

Case No. 78085

In the Supreme Court of Nevada

CHEYENNE NALDER, an individual; and
GARY LEWIS,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA, in and for the
County of Clark; THE HONORABLE DAVID M.
JONES, District Judge; and THE HONORABLE
ERIC JOHNSON, District Judge,

Respondents,

and

UNITED AUTOMOBILE INSURANCE COMPANY,
Real Party in Interest.

Electronically Filed
Jul 10 2019 04:09 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**UNITED AUTOMOBILE INSURANCE COMPANY'S APPENDIX
VOLUME 2
PAGES 251-500**

District Court Case No. 07A549111, Consolidated with 18-A-772220

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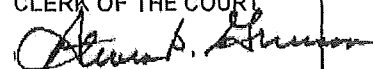
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Steven D. Grierson
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1 **COMP**

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6
7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 CHEYENNE NALDER,

CASE NO.: A5494+1 A-18-772220-C

10 Plaintiff,

DEPT NO.: XXIX Department 29

11 vs.

12 GARY LEWIS and DOES I through V,
13 inclusive,

14 Defendants.

15 **COMPLAINT**

16 Date: n/a
17 Time: n/a

18 COMES NOW the Plaintiff, CHEYENNE NALDER, by and through Plaintiff's attorney,
19 DAVID A. STEPHENS, ESQ., of STEPHENS & BYWATER, and for a cause of action against the
20 Defendants, and each of them, alleges as follows:

21 1. Upon information and belief, that at the time of the injury the Defendant, GARY
22 LEWIS, was a resident of Las Vegas, Clark County, Nevada, and that on or about December 2008
23 GARY LEWIS moved out of state and has not been present or resided in the jurisdiction since that
24 time.

25 2. That Plaintiff, CHEYENNE NALDER, was at the time of the accident, a resident of
26 the County of Clark, State of Nevada

27 3. That the true names or capacities, whether individual, corporate, associate or
28 otherwise, of Defendants names as DOES I through V, inclusive, are unknown to Plaintiff, who

1 therefore sues said Defendant by such fictitious names. Plaintiff is informed and believes and
2 thereon alleges that each of the Defendants designated herein as DOE is responsible in some
3 manner for the events and happenings referred to and caused damages proximately to Plaintiff as
4 herein alleged, and that Plaintiff will ask leave of this Court to amend this Complaint to insert the
5 true names and capacities of DOES I through V, when the names have been ascertained, and to join
6 such Defendants in this action.

7 4. Upon information and belief, Defendant, Gary Lewis, was the owner and operator of
8 a certain 1996 Chevy Pickup (hereafter referred as "Defendant vehicle") at all times relevant to this
9 action.

10 5. On the 8th day of July, 2007, Defendant, Gary Lewis, was operating the Defendant's
11 vehicle on private property located in Lincoln County, Nevada; that Plaintiff, Cheyenne Nalder,
12 was playing on the private property; that Defendant, did carelessly and negligently operate
13 Defendant's vehicle so to strike the Plaintiff, Cheyenne Nalder, and that as a direct and proximate
14 result of the aforesaid negligence of Defendant, Gary Lewis, and each of the Defendants, Plaintiff,
15 Cheyenne Nalder, sustained the grievous and serious personal injuries and damages as hereinafter
16 more particularly alleged.

17 6. At the time of the accident herein complained of, and immediately prior thereto,
18 Defendant, Gary Lewis, in breaching a duty owed to Plaintiffs, was negligent and careless, inter
19 alia, in the following particulars:

20 A. In failing to keep Defendant's vehicle under proper control;

21 B. In operating Defendant's vehicle without due care for the rights of the Plaintiff;

22 C. In failing to keep a proper lookout for plaintiffs

23 D. The Defendant violated certain Nevada Revised Statutes and Clark County Ordinances,
24 and the Plaintiff will pray leave of Court to insert the exact statutes or ordinances at the time of
25 trial.

26 7. By reason of the premises, and as a direct and proximate result of the aforesaid
27 negligence and carelessness of Defendants, and each of them, Plaintiff, Cheyenne Nalder, sustained
28 a broken leg and was otherwise injured in and about her neck, back, legs, arms, organs, and

1 systems, and was otherwise injured and caused to suffer great pain of body and mind, and all or
2 some of the same is chronic and may be permanent and disabling, all to her damage in an amount in
3 excess of \$10,000.00

4 8. By reason of the premises, and as a direct and proximate result of the aforesaid
5 negligence and carelessness of the Defendants, and each of them, Plaintiff, Cheyenne Nalder, has
6 been caused to expend monies for medical and miscellaneous expenses as of this time in excess of
7 \$41,851.89, and will in the future be caused to expend additional monies for medical expenses and
8 miscellaneous expenses incidental thereto, in a sum not yet presently ascertainable, and leave of
9 Court will be requested to include said additional damages when the same have been fully
10 determined.

11 9. Prior to the injuries complained of herein, Plaintiff, Cheyenne Nalder, was an able-
12 bodied female, capable of being gainfully employed and capable of engaging in all other activities
13 for which Plaintiff was otherwise suited. By reason of the premises, and as a direct and proximate
14 result of the negligence of the said Defendants, and each of them, Plaintiff, Cheyenne Nalder, was
15 caused to be disabled and limited and restricted in her occupations and activities, and/or suffered a
16 diminution of Plaintiff's earning capacity and future loss of wages, all to her damage in a sum not
17 yet presently ascertainable, the allegations of which Plaintiff prays leave of Court to insert here
18 when the same shall be fully determined.

19 10. That James Nalder as guardian ad litem for Plaintiff, Cheyenne Nalder, obtained
20 judgment against Gary Lewis.

21 11. That the judgment is to bear interest at the legal rate from October 9, 2007 until paid in
22 full.

23 12. That during Cheyenne Nalder's minority which ended on April 4, 2016 all statutes of
24 limitations were tolled.

25 13. That during Gary Lewis' absence from the state of Nevada all statutes of limitations
26 have been tolled and remain tolled.

27 14. That the only payment made on the judgment was \$15,000.00 paid by Lewis's insurer
28 on February 5, 2015. This payment extends any statute of limitation.

1 15. After reaching the age of majority an amended judgment was entered in Cheyenne
2 Nalder's name.

3 16. Plaintiff, in the alternative, now brings this action on the judgment to obtain a judgment
4 against Gary Lewis including the full damages assessed in the original judgment plus interest and
5 minus the one payment made.

6 17. In the alternative Plaintiff requests declaratory relief regarding when the statutes of
7 limitations on the judgments expire.

8 18. Plaintiff has been required to retain the law firm of STEPHENS & BYWATER to
9 prosecute this action, and is entitled to a reasonable attorney's fee.

10 CLAIM FOR RELIEF;

11 1. General damages in an amount in excess of \$10,000.00;

12 2. Special damages for medical and miscellaneous expenses in excess of \$41,851.89, plus
13 future medical expenses and the miscellaneous expenses incidental thereto in a presently
14 unascertainable amount;

15 3. Special damages for loss of wages in an amount not yet ascertained an/or diminution of
16 Plaintiff's earning capacity, plus possible future loss of earning and/or diminution of Plaintiff's
17 earning capacity in a presently unascertainable amount;

18 4. Judgment in the amount of \$3,500,000 plus interest through April 3, 2018 of
19 \$2,112,669.52 minus \$15,000.00 paid for a total judgment of \$5,597,669.52.

20 5. A declaration that the statute of limitations on the judgment is still tolled as a result of
21 the Defendant's continued absence from the state.

22 4. Costs of this suit;

23 5. Attorney's fees; and

24 ///

25

26 ///

27

28 ///

1 6. For such other and further relief as to the Court may seem just and proper in the
2 premises.

3 DATED this 3rd day of April, 2018.

4
5 STEPHENS GOURLEY & BYWATER

6 /s David A. Stephens
7 David A. Stephens, Esq.
8 Nevada Bar No. 00902
9 3636 North Rancho Drive
 Las Vegas, Nevada 89130
 Attorneys for Plaintiff

EXHIBIT "D"

FILED

JAN 11 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: *[Signature]*
CHIEF DEPUTY CLERK

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 70504

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

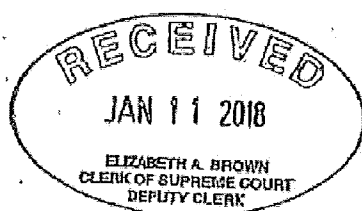
No. 13-17441

D.C. No.
2:09-cv-01348-RCJ-GWF

v.

ORDER CERTIFYING
QUESTION TO THE
NEVADA SUPREME
COURTUNITED AUTOMOBILE
INSURANCE COMPANY,
*Defendant-Appellee.*Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, PresidingArgued and Submitted January 6, 2016
San Francisco, California

Filed December 27, 2017

Before: Diarmuid F. O'Scannlain and
William A. Fletcher, Circuit Judges.* This case was submitted to a panel that included Judge Kozinski,
who recently retired.

18-01692

2 NALDER V. UNITED AUTO INS. CO.

SUMMARY**

Certified Question to Nevada Supreme Court

The panel certified the following question of law to the Nevada Supreme Court:

Under Nevada law, if a plaintiff has filed suit against an insurer seeking damages based on a separate judgment against its insured, does the insurer's liability expire when the statute of limitations on the judgment runs, notwithstanding that the suit was filed within the six-year life of the judgment?

ORDER

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 remains withdrawn pending further order. The parties shall notify the Clerk of this court within one week after the

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

NALDER V. UNITED AUTO INS. CO.

3

Nevada Supreme Court accepts or rejects the certified question, and again within one week after the Nevada Supreme Court renders its opinion.

I

Plaintiffs-appellants, James Nalder, guardian ad litem for Cheyanne Nalder, and Gary Lewis will be the appellants before the Nevada Supreme Court. Defendant-appellee, United Automobile Insurance Company ("UAIC"), a Florida corporation with its principal place of business in Florida, will be the respondent.

The names and addresses of counsel for the parties are as follows:

Thomas Christensen, Christensen Law Offices, LLC, 1000 South Valley View Boulevard, Las Vegas, Nevada 89107, and Dennis M. Prince, Eglet Prince, 400 South Seventh Street, Suite 400, Las Vegas, Nevada 89101, for appellants.

Thomas E. Winner, Susan M. Sherrod and Matthew J. Douglas, Aikin Winner & Sherrod, 1117 South Rancho Drive, Las Vegas, Nevada 89102, for respondent.

II

The question of law to be answered is:

Under Nevada law, if a plaintiff has filed suit against an insurer seeking damages based on a separate judgment against its insured, does the insurer's liability expire when the

statute of limitations on the judgment runs, notwithstanding that the suit was filed within the six-year life of the judgment?

The Nevada Supreme Court may rephrase the question as it deems necessary.

III

A

This is the second order in this case certifying a question to the Nevada Supreme Court. We recount the facts essentially as in the first order.

On July 8, 2007, Gary Lewis ran over Cheyanne Nalder. Lewis had taken out an auto insurance policy with UAIC, which was renewable on a monthly basis. Before the accident, Lewis had received a statement instructing him that his renewal payment was due by June 30, 2007. The statement also specified that "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy." The statement listed June 30, 2007, as the policy's effective date and July 31, 2007, as its expiration date. Lewis did not pay to renew his policy until July 10, 2007, two days after the accident.

James Nalder ("Nalder"), Cheyanne's father, made an offer to UAIC to settle her claim for \$15,000, the policy limit. UAIC rejected the offer, arguing Lewis was not covered at the time of the accident because he did not renew the policy by June 30. UAIC never informed Lewis that Nalder was willing to settle.

Nalder sued Lewis in Nevada state court and obtained a \$3.5 million default judgment. Nalder and Lewis then filed the instant suit against UAIC in state court, which UAIC removed to federal court. Nalder and Lewis alleged breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, fraud, and breach of section 686A.310 of the Nevada Revised Statutes. UAIC moved for summary judgment on the basis that Lewis had no insurance coverage on the date of the accident. Nalder and Lewis argued that Lewis was covered on the date of the accident because the renewal notice was ambiguous as to when payment had to be received to avoid a lapse in coverage, and that this ambiguity had to be construed in favor of the insured. The district court found that the contract could not be reasonably interpreted in favor of Nalder and Lewis's argument and granted summary judgment in favor of UAIC.

We held that summary judgment "with respect to whether there was coverage" was improper because the "[p]laintiffs came forward with facts supporting their tenable legal position." *Nalder v. United Auto. Ins. Co.*, 500 F. App'x 701, 702 (9th Cir. 2012). But we affirmed "[t]he portion of the order granting summary judgment with respect to the [Nevada] statutory arguments." *Id.*

On remand, the district court granted partial summary judgment to each party. First, the court found the renewal statement ambiguous, so it construed this ambiguity against UAIC by finding that Lewis was covered on the date of the accident. Second, the court found that UAIC did not act in bad faith because it had a reasonable basis to dispute coverage. Third, the court found that UAIC breached its duty to defend Lewis but awarded no damages "because [Lewis] did not incur any fees or costs in defending the underlying

action" as he took a default judgment. The court ordered UAIC "to pay Cheyanne Nalder the policy limits on Gary Lewis's implied insurance policy at the time of the accident." Nalder and Lewis appeal.

B

Nalder and Lewis claim on appeal that they should have been awarded consequential and compensatory damages resulting from the Nevada state court judgment because UAIC breached its duty to defend. Thus, assuming that UAIC did not act in bad faith but did breach its duty to defend Lewis, one question before us is how to calculate the damages that should be awarded. Nalder and Lewis claim they should have been awarded the amount of the default judgment (\$3.5 million) because, in their view, UAIC's failure to defend Lewis was the proximate cause of the judgment against him. The district court, however, denied damages because Lewis chose not to defend and thus incurred no attorneys' fees or costs. Because there was no clear state law and the district court's opinion in this case conflicted with another decision by the U.S. District Court for the District of Nevada on the question of whether liability for breach of the duty to defend included all losses consequential to an insurer's breach, we certified that question to the Nevada Supreme Court in an order dated June 1, 2016. In that order, we also stayed proceedings in this court pending resolution of the certified question by the Nevada Supreme Court.

After that certified question had been fully briefed before the Nevada Supreme Court, but before any ruling or oral argument, UAIC moved this court to dismiss the appeal for lack of standing. UAIC argues that the six-year life of the

default judgment had run and that the judgment had not been renewed, so the judgment is no longer enforceable. Therefore, UAIC contends, there are no longer any damages above the policy limit that Nalder and Lewis can seek because the judgment that forms the basis for those damages has lapsed. For that reason, UAIC argues that the issue on appeal is moot because there is no longer any basis to seek damages above the policy limit, which the district court already awarded.

In a notice filed June 13, 2017, the Nevada Supreme Court stayed consideration of the question already certified in this case until we ruled on the motion to dismiss now pending before us.

IV

In support of its motion to dismiss, UAIC argues that under Nev. Rev. Stat. § 11.190(1)(a), the six-year statute of limitations during which Nalder could enforce his default judgment against Lewis expired on August 26, 2014, and Nalder did not renew the judgment. Therefore, says UAIC, the default judgment has lapsed, and because it is no longer enforceable, it no longer constitutes an injury for which Lewis or Nalder may seek damages from UAIC.

In response, Nalder and Lewis do not contest that the six-year period of the statute of limitations has passed and that they have failed to renew the judgment, but they argue that UAIC is wrong that the issue of consequential damages is mooted. First, they make a procedural argument that a lapse in the default judgment, if any, may affect the amount of damages but does not affect liability, so the issue is inappropriate to address on appeal before the district court

has evaluated the effect on damages. Second, they argue that their suit against UAIC is itself "an action upon" the default judgment under the terms of Nev. Rev. Stat. § 11.190(1)(a) and that because it was filed within the six-year life of the judgment it is timely. In support of this argument, they point out that UAIC has already paid out more than \$90,000 in this case, which, they say, acknowledges the validity of the underlying judgment and that this suit is an enforcement action upon it.

Neither side can point to Nevada law that definitively answers the question of whether plaintiffs may still recover consequential damages based on the default judgment when six years passed during the pendency of this suit. Nalder and Lewis reach into the annals of Nevada case law to find an opinion observing that at common law "a judgment creditor may enforce his judgment by the process of the court in which he obtained it, or he may elect to use the judgment, as an original cause of action; and bring suit thereon, and prosecute such suit to final judgment." *Mandlebaum v. Gregovich*, 50 P. 849, 851 (Nev. 1897); see also *Leven v. Frey*, 168 P.3d 712, 715 (Nev. 2007) ("An action on a judgment or its renewal must be commenced within six years." (emphasis added)). They suggest they are doing just this, "us[ing] the judgment, as an original cause of action," to recover from UAIC. But that precedent does not resolve whether a suit against an insurer who was not a party to the default judgment is, under Nevada law, an "action on" that judgment.

UAIC does no better. It also points to *Leven* for the proposition that the Nevada Supreme Court has strictly construed the requirements to renew a judgment. See *Leven*, 168 P.3d at 719. Be that as it may, Nalder and Lewis do not

rely on any laxity in the renewal requirements and argue instead that the instant suit is itself a timely action upon the judgment that obviates any need for renewal. UAIC also points to Nev. Rev. Stat. § 21.010, which provides that "the party in whose favor judgment is given may, at any time before the judgment expires, obtain the issuance of a writ of execution for its enforcement as prescribed in this chapter. The writ ceases to be effective when the judgment expires." That provision, however, does not resolve this case because Nalder and Lewis are not enforcing a writ of execution, which is a direction to a sheriff to satisfy a judgment. See Nev. Rev. Stat. § 21.020.

Finally, apart from Nalder and Lewis's argument that it is inappropriate to address on appeal the effect of the statute of limitations on the size of damages they may collect, neither side squarely addresses whether the expiration of the judgment in fact reduces the consequential damages for UAIC's breach of the duty to defend. Does the judgment's expiration during the pendency of the suit reduce the consequential damages to zero as UAIC implies, or should the damages be calculated based on when the default judgment was still enforceable, as it was when the suit was initiated? Neither side provides Nevada law to answer the question, nor have we discovered it.

V

It appears to this court that there is no controlling precedent of the Nevada Supreme Court or the Nevada Court of Appeals with regard to the issue of Nevada law raised by the motion to dismiss. We thus request the Nevada Supreme Court accept and decide the certified question. "The written opinion of the [Nevada] Supreme Court stating the law

10 NALDER V. UNITED AUTO INS. CO.

governing the question[] certified . . . shall be res judicata as to the parties." Nev. R. App. P. 5(h).

If the Nevada Supreme Court accepts this additional certified question, it may resolve the two certified questions in any order it sees fit, because Nalder and Lewis must prevail on both questions in order to recover consequential damages based on the default judgment for breach of the duty to defend.

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.

Respectfully submitted, Diarmuid F. O'Scanlain and
William A. Fletcher, Circuit Judges.

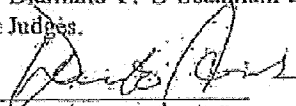

Diarmuid F. O'Scanlain
Circuit Judge

EXHIBIT "E"

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES NALDER, GUARDIAN AD
LITEM ON BEHALF OF CHEYANNE
NALDER; AND GARY LEWIS,
INDIVIDUALLY,
Appellants,

No. 70504

FILED

vs.
UNITED AUTOMOBILE INSURANCE
COMPANY,
Respondent.

FEB 23 2018

ELIZABETH A. HROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER ACCEPTING SECOND CERTIFIED QUESTION AND
DIRECTING SUPPLEMENTAL BRIEFING*

The United States Ninth Circuit Court of Appeals previously certified a legal question to this court under NRAP 5, asking us to answer the following question:

Whether, under Nevada law, the liability of an insurer that has breached its duty to defend, but has not acted in bad faith, is capped at the policy limit plus any costs incurred by the insured in mounting a defense, or is the insurer liable for all losses consequential to the insurer's breach?

Because no clearly controlling Nevada precedent answers that legal question and the answer could determine part of the federal case, we accepted that certified question and directed the parties to file briefs addressing that question. After briefing had been completed, respondent United Automobile Insurance Company informed this court that it had filed a motion to dismiss in the federal case. We then stayed our consideration of the certified question because a decision by the Ninth Circuit granting the motion to dismiss would render the question before this court advisory.

The Ninth Circuit has now certified another legal question to this court under NRAP 5. The new question, which is related to the motion to dismiss pending in the Ninth Circuit, asks us to answer the following:

Under Nevada law, if a plaintiff has filed suit against an insurer seeking damages based on a separate judgment against its insured, does the insurer's liability expire when the statute of limitations on the judgment runs, notwithstanding that the suit was filed within the six-year life of the judgment?

That question is focused on the insurer's liability, but elsewhere in the Ninth Circuit's certification order, it makes clear that the court is concerned with whether the plaintiff in this scenario can continue to seek the amount of the separate judgment against the insured as consequential damages caused by the insurer's breach of the duty to defend its insured when the separate judgment was not renewed as contemplated by NRS 11.190(1)(a) and NRS 17.214 during the pendency of the action against the insurer. We therefore choose to accept the Ninth Circuit's invitation to "rephrase the question as [we] deem necessary." Consistent with language that appears elsewhere in the certification order, we rephrase the question as follows:

In an action against an insurer for breach of the duty to defend its insured, can the plaintiff continue to seek consequential damages in the amount of a default judgment obtained against the insured when the judgment against the insured was not renewed and the time for doing so expired while the action against the insurer was pending?

As no clearly controlling Nevada precedent answers this legal question and the answer may determine the federal case, we accept this certified question as rephrased. See NRAP 5(a); *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 749-51, 137 P.3d 1161, 1163-64 (2006).

Appellants shall have 30 days from the date of this order to file and serve a supplemental opening brief. Respondent shall have 30 days from the date the supplemental opening brief is served to file and serve a supplemental answering brief. Appellants shall then have 20 days from the date the supplemental answering brief is served to file and serve any supplemental reply brief. ~~The supplemental briefs shall be limited to addressing the second certified question and shall comply with NRAP 28, 28.2, 31(c), and 32. See NRAP 5(g)(2). To the extent that there are portions of the record that have not already been provided to this court and are necessary for this court to resolve the second certified question, the parties may submit a joint appendix containing those additional documents. See NRAP 5(d). Given the relationship between the two certified questions, we~~ lift the stay as to the first certified question.

It is so ORDERED.¹

Douglas C.J.
Douglas

Gibbons J.
Gibbons

Hardesty J.
Hardesty

Cherry J.
Cherry

Pickering J.
Pickering

Stiglich J.
Stiglich

¹As the parties have already paid a filing fee when this court accepted the first certified question, no additional filing fee will be assessed at this time.

The Honorable Ron D. Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter.

cc: Eglet Prince
Christensen Law Offices, LLC
Atkin Winner & Sherrod
Cole, Scott & Kissane, P.A.
Lewis Roca Rothgerber Christie LLP/Las Vegas
Pursiano Barry Bruce Lavelle, LLP
Laura Anne Foggan
Mark Andrew Boyle
Matthew L. Sharp, Ltd.
Clerk, United States Court of Appeals for the Ninth Circuit

000271

EXHIBIT "F"

Electronically Filed
3/22/2018 11:15 AM
Steven D. Grierson
CLERK OF THE COURT

Steven D. Grierson

1 MTN
2 David A. Stephens, Esq.
3 Nevada Bar No. 00902
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5 3636 North Rancho Drive
6 Las Vegas, Nevada 89130
7 Telephone: (702) 656-2355
8 Facsimile: (702) 656-2776
9 Email: dstephens@sgblawfirm.com
10 Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

9 CHEYENNE NALDER,

07-A-549111
CASE NO.: A549111

10 Plaintiff,

DEPT NO.: XXIX

11 vs.

12 GARY LEWIS,

13 Defendants.

14 EX PARTE MOTION TO AMEND JUDGMENT IN THE NAME OF
15 CHEYENNE NALDER, INDIVIDUALLY

17 Date: N/A

18 Time: N/A

19 NOW COMES Cheyenne Nalder, by and through her attorneys at STEPHENS, GOURLEY
20 & BYWATER and moves this court to enter judgment against Defendant, GARY LEWIS, in her
21 name as she has now reached the age of majority. Judgment was entered in the name of the
22 guardian ad litem. (See Exhibit 1) Pursuant to NRS 11.280 and NRS 11.300, Cheyenne now
23 moves this court to issue the judgment in her name alone (See Exhibit 2) so that she may pursue
24 collection of the same. Cheyenne turned 18 on April 4, 2016. In addition, Defendant Gary Lewis,
25 has been absent from the State of Nevada since at least February 2010.

26

27

28 / / / /

1 Therefore, Cheyenne Nalder hereby moves this court to enter the judgment in her name of
2 \$3,500,000.00, with interest thereon at the legal rate from October 9, 2007, until paid in full.

3 Dated this 19 day of March, 2018.

4
5 STEPHENS GOURLEY & BYWATER

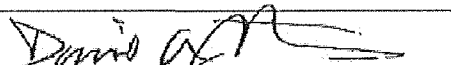
6
7 
8 David A. Stephens, Esq.
9 Nevada Bar No. 00902
10 3636 North Rancho Drive
11 Las Vegas, Nevada 89130
12 Attorneys for Plaintiff
13
14
15
16
17
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22
23
24
25
26
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28

EXHIBIT "1"

1 JMT
 2 THOMAS CHRISTENSEN, ESQ.,
 Nevada Bar #2326
 3 DAVID F. SAMPSON, ESQ.,
 Nevada Bar #6811
 4 1000 S. Valley View Blvd.
 Las Vegas, Nevada 89107
 5 (702) 870-1000

CRP SPK
 CLERK OF THE COURT

JUN 3 1 52 PM '08

FILED

6 Attorney for Plaintiff,

7 DISTRICT COURT
 8 CLARK COUNTY, NEVADA

9 JAMES NALDER,)
 as Guardian ad Litem for)
 10 CHEYENNE NALDER, a minor.)
 11)
 Plaintiffs,)

12 vs.)

CASE NO: A549111
 DEPT. NO: VI

14 GARY LEWIS, and DOES I)
 through V, inclusive)
 15)
 Defendants.)
 16)

17 JUDGMENT

18
 19 In this action the Defendant, GARY LEWIS, having been regularly served with the
 20 Summons and having failed to appear and answer the Plaintiff's complaint filed herein, the
 21 legal time for answering having expired, and no answer or demurrer having been filed, the
 22 Default of said Defendant, GARY LEWIS, in the premises, having been duly entered according
 23 to law; upon application of said Plaintiff, Judgment is hereby entered against said Defendant as
 24 follows:
 25
 26
 27
 28

000276

1 IT IS ORDERED THAT PLAINTIFF HAVE JUDGMENT AGAINST DEFENDANT in the
 2 sum of \$3,500,000.00, which consists of \$65,555.37 in medical expenses, and \$3,434,444.63 in
 3 pain, suffering, and disfigurement, with interest thereon at the legal rate from October 9, 2007,
 4 until paid in full,
 5

6 DATED THIS 2 June day of May, 2008.

7
 8 
 9 DISTRICT JUDGE

10
 11
 12 Submitted by:
 13 CHRISTENSEN LAW OFFICES, LLC.

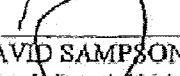
14
 15 BY: 
 16 DAVID SAMPSON
 17 Nevada Bar # 6811
 18 1000 S. Valley View
 19 Las Vegas, Nevada 89107
 20 Attorney for Plaintiff
 21
 22
 23
 24
 25
 26
 27
 28

EXHIBIT "2"

1 JMT
 2 DAVID A. STEPHENS, ESQ.
 Nevada Bar No. 00902
 3 STEPHENS GOURLEY & BYWATER
 3636 North Rancho Dr
 4 Las Vegas, Nevada 89130
 5 Attorneys for Plaintiff
 T: (702) 656-2355
 6 F: (702) 656-2776
 E: dstephens@sbglawfirm.com

7 *Attorney for Cheyenne Nalder*

8 DISTRICT COURT
 9 CLARK COUNTY, NEVADA
 10

11 CHEYENNE NALDER,
 12

13 Plaintiff,

14 vs.

15 GARY LEWIS,
 16

Defendant.

CASE NO: A549111
 DEPT. NO: XXIX

17 AMENDED JUDGMENT

18
 19 In this action the Defendant, Gary Lewis, having been regularly served with the Summons
 20 and having failed to appear and answer the Plaintiff's complaint filed herein, the legal time for
 21 answering having expired, and no answer or demurrer having been filed, the Default of said
 22 Defendant, GARY LEWIS, in the premises, having been duly entered according to law; upon
 23 application of said Plaintiff, Judgment is hereby entered against said Defendant as follows:
 24
 25 ...
 26 ...
 27 ...
 28 ...

1 IT IS ORDERED THAT PLAINTIFF HAVE JUDGMENT AGAINST DEFENDANT in the
2 sum of \$3,500,000.00, which consists of \$65,555.37 in medical expenses, and \$3,434,444.63
3 in pain, suffering, and disfigurement, with interest thereon at the legal rate from October 9,
4 2007, until paid in full.
5

6 DATED this _____ day of March, 2018.
7

8
9
10 _____
District Judge
11

12 Submitted by:
STEPHENS GOURLEY & BYWATER
13

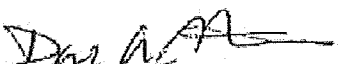
14 
15 DAVID A. STEPHENS, ESQ.
Nevada Bar No. 00902
16 STEPHENS GOURLEY & BYWATER
3636 North Rancho Dr
17 Las Vegas, Nevada 89130
Attorneys for Plaintiff
18
19
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21
22
23
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EXHIBIT "G"

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5/18/2018 3:37 PM
Steven D. Grierson
CLERK OF THE COURT



1 NOE
2 David A. Stephens, Esq.
3 Nevada Bar No. 00902
4 Stephens & Bywater
5 3636 North Rancho Drive
6 Las Vegas, Nevada 89130
Telephone: (702) 656-2355
Facsimile: (702) 656-2776
Email: dstephens@sgblawfirm.com
Attorney for Cheyenne Nalder

DISTRICT COURT
CLARK COUNTY, NEVADA

CHEYENNE NALDER,

Plaintiff,

vs.

GARY LEWIS

Defendant.

Case No. 07A549111

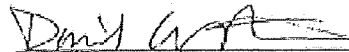
Dept. No. XXIX

NOTICE OF ENTRY OF AMENDED JUDGMENT

NOTICE IS HEREBY GIVEN that on the 26th day of March, 2018, the Honorable David M. Jones entered an **AMENDED JUDGMENT**, which was thereafter filed on March 28, 2018, in the above entitled matter, a copy of which is attached to this Notice.

Dated this 17 day of May, 2018.

STEPHENS & BYWATER

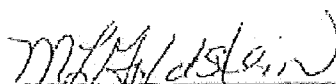


David A. Stephens, Esq.
Nevada Bar No. 00902
3636 North Rancho Drive
Las Vegas, Nevada 89130
Attorney for Brittany Wilson

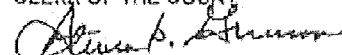
CERTIFICATE OF MAILING

I hereby certify that I am an employee of the law office of STEPHENS & BYWATER,
and that on the 18th day of May, 2018, I served a true copy of the foregoing NOTICE OF
ENTRY OF AMENDED JUDGMENT, by depositing the same in a sealed envelope upon
which first class postage was fully prepaid, and addressed as follows:

Gary Lewis
733 S. Minnesota Ave.
Glendora, California 91740


An employee of Stephens & Bywater

Electronically Filed
3/28/2018 3:05 PM
Steven D. Grierson
CLERK OF THE COURT



JMT
DAVID A. STEPHENS, ESQ.
Nevada Bar No. 00902
STEPHENS GOURLEY & BYWATER
3636 North Rancho Dr
Las Vegas, Nevada 89130
Attorneys for Plaintiff
T: (702) 656-2355
F: (702) 656-2776
E: dstephens@sbgllawfirm.com
~~Attorney for Cheyenne Nalder~~

DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER,

Plaintiff,

vs.

GARY LEWIS,

Defendant.

07A549111
CASE NO: A549111
DEPT. NO: XXIX

AMENDED JUDGMENT

In this action the Defendant, Gary Lewis, having been regularly served with the Summons and having failed to appear and answer the Plaintiff's complaint filed herein, the legal time for answering having expired, and no answer or demurrer having been filed, the Default of said Defendant, GARY LEWIS, in the premises, having been duly entered according to law; upon application of said Plaintiff, Judgment is hereby entered against said Defendant as follows:

1 JMT
 2 DAVID A. STEPHENS, ESQ.
 Nevada Bar No. 00902
 3 STEPHENS GOURLEY & BYWATER
 3636 North Rancho Dr
 4 Las Vegas, Nevada 89130
 Attorneys for Plaintiff
 T: (702) 656-2355
 6 F: (702) 656-2776
 E: dstephens@sbgllawfirm.com
 7 Attorney for Cheyenne Nalder

8 DISTRICT COURT
 9 CLARK COUNTY, NEVADA
 10

11 CHEYENNE NALDER,

12 Plaintiff,

13 vs.

14 GARY LEWIS,

15 Defendant.
 16

07A549111
 CASE NO: A549111
 DEPT. NO: XXIX

17 AMENDED JUDGMENT

18
 19 In this action the Defendant, Gary Lewis, having been regularly served with the Summons
 20 and having failed to appear and answer the Plaintiff's complaint filed herein, the legal time for
 21 answering having expired, and no answer or demurrer having been filed, the Default of said
 22 Defendant, GARY LEWIS, in the premises, having been duly entered according to law; upon
 23 application of said Plaintiff, Judgment is hereby entered against said Defendant as follows:

24 ...

25 ...

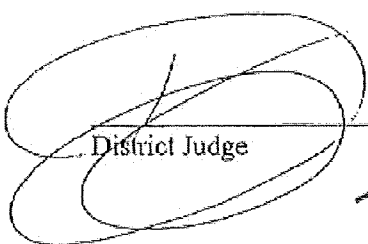
26 ...

27 ...

28 ...

1 IT IS ORDERED THAT PLAINTIFF HAVE JUDGMENT AGAINST DEFENDANT in the *mc*
2 \$ 3,434,444.63
3 sum of \$3,500,000.00, which consists of \$65,555.37 in medical expenses, and ~~\$3,434,444.63~~
4 in pain, suffering, and disfigurement, with interest thereon at the legal rate from October 9,
5 2007, until paid in full.

