131, 135, 508 P.2d 8, 11 (1973) (Citations omitted) (emphasis added).

In addition, the Nevada Supreme Court has held, "An insurance policy is a contract of adhesion." *Id.* As a result "the language of an insurance policy is broadly interpreted in order to afford 'the greatest possible coverage to the insured.'" *Id*, citing *Farmers Insurance Group v. Stonik*, 110 Nev. 64,

67, 867 P.2d 389, 391 (1994). The pivotal language from the UAIC contract comes from the policy's "Renewal Statements" which UAIC drafted, and which UAIC sent to Gary Lewis on multiple occasions advising Gary how the contract of insurance could be renewed and continue to be in effect with UAIC. The statements provide a due date for payment, but also specifically state that if payment is "received prior the expiation of your policy" there will be no lapse in coverage. The only "Expiration Date" listed in the policy's "Renewal Statements" is the expiration date for the offered policy that UAIC invited Gary Lewis to renew.

The policy's "Renewal Statements" which give a due date but then state that the policyholder can avoid a lapse in coverage by paying before the expiration of the policy, and providing an "Expiration Date" for the policy that is different than the "Due Date" are ambiguous. As noted above, **ambiguous language in a contract, or in a writing seeking to renew a contract, is construed against the drafter of the contract, or the writing seeking to renew the contract**. See, *Glenbrook Homeowners Ass'n v. Glenbrook Co.*, 111 Nev. 909, 917, 901 P.2d 132, 138 (1995). The Nevada Supreme Court has noted that an insurance company does business as a quasi-public institution, and cannot avoid liability under ambiguous provisions of policy. *Hartford Ins. Group v. Winkler*, 89 Nev. 131, 136, 508 P.2d 8, 12 (1973).

Although the District Court found that there was coverage due to the ambiguity, it failed to acknowledge that the insurance company has the knowledge of how policies work, and that ambiguities are construed in favor of coverage. Despite there being evidence of ambiguity, UAIC misrepresented that there was no coverage for the policy. As such, there is evidence of bad faith, that prevents granting summary judgment in favor of UAIC. As such, As such, the District Court's order should be reversed and remanded.

5. UAIC Breached its Duty to Investigate

Insurers have a duty to investigate. *Pemberton v. Farmers Ins. Exchange*, 109 Nev. 789, 858 P.2d 380, 382 (Nev., 1993). "Insurers have the duty to investigate claims and **coverage** in a prompt fashion." *Troutt v. CO W. Ins. Co.*, 246 F.3d 1150, 1162. *See* also *Tynes v. Bankers Life Co.*, 730 P.2d 1115, 1124 (Mont. 1986) (9th Cir., 2001). The duty to investigate is an extension of the duty of good faith and fair dealing that the insurer owes its insured and, in a claims-made-and-reported policy, extends to the handling of reported claims. *KPFF, Inc. v. California Union Ins. Co.*, 56 Cal.App.4th 963, 66 Cal.Rptr.2d 36, 44 (1997). UAIC utterly failed to investigate whether coverage existed for Gary on the claim, made no attempt to investigate the claim made against Gary Lewis, and failed to abide by established insurance

claims handling practices in its handling of this claim. Although UAIC claims that it investigated the claim, "confirming the lapse through their underwriting department" is not an investigation. Furthermore, as discussed in detail above, there was coverage under this claim.

As explained in detail above, Lewis had coverage under the policy and UAIC failed to investigate. Therefore, summary judgment was not proper in finding that UAIC did not commit bad faith. As such, the District Court's order should be reversed and remanded.

6. UAIC Breached its Duty to Inform

UAIC also made absolutely no efforts to inform Gary Lewis of the demand for the policy limits and the offer to settle Cheyanne's significant claim for a mere $15,000.00. UAIC completely ignored Cheyanne's claim and did absolutely nothing other than send Cheyanne's counsel a letter stating that there was no coverage. As noted above, the Court has continually held "at a minimum, an insured must equally consider the insured's interest and its own." *Allstate v. Miller*, 212 P.3d 318, 326 (Nev. 2009). If the insurer fails to equally consider its insured's interests and its own it violates the implied covenant of good faith and fair dealing and can be held responsible for any resulting damages suffered by its insured. *Id.* The undisputed fact is that UAIC made absolutely no efforts to inform Gary Lewis of the demand for the

policy limits and the offer to settle Cheyanne's significant claim for a mere $15,000.00. Therefore, they breached their duty to inform. This failure to inform, on its own, is sufficient to present the facts to the jury to determine whether the carrier violated the duty of good faith and fair dealing and is thus liable for a judgment entered against its insured in excess of the applicable policy limits. *Id.* As such, the District Court's order should be reversed and remanded.

7. UAIC Violated N.R.S. 686A.310

As explained above, there was a valid contract of insurance between Lewis and UAIC and there was actual coverage under the policy for the loss in question. When ambiguous language in a contract is construed in the insureds favor, it does not establish an "implied" contract, but rather provides coverage under an actual insurance contract.

UAIC violated N.R.S. § 686A.030. UAIC wrongfully refused to cover the value of the claim of Cheyanne Nalder, wrongfully failed to settle within the Policy Limits when they had the opportunity to do so, wrongfully denied coverage, failed to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under its insurance policies, and failed to effectuate the prompt, fair and/or equitable settlement of the claims in which liability of the insurer was very clear, and which clarity was

conveyed to UAIC. This is sufficient to present the facts to the jury to determine whether the carrier violated the duty of good faith and fair. As such, the District Court's order should be reversed and remanded.

8. Where the Insured Wins on the Coverage Issue by Summary Judgment, the Potential Bad Faith for that Denial of Coverage is a Question of Fact for the Jury that Precludes Summary Judgment

Entitlement to a jury trial is a question of law reviewed de novo. *See Hale v. United States Trustee*, 509 F.3d 1139, 1146 (9th Cir. 2007); *California Scents v. Surco Prods., Inc.*, 406 F.3d 1102, 1105 (9th Cir. 2005).

Although the District Court found that there was coverage; however, he found as a matter of law there was no bad faith. Pursuant to *Miller,* bad faith is a question of fact. The Court specifically noted that "an insurer's failure to adequately inform an insured of a settlement offer is a factor for the trier of fact to consider when evaluating a bad-faith claim." *Id* at 325; see also *Allen*, 656 F.2d at 489 (recognizing that under California law "What is `good faith' or `bad faith' on an insurer's part has not yet proved susceptible to [definitive] legal definition. An insurer's `good faith' is essentially a matter of fact."). Thus, the District Court should have submitted this issue to the jury. As such, the case should be reversed and remanded.

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CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse and remand with instructions to enter judgment for the verdict amount plus interest, cost, attorney fees and submit the question of bad faith and other compensatory damages to the jury.

DATED this 6th day of March, 2014

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

The undersigned hereby certifies that the foregoing "Appellants' Opening Brief" complies with the type-volume limitations of FRAP 32(a)(7)(B)(i).

The brief contains 7,270 words of text, and a *14-point* proportionately spaced type face has been used. Consistent with FRAP 32(a)(4), this brief's top, bottom, left, and right margins are each precisely one inch in width.

DATED this 6th day of March, 2014

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PROOF OF SERVICE

Pursuant to FRCP 5(b), I hereby certify that I am an employee of CHRISTENSEN LAW OFFICES, LLC, and that on this 6th day of March, 2014, I served a copy of APPELLANT'S OPENING BRIEF on the party below via Case Management/Electronic Case Filing (CM/ECF):

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/s/ Jennifer M. Gooss
An employee of CHRISTENSEN LAW OFFICES, LLC

No. 70504

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for the

Ninth Circuit

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DATE
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JAMES NALDER,
Guardian Ad Litem on behalf of Cheyanne Nalder,
and GARY LEWIS, individually,

Plaintiffs-Appellants,

v.

UNITED AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

Appeal from a Decision of the United States District Court for the District of Nevada,
No. 2:09-cv-01348-RCJ-GWF · Honorable Robert C. Jones

BRIEF OF APPELLEE

THOMAS E. WINNER, ESQ.

CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1(a) United Automobile Insurance Company ("UAIC") is a Florida Corporation with its principal place of business in Florida. All stock of UAIC is wholly owned by United Automobile Insurance Group and neither entity is a publicly traded Company.

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2 – Whether the court erred in finding Appellee breached the "duty to defend";

3 – Whether, even if this Court affirms Appellee breached the "duty to defend", that the court erred in finding no damages could be shown by Appellants.

STATEMENT OF THE CASE

Gary Lewis purchased a month-long automobile liability policy term from United Automobile Insurance Company ("UAIC") for June 2007. On June 11, 2007 UAIC sent him a renewal notice, for his July 2007 policy term, which noted the "due date" for remittance of premium by June 30, 2007. No premium was received by UAIC by that date. On July 8, 2007 Lewis was involved in an automobile accident with Cheyanne Nalder, causing injuries. Lewis then paid for a new month-long policy term on July 10, 2007.

UAIC denied coverage for the accident explaining no policy was in effect. Appellants' Nalder filed suit against Lewis and obtained a $3.5 million default judgment. Thereafter, Appellants' filed the instant suit against UAIC. In this action, Lewis initially claimed that he had paid for his July 2007 policy term timely

and, UAIC lost the payment. However, Lewis later admitted that he did not pay for his July policy term until after the loss. Instead, Lewis argued that UAIC's renewal notice was ambiguous and, thus, he should be afforded coverage. There is no evidence of record that UAIC knew of, or, had reason to know, of the alleged ambiguity in the renewal until about March 2010 when it raised in the instant suit.

Originally, the District Court found the renewal to be unambiguous and found no coverage and, therefore, no "bad faith" on the part of UAIC. On Appeal, No. 11-15010, this Court reversed and remanded on the issue of the ambiguity only.[1] On remand, the parties filed cross-motions for summary judgment and the court ruled in favor of the Appellant on coverage, finding an ambiguity in the renewal, but also found that Appellee had committed no "bad faith." The Court did find that UAIC breached the duty to defend, but found that Lewis could show no damages as he incurred no defense fees or costs in the underlying suit. Appellants' appeal again.

UAIC believes there exists no material issue of fact and this Court can affirm. It is undeniable that Lewis admitted he did not pay his July 2007 term prior to the loss. It is equally undeniable that Appellants can show no evidence that UAIC knew or, should have known, of the alleged ambiguity in the renewal notice

[1] Appellant had also made other, alternate, legal arguments for coverage, but this Court affirmed the District Court's grant of summary judgment on those grounds.

until the argument was first raised in the present action. Accordingly, without notice of the alleged ambiguity, UAIC's actions at the time were reasonable. Moreover, UAIC argues that, as the court found an ambiguity in the renewal notice, under traditional contract law principles, the District Court found an *implied policy at law* and, as such erred in finding UAIC breached any duty to defend under a policy which did not exist at the time of the alleged breach. Alternatively, even if this Court affirms the court's finding that UAIC breached the duty to defend, this Court can also affirm that Lewis can show no damages from any such breach.

STATEMENT OF FACTS

UAIC sent Lewis a renewal notice for his June 2007 monthly policy term, which required premium to be paid by May 29, 2007. *(ER p. 54).* Lewis failed to remit any premium until May 31, 2007. *(ER p. 59).* As such, Lewis' June 2007 policy did not incept until May 31, 2007 – when payment was received - *and the policy declarations page and, insurance cards, reflect this. (ER 56-58)* Accordingly, Lewis **had his first lapse in coverage** from 12:01 a.m. May 29, 2007 until 9:12 a.m. on May 31, 2007 - when the June 2007 monthly policy term was paid for.