6 DATED this *26* day of March, 2018.
7

8
9
10  District Judge
11 *mc*

12 Submitted by:
13 STEPHENS GOURLEY & BYWATER

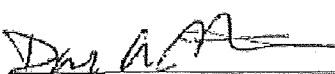
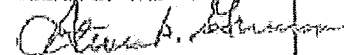
14 
15 DAVID A. STEPHENS, ESQ.
16 Nevada Bar No. 00902
17 STEPHENS GOURLEY & BYWATER
18 3636 North Rancho Dr
19 Las Vegas, Nevada 89130
20 Attorneys for Plaintiff
21
22
23
24
25
26
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EXHIBIT "H"

Electronically Filed
4/3/2018 3:07 PM
Steven D. Grierson
CLERK OF THE COURT



1 COMP
David A. Stephens, Esq.
2 Nevada Bar No. 00902
STEPHENS, GOURLEY & BYWATER
3 3636 North Rancho Drive
Las Vegas, Nevada 89130
4 Telephone: (702) 656-2353
Facsimile: (702) 656-2776
5 Email: dstephens@sgblawfirm.com
Attorney for Cheyenne Nalder

6
7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 CHEYENNE NALDER,

10 Plaintiff,

11 vs.

12 GARY LEWIS and DOES I through V,
13 inclusive,

14 Defendants.

CASE NO.: A549111 A-18-772220-C

DEPT NO.: XXIX Department 29

15 COMPLAINT

16 Date: n/a
17 Time: n/a

18 COMES NOW the Plaintiff, CHEYENNE NALDER, by and through Plaintiff's attorney,
19 DAVID A. STEPHENS, ESQ., of STEPHENS & BYWATER, and for a cause of action against the
20 Defendants, and each of them, alleges as follows:

21 1. Upon information and belief, that at the time of the injury the Defendant, GARY
22 LEWIS, was a resident of Las Vegas, Clark County, Nevada, and that on or about December 2008
23 GARY LEWIS moved out of state and has not been present or resided in the jurisdiction since that
24 time.

25 2. That Plaintiff, CHEYENNE NALDER, was at the time of the accident, a resident of
26 the County of Clark, State of Nevada

27 3. That the true names or capacities, whether individual, corporate, associate or
28 otherwise, of Defendants names as DOES I through V, inclusive, are unknown to Plaintiff, who

1 therefore sues said Defendant by such fictitious names. Plaintiff is informed and believes and
2 thereon alleges that each of the Defendants designated herein as DOE is responsible in some
3 manner for the events and happenings referred to and caused damages proximately to Plaintiff as
4 herein alleged, and that Plaintiff will ask leave of this Court to amend this Complaint to insert the
5 true names and capacities of DOES I through V, when the names have been ascertained, and to join
6 such Defendants in this action.

7 4. Upon information and belief, Defendant, Gary Lewis, was the owner and operator of
8 a certain 1996 Chevy Pickup (hereafter referred as "Defendant vehicle") at all times relevant to this
9 action.

10 5. On the 8th day of July, 2007, Defendant, Gary Lewis, was operating the Defendant's
11 vehicle on private property located in Lincoln County, Nevada; that Plaintiff, Cheyenne Nalder,
12 was playing on the private property; that Defendant, did carelessly and negligently operate
13 Defendant's vehicle so to strike the Plaintiff, Cheyenne Nalder, and that as a direct and proximate
14 result of the aforesaid negligence of Defendant, Gary Lewis, and each of the Defendants, Plaintiff,
15 Cheyenne Nalder, sustained the grievous and serious personal injuries and damages as hereinafter
16 more particularly alleged.

17 6. At the time of the accident herein complained of, and immediately prior thereto,
18 Defendant, Gary Lewis, in breaching a duty owed to Plaintiffs, was negligent and careless, inter
19 alia, in the following particulars:

- 20 A. In failing to keep Defendant's vehicle under proper control;
21 B. In operating Defendant's vehicle without due care for the rights of the Plaintiff;
22 C. In failing to keep a proper lookout for plaintiffs
23 D. The Defendant violated certain Nevada Revised Statutes and Clark County Ordinances,
24 and the Plaintiff will pray leave of Court to insert the exact statutes or ordinances at the time of
25 trial.

26 7. By reason of the premises, and as a direct and proximate result of the aforesaid
27 negligence and carelessness of Defendants, and each of them, Plaintiff, Cheyenne Nalder, sustained
28 a broken leg and was otherwise injured in and about her neck, back, legs, arms, organs, and

1 systems, and was otherwise injured and caused to suffer great pain of body and mind, and all or
2 some of the same is chronic and may be permanent and disabling, all to her damage in an amount in
3 excess of \$10,000.00

4 8. By reason of the premises, and as a direct and proximate result of the aforesaid
5 negligence and carelessness of the Defendants, and each of them, Plaintiff, Cheyenne Nalder, has
6 been caused to expend monies for medical and miscellaneous expenses as of this time in excess of
7 \$41,851.89, and will in the future be caused to expend additional monies for medical expenses and
8 miscellaneous expenses incidental thereto, in a sum not yet presently ascertainable, and leave of
9 Court will be requested to include said additional damages when the same have been fully
10 determined.

11 9. Prior to the injuries complained of herein, Plaintiff, Cheyenne Nalder, was an able-
12 bodied female, capable of being gainfully employed and capable of engaging in all other activities
13 for which Plaintiff was otherwise suited. By reason of the premises, and as a direct and proximate
14 result of the negligence of the said Defendants, and each of them, Plaintiff, Cheyenne Nalder, was
15 caused to be disabled and limited and restricted in her occupations and activities, and/or suffered a
16 diminution of Plaintiff's earning capacity and future loss of wages, all to her damage in a sum not
17 yet presently ascertainable, the allegations of which Plaintiff prays leave of Court to insert here
18 when the same shall be fully determined.

19 10. That James Nalder as guardian ad litem for Plaintiff, Cheyenne Nalder, obtained
20 judgment against Gary Lewis.

21 11. That the judgment is to bear interest at the legal rate from October 9, 2007 until paid in
22 full.

23 12. That during Cheyenne Nalder's minority which ended on April 4, 2016 all statutes of
24 limitations were tolled.

25 13. That during Gary Lewis' absence from the state of Nevada all statutes of limitations
26 have been tolled and remain tolled.

27 14. That the only payment made on the judgment was \$15,000.00 paid by Lewis's insurer
28 on February 5, 2015. This payment extends any statute of limitation.

1 15. After reaching the age of majority an amended judgment was entered in Cheyenne
2 Nalder's name.

3 16. Plaintiff, in the alternative, now brings this action on the judgment to obtain a judgment
4 against Gary Lewis including the full damages assessed in the original judgment plus interest and
5 minus the one payment made.

6 ~~17. In the alternative Plaintiff requests declaratory relief regarding when the statutes of~~
7 limitations on the judgments expire.

8 18. Plaintiff has been required to retain the law firm of STEPHENS & BYWATER to
9 prosecute this action, and is entitled to a reasonable attorney's fee.

10 CLAIM FOR RELIEF;

11 1. General damages in an amount in excess of \$10,000.00;

12 2. Special damages for medical and miscellaneous expenses in excess of \$41,851.89, plus
13 future medical expenses and the miscellaneous expenses incidental thereto in a presently
14 unascertainable amount;

15 3. Special damages for loss of wages in an amount not yet ascertained and/or diminution of
16 Plaintiff's earning capacity, plus possible future loss of earning and/or diminution of Plaintiff's
17 earning capacity in a presently unascertainable amount;

18 4. Judgment in the amount of \$3,500,000 plus interest through April 3, 2018 of
19 \$2,112,669.52 minus \$15,000.00 paid for a total judgment of \$5,597,669.52.

20 5. A declaration that the statute of limitations on the judgment is still tolled as a result of
21 the Defendant's continued absence from the state.

22 4. Costs of this suit;

23 5. Attorney's fees; and

24 ///

25

26 ///

27

28 ///

DATED this 3rd day of April, 2018.

/s/ David A. Stephens
David A. Stephens, Esq.
Nevada Bar No. 00902
3636 North Rancho Drive
Las Vegas, Nevada 89130
Attorneys for Plaintiff

EXHIBIT "I"

STEPHENS & BYWATER, P.C.
ATTORNEYS AT LAW

David A. Stephens email: dstephens@sgblawfirm.com

Gordon E. Bywater email: gbywater@sgblawfirm.com

July 17, 2018

VIA REGULAR U.S. MAIL

Thomas E. Winner, Esq.
Atkin Winner & Sherrod
1117 S. Rancho Drive
Las Vegas, Nevada 89102

RE: Cheyenne Nalder vs. Gary Lewis

Dear Tom:

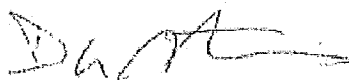
I am enclosing with this letter a Three Day Notice to Plead which I filed in the above entitled matter.

I recognize that you have not appeared in this matter. I served Mr. Lewis some time ago and he has never filed an answer. Thus, as a courtesy to you, who I understand to be representing Mr. Lewis in related cases, I am providing this Three Day Notice to you in addition to Mr. Lewis.

I appreciate your consideration.

Sincerely,

STEPHENS & BYWATER



David A. Stephens, Esq.

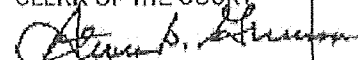
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enclosure

3636 N. Rancho Drive, Las Vegas, Nevada 89130
Telephone: (702) 656-2355 | Facsimile: (702) 656-2776
Website: www.sgblawfirm.com



RECEIVED
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FBI

Electronically Filed
7/18/2018 3:54 PM
Steven D. Grlerson
CLERK OF THE COURT



1 TDNP (CIV)
2 David A. Stephens, Esq.
3 Nevada Bar No. 00902
4 STEPHENS, GOURLEY & BYWATER
5 3636 North Rancho Drive
6 Las Vegas, Nevada 89130
7 Telephone: (702) 656-2355
8 Facsimile: (702) 656-2776
9 Email: dstephens@sgblawfirm.com
10 Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

9 CHEYENNE NALDER,

CASE NO.: A-18-772220-C

10 Plaintiff,

DEPT NO.: XXIX

11 vs.

12 GARY LEWIS and DOES I through V,
13 inclusive,

14 Defendants.

THREE DAY NOTICE TO PLEAD

Date: n/a
Time: n/a

18 To: Gary Lewis, Defendant

19 PLEASE TAKE NOTICE that the Plaintiff intends to take a default and default judgment
20 against you if you have not answered or otherwise filed a response of pleading within three (3) days
21 of the date of this notice.

22 Dated this 17 day of July 2018.

23

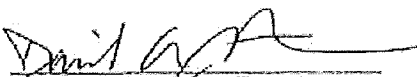
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David A. Stephens, Esq.
Nevada Bar No. 00902
Stephens Gourley & Bywater
3636 N. Rancho Drive
Las Vegas, NV 89130
Attorney for Plaintiff

1 CERTIFICATE OF MAILING

2 I hereby certify that service of this THREE DAY NOTICE TO PLEAD was made this 17th
3 day of July, 2018, by depositing a copy thereof in the U.S. Mail, first class postage prepaid,
4 addressed to:

5 Gary Lewis
6 733 Minnesota Avenue
Glendora, CA 91740

Thomas E. Winner, Esq.
Atkin Winner Shorrod
1117 S. Rancho Drive
Las Vegas, NV 89102

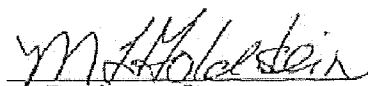
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10 An Employee of
11 Stephens Gourley & Bywater
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EXHIBIT “J”

Case 2:09-cv-01348-RCJ-GWF Document 103 Filed 10/30/13 Page 1 of 1

AO450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

DISTRICT OF

Nevada

Nalder et al.,

Plaintiffs,

JUDGMENT IN A CIVIL CASE

V.

United Automobile Insurance Company,

Case Number: 2:09-cv-01348-RCJ-GWF

Defendant.

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☐ **Notice of Acceptance with Offer of Judgment.** A notice of acceptance with offer of judgment has been filed in this case.

IT IS ORDERED AND ADJUDGED

The Court grants summary judgment in favor of Nalder and finds that the insurance renewal statement contained an ambiguity and, thus, the statement is construed in favor of coverage during the time of the accident. The Court denies summary judgment on Nalder's remaining bad-faith claims.

The Court grants summary judgment on all extra-contractual claims and/or bad faith claims in favor of Defendant. The Court directs Defendant to pay Cheyanne Nalder the policy limits on Gary Lewis's implied insurance policy at the time of the accident.

October 30, 2013

Date

/s/ Lance S. Wilson

Clerk

/s/ Summer Rivera

(By) Deputy Clerk



EXHIBIT “K”



CHRISTENSEN LAW
www.injuryhelpnow.com

August 13, 2018

Stephen H. Rogers, Esq.
ROGERS, MASTRANGELO, CARVALHO & MITCHELL
700 S. Third Street
Las Vegas, Nevada 89101

VIA Fax: (702)384-1460
Email: srogers@rmcmlaw.com

Re: Gary Lewis

Dear Stephen:

I am in receipt of your letter dated Friday, August 10, 2018. I was disappointed that you have chosen to disregard my request that you communicate with me and not directly with my client. You say you have "been retained to defend Mr. Lewis with regard to Ms. Nalder's 2018 actions." Would you be so kind as to provide me with all communications written or verbal or notes of communications you have had with UAIC, their attorneys and/or Mr. Lewis from your first contact regarding this matter to the present?

Please confirm that UAIC seeks now to honor the insurance contract with Mr. Lewis and provide a defense for him and pay any judgment that may result? This is the first indication I am aware of where UAIC seeks to defend Mr. Lewis. I repeat, please do not take any actions, including requesting more time or filing anything on behalf of Mr. Lewis without first getting authority from Mr. Lewis through me. Please only communicate through this office with Mr. Lewis. If you have already filed something or requested an extension without written authority from Mr. Lewis, he requests that you immediately reverse that action. Please also only communicate with UAIC that any attempt by them to hire any other attorneys to take action on behalf of Mr. Lewis must include notice to those attorneys that they must first get Mr. Lewis' consent through my office before taking any action including requesting extensions of time or filing any pleadings on his behalf.

Regarding your statement that Mr. Lewis would not be any worse off if you should lose your motions. That is not correct. We agree that the validity of the judgment is unimportant at this stage of the claims handling case. UAIC, however, is arguing that Mr. Lewis' claims handling case should be dismissed because they claim the judgment is not valid. If you interpose an insufficient improper defense that delays the inevitable entry of judgment against Mr. Lewis and the Ninth Circuit dismisses the appeal then Mr. Lewis will have a judgment against him and no claim against UAIC. In addition, you will cause additional damages and expense to both parties for which, ultimately, Mr. Lewis would be responsible.



CHRISTENSEN LAW
www.injuryhelpnow.com

Could you be mistaken about your statement that "the original judgment expired and cannot be revived?" I will ask your comment on just one legal concept -- Mr. Lewis' absence from the state. There are others but this one is sufficient on its own. There are three statutes applicable to this narrow issue: NRS 11.190; NRS 11.300 and NRS 17.214.

NRS 11.190 Periods of limitation. ... actions ... may only be commenced as follows:

1. Within 6 years:

(a) ... an action upon a judgment or decree of any court of the United States, or of any state or territory within the United States, or the renewal thereof.

NRS 11.300 Absence from State suspends running of statute. If, ... after the cause of action shall have accrued the person (defendant) departs from the State, the time of the absence shall not be part of the time prescribed for the commencement of the action.

NRS 17.214 Filing and contents of affidavit; recording affidavit; notice to judgment debtor; successive affidavits.

1. A judgment creditor or a judgment creditor's successor in interest may renew a judgment which has not been paid by:

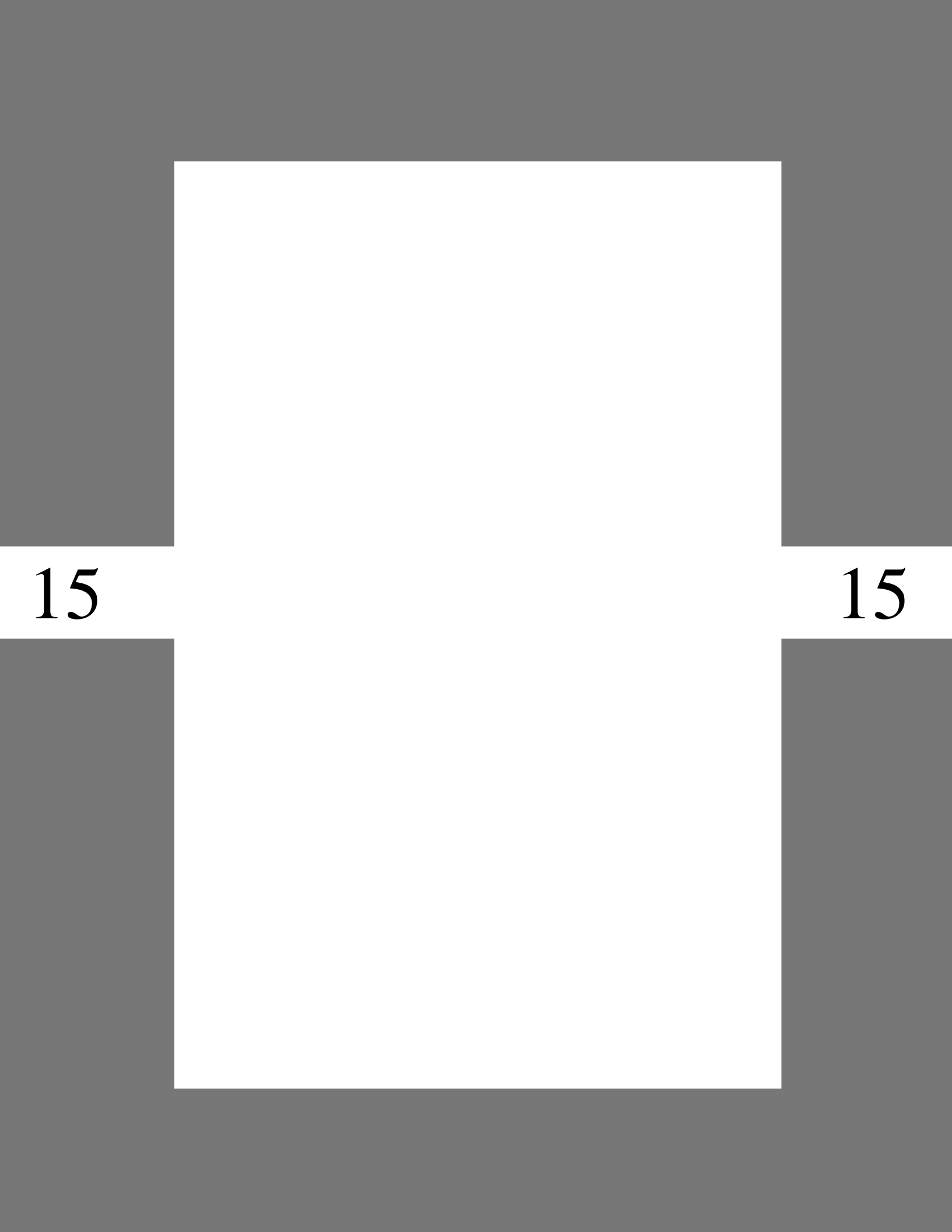
(a) Filing an affidavit with the clerk of the court where the judgment is entered and docketed, within 90 days before the date the judgment expires by limitation.

These statutes make it clear that both an action on the judgment or an optional renewal is still available through today because Mr. Lewis has been in California since late 2008. If you have case law from Nevada contrary to the clear language of these statutes please share it with me so that I may review it and discuss it with my client.

Your prompt attention is appreciated. Mr. Lewis does not wish you to file any motions until and unless he is convinced that they will benefit Mr. Lewis -- not harm him and benefit UAIC. Mr. Lewis would like all your communications to go through my office. He does not wish to have you copy him on correspondence with my office. Please do not communicate directly with Mr. Lewis.

Very truly yours,

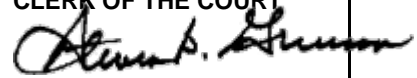
Tommy Christensen
CHRISTENSEN LAW OFFICE, LLC



15

15

OPPS (CIV)
David A. Stephens, Esq.
Nevada Bar No. 00902
STEPHENS & BYWATER, P.C.
3636 North Rancho Drive
Las Vegas, Nevada 89130
Telephone: (702) 656-2355
Facsimile: (702) 656-2776
Email: dstephens@sdblawnfirm.com
Attorney for Cheyenne Nalder



DISTRICT COURT
CLARK COUNTY, NEVADA

| | | |
|------------------|---|---------------------|
| CHEYENNE NALDER, |) | CASE NO.: 07A549111 |
| |) | |
| |) | DEPT NO.: XX |
| Plaintiff, |) | |
| |) | |
| vs. |) | |
| |) | |
| GARY LEWIS, |) | |
| |) | |
| Defendants. |) | |

**PLAINTIFF'S OPPOSITION TO INTERVENOR UAIC'S MOTION
TO CONSOLIDATE**

Date: 11/28/2018
Time: 10:30 a.m.

Cheyenne Nalder, through her attorney, David A. Stephens, Esq., opposes the Motion to Consolidate filed by Intervenor United Automobile Insurance Company, ("UAIC"), on order shortening time, as follows:

POINTS AND AUTHORITIES

I. Factual background of this case and the insurance coverage

This matter arises from an auto accident that occurred on July 8, 2007, wherein Lewis accidentally ran over Cheyenne Nalder, ("Nalder"). Nalder was born April 4, 1998 and was a nine-year-old girl at the time.

At the time of the accident Lewis maintained an auto insurance policy with United Auto Insurance Company ("UAIC"), which was renewable on a monthly basis.

Following the incident, Nalder's father, James Nalder, extended an offer to UAIC to settle

1 Nalder's injury claim for Lewis's policy limit of \$15,000.00.

2 After UAIC rejected James Nalder's offer, James Nalder, on behalf of Cheyenne Nalder, filed
3 this lawsuit against Lewis in the Nevada state district court.

4 UAIC was notified of the lawsuit but declined to defend Lewis or file a declaratory relief action
5 regarding coverage. Lewis failed to appear and answer the complaint. As a result, Nalder obtained a
6 default judgment against Lewis for \$3,500,000.00. The judgment was filed on June 3, 2008. The
7 notice of entry of judgment was filed on August 26, 2008.

8 Lewis left the state of Nevada and relocated to California prior to 2010. Neither Lewis, nor
9 anyone on his behalf, has been subject to service of process in Nevada since 2010.

10 **II. Factual Background of the Claims Handling Case Against UAIC**

11 On May 22, 2009, James Nalder, on behalf of Cheyenne Nalder, and Lewis filed suit against
12 UAIC alleging breach of contract, breach of the implied covenant of good faith and fair dealing, bad
13 faith, fraud, and violation of NRS 686A.310. Lewis assigned to Nalder his right to "all funds
14 necessary to satisfy the Judgment" and retaining to himself any funds recovered above the judgment.

15 Once UAIC removed the underlying case to federal district court, UAIC filed a motion for
16 summary judgment as to all of Lewis and Nalder's claims, alleging Lewis did not have insurance
17 coverage on the date of the subject collision. The federal district court granted UAIC's summary
18 judgment motion because it determined the insurance contract was not ambiguous as to when Lewis
19 had to make payment to avoid a coverage lapse. Nalder and Lewis appealed this decision to the Ninth
20 Circuit. The Ninth Circuit reversed and remanded the matter because Lewis and Nalder had facts to
21 show the renewal statement was ambiguous regarding the date when payment was required to avoid
22 a coverage lapse.

23 On remand, the U.S. District Court concluded the renewal statement was ambiguous and

1 therefore, Lewis was covered on the date of the incident because the court construed this ambiguity
2 against UAIC. The U.S. District Court also determined UAIC breached its duty to defend Lewis, but
3 did not award damages because Lewis did not incur any fees or costs in defense of the Nevada state
4 court action. Based on these conclusions, the district court ordered UAIC to pay the policy limit of
5 \$15,000.00. UAIC then made three payments on the judgment: June 23, 2014; June 25, 2014; and
6 March 5, 2015.

8 Both Nalder and Lewis appealed that decision to the Ninth Circuit, which ultimately led to the
9 certification of the first question to the Nevada Supreme Court, namely whether an insurer that
10 breaches its duty to defend is liable for all foreseeable consequential damages of the breach.

12 After the first certified question was fully briefed and pending before the Nevada Supreme
13 Court, UAIC decided that the judgment in this case had to be renewed pursuant to NRS 17.214, and
14 that the time period for renewing the judgment had expired.

16 Based on that position, UAIC filed a motion to dismiss Lewis and Nalder's appeal with the
17 Ninth Circuit for lack of standing. This allegation had not been raised in the trial court. It was
18 something UAIC concocted solely for its own benefit. This allegation was brought for the first time in
19 the appellate court. UAIC ignored all of the tolling statutes and presented new evidence in the appeal
20 process, arguing Nalder's underlying \$3,500,000.00 judgment against Lewis is not enforceable because
21 the six-year statute of limitation to institute an action upon the judgment or to renew the judgment
22 pursuant to NRS 11.190(1)(a) expired. The only proof that it expired was UAIC counsel's affidavit
23 that no renewal pursuant to NRS 17.124 had been filed.

25 **III. Factual Background of 2018 Litigation**

26 Cheyenne Nalder reached the age of majority on April 4, 2016. Nalder hired David A.
27 Stephens, Esq., to enforce her judgment. First, counsel obtained an amended judgment in Cheyenne's
28

1 name as a result of her reaching the age of majority. This amendment was obtained appropriately, by
2 demonstrating to the court that the judgment, as a result of the tolling provisions, was still within the
3 applicable statute of limitations.
4

5 Nalder then filed a separate action with three distinct claims for relief, pled in the alternative.
6 The first claim is an action on the amended judgment which will result in a new judgment which will
7 have the total principal and post judgment interest reduced to judgment, so that interest would now run
8 on the new, larger principal amount.

9 The second alternative claim is for declaratory relief determining if and when a renewal under
10 NRS 17.214 must be filed and when the statute of limitations, which is subject to tolling provisions,
11 will run on the judgment.
12

13 And finally, the third claim, should the Court determine that the judgment is invalid, is an action
14 on the injury claim within the applicable statute of limitations for injury claims, that is, two years after
15 her reaching the age of majority.
16

17 Nalder also retained California counsel, who filed a judgment in California, which has a ten-
18 year statute of limitations regarding actions on a judgment. Nalder maintains that all of these actions
19 are unnecessary to the questions on appeal, and most are unnecessarily early; however, out of an
20 abundance of caution, she brings them to maintain and enforce her judgment against Lewis.
21

22 UAIC, without notice to Lewis or any attorney representing him, filed motions to intervene in
23 both cases which were both defective in service on the face of the pleading. At least in this case the
24 intervention was granted improperly.

25 IV. ARGUMENT

26 NRCP 42(a) states:
27
28

1 “(a) Consolidation. When actions involving a common question of law
2 or fact are pending before the court, it may order a joint hearing or trial
3 of any or all the matters in issue in the actions; it may order all the
4 actions consolidated; and it may make such orders concerning
5 proceedings therein as may tend to avoid unnecessary costs or delay.”
6

7 There are no common questions of fact between the two suits.

8 In this case the facts are that a judgment against Lewis and in favor of Nalder was entered in
9 2008. In 2018, Nalder amended the judgment to name herself as plaintiff in place of her father in that
10 she has reached the age of majority. None of these facts are in dispute.
11

12 In the new case filed in 2018, Nalder seeks to enforce the judgment and also seeks declaratory
13 relief that the judgment is still valid. To Nalder’s knowledge none of the facts in that case are in
14 dispute.
15

16 There are few, if any, common questions of law between the two cases.

17 Similar motions have been filed in both cases both by UAIC and Lewis’ UAIC retained
18 attorney. Both of them have filed separate motions for relief from the judgment in this case pursuant
19 to NRCP 60(b).¹
20

21 In the case filed in 2018 each of them has filed separate motions to dismiss. These motions are
22 based on the same grounds.

23 There is one common issue of law in these motions, which is whether the statute of limitations
24 on the judgment in the 2008 case has expired. All other issues of law are separate and distinct.
25

26 ¹ It is somewhat ironic that UAIC now argues for saving time and money by asking the
27 court to consolidate the cases when UAIC and Mr. Lewis’ UAIC attorney each filed separate, but
28 extraordinarily similar, motions for relief from stay in this case, forcing Nalder to file separate
oppositions and possibly make two court appearances to argue the two motions.

1 UAIC continues to argue that Nalder committed an act of fraud on the Court by amending her
2 judgment. Apparently the fraud is that she failed to advise the Court in her motion to amend of the
3 pending appeals before the Ninth Circuit. UAIC maintains that the amendment was an effort to go
4 around the pending appeals. However, that is not the case.

5
6 A review of the appellate issues, as set forth in the UAIC's motion to consolidate shows that
7 the issue on appeal is the validity of Nalder's judgment against UAIC. The issue of the validity of her
8 judgment against Lewis is not an issue on appeal.

9
10 The basis for determining the enforceability against UAIC is the nature of the action filed
11 against UAIC, the effect of the assignment of rights from Lewis, and the timing of the judgment. The
12 continued enforceability against Lewis is not at issue or determinative of that issue. All of those
13 arguments, if successful, would result in UAIC being liable for the judgment, even if it was expired as
14 to Lewis now.

15
16 Thus, the failure to advise the Court of the pending appellate issues cannot be a fraud on the
17 court because the issue, as framed by the Supreme Court, goes to the enforceability of the judgment
18 against UAIC. That issue is not related to the issue of the enforceability of the judgment against Lewis.

19 Whether UAIC is responsible for the judgment is the issue before the Supreme Court of Nevada.
20 Independent from that issue, Nalder has now instituted an action on the Nevada State Court judgment
21 to maintain her judgment's continued validity against Lewis.

22
23 Even if it were at issue, the Nevada Supreme Court cannot decide the validity of the judgment
24 against Lewis unless it were to determine, as a matter of law that the tolling statutes do not apply to the
25 statute of limitations on judgments. If the tolling statutes apply, there are no facts before the Supreme
26 Court from which it can make such a determination. See *Mandlebaum v. Gregovich*, 24 Nev. 154, 161,
27 50 P. 849, 851 (1897), for a case in which the Nevada Supreme Court held that the tolling statutes did
28

1 apply to the enforcement of a judgment.

2 **VII. CONCLUSION**

3 For the reasons set forth above, Nalder respectfully requests that this Court deny the Motion
4 to Consolidate brought by UAIC.
5

6 Dated this 27th day of November, 2018.

7 STEPHENS & BYWATER, P.C.

8
9 /s/ David A Stephens

10 David A. Stephens, Esq.

11 Nevada Bar No. 00902

12 3636 North Rancho Drive

13 Las Vegas, Nevada 89130

14 Attorneys for Plaintiff
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of November, 2018, I served the following document: **PLAINTIFF'S OPPOSITION TO INTERVENOR UAIC'S MOTION TO CONSOLIDATE**

☒ VIA ELECTRONIC FILING; (N.E.F.R. 9(b))

Matthew J. Douglas, Esq.

Randall Tindall, Esq.

E. Breen Arntz, Esq.

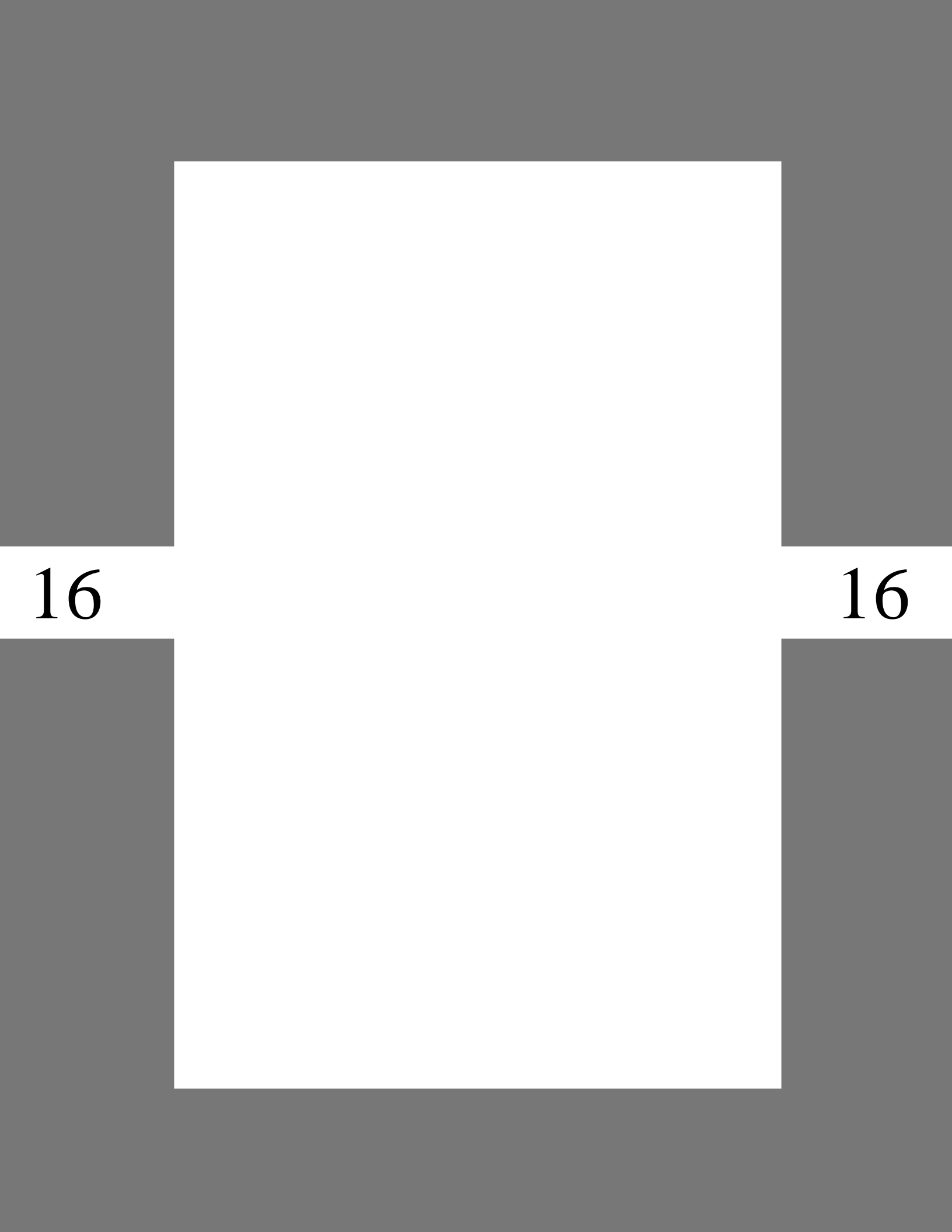
☐ VIA ELECTRONIC SERVICE (N.E.F.R. 9) ·

☐ BY MAIL: by placing the documents(s) listed above in a sealed envelope, postage prepaid in the U. S. Mail at Las Vegas, Nevada, addressed as set forth below:

☐ BY FAX: by transmitting the document(s) listed above via telefacsimile to the fax number(s) set forth below. A printed transmission record is attached to the file copy of this document(s).