UAIC then sent Lewis a renewal notice, for his July 2007 term, which stated that the "Renewal Amount" must be paid "**No Later than 6/30/07**." *(ER p. 60).*

Appellants' have admitted no payment was received by June 30, 2007 or, prior to the July 8, 2007 date of loss. *(ER p. 491, Responses numbered 4 & 5).* The renewal stated that the payment must be made "no later than" June 30, 2007, and the *amount and due date were also surrounded with "stars". (ER p.158)* Further, the renewal statement also listed the date for payment as the "due date" in the lower left hand portion on the payment stub. *(ER p.60).*[2]

The subject accident occurred while Gary Lewis was operating his vehicle in Pioche, Nevada, on July 8, 2007. *(ER p. 344, Lines 12-15).* After the accident Lewis returned to Las Vegas from Pioche, Nevada *(ER p. 355, Lines 2-8)* and paid for his policy term on July 10th, 2007. *(ER p. 65)* As such, it is agreed by all parties that Lewis did not remit premium for his policy term until July 10, 2007 – two (2) days after the accident *(ER pps. 65 & 491)* when he presented a money order for payment of his premium for a new policy. *(Supplemental Excerpts of the Record pps. 864-866).* UAIC incepted Lewis' new July 2007 policy term on July 10, 2007. (*SER pps. 838-868*).

Lewis claims that the first time he learned he did not have coverage for the accident was when UAIC phoned him and told him days after the accident. (*ER p. 405, Lines 11-25).* In response to the notification of no coverage for this accident

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[2] It was this subject renewal offer that was found ambiguous by the Court below. *(ER pps.734-43).*

Lewis claimed he only called UAIC once (he also called to report the loss) and never called his insurance agent, US Auto. (*ER. p. 407, Lines 9-25)* Moreover, Lewis continued to renew his monthly policy terms with UAIC through August 2008. (*ER p. 409, Lines 7-25 & SER pps. 370-464*).

UAIC became aware of the loss when Lewis called UAIC to check coverage on July 13, 2007 whereupon Eric Cook informed him the loss occurred in a period of no coverage after confirming with the Underwriting Department. *(SER pg 567, Lines 17-23 & p. 584, lines 4- 10, and Underwriting notes confirming call, SER p. 307)*[3]. When the Nalders' made a formal claim upon UAIC, the Company double-checked coverage and, contacted Lewis' insurance agency, U.S. Auto, which confirmed Lewis had not paid his premium until July 10, 2007 and provided a copy of the receipt. *(SER pps. 838-868).* Additionally, UAIC attempted to contact Lewis, but was unsuccessful. (*SER p. 640, lines 8-19, p. 641, lines 7-18, p. 656, lines 11-14, p. 662, lines 2-15, p. 674, lines 13-16, p. 678, lines 14-20; SER p. 262, lines 4-5; UAIC's claims notes, SER pps. 468-69).*

Appellants' were informed of the fact that no coverage was in force for the loss. (*SER pps. 830-37).* Nalder then filed suit against Lewis in the Clark County District Court on October 9, 2007. On October 10, 2007, and again November 1,

[3] This same note was used at Eric Cook's deposition, but Plaintiff never supplied the Exhibit to the court reporter.

2007, the Company informed both claimant attorneys via correspondence that there was no coverage. *(SER 830-837).* Lewis' current attorneys then took a default Judgment against him on May 15, 2008 in the amount of $3.5 million. *(ER pps. 0078-9).*

In the meantime, Lewis was issued a renewal notice to remit his premium for his August 2007 monthly policy term by August 10, 2007. *(SER p. 365)* Lewis, however, did not pay his August 2007 premium until August 13, 2007 – three days late. *(SER p. 370)* As such, Lewis had a ***third lapse in coverage***, in his dealings with UAIC in 2007. (*SER pps. 361 & 367*). Next, Lewis' 'September 2007'[4] Policy then required remittance of renewal premium by September 13, 2007. *(SER p. 379).* However, Lewis failed to remit premium until September 14, 2007 (*ER p. 386).* Accordingly, Lewis had a ***fourth lapse in coverage***. (*SER pps. 367 & 383*).

Lewis went on to make his October and November 2007 policy term premium payments timely (*SER 395 & 407)* before failing to remit his December 2007 premium on time. Once again, UAIC did not issue a new policy term until said payment was received on December 15, 2007 and Lewis had a ***fifth lapse in coverage***. (*SER pps. 407 & 410*). Lewis continued to renew his policy through August 2008. (*SER p. 462-64).*

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[4] The policies are still referred to by month for ease of description, though, by this time they were incepting in the middle of the month.

On May 22, 2009 Nalder and Lewis filed the present suit against the UAIC seeking payment of the default judgment against Lewis[5]. *(SER p. 695-705).* Lewis ***first*** insisted that he had, in fact, paid for his premium prior to the expiration of his policy on June 30th, 2007 and *that Defendant had denied receiving it.* (*ER p. 485-486, responses numbered 4 & 7*). After UAIC propounded discovery to ascertain the mode of this claimed 'payment', and, at hearing on the Motion to Compel such discovery (*SER pg. 900)*, Lewis provided "amended" Answers to requests to admit which conceded no timely payment was made, and, instead, claimed an ambiguity in the renewal statement. (*ER p. 492, Response number 8).* Further, Appellants' also produced an 'Assignment' - which purports to assign Lewis' chose in action to the Nalders' – but, which was entered into on February 28, 2010. (*SER pg. 529)*[6].

UAIC filed summary judgment on all claims and The Honorable Edward Reed granted summary judgment in favor of UAIC on all issues. *(SER pps. 869-912).* At oral argument on that summary judgment, Counsel for Appellants stated that a person could "***certainly read it that the payment was due June 1st***" and that UAIC's interpretation was a 'potentially reasonable one.' (*SER p. 751, lines 7-8, & SER 752, Lines 3-4 & 20-24*). Appellant took Appeal to this Court, under Case No.

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[5] The current suit was UAIC's first notice that Lewis had been served and, that a default judgment had been taken against him.

[6] The court will note that this purported 'assignment' was apparently executed long after the lawsuit was filed in May 2009.

11-15462, wherein the Court reversed and remanded on the issue of ambiguity in the renewal statement only. (*ER pps. 0002-4*)

Thereafter, the parties filed cross-motions for summary judgment and the renewal notice for the July 2007 policy term was found to be ambiguous, but while UAIC owed coverage, UAIC's actions had been reasonable and, therefore, UAIC was granted summary judgment on Appellants' bad faith claims. Also, UAIC was found to have breached the duty to defend, but that Lewis could show no damages from this breach. (*ER pps.734-743*).

SUMMARY OF ARGUMENT

I. APPELLEE'S RESPONSE TO APPELLANTS' OPENING BRIEF

A. The District Court Judgment should be affirmed as all evidence and law supports UAIC's position as reasonable and Appellants raise no material issues of fact.

Allstate v Miller, 125 Nev. 300, 212 P.3d 318 (NV. 2009), held that "when there is a genuine dispute regarding an insurer's legal obligations, the district court can determine if the insurer's actions were reasonable..." and the Court "evaluates the insurer's actions at the time it made the decision." *Id.* at 317, 329-30. Moreover, the *Miller* Court "defined bad faith as "an actual or implied awareness of the absence of a reasonable basis for denying benefits of the [insurance] policy." citing *Am. Excess Ins. Co. v. MGM,* 102 Nev. 601, 605, 729 P.2d 1352, 1354-55 (1986). *Id.* at 308, 324.

Appellee maintains that its interpretation of the renewal, requiring payment by the "due date", was reasonable and, coupled with Lewis' admission that he failed to pay his renewal premium until after the loss, clearly created a reasonable basis for UAIC to disclaim coverage for the loss and this Court can affirm same.

B. Appellant's Arguments that the Default Judgment, attorneys fees and costs or, consequential damages are their measure of damages in the Case at Bar is incorrect and the District Court Order should be affirmed or, in the alternative, this Court can find UAIC did not breach the duty to defend.

1. The cases cited by appellant are inapplicable or distinguishable.

None of the cases cited by Appellants supports their proposition they are due the damages claimed for UAIC's breach of the duty to defend under the facts at bar. Under Nevada law, if the insurer had a reasonable basis to deny coverage, there are no damages available. Moreover, even if UAIC breached the duty to defend, the correct measure of damages would be costs expended by Lewis, and here he had none.

2. That should this Court affirm the breach of the duty to defend, the correct measure of damages would be any costs incurred by the insured Lewis in the underlying suit and, here there were none.

Any damages for the breach of the duty to defend would be attorney's fees and costs *expended by Lewis* – not the Nalders'. *Home Sav. Ass'n v. Aetna Cas. & Surety Co.*, 854 P.2d 851. See *Home Sav. Ass'n* and *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 255 P.3d 268, 277 (Nev. 2011) (finding

the measure of damages when an indemnitor breached a duty to defend was costs indemnitee paid to defend). Here, Lewis did not defend and, the Nalders' took a default judgment so there were no damages to present.

3. Alternatively, UAIC asks this Court to find it did not breach the duty to defend.

In *United Insurance Co. v. Frontier Insurance Co.*, 120 Nev. 678 (2004), the court found that the insurer was ***not liable*** for breach of the duty to defend when it failed to defend a loss that did not occur within the policy term. Moreover, *Lunsford v. American Guarantee Liab. Ins. Co.*, 18 F.3d 653 (9th Cir. 1994), held that an insurer who investigated coverage and based its decision not to defend on *reasonable construction of policy* was not liable for breach of the duty to defend ***even after*** the Court resolved the ambiguity in the contract in favor of the insured.

As the parties agree no timely payment was made by Lewis prior to the loss and, that UAIC's interpretation of the renewal was reasonable, UAIC should not be found to have breached the duty to defend just because its decision was later adjudged incorrect. Alternatively, the correct contractual remedy was for the court below to *imply a policy at law* for the date of loss based on same ambiguity and UAIC should not be held to have breached this 'future' policy for actions it took in 2007.

C. Summary Judgment should not be reversed on the Extra-contractual or, "bad Faith" claims as no issues of fact exist.

1. Appellant cites inapplicable standards for a determination of bad faith that should not be relied on herein.

The cases cited by Appellants' are inapplicable or distinguishable from the case at bar. Rather, the correct standard for a bad faith claim, is stated in *Allstate v Miller*, 125 Nev. 300, 212 P.3d 318 (NV. 2009), "when there is a genuine dispute regarding an insurer's legal obligations, the court can determine if the insurer's actions were reasonable... and the Court "evaluates the insurer's actions at the time it made the decision." *Id.* at 317, 329-330.

2. UAIC did not breach its Duty to Defend Lewis where it reasonably believed there was no policy in effect at the time and, further, even if UAIC breached the duty to Defend, Appellants can show no damages.

A potential for coverage only exists when there is arguable or possible coverage. *United Insurance Co. v. Frontier Insurance Company, Inc.,* 120 Nev. 678 (2004.); *Turk v. TIG Ins. Co.*, 616 F. Supp. 2d 1044 (2009). In *United Insurance Co. v. Frontier Insurance Co.,* 120 Nev. 678 (2004), the Nevada Supreme court found that the insurer was not liable for breach of the duty to defend when it failed to defend a loss that **did not occur within the policy term**. Similarly, in *Turk v. TIG Ins. Co.*, 616 F. Supp. 2d 1044 (2009), the policy at issue did not list an additional insured, and, as such, there was no possibility for potential

coverage and, therefore, no duty to defend. In this way, like the insurer in *Turk*, it was reasonable for UAIC to believe there was no *potential for coverage.*

Alternatively, if this Court affirms that UAIC breached the duty to defend, it should also affirm the finding that Appellants' can show no damages from any breach. Under Nevada law, any damages for this breach would be limited to fees and/or costs expended by Lewis in defending the underlying Complaint on his own. *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 255 P.3d 268, 277 (Nev. 2011). Here, Lewis expended no monies and, therefore, Plaintiff's can show no damages.