☐ BY HAND DELIVER: by delivering the document(s) listed above to the person(s) at the address(es) set forth below.

/s/David A Stephens
An Employee of Stephens & Bywater

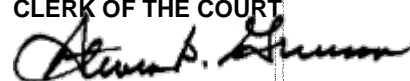


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OPPS

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

JAMES NALDER,

Plaintiff,

vs.

GARY LEWIS and DOES I through V,
inclusive

Defendants,

CASE NO: 07A549111

DEPT. NO: XX

UNITED AUTOMOBILE INSURANCE
COMPANY,

Intervenor.

GARY LEWIS,

Third Party Plaintiff,

vs.

UNITED AUTOMOBILE INSURANCE
COMPANY, RANDALL TINDALL,
ESQ., and RESNICK & LOUIS, P.C.
And DOES I through V,
Third Party Defendants.

**OPPOSITION TO UAIC'S MOTION TO CONSOLIDATE AND COUNTERMOTION TO
SET ASIDE VOID ORDER AND TO STRIKE ALL FILINGS BY INTERVENOR**

Third party Plaintiff, Gary Lewis, by and through his counsel, Thomas Christensen, Esq.,
hereby presents his brief in Opposition to UAIC's Motion To Consolidate. UAIC purports to

1 seek judicial economy, but in fact it is confusing issues and misstating the facts and the law to
2 gain advantage over its insured, Gary Lewis. UAIC's motion should be denied. This action is
3 already to judgment, the action sought to be consolidated is still awaiting an answer from two of
4 the parties. This action is a simple and constitutes a completed judgment amendment, the action
5 sought to be consolidated is an insurance claims handling case and a legal malpractice case.
6 Third party Plaintiff, Gary Lewis, brings this countermotion for relief from order and to strike all
7 filings by intervenor in this case, this course represents judicial economy and is consistent with
8 black letter Nevada law. In the alternative, Gary Lewis moves for summary judgment.
9

10 This opposition and countermotion is made and based upon the papers and pleadings on
11 file herein, the Points and Authorities attached hereto and any oral argument that may be
12 permitted by the Court.
13

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21 **POINTS AND AUTHORITIES**

22
23 **I. OPPOSITION TO UAIC'S MOTION TO CONSOLIDATE**

24 **A. UAIC's Motion to Consolidate is not appropriate post judgment and will not result in**
25 **judicial economy.**

26 The Nevada rule concerning consolidation is stated in NRCP 42(a):
27
28

1 (a) Consolidation. When actions involving a common
2 question of law or fact **are pending before the court**, it
3 may order **a joint hearing or trial** of any or all the
4 matters in issue in the actions; it may order **all the**
5 **actions consolidated**; and it may make such orders
6 concerning proceedings therein as may tend to **avoid**
7 **unnecessary costs or delay**. (Emphasis added.)

8 A reading of this applicable rule makes it obvious that it is just as improper to ask for
9 consolidation after judgment is entered as it is to seek intervention after judgment is entered. As
10 this Court is aware, an action that has proceeded to judgment cannot be consolidated with a
11 recently filed action. One action is over the other action has just begun. There is no overlap of
12 discovery or proof. There can be no judicial economy.

13 FRCP 42 was amended in 2007 for ease of understanding and style. (FRCP 42,
14 Commentary (2010)). Based thereon, application of the rule should be the same despite the
15 revisions. Because no Nevada decisions have distinguished between the federal and state court
16 applications of the rule, the Nevada Supreme Court's reliance on federal case law when
17 interpreting NRCP 42(a) should remain consistent. Indeed, the Nevada Supreme Court has relied
18 on federal case law when interpreting NRCP 42(a). See, e.g., *Mikulich v. Carner*, 68 Nev. 161,
19 228 P.2d 257, 231 P.2d 603 (1957).

20 In Nevada, as in the federal system, consolidation is permitted as a matter of discretion, to avoid
21 unnecessary costs or delays, or as a matter of convenience and economy in administration. NRCP
22 42(a); FRCP 42(a); *Mikulich*, 68 Nev. 161, 228 P.2d 257, 231 P.2d 603 (1957). The court is given
23 broad discretion to determine when consolidation is proper. *Id.* In *Ward v. Sheeline Banking &*
24 *Trust Co.*, 54 Nev. 442, 22 P.2d 358 (1933), the Nevada Supreme Court indicated that where
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1 consolidation is not a matter of right, the trial court is vested with discretion to grant or refuse
2 consolidation, subject to reversal only in case of abuse of that discretion. *Id.* at 452, 22 P.2d at
3 361.
4

5 When determining whether to order consolidation, the trial court should consider if the cases
6 are at different stages of pretrial preparation. Even when two actions involve common questions
7 of law and fact, consolidation may be improper if only one action is ready for trial and the other
8 is in an early discovery phase. *Prudential Ins. Co. of Am. v. Marine Nat'l Exch. Bank*, 55 F.R.D.
9 436 (E.D. Wis. 1972). Not only do the cases herein not involve common questions of law and
10 fact, but it is also certainly the case here where one matter has been to judgment for over six
11 months and the other still awaits an answer from one of the parties. In essence, the court must
12 weigh the time, effort, and expense consolidation would save against any inconvenience, delay, or
13 expense that it would cause. *Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984). Also,
14 consolidation may be improper if it results in aligning parties, like Lewis and UAIC, who have
15 conflicting interests, *Dupont v. S. Pac. Co.*, 366 F.2d 193, 195-96 (5th Cir. 1966), or if the
16 common issue is not central or material. *Shump v. Balka*, 574 F.2d 1341, 1344-45 (10th Cir.
17 1978).
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23 II. MOTION FOR RELIEF FROM ORDER

24 A. VOID ORDER ALLOWING INTERVENTION

25 UAIC's Motion to Intervene in case number A549111 contains no proof of service on its
26 face. This motion should never have been accepted for filing as there is no proof of service.
27
28

1 This defective motion can certainly not be the basis for an order allowing intervention. The
2 filing of a pleading without serving the pleading amounts to an ex-parte communication with the
3 Court and a violation of the due process. This lack of service was brought to the attention of the
4 UAIC attorneys, who refused to correct the error or grant additional time to the parties to
5 interpose an opposition. Taking advantage of a lawyer in this way by counsel for UAIC is a
6 violation of NRPC 3.5A and results in any action by the Court being void. Lewis requests the
7 Court relieve him from the resulting order allowing intervention pursuant to NRCP 60 (b). The
8 motion not having been served, the order is void. It is appropriate for this Court to grant Lewis
9 relief from this order pursuant to NRCP 60 (b).
10
11

12 In *Gralnick v. Eighth Judicial Dist. Court of Nev.*, No. 72048 (Nev. App. Mar. 21, 2017) The
13 court held that intervention and setting aside of a judgment was improper and the court granted
14 writ relief, reversing the trial court, because intervention was allowed after judgment, which is
15 contrary to NRS 12.130. As the Court noted:
16

17 Here, real party in interest Liberty Mutual Insurance Company moved to
18 intervene in the underlying action after judgment was entered against real
19 party in interest Tessea Munn. Because "**NRS 12.130 does not permit
20 intervention subsequent to the entry of a final judgment,**" *Lopez v.*
21 *Merit Ins. Co.*, 109 Nev. 553, 556, 853 P.2d 1266, 1268 (1993), the district
22 court was **required, as a matter of law**, to deny the motion to intervene. As
23 the district court did not deny the motion to intervene, but instead, granted
24 intervention and then improperly set aside the judgment based on Liberty
25 Mutual's motion, *see id.* at 557, 853 P.2d at 1269 (explaining that, where an
26 insurance company was improperly allowed to intervene, it was not a party
27 to the lawsuit and, thus, could not move to set aside the judgment), writ
28 relief is warranted. *See Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674,
677, 818 P.2d 849, 851 (1991) (explaining that whether to consider a writ
petition is discretionary); *cf. Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at
558-59 (explaining that writ relief may be warranted to challenge a district
court order denying a motion to dismiss if no factual disputes exist and the
district court was obligated by clear authority to dismiss the action).
**Accordingly, we grant the petition and direct the clerk of the court to
issue a writ of mandamus directing the district court to vacate its**

1 **orders granting intervention and setting aside the judgment and to**
2 **reinstate the default judgment.** (Emphasis added.)

3 In addition, UAIC's motion to intervene should have been denied because UAIC waived its
4 right to direct the defense and its right to intervene when it refused to defend Lewis and failed
5 to indemnify him. UAIC claims to have a direct and immediate interest to warrant
6 intervention. However the court in *Hinton v. Beck*, 176 Cal.App.4th 1378 (Cal. Ct. App.
7 2009) held just the opposite: "Grange[the insurance company], having denied coverage and
8 having refused to defend the action on behalf of its insured, did not have a direct and
9 immediate interest to warrant intervention in the litigation." In addition, UAIC's proposed
10 defense is unsupported by Nevada authority and is frivolous. UAIC misstates Nevada's
11 statute of limitations and tolling statutes. UAIC misstates Nevada cases regarding actions on
12 a judgment to obtain a new judgment and its relationship to the optional and additional
13 process to renew a judgment by affidavit. UAIC's motion is not supported by authority, is not
14 timely, is not brought in good faith and is contrary to law.

15
16
17 **B. UAIC'S DEFENSE IS FRIVOLOUS**

18 UAIC's claims that "the underlying judgment expired on 2014." This is not true. This
19 statement of fact is not supported by the evidence. This allegation is not supported in the
20 motion by **ANY** Nevada legal authority. There is no Nevada legal authority to support this
21 statement. UAIC knew there was no Nevada legal authority for this argument because they
22 had been asked to provide it and failed to provide any Nevada legal authority.

23
24 In fact, UAIC's defense is contrary to the "well established" law in Nevada for the past
25 one hundred years. See *Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (1897)

26 **The law is well settled** that a judgment creditor may enforce his
27 judgment by the process of the court in which he obtained it, or he may elect
28 to use the judgment as an original cause of action and bring suit thereon and

1 prosecute such suit to final judgment. (Emphasis added.)

2 The facts in *Mandlebaum* are identical to Nalder's action on a judgment:

3
4 The averments of the complaint and the undisputed facts are that, at the
5 time of the rendition and entry of the judgment in 1882, the appellant was out of
6 the state, and continuously remained absent therefrom until March, 1897,
7 thereby preserving the judgment and all rights of action of the judgment creditor
8 under the same. **Notwithstanding nearly fifteen years had elapsed since the
entry of the judgment**, yet, for the purposes of action, the judgment was not
barred — for that purpose **the judgment was valid**. *Id.*, (Emphasis added.)
Mandlebaum at 851.

9 UAIC then accuses the Court of a mistake that resulted from some improper conduct on
10 the part of Lewis' counsel. This is also not true. The Motion to Amend Judgment had, as its
11 basis, the tolling statutes and the operation of *Mandelbaum*. (See Exhibit 1). It would have
12 been an abuse of discretion for the Court to refuse to sign the Amended Judgment. UAIC has
13 now admitted in pleadings filed before the Nevada Supreme Court that Nalder's action on a
14 judgment is appropriate. (See Exhibit 2, UAIC's appellate brief, page 11). As will be detailed
15 later in this motion, UAIC disregards the effect of all the tolling statutes on the judgment
16 statute of limitations without citing any authority and against the weight of Nevada authority
17 that the tolling statutes in NRS Chapter 11 apply to the statute of limitations in NRS 11.190.
18 This contention is not a good faith attempt to change the law, but a frivolous and fraudulent
19 attempt to mislead the Court and increase the cost of litigation for all involved.

20
21 UAIC then makes the claim that judgments in Nevada are required to be renewed in six
22 years. This is not what the Nevada statute says. UAIC purposely misstates the statute: NRS
23 17.214 says one "may renew a judgment ... by ... filing an affidavit ... within 90 days before
24 the date the judgment expires by limitation." The two misstatements: 1. This procedure is
25 permissive not mandatory, nor exclusive of an action on a judgment; and 2. The renewal
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1 statute sends one to NRS chapter 11 with its statutes of limitations and tolling statutes
2 regarding the timing of filing an affidavit of renewal if that is the course one wishes to take.
3

4 Then UAIC makes the claim that the amended judgment revived the original judgment.
5 UAIC goes on to say that Nalder did not cite any authority for reviving the judgment. While
6 it is true that Nalder did not cite authority for reviving the judgment, it is frivolous for UAIC
7 to argue the need for authority for this imagined need. As has been set forth above, and will
8 be set forth below, the original judgment is valid. It has not expired. It does not need to be
9 revived. A renewal pursuant to NRS 17.214 would be premature.
10

11 UAIC states "Cheyenne's Motion proposes that tolling provisions applicable to certain
12 causes of action are also applicable to the deadlines to renew judgments." That is not
13 anywhere in Cheyenne's Motion. It is a factual misstatement. It was made on purpose to
14 mislead the Court. UAIC also claims "In short, the Court was not put on notice that it was
15 being asked to ostensibly revive an expired judgment." This statement is false. Cheyenne
16 cited tolling provisions applicable to NRS 11.190 1.(a) actions on judgments to demonstrate
17 that the underlying judgment was still valid and could be amended. Nowhere did she ask to
18 renew the judgment or revive the judgment.
19

20 UAIC does not request that the Court set aside the amended judgment pursuant to NRCP
21 60, but instead states that it wants to "avoid the Amended Judgment" and have declaratory
22 relief that the "original Judgment has expired." **This is well beyond anything provided by**
23 **NRCP 60.** All UAIC could possibly ask for is to set aside the amended judgment, which
24 would leave the original judgment as the operative document. This does not change anything
25 other than the caption from the now adult back to her guardian ad litem. Cheyenne is an adult
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1 she has the right to have the judgment in her name. It is inappropriate in a motion to set aside
2 a judgment to ask for declaratory relief. This request is an unsupported and improper claim.

3
4 UAIC claims “NRS 11.190(1)(a) provides that a judgment expires by limitation in six (6)
5 years.” What the statute says is “**NRS 11.190 Periods of limitation.** ... actions .. may
6 only be commenced as follows: 1. Within 6 years: (a) ... an action upon a judgment...”
7 Further NRS 11.190 is obviously modified by the many tolling statutes in Chapter 11. To
8 claim they do not apply is frivolous. To make the claim without authority is shameful. In
9 regard to the validity of the judgment UAIC misstates Nevada law throughout its motion.
10 NRS 11.190 is the statute of limitations for many types of actions including an action on a
11 judgment. It’s time calculation is tolled by many statutes in the same section. NRS 11.300
12 tolled the 6 year statute of limitations in NRS 11.190 in the case of *Bank of Nevada v.*
13 *Friedman*, 82 Nev. 417, 420 P2d 1 (Nev. 1966) and also in *Mandlebaum v. Gregovich*, 24
14 Nev. 154, 161, 50 P. 849, 851 (1897) The three applicable here are NRS 11.200 (the time in
15 NRS 11.190 runs from the last transaction or payment), NRS 11.250 (the time in NRS 11.190
16 runs from the time the person reaches the age of majority) and NRS 11.300 (the time in NRS
17 11.190 is tolled for any time the defendant is out of the state of Nevada). Nowhere does NRS
18 11.190(1)(a) say “unless renewed under NRS 17.214.” In fact it says within six years “an
19 action upon a judgment...**OR** the renewal thereof.” (emphasis added)
20
21

22 The judgment remains valid even in the absence of an action upon the judgment or renewal
23 of the judgment for three reasons. UAIC made three undisputed payments toward the judgment
24 on June 23, 2014; June 25, 2014; and March 5, 2015. Pursuant to “**NRS 11.200 Computation of**
25 **time.** The time in NRS 11.190 shall be deemed to date from the last transaction ... the limitation
26 shall commence from the time the last payment was made.” Further, when any payment is made,
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1 “the limitation shall commence from the time the last payment was made.” Therefore, UAIC’s
2 last payment on the judgment extended the expiration of the six-year statute of limitations to
3 March 5, 2021.
4

5 Additionally, NRS 11.250 outlines various circumstances that prevent the running of the
6 statute of limitations and states, in relevant part:

7 If a person entitled to bring an action other than for the recovery of real property be,
8 at the time the cause of action accrued, either:

9 1. Within the age of 18 years;

10 ...
the time of such disability *shall not* be a part of the time limited for the
commencement of the action (emphasis added).

11 Cheyenne Nalder was a minor when she obtained the judgment. She turned 18 on April 4, 2016.
12 Therefore, the earliest that the six-year statute of limitations runs is April of 2022. This judgment
13 was never recorded and the provisions of NRS 17.214 relating to real property have no
14 application here.
15

16 Pursuant to NRS 11.300, the absence of Lewis from the State of Nevada tolls the statute of
17 limitations to enforce a judgment and it remains tolled because of his absence. *See Bank of*
18 *Nevada v. Friedman*, 82 Nev. 417, 421, 420 P.2d 1, 3 (1966) and *Mandlebaum v. Gregovich*, 24
19 Nev. 154, 161, 50 P. 849, 851 (1897)

20 The averments of the complaint and the undisputed facts are that, at the
21 time of the rendition and entry of the judgment in 1882, the appellant was out of
22 the state, and continuously remained absent therefrom until March, 1897,
23 thereby preserving the judgment and all rights of action of the judgment creditor
24 under the same. Notwithstanding nearly fifteen years had elapsed since the entry
of the judgment, yet, for the purposes of action, the judgment was not barred —
for that purpose the judgment was valid.

25 UAIC admits that North Dakota is a state with similar renewal methods to Nevada. While
26 they are partially correct there is a crucial difference in the renewal statutes between North
27
28

1 Dakota and Nevada. The language of the renewal statute in North Dakota contains a ten year
2 period in the body of the statute. The Nevada renewal statute refers one back to the statute of
3 limitations for judgments. Further, the case cited by UAIC, *F/S Manufacturing v. Kensmoe*, 798
4 N.W.2d 853 (N.D. 2011) supports the validity of the judgment here. As that Court notes:
5

6 Of course, it may be easier to renew a judgment by affidavit; but it by no
7 means follows that the old judgment may not be made the basis of a new suit, and
8 *many cases arise where it is an advantage to be able to bring suit, instead of*
9 *renewing by affidavit — the case at bar being an example.* It is our conclusion that
10 the two remedies are not inconsistent, and that a judgment creditor may either sue
11 upon his judgment, or renew it by affidavit ... *Id at 857.*

12 These tolling statutes present a catch-22 for the use of NRS 17.214 and the “strict
13 compliance” interpretation given by the Nevada Supreme Court. One of the terms of the statute
14 in Nevada is that the renewal needs to be brought within 90 days of the expiration of the statute of
15 limitations. If that 90-day period is strictly construed, any renewal attempt pursuant to NRS
16 17.214 by Nalder at the present time, or earlier as argued by UAIC, might be premature and
17 therefore may be ineffective because it would not be filed within the 90 day window prior to
18 expiration of the statute of limitations.

19 NRS 17.214 was enacted to give an optional, not “mandatory,” statutory procedure in
20 addition to the rights already present for an action on the judgment. UAIC claims the plain,
21 permissive language of NRS 17.214: “A judgment creditor...**may** renew a judgment,” (emphasis
22 added) mandates use of NRS 17.214 as the only way to obtain a new judgment. UAIC cites no
23 authority for this mandated use of NRS 17.214. The legislative history demonstrates that NRS
24 17.214 was adopted to give an easier way for creditors to renew judgments not replace the
25 common law action on a judgment to obtain a new judgment. This was to give an option for
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1 renewal of judgments that was easier and more certain, not make it a trap for the unwary and cut
2 of rights of injured parties. This is contrary to the clear wording of the statute and the case law
3 in Nevada. See *Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (1897)
4

5 The law is well settled that a judgment creditor may enforce his
6 judgment by the process of the court in which he obtained it, or he may elect
7 to use the judgment as an original cause of action and bring suit thereon and
8 prosecute such suit to final judgment.

9 Where as here, the timing of the expiration is in doubt, the best way to obtain a new
10 judgment is the common law method, which is only supplemented by the statutory renewal
11 method, not replaced. See *Mandlebaum* at 161-162.

12 In the absence of direct legislation restricting or limiting the
13 common law rule of the right of action upon judgments, there are found
14 within our statutes provisions from which the court is authorized in
15 holding, as a matter of inference, that no change in that rule was intended,
16 otherwise some legislative restriction or limitation of the right under the
17 common law rule would have been included in the statute other than the
18 one barring the action if not commenced within six years after the right
19 accrued. In other words, the legislature gave to the judgment creditor the
20 right of action at any time within six years after such right accrued without
21 other limitations. Furthermore, the statutory law preserved that right as
22 against the judgment debtor who might be out of the state, by allowing
23 such action to be commenced within the time limited after his return to the
24 state, which might be, as in this case, long after the right of execution had
25 been barred.

26 We must therefore hold, that under the common law rule, which
27 prevails in this state, that the right of action upon an unsatisfied judgment is
28 a matter of course...

29 This has been the law in Nevada for over a hundred years. It has not been modified by the
30 legislature. UAIC's Motion in Intervention should be stricken and Intervention not allowed.
31 UAIC's motion for relief from judgment should be stricken or denied, it is untimely and
32 frivolous.

1 UAIC continues with the false premise that the only thing Cheyenne Nalder could do was
2 renewal under NRS 17.214. UAIC claims that the tolling statutes that apply and extend the
3 time to file actions upon a judgment don't apply to extend the time for renewal under NRS
4 17.214. UAIC makes these claims disregarding the fact that NRS 17.214 does not have a
5 specific time period in the body of the statute, but only refers to the expiration pursuant to
6 NRS 11.190. According to UAIC, the expiration of the judgment will be different for actions
7 on the judgment than for renewal even though there is not language in either statute providing
8 for that different result. Regardless, Cheyenne is seeking to obtain a new judgment by filing a
9 separate timely action on the original judgment, a procedure approved by NRS 11.190 and
10 the Nevada Supreme Court. See *Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851
11 (Nev 1897).

12 UAIC makes the claim that "The judgment expired on June 3, 2014" UAIC's logic is --
13 if it wasn't renewed pursuant to NRS 17.214, it is expired. This circular reasoning is a
14 knowing misstatement of the law. The statute of limitations under NRS 11.190 is 6 years it is
15 true, however the numerous tolling statutes apply to and do extend the 6 year period of the
16 judgment expiration. In this case those are NRS 11.200, NRS 11.250(incorrectly cited as
17 NRS 11.280 by Nalder) and NRS 11.300. If there was any question about these tolling
18 statutes applying to the 6 year period in NRS 11.190 the wording of NRS 11.200 removes all
19 doubt. **"NRS 11.200 Computation of time. The time in NRS 11.190 shall be ..."**

20 UAIC argues "the deadline to renew the Judgment was not tolled by any statute or rule."
21 First UAIC misstates and says that Cheyenne discussed NRS 17.214 in her Ex Parte Motion.
22 This is a fabrication, sophistry and disingenuous. Cheyenne discussed the tolling statutes that
23 obviously apply to the statute of limitations for actions on a judgment to demonstrate that the
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1 judgment she was seeking to put in her name was still valid. The Court agreed and issued the
2 amended judgment. UAIC states the obvious: that NRS 11.190, the limitation statute, does
3 not have any tolling provision in it. That is because the tolling statutes NRS 11.200, NRS
4 11.250, NRS 11.300 and others apply to toll it. It being tolled necessarily extends the time to
5 renew under NRS 17.214 because the judgment is not yet expired. The limitation statute is
6 tolled.
7

8 As stated previously, Nalder incorrectly identified NRS 11.280 as the general disability
9 tolling statute when the actual general disability tolling statute applicable in this case is NRS
10 11.250. UAIC does not, in candor, bring this to the Court's attention, but instead wastes
11 judicial resources evaluating the effect of NRS 11.280. Then UAIC discusses the effect on
12 real property when UAIC knows this judgment was never recorded and does not have any
13 application to real property concerns. Nor do any real property concerns change the effect of
14 the tolling statutes on the limitation statute as alleged by UAIC without any supporting case
15 law.
16

17 UAIC's final claim is that NRS 11.300 does not apply to NRS 11.190 and by extension
18 NRS 17.214. UAIC supports this novel claim by misquoting the F/S Manufacturing v.
19 Kensmoe, 798 N.W.2d 853 (N.D. 2011) case. First, this is a North Dakota case, not Nevada.
20 The North Dakota renewal by affidavit statute is 28-20-21 Renewal of judgments by affidavit
21 it provides a **specific time set forth in the statute within which to renew**, unlike Nevada's
22 statute that provides the time to renew by reference to the expiration of the judgment set forth
23 in NRS 11.190. This means that Nevada's statute refers back to the the limitations statute
24 NRS 11.190 and all of the applicable tolling statutes. In North Dakota, the renewal statute has
25 a specific time set forth in the statute:
26
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28-20-21. Renewal of judgments by affidavit Any judgment ...
may be renewed by the affidavit of the judgment creditor ... at any
time within ninety days preceding **the expiration of ten years**
from the first docketing of such judgment. (emphasis added)

This was the basis for the North Dakota ruling and was misquoted in UAIC's motions. The
correct quote is "Because the statutory procedure for renewal by affidavit is not a separate
action to renew the judgment, the **specific time period in N.D.C.C. § 28-20-21** cannot be
tolled under N.D.C.C. § 28-01-32 based on a judgment debtor's absence from the state." *Id.* at
858. (Emphasis added.)

Pursuant to NRS 11.300, the absence of Lewis from the State of Nevada tolls the statute of
limitations in NRS 11.190. Therefore, when NRS 17.214 does not have a specific time but
rather refers to the limitations statutes the tolling statutes necessarily apply and the time in
NRS 11.190 remains tolled because of his absence. *See Bank of Nevada v. Friedman*, 82 Nev.
417, 421, 420 P.2d 1, 3 (1966). UAIC admits that North Dakota is a state with similar
renewal methods to Nevada. While UAIC is partially correct, the language of the renewal
statute in North Dakota contains a ten year period in the body of the statute and does not refer
back to the limitations chapter and its tolling provision as does Nevada. Further, the case
cited by UAIC, *F/S Manufacturing v. Kensmoe*, 798 N.W.2d 853 (N.D. 2011) makes UAIC's
claims even more frivolous. As that Court notes:

Of course, it may be easier to renew a judgment by affidavit; but it
by no means follows that the old judgment may not be made the basis of a
new suit, and *many cases arise where it is an advantage to be able to bring
suit, instead of renewing by affidavit — the case at bar being an example.* It
is our conclusion that the two remedies are not inconsistent, and that a
judgment creditor may either sue upon his judgment, or renew it by affidavit
... *Id.* at 857.

1 UAIC, based on these flawed arguments, and without any supporting authority or additional
2 facts, claims that the motion was brought in a reasonable time even though it was filed more
3 than six months after the judgment. UAIC then claims the judgment is void as a result of the
4 Court's mistake and can therefore be set aside. This is done without any additional authority
5 or discussion.
6

7 8 **III BACKGROUND LAW ON INSURANCE CLAIMS HANDLING LITIGATION AND** 9 **VERDICTS ABOVE POLICY LIMITS**

10 **A. General Principles of Insurance :** Insurance is a social device for reducing risk. By
11 combining a sufficient number of similar or homogeneous exposure units - like homes, lives, or
12 cars - losses are predictable, not individually, but collectively. People value their lives, health, and
13 property, so they are able to buy insurance to soften the financial impact of losses and accidents.
14 Insurance is intended to provide peace of mind and good service and to fulfill financial
15 requirements of the varied beneficiaries.
16

17 **B. Role of Insurance Companies:** Insurance companies receive Certificates of Authority to sell
18 policies in states where they are licensed. Insurance is imbued with the concept of public trust,
19 presuming that insurers will conduct their activities legally and with a high degree of good faith
20 and fair dealing. Insurers are often said to have "special" or "fiduciary-like" duties to insureds,
21 and they must accomplish the purposes of the insurance policy, rather than attempting to prevent
22 insureds from obtaining the benefits purchased.
23

24 By statute, regulation, commercial practice, and common law requirements, insurers must
25 adopt and implement systems, instructions, and guidelines for the prompt investigation and
26 settlement of claims. In the broad sense, insurance indemnifies, or makes whole, an insured to
27
28

1 soften the financial consequences of an insured event. Sometimes this involves both first-party
2 and third-party coverages. When payment for a covered claim is delayed or withheld, the insured
3 suffers the very financial consequences insurance is bought to avoid. This is especially true in the
4 case of loss of funds, where the insured is relying on the insurer's best efforts to make insurance
5 payments properly. An adjuster's job, accordingly, is to facilitate use of the insurance contract by
6 addressing and resolving claims following notice of the event. Insurers should ensure their
7 practices don't undercut the public's confidence in the insurance mechanism.
8

9 **C. Claims-Handling Standards:** Claims-handling standards are fundamental to delivery of the
10 insurance contract promises. Insurance adjusters commonly know and understand these
11 principles. Knowing and following the underlying precepts of claims work is crucial to fair claim
12 practices. For example, an insurer:
13

- 14 1. Must treat its insured's interests with equal regard as it does its own interests, without
15 turning the claims handling into an adversarial or competitive process.
- 16 2. Must assist the insured with the claim to achieve the purpose of the coverage.
- 17 3. Must disclose all benefits, coverages, and time limits that may apply to the claim.
- 18 4. Must review and analyze the insured's submissions.
- 19 5. Must conduct a full, fair, and prompt investigation of the claim at its own expense,
20 keeping the insured on equal footing with disclosure of the facts.
- 21 6. Must fairly and promptly evaluate and resolve the claim, making payments or defending
22 in accordance with applicable law and policy language.
- 23 7. Must not deny a claim or any part of a claim based upon insufficient information,
24 speculation, or biased information.
- 25 8. Must give a written explanation of any full or partial claim denial, pointing to the facts and
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1 policy provisions supporting the denial.

2 9. Must not engage in stonewalling or economic coercion leading to unwanted litigation that
3 shows the unreasonableness of the company's assessments of coverage.

4 10. Must not misrepresent facts or policy provisions or make self-serving coverage
5 interpretations that subvert the intent of the coverage.

6 11. Must continue to defend the insured until final resolution.

7 12. Must relieve the insured of a verdict above the policy limits at the earliest opportunity.

8
9 As a minimum standard, Nevada claim handlers should also adhere to state requirements and the
10 unfair claim practices standards outlined in NRS 686A.310.

11 **D. CLAIMS HANDLING LITIGATION**

12
13 In general, there are a few different areas of litigation that involve failure by an insurance
14 company to fulfill the promises of this important product. All of these actions, regardless of the
15 parties involved, however, are founded in the general principle of contract law that in every
16 contract, especially policies of insurance, there is an implied covenant of good faith and fair
17 dealing that neither party will do anything which will injure the right of the other to receive the
18 benefits of the agreement. *Comunale v. Traders & General Insurance Company*, 50 Cal.2d 654,
19 328 P.2d 198, 68 A.L.R.2d 883. If the alleged failure to act in good faith is claimed by a
20 first-party insured or a third-party beneficiary, the standards may vary between the states. Most
21 courts have held, however, that an insurance company always fails to act in good faith whenever
22 it breaches its duty to settle by failing adequately to consider the interest of the insured. Windt,
23 Allan D., 1 Insurance Claims & Disputes 5th, Section 5:13 (Updated March, 2009).
24
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1 Within the area of first-party failure to deal in good faith, there are essentially three
2 standards which other courts have imposed on liability insurers in determining whether the
3 insurer has met its duty to the insured. Those standards involve strict liability, negligence and
4 failure to act in good faith. Shamblin v. Nationwide Mutual Insurance Company, 396 S.E.2d
5 766(W.Va. 1990), citing, *Schwartz, Statutory Strict Liability for an Insurer's Failure to settle: A*
6 *Balanced Plan for an Unresolved Problem*, 1975 Duke L.J. 901; *Annotation, Liability Insurer's*
7 *Negligence for Bad Faith in Conducting Defense as Ground of Liability to Insured*, 34 A.L.R.3d
8 533 (1970 & Supp. 1989).

10 The courts which have applied the strict liability standard have held that an insurer who
11 fails to settle within policy limits does so at its own risk, and although its position may not have
12 been entirely groundless, if the denial is *later found to be wrongful*, it is liable for the full
13 amount which will compensate the insured for all the detriment caused by the insurer's breach of
14 the express and implied obligations of the contract. Id., citing, *Crisci v. Security Ins. Co.*, 66
15 Cal2d 425, 58 Cal.Rptr. 13, 426 P.2d 173 (1967); *Rova Farms Resort, Inc. v. Investors Insurance*
16 *Co.*, 65 N.J. 474, 323 A.2d 495 (1974). Many commentators have suggested that the relationship
17 of the insurer and the insured when the insurer passes up an opportunity to settle within policy
18 limits and a verdict above the policy limit results should give rise to strict liability on the insurer
19 for the entire verdict. 22 AZSLJ 349.

22 The *Crisci* Court recognized that the insured's expectation of protection provides a basis
23 for imposing strict liability in failure to settle cases because it will always be in the insured's best
24 interest to settle within the policy limits when there is any danger, however slight, of a judgment
25 above those limits. Crisci v. Security Insurance Company of New Haven, Conn. 426 P.2d 173, 66
26 Cal.2d 425, 58 Cal. Rptr. 13, (1967). And that there is more than a small amount of elementary
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1 justice in a rule that would require that, in this situation, where the insurer's and insured's interests
2 necessarily conflict, the insurer, which may reap the benefits of its determination not to settle,
3 should also suffer the detriments of its decision. *Id.*

4
5 This standard makes sense, as Chief Justice Neely concurred with the *Shamblin* Court:

6 Can you honestly imagine a situation where an insurance company fails to
7 settle within the policy limits, the policyholder gets stuck with an excess
8 judgment, and this court *does not* require the insurance company to
9 indemnify the policy holder? That will happen the same day the sun rises
10 in the West! As far as I am concerned, even if the insurance company is
11 run by angels, archangels, cherubim and seraphim, and the entire heavenly
12 host sing of due diligence and reasonable care, I will *never*, under any
13 circumstances, vote that a policyholder instead of an insurer pays the
14 excess judgment when it was possible to settle a case within the coverage
15 limits.

16 When I buy insurance, I buy protection from untoward events. I do
17 not object to an insurance company's vigorous defense of a claim,
18 including going to jury trial and exhausting every appeal. Furthermore, as
19 a policyholder, I will diligently assist my insurer to vindicate its rights
20 and protect its reserves. However, I draw the line when the insurer decides
21 that in the process of protecting its reserves, it will play "you bet *my*
22 house." The insurance company can bet as much of its own money as it
23 wants, and it can bet its own money at any odds that it wants, but it cannot
24 bet one single penny of my money even when the odds are ten million to
25 one in its favor!

26
27 *Id.* at 780.