3. UAIC did not Misrepresent Coverage.

The purpose of N.R.S. § 686A.310(1)(a) is to prevent an insurer misrepresenting the terms of an insurance policy to its insured, or misrepresenting to its insured facts within the insurer's knowledge that could potentially give rise to coverage. See *Albert H. Wohlers & Co. v. Bartgis,* 114 Nev. 1249, 969 P.2d 949, 961 (Nev. 1998).

As Appellants' cite absolutely no facts to support their claim that UAIC either knew or, should have known, of the alleged ambiguity at the time it denied the claim nor, that UAIC made any false or misleading statement at the time regarding coverage, this Court can affirm the grant of summary judgment in this regard.

4. *UAIC did not Breach its Duty to Investigate; UAIC reasonably investigated the claim and, based on the information known at the time, and reasonably believed no policy was in force.*

While Appellants' complain UAIC did "no investigation", the facts tell a different story. UAIC conducted a reasonable investigation under the circumstances and merely because UAIC's decision was, six years later, shown to be erroneous does not mean that UAIC breached its duty as there was no information at the time suggesting Lewis was claiming an ambiguity in the renewal. An insurer has no duty to investigate matters which have a 'speculative possibility' when investigating a claim. *KPFF, Inc.*, 66 Cal. Rptr. 2d 36, 44. Here, UAIC reasonably investigated the loss, determined there was no coverage and, had no duty to investigate the ***speculative possibility*** the insured would claim ambiguity in a renewal when it was never raised to UAIC at the time.

5. *UAIC did not breach its duty to notify of settlement demands because, alternatively, Allstate v Miller should not be retroactively applied, where UAIC reasonably believed no policy was in effect it had no such duty and, further Lewis could not have satisfied the demand on his own anyway.*

   a. The ruling in Miller should not be retroactively applied to UAIC in the case at bar as the Defendant could not foresee the new precedent and substantial prejudice would accrue to Defendant.

The *Miller* case was released in July 2009 – fully *2 years after the alleged actions by UAIC in this case occurred.* Accordingly, under prevailing case law, UAIC asks that this Court not apply the *Miller* decision ***retroactively*** as same

would cause undue prejudice to UAIC who *could not have foreseen the precedent.* See *Breithaupt v. USAA Property & Casualty Co.*, 110 Nev. 31, 867 P.2d 402 (1994) (holding a new rule of law would not be applied retroactively against an insurer where certain factors are met).

b. The duty to inform, under *Miller*, is inapplicable, where, as here there was a good faith dispute over the existence of a policy in effect

It is clear that the logic for the decision in *Miller* is that the duties of an insurer in regard to settlement demand flow from the fact that the insurer has a right to control the defense and settlement of the claim. *Miller*, 125 Nev. 300, 212 P.3d 318 (NV. 2009). As the insurer undertakes the defense and settlement process, an insured would have an expectation the insurer will pay reasonable settlement demands. Therefore, where, as here, the insured has reason to know no policy was in existence, that expectation does not exist and, therefore, there should be no duty to inform.

c. UAIC's failure to inform did not prejudice Plaintiffs' because Lewis could not have satisfied the demand on his own, anyway.

In *Hicks v Dairyland Ins. Co.*, 2010 U.S. Dist. LEXIS 63597 (U.S. Dist NV 2010), the court ruled held that the capability of the insured to pay a settlement offer was a factor in determining whether an insurer was liable for a failure to inform. Here, the Appellants' have not presented any evidence that Lewis could

have satisfied their demand *even if he had been informed of same.* Rather, there is evidence that he could not have paid the offer. Accordingly, as there was no prejudice to Lewis' for having failed to so inform him, UAIC should not be liable for breach of any duty to so inform here.

6. *Plaintiffs' offer no evidence whatsoever to support any breach of N.R.S. 686A.310 by UAIC where a reasonable dispute as to coverage existed.*

In *Hicks v Dairyland Ins. Co.*, 2010 U.S. Dist. LEXIS 63597 (U.S. Dist NV 2010), the court in Nevada held that a plaintiff's failure to bring forth any evidence or, make any argument opposing a Motion for summary judgment on these issues, serves as grounds for dismissal.

Under *N.R.S. 686A.310*, Appellants' only arguable claims would be under subsections (c) and (e) (failing to implement standards and failing to effectuate prompt settlement when liability reasonably clear.) UAIC believes there is no material issue of fact regarding either of these issues. UAIC has outlined that its investigation was reasonably prompt and, as such, there is no evidence it did not implement such reasonable standards. Accordingly, if this Court also agrees UAIC coverage denial was based on a reasonable basis, there also should be no breach of subsection (e) of this statute.

a. Alternatively, claims under N.R.S. 686A.310 *et seq.*, are not available under an implied or, constructive, insurance contract.

In *Nevada Assoc. Servs., Inc. v First Amer. Title Ins. Co.*, 2012 U.S. Dist. LEXIS 105466 (U.S. Dist. NV 2012), the court there found that the plaintiffs in that case were seeking an *implied insurance* contract and, as such, *N.R.S. 686A.310* was inapplicable to such a constructed contract. Here, Appellants' were asking the District Court to *imply* a constructive contract by finding the renewal was ambiguous. See *Wilson v. Career Educ. Corp.*, 729 F.3d 665 (2013). Appellee argues that, under such a construct, Appellants have no cause of action under N.R.S. 686A.310, as these causes of action were not anticipated for 'implied contracts'.

7. *A finding of coverage does not automatically create an issue of fact in regards to Extra-contractual or, "Bad Faith" claims.*

Allstate v Miller states "**When there is a genuine dispute regarding an insurer's legal obligations, the... court can determine if the insurer's actions were reasonable**. *Miller*, 125 Nev. 300, 317, 212 P.3d 318, 329-30 (NV. 2009). (emphasis added).

Accordingly, a court can review an insurer's actions – at the time they were made – to determine if they were reasonable as a matter of law. Here, UAIC actions at the time should be found to have been reasonable based on a review of

the record and, as such, asks that this Court affirm there exists no material issue of fact.

ARGUMENT

I. APPELLEE'S RESPONSE TO APPELLANTS' OPENING BRIEF

Appellants' claims for extra-contractual remedies[7] or, "bad faith", could be decided as a matter of law. The primary argument by UAIC is that there is *simply no evidence* presented that its position was unreasonable at the time or, that its coverage decision was based on anything but a 'genuine dispute' as to coverage. Rather, all the evidence in the record *supports* UAIC's position. Namely, that: 1) UAIC had no knowledge of Lewis' claimed ambiguity in the renewal until March 2010; 2) UAIC investigated the claim and coverage after the loss and confirmed there was a late payment with their own underwriting department, Lewis' insurance agent and, by calling Lewis himself; 3) Lewis continued to renew coverage with UAIC for *another year* after UAIC told him they denied coverage; 4) Both Federal District Court judges hearing this matter have found UAIC's actions were reasonable; and 5) Appellant's Counsel has admitted that someone '*could certainly read*' the renewal statement as UAIC did.

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[7] Appellant has claimed breach of the implied covenant of good faith and fair dealing and breach of the Nevada Unfair Claims Practices Act, N.R.S. 686A.310. *(SER pps 695-705)*

Appellant essentially argues that any determination on "bad faith" is a factual issue not appropriate for Summary judgment and, alternatively, identifies several areas it feels material issues of fact exist. Additionally, Appellant claims it is owed damages for Appellee's alleged breach of the duty to defend. However, Appellee believes Appellant has cited incorrect or, inapplicable, law for its propositions and, **fails to set forth any facts** to create any material issues.

UAIC asks this Court on review, *de novo,* to affirm the District Court and find UAIC's position was a reasonable and, as such, affirm the grant of summary judgment on the extra-contractual and/or, statutory bad faith, claims. Secondly, UAIC argues that should this Court affirm that UAIC breached the duty to defend, that it also affirm that Lewis can show no damages. In the alternative, however, UAIC argues that, as the policy was *implied at law* due to an ambiguity in the renewal raised years after the loss – that this Court find that UAIC did not breach the duty to defend and/or its actions at the time were reasonable under the facts known and, thus UAIC did *not* breach the duty to defend.

For the standard of review, this Court has held that a district court's grant of summary judgment *de novo. Funky Films Inc. v. Time Warner Entertainment Co., L.P.* 462 F.3d 1072, 1076 (9th Cir. 2006). In reviewing the District Court's grant of summary judgment the Court of Appeals "must determine, viewing the evidence in

the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Fitzgerald Living Trust v. United States,* 460 F.3d 1259, 1263 (9th Cir. 2006).

A. The District Court Judgment should be affirmed as all evidence and law supports UAIC's position as reasonable and Appellants raise no material issues of fact.

Appellant has cited case law in Opening Brief suggesting that UAIC committed some bad faith for failing to fully investigate the claim, misrepresenting coverage, failing to send notice of settlement offers, for failing to defend and/or, for breach of statute. UAIC will reply to each such argument, however, what Appellants' ignore is that for their arguments to succeed *there would need to have been a policy in place and/or, facts to support that UAIC was unreasonable.*

UAIC had always maintained there was *no policy in force* and UAIC argues this position was a reasonable one at the time. Accordingly, with an issue over whether a policy even *existed* to cover the loss, *the context of any inquiries* into UAIC's actions at the time is changed substantially. For instance, if a policy was in place and there was a coverage question surrounding whether the allegations in the Complaint were covered – more investigation may have been needed to see if facts supported the possibility of coverage. Here, however, regardless of the allegations in the Complaint, **it is unquestioned that Lewis failed to timely remit premium**

for his policy term. Here, it appears that Appellants' argue that UAIC should have paid the policy limits – even with a reasonable belief no policy was in force – on the off chance, almost 3 years later, an insured would suddenly claim he thought his renewal was ambiguous. Following this logic to its reasonable extension would certainly not serve public policy as it would bankrupt every insurer doing business in the state. Insureds could simply fail to pay for new policy terms, knowing their insurer would need to honor and pay all claims on the speculative chance, *sometime in the future*, an insured may claim ambiguity in the renewal and succeed in having a policy enforced. The fact is an insurer is under no duty to speculate as to *every possible* argument that a claimant or insured might advance in the future – only the facts and circumstances known or, reasonably knowable, at the time. Accordingly, Plaintiffs' argument makes little practical, legal or, common, sense and should thus be disregard.

As referenced by the Nevada Supreme Court in *Allstate v Miller*, 125 Nev. 300, 317, 309 212 P.3d 318, 329-330 (NV. 2009), **when there is a genuine dispute regarding an insurer's legal obligations, the... court can determine if the insurer's actions were reasonable**... and the Court "**evaluates the insurer's actions at the time it made the decision.**" citing *Cal Farm Ins. Co.*, 31 Cal. Rptr. 3d at 629.

In the case at bar, given the information that was known at the time, all the evidence suggests UAIC's actions were reasonable. Specifically, after notification of the loss, UAIC confirmed the lapse through their underwriting department, the insured's agent, and attempted to call Lewis himself. This was done when Lewis initially called to check coverage (on July 13, 2007) as documented by the underwriting note, whereupon customer service representative Eric Cook informed him the loss occurred in a period of no coverage after confirming this with the Underwriting Department. *(SER pg 567, Lines 17-23 & p. 584, lines 4- 10, and SER p. 307, copy of Underwriting note).* Thereafter, when the Nalders' made a formal claim upon UAIC, the Company double-checked coverage and, contacted Lewis' insurance agency, U.S. Auto, who confirmed Lewis had not paid his premium until July 10, 2007 and, provided a copy of the receipt. (*SER pps. 838-868*). In fact, UAIC was informed that Lewis returned from Pioche, Nevada to remit his late premium on July 10th, 2007 - 2 days post loss and 10 days since the expiration of his policy. Additionally, UAIC attempted to contact Lewis, but was unsuccessful. (*SER p. 640, lines 8-19, p. 641, lines 7-18, p. 656, lines 11-14, p. 662, lines 2-15, p. 674, lines 13-16, p. 678, lines 14-20; & SER p. 262, lines 4-5 UAIC's claims notes, SER pps. 468-69).* Indeed Appellants admitted in this case that Lewis failed to timely remit his policy premium. (*ER p. 492, Response number 8).*

Moreover, UAIC believes its interpretation of the Renewal was reasonable wherein it stated that the "Renewal Amount" must be paid "**No Later than 6/30/07**." *(ER p. 60)* It also stated that the payment must be made "no later than" June 30, 2007, and the *amount and due date were also surrounded with "stars". (ER p.158)* Further, the renewal statement also listed the date for payment as the "due date" in the lower left hand portion on the payment stub. *(ER p.60).* Indeed Counsel for Appellants' has stated that a person could "***certainly read it that the payment was due June 1st***" and, that UAIC's interpretation was a 'potentially reasonable one.' (*SER p. 751, lines 7-8, & SER 752, Lines 3-4 & 20-24*).

Furthermore, Lewis never informed his agent or, UAIC, he misunderstood his renewal statement at the time or, after he was informed there was no coverage. (*ER p. 0378, lines 2-16 & p. 0407, lines 23-25).* Moreover, Lewis continued to renew his policy with UAIC – still often late – for nearly another year. *(SER pps. 370-464).* UAIC was never informed of the claimed 'ambiguity' until about March 2010 - *well after this Complaint was filed.* Accordingly, at the time coverage was denied and the underlying suit was filed UAIC **did not know** such a claim would be made.

As such, based on all the evidence available at the time[8], UAIC denied coverage for the loss based upon a reasonable basis that there was no policy in force for the loss. Under the case law cited herein, this cannot be a basis for bad faith remedies against UAIC. This is a simple disagreement about the coverage for a loss where the insured, Lewis, *admitted he made no timely payment under the terms of the policy* and, only in this case claimed an ambiguity in the renewal. At the time of the claim UAIC reviewed coverage, confirmed the payment was late with the insurance agent and, tried to contact Lewis. Based on the information available to it at the time, UAIC made a reasonable decision that there was *no policy in effect.* Both Judge's hearing this case and, Appellants' counsel, have agreed UAIC's position regarding the renewal statement was a reasonable one. Under these circumstances, although the court ultimately implied a contract due to the ambiguity, there can be no basis for any extra-contractual claims. Therefore, Appellant cannot, as a matter of law, establish that UAIC's determination that no policy was in force is unreasonable or without proper cause. Rather, under the "genuine dispute" doctrine, it is clear UAIC was entitled to summary judgment as to Appellants' extra-contractual claims and asks this Court to affirm same.

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[8] The Nevada Supreme Court in *Allstate v Miller*, cited above, specifically followed the California case that held that a Court "evaluates the insurer's actions at the time it made the decision." Citing *Cal Farm Ins. Co.*, 31 Cal. Rptr. 3d at 629.

B. Appellant's Arguments that the Default Judgment, attorneys fees and costs or, consequential damages are their measure of damages in the Case at Bar is incorrect and the District Court Order should be affirmed or, in the alternative, this Court can find UAIC did not breach the duty to defend.

Appellants' argue they should be granted, alternatively, their $3.5 million default judgment, *Nalders'* fees, interests and costs or, consequential damages, for Appellee's failure to defend in this case. Although Appellant divides these requested damages into three separate sections in their brief, UAIC believes all the requests must fail for the same reasons and, accordingly, UAIC addresses them together. In short, UAIC disagrees with Appellants' citation to and, application of, case law in regards to these issues and asks this Court to affirm the ruling that its actions at the time were reasonable. (See section I.A., herein). Accordingly, if UAIC had a reasonable belief that *no policy was in force,* there would have been no "arguable or possible coverage." Without such a possibility of coverage, Plaintiff is not entitled to the damages sought. Moreover, *even if* UAIC breached the duty to defend, the correct measure of damages would be the attorney fees and costs *accrued* ***by the insured Lewis*** *in the underlying suit* (and, here, he had none) and this Court can affirm same. Alternatively, in reviewing the case, *de novo*, this Court can find that UAIC did not breach its duty to defend as this insurance contract as its actions were reasonable and, the policy was only implied at law,

years after the subject events, and, as such, the default judgment, and there can be no retroactive breach of the duty to defend.

1. The cases cited by appellant are inapplicable or distinguishable.

The thrust of Appellants' argument is premised on the belief that there was "arguable or possible coverage" and, therefore, the default judgment and other damages were 'proximately caused' by a 'failure to provide coverage.' In support of their argument, Appellant relies on several cases[9] which will be discussed, in turn, herein.

Appellant cites to *Hecla Min. Co. v. New Hampshire Ins. Co.*, for the proposition that where there is arguable or possible coverage, an insurer should resolve the issue in favor of the insured and provide coverage and a defense. The *Hecla Min. Co.* decision, besides not being binding on this Court, is distinguishable because in that case there was *no dispute as to a policy being in force* – only whether there was coverage for the claims. *Hecla Min. Co. v. New Hampshire Ins. Co.,* 811 P.2d 1083 (Colo. 1991). Conversely, in this case, UAIC reasonably believed at the time that no policy was in existence to cover the loss (see discussion in section I.A., herein). Accordingly, if this Court affirms UAIC was reasonable – there was *no arguable or possible of coverage* at the time.

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[9] Appellant also cites to *Miller v Allstate*, 212 P.3d 318 (Nev. 2009) for the general principle that insurance liability contracts create a duty to defend.

Appellant also cites *Neal v Farmers Ins. Exch.*, 21 Cal. 3d 910, 582 P.2d 980 (Cal. 1978) for the proposition that once an insurer violates the implied duty of good faith and fair dealing, it is liable to pay all compensatory damages proximately caused by the breach. *Neal* dealt with a 'first party' insurance situation where the Court found the insurer *had oppressed and otherwise failed to make payment* to its insured under the Uninsured Motorist provisions of the policy which was unquestionably *in force* at the time. *Id.* The *Neal* case offers no support for Appellants' arguments here, where UAIC had a reasonable belief at the time that there was no policy in existence to cover the loss. Accordingly, in this case, there is simply no evidence that UAIC breached the implied covenant of good faith and fair dealing and, therefore this case is distinguishable.

Appellant cites *Noya v A.W. Coulter Trucking*, 143 Cal. App. 4th 838 (Cal. Ct. App. 2006)[10] for the proposition that an insurer "may challenge the reasonableness of damages, but its breach of its duty is a proximate cause of the [insured's] reasonable damages." However, this case offers little assistance to the examination of the issues at bar. In *Noya* there was again no issue as to a policy being in force to cover the loss. *Id.* Therefore, again, as UAIC maintains it reasonably believed there was not even a policy in force to cover the loss, the analysis for any possible damages *after coverage is retroactively applied* should be

[10] Appellee notes that Appellant's citation to this case was incorrect.

completely different. Moreover, in *Noya* the issue was whether an insurer, who had wrongfully denied coverage, could intervene to challenge a settlement entered into by the insured after the insurer failed to defend, and the Court held that the insurer could challenge its reasonableness in a subsequent bad faith suit. *Id.* Accordingly, nothing in the *Noya* decision stands for the proposition that Appellants' here are entitled to Attorney's fees, costs or interest if UAIC's actions are affirmed as reasonable.

Appellants also argue that an insurer may be liable for consequential damages for breach of the duty to defend in *Carlson v. Century Surety Co.,* 2012 U.S. Dist. LEXIS 23119 (N.D. Cal. Feb 23, 2012). While the court's *original* decision found such consequential damages *could be available,* that decision was vacated, in part, in *Carlson v. Century Surety Co.,* 2012 U.S. Dist. LEXIS 40986 (N.D. Cal. Mar. 26, 2012). In the later opinion the court specifically stated that the **only party injured by the failure to defend was the insured** and in any event, found the assignment to be based upon fraud and, dismissed plaintiff's case. *Id.* at 33. In this way, the court's later analysis is actually more in line with Nevada law that **only an insured** can show damages (for defense fees and costs) for a failure to defend.

Finally, Appellants rely on *Pershing Park Villas v. United Pac. Ins. Co.*, 219 F.3d 895 (9th Cir. 2000) for the proposition that by not providing a defense, the ensuing default judgment or, other damages, are proximately caused by the insurer's breach. Again, however, *Pershing Park Villas* is distinguishable as in that case, decided on California law, the insurer *had withdrawn its defense* shortly before trial, disclaiming coverage and there was again never any question as to whether there was a policy *in force*. Thereafter, the policy was found to provide coverage and, while the court found the insurer responsible for its breach of the duty to defend, it did so based in part on evidence presented that the insurer *knew there was a potential for coverage.*

Obviously, these cases are all distinguishable from the present case as UAIC had reasonably maintained there was no policy in force covering the loss (*i.e.* not just a question as to coverage) and, more importantly, there **has never been a showing that UAIC had any reason to believe there was a potential for coverage at that time**. In fact, the case history shows Lewis changed his argument (to claim ambiguity) *during this litigation*. Indeed, for this reason, among others, two Judges have also found UAIC's actions to be reasonable at the time. For all of the above UAIC asks this Court to affirm UAIC's actions as reasonable at the time, foreclosing Appellants claimed damages.

2. *That should this Court affirm the breach of the duty to defend, the correct measure of damages would be any costs incurred by the insured Lewis in the underlying suit and, here there were none.*

Appellants' argue that they were not given opportunity to submit damages for "costs, attorney's fees and interest" on the policy limits withheld.[11] However, again, neither the case law cited by Appellant nor, the facts at bar, support this contention. Quite simply, any damages for the breach of the duty to defend would be attorney's fees and costs *expended by Lewis* – not Appellant's Nalder. Here, Lewis did not defend and, the Nalders' took a default judgment so there were no damages to present.

Appellants' cite *Home Sav. Ass'n v. Aetna Cas. & Surety Co.*, 854 P.2d 851 for the proposition that "if the insurer breaches the duty to defend, ***the insured*** is entitled to at least fees and costs incurred to defend the action". (emphasis added). As can be plainly seen from Appellants' own argument on this case – they admit that any damages for the breach of the duty to defend would be owed to *the insured*, who in this case is Gary Lewis, and he had no damages.

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[11] Appellants' have filed a Motion, in the Court below, for Attorneys Fees, Costs and Pre-judgment interest which remains pending and, as such, this argument is somewhat disingenuous. *(SER 001-012).*

This issue was recently discussed at length in *Andrew v. Century Surety Co.*, 2014 U.S. Dist. LEXIS 60972, 29 (2014), which stated while the Nevada Supreme Court has not articulated the measure of damages "for an insurer's mere breach of the duty to defend absent bad faith", it had considered the issue in other contexts. Specifically, the court relied *Home Sav. Ass'n* and *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 255 P.3d 268, 277 (Nev. 2011), where the court had considered the measure of damages when an indemnitor breached a duty to defend. *Reyburn*, citing California law, held that "[t]he breach of that duty, 'may give rise to damages in the form of reimbursement of the defense costs the indemnitee was thereby forced to incur" in defending 'against claims encompassed by the indemnity provision.'" *Id.* (quoting *Crawford v. Weather Shield Mfg. Inc.*, 44 Cal. 4th 541, 557, 79 Cal. Rptr. 3d. 721, 187 P.3d. 424, 433(2008).). Furthermore, *Andrew* specifically stated that "[n]o Nevada case supports the Plaintiffs' argument that an insurer who breaches its duty to defend is automatically liable for the full amount of the resulting judgment even if it exceeds the limits of the insurance policy. California - another jurisdiction the Nevada Supreme Court relied on in articulating the duty to defend in *United National*, 120 Nev. at 687, 99 P.3d at 1158 - recognizes that '[w]here there is no opportunity to compromise the claim and the only wrongful act of the insurer is the refusal to defend, the liability of the insurer is ordinarily limited to the amount of the

policy plus attorneys' fees and costs.' *Comunale v. Traders & Gen. Ins, Co.*, 50 Cal. 2d 654, 659, 328 P.2d 198 (1958). Similarly, Nevada has not recognized extra-contractual damages for breach of the duty to defend in the absence of a finding of bad faith. Given that and the holding in *Comunale*, the Court concludes that the Nevada Supreme Court would not allow for extra-contractual damages if the insurer did not act in bad faith." (citations omitted) *Andrew* at 30-31.