28 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. (Emphasis added.)

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

5
6 Other states make no distinction on what standard to apply when dealing with a first-party
7 claim as opposed to a third-party claim. Arizona has found no legal distinction between the duty
8 or standard of good faith owed by an insurance company when dealing with the different types of
9 claims. Instances of first and third-party failures merely involve different breaches of the same
10 overall duty of good faith. Trus Joist Corp. v. Safeco Ins. Co. of America, 735 P.2d 125 (1986).
11 They have also made clear that the tort of failure to act in good faith does not rise to the level of a
12 traditional tort in the sense that the insurer must know with substantial certainty that its actions
13 will bring particular harm to the insured. *Id.*, citing Restatement (Second) of Torts Section 8A,
14 comment B (1956).
15

16 Most states apply this sort of standard when evaluating first-party rights against insurance
17 companies. Utah has implemented a reasonableness standard wherein it determined that actions
18 against insurance carriers for failure to resolve a claim in a commercially reasonable manner
19 center on the question of whether the insurance carrier acted reasonably. Campbell v. State Farm,
20 840 P.2d 130 (Utah App. 1992). In Campbell, State Farm paid the entire verdict against the
21 insured above the policy limits. State Farm was still liable for millions of dollars for the delay in
22 paying the verdict above the policy. Under Oregon law, a liability insurer must exercise good
23 faith and due care in the settlement and defense of claims on behalf of its insured. Baton v.
24 Transamerica Insurance Company, 584 F.2d 907 (1978), citing, *Radcliffe v. Franklin National*
25 *Insurance Co.*, 208 Or. 1, 298 P.2d 1002 (1956).
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1 In Nevada, the question of which standard to apply when a verdict is more than the policy
2 was answered in *Allstate Insurance Co. v. Miller*, 125 Nev. 300, 212 P.3d 318 (2009). The court
3 held that an insurance company breaches the covenant of good faith and fair dealing if it fails to
4 inform the insured of opportunities to settle and that the duty to defend includes the duty to
5 inform the insured of settlement opportunities and to treat the insured's interest equal to the
6 insurer's interest. Nevada has long recognized that there is a special relationship between the
7 insurer and the insured. *Powers v. USAA*, 114 Nev. 690, 962 P.2d 596 (1998), citing, *Ainsworth v.*
8 *Combined Ins. Co.* 104 Nev. 587, 763 P.2d 673 (1988).
9

10 Nevada has also established similar standards that apply in other types of failure to act in
11 good faith situations. In *Pemberton v. Farmers Insurance Exchange*, 109 Nev. 789, 858 P.2d 380
12 (1993), the Nevada Supreme Court established standards to apply when an action is brought
13 related to the lack of good faith in the denial of first-party benefits under uninsured or
14 underinsured coverage. There, the court noted that numerous appellate court decisions affirm that
15 an insurer's failure to deal fairly and in good faith with an insured's UM claim is actionable. *Id.* at
16 794 (citations omitted) The *Pemberton* Court ultimately held that an insured may institute an
17 action for breach of the duty of good faith and fair dealing against his or her own insurer once the
18 insured has established "legal entitlement" and conduct not based on reason and logic by the
19 insurer concerning its obligations to the insureds. *Id.* at 797.
20

21 Perhaps most instructional in Nevada, however, on the standard to be applied when dealing
22 with negative effects resulting from an insurer's failure to settle a claim is *Landow v. Medical Ins.*
23 *Exchange*, 892 F.Supp. 239 (D.Nev. 1995). The Court's ruling is enlightening because although
24 it does not involve a verdict above the policy limit, it does involve a first-party insured bringing a
25 claim for stress and damage to his reputation related to ongoing litigation that could have exposed
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1 him to a verdict but was concluded prior to a verdict. The underlying plaintiffs in *Landow* sought
2 damages above Landow's policy limit after previously offering to settle for that limit. Landow
3 requested that his insurance company pay the limit and accept the plaintiff's offer to end the case,
4 but the insurance company refused and forced litigation. The *Landow* Court, following the
5 rationale of California courts in above limit verdict situations accepted that, "the litmus test ... is
6 whether the insurer, in determining whether to settle a claim, gave as much consideration to the
7 welfare of its insured as it gave to its own interests," citing, *Egan v. Mutual of Omaha Ins. Co.*, 24
8 Cal.3d. 809, 818, 169 Cal.Rptr. 691, 620 P.2d 141 (1979). Ultimately, the Landow Court decided
9 that the insurer has a duty to consider injury to the insured, such as emotional distress and injury
10 to business goodwill that proximately flow from its failure to settle. *Id.* at 241.
11
12

13 CONCLUSION

14 UAIC's motion to consolidate should be denied. UAIC's intervention order should be
15 voided and all filings by UAIC in case no. 07A549111 be stricken. In the alternative, Partial
16 summary judgment should issue in favor of Lewis and against UAIC for breach of the covenant
17 of good faith and fair dealing, and fraud, with a finding that the minimum damages are the
18 amount of any judgment entered in this case against Lewis together with attorney fees and costs.
19 The only issues left for trial would be additional compensatory damages and punitive damages.
20

21 CHRISTENSEN LAW OFFICES

22 

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Attorney for Third Party Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of CHRISTENSEN LAW OFFICES, LLC and that on this 21st day of Nov, 2018, I served a copy of the foregoing

**OPPOSITION TO UAIC'S MOTION TO CONSOLIDATE AND COUNTERMOTION
TO SET ASIDE VOID ORDER AND TO STRIKE ALL FILINGS BY INTERVENOR**

as follows:

☐ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or

☒ E-Served through the Court's e-service system.

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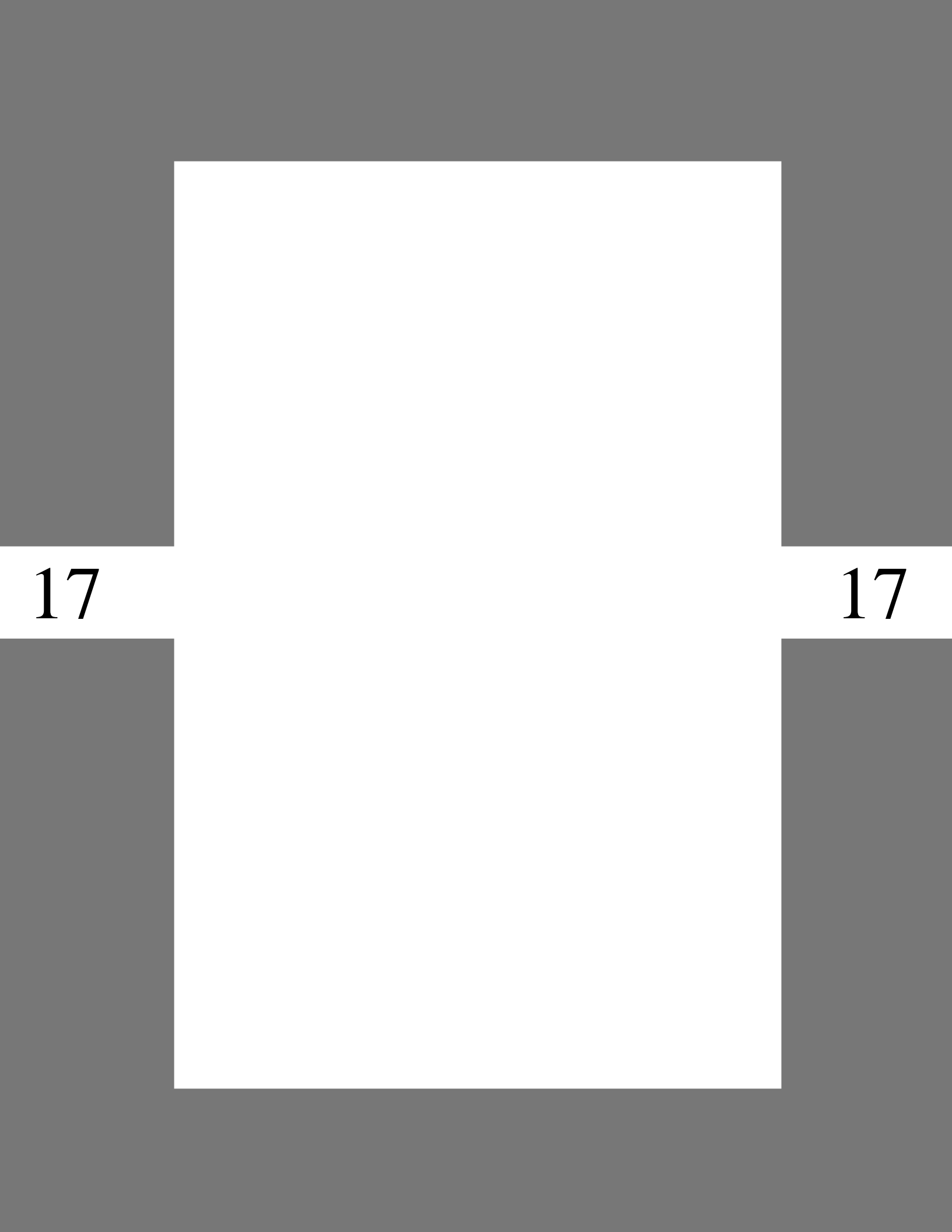
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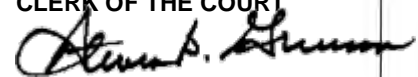


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17

17



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Attorneys for Intervenor/Third Party Defendant United Automobile Insurance Company

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYANNE NALDER,

Plaintiff,

vs.

GARY LEWIS and DOES I through V,
inclusive,

Defendants,

UNITED AUTOMOBILE INSURANCE
COMPANY,

Intervenor.

GARY LEWIS,

Third Party Plaintiff,

vs.

UNITED AUTOMOBILE INSURANCE
COMPANY, RANDALL TINDALL, ESQ.
and RESNICK & LOUIS, P.C., and DOES I
through V.,

Third Party Defendants.

CASE NO.: 07A549111
DEPT. NO.: 20

CASE NO.: A-18-772220-C
DEPT. NO.: 20.

**UAIC'S OPPOSITION TO THIRD
PARTY PLAINTIFF LEWIS'
COUNTER-MOTION FOR SUMMARY
JUDGMENT & COUNTER-MOTION TO
STRIKE AFFIDAVIT OF LEWIS IN
SUPPORT OF SAME COUNTER-
MOTION FOR SUMMARY JUDGMENT
AND/OR STAY PROCEEDINGS
PENDING APPELLATE RULING
AND/OR STAY COUNTER-MOTION
FOR SUMMARY JUDGMENT
PENDING NECESSARY DISCOVERY
PURSUANT TO N.R.C.P. 56(f)**

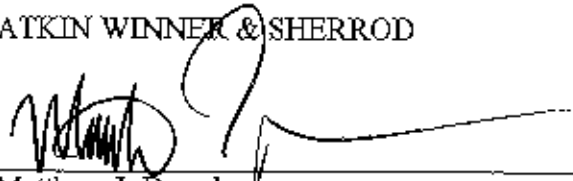
COMES NOW, UNITED AUTOMOBILE INSURANCE COMPANY (hereinafter referred to as "UAIC"), by and through its attorney of record, ATKIN WINNER & SHERROD and hereby files its Opposition to Defendant/Third Party Plaintiff Gary Lewis' Counter Motion for Summary Judgment & UAIC's Counter-Motion to Strike Affidavit of Gary Lewis, Stay

1 Proceedings for appellate ruling and/or for discovery pursuant to N.R.C.P. 56(f). Third Party
 2 Plaintiff's extra-contractual claims have been previously litigated, and judgment entered. Third
 3 Party Plaintiff's continued requests to re-litigate these claims is both improper and clear forum
 4 shopping which should be summarily dismissed by this Court. Moreover, the Affidavit of Lewis
 5 filed in support of his Motion is improper and must be stricken in whole or in part.

6 This Opposition & Counter-Motion is made and based upon the papers and pleadings on
 7 file herein, the Memorandum of Points and Authorities attached hereto, and such oral argument
 8 as the Court may permit.

DATED this 14th day of December, 2018.

ATKIN WINNER & SHERROD


 Matthew J. Douglas
 Nevada Bar No. 11371
 1117 South Rancho Drive
 Las Vegas, Nevada 89102
 Attorneys for Intervenor/Third Party Defendant
 UAIC

**AFFIDAVIT OF COUNSEL IN SUPPORT OF UAIC's
 MOTION TO STAY LEWIS' COUNTER-MOTION FOR SUMMARY JUDGMENT
 PENDING APPEAL AND/OR FOR DISCOVERY PURSUANT TO N.R.C.P. 56(f)**

STATE OF NEVADA)
) SS:
 COUNTY OF CLARK)

Matthew J. Douglas, Esq., having been first duly sworn, deposes and states:

1. I am a duly licensed and practicing attorney of the State of Nevada and I am partner of the law firm of Atkin Winner & Sherrod maintaining offices at 1117 South Rancho Drive, Las Vegas, Nevada 89102;

2. I represent Intervenor, UAIC, in the above-captioned action;

3. I have reviewed the facts and circumstances surrounding this matter and, Third Party Plaintiff Lewis' Counter-Motion for Summary Judgment and I am competent to testify to those facts contained herein upon personal knowledge, or if so stated, upon my best information and belief;

4. That the following is true and accurate to the best of affiant's knowledge and information;

5. That, Defendant/Third Party Plaintiff Lewis is the judgment-debtor in the initial action filed by Cheyanne Nalder to collect on a 2008 judgment, within which Lewis filed this Third-party Complaint;

6. Counsel for Third Party Plaintiff Lewis is Thomas Christensen, Esq.;

7. Thomas Christensen, Esq. also represents the judgment-creditor, Cheyanne Nalder on the original 2008 judgment in the consolidated matter 07A549111 and in an ongoing appeal in the case of *Nalder, et al. v UAIC*, Federal District Court case no. 2:09-cv-01348-RCJ-PAL which is before the U.S. Court of Appeals for the Ninth Circuit under docket no. 13-17441 as well as before the Nevada Supreme Court on certified questions;

8. In response to UAIC's Motion to dismiss the third party Complaint under the theory of claim preclusion and, while a Motion for Evidentiary hearing on the motivations and conflicts of Mr. Christensen, by UAIC, is pending, the instant Counter-Motion for summary judgment was filed with a 127 paragraph affidavit, purportedly signed by Gary Lewis, attached as support;

9. That given many of the issues raised in the instant matter filed by Nalder, as well as in Lewis' third party Complaint and Lewis' counter-Motion for summary judgment are on appeal before the Ninth Circuit and Nevada Supreme Court, this counter-motion for summary judgment should be stayed pending resolution of the pending appeals;

10. That, alternatively, in order to properly respond to Counter-Motion for summary judgment and, the Lewis affidavit made in support of same, UAIC is requesting discovery pursuant to N.R.C.P. 56(f);

11. That, as this case is still in the pleadings stage (as UAIC has a pending Motion to dismiss), no joint case conference report has been filed or, discovery scheduling order entered and, thus, no discovery has or, can, take place;

12. That given the lengthy averments of the Lewis affidavit and, the issues surrounding the creation of same, UAIC requests, at a minimum, the following discovery:

- a-written discovery to Gary Lewis;
- b-deposition of Gary Lewis;
- c-deposition of Thomas Christensen, Esq.;
- d-deposition of Breen Arntz, Esq.;
- e-deposition of David Stephens, Esq.;

13. This discovery is necessary to respond to the Motion and, will lead to the creation of genuine issues of facts, as follows:

a & b – the written discovery and deposition of Gary Lewis will lead to a creation of genuine issue of fact because UAIC needs to examine Lewis on who drafted the affidavit, who advised him to refuse UAIC's retained defense counsel, whether Lewis was advised of the fact that the original 2008 judgment expired, whether Lewis was advised that the issues raised by his counsel to combat the theory that the 2008 judgment is expired are already on appeal before the Ninth Circuit and Nevada Supreme court, where he got his knowledge and understanding of the alleged facts he testified to regarding the case on appeal and other facts in his affidavit, why he

believes UAIC 's efforts to vacate an "amended judgment" made on an expired judgment will cause him more damages; why, despite the preceding issue, he wanted Breen Arntz, Esq. to enter into a stipulated judgment in this action for the same increased judgment he now claims to fear, how Breen Arntz, Esq. came to represent him, what support he has for his allegations concerning UAIC's actions/failures to act in regard to his claims (e.g. that UAIC ignored statutes, mischaracterized the law, failed to investigate, that UAIC damaged his contractual relationship with Nalder (and what contractual relationship exists), what facts he has to support his allegations UAIC's defense is frivolous or that he will lose, what damages Lewis has actually sustained, the factual bases for his allegations that UAIC has violated N.R.S. 686A.310, what facts he has to support the allegation that UAIC breached the covenant of good faith and fair dealing or acted unreasonably, what facts he has to support his claims of a conspiracy involving UAIC);

c- the deposition of Thomas Christensen, Esq. is necessary and will lead to genuine issues of fact in regard to his representation of both the judgment-creditor, Nalder, and the judgment-debtor, Lewis, in the same action, that said conflict has caused a fraud upon the court which he continues to perpetrate by fomenting more litigation and has precluded UAIC from abiding its duty to defend Lewis in blocking retained defense counsel's attempts to confer with Lewis and retaining other counsel for both Lewis and Nalder to obfuscate his intentions, regarding his role in drafting the affidavit signed by Lewis;

d - the deposition of Breen Arntz, Esq. is necessary and will lead to genuine issues of material fact concerning his retention to represent Lewis by attorney Christensen and also blocking UAIC's retained counsel from defending Lewis and prevent them from either vacating the improper "amended judgment" in the 2007 action or, dismissing the current complaint and, instead seeking to enter a stipulated judgment which subjects his client, Lewis, to damages when a judgment against him already expired and said issue on appeal;

e. the deposition of David Stephens is necessary and will lead to material issues of fact concerning how he was retained to amend an expired judgment for Nalder, his discussions with Mr. Arntz, Esq. to enter a stipulated judgment on this action while UAIC's intervention was pending, his understanding of the case on appeal when he undertook his attempt to amend an expired judgment;

14. In short, UAIC believes the above requested discovery will lead to material issues of fact because such discovery will reveal the hollowness of Lewis's affidavit and, therefore the entire counter-motion for summary judgment as all the alleged "facts" in support of same motion are, at least, all in dispute or, at worst, interposed improperly to produce a fraud upon the court;

15. As stated, this case has just been filed and discovery conducted and, thus the case is not at the appropriate stage to consider a summary judgment motion without discovery;

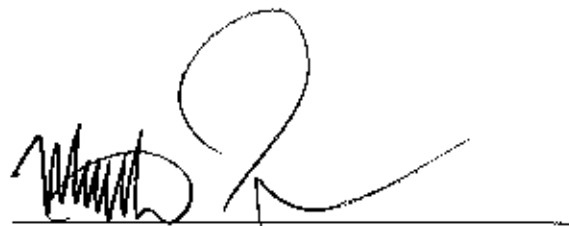
16. No prejudice will come to any party if the requested discovery is allowed, but severe prejudice will accrue to UAIC if same is refused;

///

16. This Motion is brought for good cause and not for purposes of unnecessary delay.

Further Affiant Sayeth Naught.

DATED this 14th day of December, 2018.


Matthew J. Douglas, Esq.

SUBSCRIBED AND SWORN to before me

This 14th day of December 2018


NOTARY PUBLIC in and for said
Clark County, Nevada



**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
COUNTER MOTION TO STRIKE LEWIS AFFIDAVIT AND/OR STAY COUNTER-
MOTION PENDING APPEAL AND/OR, FOR DISCOVERY PURSUANT TO N.R.C.P.
56(f) & OPPOSITION TO LEWIS' COUNTER-MOTION FOR SUMMARY JUDGMENT**

I.

INTRODUCTION

In an obvious attempt to stir up more litigation over matters previously ruled upon as well as to cloud issues before this Court, Third Party Plaintiff Lewis has filed the present counter-Motion based on Affidavit of Gary Lewis which appears to be nothing more than argument of counsel. Most alarmingly, the disjointed and rambling argument makes one thing clear – third Party Plaintiff Lewis' counsel believes everyone involved - UAIC, retained counsel for Lewis, a sitting District Court Judge and, Nevada Bar Counsel – are all in some sort of conspiracy against him and/or are conflicted. This can only be seen as an attempt to deflect attention from the one person in this matter with a clear conflict in this case – Third Party Plaintiff counsel, Mr. Tom Christensen. UAIC asks this Court to consider Occam's Razor in such a scenario. What is the

1 simpler answer - is everyone involved in this case in a conspiracy against Mr. Christensen or, is it
2 simply that Mr. Christensen is trying to hide from this court his conflict of interest and attempt to
3 cover up his failure to renew his client's judgment by casting dispersions and creating false claims.

4 After all the conclusory and self-serving argument is wiped away, what one is left with is
5 are really speculative claims concerning issues on appeal or, that are clearly in dispute. Further,
6 than when examined closely, they are really all false controversies fomented by Mr. Christensen
7 himself, to benefit himself and his original client, Nalder. This is most clearly evidenced by the
8 alleged stipulated judgment Nalder (through her 'new' counsel David Stephens, Esq.) and Lewis
(through Counsel retained for him by Mr. Christensen attempted to have the court enter. By this
stipulated judgment Lewis attempted to stipulate to same damages he now claims UAIC's frivolous
defense will subject him to. This upside, backwards and sideways. In short, despite all the bluster
and accusations made against UAIC, Lewis has not articulated how attempting to relieve him
from an expired multi-million dollar judgment is harming him.

19 In short, The Counter Motion for summary judgment is based on Lewis' affidavit, which
is basically pure legal argument made by counsel - *but signed by the client.* It is bereft of personal
knowledge in many places and, most importantly, does not contain facts to support the conclusory
20 statements of law. In short, there exist grave questions about Mr. Lewis' s personal knowledge
21 much less his ability to attest to the matters set forth herein. First, at no time does Mr. Lewis ever
22 attest how he came to learn any of the legal matters attested to, much less the actions of third
23 parties. Indeed, as Lewis himself admits - he refused to talk to UAIC or retained defense counsel
24 and, thus, how can he be aware of their beliefs, actions or reasoning - much less of their conspiracy.
25 As such, his alleged "personal knowledge" is not evident and the affidavit should be stricken in its
26 entirety for this reason. At the very least, based on the Affidavit of UAIC Claims V.P. Brandon
27 Carroll, material issues abound and the motion should be denied.

28 Accordingly, UAIC believes the Affidavit of Lewis should be stricken and the Motion

1 denied. In the alternative, UAIC requests the Counter-Motion for summary judgment be stayed or,
 2 deferred, pending appeal discovery and/or stayed under N.R.C.P. 56(f) for additional discovery to
 3 respond to the Motion.

4 II.

5 STATEMENT OF FACTS

6
 7 Intervenor/Third Party Defendant will not re-state the entire history of this matter as it is
 8 adequately set forth in Order Certifying a Second Question to the Nevada Supreme Court by
 United States Court of Appeals for the Ninth Circuit, which was filed on January 11, 2018. *A copy*
of the Order certifying the second question of law is attached hereto as Exhibit 'A.' Said certified
 question was accepted and, reformulated, by the Nevada Supreme Court on February 23, 2018. *A*
copy of the Order accepting the second certified question of law by the N. Sup. Ct. is attached
hereto as Exhibit 'B.'

Rather, the salient points are that Plaintiff Cheyanne Nalder obtained the original judgment
 against Defendant/Third Party Plaintiff Gary Lewis on August 26, 2008 for personal injuries
 stemming from a July 7, 2007 accident between Nalder and Lewis. After obtaining the judgment,
 Counsel for Plaintiff¹ then filed an action against Mr. Lewis' insurer, UAIC, Intervenor/Third
 Party Defendant herein and that matter proceeded is U.S. Federal District Court for the District of
 Nevada as *Nalder et al. v UAIC*, case no. 2:09-cv-1348. That complaint was filed upon an
 assignment of Lewis' causes of action against UAIC for alleged "bad faith", however, the
 assignment was only obtained after the litigation was filed. The original Complaint by Lewis
 against UAIC specifically plead improper investigation by UAIC in regard to the claim, improper
 denial of coverage, that UAIC's actions caused expense and aggravation to Lewis, that UAIC
 committed various breaches of the Nevada Unfair Claims Practices Act (N.R.S. 686A.310 *et seq.*),

28 ¹ Thomas Christensen, Esq., who is also Counsel for Lewis as third party Plaintiff, herein, and
 progenitor of this Motion.

1 and that UAIC breached the implied covenant of good faith and fair dealing. See Exhibit 'C', copy
 2 of original filed Complaint by Nalder and Lewis against UAIC.

3 In any event, following lengthy and comprehensive discovery, the District Court granted
 4 complete summary judgment in favor of UAIC finding no policy of insurance in effect as between
 5 Lewis and UAIC² and, accordingly, that there was no "bad faith." *A copy of the District Court's*
 6 *Order dated 12/20/10 is attached hereto as Exhibit 'D.'* Lewis and Nalder appealed this judgment
 7 to the U.S. Court of Appeals for the Ninth Circuit wherein, following argument, the Ninth Circuit
 8 reversed finding a potential ambiguity in the language of Lewis' renewal statement. On remand,
 the parties again filed cross-motions for summary judgment³ and, The District Court now found
 that Lewis has an *implied policy of insurance* on the date of the loss – due to the ambiguity in the
 renewal – but the Court found UAIC had committed no statutory or common law bad faith as its
 belief the policy had lapsed was a reasonable one. *A copy the U.S. District Court's 10/30/13 Order*
& Judgment is attached hereto as Exhibits 'G' & 'H', respectively.

Lewis and Nalder appealed again to the Ninth Circuit and that appeal remains pending.
 Indeed, it is evident from Nalder and Lewis' Opening brief on the appeal that they are arguing
 nearly identical issues as Lewis argues herein (indeed the argument is often verbatim). *A copy of*
Nalder and Lewis' Opening brief on Appeal is attached as Exhibit 'I.' Following briefing and
 argument, the Ninth Circuit certified a *first* certified question to the Nevada Supreme Court asking,
 in short, whether Plaintiff and Lewis could recover their default judgment from UAIC as a
 'consequential damage' *even in the absence of bad faith.* During the pendency of this issue it was
 observed that Plaintiff had failed to renew her 2008 judgment against Lewis pursuant to Nevada
 law. Specifically, under N.R.S. 11.190(1)(a) the limitation for action to execute on such a

² It is uncontroverted that Lewis failed to make a timely renewal premium and his policy with
 UAIC lapsed days before the July 8th, 2007 loss.

³ *A copy of Plaintiff's Motion for Summary Judgment is attached as Exhibit 'E' and, a copy of*
UAIC's Opposition, attached as Exhibit 'F.'

1 judgment would be six (6) years, unless renewed under N.R.S. 17.214. Upon realizing the
 2 judgment had never been timely renewed, UAIC filed a Motion to Dismiss the Appeal for Lack of
 3 Standing with the Ninth Circuit on March 14, 2017. On December 27, 2017 the Ninth Circuit
 4 certified a second question to the Nevada Supreme Court – specifically certifying the following
 5 question:

6
 7 “Under Nevada law, if a plaintiff has filed suit against an insurer seeking damages based on a
 8 separate judgment against its insured, does the insurer’s liability expire when the statute of
 limitations on the judgment runs, notwithstanding that the suit was filed within the six-year life
 of the judgment?”

See *Exh. ‘A.’*

On February 23, 2018 the Nevada Supreme Court issued an order accepting this second certified
 question and ordered Appellants to file their Opening brief within 30 days, or by March 26, 2018.

See *Exhibit ‘B.’* In accepting the certified question, the Nevada Supreme Court rephrased the
 question as follows:

**In an action against an insurer for breach of the duty to defend its insured, can the
 plaintiff continue to seek consequential damages in the amount of a default
 judgment obtained against the insured when the judgment against the insured was
 not renewed and the time for doing so expired while the action against the insurer
 was pending?**

Id.

20 This issue remains pending and, is currently being briefed before the Nevada Supreme
 21 Court. Despite the above, in what appears to be a clear case of forum shopping, Plaintiff retained
 22 additional Counsel (Plaintiff’s Counsel herein, David Stephens, Esq.) who filed an *ex parte* Motion
 23 on March 22, 2018 seeking, innocently enough, to “amend” the 2008 expired judgment to be in
 24 the name of Cheyenne Nalder individually. Thereafter, the Court obviously not having been
 25 informed of the above-noted Nevada Supreme Court case, entered the amended judgment and
 26 same was filed with a notice of entry on May 18, 2018.

Furthermore, Plaintiff then initiated a "new" action, under case no. A-18-772220-C⁴ in a thinly veiled attempt to have this Court rule on issues pending before the Nevada Supreme Court and "fix" their expired judgment. This intent appears clearly evidenced by paragraph five (5) of Plaintiff's prayer for relief herein which states Plaintiff is seeking this Court to make "a declaration that the statute of limitations on the judgment on the judgment is still tolled as a result of Defendant's continued absence from the state."

Upon learning of these machinations in July 2018, when a 3 day notice of intent to take default against Lewis was sent to UAIC, UAIC immediately attempted to retain counsel for Lewis to defend him and relieve him of the amended judgment and, dismiss the new action. *See Affidavit of Brandon Carroll for UAIC and, exhibits thereto, attached as Exhibit 'J.'* However, Counsel for Nalder and Lewis, Mr. Christensen refused to allow communication with Lewis and forbade and filings on his behalf. *Id.* Upon learning of this interference, UAIC moved to intervene to protect Lewis and UAIC's interests in the consolidated cases herein. *Id.* However, while the Motion to intervene was pending Counsel for Nalder and Lewis arranged for additional counsel for Lewis to appear, Breen Arntz, Esq., and he and new counsel for Nalder, Stephens, attempted to enter a stipulated judgment as between Lewis and Nalder. *See Exhibit 'J' & A copy of the proposed stipulated judgment is attached hereto as Exhibit 'K.'* The stipulation grants all damages Nalder seeks in this matter. *See Exhibit 'K.'*

Then, despite the apparent contradiction of counsel representing both the judgment-creditor and judgment-debtor in the same action, Mr. Christensen, on behalf of Lewis, has now filed the instant third party complaint against UAIC seeking to, again, re-litigate issues of "bad faith" against UAIC despite the above-referenced appeals. *A copy of the Third Party Complaint, filed herein, by Lewis is attached hereto as Exhibit 'L.'* As this Court can see, this Third Party

⁴ Both Lewis and UAIC have pending Motions to dismiss this action before this court for claim preclusion.

1 Complaint again pleads the same causes of action as plead in Lewis' initial complaint against
 2 UAIC, seeking both common law and/or statutory bad faith against UAIC, and attendant damages,
 3 for failures involved in the handling and litigation of the 2007 loss. See Exhibits 'C' & 'L.'
 4 Moreover, the third party complaint also makes allegations against lawyers in the case, a sitting
 5 judge and, Nevada Bar Counsel. See Exhibit 'L.' It is these same allegations which Lewis now
 6 makes anew in this pending counter-motion for summary judgment.
 7

8 Given the above noted outrageous conduct by Mr. Christensen, UAIC has also filed a
 Motion for an evidentiary hearing for a fraud upon the court given what is clear forum shopping
 and an improper attempt to re-litigate issues between the same parties. As will be set forth in detail
 below, besides denying this Motion and/or granting UAIC's Counter-Motions in the alternative,
 we see an attempt of fraud upon the court which should not be countenanced and an evidentiary
 hearing should be held on these issues.

III.

COUNTER-MOTION TO STRIKE LEWIS' AFFIDAVIT AND/OR TO STAY PROCEEDINGS PENDING APPEAL AND/OR FOR DISCOVERY PURUANT TO N.R.C.P. 56(f)

A. Motion to Strike Affidavit of Gary Lewis

19 Besides what appears to be conclusory and argumentative averments in his affidavit, UAIC
 20 also has well-founded doubts about the personal knowledge of Mr. Lewis in offering many
 21 statements in his affidavit put forth in support of this Motion for summary judgment. Specifically,
 22 the affidavit appears to be nothing more than the arguments of counsel, signed by his client.
 23 Moreover, the language of the affidavit itself suggests that although he attests to "personal
 24 knowledge" – the statements cite legal argument (though he is not an attorney) and, moreover,
 25 offer conclusory allegations which are the subject of ongoing litigation on appeal or, this case.
 26 Accordingly, UAIC asks this Court to strike the affidavit in whole or, alternatively, to strike the
 27 most objection paragraphs. UAIC maintains that this affidavit governed by N.R.C.P.56(e).
 28

1 Rule 56(e) of the Nevada Rules of Civil Procedure requires that "[s]upporting and opposing
2 affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible
3 in evidence, and shall show affirmatively that the affiant is competent to testify to the matters
4 stated therein." It must be noted that this rule is exactly the same as the Federal counter-part,
5 F.R.C.P. 56(e). The Nevada Supreme Court has confirmed that affidavits pursuant to Rule 56(e)
6 must be on personal knowledge and must present admissible evidence cited to federal court
7 opinions regarding same. *Daugherty v Wabash Life Ins. Co.*, 87 Nev. 32, 482, P.2d 814 (1971);
8 *See Cuzze v Univ. & Cmty College Sys.*, 123 Nev 598, 602-3, 172 P.3d 131, 134 (2007) (finding
when a Motion for summary judgment relies on affidavits, the affidavits must be set forth on
"facts that would be admissible as evidence"). A party must come forth with more than his own
uncorroborated statements in an affidavit to support a claim. *Yeager v Harrah's Club*, 111 Nev.
830, 897 P.2d 1093 (1995).

In reviewing motions for summary judgment, courts may not consider affidavits or
declarations that do not comply with these requirements. *El Deeb v. Univ. of Minnesota*, 60 F.3d
423, 428 (8th Cir. 1995); *School Dist. 1J v. AC and S*, 5 F.3d 1255, 1261 (9th Cir. 1993), *cert.*
denied, 512 U.S. 1236 (1983); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 585 (6th Cir. 1992); *Friedel*
v. City of Madison, 832 F.2d 965, 970 (7th Cir. 1987); *United States v. M.E. Dibble*, 429 F.2d 598
(9th Cir. 1970).

20 All matters set forth in declarations must be based on personal knowledge and statements
21 in a declaration are inadmissible unless the declaration itself affirmatively demonstrates that the
22 declarant has personal knowledge of those facts. *Daugherty v Wabash Life Ins. Co.*, 87 Nev. 32,
23 482, P.2d 814 (1971); *Love v. Commerce Bank of St. Louis, N.A.*, 37 F.3d 1295, 1296 (8th Cir.
24 1994); *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 315-16 (6th Cir. 1989) (holding that
25 statements in affidavits that are not based on personal knowledge and personal observation do not
26 contain facts that are admissible evidence for summary judgment purposes); *El Deeb*, 60 F.3d at
27 428 (affidavits "shall be made on personal knowledge" and must include facts "to show the affiant
28 possesses that knowledge.") *Dibble*, 429 F.2d at 602.