The above quoted analysis is nearly identical to the case at bar. UAIC argues and, asks this Court to affirm, it acted reasonably in regards to the Appellants' claims. However, if UAIC is found to have breached the duty to defend, under Nevada case law the extent of Appellant's damages would be limited to the amount of fees or costs *expended by Lewis* in defending the action underlying this case. As he had no such damages here and, indeed, Appellants' Nalder took a default judgment, this Court can affirm the District Court's ruling.

3. Alternatively, UAIC asks this Court to find it did not breach the duty to defend.

On review, *de novo*, this Court can also examine the lower court's determination that UAIC breached the duty to defend. Here UAIC argues that if this Court agrees that is actions at the time were reasonable, UAIC should not be found to have breached a duty to defend on an insurance policy that was only found to exist years later.

In *United Insurance Co. v. Frontier Insurance Co.*, the Nevada Supreme court found that the insurer was ***not liable*** for breach of the duty to defend when it failed to defend a loss that did not occur within the policy term. *United Insurance Co. v. Frontier Insurance Company, Inc.*, 120 Nev. 678 (2004). UAIC argues that *United Insurance* supports its position as UAIC reasonably believed the policy expired *prior to the loss.* Also, in *Turk v. TIG Ins. Co.*, 616 F. Supp. 2d 1044 (2009), the policy at issue did not list an entity as an additional insured and, as such, there was no possibility for potential coverage and, therefore, no duty to defend. Clearly, an insurer who looks at a policy's declarations and determines an entity is not listed must be comparable to a situation where the insurer finds no policy to be in effect for the loss. In this way, like the insurer in *Turk*, it was reasonable for UAIC to believe there was no *potential for coverage.* (See discussion Section I.A., above).

Similarly, in *Lunsford v. American Guarantee Liab. Ins. Co.*, 18 F.3d 653 (9th Cir. 1994), this Court held that an insurer who investigated coverage and based its decision not to defend on *reasonable construction of policy* was not liable for bad faith breach of the duty to defend ***even after*** the Court resolved the ambiguity in the contract in favor of the insured. Further, in *Franceschi v Amer. Motor. Ins. Co.*, 852 F.2d 1217 (9th Cir. 1988) this Court again resolved an ambiguity in favor of insured, but held the insurer's position had been reasonable and granted

summary judgment as to bad faith claims. Although Appellants' pointed out below that the *Lunsford* decision dealt with coverage for 'malicious prosecution' and the *Franceschi* decision concerned medical insurance and exclusions, UAIC notes that *the standards for the insurer in those cases,* in regards to its defense obligations, *are the same as UAIC here.* As the insurers in those cases would be held to the same standard as UAIC here, UAIC's reliance on these cases in support of its position is relevant and, on point. Moreover, Appellants' have offered *no authority* which is contrary to these cases.

As stated above, from the *Allstate v. Miller* and *Guebara* holdings and, other decisions cited herein, it is clear that the key to a bad faith claim **is whether or not the insurer's decision regarding coverage is reasonable** and, that when the insurer's actions are reasonable, the Court can decide extra-contractual claims as a matter of law. Therefore, under the *United Ins. v Frontier* decision and the holdings of the *Lunsford* and *Franceschi* cases, exploring issues similar to this case, UAIC argues an insurer should not be found liable for breach of the duty to defend even if the ambiguity was resolved in favor of the insured if it had a ***reasonable basis*** to deny defense of lawsuit. Accordingly, UAIC argues this Court can find its actions were reasonable and it did not breach the duty to defend.

Further in the alternative, in the case at bar, this Court can see that although the court below found coverage, it was based upon an ambiguity in the renewal statement. As the parties agree no timely payment was made by Lewis prior to the loss, the correct contractual remedy was for the court below to *imply a policy at law* for the date of loss based on same ambiguity. See *Wilson v. Career Educ. Corp.*, 729 F.3d 665 (2013) (A quasi-contract or, contract implied in law, is one in which no actual agreement between the parties occurred, but a duty is imposed to prevent injustice). As this insurance contract was only formed at law in October 2013, UAIC should not be found to have breached this *future* policy for actions it took in 2007. Therefore, UAIC asks this Court to find that UAIC did not breach the duty to defend in 2007 on a quasi-contract formed at law in 2013.

C. Summary Judgment should not be reversed on the Extra-contractual or, "bad Faith" claims as no issues of fact exist.

UAIC has always maintained that, at the very least, its position/actions in regard to coverage were reasonable at the time. Here, the *both prior Judges and, Plaintiff's own counsel at hearing, previously agreed that Defendant's interpretation of the renewals was reasonable.* Moreover, Appellants have never shown any facts that UAIC ever knew of the claimed ambiguity prior to this suit. On Appeal, as in the court below, Appellants' cite case law that is inapplicable to the case at bar or, not binding precedent. The cases cited by Appellants involves a situation where there *existed a policy in force at the time of loss* making such cases

distinguishable from the one at bar where there the parties admit there *no payment made for the policy prior to the loss and an ambiguity was only claimed years later.* In this way, such cases simply do not correctly reflect a situation where the insurer's records revealed **no policy to be in force for the loss.** Accordingly, the court's ruling on this issue should be affirmed.

1. Appellant cites inapplicable standards for a determination of bad faith that should not be relied on herein.

Appellants cite to a West Virginia opinion, *Shamblin v. Nationwide Mut. Ins. Co.,* 396 S.E. 2d 766 (W.Va. 1990) suggesting an insurer can be held strictly liable for insurer bad faith. This precedent is not binding on this Court and, moreover, does not accurately set forth the standard for insurer bad faith liability in Nevada. Accordingly, this case and, argument, is of little use in the case at bar. Moreover, the *Shamblin* case and, several California decisions relied upon by Plaintiff, are distinguishable for the simple reason that ***all*** of those cases involved instances where ***there was no dispute as to a policy being in force.*** Those cases involved insurers failure to settle claims within limits ***under a valid policy***, thus exposing the insureds to excess judgments. Accordingly, the standards applied in those cases are distinguishable from the case at bar where there was a genuine dispute as to the *existence of a policy at the time of loss.*

Similarly, the California precedents and, one New Jersey case, cited by Appellants all merely state that an insurer who failed to settle within an insured's policy limits, may later be responsible for the detriment caused by the insurer's breach of the implied covenant of good faith and fair dealing. See *Comunale v Traders & General Ins. Co.,* 50, Cal.2d 654, 328 P.2d 198; *Crisci v. Sec. Ins. Co.,* 66 Cal.2d 425 (1967); *Johansen v Calif. State Auto. Assn. Inter-Ins. Bureau*, 538 P.2d 744 (1975); *Rova Farms Resort Inc. v Investors Ins. Co.*, 323 A.2d 495 (1974). Again, while this may be a correct recitation of the law as it applies to claims made against an insured when a policy is *in force* – they have less application to the case at bar where UAIC reasonably believed *no policy was in effect.* This is evident from a review of the *Crisci*, *Comunale*, *Johansen* and, *Rova* decisions wherein there was *no question as to a policy being in force*[12] and, moreover, there existed evidence that the insurers had no reasonable defense for the insureds to refuse a settlement offer within the policy.

The same problem arises with the cases cited by Appellants. *Powers v. U.S.A.A.*, 114 Nev. 690 (1998), is cited for the proposition that a quasi-fiduciary relationship exists between an insurer and insured. While this is a correct

[12] The *Comunale* and *Johansen* cases did involve an issue of coverage under the policy, which was resolved against the insurer, but they are dissimilar to this case where UAIC had a reasonable belief there was *no policy in force* as Lewis never paid his premium timely and, not merely an argument *against coverage* for the loss.

interpretation *when a policy in force*, it has little application to the situation at bar. Further, in *Landow v. Medical Ins. Exch. of Cal.*, 892 F. Supp. 239 (1995) found an insurer could be held liable for harm caused to an insured by a failure to settle a claim prior to litigation. However, in that case there **was no issue as to coverage or of a policy being in force**. In fact, in *Landow* the parties *acknowledged coverage was in effect* and merely disagreed over whether the insurer should subject an insured to the stress of litigating the claim. *Id.* Accordingly, that case in no way stands for the proposition that UAIC would have owed such a duty to Lewis, here, when there was no evidence that UAIC's actions were unreasonable or, that it knew of any claimed argument for ambiguity.

Appellants' cite to *Pemberton v. Farmers Ins. Exch.*, 109 Nev. 789, 858 P.2d 380 (1993), broadly, for the proposition that 'insurers have a duty to investigate.' Regardless, it is clear that in that case the court held that a claim for insurance bad faith *does not accrue until the underlying contractual action is resolved. Id.* As such, the court there felt the insurer's duties did not accrue to the insured until *legal entitlement to benefits was established.* Here, the Appellants did not **prove a policy in force** (and, therefore, legal entitlement) until October 2013. Moreover, a prior judge had already found that there was no policy in effect. As such, this case also does not lend Appellants support for the proposition that UAIC committed any actionable bad faith *at the relevant time the claim was denied.*

Finally, Appellants rely on *Allstate v. Miller*, 212 P.3d 318 (2009), for the proposition that the implied covenant of good faith and fair dealing included a duty to notify of settlement offers. Again, however, Appellants fail to address that, in *Miller*, there *was simply no question as to whether a policy was in effect.* This is an important fact that distinguishes this case from the one at bar as the implied covenant of good faith and fair dealing necessarily *flows from the existence of a valid policy.*

In any event, *Allstate v Miller* articulates the correct standard for review here under Nevada law. That case stands for the proposition that Nevada follows *the genuine dispute doctrine*, as set forth in *Guebara v. Allstate Insurance Company*, 237 F.3d 987, 992 (9th Cir. 2001). The court in *Allstate v Miller*, stated "**if the insurer's actions resulted from "'an honest mistake, bad judgment or negligence,'" then the insurer is not liable under a bad-faith theory.**" (citations omitted). *Miller*, 212 P.3d.at 317, 329 (emphasis added). Further, that "**When there is a genuine dispute regarding an insurer's legal obligations, the... court can determine if the insurer's actions were reasonable.** See *Lunsford v. American Guarantee & Liability Ins. Co.*, 18 F.3d 653, 656 (9th Cir. 1994) (interpreting California law); **This court reviews de novo the district court's decision in such cases and evaluates the insurer's actions at the time it**

made the decision. *Cal Farm Ins. Co.*, 31 Cal. Rptr. 3d at 629. *Id.* (emphasis added)

As can be seen the *Miller* decision actually supports UAIC's position. Namely, that a court can review an insurer's actions – at the time they were made – to determine if they were reasonable as a matter of law. Moreover, that 'bad faith' cannot be premised upon an 'honest mistake, bad judgment or negligence.' Here, UAIC argues its actions at the time must be found to have been reasonable and, certainly were not in 'bad faith' based on a reasonable review of the record.

2. UAIC did not breach its Duty to Defend Lewis where it reasonably believed there was no policy in effect at the time and, further, even if UAIC breached the duty to Defend, Appellants can show no damages.

While UAIC acknowledges no defense was afforded Lewis, UAIC asserts that, if this Court agrees UAIC reasonably believed no policy was in effect, it cannot have breached the duty to defend under an insurance policy later implied at law. Alternatively, even should this Court affirm that UAIC breached its duty to defend, UAIC asks that this Court also affirm that Lewis can show no damages from the failure to defend. As these arguments have previously been addressed in the instant brief at Section I.B., UAIC refers this Court to that section and re-incorporates those arguments herein.

3. UAIC did not Misrepresent Coverage.

Appellants' allege UAIC misrepresented coverage because UAIC claimed there was no coverage "despite there being evidence of the ambiguity." However, Appellants' present *no evidence* to support this charge. Rather, it appears from Appellants' argument that because UAIC was eventually found to owe coverage for an ambiguity in a renewal – *an issue never raised at the time* – UAIC should be guilty of claiming there was no coverage *in the past*. Appellants' argument is backwards. UAIC asks this Court to affirm that, if UAIC's actions were reasonable at the time, it cannot be liable for 'misrepresenting' coverage later merely because its position was found to be incorrect.

Appellant appears to be re-litigating, in this section, the Court's determination of an ambiguity and, cites case law to that effect. However, the ambiguity has already been decided. Accordingly, Appellants' discussion of the ambiguity again here is of absolutely no value save that UAIC's interpretation was reasonable. In terms of Appellants' claims that UAIC *misrepresented* coverage, the relevant statutory language governing misrepresentations by an insurer is set forth in N.R.S. § 686A.310(1)(a) which states that '[m]isrepresenting to insureds or claimants pertinent facts or insurance policy provisions relating to any coverage at issue' is considered an unfair practice.

The purpose of this subsection is to prevent an insurer misrepresenting the terms of an insurance policy to its insured, or misrepresenting to its insured facts within the insurer's knowledge that could potentially give rise to coverage. See *Albert H. Wohlers & Co. v. Bartgis,* 114 Nev. 1249, 969 P.2d 949, 961 (Nev. 1998) (insurer misrepresented to the insured that a policy was similar to the insured's previous policy and unilaterally inserted provisions into the policy without disclosing their effect to the insured). Moreover, *misrepresent* is defined as "to give a false or misleading representation, usually with an intent to deceive or be unfair. See *Merriam Webster Dictionary, 2014.*

As such, to have misrepresented something the party needs *knowledge of the falsity* or, have *the intent to deceive*. In this case, Appellants' can show neither. As explained above in more detail (in section I.A. which UAIC incorporates herein) UAIC performed an investigation after the loss and found there was no coverage in effect because Lewis failed to timely pay his premium. Moreover, at no time prior to this lawsuit (*which was filed in May 2009*) was UAIC **ever notified** there was an issue as to a claimed ambiguity in the renewal. In fact, the claimed ambiguity was Appellants' **second argument for coverage in this case.** Accordingly, UAIC had neither the knowledge of the ambiguity claim nor, any intent to deceive, when it denied the claim and, as such, did not commit any misrepresentation.

Therefore, as Appellants' cite absolutely no facts to support their claim that UAIC either knew or, should have known, of the alleged ambiguity at the time it denied the claim, nor that UAIC made any false or misleading statement at the time regarding coverage, this Court can affirm the grant of summary judgment in this regard.

4. UAIC did not Breach its Duty to Investigate; UAIC reasonably investigated the claim and, based on the information known at the time, and reasonably believed no policy was in force.

Appellant contends that UAIC 'failed to investigate the claim' and, therefore, summary judgment on the extra-contractual claims was improper. However, Appellant makes only argument in this regard with absolutely ***no facts*** to support its charge. Conversely, UAIC has cited facts in evidence in support of a reasonable investigation under the circumstances at the time.

Appellants' cite *Pemberton v. Farmers Ins. Exch.*, 109 Nev. 789, 858 P.2d 380 (1993), for the proposition that 'insurers have a duty to investigate.' Certainly, however, a "reasonableness standard" certainly must be applied and, as such, such a duty must be reviewed in the *context of the issue involved* and, the *information available at the time*. This concept is fairly well explored in the three cases cited by Appellants' on this issue and, as will be shown, *actually support the UAIC's position.*

In *Troutt v. Colorado Western Ins. Co.*, 246 F. 3d 1150 (9th Cir. 2001), the issue was whether a claim was covered under a liquor liability policy and whether the insurer failed to investigate. The record revealed that after the insurer was notified of the loss it conducted an investigation which revealed no facts that alcohol was a factor in the loss. Based on this investigation, the insurer denied the defense of the claim. Later, however, deposition testimony suggested alcohol may have been a factor. On review, the court found that while there was coverage, there was no breach of the duty to defend or, investigate. Specifically, the Court in *Troutt* held that the investigation must be reasonable based on all available evidence. *Id.* at 1162. There, the court held that though the insurer's decision ***was later found to be erroneous***, the facts gathered at the time showed there was no coverage, and thereby the insurer did not breach its duty to investigate. *Id.* at 1162.

Tynes v. Bankers Life Co., 730 P. 2d 1115 (MT. 1986), also cited by Appellant, is completely distinguishable. In that case, the insurer had denied benefits, under a group health insurance policy, claiming the plaintiff was not an "employee" of the insured company and, as such, owed no benefits. However, in upholding a verdict against the insurer for coverage and, bad faith, the court found there was evidence that the insurer's *initial investigation had actually found the Plaintiff was an employee* and, indeed, the insurer had paid benefits under the

policy, before later changing its coverage decision after subsequent investigations. *Id.* at 1123-24.

Finally, in *KPFF, Inc. v. Cal. Union Ins. Co.*, 66 Cal. Rptr. 2d 36 (CA. 1997), the court affirmed an insurer's decision to deny coverage and defense of claims of "seismic defect" against its an insured. In that case, claims arose as to defects in a building designed by the insured. After the original action was settled, a second action was filed which alleged seismic defects which had contributed to further damage to the building. The defendant insurer accepted the "non-seismic claims" - but denied coverage and defense for the seismic claims, stating they had not been part of the original claim. The insured and its new insurer sued the prior insurer for denying coverage of those claims. The issue for the court was whether the allegations in the first complaint was sufficient to put the insurer on notice of the seismic claims and, whether their investigation had been sufficient. In affirming the finding of no coverage and, no breach of the duty to investigate, the Court stated as follows:

> **"An insurer thus has no duty to investigate matters which are not relevant to the performance of its contractual obligation to properly handle the insured's claim according to the terms of the policy. (See** *California Shoppers, Inc. v. Royal Globe Ins. Co., supra*, 175 Cal. App. 3d at p. 37.**)"**

Id. at 45.

Under the above analyses, it seems clear that from the facts present at the time Appellants' made demand against Lewis, UAIC promptly and reasonably investigated and, found there was simply no policy in effect. Moreover, no facts were ever found or, presented, at the time regarding an alleged ambiguity. The fact is, contrary to Appellants' arguments that UAIC did 'no investigation', UAIC investigated this coverage issue twice before declining coverage and defense of the underlying suit. UAIC's argument and, facts in support of its investigation of more fully set forth in Section I.A., herein, and UAIC incorporates them for this argument. In this way, while Appellants' complain UAIC did "no investigation", the facts[13] tell a different story. As in *Troutt*, UAIC conducted a prompt investigation (immediately upon notice of the claim and, again when demand by Appellants' was made) and found no coverage. The fact that UAIC's decision was now, six years later, shown to be erroneous does not mean that UAIC breached its duty as there was *no information at the time suggesting Lewis was claiming an ambiguity* in the renewal. Further, *unlike* the insurer in *Tynes*, discussed above, none of UAIC's investigations *ever* revealed coverage. The fact is, Appellants' must admit that the record reveals that the **first time** an ambiguity in the renewal was raised as a possible argument for coverage was in about March 2010 – *during this litigation*. In fact, the record reveals this was the second argument for coverage

[13] Facts which, UAIC must point out, Appellant failed to include in the Excerpts of the Record.

raised by Appellants' as, initially, Appellants' claimed Lewis had in fact made his payment and UAIC lost it. (*ER p. 485-6)* Accordingly, UAIC could not have possibly guessed at some future legal argument, that Appellants' themselves did not raise until March 2010. As the Court in *KPFF* noted above, an insurer has no duty to investigate matters which have a 'speculative possibility' when investigating a claim. *KPFF, Inc.*, 66 Cal. Rptr. 2d 36, 44. UAIC had no duty to investigate the ***speculative possibility*** the insured would claim ambiguity in a renewal when that was never raised to UAIC at the time.

In sum, based on all the evidence available at the time, after investigating coverage, UAIC denied coverage for the loss based upon a reasonable basis that there was no policy in force and, therefore, no coverage for the loss. Under the case law cited herein, this cannot be a basis for bad faith remedies against UAIC.

5. *UAIC did not breach its duty to notify of settlement demands because, alternatively, Allstate v Miller should not be retroactively applied, where UAIC reasonably believed no policy was in effect it had no such duty and, further Lewis could not have satisfied the demand on his own anyway.*

Appellants' also argue UAIC breached its duties by failing to inform Lewis of a settlement demand under the ruling in *Allstate v Miller*. UAIC believes Appellants' argument must fail for three reasons. First, UAIC believes that, under prevailing case law, the decision of the Nevada Supreme Court in the *Miller* case in 2009 should not be retroactively applied to UAIC's actions in 2007. In the

alternative, UAIC argues that, if this Court agrees UAIC reasonably relied on their coverage determination that no policy was in effect, there should be no breach of the duty to inform. Finally, and also in the alternative, UAIC argues that Lewis had no chance to pay the settlement and, as such, the failure to inform was not prejudicial.

a. The ruling in Miller should not be retroactively applied to UAIC in the case at bar as the Defendant could not foresee the new precedent and substantial prejudice would accrue to Defendant.

While UAIC acknowledges the Court in *Miller* did hold that the implied covenant of good faith and fair dealing included a duty to notify of settlement offer, the Appellants' fail to note that the *Miller* case was only released in July 2009 – fully *2 years after the alleged actions by UAIC in this case.* Accordingly, under prevailing case law, UAIC asks that this Court not apply the *Miller* decision ***retroactively*** as same would cause undue prejudice to UAIC who *could not have foreseen the precedent.*

In *Breithaupt v. USAA Property & Casualty Co.*, 110 Nev. 31, 867 P.2d 402 (1994), a new rule of law was not retroactively applied against an insurer. In that case, the insured sought a finding that the insurer had breached a provision of a new statute requiring insurers to offer Uninsured motorist ("UM") protection to

insureds. In affirming judgment for the insurer, the Nevada Supreme Court found that a new rule of law should not be applied retroactively, as follows:

> **"In determining whether a new rule of law should be limited to prospective application, courts have considered three factors: (1) "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;" (2) the court must "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation;" and (3) courts consider whether retroactive application "could produce substantial inequitable results." *Citations omitted.***

Id. at 35-36, 405-406.

In this case, in terms of the first prong of the test, it is clear that the *Miller* decision clearly established a new principle of law on an issue of first impression not previously foreshadowed. Specifically, the Court in *Miller* clearly stated it was establishing a new rule of law[14]. For the second prong, looking at the history of the rule and its purpose and whether application retroactively would 'further or retard its operation', it seems clear that applying it retroactively would serve no purpose, save to punish UAIC for failure to comply with a rule that it had no reason to know would later become law. Under the third prong of the test, whether retroactive

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[14] We now join these jurisdictions and conclude that an insurer's failure to adequately inform an insured of a settlement offer is a factor for the trier of fact to consider when evaluating a bad-faith claim. *Miller* at 310.

application could produce substantial inequitable results, UAIC believes this prong clearly weighs in favor of **no** retroactive application. For the Court here to hold UAIC's actions **in July 2007** improper, under a rule of law set **in July 2009**, would cause an inequitable result. Appellants' argument that UAIC's failure to comply with a yet unannounced rule of law, subjecting it to bad faith resulting in a multi-million dollar judgment for Appellants', is clearly inequitable.