While it is true that a court may exercise discretion in dealing with deficiencies in

1 declarations, "leniency does not stretch so far that Rule 56(e) becomes meaningless." *School Dist.*
 2 *No. 1J*, 5 F.3d at 1261, citing *Peterson v. United States*, 694 F.2d 943, 945 (3rd Cir. 1982)(lack of
 3 personal knowledge and failure to attach authenticated document violated rule 56(e) and made
 4 summary judgment improper).

5 In the case at bar, Third Party Plaintiff has attached the affidavit of Gary Lewis (See Exhibit
 6 3 to Lewis motion, herein) in support of their request for summary judgment. However, UAIC
 7 argues this affidavit is clearly not based upon personal knowledge and, additionally, fails to offer
 8 facts, but instead conclusory allegations, which are improper and cannot support a Motion for
 summary judgment under N.R.C.P. 56.

UAIC believes the affidavit's deficient paragraphs share one or more of the following 3
 improper categories – attestations that are irrelevant to the case at bar, attestations not based on
 personal knowledge and conclusory argument.

1. Irrelevant averments concerning issues in case on appeal which are precluded herein
and, thus, cannot offer support of any claim in this third-party complaint.

As this Court can see, paragraphs 7 - 40 essentially are attestations regarding the alleged
 background of the original action *Nalder v UAIC* currently on appeal. These averments have
 absolutely no bearing on the issues raised by Lewis herein. In short, Lewis' alleged 'bad faith' or,
 extra-contractual, causes of action against UAIC stemming from the original claim and lawsuit by
 Nalder in 2007 – **have already been litigated in the prior case** and, indeed, the Federal District
 20 Court's have twice found UAIC committed no actionable "bad faith." See Exhibits 'A', 'D', 'G',
 21 & 'H.' Accordingly, these paragraphs appear to be an attempt to re-litigate these issues – which is
 22 the subject of UAIC's Motion to dismiss for claim preclusion.
 23

24 This is made evident by paragraph 32, which states:

25 32. The district court also granted summary judgment in favor of UAIC on my bad
 26 faith allegations even though there were questions of fact regarding the reasonableness of
 27 UAIC's actions and their failure to defend me or communicate offers of settlement to me were
 28 sufficient to sustain a bad faith claim under *Miller v. Allstate*. Nalder and I appealed this
 erroneous decision.

Similarly, Lewis' attestations regarding damages he suffered "at that time" have no bearing here

as that issue, regarding consequential damages for the breach of the duty to defend are squarely on appeal. Accordingly, again Lewis' attestation at paragraph 33 is irrelevant to the case at bar, as follows:

33. At this time I had already suffered damages as a result of the judgment entered against me.

Further, paragraph 39 also refers to alleged acts by UAIC which relate to the case on appeal when Lewis attests that:

39. UAIC did an unreasonable investigation, did not defend me, did not attempt to resolve or relieve me from the judgment against me, did not respond to reasonable opportunities to settle and did not communicate opportunities to settle to me.

This paragraph is pure legal argument and, in any event, relates to issues on appeal. Moreover, it is incorrect as the Court found there were no issues of fact in granting UAIC summary judgment on the bad faith counts. *Id.* Regardless, though still technically on appeal, such matters cannot be raised herein and need to be stricken.

Accordingly, as all the above averments relate to issues on appeal, they are precluded here and offer no support to Lewis' "alleged" claims here and, should be stricken.

2. Attestations regarding issues on appeal which are either not based on personal knowledge or contain improper legal argument and/or conclusory attestations.

Most glaring are the scores of attestations made by Lewis that appear to be pure legal argument or, simply conclusory in nature, which are insufficient under N.R.C.P. 56(e). Again, many of these allegations appear to be an attempt to "re-litigate" issues now on appeal in the original action filed by Nalder and Lewis against UAIC and, thus, are more evidence of Lewis' forum shopping. These paragraphs are generally located at paragraphs 41-51 and, as can be seen intermingling conclusory legal argument and speculation with a recounting of the history of the case on appeal. UAIC contends these averments are not on personal knowledge of Lewis, are conclusory legal argument of issues on appeal and, are speculative, as follows:

41. After the first certified question was fully briefed and pending before the Nevada

Supreme Court, UAIC embarked on a new strategy putting their interests ahead of mine in order to defeat Nalder's and my claims against UAIC.

This paragraph contains conclusory arguments that UAIC put their interest ahead of Lewis.

UAIC sought to show the judgment against Lewis expired and, thus, such a finding cannot possibly hurt Lewis. Regardless, this issue is on appeal.

42. UAIC mischaracterized the law and brought new facts into the appeal process that had not been part of the underlying case. UAIC brought the false, frivolous and groundless claim that neither Nalder nor I had standing to maintain a lawsuit against UAIC without filing a renewal of the judgment pursuant to NRS 17.214.

43. Even though UAIC knew at this point that it owed a duty to defend me, UAIC did not undertake to investigate the factual basis or the legal grounds or to discuss this with me, nor did it seek declaratory relief on my behalf regarding the statute of limitations on the judgment.

44. This failure to investigate the factual basis for the validity of the judgment against me caused me additional damages.

45. UAIC, instead, tried to protect themselves and harm me by filing a motion to dismiss my and Nalder's appeal with the Ninth Circuit for lack of standing.

46. This was not something brought up in the trial court, but only in the appellate court for the first time. My understanding is that the Ninth Circuit is not a trial court that takes evidence.

47. This action could leave me with a valid judgment against me and no cause of action against UAIC.

48. UAIC ignored all of the tolling statutes and presented new evidence into the appeal process, arguing Nalder's underlying \$3,500,000.00 judgment against me is not enforceable because the six-year statute of limitation to institute an action upon the judgment or to renew the judgment pursuant to NRS 11.190(1)(a) expired.

All the above averments are conclusory paragraphs attempting to argue the Plaintiff's position on whether the underlying judgment is expired. Moreover, these are the very issues before the Nevada Supreme Court. See Exhibit 'B.' In short, if Lewis' argument regarding the applicability of tolling statutes is correct and the judgment is not expired – why is the issue on a certified question to the Nevada Supreme Court? The fact is, the Supreme Court took the question to grapple with these arguments and, thus, UAIC's position must be reasonable as there clearly is

1 a dispute⁵. Regardless, as they are on appeal, they are not the basis for claims/damages herein.
 2 Finally, Lewis' attestation that the question on appeal could leave him with a valid judgment with
 3 no cause of action against UAIC is not only conclusory, *but somewhat ridiculous*. That is, if the
 4 Supreme Court agrees the judgment *expired* – as UAIC argues – than there is no further judgment
 5 against him and, this "amendment" of an expired judgment herein will fail. Accordingly, this is
 6 pure speculative argument – and not a sound one at that – because if the judgment is not found to
 7 be expired, Lewis will be in no worse position than he was before UAIC raised these arguments.
 8

Next, Lewis launches into a series of paragraphs which appear to be nothing more than
 conclusory argument to justify Nalder's forum shopping in this matter and, in California, in
 attempt to resurrect her expired judgment. Besides, again, being argument regarding issues on
 appeal, it is also is apparent these statements could not be based on the personal knowledge of
 Lewis because they reference actions Nalder or, her counsel took. These paragraphs are, as
 follows:

53. Even though Nalder believed the law is clear that UAIC is bound by the judgment, regardless
 of its continued validity against me, and took action in Nevada and California to insure and
 demonstrate the continued validity of the underlying judgment against me. Before the actions of
 UAIC questioning the validity of the judgment, as part of my assignment of a portion of my
 claim against UAIC Nalder's only efforts to collect the judgment had been directed at UAIC and
 not me. Thus UAIC's improper investigation and refusal to withdraw a fraudulent affidavit
 caused me and continue to cause me injury and damage.

54. These Nevada and California state court actions are further harming me and Nalder but were
 undertaken to demonstrate that UAIC has again tried to escape responsibility by making
 misrepresentations to the Federal and State Courts and putting their interests ahead of mine.

55. Cheyenne Nalder reached the age of majority on April 4, 2016.

56. Nalder hired David Stephens to obtain a new judgment. First David Stephens obtained an
 amended judgment in Cheyenne's name as a result of her reaching the age of
 majority.

⁵ It must be noted that, at paragraphs 50-51, the Lewis affidavit implicitly acknowledges the
 Ninth Circuit could not resolve the above noted argument regarding whether the judgment is expired and,
 thus, certified the question. This admission alone justifies striking the above-referenced paragraphs are
 conclusory and irrelevant argument.

57. This was done appropriately by demonstrating to the court that the judgment was still within the applicable statute of limitations. I have read the *Mandlebaum v. Gregovich*, 24 Nev. 154, 50 P. 849, (1897) case. It is exactly my situation and it provides: "The averments of the complaint and the undisputed facts are that, at the time of the rendition and entry of the judgment in 1882, the appellant was out of the state, and continuously remained absent therefrom until March, 1897, thereby preserving the judgment and all rights of action of the judgment creditor under the same. Notwithstanding nearly fifteen years had elapsed since the entry of the judgment, yet, for the purposes of action, the judgment was not barred — for that purpose the judgment was valid." *Id.*, *Mandlebaum* at 851.

58. A separate action was then filed with three distinct causes of action pled in the alternative. The first, an action on the amended judgment to obtain a new judgment and have the total principal and post judgment interest reduced to judgment so that interest would now run on the new, larger principal amount. The second alternative action was one for declaratory relief as to when a renewal must be filed base on when the statute of limitations, which is subject to tolling provisions, is running on the judgment. The third cause of action was, should the court determine that the judgment is invalid, Cheyenne brought the injury claim within the applicable statute of limitations for injury claims - 2 years after her majority.

59. Nalder also retained California counsel, who filed a judgment in California, which has a ten year statute of limitations regarding actions on a judgment. Nalder maintains that all of these actions are unnecessary to the questions on appeal regarding UAIC's liability for the judgment; but out of an abundance of caution and to maintain the judgment against me, she brought them to demonstrate the actual way this issue should have been litigated in the State Court of Nevada, not at the tail end of an appeal by a fraudulent affidavit of counsel for UAIC.

As can be seen, the above paragraphs cite case law and, make purely conclusory argument regarding the appropriateness of Nalder's actions here and, in California, to revive her expired judgment. Besides that, the arguments reference beliefs of another party (Nalder) and her counsel and, thus, cannot be on personal knowledge. Finally, they are also circular in nature. That is, they claim Lewis was injured because Nalder "had", to file these new actions even though she "believed" her judgment was still valid only because UAIC filed the Motion to dismiss. However, this is illogical. If their belief was truly the action could be maintained by dint of tolling for Cheyenne's majority — since she allegedly turned 18 in April 2016 — *Nalder would have had to bring this action based on same tolling by April 2018*. So, again, the argument, besides being pure conclusory argument, and not based on personal knowledge, is also incorrect as any alleged "damage" Lewis sustained would have been incurred regardless of UAIC's actions as it still would have needed to be filed this past spring.

Further, Lewis, then embarks on a series of averments which actually deal with issues concerning this litigation, but again, the paragraphs are speculative, conclusory or, not based on personal knowledge. These paragraphs, at 61-71, state as follows:

61. UAIC hired attorney Stephen Rogers, Esq. to represent me, misinforming him of the factual and legal basis of the representation. This resulted in a number of improper contacts with me. These contacts were made in spite of my requests to discuss any matters related to my claims against UAIC with my attorney handling my action against UAIC Thomas Christensen.

62. Thomas Christensen explained the nature of the conflict and my concern regarding a frivolous defense put forth on my behalf. I fear that if the state court judge is fooled into an improper ruling that then has to be appealed in order to get the correct law applied damage could occur to me during the pendency of the appeal.

63. Regardless of potential greater damage should the trial court be fooled these actions by UAIC and Tindall are causing immediate damages of continued litigation, litigation costs and fees and damage to my contractual relationship with Cheyenne Nalder.

64. UAIC's strategy of trickery, delay and misrepresentation was designed to benefit UAIC but harm me.

65. In order to evaluate the benefits and burdens to me and the likelihood of success of the course of action proposed by UAIC and the defense attorneys hired by UAIC, I asked through my attorney Thomas Christensen that UAIC and their attorneys communicate to Thomas Christensen regarding the proposed course of action and what research supported it. It was requested that this communication go through Thomas Christensen's office because that was my desire, in order to receive counsel prior to embarking on a course of action.

66. My attorney Thomas Christensen informed Stephen Rogers, Esq. that when I felt the proposed course by UAIC was not just a frivolous delay and was based on sound legal research and not just the opinion of UAIC's counsel, that it could be pursued.

67. Stephen Rogers, Esq. never provided any Nevada law or assurances that UAIC will be responsible if their proposed defense fails or documents or communications regarding my representation.

68. Instead, UAIC obtained my confidential client communications and then misstated the content of these communications to the Court. That is why I sought Cumis counsel. The conflict of having UAIC as a co-client with any attorney representing me is a conflict I am unwilling to waive. This was for UAIC's benefit and again harmed me.

69. UAIC, without notice to me or any attorney representing me, then filed two motions to intervene, which were both defective in service on the face of the pleadings.

70. In the motions to intervene, UAIC claimed that they had standing because they would be bound by and have to pay any judgment entered against me.

1 71. In the motions to intervene, UAIC fraudulently claimed that I refused representation by
2 Stephen Rogers.

3 ***

4 73. I am informed that David Stephens, Esq., counsel for Nalder in her 2018 action,
5 through diligence, discovered the filings on the court website. He contacted Matthew Douglas,
6 Esq., described the lack of service, and asked for additional time to file an opposition.

7 74. These actions by UAIC and counsel on its behalf are harmful to me and benefit UAIC and
8 not me.

9 As this Court again see, this set of paragraphs again contain purely speculative or, conclusory
10 argument and, moreover, are often bereft of personal knowledge. Lewis claims UAIC
11 "misinformed" Steve Roger's regarding his representation, but offers no basis for this opinion -
12 much less was those misrepresentations were/are. Lewis also worries this Court "will be fooled"
13 and thus, this will cause "damage to his contractual relationship with Nalder." Again, this is pure
14 speculation and, regardless, fails to identify his future perceived "damage to his contractual
15 relationship." Next his characterization of UAIC's actions as "trickery" etc. is clearly argument
16 and, again, bereft of any specific facts. Finally, Lewis' suggestion that UAIC somehow received
17 confidential communications (without any reference to same or, proof) as well as arguments about
18 the sufficiency of UAIC's intervention (which was required by his Counsel's attempts to thwart
19 UAIC's duty to defend and, potentially, impose a fraud upon the court) is again pure argument and
20 is irrelevant. Finally, Lewis attestations about what Counsel for Nalder did is not based on personal
21 knowledge and, his claims that UAIC's actions are "harmful to him" is pure speculation and, again,
22 bereft of actual facts to support this claim. In short, how is UAIC trying to relieve him of a multi-
23 million dollar judgment harmful to Lewis? The answer is, it is not harmful, and Lewis does not
24 dare say how this claim is true. For all of the above, each of these paragraphs should be stricken.

25 For the next set of paragraphs, Lewis' averments steer into wild fancy that is not only
26 speculative and/or argument, *but are completely irrelevant*. These paragraphs, at 76-82 & 91-99,
27 states as follows:
28

76. I do not understand why the court granted UAIC's Motion to Intervene after judgment since it is contrary to NRS 12.130, which states: Intervention: Right to intervention; procedure, determination and costs; exception. 1. Except as otherwise provided in subsection 2: (a) Before the trial ...

77. These actions by State Actor David Jones ignore my rights to due process and the law and constitution of the United States and Nevada. The court does the bidding of UAIC and clothes defense counsel in the color of state law in violation of 42 USCA section 1983.

78. David Stephens representing Nalder and E. Breen Arntz representing me worked out a settlement of the action and signed a stipulation. This stipulation was filed and submitted to the court with a judgment prior to the "hearing" on UAIC's improperly served and groundless motions to intervene.

79. I was completely aware of the settlement entered into by E. Breen Arntz. I authorized that action because the defense put forward by UAIC is frivolous. I do not want to incur greater fees and expenses in a battle that I will most likely lose. I also don't want to create the situation where Nalder will have even greater damages against me than the judgment. From all the information I have gathered from UAIC the judgment against me is valid. I don't want a frivolous defense that will ultimately fail. I don't want to take that risk.

80. Instead of signing the judgment and ending the litigation as I had requested, the court asked for a wet signed stipulation as a method of delaying signing the stipulated judgment.

81. This request was complied with prior to the September 19, 2018 "hearing" on the Motion to Intervene. The judge, without reason, failed to sign the judgment resolving the case.

82. Instead, the judge granted the Motion to Intervene, fraudulently claiming, in a minute order dated September 26, 2018, that no opposition had been filed.

91. I filed a bar complaint against Tindall, but State Actors Daniel Hooze and Phil Pattee dismissed the complaint claiming they do not enforce the ethical rules if there is litigation pending. This makes no sense to me. Why won't the bar protect the public from these unethical fraudulent practices by Tindall?

92. With this affidavit I am appealing the dismissal of my bar complaint against Randall Tindall.

93. With this affidavit I am requesting an investigation of Daniel Hooze and Phil Pattee regarding the dismissal of my bar complaint.

94. Following Mr. Tindall's involvement the court signed an order granting intervention while still failing to sign the judgment resolving the case.

95. I later discovered Judge Jones and Mr. Tindall had a business relationship while working together at another insurance company.

1 96. Although Judge Jones removed himself from these cases he did not rescind the orders he
2 issued after Mr. Tindall's involvement in the case. These orders are tainted by Mr. Tindall's prior
involvement.

3 97. UAIC and Tindall, and each of the state actors, by acting in concert, intended to accomplish
4 an unlawful objective for the purpose of harming me.

5 98. I sustained damage resulting from defendants' acts in incurring attorney fees, litigation costs,
6 loss of claims, delay of claims, and as more fully set forth below.

7 99. UAIC and Tindall acting under color of state law deprived me of rights, privileges, and
8 immunities secured by the Constitution or laws of the United States.

As this Court can see, the preceding paragraphs appear to be rambling and wild accusations made
at not only UAIC – *but a sitting District Court judge and, Bar Counsel*. Quite simply they are
inappropriate. First, purely legal arguments about whether a sitting judge should have denied a
motion to intervene or, entered a stipulation while an intervention was pending is pure legal
argument and must be stricken. Moreover, accusations against Bar Counsel and averments about
bar complaints are not only improper an irrelevant – but Counsel for Third Party Plaintiff Lewis
was already warned – in open court – *prior to filing this Motion that such matters were*
confidential, yet he still announces them publicly. This should not be tolerated. Moreover, appeals
of bar complaints, allegations against Judge Jones and Bar Counsel, as well as alleged section 1983
allegations are irrelevant, conclusory, and speculative and must be stricken. Finally, Lewis' claims
he sustained "damages" from the above is also wholly unsupported with any specific facts and,
therefore is speculative and must be stricken.

The final set of averments continue this wild conspiracy theory, but also launch into
conclusory legal allegations about UAIC's actions which are pure argument without any factual
basis for the alleged claims and, thus, UAIC asks they be stricken. The paragraphs, contained
within p. 101-122, state as follows:

101. That I had to sue UAIC in order to get protection under the policy. That UAIC, and each of
them, after being compelled to pay the policy limit and found to have failed to defend me, now
fraudulently claim to be defending me when in fact UAIC is continuing to delay investigating
and processing the claim; not responding promptly to requests for settlement; doing a one-sided

1 investigation, and have compelled me to hire counsel to defend myself from Nalder, Tindall and
2 UAIC. All of the above are unfair claims settlement practices as defined in N.R.S. 686A.310 and
I have been damaged.

3 102. That UAIC failed to settle the claim when given the opportunity to do so and then
4 compounded that error by making frivolous and fraudulent claims and represented to the court
5 that it would be bound by any judgment and is therefore responsible for the full extent of any
judgment against me in this action.

6 103. UAIC and Tindall's actions have interfered with the settlement agreement Breen Arntz had
7 negotiated with David Stephens and have caused me to be further damaged.

8 104. The actions of UAIC and Tindall, and each of them, in this matter have been fraudulent,
malicious, oppressive and in conscious disregard of my rights.

105. It seems to me that the above mentioned parties have communicated with each other and
conspired together to harm me.

106. During the litigation and investigation of the claim, UAIC, and Tindall, threatened,
intimidated and harassed me and my counsel.

107. The investigation conducted by UAIC, and Tindall, was done for the purpose of denying
coverage and not to objectively investigate the facts.

108. UAIC and Tindall, failed to adopt and implement reasonable standards for the prompt
investigation and processing of claims.

109. UAIC and Tindall, failed to affirm or deny coverage of the claim within a reasonable time
after proof of loss requirements were completed and submitted by me.

110. UAIC and Tindall, failed to effectuate a prompt, fair and equitable settlement of the claim
after my liability became reasonably clear.

20 111. UAIC and Tindall, failed to promptly provide to me a reasonable explanation of the basis in
21 the Policy, with respect to the facts of the Nalder claim and the applicable law, for the delay in
the claim or for an offer to settle or compromise the claim.

22 112. Because of the improper conduct of UAIC and Randall Tindall, I was forced to hire an
23 attorney.

24 113. I have suffered damages as a result of the delayed investigation, defense and payment on the
25 claim.

26 114. I have suffered anxiety, worry, mental and emotional distress as a result of the conduct of
UAIC and Tindall.

27 115. The conduct of UAIC and Tindall, was oppressive and malicious and done in conscious
28 disregard of my rights.

1 116. UAIC and Tindall, breached the contract existing between me and UAIC, breached the
 2 covenant of good faith and fair dealing, acted unreasonably and with knowledge that there was
 3 no reasonable basis for their conduct, violated NRS 686A.310 and were negligent by their
 4 actions set forth above which include but are not limited to: Unreasonable conduct in
 5 investigating the loss; Unreasonable failure to affirm or deny coverage for the loss; Unreasonable
 6 delay in making payment on the loss; Failure to make a prompt, fair and equitable settlement for
 7 the loss; Unreasonably compelling me to retain an attorney before affording coverage or making
 8 payment on the loss; Failing to defend me; Fraudulent and frivolous litigation tactics; Filing false
 and fraudulent pleadings; Conspiring with others to file false and fraudulent pleadings;

117. As a proximate result of the aforementioned, I have suffered and will continue to suffer in
 the future damages as a result of the fraudulent litigation tactics and delayed payment on the
 judgment.

118. As a further proximate result of the aforementioned, I have suffered anxiety, worry, mental
 and emotional distress, and other incidental damages and out of pocket expenses.

119. As a further proximate result of the aforementioned, I was compelled to retain legal counsel
 to prosecute this claim, and UAIC and Tindall, are liable for attorney's fees reasonably and
 necessarily incurred in connection therewith.

120. The conduct of UAIC and Tindall, was oppressive and malicious and done in conscious
 disregard of my rights.

121. The aforementioned actions of UAIC and Tindall, constitute extreme and outrageous
 conduct and were performed with the intent or reasonable knowledge or reckless disregard that
 such actions would cause severe emotional harm and distress to me.

122. As a proximate result of the aforementioned intentional infliction of emotional
 distress, I have suffered severe and extreme anxiety, worry, mental and emotional distress, and
 other incidental damages and out of pocket expenses.

Here, it appears Lewis is doing no more than, re-stating the allegations of his Third Party
 Complaint. These paragraphs allege violations of breach of the covenant of good faith and fair
 dealing, as well as N.R.S. 686A.310 – but are bereft of actual factual support. These are conclusory
 allegations that must be stricken. For instance, the paragraphs suggest UAIC has “continued to
 delay investigation and processing of the claim”, but fails to state what these failures are/were. The
 fact is, there is no claim currently as the loss belying this action occurred in 2007, went to judgment
 and, is on appeal. Rather, it appears, again, these are attempts to re-litigate issues already on appeal.
 Further, claims that UAIC failed to settle are also bereft of support and, again, deal with issues on
 appeal (in regard to UAIC's failure to tender the policy limit previously). If, Lewis is claiming
 there has been some failure to respond to settle now, these are still issues in the context of the

1 matters on appeal – specifically whether the consequential damages are owed so, is also irrelevant.
 2 Lewis argument UAIC is bound by any judgment (in the Nalder action) is also pure speculative
 3 argument.

4 Next, Lewis claims the actions of UAIC and Tindall have been fraudulent and malicious,
 5 but, from what is also alleged, the only evidence of this is the claim that Tindall and, UAIC, should
 6 not relieve him of a multi-million dollar expired judgment against him and, should have let a
 7 stipulated judgment- for the full amount sought by Nalder – be entered. This argument is specious
 8 at best and, at the very least conclusory. The allegations of conspiracy are also lacking in any
 evidence and are speculative – which is confirmed by the language “it seems to me.” The allegation
 Tindall threatened/harassed him is again pure argument without any factual support of actual acts
 of such “intimidation.”

Further, paragraphs 108-122 are clearly nothing more than conclusory legal arguments.
 The paragraphs read like a complaint -but bereft of factual support. Such conclusory legal
 arguments regarding UAIC’s alleged failures under NRS 686A.310 and/or the covenant of good
 faith and fair dealing - without specific factual support for each claim - are argument and must be
 stricken. Similarly, averments that the actions are oppressive or malicious without factual support
 of actions supporting same are likewise argument that must be stricken. Moreover, the self-serving
 20 allegations that Lewis has suffered “emotional distress” is again without actual factual support
 21 and, thus, pure conclusory argument which must be stricken. Indeed, as noted below, Nevada has
 22 not recognized “emotional distress” as a valid extra-contractual claim against an insurer anyway.
 23

24 Overall, as the Court can see and, as discussed above, Lewis’ affidavit is basically pure
 25 legal argument made by counsel – *but signed by the client*. It is bereft of personal knowledge in
 26 many places and, most importantly, does not contain facts to support the conclusory statements of
 27 law. In short, there exist grave questions about Mr. Lewis’ s personal knowledge much less his
 28 ability to attest to the matters set forth herein. First, at no time does Mr. Lewis ever attest how he

1 came to learn any of the legal matters attested to, much less the actions of third parties. Indeed, as
 2 Lewis himself admits – he refused to talk to UAIC or retained defense counsel and, thus, how can
 3 he be aware of their beliefs, actions or reasoning – much less of their conspiracy. As such, his
 4 alleged “personal knowledge” is not evident and the affidavit should be stricken in its entirety for
 5 this reason.
 6

7 UAIC asks this court to consider this affidavit pursuant to N.R.C.P. 56(e) and find that said
 8 affidavit lacks the requisite specificity or, personal knowledge as required pursuant to N.R.C.P.
 56(e) and, strike the affidavit in total. Alternatively, UAIC asks this Court to strike the paragraphs,
 discussed above from this affidavit for the reasons noted. At the very least an evidentiary hearing
 where Lewis appears should be held such that parties can inquire as to his alleged personal
 knowledge. Based upon same UAIC asks this Court to deny Lewis’ Counter-Motion for summary
 judgment for these additional reasons.

B. Motion to Stay/Defer pending Appeal

Additionally, or, in the alternative, UAIC also moves this Court to stay all proceedings in
 this matter and/or, Third Party Plaintiff’s Counter-Motion for summary judgment due to the
 intertwined and inter-related issues now on appeal, which could substantially affect this litigation.
 The stay may be granted within this Court’s discretion.

20 In the case at bar it is unassailable that the subject of the expiration or, ongoing validity, of
 21 the 2008 judgment in the case of *Nalder v Lewis*, 07A549111, which is consolidated herein, is at
 22 issue both in this Court in both consolidated actions and, on appeal to the Nevada Supreme Court.
 23 See Exhibit ‘B.’ As stated above, the issue of whether the 2008 expired or, is tolled per case law
 24 and statutes argued by Plaintiff and Lewis, is squarely before the Nevada Supreme Court. It is
 25 further uncontroverted Plaintiff and Lewis have raised the issues herein. See Exhibit ‘L.’ Indeed,
 26 Lewis Third Party Complaint and, the present Motion, is premised upon their argument that UAIC
 27 has acted improperly in arguing the judgment is expired and by trying to relieve Lewis of the
 28

1 attempts to revive it herein. As such, to avoid forum shopping and, potentially, conflicting
 2 outcomes, both equitable principles and judicial economy favor staying or, deferring these matters
 3 and, particularly this Counter Motion for summary judgment, until the appeal is resolved.

4 As such, UAIC asks this Court to exercise its discretionary authority and stay or, defer,
 5 these proceedings or, at least this counter-Motion for summary judgment, until a decision is
 6 rendered in the Nevada Supreme Court.

7
 8 **C. Motion to stay pending additional discovery pursuant to Rule 56(f)**

Additionally, and/or further in the alternative, UAIC also brings this Counter-Motion to
 stay the hearing on this Lewis' Counter Motion for summary judgment until UAIC can conduct
 discovery, pursuant to N.R.C.P. 56(f) necessary to respond to the motion which UAIC also
 believes will lead to material issues of fact and development of a record.

N.R.C.P. 56 (f) provides a mechanism for a district court to grant a continuance when a
 party opposing the Motion for summary judgment is unable to marshal facts in support of its
 opposition. *Ameritrade Inc. v First Interstate Bank*, 105 Nev. 696, 699, 782 P.2d 1318, 1320
 (1989). In order to grant a motion pursuant to rule 56(f) the movant expresses how discovery will
 lead to the creation of issues of fact. *Bakerink v. Orthopaedic Assoc. Ltd.*, 94 Nev. 428, 431, 581
 P.2d 9, 11 (1978). A motion granting a continuance under rule 56(f) will be reviewed only for an
 abuse of discretion. *Harrison v Falcon Products*, 103 Nev. 558, 560, 746 P.2d 642, 642 (1987).

21
 22 ///

23 *N.R.C.P. 56 (f)* provides, as follows:

24 **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the
 25 motion that the party cannot for reasons stated present by affidavit facts essential to justify the
 26 party's opposition, the court may refuse the application for judgment or may order a continuance
 27 to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make
 28 such other order as is just.

As can be seen, from the affidavit of counsel for UAIC (above) and, affidavit of Claims

1 V.P. Brandon Carroll⁶, UAIC has set forth meaningful discovery it requests to oppose the Motion
 2 and how same will lead to genuine issues of material fact. Specifically, that given the lengthy
 3 averments of the Lewis affidavit and, the issues surrounding the creation of same, UAIC requests,
 4 at a minimum, the following discovery:

- 5
- 6 a-written discovery to Gary Lewis;
- 7 b-deposition of Gary Lewis;
- 8 c-deposition of Thomas Christensen, Esq.;
- d-deposition of Breen Arntz, Esq.;
- e-deposition of David Stephens, Esq.;

This discovery is necessary to respond to the Motion and, will lead to the creation of genuine
 issues of facts, as follows:

a & b – the written discovery and deposition of Gary Lewis will lead to a creation of
 genuine issue of fact because UAIC needs to examine Lewis on who drafted the affidavit, who
 advised him to refuse UAIC's retained defense counsel, whether Lewis was advised of the fact
 that the original 2008 judgment expired, whether Lewis was advised that the issues raised by his
 counsel to combat the theory that the 2008 judgment is expired are already on appeal before the
 Ninth Circuit and Nevada Supreme court, where he got his knowledge and understanding of the
 alleged facts he testified to regarding the case on appeal, why he believes UAIC 's efforts to
 vacate an "amended judgment" made on an expired judgment will cause him more damages;
 why, despite the preceding issue, he wanted Breen Arntz, Esq. to enter into a stipulated judgment
 in this action for the same increased judgment he now claims to fear, how Breen Arntz, Esq.
 came to represent him, what support he has for his allegations concerning UAIC's
 actions/failures to act in regard to his claims (e.g. that UAIC ignored statutes, mischaracterized
 the law, failed to investigate, that UAIC damaged his contractual relationship with Nalder (and
 what contractual relationship exists), what facts he has to support his allegations UAIC's defense
 is frivolous or that he will lose, what damages Lewis has actually sustained, the factual bases for
 his allegations that UAIC has violated N.R.S. 686A.310, what facts he has to support the
 allegation that UAIC breached the covenant of good faith and fair dealing or acted unreasonably,
 what facts he has to support his claims of a conspiracy involving UAIC);

c- the deposition of Thomas Christensen, Esq. is necessary and will lead to genuine issues
 of fact in regard to his representation of both the judgment-creditor, Nalder, and the judgment-
 debtor, Lewis, in the same action, that said conflict has caused a fraud upon the court which he
 continues to perpetrate by fomenting more litigation and has precluded UAIC from abiding its
 duty to defend Lewis in blocking retained defense counsel's attempts to confer with Lewis and
 retaining other counsel for both Lewis and Nalder to obfuscate his intentions, regarding his role
 in drafting the affidavit signed by Lewis;

⁶ See Exhibit 'J.'

1 d – the deposition of Breen Arntz, Esq. is necessary and will lead to genuine issues of
 2 material fact concerning his retention to represent Lewis by attorney Christensen and also
 3 blocking UAIC's retained counsel from defending Lewis and prevent them from either vacating
 4 the improper "amended judgment" in the 2007 action or, dismissing the current complaint and,
 instead seeking to enter a stipulated judgment which subjects his client, Lewis, to damages when
 a judgment against him already expired and said issue on appeal;

5 e. the deposition of David Stephens is necessary and will lead to material issues of fact
 6 concerning how he was retained to amend an expired judgment for Nalder, his discussions with
 7 Mr. Arntz, Esq. to enter a stipulated judgment on this action while UAIC's intervention was
 8 pending, his understanding of the case on appeal when he undertook his attempt to amend an
 expired judgment;

Moreover, UAIC has presented the affidavit of Brandon Carroll has attested that UAIC
 has been hindered in any defense of these claims because it has been forbidden from speaking to
 its insured Lewis, through retained defense counsel. See *Exhibit 'J.'* This has not only inhibited
 any investigation of the claims alleged by Lewis, but also prejudiced UAIC in its defense herein
 - as can clearly be seen. *Id.* Moreover, this raises issues of non-cooperation under the policy by
 Lewis and, thus, possible defenses for UAIC. UAIC needs the discovery and, deposition of
 Lewis, to explore these issues. *Id.*

The case of *Aviation Ventures, Inc. v Joan Morris, Inc.*, 121 Nev. 113, 110 P.3d 59
 (2005), is squarely on point. In that case a party brought a summary judgment motion before
 discovery commenced and, despite a rule 56(f) motion by the party opposing the motion – with
 affidavits attesting to the discovery needed and how it would lead to material issues of fact – the
 Court denied the Motion. On appeal, the Nevada Supreme Court reversed and noted that
 summary judgment is improper when the case is in the early stages of litigation and a party
 seeks additional time to compile facts to support its opposition. *Aviation Ventures, Inc. v Joan
 Morris, Inc.*, 121 Nev. 113, 110 P.3d 59 (2005).