Accordingly, under the general rule for application of new rules of law and, the factors for the test relied on in *Breithaupt*, UAIC asks this Court not to retroactively apply the rule of law, stated in *Miller*, to UAIC's actions 2 years prior, as the result would clearly be inequitable and unfair.

b. The duty to inform, under *Miller*, is inapplicable, where, as here there was a good faith dispute over the existence of a policy in effect

Appellants' also fail to address the fact that, in *Miller*, there *was simply no question as to whether a policy was in effect.* This is an important factor that distinguishes the *Miller* case from the case at bar as the implied covenant of good faith and fair dealing necessarily *flows from the existence of a valid policy* and here UAIC reasonably maintained no such policy existed.

In *Miller* the insured had claimed the insurer had failed to notify him of settlement offers and/or gave him a chance to contribute to same. The logic for the decision in *Miller* is that the duties of an insurer in regard to settlement demands

flows from the insurers right to control the defense and settlement of a claim. *Id.* at 309. Accordingly, because if its right to control the settlement, the insurer necessarily has a duty to notify of settlement offers because the insured has a right to know how the insurer values the claim, the possibility it may subject the insured to litigation, and the possibility of an excess verdict, etc. In such cases, if the insurer *declines the offer,* the insured has right to know so he/she may contribute, etc. Based on this reasoning, the insurer only has a duty to inform because the insurer undertakes the defense and settlement process and, accordingly, an insured *would have an expectation* the insurer will pay reasonable settlement demands. Therefore, where, as here, the insured has reason to know a policy was not in existence, *that expectation does not exist* and, therefore, there should be no duty to inform.

Alternatively, the Appellants' essentially asked the Court below to *imply a policy* at law and, as such, this Court should not retroactively apply the implied covenant of good faith and dealing. If UAIC had no reason to foresee a future argument for coverage in a renewal UAIC should not be held accountable for failing to notify of a settlement offer under a future policy. In any event, this Court can review an insurer's actions – at the time they were made – to determine if they were reasonable as a matter of law. See *Miller* at 317, 329. (holding when there is a genuine dispute regarding an insurer's legal obligations, the district court can

determine if the insurer's actions were reasonable). Accordingly, the failure to inform of settlement offers must be viewed under this rule as well.

Here, UAIC reasonably believed no policy was in force and, as such, that it had no duty to notify of settlement offers and, UAIC asks this Court to review same under the standard set forth in *Miller* and affirm that UIAC committed no such bad faith.

c. UAIC's failure to inform did not prejudice Plaintiffs' because Lewis could not have satisfied the demand on his own, anyway.

Part of the reasoning behind the Court's ruling in *Miller* was that the insurer would have a duty to notify of settlement offers such that an insured may contribute to or, satisfy, the demand on his or her own. In this case, it is clear that Lewis would not have been able to satisfy the offer regardless of whether UAIC had notified him of same and, as such, Appellants' were not prejudiced by this failure to inform.

In *Hicks v Dairyland Ins. Co.*, 2010 U.S. Dist. LEXIS 63597 (U.S. Dist NV 2010), the court ruled that, in part, the capability of the insured to pay a settlement offer was a factor in determining whether an insurer was liable for a failure to inform of a judgment. In that case the plaintiff failed to provide any evidence that the insured could have paid the offer *even if he had known about it. Id.*

Here, the Appellants' have not presented a shred of evidence that Lewis could have satisfied their demand *even if he had been informed of same.* Moreover, there is ample evidence that, in fact, he could not have paid the offer. At deposition, Lewis stated that around the time of this loss (July 2007) "sometimes money was tight." *(ER p. 383, lines 16-21).* Further, Lewis also testified he was not working at the time and his girlfriend was supporting him and, he is in debt. *(ERp.441, lines 23-25 & p. 442, lines 1-12).*

Accordingly, it seems clear that Lewis' testimony provides ample proof that it Lewis would not have been able to satisfy the Nalder's offer – *even* had he known about it. Accordingly, as there was no prejudice to Lewis' for having failed to so inform him, UAIC should not be liable for breach of any duty to so inform here.

6. Plaintiffs' offer no evidence whatsoever to support any breach of N.R.S. 686A.310 by UAIC where a reasonable dispute as to coverage existed.

N.R.S. 686A.310 lists several specific bases for liability for an insurer in the handling and processing of claims. Appellants' have presented **no evidence** supporting any issue of fact regarding the UAIC's breach of any section of this statute. Accordingly, as a good faith dispute existed as to coverage and, Appellants' have pointed to no independent evidence of a breach this statute by

UAIC, this Court can affirm the District Court's grant of summary judgment on these claims.

In *Hicks v Dairyland Ins. Co.*, 2010 U.S. Dist. LEXIS 63597 (U.S. Dist NV 2010), the court in Nevada held that a plaintiff's failure to bring forth any evidence or, make any argument opposing a Motion for summary judgment on these issues, serves as grounds for dismissal.

In the case at bar, Appellants' alleged in their Complaint three possible breaches by UAIC of this statute. Specifically, they alleged UAIC "wrongfully refused to cover the value of Nalder's claim", "wrongfully failed to settle when they had opportunity to do so" and "wrongfully denied coverage." The Complaint also claims UAIC "failed to implement reasonable standards for prompt investigation" of such claims. *(SER pps. 695-705, paragraphs 44-46).*

Pursuant to *N.R.S. 686A.310*, Appellants' only arguable grounds for a claim under said allegations would be under subsections (c) and (e) (failing to implement standards and failing to effectuate prompt settlement when liability reasonably clear.) UAIC believes there is no material issue of fact regarding either of these issues – or, any other under any provision *N.R.S. 686A.310* - to preclude affirming the court below. UAIC has outlined, above, that its investigation was reasonably prompt (See argument in section I.A, herein) and, as such, there is no evidence it

did not implement such reasonable standards. Moreover, as the investigation found no coverage for the loss, the mere fact that the decision was later found to be incorrect does not mean UAIC failed to implement reasonable standards. Similarly, again, UAIC argues it did not fail to promptly settle because, as discussed above, it relied, in good faith, on its finding that no policy was in effect. Accordingly, if this Court also agrees UAIC coverage denial was based on a reasonable basis, etc., there also should also be no breach of subsection (e) of this statute.

Accordingly, for all the above, UAIC asks, that this Court also affirm the District Court's grant of summary judgment as to any possible claims under *N.R.S. 686A.310* Appellants' may have.

a. Alternatively, claims under N.R.S. 686A.310 *et seq.*, as same are not available under an implied or, constructive, insurance contract.

The only evidence at bar is that Lewis' June 2007 policy of insurance terminated *prior* to the loss, and, his new July 2007 policy did not incept until *after* the loss. Accordingly, UAIC argues that even with the determination of an ambiguity in the renewal, Appellants' remedy was for the Court to imply a contract at law. Accordingly, under the case cited by UAIC, the Unfair Claims Practices Act claims should be dismissed as no such claim would lie under an implied contract at law.

In *Nevada Assoc. Servs., Inc. v First Amer. Title Ins. Co.*, 2012 U.S. Dist. LEXIS 105466 (U.S. Dist. NV 2012), the court there found that the plaintiffs in that case were seeking an *implied insurance* contract and, as such, *N.R.S. 686A.310* was simply inapplicable to such a constructed contract and dismissed the claims.

In this case, it is undisputed that Appellants' argument for coverage was an ambiguous renewal statement to Lewis. As such, it is clear from these facts that Appellants' legal remedy sought the court to *imply* a constructive contract by finding the ambiguity. Accordingly, if this Court agrees that Lewis was granted an implied contract (policy) at law - Appellants' *would have only an implied insurance contract for the date of loss*. See *Wilson v. Career Educ. Corp.*, 729 F.3d 665 (2013) (A quasi-contract or, contract implied in law, is one in which no actual agreement between the parties occurred, but a duty is imposed to prevent injustice).

UAIC argues that, under such a construct, Appellants have no cause of action under N.R.S. 686A.310, as these causes of action were not anticipated for 'implied contracts'. The statute only applies, by its own terms, to an *insurance policy.* Here because it is undisputed there was no insurance policy in effect on the date of loss and, it was only implied later, N.R.S. 686A.310 should not be applied retroactively. Accordingly, if UAIC's belief was reasonable, it would not be just

nor, meet the requirements of the statute to hold UAIC to have been governed by this statute 6 years ago on a contract that would only be formed, by law, *in the future*.

Therefore, for all of the above, UAIC asks, in the alternative, that that this Court affirm the grant of summary judgment on Appellants' causes of action pursuant to N.R.S. 686A.310 because no such right of action exists for an implied contract (policy).

7. A finding of coverage does not automatically create an issue of fact in regards to Extra-contractual or, "Bad Faith" claims.

Despite Appellants' arguments, it is clear that Nevada law - including *Miller v Allstate* cited by Appellants' – supports that a Court may review an insurer's actions and determine they were ***reasonable as a matter of law***. Accordingly, this court can affirm that issues of "bad faith" are not automatically questions of fact even if coverage is found later.

This conclusion is confirmed by *Allstate v Miller* states: "**When there is a genuine dispute regarding an insurer's legal obligations, the district court can determine if the insurer's actions were reasonable**. *Miller* at 317, 329. (emphasis added)

As such, a court can review an insurer's actions – at the time they were made – to determine if they were reasonable as a matter of law. Moreover, that

'bad faith' cannot be premised upon an 'honest mistake, bad judgment or negligence.' Here, Defendant argues, UAIC actions at the time must be found to have been reasonable and, certainly were not in 'bad faith' based on a reasonable review of the record discussed herein. (See section I.A., herein).

Accordingly, the UAIC asks this court to affirm the district court to find UAIC's were reasonable as a matter of law and that the determination of coverage for an ambiguity did not "automatically" create an issue of fact.

CONCLUSION

UAIC respectfully asks that this Court to deny Appellants' appeal on all issues and, affirm the District Court's Order of October 30, 2014 in all respects. In alternative, that this Court find UAIC did not breach of the duty to defend on a policy implied at law.

Dated this 21st day of May, 2014.

ATKIN WINNER & SHERROD

s/ Matthew J. Douglas
By: Matthew J. Douglas
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 13,980 words.

Dated this 21st day of May, 2014.

ATKIN WINNER & SHERROD

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STATEMENT OF RELATED CASES

Appellee here certifies that, to Appellee's knowledge, there are no cases or appeals pending before this Court related to the present appeal.

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kirstin E. Largent

CERTIFICATE OF SAMENESS

I, Matthew J. Douglas, certify that this brief is identical to the version submitted electronically on May 21, 2014, pursuant to Rule 6(c) of the Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases.

Date: May 22, 2014

Signature: s/ Matthew J. Douglas

CASE NO. 13-17441

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES NALDER, Guardian Ad Litem on Behalf of Cheyanne Nalder and GARY LEWIS, individually, Appellants, vs. UNITED AUTOMOILE INSURANCE COMPANY, Respondent.	No. 13-17441 D.C. No. 2:09-cv-01348-RJC-GWF District of Nevada, Las Vegas

APPELLANTS' REPLY BRIEF

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INTRODUCTION[1]

In this case, the insurer has the financial power and expertise to defend under a reservation of rights while doing its investigation or filing a declaratory relief action; however, the insured and the claimant has no power. UAIC chose this method, deciding not to defend at all, which posed the most severe downsides for them because it has the most severe downside for the insured. However, they picked it. They should have paid the policy or at the least defended under a reservation of rights and filed a declaratory relief action. Because of UAIC's decisions, its insured has a judgment against him, and its insured and the claimant were forced to incur substantial attorneys fees and costs to receive the insurance proceeds that should have been paid many years ago. The measure of damages for this is, at a minimum, the excess judgment. Further, interest, attorneys fees and costs, and all consequential damages should have been awarded for this.

Respondent's liability for breaching its duty to defend, misrepresenting coverage, breaching its duty to investigate, breaching its duty to inform, and

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[1] In this Introduction, there are no citations to the appendix as this section constitutes counsel's summary of the events and is thus intended as argument. The facts supporting this introduction are set forth in the Statement of Facts and each statement of fact is supported by an appropriate citation to the appendices.

violating N.R.S. 686A.310 is, at the very least, an issue of fact to be determined by a jury. As such, this case should be reversed and remanded.

ARGUMENT

A. A VALID STATE COURT JUDGMENT IS THE MINIMUM MEASURE OF DAMAGES IN A FAILURE TO DEFEND CASE

1. As a Matter of Law, the Valid State Court Judgment, Including Pre- and Post- Judgment Interest, was Proximately Caused by the Failure to Provide Coverage

Oddly, even though Respondent failed to file a cross-appeal, it is arguing that the district court's order finding that it breached the duty to defend should be overturned by this court. Obviously, this is not proper as this issue is not in front of this court. As such, this Court must acknowledge that Respondent breached the duty to defend. As such, UAIC has a duty to indemnify GARY LEWIS. *See United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 120 Nev. 678 (Nev., 2004).

UAIC's failure to provide coverage and their breach of their duty to defend was the proximate cause of the Judgment being entered against GARY LEWIS. "When the insurer refused to defend and the insured does not employ counsel and presents no defense, it can be said the ensuing default judgment is proximately caused by the insurer's breach of the duty to defend." *Pershing Park Villas v. United Pac. Ins. Co.*, 219 F.3d 895 (9th Cir. 2000).

As, such, the full judgment is the minimum measure of damages for both the contractual claims and the bad faith claims, as a matter of law.

In opposition, Respondent relies on an unpublished, and non-binding district court case relying on California law for the proposition that where there is no bad faith, the insurer is not responsible for the entire judgment. *See Andrew v. Century Surety Co.*, 2014 U.S. Dist. Lexis 60972, 29 (2014). Along with being unpublished and non-binding, this case is also not persuasive. The California case it relied upon held that "[w]here there is **no opportunity to compromise the claim and the only wrongful act of the insurer is the refusal to defend**, the liability of the insurer is ordinarily limited to the amount of the policy plus attorneys' fees and costs." *See Comunale v. Traders and Gen. Ins. Co.*, 50 Cal. 2d 654, 659, 328 P.2d 198 (1958) (emphasis added). In this case, there were multiple opportunities to compromise the claim and the failure to defend was not the only wrongful act. Further, there is ample evidence to support a claim for bad faith. As such, the full judgment is the minimum measure of damages for both the contractual claims and the bad faith claims, as a matter of law.

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2. All consequential damages should be awarded for Appellee breaching the duty to defend including Costs, Attorney's Fees, and interest on the policy limits that were withheld

"When the insurer refused to defend and the insured does not employ counsel and presents no defense, it can be said the ensuing default judgment is proximately caused by the insurer's breach of the duty to defend." *Pershing Park Villas v. United Pac. Ins. Co.*, 219 F.3d 895 (9th Cir. 2000). Further the California Court of Appeals held that a carrier who breached the duty to defend may be liable for consequential damages above policy limits. *Carlson v. Century Surety Co.*, 2012 U.S. Dist. LEXIS 23119 (N.D. Cal. Feb 23, 2012). In *Carlson*, the Court held that because "a judgment in excess of the policy limits is a foreseeable outcome of the breach of the duty to defend," even if the insurance company did not violate the implied covenant of good faith and fair dealing, if the insurer violated its duty to defend, it may be liable for the default judgment, even if in excess of the policy limit. *Id.*

As such, the District Courts order denying any consequential damages should be reversed and the action remanded for a determination of the appropriate amount of consequential damages.

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B. SUMMARY JUDGMENT SHOULD BE REVERSED ON THE NON-CONTRACTUAL CLAIMS

1. UAIC Breached its Duty to Defend

Although the District Court found that UAIC breached its duty to defend, it found that there was no bad faith. Without filing a counter-appeal, the Respondent cannot request this court to overturn the district court's finding on the breach of the duty to defend, as such, this Court must disregard any argument regarding such.

As a failure to defend can be bad faith, this presents a question of fact for the jury which prevents summary judgment. As such, the District Court's order should be reversed and remanded.

2. UAIC Misrepresented Coverage

UAIC misrepresented to its insured that there was no coverage under his policy.

Although the District Court found that there was coverage due to the ambiguity, it failed to acknowledge that the insurance company has the knowledge of how policies work, and that ambiguities are construed in favor of coverage. Despite there being evidence of ambiguity, UAIC misrepresented that there was no coverage for the policy. As such, there is evidence of bad faith, that prevents granting summary judgment in favor of

UAIC. As such, As such, the District Court's order should be reversed and remanded.

3. UAIC Breached its Duty to Investigate

Insurers have a duty to investigate. *Pemberton v. Farmers Ins. Exchange*, 109 Nev. 789, 858 P.2d 380, 382 (Nev., 1993). "Insurers have the duty to investigate claims and **coverage** in a prompt fashion." *Troutt v. CO W. Ins. Co.*, 246 F.3d 1150, 1162.

Respondent attempts to reply on *Troutt's* holding that "investigation must be reasonable based on all available evidence, (*Id.* at 1162), for the proposition that based on the evidence it had, its investigation was reasonable. However, what it fails to acknowledge is that UAIC utterly failed to investigate whether coverage existed for Gary on the claim, made no attempt to investigate the claim made against Gary Lewis, and failed to abide by established insurance claims handling practices in its handling of this claim. Although UAIC claims that it investigated the claim, "confirming the lapse through their underwriting department" is not an investigation. A true investigation would have included looking at the history of Lewis' policy, any potential ambiguities, and attempting to find coverage.

As explained in detail above, Lewis had coverage under the policy and UAIC failed to investigate. Therefore, summary judgment was not proper in

finding that UAIC did not commit bad faith. As such, the District Court's order should be reversed and remanded.

4. UAIC Breached its Duty to Inform

UAIC also made absolutely no efforts to inform Gary Lewis of the demand for the policy limits and the offer to settle Cheyanne's significant claim for a mere $15,000.00. UAIC completely ignored Cheyanne's claim and did absolutely nothing other than send Cheyanne's counsel a letter stating that there was no coverage. As noted above, the Court has continually held "at a minimum, an insured must equally consider the insured's interest and its own." *Miller v. Allstate*, 212 P.3d 318, 326 (Nev. 2009).

The undisputed fact is that UAIC made absolutely no efforts to inform Gary Lewis of the demand for the policy limits and the offer to settle Cheyanne's significant claim for a mere $15,000.00. Therefore, they breached their duty to inform. UAIC argues that *Miller* should not be applied to this case for only the duty to inform. However, it relies on it for all other inquiries on the breach of the covenant of good faith and fair dealings. As such, this argument is non-sensical. Additionally, this is not a new principal of law as UAIC claims as Miller stated "we join other jurisdictions." *See Id.* at 310.

Finally, Respondent relies on *Hicks v. Dairyland,* an unpublished decision, which cannot be relied upon by this court, for the proposition that if Lewis could not pay the demand, then it did not breach its duty to inform him of such demand. Not only is this a misstatement of Nevada Law, but UAIC has presented no evidence that Lewis could not pay any amount on a demand. There is no evidence provided that Lewis would not have been willing to borrow money from a friend or family member, or even gotten a loan to pay a demand rather than have a judgment entered against him. The fact is, it will never be known whether he could have because UAIC failed to inform him of the settlement demands.

This failure to inform, on its own, is sufficient to present the facts to the jury to determine whether the carrier violated the duty of good faith and fair dealing and is thus liable for a judgment entered against its insured in excess of the applicable policy limits. *Id.* As such, the District Court's order should be reversed and remanded.

5. UAIC Violated N.R.S. 686A.310

As explained above, there was a valid contract of insurance between Lewis and UAIC and there was actual coverage under the policy for the loss in question. When ambiguous language in a contract is construed in the

insureds favor, it does not establish an "implied" contract, but rather provides coverage under an actual insurance contract.

Respondent again relies on an unpublished district court decision for its opposition. However, it misrepresents its holding to this court. Contrary to Respondent's assertions *Nevada Assoc. Serv. Inc. v. First Amer. Title Ins. Co.* does not hold that NRS 686A.310 was inapplicable to an implied insurance contract. Rather the court held that NRS 686A "cannot apply because the allegations of the complaint are not based on an insurance policy." *See Nevada Assoc. Serv. Inc. v. First Amer. Title Ins. Co.*, 2012 U.S. Dist. LEXIS 105466, 3 (U.S. Dist. NV 2012). Further, the case dealt with a contract regarding attempts to collect debts implied by a course of conduct . Thus, the case is irrelevant to the instant inquiry.

UAIC violated N.R.S. § 686A. UAIC wrongfully refused to cover the value of the claim of Cheyanne Nalder, wrongfully failed to settle within the Policy Limits when they had the opportunity to do so, wrongfully denied coverage, failed to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under its insurance policies, and failed to effectuate the prompt, fair and/or equitable settlement of the claims in which liability of the insurer was very clear, and which clarity was conveyed to UAIC. This is sufficient to present the facts to the jury to

determine whether the carrier violated the duty of good faith and fair. As such, the District Court's order should be reversed and remanded.

6. Where the Insured Wins on the Coverage Issue by Summary Judgment, the Potential Bad Faith for that Denial of Coverage is a Question of Fact for the Jury that Precludes Summary Judgment

Although the District Court found that there was coverage, he found as a matter of law there was no bad faith. Pursuant to *Miller,* bad faith is a question of fact. The Court specifically noted that "an insurer's failure to adequately inform an insured of a settlement offer is a factor for the trier of fact to consider when evaluating a bad-faith claim." *Id* at 325; see also *Allen*, 656 F.2d at 489 (recognizing that under California law "What is `good faith' or `bad faith' on an insurer's part has not yet proved susceptible to [definitive] legal definition. An insurer's `good faith' is essentially a matter of fact."). Thus, the District Court should have submitted this issue to the jury. As such, the case should be reversed and remanded.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse and remand with instructions to enter judgment for the verdict amount plus interest, cost, attorney fees and submit the question of bad faith

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and other compensatory damages to the jury.

DATED this 4th day of June, 2014

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

The undersigned hereby certifies that the foregoing "Appellants' Reply Brief" complies with the type-volume limitations of FRAP 32(a)(7)(A)(i).

The brief contains 2,418 words of text, and a *14-point* proportionately spaced type face has been used. Consistent with FRAP 32(a)(4), this brief's top, bottom, left, and right margins are each precisely one inch in width.

DATED this 4th day of June, 2014

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PROOF OF SERVICE

Pursuant to FRCP 5(b), I hereby certify that I am an employee of CHRISTENSEN LAW OFFICES, LLC, and that on this 4th day of June, 2014, I served a copy of APPELLANT'S REPLY BRIEF on the party below via Case Management/Electronic Case Filing (CM/ECF):

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CERTIFICATE FOR BRIEF IN PAPER FORMAT

(attach this certificate to the end of each paper copy brief)

9th Circuit Case Number(s): 13-17441

I, Jennifer M. Gooss, Esq. , certify that this brief is identical to the version submitted electronically on [date] June 4, 2014 .

Date June 9, 2014

Signature /s/ Jennifer M. Gooss

(either manual signature or "s/" plus typed name is acceptable)