In short, UAIC believes this case is premature for summary judgment as the matter was
 just filed. No discovery order has been entered and, no discovery conducted. Thus, no record has
 been created and, moreover, no prejudice will accrue any party in allowing same discovery. The

1 above requested discovery will lead to material issues of fact because such discovery will reveal
 2 the hollowness of Lewis's affidavit or lack of support for same. Moreover, it will likely lead to
 3 defenses for UAIC concerning its prejudice by Lewis' failure to cooperate or communicate. As
 4 such, the entire counter-motion for summary judgment as all the alleged "facts" in support of
 5 same motion are, at least, all in dispute or, at worst, interposed improperly to produce a fraud
 6 upon the court and UAIC believes this discovery will reveal same and, thus, the continuance, per
 7 rule 56(f), should be granted and the above-requested discovery allowed.
 8

IV.

OPPOSITION TO THIRD PARTY PLAINTIFF LEWIS' COUNTER MOTION FOR SUMMARY JUDGMENT

In addition to the arguments to strike and stay this Motion, UAIC must also note that the
 fact is Lewis' Motion should be denied outright. The fact is many of the arguments made are
 clearly attempts to re-litigate matters already decided by the Federal District Court in the sister-
 case on appeal and, thus, those should be summarily disregarded⁷. Plaintiff's own briefs betray
 this in that Lewis recycled the exact same arguments he made in this Motion – verbatim – as
were made in his Motion for summary judgment in the federal court case on appeal. In short
 most of the allegations made against UAIC stem from their claims handling of the 2007 loss and
 the first suit brought by Nalder against UAIC which resulted in the original default judgment in
 case 07A549111 – all of which have previously been litigated (e.g. notice of the demand, failure
 to pay the demand and failure to defend the initial lawsuit) and, thus, cannot serve as a basis for
 claims herein.

Further, in terms of any "new" arguments for "bad faith", although the Counter-Motion
 is disjointed and rambling, it seems they essentially boil down to 4 claims which Lewis asserts

⁷ Obviously, should UAIC's Motion to dismiss this third-party complaint for claim preclusion be granted, UAIC believes this would resolve these matters.

1 have “damaged” him: (1) that UAIC did not defend him in 2014-2018; (2) That UAIC was
2 incorrect to move for dismissal of the appellate action due to an expired judgment, (3) that UAIC
3 is wrong to try and defend him and vacate the improper amendment of the expired judgment or,
4 enforcement of same herein, and (4) UAIC was wrong to engage counsel to defend him and file
5 motions to relieve him of a multi-million judgment and disregard his wishes. As this Court can
6 see, when one actually looks at the claims being made – without bellicose and conspiratorial
7 argument- *the absurdity of the claims becomes clear*. Overall, Lewis is arguing UAIC should not
8 do anything and, instead, allow Counsel Thomas Christensen, who represents both the judgment-
creditor and judgment-debtor (himself), engineer a way to cover up his failure to renew his
client’s expired judgment. That UAIC should pay for conflict counsel for conflicts solely
manufactured by Thomas Christensen, for his own benefit, when he is the only attorney in clear
conflict in this matter. Regardless, Lewis’ arguments are speculative at best, but regardless,
material issues of fact remain and/or there exists a genuine dispute and, thus, the Motion should
be denied.

A. LEGAL STANDARDS

1. Standard for Summary Judgment

The defense concurs with the plaintiffs that *Wood v. Safeway*, 121 Nev. 724, 121 P.3d
1026 (2005), sets the applicable standard for summary judgment motions.

When quoting *Wood v. Safeway*, attorneys most commonly focus on the parts of the
decision that raised the responding party’s burden to overcome the motion from the “slightest
doubt” standard to the currently-applicable “genuine issue of material fact” standard. That is the
case here. But the opposing party’s burden of proof is the *second* step in this court’s analysis, not
the first. The movant must initially meet its burden of proof before the responding party is forced
to raise a genuine issue of material fact.

NRCP 56(c) requires that a motion for summary judgment include specific evidence to
substantiate the claims:

Motions for summary judgment and responses thereto shall include a concise statement setting forth each fact material to the disposition of the motion which the party claims is or is not genuinely in issue, citing the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence upon which the party relies.

NRCP 56(c) (*emphasis added*).

The *Wood v. Safeway* decision supports the language of Rule 56, namely, that it is initially the plaintiff's burden to present admissible evidence that would prove the claims:

Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law."

Wood v. Safeway, 121 Nev. at 731 (*emphasis added*).

The decision also states: "when a motion for summary judgment is made and supported as required by NRCP 56, the non-moving party may not rest upon general allegations but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue." *Id.* (*emphasis added*).

Here, while Plaintiff's has submitted what purports to be "evidentiary proof", it is really just a conclusory and rambling affidavit of the third party Plaintiff. Accordingly, initially, UAIC urges this Court to strike same affidavit in whole or, unsupported and conclusory allegations made therein. Should the Court so strike same, UAIC argues Lewis cannot meet his burden on the present Motion and, same should be denied as the third party plaintiff's motion would fail to meet the minimum evidentiary standard for a summary judgment motion set forth in NRCP 56 and explained in *Wood v. Safeway*. For this reason alone, the motion must be denied.

Alternatively, should the Court not strike the Lewis affidavit in whole or in part and/or the Court feels Lewis has met his burden to proceed to the second step of the analysis for summary judgment, UAIC directs this Court to the affidavit of Claims V.P. for UAIC, Brandon Carroll. See *Exhibit J*. As can be seen, from Mr. Carroll's averments, it is clear they create, at the very least, material issues of fact as to all claims raised by Lewis and, thus, on this basis the Motion should also be denied.

2. Standards on Extra-contractual and/or "bad Faith" claims

In *Schumacher v. State Farm Fire & Cas. Co.*, 467 F. Supp. 2d 1090 (D. Nev. 2006) the United States District Court, in applying Nevada law, held that "Nevada's definition of bad faith is: (1) an insurer's denial of (or refusal to pay) an insured's claim; (2) without any reasonable basis; and (3) the insurer's knowledge or awareness of the lack of any reasonable basis to deny coverage, or the insurer's reckless disregard as to the unreasonableness of the denial." See *Id.* at 1095-96; citing *Pioneer Chlor Alkali Co., Inc. v. National Union Fire Insurance Co.*, 863 F.Supp. 1237, 1247 (D.Nev. 1994); citing *American Excess Ins. Co. v. MGM Grand Hotel, Inc.*, 102 Nev. 601, 605, 729 P.2d 1352 (1986); *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888 (1991). In *Schumacher*, *supra*, the Court found that where an insurer did not deny coverage but simply paid a different value than the insured requested, the insurer did not commit bad faith). Likewise, in *Pioneer Chlor Alkali Company, Inc. v. National Union Fire Insurance Company*, 863 F. Supp. 1237 (D. Nev. 1994), the U.S. District Court also stated that where a legitimate contractual dispute exists, the insurer "is entitled to its day in court on such an issue without facing a claim for bad faith simply because it disagrees with [the insured]." *Id.* at 1250. (Emphasis Added). Indeed, in its most recent comprehensive case involving insurer bad faith, The Nevada Supreme Court stated, in *Allstate v Miller*, 125 Nev. 300, 212 P.3d 318 (NV. 2009), that "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 (Emphasis Added).

The foregoing indicates that if a dispute exists as to the merits or amount to which an insured is entitled under the policy he may certainly seek recovery from the insurer under the contractual provisions of the policy. However, when there is a genuine dispute regarding coverage there can be no bad faith or extra-contractual damages. Further, that when the insured has not demonstrated the "extent of his damages" he is not "legally entitled" to any specific damages and

1 a cause of action for "bad faith" has not accrued.

2 For these and the reasons set forth below, Third Party Plaintiff's motion for summary
3 judgment must be denied as clearly a genuine dispute exists as to whether UAIC's actions are in
4 "bad faith" in merely trying to vacate a multi-million dollar judgment against him. Additionally,
5 as will be discussed below, as Lewis cannot claim damages under NRS 686A.310 at this time, he
6 is not entitled to summary judgment as to same.
7

8 **B. RESPONSE TO LEWIS' "BACKGROUND ON INSURANCE CLAIMS
HANDLING LITIGATION AND VERDICTS ABOVE POLICY LIMITS**

Though not clearly part of the Counter-Motion for Summary judgment, Lewis' brief *at pps.*
6-7 purports to set forth his "general principles of insurance", "role of insurance companies" and,
"claims handling standards." In response, UAIC merely would like to point out the relevant and
appropriate law and statutes governing same in opposition to Lewis' claimed recitation of law.

First, in regard to the duties of an insurer in regard to its insured, they are adequately set
forth in *Allstate v Miller*, 125 Nev. 300, 212 P.3d 318 (NV. 2009). There, the court stated that the
insurer must give the insureds interests equal consideration to its own. *Id.* Here, UAIC believes
that seeking to find the original 2008 judgment is expired and, thus, no longer enforceable as to
either UAIC *or Lewis*, is in keeping with this standard.

20 Next, in terms of the claims handling standards, UAIC must point out that Lewis has altered
21 N.R.S. 686A.310, generally referred to as the Unfair Claims Practices Act – by changing the
22 language of the statute. As such, UAIC sets forth the actual statute, as follows:

23 N.R.S. 686A.310

- 24 **1. Engaging in any of the following activities is considered to be an unfair practice:**
25 (a) Misrepresenting to insureds or claimants pertinent facts or insurance policy provisions
relating to any coverage at issue.
26 (b) Failing to acknowledge and act reasonably promptly upon communications with respect to
claims arising under insurance policies.
27 (c) Failing to adopt and implement reasonable standards for the prompt investigation and
processing of claims arising under insurance policies.
28 (d) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss
requirements have been completed and submitted by the insured.

- 1 (e) Failing to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear.
- 2 (f) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds, when the insureds have made claims for amounts reasonably similar to the amounts ultimately recovered.
- 3 (g) Attempting to settle a claim by an insured for less than the amount to which a reasonable person would have believed he or she was entitled by reference to written or printed advertising material accompanying or made part of an application.
- 4 (h) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured, or the representative, agent or broker of the insured.
- 5 (i) Failing, upon payment of a claim, to inform insureds or beneficiaries of the coverage under which payment is made.
- 6 (j) Making known to insureds or claimants a practice of the insurer of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.
- 7 (k) Delaying the investigation or payment of claims by requiring an insured or a claimant, or the physician of either, to submit a preliminary claim report, and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.
- 8 (l) Failing to settle claims promptly, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.
- 9 (m) Failing to comply with the provisions of NRS 687B.310 to 687B.390, inclusive, or 687B.410.
- 10 (n) Failing to provide promptly to an insured a reasonable explanation of the basis in the insurance policy, with respect to the facts of the insured's claim and the applicable law, for the denial of the claim or for an offer to settle or compromise the claim.
- 11 (o) Advising an insured or claimant not to seek legal counsel.
- 12 (p) Misleading an insured or claimant concerning any applicable statute of limitations.

As will be shown below, UAIC has not violated any of the enumerated sections of the act and, at the very least, material issues of fact exist regarding any claimed breaches.

C. RESPONSE TO LEWIS "CLAIMS HANDLING LITIGATION SECTION"

Again, though not clearly part of the Counter-Motion for Summary judgment at pps. 8-12 of his brief, Lewis launches into a lengthy recitation of his view of "bad faith" law, which mostly contains citations to dated and out of state case law which is not binding on this Court. However, important for this Motion is the fact *that this argument is recycled – verbatim – from his last motion for summary judgment in the Federal court action on appeal, which he filed in March of 2013. See Lewis/Nalder's Motion for Summary Judgment, filed March 4, 2013, attached hereto as Exhibit 'E', pps. 13-18; See also, Appellant Lewis/Nalder's Opening Brief on appeal to the Ninth circuit, attached as Exhibit 'I.'* This is germane to this Motion because this is further proof

1 that Lewis' third party complaint and, counter-motion for summary judgment, is clearly an
 2 attempt to re-litigate the issues already decided by the Federal District Court in *Nalder et al.*
 3 *v UAIC*, case number 2:09-cv-1348, which is now on appeal. Overall, given that the arguments are
 4 the same and, to save this Court from further briefing herein, UAIC attaches hereto a copy of its
 5 Opposition to that 2013 Motion for summary judgment by Lewis and, incorporates all of its
 6 arguments, in regard to the cases cited, herein. *Copy of UAIC's Opposition to Lewis/Nalder's*
 7 *Motion for summary judgment in Federal court actions is attached hereto as Exhibit 'F.'*
 8

In short, UAIC would point out the proper standard for bad faith claims in Nevada was
 enunciated in *Allstate v Miller*, 125 Nev. 300, 212 P.3d 318 (NV. 2009), that "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 (Emphasis Added).

Further, in terms of Lewis' citation to *Landow v. Medical Ins. Exch. of Cal.*, 892 F. Supp.
 239 (1995), for the proposition that an insurer could be held liable for emotional distress caused to
 an insured by a failure to settle a claim prior to litigation, that case is a federal district court case
 and, thus, not binding on this Court. Indeed, no Nevada court has ever allowed such damages.
 Moreover, 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.* Here, the only
 additional litigation herein **has been initiated by Nalder** and UAIC has tried to terminate this new
 litigation and, thus, that case completely distinguishable from the case at bar.

24 D. RESPONSE TO COUNTER MOTION FOR SUMMARY JUDGMENT

25 As noted above, the areas of the alleged dispute raised by Lewis' third party complaint and,
 26 counter-motion for summary judgment on same third party complaint, stem from alleged
 27 disagreements over whether UAIC should be allowed to defend him and, relieve him of a multi-
 28 million dollar judgment which UAIC believes is expired. The issue of whether the 2008 judgment

1 is expired is squarely before the Nevada Supreme Court and, thus, is clearly an issue of genuine
2 dispute. See Exhibit 'B.' Moreover, given the affidavit of Brandon Carroll for UAIC (*Exhibit 'J'*),
3 there also is clearly a genuine over UAIC's duty to defend Lewis and, how they may do so to try
4 and relieve him from a multi-million dollar judgment which it believes expired. If there is a
5 genuine dispute over both the validity of the judgment which forms the basis of this suit as well as
6 UAIC's duties to Lewis in relation thereto, by definition, there can be no bad faith or extra-
7 contractual remedies and, this Court should deny the Motion. The Nevada Supreme Court has held
8 that, generally, issues of bad faith are questions for the jury. *Allstate v Miller*, 125 Nev. 300, 212
P.3d 318 (NV. 2009).

1. UAIC is Not Liable for any Judgment Against Lewis in this Action Merely because it
has intervened.

For his first argument, Lewis argues that because UAIC argued it may be liable for a
judgment against Lewis in its Motion to intervene it is now liable for any judgment. This is surely
a case of Lewis trying to have the 'tail wag the dog' and the argument should be outright denied
for being incorrect in fact and law.

UAIC sought to intervene under N.R.C.P. 24. NRCP 24(a)(2) imposes four (4)
requirements for the intervention of right: (1) the application must be timely; (2) it must show an
interest in the subject matter of the action; (3) it must show that the protection of the interest may
be impaired by the disposition of the action; and (4) it must show that the interest is not adequately
represented by an existing party. *State Indus. Ins. Sys. v. Eighth Judicial Dist. Court*, 111 Nev. 28,
888 P.2d 911 (1995).⁸

⁸ The Rule specifically reads: (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

1 In arguing the Motion UAIC argued, alternatively, that it had an interest that may be
2 impaired *not only in protecting Lewis*, but because “UAIC could potentially be responsible for any
3 damages Lewis is found liable for – including the instant amended judgment.” In his Motion,
4 Lewis takes out the word *potentially* to try and trick this Court into thinking UAIC has somehow
5 admitted it *will* be liable. Accordingly, this Court should ignore this ridiculous argument.

6
7 UAIC’s intervention was done as a necessity to protect both Lewis and UAIC due to Lewis’
8 counsel’s conflicted machinations. To allow this argument of Lewis would be to undermine the
issues of the validity of an expired judgment – the exact issue Nalder has sought to forum shop
away from the Nevada Supreme Court – and reward this behavior.

Further, is Lewis or, his Counsel, suggesting that, if UAIC had not intervened, he would
not have sought to collect same from UAIC? The obvious answer undercuts this ridiculous circular
argument.

In seeking to intervene – *after Lewis’ counsel forbade retained defense counsel from
defending him* – UAIC was merely to prevent the obvious schemes of Nalder and Lewis to do an
‘end run’ around the Nevada Supreme court and improperly resurrect an expired judgment. Merely
intervening does not, *ipso facto*, mean UAIC is responsible for any judgment entered. At the very
least, material issues of fact exist over this issue and, thus, the Court should deny this claim.

20 2. UAIC has Not Breached the Covenant of Good Faith and Fair Dealing

21
22 As noted above, when one manages to wade through the Third Party Plaintiff’s brief, the
23 actual “new”⁹ arguments for “bad faith” presented in the Motion, it seems they essentially boil
24 down to 4 claims which Lewis asserts have “damaged” him: (1) that UAIC did not defend him in
25 2014-1018; (2) That UAIC was incorrect to move for dismissal of the appellate action due to an
26 expired judgment, (3) that UAIC is wrong to try and defend him and vacate the improper
27

28
⁹ That is, those, not litigated in the case on appeal.

1 amendment of the expired judgment or, enforcement of same herein, and (4) UAIC was wrong to
2 engage counsel to defend him and file motions to relieve him of a multi-million judgment and
3 disregard his wishes. Each, when actually reviewed, can be easily dispensed with as clearly, at the
4 very least, issues of material fact exist per the affidavit of Brandon Carroll (*Exhibit 'J'*), on behalf
5 of UAIC. Moreover, the case law cited by Lewis is clearly distinguishable. Accordingly, the
6 motion for summary judgment on these claims should be denied.

7
8 a. *UAIC had no new defense obligations to Lewis in 2013-2018 until the attempt to amend
the 2008 judgment and, new action, were discovered.*

In his Motion, Lewis argues UAIC did nothing to defend him in 2013-2018 and, as such,
UAIC cannot possibly claim to be defending Lewis now. This argument misses one clear issue –
that there was no new duty to defend triggered in the time after the Federal District court first
found an implied policy, in October 2013, and when the attempt to amend the judgment and new
action being filed was discovered in July 2018. Quite simply, there was nothing to defend in the
time noted by Plaintiff and, accordingly, this argument is hollow and should be disregarded.

In *Andrew v. Century Surety Co.*, 2014 WL 1764740,*6 (D. Nev. 2014), the court
concluded that the Nevada Supreme Court would apply a “four corners rule” with respect to an
insurer’s duty to defend analysis such that an insurance company’s defense obligation is
determined by comparing the allegations in the complaint to the terms of the policy. Under
Nevada law it is long been the case that where there is no potential for coverage, no duty to defend
or indemnify exists. *Bidart v. Amer. Title Ins. Co.*, 103 Nev. 175 (1987). Moreover, the Nevada
Supreme Court stated that the duty to defend is not absolute and only exists when there is arguable
or possible coverage. *United National Ins. Co. v Frontier Ins. Co.*, 120 Nev. 678, 687 (2004).

In the case at bar, it is unquestioned that no court found a policy in existence, such as to
afford Lewis a defense, until October 2013. Lewis tacitly admits this when he alleges UAIC did
“nothing to defend him” in the ensuing 5 years until these new issues arose. The fact is, UAIC had

1 no reason to defend him, because no new complaint had been filed, pursuant to the above-noted
 2 case law, to trigger its defense obligations. Accordingly, where no action triggered its defense
 3 obligations until the present matters arose in 2018, there was no duty to defend him. Accordingly,
 4 this argument is an attempt to fool the court into think UAIC failed to act. The court should not be
 5 fooled.
 6

7 Further any argument that UAIC should have, upon learning of its duty to defend, tried to
 8 vacate the original 2008 judgment in 2013, is also specious. As this Court knows, the procedure
 for opening and/or vacating judgments is governed by N.R.C.P. 60 and, sub-section (b) of that rule
specifically notes that a 6 month time limit applies. Accordingly, as the default judgment against
 Lewis was entered in June 2008, UAIC learning of its duty to defend in 2013 still left it with no
 timely recourse regarding said default judgment on behalf of Lewis. Accordingly, this argument
 is also hollow and should be disregarded.

As such, the claims that UAIC failed to defend Lewis in 2013-2018 is a red-herring that
 should be disregarded by this court and, serves as no basis for summary judgment.

- b. *At the very least a material issue of fact exists as to whether UAIC's action in moving to dismiss the Appellate action due to the 2008 judgment being expired was not in bad faith and, did not damage Lewis.*

19 Without any legal authority, Lewis argues that UAIC's actions, in moving to dismiss the
 20 Nalders' appeal in the federal court action, by claiming the judgment against him expired, without
 21 informing him or, seeking a declaratory judgment action on same, was in bad faith and "damaged
 22 him." Lewis makes no showing of these damages and, overall, the argument is simply without
 23 merit. At the very least a material issue of fact exists as to this issue.
 24

25 It has never been contested by Lewis that the original 2008 judgment against him expired
 26 and, was not timely renewed. As noted herein, upon realizing the judgment was expired, UAIC
 27 moved to dismiss the appeal as the judgment it was seeking damages for was expired. Specifically,
 28 in that Motion, UAIC argued the judgment is unenforceable – as to Lewis and UAIC.

1 Accordingly, rather than damage Lewis, the Motion actually sought to confirm that the judgment
2 against Lewis *was expired*. The issue is still on appeal. Indeed, in accepting the certified question,
3 the Nevada Supreme Court rephrased the question as follows:

4 **In an action against an insurer for breach of the duty to defend its insured, can the**
5 **plaintiff continue to seek consequential damages in the amount of a default**
6 **judgment obtained against the insured when the judgment against the insured was**
7 **not renewed and the time for doing so expired while the action against the insurer**
8 **was pending?**

See Exhibit 'B.'

As this Court can see, resolution of this question in favor of UAIC is also a resolution in favor of
Lewis as the judgment against him would be void. As such, given the question is before the Nevada
supreme Court, at the very least a material issue of fact exists regarding whether these actions
'damaged' Lewis or, conversely, *helped him*. Accordingly, UAIC and Lewis' interests are aligned
in seeking to extinguish the judgment against him and Lewis arguments otherwise are not based
on anything but sheer conjecture.

Furthermore, in terms of Lewis argument that UAIC should have filed a declaratory
judgment on this issue first, to litigate the alleged "tolling statutes", this is also a red-herring. After
all, should the Nevada Supreme Court rule against UAIC on the above question, in terms of the
ability for Plaintiff to pursue damages on the 2008 judgment, *Lewis is in no worse position than*
20 *he was before UAIC moved to dismiss*. That is, if the court finds the action for consequential
21 damages may proceed, regardless of the judgment's expiration, the Court must still find UAIC is
22 responsible for same consequential damages. Whether or not UAIC is successful on that second
23 issue is independent from the judgment issue and, thus, again, Lewis is in no different position
24 than he would have been before the Motion to dismiss – as that issue was currently before the
25 supreme court.
26

27 In short, Lewis has not adequately articulated how UAIC moving to dismiss the appeal for
28 an expired judgment "harmed him" – because he cannot. Moreover, even if Lewis comes up with

some argument, the fact remains that at the very least a material issue of fact exists on this issue per the affidavit of Brandon Carroll (*exhibit 'J'*) and the pending decision on appeal. Accordingly, the Court should deny the summary judgment on this issue.

c. At the very least a material issue of fact exists as to UAIC's duty to defend Lewis in regard to the amended judgment and "new" action and same did not damage Lewis.

It appears that Lewis' additional argument is that, as UAIC breached the policy when it initially refused to defend Lewis in regard to the original 2007 action, it cannot defend him now as it has relinquished the right to control the defense. Lewis relies on a California citation for this proposition. In short, the theory Lewis is advancing is distinguishable from the case at bar for 2 simple reasons, UAIC had no policy in effect for Lewis (and, therefore, duty to defend) until October 2013 and, second, these *are new actions* and, thus UAIC never breached the duty to defend these "new" actions. Accordingly, at the very least a material issue of fact exists as to this claim and, summary judgment should be denied.

It is axiomatic that a policy a liability insurance comes with a duty to defend and, that same duty is broader than the duty to indemnify.¹⁰ *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678 (2004). It is further well-settled in Nevada that when an insurer retains defense counsel to defend its insured, same counsel represents both the insurer and insured and has duties to both. *Nev. Yellow Cab Corp. v. Eight Jud. Dist. Court of Nev.*, 123 Nev. 44 (2007). Such dual representation is allowed as long as no actual conflict exists. *Id.*

Accordingly, under the above noted case law, UAIC has a duty to defend this action on Lewis' behalf – and attempt to relieve Lewis from this "amended judgment" and has retained counsel to do just that. There is nothing improper in this regard. The fact remains UAIC's duty to defend was only established, at law, in 2013 and, thus, UAIC is trying to comply with same here.

¹⁰ Thus, UAIC would have a duty to defend even if policy limits have been tendered, which they have been here.

1 The issues surrounding the amending of the 2008 judgment and, new suit filed, *only arose this*
 2 *year* and, thus, UAIC's duty to defend these new judgments and claims only arose now. By
 3 seeking to stand by its duty to defend Lewis and, seeking to relieve him of an expired multi-
 4 million dollar judgment - which UAIC believes was improperly attempted to be revived- there is,
 5 at the very least, a material issue of fact as noted in the Affidavit of Brandon Carroll (*Exhibit*
 6 *J'*). Moreover, these issues are partially before the Nevada Supreme Court.

7
 8 The case cited by Lewis in support of these arguments, *Hinton v. Beck*, 176 Cal. App. 4th
 1378 (Ca. Ct. of App. 2009), is both non-binding on this court and, easily distinguishable. In that
 case the Court prevented an insurer from intervening in a personal injury case, while it was still
 being litigated, after it failed to defend. *Id.* Here, the matter UAIC allegedly failed to defend was
 litigated back in 2008 and the judgment entered then. UAIC has not tried to intervene in that
 original matter, nor challenge the original default judgment entered in 2008. Rather, only after a
 court found a duty to defend and, then, an improper attempt to revive the expired 2008 judgment
 through amendment and, a new action filed, did UAIC seek to intervene. Accordingly, these
 factors distinguish this matter from the *Hinton* case and, at the very least, create a material issue
 of fact regarding UAIC's ability to defend Lewis and intervene to contest these issues.

Accordingly, again, this should not be a basis for summary judgment.

20 Finally, Lewis utterly fails to articulate how UAIC retaining defense counsel on his
 21 behalf or, intervening, and seeking to vacate an expired judgment and dismiss a newly filed
 22 action based on same expired judgment is not in his interest. Lewis argument that a failed
 23 defense for him here will result in a large judgment against him is absolutely ridiculous for 2
 24 reasons. First, if a judgment ends up being entered against him, he is no worse position than he
 25 would have been had UAIC not tried to defend him. Second, the fact is, by way of stipulated
 26 judgment, Lewis attempted to enter the exact judgment Plaintiff Nalder is seeking in the new
 27 action. See *Stipulated Judgment, attached hereto as exhibit 'K.'* Accordingly, any argument that
 28

1 Lewis makes claiming a failed defense here would expose him to the exact same judgment he
 2 sought to stipulate too - is outlandish.

3 Regardless, as noted above, UAIC has a duty to defend and a material issue of fact, at the
 4 very least, exists as to whether UAIC's actions herein in trying to relieve Lewis from this
 5 judgment and, new action, was in 'bad faith' or 'harmed him.' Accordingly, the Court should
 6 also deny this ground for summary judgment.
 7

8 *d. At the very least a material issue of fact exists in regard to UAIC's retention of counsel
 for Lewis and have him file Motions on his behalf under their duty to defend.*

Lewis also takes umbrage with the fact that UAIC retained counsel to defend him in these
 actions and, that said counsel either failed to heed his communications and/or filed pleadings
 without his consent. On the surface this could seem to be a compelling argument - as Lewis paints
 Tindall as some rogue counsel out for UAIC's interest and not his own. However, when one views
 the actual circumstances it is apparent that Lewis argument is built upon a false premise. That is,
 he claims Tindall's actions in filing a motion to vacate a multi-million dollar judgment and, dismiss
 an action on same judgment, is somehow "harming" him. This is pure speculation with no factual
 proof of harm. Moreover, the argument fails to acknowledge UAIC's duty to defend him from
 these actions and, indeed, what may be the manipulations of his Counsel, Thomas Christensen -
 20 who also represents the creditor and, thus, is conflicted. In short, UAIC has a duty to defend per
 21 the ruling of the federal district court and UAIC is merely trying to fulfill that duty. At the very
 22 least, therefore, a material issue of fact exists as to these issues.

23
 24 It is axiomatic that a policy a liability insurance comes with a duty to defend and, that same
 25 duty is broader than the duty to indemnify.¹¹ *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 120 Nev.
 26 678 (2004). It is further well-settled in Nevada that when an insurer retains defense counsel to
 27

28 ¹¹ Thus, UAIC would have a duty to defend even if policy limits have been tendered, which they
 have been here.

1 defend its insured, same counsel represents **both** the insurer and insured and has duties to both.
 2 *Nev. Yellow Cab Corp. v Eight Jud. Dist. Court of Nev.*, 123 Nev. 44 (2007). Such dual
 3 representation is allowed as long as no actual conflict exists. *Id.* An insurer must only provide
 4 independent, "Cumis" counsel, when an actual conflict exists. *State Farm Mut. Auto. Ins. Co. v.*
 5 *Hansen*, 357 P.3d 338 (2015).

6
 7 In the case at bar, the federal district court case, in the matter on appeal, the court there has
 8 implied an insurance policy between Lewis and UAIC for the time of the July 2007 loss. See
Exhibit 'H.' The policy which was implied states, in pertinent part, as follows:

We will defend any suit or settle any claim for damages as we think appropriate. We will not defend or settle any suit or claim after we reach our limit of liability. We have no duty to defend any suit or settle any claim for bodily injury or property damage not covered under this policy.

See Copy of UAIC policy terms, attached hereto as Exhibit 'M', at page 2, Part I – Liability, Coverage A. Indeed, the right of an insurer to control the defense has been recognized by the Nevada Supreme Court in *Allstate v Miller*, 125 Nev. 300, 212 P.3d 318 (NV. 2009).

As can be seen from the above-cited principles and, implied contract, UAIC had a duty to defend Lewis beginning, at least, on October 30, 2013. As discussed above, this duty was not triggered until UAIC was made aware of the new "amendment" of the expired judgment and, the new action thereupon, herein, when Nalder gave notice she was going to default Lewis. See Exhibit 'J', including attachments thereto. Given these events, UAIC felt it needed to defend its insured and did so, despite counsel for third party Lewis' interference because of his conflicted dual representation of the creditor and debtor, eventually retaining Randy Tindall, Esq. to file necessary motions to vacate the "amended" judgment and dismiss the new action. *Id.* This was reasonable and proper under the circumstances. Lewis has yet to articulate how this will/has harmed him. Accordingly, at the very least UAIC's actions can be seen as reasonable and, thus, a genuine dispute exists as to these issues, preventing summary judgment.

In his Motion, Lewis maintains that UAIC has breached the covenant of good faith and fair dealing because either, (1) Attorney Tindall never talked to Lewis, (2) Attorney Tindall and/or UAIC failed to give notice to Counsel for Nalder and Lewis, Tom Christensen, and (3) filed pleadings without his consent and/or that he asked be withdrawn. In support of these claims, Lewis cites *Powers v USAA*, 114 Nev. 690, 962 P.2d 596 (1998) for the broad principle that an insurer cannot "deny a reasonable request of the insured or harass the insured." *Lewis Motion*, p. 15, lines 15-17. The problem is, of course, nowhere in the Powers case is such a principle noted. As this Court is probably aware, the *Powers* case is generally cited in regard to two issues – (1) an insurer's burden for alleging a material misrepresentation under the policy to deny coverage and, (2) that a quasi-fiduciary duty between the insured and insurer exists which is part of the covenant of good faith and fair dealing which requires the insurer to put its interests on equal footing with the insureds. *Powers v USAA*, 114 Nev. 690, 962 P.2d 596 (1998). Specifically, in *Powers* the insurer was found to have wrongfully denied a claim and, indeed sought to prosecute its insured for making a fraudulent claim, when it appeared the insurer may have manufactured evidence against its insured. *Id.* Indeed, because of such behavior the court upheld the bad faith finding against the insurer. *Id.* The only mention in the *Powers* decision of the insurer "disregarding" requests of the insured is in relation to the fact the jury agreed with *Powers* that USAA had refused his (1) requests for photos used at his E.U.O., (2) failed to allow him to be present when his sunk boat was raised and, (3) failed to protect the boat (evidence) after it was raised. *Id.* at 602, 700.

As such, when one reviews the case relied upon by Lewis for his claims, it is clearly distinguishable. Nowhere does it say an insurer cannot seek to vacate an expired judgment against its insured nor, defend him from a suit based upon same improper judgment. See Exhibit 'J.' Moreover, the issues are dissimilar to *Powers*. In *Powers* the insurer denied the insured requests that dealt with access to evidence – evidence he needed to defend a criminal fraud case. As noted above, USAA apparently denied *Powers* access to photos used at his E.U.O., to be present when

evidence was collected and, failure to protect evidence. Such actions do not even come close to equating with the claims Lewis' makes against UAIC here. Rather, Lewis complains the UAIC failed to communicate or, communicated improperly, or failed to heed his demand to cease the defense. Besides being completely different that the alleged refusals in *Powers*, it also true that these arguments omit relevant facts. Namely, that conflicted counsel Thomas Christensen was prohibiting retained defense counsel from communicating with Lewis. *Id.* As such, the complaint that UAIC failed to communicate with Lewis, or copy Christensen on correspondence is a red-herring considering issues of fact exist over Christensen's true motivations and conflicts, as well as interference with or, non-cooperation under the policy. *Id.* The other problem with this argument is it ignores UAIC's right to control the defense of its insured under the policy, noted above. As such, given UAIC's right to control the defense there is at least a material issue of fact or, genuine dispute over this issue and Lewis' right to "deny himself a defense."

Consider this hypothetical: Single vehicle accident with a husband driving and he is allegedly negligent causing an accident injuring his passenger, who is his wife. Under Nevada law the wife would have to sue her husband for negligence to recover. Under Lewis' theory, the husband could refuse retained defense counsel and command them not to mount a defense to his wife's claims claiming he was negligent and does not want to contest it – *despite the insurer having evidence that either, he was not negligent or, there may be collusion with his plaintiff/wife.* This would turn justice on its head and, potentially, allow a fraudulent claim. UAIC hopes this Court can see the parallels here. That is, James Nalder (claimant Cheyenne's father) and Gary Lewis have been friends for years. The loss, where Gary hit James' daughter, occurred while they were both in attendance at their biker's club picnic. It is understandable if Lewis feels guilty for his actions and wants to see his friend's daughter compensated. Lewis also has no funds of his own so, of course wants an insurer to pay. Lewis is also represented by the same counsel who represents the creditor – Nalder. UAIC hopes the court see the concern for the same fraud or collusion, as in

1 the hypothetical above, here. In short, an insurer must be able to mount a defense where it believes
2 a defense to its insured is valid- as UAIC believes it has done here – even when the insured
3 proclaims not to want same, **especially when potential fraud or collusion may be involved.** *Id.*

4 Finally, again, Lewis' argument that *if* UAIC's defense through retained defense counsel
5 fails, he will be exposed to a larger judgment than he otherwise would have is completely
6 baseless. First, without any defense, Plaintiff would simply enter the judgment she seeks –
7 adding on interest accrued, etc. So, if the defense fails Lewis' is in no worse a position. Further,
8 the argument is completely undercut by the fact that his "independent" counsel, Breen Arntz,
Esq. by way of stipulated judgment, attempted to stipulate to the exact judgment Plaintiff Nalder
is seeking in the new action with interest accrued tacked on. See Stipulated Judgment, attached
hereto as exhibit 'K.' Accordingly, any argument that Lewis makes claiming a failed defense
here would expose him to the exact same judgment he sought to stipulate too - is not only
specious, *but ignores an insured's duties to mitigate his damages.* Moreover, this court should
note that attorneys can be fiduciaries too. *By this action is counsel for Lewis (Christensen and*
Arntz) putting their interests ahead of Lewis'.

19 At the very least, given the Nevada Supreme Court is currently tasked with deciding the
20 issues concerning the validity of the 2008 judgment, these defenses cannot be argued as "frivolous"
21 and, *at the very least*, an issue of fact exists over the defenses. Further, there is no evidence of
22 conspiracy except Lewis' conclusory allegations – which UAIC has denied. *Id.* Most importantly,
23 as stated throughout this brief – Lewis has not articulated how these defenses by UAIC *harm him.*
24 UAIC is merely trying to relieve him from a multi-million dollar judgment. UAIC has a duty to
25 defend him per court ruling and, a right to control that defense. Moreover, UAIC believes this is
26 in Lewis' interests and, that UAIC's and Lewis' interests are actually aligned here. *Id.* Regardless,
27 certainly there is a material issue of fact regarding whether UAIC is putting its interests above
28 Lewis'. Finally, at the very least a "genuine dispute" exists over these issues, preventing summary

1 judgment for Lewis.

2 e. *At the very least, material issues of fact exist as to Lewis' other claimed breaches of*
3 *the covenant of good faith and fair dealing.*

4 Again, though difficult to discern from the disjointed brief, it seems that in addition to the
5 'main' claims for breach of the covenant of good faith and fair dealing discussed above, Lewis'
6 also make some other accusations. UAIC will discuss each, below, but in short, again they suffer
7 from the same defect as those above- Lewis' claims are speculative or conclusory and, at the very
8 least genuine disputes regarding these issues exist between UAIC and Lewis, and thus material
issues of fact, preventing summary judgment.

Lewis' claims that, because he asserts a conflict exists between himself and retained
defense counsel, UAIC must pay for independent, "Cumis" counsel, in this case Breen Arntz, Esq.
However, as will be shown an issue remains whether there is an *actual conflict* or merely one
contrived by Nalder's counsel, Tom Christensen, colluding with Lewis. In short, an insurer must
only provide independent, "Cumis" counsel, when **an actual conflict** exists. *State Farm Mut. Auto.*
Ins. Co. v. Hansen, 357 P.3d 338 (2015). In this case, although Lewis' *claims* there is a conflict -
same is not readily apparent. Rather, the conflict is **allegedly** because Lewis does not want his
retained defense counsel to vacate an expired multi-million dollar judgment against him because
of vague references to 'harm to a contractual relationship' which is not supported or explained. As
such, this alleged conflict hardly passes the 'smell test.' At the very least, Lewis must come forth
with some evidence explaining this claim and, the alleged damage¹², which he has not. Regardless,
to be sure, UAIC has filed a declaratory judgment action on the issue, which is now pending before
the federal district court and, at the very least, this court should consider this a material issue of
fact as to whether a conflict *actually* exists. See Exhibit 'J.' Furthermore, the fact this alleged

12 Lewis cannot cure this in his Reply. Evidence supporting claims must be set forth in his initial
brief so UAIC can properly respond.

conflict - and, indeed Lewis 'independent counsel Arntz - appears to be engineered by Counsel for the judgment-creditor Nalder "on Lewis' behalf" further, adds to the aroma of this conflict. As stated herein, the only attorney - Tom Christensen - with an actual conflict in this case - is the one complaining of same. This should not escape the attention of this court. Accordingly, UAIC asks this court to find a genuine dispute exists on this issue or, at the very least, a material issue of fact, preventing summary judgment.

Next, Lewis makes the improper and false claim UAIC failed to pursue settlement negotiations to relieve him of the judgment. First, discussions of offers of compromise are improper and not admissible under statute. *N.R.S. 48.105*. Moreover, this is not an established cause of action and, rather, may be a factor to consider in bad faith action. *Allstate v Miller*, 125 Nev. 300, 212 P.3d 318 (NV. 2009). Most importantly, however, the allegation is untrue. UAIC attended a mediation of these matters several times, both through court mandated ones on appeal and, through private mediation. Accordingly, this argument also cannot sustain summary judgment.

Lewis also claims, oddly, that UAIC has done no investigation to relieve him of the judgment. This argument is baffling because UAIC has retained 2 defense counsel - Steve Rogers and Randall Tindall - to do just that and, indeed, Steve Rogers drafted motions explicitly stating the reasons why the amended judgment should be vacated, the original judgment is expired and that the new action be dismissed. See Exhibit 'J.' Accordingly, this argument should be denied.

f. The defense provided Lewis is not frivolous and, instead, is seeking to relieve him of an expired judgment - issues which are before the Nevada Supreme Court.

In his brief, Lewis continues to assert issues regarding the validity of the judgment pursuant to the *Mandlebaum* case or, tolling statutes. The issues are not only before the Nevada Supreme Court, but extensively briefed elsewhere and, thus, UAIC will not re-state all arguments. In short, however, it is clear a material issue of fact exists over these issues.

1 Nevada law provides that the statute of limitations for execution upon a judgment is six (6)
 2 years. NRS 11.190(1)(b). The judgment creditor may renew a judgment (and therefore the statute
 3 of limitation) for an additional six years by following the procedure mandated by NRS 17.214.
 4 The mandated procedures were not followed. Therefore the judgment expired.

5
 6 (i) **Payments by UAIC on a judgment entered against it, in a separate action, do not toll the expiration of the 2008 judgment entered against Lewis.**

7 Contrary to Plaintiff's assertion, the payments made by UAIC in 2015 were not
 8 "payments on [this] judgment." Instead, the payments made by UAIC went toward satisfaction
of the judgment entered by the district court in the action against UAIC, now on appeal. See
 Exhibit 'J.' And because the action against UAIC was not an action upon the original default
 judgment here¹³ but in a separate action under assignment against UAIC, *UAIC did not*
acknowledge the validity of the original default judgment by satisfying the judgment entered
against it by the district court.

(ii) **The deadline to renew the Judgment was not tolled by any statute or rule**

Lewis has suggested that the deadlines mandated by NRS 17.214 were somehow extended
 because certain statutes of information can be tolled for causes of action under some
 circumstances. No such tolling applies to renewal of a judgment because renewal of a judgment is
 not a cause of action.

The introduction to NRS 11.090, the statute of limitation law, states that it applies to:
 "...actions other than those from the recovery of real property, unless further limited by specific

¹³ An action upon a judgment is one that seeks to collect upon a debt owed. See, e.g., *Fid. Nat'l Fin. Inc. v. Friedman*, 225 Ariz. 307, 310, 238 P.3d 118, 121 (2010) ("Our post-statehood case law confirms that every judgment continues to give rise to an 'action to enforce it, called an action upon a judgment.' . . . As was true at common law, the defendant in an action on the judgment under our statutory scheme is generally the judgment debtor, and the amount sought is the outstanding liability on the original judgment. The judgment debtor cannot deny the binding force of the judgment, but can assert such defenses as satisfaction or partial payment. If indebtedness remains on the original judgment, the action results in a new judgment in the amount owed.") (internal citations omitted and emphasis added). Appellants' action against UAIC, however, was not an action to collect on the default judgment, as UAIC was not a judgment debtor thereon.

1 statute..." The list which follows includes various causes of action for which suit can be brought.
 2 Nowhere in the list is renewing a judgment defined as or analogized to a cause of action.

3 The Nevada Supreme Court has held that actions to enforce a judgment fall under the six
 4 year "catch all" provision of NRS 11.090(1)(a). *Leven* at 403, 168 P.3d at 715 ("An action on a
 5 judgment or its renewal must be commenced within six years under NRS 11.190 (1) (a); thus a
 6 judgment expires by limitation in six years"). In summary, neither statute, NRS 11.190 nor NRS
 7 17.214, provides for any tolling of the time period to renew a judgment.
 8

(iii) The Mandelbaum case is not persuasive.

Finally, any reliance by Plaintiff on the Court's holding in *Mandlebaum* that the
 judgment creditor's and assignee's action was timely brought because the statute of limitations
 was tolled due to the judgment debtor's absence from the State of Nevada, is misplaced because,
 as discussed above, the action against UAIC on appeal is not an action on the judgment sufficient
to satisfy the requirements of NRS 11.190.

Similarly, Lewis cites to *Los Angeles Airways v Estate of Hughes*, 99 Nev. 166, 659 P. 2d
 871 (1983) apparently for the same proposition as the *Mandelbaum* case. However, again
Hughes also offers no support for the argument because in that case to the tolling of statutes for
 filing of an action and says nothing about extending the time to renew a judgment. *Los Angeles*
Airways v Estate of Hughes, 99 Nev. 166, 659 P. 2d 871 (1983). Moreover, again, the reliance is
 also misplaced because, as discussed above, the action against UAIC on appeal is not an action
on the judgment sufficient to satisfy the requirements of NRS 11.190.

Accordingly, for all of the above, these arguments also cannot save Plaintiff or Lewis and,
 in any event, provide no support for the summary judgment herein.¹⁴

3. UAIC has not breached any provision of N.R.S. 686A.310 nor, is Lewis entitled to
relief under the statute anyway.

¹⁴ Should Plaintiff raise any further arguments in regard to this issue in his reply, UAIC would
 incorporate its arguments in its Reply in support of its Motion to vacate the amended judgment, herein.

1
2 Again, while unclear, if Lewis is claiming UAIC breached the unfair claims practices act,
3 it is clear he has not met his burden to supply facts to support same. Moreover, should this court
4 find some issue, in the alternative, UAIC argues the Affidavit of V.P. of Claims Brandon Carroll
5 creates a material issue of fact in regards to any such alleged breaches. See Exhibit 'J.'

6
7 In this way, for the statutory section for which Lewis has alleged violations by UAIC – the
8 evidence for violation of any section is not set forth and, in the least, is in dispute as material issues
of fact exist. For these simple reasons, plaintiff's Motion for summary judgment should be denied.

Furthermore, UAIC argues that, under an implied insurance policy – as Lewis has here –
he has no cause of action under N.R.S. 686A.310, as these causes of action were not anticipated
for 'implied contracts.'

A District Court Judge for the District of Nevada reached this very conclusion in
interpreting Nevada 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 Plaintiffs 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 so ruling the Court stated that:

20 "Plaintiff's claims are based on a purported implied contract and Plaintiff has cited no
21 authority suggesting that N.R.S. § 686A applies to implied agreements. Plaintiff's claim
22 under this statute are bare assertions or mere recitations of the law void of factual allegation
and cannot survive the motion to dismiss. Accordingly, the Court dismisses the claims for
violations of N.R.S. § 686A."

23 Id. at 9-10.

24 It should be apparent the soundness of the Court's rationale in *Nevada Assoc. Servs.*
25 Because the statute only applies, by its own terms, to an *insurance policy*. Here as is undisputed
26 there was no insurance policy in effect on the date of loss, N.R.S. 686A.310 should not be applied
27 retroactively where no written contract was in place. Moreover, UAIC argues it would be
28 inherently unfair for a Court to imply a contract where one existed, only then to apply,

1 retroactively, duties from a statute to the parties of this new, implied contract.

2 Additionally, even were Lewis to have proved a viable statutory violation his Motion must
3 still fail because he has not presented any admissible evidence that any alleged violation has caused
4 him to suffer damages or, the amount of said damages.

5 It is clear that section 686A.310 requires that a claimant's injury be "as a result of" an
6 insurer's action. See *Exhibit 'A', 686A.310 (2)*. This reading of the statute is confirmed by the
7 Nevada Supreme Court in *Palmer v. Del Webb's High Sierra*, 108 Nev. 673, 674 (1992), where
8 the court found that the "as a result of" clause created a causation element. In this way, as 686A.310
expressly refers to damages "as a result of" the insurer's acts – it should be construed as requiring
Plaintiff to prove causation for same damages.

In this matter, it is clear that Lewis fails to prove –he has suffered damage "as a result of"
a statutory violation. Quite simply vague allegations of speculative damage to "contractual
relations" without proof or explanation or, claims of fees for independent counsel arranged by the
creditors counsel – to enter a judgment against him – does not prove damages. At the very least,
as noted above, material issues of fact abound concerning these alleged claims.

As such, Lewis fails to make a *prima facie* showing against UAIC under NRS 686A.310
and, Lewis' Motion for summary judgment should be denied.

20
21 4. Any Judgment entered against Lewis herein is not the measure of any damages against
22 UAIC.

23 For his final argument, Lewis attempts some interesting circular logic. Despite a 2
24 Federal District court's already holding UAIC did not act in "bad faith" in failing to defend
25 Lewis when the original 2008 judgment - Lewis tries to bootstrap his claims of bad faith here to
26 now make UAIC liable for that same judgment. This argument is specious. It misstates the law
27 and, attempts, again to re-litigate issues on appeal. Moreover, those cases apply when an insurer
28 fails to defend and, as this Court can see UAIC is trying to defend, but gets thwarted by Counsel

1 for Lewis. The Court should see through this ruse.

2 Lewis bases his argument on out of state case law, not binding on this Court and, *Allstate*
 3 *v Miller*, 125 Nev. 300, 212 P.3d 318 (NV. 2009). However, all those cases, including *Miller* dealt
 4 with situations when an insurer failed to defend on the original tort claim. That issue was already
 5 litigated in the case on appeal and, UAIC has prevailed. None of those cases stand for the
 6 proposition asserted by Lewis here – that, after finding there was no bad faith breach of the duty
 7 to defend and, insurer can later be found liable for the prior judgment due to some other, new,
 8 claim of bad faith. Moreover, UAIC has tried to defend this case and, thus, has not breached any
 such duty so, this principle does not apply. See Exhibit J.

Accordingly, this court should deny this argument and, at the very least, material issues of
 fact, precluding summary judgment on this issue.

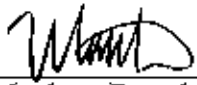
V.

CONCLUSION

Based upon the foregoing, Defendants UNITED AUTOMOBILE INSURANCE
 COMPANY respectfully requests that this Court grant their Counter-Motions and/or deny Lewis'
 Motion for Summary Judgment as materials issues of fact abound.

DATED this 14th day of December, 2018.

ATKIN WINNER & SHERROD


 Matthew Douglas, Esq.
 Nevada Bar No. 11377
 1117 S. Rancho Drive
 Las Vegas, Nevada 89102
 Attorneys for UAIC

CERTIFICATE OF SERVICE

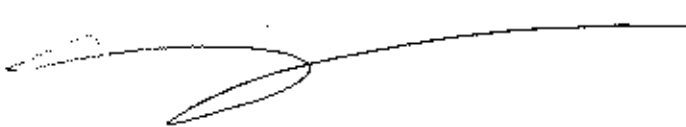
I certify that on this 14th day of December, 2018, the foregoing UAIC'S OPPOSITION TO THIRD PARTY PLAINTIFF LEWIS'S MOTION FOR SUMMARY JUDGMENT was served on the following by ☐ Electronic Service pursuant to NEFR 9 ☒ Electronic Filing and Service pursuant to NEFR 9 ☐ hand delivery ☐ overnight delivery ☐ fax ☐ fax and mail ☐ mailing by depositing with the U.S. mail in Las Vegas, Nevada, enclosed in a sealed envelope with first class postage prepaid, addressed as follows:

David Stephens, Esq.
STEPHENS & BYWATER, P.C.
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Las Vegas, NV 89130
Attorney for Plaintiff

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Carissa Christensen, Esq.
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Additional Attorney for Defendant Lewis

Thomas Christensen, Esq.
CHRISTENSEN LAW OFFICES
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Las Vegas, NV. 89107
Counsel for Third Party Plaintiff Lewis


An employee of ATKIN WINNER & SHERROD

ATKIN WINNER & SHERROD
A NEVADA LAW FIRM

000388

EXHIBIT "A"

FILED

JAN 11 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 70504

JAMES NALDER, Guardian
Ad Litem on behalf of
Cheyenne Nalder; GARY
LEWIS, individually,
Plaintiffs-Appellants,

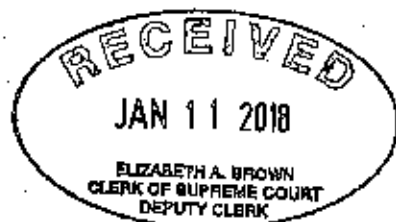
No. 13-17441

D.C. No.
2:09-cv-01348-RCJ-GWF

v.

UNITED AUTOMOBILE
INSURANCE COMPANY,
*Defendant-Appellee.*ORDER CERTIFYING
QUESTION TO THE
NEVADA SUPREME
COURTAppeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, PresidingArgued and Submitted January 6, 2016
San Francisco, California

Filed December 27, 2017

Before: Diarmuid F. O'Scannlain and
William A. Fletcher, Circuit Judges.** This case was submitted to a panel that included Judge Koziński,
who recently retired.

18-01192

2 NALDER V. UNITED AUTO INS. CO.

SUMMARY**

Certified Question to Nevada Supreme Court

The panel certified the following question of law to the Nevada Supreme Court:

Under Nevada law, if a plaintiff has filed suit against an insurer seeking damages based on a separate judgment against its insured, does the insurer's liability expire when the statute of limitations on the judgment runs, notwithstanding that the suit was filed within the six-year life of the judgment?

ORDER

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 remains withdrawn pending further order. The parties shall notify the Clerk of this court within one week after the

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

NALDER V. UNITED AUTO INS. CO.3

Nevada Supreme Court accepts or rejects the certified question, and again within one week after the Nevada Supreme Court renders its opinion.

I

Plaintiffs-appellants, James Nalder, guardian ad litem for Cheyanne Nalder, and Gary Lewis will be the appellants before the Nevada Supreme Court. Defendant-appellee, United Automobile Insurance Company ("UAIC"), a Florida corporation with its principal place of business in Florida, will be the respondent.

The names and addresses of counsel for the parties are as follows:

Thomas Christensen, Christensen Law Offices, LLC, 1000 South Valley View Boulevard, Las Vegas, Nevada 89107, and Dennis M. Prince, Eglet Prince, 400 South Seventh Street, Suite 400, Las Vegas, Nevada 89101, for appellants.

Thomas E. Winner, Susan M. Sherrod and Matthew J. Douglas, Atkin Winner & Sherrod, 1117 South Rancho Drive, Las Vegas, Nevada 89102, for respondent.

II

The question of law to be answered is:

Under Nevada law, if a plaintiff has filed suit against an insurer seeking damages based on a separate judgment against its insured, does the insurer's liability expire when the

statute of limitations on the judgment runs, notwithstanding that the suit was filed within the six-year life of the judgment?

The Nevada Supreme Court may rephrase the question as it deems necessary.

III

A

This is the second order in this case certifying a question to the Nevada Supreme Court. We recount the facts essentially as in the first order.

On July 8, 2007, Gary Lewis ran over Cheyanne Nalder. Lewis had taken out an auto insurance policy with UAIC, which was renewable on a monthly basis. Before the accident, Lewis had received a statement instructing him that his renewal payment was due by June 30, 2007. The statement also specified that "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy." The statement listed June 30, 2007, as the policy's effective date and July 31, 2007, as its expiration date. Lewis did not pay to renew his policy until July 10, 2007, two days after the accident.

James Nalder ("Nalder"), Cheyanne's father, made an offer to UAIC to settle her claim for \$15,000, the policy limit. UAIC rejected the offer, arguing Lewis was not covered at the time of the accident because he did not renew the policy by June 30. UAIC never informed Lewis that Nalder was willing to settle.

Nalder sued Lewis in Nevada state court and obtained a \$3.5 million default judgment. Nalder and Lewis then filed the instant suit against UAIC in state court, which UAIC removed to federal court. Nalder and Lewis alleged breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, fraud, and breach of section 686A.310 of the Nevada Revised Statutes. UAIC moved for summary judgment on the basis that Lewis had no insurance coverage on the date of the accident. Nalder and Lewis argued that Lewis was covered on the date of the accident because the renewal notice was ambiguous as to when payment had to be received to avoid a lapse in coverage, and that this ambiguity had to be construed in favor of the insured. The district court found that the contract could not be reasonably interpreted in favor of Nalder and Lewis's argument and granted summary judgment in favor of UAIC.

We held that summary judgment "with respect to whether there was coverage" was improper because the "[p]laintiffs came forward with facts supporting their tenable legal position." *Nalder v. United Auto. Ins. Co.*, 500 F. App'x 701, 702 (9th Cir. 2012). But we affirmed "[t]he portion of the order granting summary judgment with respect to the [Nevada] statutory arguments." *Id.*

On remand, the district court granted partial summary judgment to each party. First, the court found the renewal statement ambiguous, so it construed this ambiguity against UAIC by finding that Lewis was covered on the date of the accident. Second, the court found that UAIC did not act in bad faith because it had a reasonable basis to dispute coverage. Third, the court found that UAIC breached its duty to defend Lewis but awarded no damages "because [Lewis] did not incur any fees or costs in defending the underlying

6 NALDER V. UNITED AUTO INS. CO.

action" as he took a default judgment. The court ordered UAIC "to pay Cheyanne Nalder the policy limits on Gary Lewis's implied insurance policy at the time of the accident." Nalder and Lewis appeal.

B

Nalder and Lewis claim on appeal that they should have been awarded consequential and compensatory damages resulting from the Nevada state court judgment because UAIC breached its duty to defend. Thus, assuming that UAIC did not act in bad faith but did breach its duty to defend Lewis, one question before us is how to calculate the damages that should be awarded. Nalder and Lewis claim they should have been awarded the amount of the default judgment (\$3.5 million) because, in their view, UAIC's failure to defend Lewis was the proximate cause of the judgment against him. The district court, however, denied damages because Lewis chose not to defend and thus incurred no attorneys' fees or costs. Because there was no clear state law and the district court's opinion in this case conflicted with another decision by the U.S. District Court for the District of Nevada on the question of whether liability for breach of the duty to defend included all losses consequential to an insurer's breach, we certified that question to the Nevada Supreme Court in an order dated June 1, 2016. In that order, we also stayed proceedings in this court pending resolution of the certified question by the Nevada Supreme Court.

After that certified question had been fully briefed before the Nevada Supreme Court, but before any ruling or oral argument, UAIC moved this court to dismiss the appeal for lack of standing. UAIC argues that the six-year life of the

default judgment had run and that the judgment had not been renewed, so the judgment is no longer enforceable. Therefore, UAIC contends, there are no longer any damages above the policy limit that Nalder and Lewis can seek because the judgment that forms the basis for those damages has lapsed. For that reason, UAIC argues that the issue on appeal is moot because there is no longer any basis to seek damages above the policy limit, which the district court already awarded.

In a notice filed June 13, 2017, the Nevada Supreme Court stayed consideration of the question already certified in this case until we ruled on the motion to dismiss now pending before us.

IV

In support of its motion to dismiss, UAIC argues that under Nev. Rev. Stat. § 11.190(1)(a), the six-year statute of limitations during which Nalder could enforce his default judgment against Lewis expired on August 26, 2014, and Nalder did not renew the judgment. Therefore, says UAIC, the default judgment has lapsed, and because it is no longer enforceable, it no longer constitutes an injury for which Lewis or Nalder may seek damages from UAIC.

In response, Nalder and Lewis do not contest that the six-year period of the statute of limitations has passed and that they have failed to renew the judgment, but they argue that UAIC is wrong that the issue of consequential damages is mooted. First, they make a procedural argument that a lapse in the default judgment, if any, may affect the amount of damages but does not affect liability, so the issue is inappropriate to address on appeal before the district court

has evaluated the effect on damages. Second, they argue that their suit against UAIC is itself "an action upon" the default judgment under the terms of Nev. Rev. Stat. § 11.190(1)(a) and that because it was filed within the six-year life of the judgment it is timely. In support of this argument, they point out that UAIC has already paid out more than \$90,000 in this case, which, they say, acknowledges the validity of the underlying judgment and that this suit is an enforcement action upon it.

Neither side can point to Nevada law that definitively answers the question of whether plaintiffs may still recover consequential damages based on the default judgment when six years passed during the pendency of this suit. Nalder and Lewis reach into the annals of Nevada case law to find an opinion observing that at common law "a judgment creditor may enforce his judgment by the process of the court in which he obtained it, or he may elect to use the judgment, as an original cause of action, and bring suit thereon, and prosecute such suit to final judgment" *Mandlebaum v. Gregovich*, 50 P. 849, 851 (Nev. 1897); see also *Leven v. Frey*, 168 P.3d 712, 715 (Nev. 2007) ("An action on a judgment or its renewal must be commenced within six years." (emphasis added)). They suggest they are doing just this, "us[ing] the judgment, as an original cause of action," to recover from UAIC. But that precedent does not resolve whether a suit against an insurer who was not a party to the default judgment is, under Nevada law, an "action on" that judgment.

UAIC does no better. It also points to *Leven* for the proposition that the Nevada Supreme Court has strictly construed the requirements to renew a judgment. See *Leven*, 168 P.3d at 719. Be that as it may, Nalder and Lewis do not

rely on any laxity in the renewal requirements and argue instead that the instant suit is itself a timely action upon the judgment that obviates any need for renewal. UAIC also points to Nev. Rev. Stat. § 21.010, which provides that "the party in whose favor judgment is given may, at any time before the judgment expires, obtain the issuance of a writ of execution for its enforcement as prescribed in this chapter. The writ ceases to be effective when the judgment expires." That provision, however, does not resolve this case because Nalder and Lewis are not enforcing a writ of execution, which is a direction to a sheriff to satisfy a judgment. See Nev. Rev. Stat. § 21.020.

Finally, apart from Nalder and Lewis's argument that it is inappropriate to address on appeal the effect of the statute of limitations on the size of damages they may collect, neither side squarely addresses whether the expiration of the judgment in fact reduces the consequential damages for UAIC's breach of the duty to defend. Does the judgment's expiration during the pendency of the suit reduce the consequential damages to zero as UAIC implies, or should the damages be calculated based on when the default judgment was still enforceable, as it was when the suit was initiated? Neither side provides Nevada law to answer the question, nor have we discovered it.

V

It appears to this court that there is no controlling precedent of the Nevada Supreme Court or the Nevada Court of Appeals with regard to the issue of Nevada law raised by the motion to dismiss. We thus request the Nevada Supreme Court accept and decide the certified question. "The written opinion of the [Nevada] Supreme Court stating the law

governing the question[] certified . . . shall be res judicata as to the parties." Nev. R. App. P. 5(h).

If the Nevada Supreme Court accepts this additional certified question, it may resolve the two certified questions in any order it sees fit, because Nalder and Lewis must prevail on both questions in order to recover consequential damages based on the default judgment for breach of the duty to defend.

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.

Respectfully submitted, Diarmuid F. O'Scannlain and
William A. Fletcher, Circuit Judges.

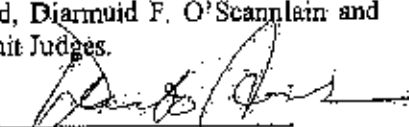

Diarmuid F. O'Scannlain
Circuit Judge

EXHIBIT “B”

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES NALDER, GUARDIAN AD
LITEM ON BEHALF OF CHEYANNE
NALDER; AND GARY LEWIS,
INDIVIDUALLY,
Appellants,
vs.
UNITED AUTOMOBILE INSURANCE
COMPANY,
Respondent.

No. 70504

FILED

FEB 23 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER ACCEPTING SECOND CERTIFIED QUESTION AND
DIRECTING SUPPLEMENTAL BRIEFING*

The United States Ninth Circuit Court of Appeals previously certified a legal question to this court under NRAP 5, asking us to answer the following question:

Whether, under Nevada law, the liability of an insurer that has breached its duty to defend, but has not acted in bad faith, is capped at the policy limit plus any costs incurred by the insured in mounting a defense, or is the insurer liable for all losses consequential to the insurer's breach?

Because no clearly controlling Nevada precedent answers that legal question and the answer could determine part of the federal case, we accepted that certified question and directed the parties to file briefs addressing that question. After briefing had been completed, respondent United Automobile Insurance Company informed this court that it had filed a motion to dismiss in the federal case. We then stayed our consideration of the certified question because a decision by the Ninth Circuit granting the motion to dismiss would render the question before this court advisory.

The Ninth Circuit has now certified another legal question to this court under NRAP 5. The new question, which is related to the motion to dismiss pending in the Ninth Circuit, asks us to answer the following:

Under Nevada law, if a plaintiff has filed suit against an insurer seeking damages based on a separate judgment against its insured, does the insurer's liability expire when the statute of limitations on the judgment runs, notwithstanding that the suit was filed within the six-year life of the judgment?

That question is focused on the insurer's liability, but elsewhere in the Ninth Circuit's certification order, it makes clear that the court is concerned with whether the plaintiff in this scenario can continue to seek the amount of the separate judgment against the insured as consequential damages caused by the insurer's breach of the duty to defend its insured when the separate judgment was not renewed as contemplated by NRS 11.190(1)(a) and NRS 17.214 during the pendency of the action against the insurer. We therefore choose to accept the Ninth Circuit's invitation to "rephrase the question as [we] deem necessary." Consistent with language that appears elsewhere in the certification order, we rephrase the question as follows:

In an action against an insurer for breach of the duty to defend its insured, can the plaintiff continue to seek consequential damages in the amount of a default judgment obtained against the insured when the judgment against the insured was not renewed and the time for doing so expired while the action against the insurer was pending?

As no clearly controlling Nevada precedent answers this legal question and the answer may determine the federal case, we accept this certified question as rephrased. See NRAP 5(a); *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 749-51, 137 P.3d 1161, 1163-64 (2006).

Appellants shall have 30 days from the date of this order to file and serve a supplemental opening brief. Respondent shall have 30 days from the date the supplemental opening brief is served to file and serve a supplemental answering brief. Appellants shall then have 20 days from the date the supplemental answering brief is served to file and serve any supplemental reply brief. The supplemental briefs shall be limited to addressing the second certified question and shall comply with NRAP 28, 28.2, 31(c), and 32. See NRAP 5(g)(2). To the extent that there are portions of the record that have not already been provided to this court and are necessary for this court to resolve the second certified question, the parties may submit a joint appendix containing those additional documents. See NRAP 5(d). Given the relationship between the two certified questions, we lift the stay as to the first certified question.

It is so ORDERED.¹

Douglas, C.J.
Douglas

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Cherry, J.
Cherry

Pickering, J.
Pickering

Stiglich, J.
Stiglich

¹As the parties have already paid a filing fee when this court accepted the first certified question, no additional filing fee will be assessed at this time.

The Honorable Ron D. Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter.

cc: Eglet Prince
Christensen Law Offices, LLC
Atkin Winner & Sherrod
Cole, Scott & Kissane, P.A.
Lewis Roca Rothgerber Christie LLP/Las Vegas
Pursiano Barry Bruce Lavelle, LLP
Laura Anne Foggan
Mark Andrew Boyle
Matthew L. Sharp, Ltd.
Clerk, United States Court of Appeals for the Ninth Circuit

EXHIBIT “C”

FILED

May 22 1 48 PM '09

Ed [Signature]
CLERK OF THE COURT

1 **COM**
 2 THOMAS CHRISTENSEN, ESQ.
 3 Nevada Bar No. 2326
 4 DAVID F. SAMPSON, ESQ.
 5 Nevada Bar No. 6811
 6 CHRISTENSEN LAW OFFICES, LLC
 7 1000 S. Valley View Blvd.
 8 Las Vegas, Nevada 89107
 9 Attorneys for Plaintiffs

DISTRICT COURT
CLARK COUNTY, NEVADA

7 JAMES NALDER, Guardian Ad Litem for minor)
 8 Cheyanne Nalder, real party in interest, and)
 9 GARY LEWIS, Individually;)

9 Plaintiffs,)

10 vs.)

11 UNITED AUTOMOBILE INSURANCE CO,)
 12 DOES I through V, and ROE CORPORATIONS)
 13 I through V, inclusive)

13 Defendants.)

Case No.: A-09-590967-C

Dept No.: II

COMPLAINT

16 COME NOW the Plaintiffs, James Nalder, Guardian Ad Litem for minor, Cheyanne
 17 Nalder, real party in interest in this matter, and Gary Lewis, by and through their attorneys of
 18 record, DAVID SAMPSON, ESQ., of the law firm of CHRISTENSEN LAW OFFICES, LLC,
 19 and for Plaintiffs' Complaint against the Defendants, and each of them, allege as follows:

20 1. That Plaintiff, James Nalder, Guardian Ad Litem for minor, Cheyanne Nalder real party
 21 in interest, was at all times relevant to this action a resident of the County of Clark, State of
 22 Nevada.

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1 2. That Plaintiff, Gary Lewis, was at all times relevant to this action a resident of the
2 County of Clark, State of Nevada.

3 3. That Defendant, United Automobile Insurance Co. (hereinafter "UAI"), was at all times
4 relevant to this action an automobile insurance company duly authorized to act as an insurer in
5 the State of Nevada and doing business in Clark County, Nevada.

6 4. That the true names and capacities, whether individual, corporate, partnership, associate
7 or otherwise, of Defendants, DOES I through V and ROE CORPORATIONS I through V, are
8 unknown to Plaintiffs, who therefore sue said Defendants by such fictitious names. Plaintiffs
9 are informed and believe and thereon allege that each of the Defendants designated herein as
10 DOE or ROE CORPORATION is responsible in some manner for the events and happenings
11 referred to and caused damages proximately to Plaintiffs as herein alleged, and that Plaintiffs
12 will ask leave of this Court to amend this Complaint to insert the true names and capacities of
13 DOES I through V and ROE CORPORATIONS I through V, when the same have been
14 ascertained, and to join such Defendants in this action.

15 5. That, at all times relevant hereto, Gary Lewis was the owner of a certain 1996 Chevy
16 Silverado with vehicle identification number 1GCEC19M6TE214944 (hereinafter "Plaintiff's
17 Vehicle").

18 6. That Gary Lewis had in effect on July 8, 2007, a policy of automobile insurance on the
19 Plaintiff's Vehicle with Defendant, UAI (the "Policy"); that the Policy provides certain
20 benefits to Cheyanne Nalder as specified in the Policy; and the Policy included liability
21 coverage in the amount of \$15,000.00/\$30,000.00 per occurrence (hereinafter the "Policy
22 Limits").



1 7. That Gary Lewis paid his monthly premium to UAI for the policy period of June 30,
2 2007 through July 31, 2007.

3 8. That on July 8, 2007 on Bartolo Rd in Clark County Nevada, Cheyanne Nalder was a
4 pedestrian in a residential area, Plaintiff's vehicle being operated by Gary Lewis when Gary
5 Lewis drove over top of Cheyanne Nalder causing serious personal injuries and damages to
6 Cheyanne Nalder.

7 9. That Cheyanne Nalder made a claim to UAI for damages under the terms of the Policy
8 due to her personal injuries.

9 10. That Cheyanne Nalder offered to settle his claim for personal injuries and damages
10 against Gary Lewis within the Policy Limits, and that Defendants, and each of them, refused to
11 settle the claim of Cheyanne Nalder against Gary Lewis within the Policy Limits and in fact
12 denied the claim all together indicating Gary Lewis did not have coverage at the time of the
13 accident.

14 11. That Plaintiff, Gary Lewis has duly performed all the conditions, provisions and terms
15 of the Policy relating to the loss sustained by Plaintiff, Cheyanne Nalder, and has furnished and
16 delivered to the Defendants, and each of them, full and complete particulars of said loss and
17 have fully complied with all of the provisions of the Policy relating to the giving of notice of
18 said loss, and have duly given all other notices required to be given by the Plaintiffs under the
19 terms of the Policy, including paying the monthly premium.

20 12. That Plaintiff, Cheyanne Nalder, is a third party beneficiary under the Policy as well as a
21 Judgment Creditor of Gary Lewis and is entitled to pursue action against the Defendants directly
22 under Hall v. Enterprise Leasing Co., West, 122 Nev. 685, 137 P.3d 1104, 1109 (2006), as well as
23 Denham v. Farmers Insurance Company, 213 Cal.App.3d 1061, 262 Cal.Rptr. 146 (1989).
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1 13. That Cheyanne Nalder conveyed to UAI her willingness to settle her claim against Gary
2 Lewis at or within the policy limits of \$15,000.00 provided they were paid in a commercially
3 reasonable manner.

4 14. That Cheyanne Nalder and Gary Lewis cooperated with UAI in its investigation
5 including but not limited to providing a medical authorization to UAI on or about August 2,
6 2007.

7 15. That on or about August 6, 2007 UAI mailed to Plaintiff, Cheyanne Nalders' attorney,
8 Christensen Law Offices, a copy of "Renewal Policy Declaration Monthly Nevada Personal
9 Auto Policy" for Gary Lewis with a note that indicated "There was a gap in coverage".

10 16. That on or about October 10, 2007 UAI mailed to Plaintiff, Cheyanne Nalders'
11 attorney, Christensen Law Offices, a letter denying coverage.

12 17. That on or about October 23, 2007, Plaintiff, Cheyanne Nalder provided a copy of the
13 complaint filed against UAI's insured Gary Lewis.

14 18. That on or about November 1, 2007, UAI mailed to Plaintiff, Cheyanne Nalders'
15 attorney, Christensen Law Offices, another letter denying coverage.

16 19. That UAI denied coverage stating Gary Lewis had a "lapse in coverage" due to non-
17 payment of premium.

18 20. That UAI denied coverage for non-renewal.

19 21. That UAI mailed Gary Lewis a "renewal statement" on or about June 11, 2007 that
20 indicated UAI's intention to renew Gary Lewis' policy.

21 22. That upon receiving the "renewal statement", which indicated UAI's intention to renew
22 Gary Lewis' policy, Gary Lewis made his premium payment and procured insurance coverage
23 with UAI.

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23. That UAI was required under the law to provide insurance coverage under the policy Gary Lewis had with UAI for the loss suffered by Cheyenne Nalder, and was under an obligation to defend Gary Lewis and to indemnify Gary Lewis up to and including the policy limit of \$15,000.00, and to settle Cheyenne's claim at or within the \$15,000.00 policy limit when given an opportunity to do so.

24. That UAI never advised Lewis that Nalder was willing to settle Nalder's claim against Lewis for the sum of \$15,000.00.

25. UAI did not timely evaluate the claim nor did it tender the policy limits.

26. Due to the dilatory tactics and failure of UAI to protect their insured by paying the policy limits when given ample opportunity to do so, Plaintiff, Nalder, was forced to seek the services of an attorney to pursue his rights under her claim against Lewis.

27. Due to the dilatory tactics and failure of UAI to protect their insured by paying the policy limits when given ample opportunity to do so, Plaintiff, Cheyenne Nalder, was forced to file a complaint on October 9, 2007 against Gary Lewis for her personal injuries and damages suffered in the July 8, 2007 automobile accident.

28. The filing of the complaint caused additional expense and aggravation to both Cheyenne Nalder and Gary Lewis.

29. Cheyenne Nalder procured a Judgment against Gary Lewis in the amount of \$3,500,000.00.

30. UAI refused to protect Gary Lewis and provide Gary Lewis with a legal defense to the lawsuit filed against Gary Lewis by Cheyenne Nalder.

31. That Defendants, and each of them, are in breach of contract by their actions which include, but are not limited to:

- a. Unreasonable conduct in investigating the loss;
- b. Unreasonable failure to provide coverage for the loss;
- c. Unreasonable delay in making payment on the loss;
- d. Failure to make a prompt, fair and equitable settlement for the loss;
- e. Unreasonably compelling Plaintiffs to retain an attorney before making payment on the loss.

32. As a proximate result of the aforementioned breach of contract, Plaintiffs have suffered and will continue to suffer in the future, damages in the amount of \$3,500,000.00 plus continuing interest.

33. As a further proximate result of the aforementioned breach of contract, Plaintiffs have suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses, all to their general damage in excess of \$10,000.00.

34. As a further proximate result of the breach of contract, Plaintiffs were compelled to retain legal counsel to prosecute this claim, and Defendants, and each of them, are liable for their attorney's fees reasonably and necessarily incurred in connection therewith.

35. That Defendants, and each of them, owed a duty of good faith and fair dealing implied in every contract.

36. That Defendants, and each of them, were unreasonable by refusing to cover the true value of the claim of Cheyanne Nalder, wrongfully failing to settle within the Policy Limits when they had an opportunity to do so, and wrongfully denying coverage.

37. That as a proximate result of the aforementioned breach of the implied covenant of good faith and fair dealing, Plaintiffs have suffered and will continue to suffer in the future, damages in the amount of \$3,500,000.00 plus continuing interest.

1 38. That as a further proximate result of the aforementioned breach of the implied covenant
2 of good faith and fair dealing, Plaintiffs have suffered anxiety, worry, mental and emotional
3 distress, and other incidental damages and out of pocket expenses, all to their general damage
4 in excess of \$10,000.00.

5 39. That as a further proximate result of the aforementioned breach of the implied covenant
6 of good faith and fair dealing, Plaintiffs were compelled to retain legal counsel to prosecute this
7 claim, and Defendants, and each of them, are liable for their attorney's fees reasonably and
8 necessarily incurred in connection therewith.

9 40. That Defendants, and each of them, acted unreasonably and with knowledge that there
10 was no reasonable basis for its conduct, in its actions which include but are not limited to:
11 wrongfully refusing to cover the value of the claim of Cheyanne Nalder, wrongfully failing to
12 settle within the Policy Limits when they had an opportunity to do so and wrongfully denying
13 the coverage.

14 41. That as a proximate result of the aforementioned bad faith, Plaintiffs have suffered and
15 will continue to suffer in the future, damages in the amount of \$3,500,000.00 plus continuing
16 interest.

17 42. That as a further proximate result of the aforementioned bad faith, Plaintiffs have
18 suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of
19 pocket expenses, all to their general damage in excess of \$10,000.00.

20 43. That as a further proximate result of the aforementioned bad faith, Plaintiffs were
21 compelled to retain legal counsel to prosecute this claim, and Defendants, and each of them, are
22 liable for their attorney's fees reasonably and necessarily incurred in connection therewith.

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1 44. That Defendants, and each of them, violated NRS 686A.310 by their actions, including
2 but not limited to: wrongfully refusing to cover the value of the claim of Cheyanne Nalder,
3 wrongfully failing to settle within the Policy Limits when they had an opportunity to do so and
4 wrongfully denying coverage.

5 45. That NRS 686A.310 requires that insurance carriers conducting business in Nevada
6 adopt and implement reasonable standards for the prompt investigation and processing of
7 claims arising under insurance policies, and requires that carriers effectuate the prompt, fair and
8 equitable settlements of claims in which liability of the insurer has become reasonably clear.

9 46. That UAI did not adopt and implement reasonable standards for the prompt
10 investigation and processing of claims arising under its insurance policies, and did not
11 effectuate the a prompt, fair and/or equitable settlement of Nalder's claim against Lewis in
12 which liability of the insurer was very clear, and which clarity was conveyed to UAI.

13 47. That NAC 686A.670 requires that an insurer complete an investigation of each claim
14 within 30 days of receiving notice of the claim, unless the investigation cannot be reasonably
15 completed within that time.

16 48. That UAI received notice of Nalder's claim against Lewis, at the very latest, on or
17 before August 6, 2007. That it was more than reasonable for UAI to complete its investigation of
18 Nalder's claim against Lewis well within 30 days of receiving notice of the claim.

19 49. That UAI did not offer the applicable policy limits.

20 50. That UAI did failed to investigate the claim at all and denied coverage.

21 51. That as a proximate result of the aforementioned violation of NRS 686A.310, Plaintiffs
22 have suffered and will continue to suffer in the future, damages in the amount of \$3,500,000.00
23 plus continuing interest.

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52. That as a further proximate result of the aforementioned violation of NRS 686A.310, Plaintiffs have suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses, all to their general damage in excess of \$10,000.00.

53. That as a further proximate result of the aforementioned violation of NRS 686A.310, Plaintiffs were compelled to retain legal counsel to prosecute this claim, and Defendants, and each of them, are liable for their attorney's fees reasonably and necessarily incurred in connection therewith.

54. That the Defendants, and each of them, have been fraudulent in that they have stated that they would protect Gary Lewis in the event he was found liable in a claim. All of this was done in conscious disregard of Plaintiffs' rights and therefore Plaintiffs are entitled to punitive damages in an amount in excess of \$10,000.00.

WHEREFORE, Plaintiffs, pray for judgment against Defendants, and each of them, as follows:

1. Payment for the excess verdict rendered against Lewis which remains unpaid in an amount in excess of \$3,500,000.00;

2. General damages for mental and emotional distress and other incidental damages in an amount in excess of \$10,000.00;

3. Attorney's fees and costs of suit incurred herein; and

4. Punitive damages in an amount in excess of \$10,000.00;

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1 5. For such other and further relief as this Court deems just and proper.

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3 DATED this 17 day of April, 2009.

4 CHRISTENSEN LAW OFFICES, LLC.

5 By: 

6 Thomas Christensen, Esq.
7 David F. Sampson, Esq.
8 Nevada Bar No. 6811
9 1000 South Valley View Blvd
10 Las Vegas, Nevada 89107
11 Attorneys for Plaintiffs



EXHIBIT “D”

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3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA
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7 JAMES NALDER, Guardian Ad Litem) 2:09-cv-1348-ECR-GWF
8 for minor Cheyanne Nalder, real)
9 party in interest, and GARY LEWIS,)
10 Individually;)

11 Plaintiffs,)

Order

12 vs.)

13 UNITED AUTOMOBILE INSURANCE)
14 COMPANY, DOES I through V, and)
15 ROE CORPORATIONS I through V,)
16 inclusive)

17 Defendants.)
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16 Plaintiffs in this automobile insurance case allege breach of
17 contract, breach of the implied covenant of good faith and fair
18 dealing, bad faith, breach of Nev. Rev. Stat. § 686A.310, and fraud.
19 Now pending is Defendant's "motion for summary judgment on all
20 claims; alternatively, motion for summary judgment on extra-
21 contractual remedies; or, further in the alternative, motion stay
22 [sic] discovery and bifurcate claims for extra-contractual remedies;
23 finally, in the alternative, motion for leave to amend" ("MSJ")
24 (#17).

25 The motion is ripe, and we now rule on it.
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I. Background

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2 Plaintiff Gary Lewis ("Lewis") is a resident of Clark County,
3 Nevada. (Compl. ¶ 2 (#1).) Plaintiff James Nalder ("Nalder"),
4 Guardian ad Litem for minor Cheyanne Nalder, is a resident of Clark
5 County, Nevada. (Id. at ¶ 1.) Defendant United Automobile
6 Insurance Co. ("UAIC") is an automobile insurance company duly
7 authorized to act as an insurer to the State of Nevada and doing
8 business in Clark County, Nevada. (Id. at ¶ 3.) Defendant is
9 incorporated in the State of Florida with its principal place of
10 business in the State of Florida. (Pet. for Removal ¶ VII (#1).)

11 Lewis was the owner of a 1996 Chevy Silverado insured, at
12 various times, by Defendant. (Compl. at ¶ 5-6 (#1).) Lewis had an
13 insurance policy issued by UAIC on his vehicle during the period of
14 May 31, 2007 to June 30, 2007. (MSJ at 3 (#17).) Lewis received a
15 renewal statement, dated June 11, 2007, instructing him to remit
16 payment by the due date of June 30, 2007 in order to renew his
17 insurance policy. (Id. at 3-4.) The renewal statement specified
18 that "[t]o avoid lapse in coverage, payment must be received prior
19 to expiration of your policy." (Pls.' Opp. at 3 (#20).) The
20 renewal statement listed June 30, 2007 as effective date, and July
21 31, 2007 as an "expiration date." (Id.) The renewal statement also
22 states that the "due date" of the payment is June 30, 2007, and
23 repeats that the renewal amount is due no later than June 30, 2007.
24 (MSJ at 7-8 (#17).) Lewis made a payment on July 10, 2007. (Id.)

25 Defendant then issued a renewal policy declaration and
26 automobile insurance cards indicating that Lewis was covered under
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1 an insurance policy between July 10, 2007 to August 10, 2007. (Pls'
2 Opp. Exhibit 1 at 35-36; MSJ at 4.)

3 On July 8, 2007, Lewis was involved in an automobile accident
4 in Pioche¹, Nevada, that injured Cheyanne Nalder. (MSJ at 3 (#17).)
5 Cheyanne Nalder made a claim to Defendant for damages under the
6 terms of Lewis's insurance policy with UAIC. (Compl. at ¶ 9 (#1).)
7 Defendant refused coverage for the accident that occurred on July 8,
8 2007, claiming that Lewis did not have coverage at the time of the
9 accident. (Id. at ¶ 10.) On October 9, 2007, Plaintiff Nalder, as
10 guardian of Cheyanne Nalder, filed suit in Clark County District
11 Court under suit number A549111 against Lewis. (Mot. to Compel at 3
12 (#12).) On June 2, 2008, the court in that case entered a default
13 judgment against Lewis for \$3.5 million. (Id.)

14 Plaintiffs then filed their complaint in this action in Nevada
15 state court on March 22, 2009 against Defendant UAIC. On July 24,
16 2009, Defendant removed the action to federal court, invoking our
17 diversity jurisdiction. (Petition for Removal (#1).)

18 On March 18, 2010, Defendant filed the MSJ (#17). On April 9,
19 2010, Plaintiffs opposed (#20), and on April 26, 2010, Defendant
20 replied (#21). We granted leave for Plaintiffs to file a supplement
21 (#26), and Defendant filed a supplement (#33) to its reply (#21).
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25 ¹ Plaintiffs' complaint originally alleged that the accident
26 occurred in Clark County, Nevada. It is unclear from the documents
27 which site is the correct one, but neither party disputes jurisdiction
and the actual location of the accident is irrelevant to the
disposition of this motion.

II. Summary Judgment Standard

Summary judgment allows courts to avoid unnecessary trials where no material factual dispute exists. N.W. Motorcycle Ass'n v. U.S. Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). The court must view the evidence and the inferences arising therefrom in the light most favorable to the nonmoving party, Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996), and should award summary judgment where no genuine issues of material fact remain in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party. Fed. R. Civ. P. 50(a). Where reasonable minds could differ on the material facts at issue, however, summary judgment should not be granted. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 116 S.Ct. 1261 (1996).

The moving party bears the burden of informing the court of the basis for its motion, together with evidence demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the party opposing the motion may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing that there exists a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the parties may submit evidence in an inadmissible form — namely, depositions, admissions, interrogatory answers, and affidavits — only evidence which might be admissible at trial may be considered

1 by a trial court in ruling on a motion for summary judgment. Feb.
2 R. Civ. P. 56(c); Beyene v. Coleman Sec. Servs., Inc., 854 F.2d
3 1179, 1181 (9th Cir. 1988).

4 In deciding whether to grant summary judgment, a court must
5 take three necessary steps: (1) it must determine whether a fact is
6 material; (2) it must determine whether there exists a genuine issue
7 for the trier of fact, as determined by the documents submitted to
8 the court; and (3) it must consider that evidence in light of the
9 appropriate standard of proof. Anderson, 477 U.S. at 248. Summary
10 judgment is not proper if material factual issues exist for trial.
11 B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir.
12 1999). "As to materiality, only disputes over facts that might
13 affect the outcome of the suit under the governing law will properly
14 preclude the entry of summary judgment." Anderson, 477 U.S. at 248.
15 Disputes over irrelevant or unnecessary facts should not be
16 considered. Id. Where there is a complete failure of proof on an
17 essential element of the nonmoving party's case, all other facts
18 become immaterial, and the moving party is entitled to judgment as a
19 matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a
20 disfavored procedural shortcut, but rather an integral part of the
21 federal rules as a whole. Id.

22 23 III. Analysis

24 Defendant seeks summary judgment on all claims on the basis
25 that Lewis had no insurance coverage on the date of the accident.
26 Plaintiff contends that Lewis was covered on the date of the
27 accident because the renewal notice was ambiguous as to when payment

1 must be received in order to avoid a lapse in coverage, and any
2 ambiguities must be construed in favor of the insured. Defendants
3 request, in the alternative, that we dismiss Plaintiffs' extra-
4 contractual claims, or bifurcate the claim of breach of contract
5 from the remaining claims. Finally, if we deny all other requests,
6 Defendant requests that we grant leave to amend

7 A. Contract Interpretation Standard

8 In diversity actions, federal courts apply substantive state
9 law. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); Nitco
10 Holding Corp. v. Boujikian, 491 F.3d 1086, 1089 (9th Cir. 2007).
11 Under Nevada law, "[a]n insurance policy is a contract that must be
12 enforced according to its terms to accomplish the intent of the
13 parties." Farmers Ins. Exch. v. Neal, 64 P.3d 472, 473 (Nev. 2003).
14 When the facts are not in dispute, contract interpretation is a
15 question of law. Grand Hotel Gift Shop v. Granite State Ins. Co.,
16 839 P.2d 599, 602 (Nev. 1992). The language of the insurance policy
17 must be viewed "from the perspective of one not trained in law," and
18 we must "give plain and ordinary meaning to the terms." Farmers
19 Ins. Exch., 64 P.3d at 473 (internal quotation marks omitted).
20 "Unambiguous provisions will not be rewritten; however, ambiguities
21 are to be resolved in favor of the insured." Id. (footnote
22 omitted); see also Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co., 184
23 P.3d 390, 392 (Nev. 2008) ("In the insurance context, we broadly
24 interpret clauses providing coverage, to afford the insured the
25 greatest possible coverage; correspondingly, clauses excluding
26 coverage are interpreted narrowly against the insurer.") (internal
27 quotation marks omitted); Capitol Indemnity Corp. v. Wright, 341 F.

1 Supp. 2d 1152, 1156 (D. Nev. 2004) (noting that "a Nevada court will
2 not increase an obligation to the insured where such was
3 intentionally and unambiguously limited by the parties"). "When a
4 contract is unambiguous and neither party is entitled to relief from
5 the contract, summary judgment based on the contractual language is
6 proper." Allstate Ins. Co. v. Fackett, 206 P.3d 572, 575 (Nev.
7 2009) (citing Chwialkowski v. Sachs, 834 P.2d 405, 406 (Nev. 1992)).

8 B. Plaintiff Lewis' Insurance Coverage on July 8, 2007

9 Plaintiffs contend that Lewis was covered under an insurance
10 policy on July 8, 2007, the date of the accident, because Lewis'
11 payment on July 10, 2007 was timely. Plaintiffs rely on the
12 sentence "[t]o avoid lapse in coverage, payment must be received
13 prior to expiration of your policy" contained in the renewal
14 statement. Defendant contends that "expiration of your policy" did
15 not refer to the expiration date of the renewal policy listed on the
16 renewal statement, but to the expiration of Lewis' current policy,
17 which coincided with the listed due date on the renewal statement.
18 Plaintiffs contend that Lewis reasonably believed that while there
19 was a due date on which UAIC preferred to receive payment, there was
20 also a grace period within which Lewis could pay and avoid any lapse
21 in coverage.

22 The renewal statement cannot be considered without considering
23 the entirety of the contract between Lewis and UAIC. Plaintiff
24 attached exhibits of renewal statements, policy declarations pages,
25 and Nevada automobile insurance cards issued by UAIC for Lewis. The
26 contract, taken as a whole, cannot reasonably be interpreted in
27 favor of Plaintiffs' argument.

1 Lewis received a "Renewal Policy Declarations" stating that he
2 had coverage from May 31, 2007 to June 30, 2007 at 12:01 A.M. (Pls'
3 Opp., Exhibit A at 29 (#20-1); Pls' Supp., Exhibit A at 11-12 (#26-
4 1); Pls' Supp., Exhibit A at 15 (#26-1).) The declarations page
5 stated that "[t]his declaration page with 'policy provisions' and
6 all other applicable endorsements complete your policy." (Pls'
7 Opp., Exhibit A at 29 (#20-1).) Lewis also received a Nevada
8 Automobile Insurance Card issued by UAIC stating that the effective
9 date of his policy was May 31, 2007, and the expiration date was
10 June 30, 2007. (Id. at 30; Pls' Supp., Exhibit A at 11-12 (#26-1).)
11 The renewal statement Lewis received in June must be read in light
12 of the rest of the insurance policy, contained in the declarations
13 page and also summarized in the insurance card.

14 "In interpreting a contract, 'the court shall effectuate the
15 intent of the parties, which may be determined in light of the
16 surrounding circumstances if not clear from the contract itself.'"
17 Anvui, LLC v. G.L. Dragon, LLC, 163 P.3d 405, 407 (Nev. 2007).
18 Plaintiffs contend that there was a course of dealing between Lewis
19 and UAIC supporting a reasonable understanding that there was a
20 grace period involved in paying the insurance premium for each
21 month-long policy. In fact, the so-called course of dealing tilts,
22 if at all, in favor of Defendant. Lewis habitually made payments
23 that were late. UAIC never retroactively covered Lewis on such
24 occasions. Lewis' new policy, clearly denoted on the declarations
25 page and insurance cards Lewis was issued, would always become
26 effective on the date of the payment.

1 Plaintiffs point to the fact that in April 2007, Lewis was
2 issued a revised renewal statement stating that the renewal amount
3 was due on May 6, 2007, a date after the effective date of the
4 policy Lewis would be renewing through the renewal amount. This
5 isolated occasion occurred due to the fact that Lewis added a driver
6 to his insurance policy, resulting in an increase in the renewal
7 amount, after UAIC had previously sent a renewal notice indicating
8 that a lower renewal amount was due on April 29, 2007. UAIC issued
9 a revised renewal statement dated April 26, 2007, and gave Lewis an
10 opportunity to pay by May 6, 2007, instead of April 29, 2007, when
11 the original renewal amount had been due upon expiration of his
12 April policy. In that case, Lewis made a timely payment on April
13 28, 2007, and therefore there is not a single incident Plaintiffs
14 can point to in which Lewis was retroactively covered for a policy
15 before payment was made, even in the single instance UAIC granted
16 him such an opportunity due to a unique set of circumstances.

17 C. Statutory Arguments

18 Plaintiffs' arguments that Lewis had coverage due to Nev. Rev.
19 Stat. § 687B.320 and § 687B.340 are untenable. Section 687B.320
20 applies in the case of midterm cancellations, providing that:

- 21 1. Except as otherwise provided in subsection 3, no
22 insurance policy that has been in effect for at least 70
23 days or that has been renewed may be cancelled by the
24 insurer before the expiration of the agreed term or 1 year
25 from the effective date of the policy or renewal,
26 whichever occurs first, except on any one of the following
27 grounds:

1 (a) Failure to pay a premium when due;

2 . . .

3 2. No cancellation under subsection 1 is effective until
4 in the case of paragraph (a) of subsection 1 at least 10
5 days and in the case of any other paragraph of subsection
6 1 at least 30 days after the notice is delivered or mailed
7 to the policyholder.

8 The policies at issue in this case were month-long policies
9 with options to renew after the expiration of each policy. Lewis'
10 June policy expired on June 30, 2007, according to its terms. There
11 was no midterm cancellation and Nev. Rev. Stat. § 687B.320 simply
12 does not apply. Plaintiffs' arguments that between terms is
13 equivalent to "midterm" simply defies the statutory language and the
14 common definition of midterm. In a Ninth Circuit case interpreting
15 Montana law, the Ninth Circuit noted that the district court's
16 observation that "the policy expired by its own terms; it was not
17 cancelled" was proper, and the Montana statute at issue in the case,
18 similar to the Nevada statute here, "appl[ies] only to cancellation
19 of a policy, not to its termination." State Farm Mut. Auto. Ins.
20 Co. v. White, 563 F.2d 971, 974 (9th Cir. 1977). The Ninth Circuit
21 went on to note that situations in which "the policy terminated by
22 its own terms for failure of the insured to renew" is controlled by
23 a different statute, which "does not require any notice to the
24 policy-holder when the reason for the non-renewal of the policy is
25 the holder's failure to pay the renewal premiums." Id.

26 Nev. Rev. Stat. § 687B.340 provides:
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1 1. Subject to subsection 2, a policyholder has a right to
2 have his or her policy renewed, on the terms then being
3 applied by the insurer to persons, similarly situated, for
4 an additional period equivalent to the expiring term if the
5 agreed term is 1 year or less, or for 1 year if the agreed
6 term is longer than 1 year, unless:

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8 (b) At least 30 days for all other policies, .
9 before the date of expiration provided in the policy the
10 insurer mails or delivers to the policyholder a notice of
11 intention not to renew the policy beyond the agreed
12 expiration date. If an insurer fails to provide a timely
13 notice of nonrenewal, the insurer shall provide the insured
14 with a policy of insurance on the identical terms as in the
15 expiring policy.

16 Plaintiffs argues that Nev. Rev. Stat. § 687B.340 indicates how
17 favorable the law is to the insured, and that there is no mention in
18 the statute that payment is a prerequisite to a policyholder's
19 "right to have his or her policy renewed." It is true that the
20 Nevada statute does not include a provision similar to the one in
21 the Montana statute providing that the section does not apply when
22 the insured has "failed to discharge when due any of his obligations
23 in connection with the payment of premiums for the policy, or the
24 renewal therefor" White, 563 F.2d at 974 n.3. The Montana
25 statute also stated that the section does not apply "[i]f the
26 insurer has manifested its willingness to renew." Id.

1 Plaintiffs, however, fail to give credit to the entirety of the
2 Nevada statute. The statute does not say that the policyholder's
3 policy must be renewed, it says that the insurer shall provide the
4 insured with a policy on "the identical terms as in the expiring
5 policy." One of the terms of the expiring policy was payment of the
6 renewal amount. UAIC did provide Lewis, the policyholder, with a
7 renewal statement indicating that UAIC would renew the insurance
8 policy as long as all the terms of the previous policy were met,
9 i.e., payment.

10 Defendant correctly points out that this statute does not fit
11 the circumstances of this case. Lewis' policy was not renewed not
12 because UAIC had an intention not to renew, but because Lewis failed
13 to carry out his end of the contract, that is, to pay a renewal
14 amount. Lewis' policy was renewed on the date payment was received,
15 but this date was after the date of the accident. Plaintiffs'
16 statutory arguments, therefore, do not pass muster.

17 18 IV. Conclusion

19 Defendant's motion for summary judgment on all claims shall be
20 granted because Lewis had no insurance coverage on the date of the
21 accident. The renewal statement was not ambiguous in light of the
22 entire contract and history between Lewis and UAIC. The term
23 "expiration of your policy" referred to the expiration of Lewis'
24 current policy, and Lewis was never issued retroactive coverage when
25 his payments were late. His renewal policy would always begin on
26 the date payment was received. We cannot find that Lewis was
27 covered between the expiration of his policy in June and payment for
28

1 his next policy without straining to find an ambiguity where none
2 exists, and creating an obligation on the part of insurance
3 companies that would be untenable, i.e., to provide coverage when
4 the insured has not upheld his own obligations under the contract to
5 submit a payment.

6 The statutes cited by Plaintiffs simply do not apply. The
7 expiration of Lewis' policy was not a midterm cancellation, and UAIC
8 was not obligated to provide an insurance policy despite Lewis'
9 failure to adhere to the terms of that policy.

10 Defendant's other requests are moot in light of our decision
11 granting summary judgment.

12
13 IT IS, THEREFORE, HEREBY ORDERED that Defendant's motion for
14 summary judgment on all claims (#17) is GRANTED with respect to all
15 of Plaintiffs' claims.

16 The Clerk shall enter judgment accordingly.

17
18
19 DATED: December 17, 2010.

20 
21 UNITED STATES DISTRICT JUDGE
22
23
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25
26
27
28

EXHIBIT "E"

1 **MOT**

2 THOMAS CHRISTENSEN, ESQ.

3 Nevada Bar #2326

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5 1000 S. Valley View Blvd.

6 Las Vegas, Nevada 89107

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10 Attorneys for Plaintiff,

11 JAMES NALDER

12 **UNITED STATES DISTRICT COURT**

13 **FOR THE DISTRICT OF NEVADA**

14 JAMES NALDER, Guardian Ad Litem for minor)

15 Cheyanne Nalder, real party in interest, and)

16 GARY LEWIS, Individually;)

17 Plaintiffs,)

Case No.: 2:09-cv-1348

18 vs.)

19 UNITED AUTOMOBILE INSURANCE CO,)

20 DOES I through V, and ROE CORPORATIONS)

21 I through V, inclusive)

22 Defendants.)

23 **MOTION FOR SUMMARY JUDGMENT**

24 COMES NOW, Plaintiff, JAMES NALDER, by and through his attorney of record,

25 Thomas Christensen, Esq., of the law firm of CHRISTENSEN LAW OFFICES, LLC, and

26 moves this Honorable Court for partial summary judgment as to liability as against

27 Defendant, UNITED AUTOMOBILE INSURANCE CO.

28 This Motion is made and based on the papers and pleadings herein, the attached

memorandum of Points and Authorities, and any oral argument at the hearing bereof.

1 DATED this 12th day of February, 2013.

2 CHRISTENSEN LAW OFFICES, LLC

3
4 By:  #12451

5 Thomas Christensen, Esq.

6 Nevada Bar No. 2326

7 1000 S. Valley View Blvd.

8 Las Vegas, NV 89107

9 (702) 216-1471 Phone

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11 courtnotices@injuryhelpnow.com

12 Attorneys for Plaintiff,

13 JAMES NALDER

14 **NOTICE OF MOTION**

15 YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned
16 will bring the above and foregoing MOTION FOR SUMMARY JUDGMENT on for
17 hearing before the above-entitled Court on the _____ day of _____, 2012 at in
18 Dept _____ of the above referenced court at _____ m. or as soon thereafter as
19 counsel may be heard.

20 DATED this 12th day of February, 2013.

21 CHRISTENSEN LAW OFFICES, LLC

22
23 By:  #12451

24 Thomas Christensen, Esq.

25 Nevada Bar No. 2326

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Attorneys for Plaintiff,

JAMES NALDER

MEMORANDUM OF POINTS AND AUTHORITIES

I

INTRODUCTION

Ambiguous insurance contracts, such as the one in question presently, must be construed liberally in favor of the insured and strictly against the insurer. As such, because the Renewal Statements were ambiguous, they must be construed in favor of GARY LEWIS, resulting in the policy being effective the date of the accident. Furthermore, UAIC breached the contract in failing to investigate for coverage, failing to provide coverage and other duties of an insurer. Additionally, it should be established as a matter of law that the default judgment, including pre- and post-judgment interest, was proximately caused by the failure to provide coverage.

II

FACTUAL AND PROCEDURAL BACKGROUND

This action arose when GARY LEWIS ran over CHEYENNE NALDER, a nine year old girl at the time, with GARY LEWIS's truck. CHEYENNE 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 Exhibit 1 P. 1. The records from UAIC specifically list the policy as "New Business". See Exhibit 1 P. 6. 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 Exhibit 1 at P. 15. The "Renewal Statement" indicates that payment to "Renew" the policy had to be made by May 6,

1 2007, which was seven days after the policy's "Effective Date" of April 29, 2007". The
2 "Renewal Statement" also stated "To avoid lapse in coverage, payment must be received prior
3 to (sic) expiration of your policy." The only expiration date listed on the "Renewal Statement"
4 is "May 29, 2007". Gary Lewis made the payment and renewed the policy. The records from
5 UAIC specifically list the policy as "RENEWAL". See Exhibit 1 at P. 25.

6
7 In mid-May 2007 (Invoice Date May 9, 2007) UAIC sent Gary Lewis a "Renewal
8 Statement" offering to "Renew" Gary's policy with UAIC for from May 29, 2007 through June
9 29, 2007. See Exhibit 1 at P. 27. The "Renewal Statement" indicates that payment to "Renew"
10 the policy had to be made by May 29, 2007. The "Renewal Statement" also stated "To avoid
11 lapse in coverage, payment must be received prior to (sic) expiration of your policy." The only
12 expiration date listed on the "Renewal Statement" is "June 29, 2007". Gary Lewis made the
13 payment on May 31, 2007, two days after the "Due Date" of "May 29, 2007", and renewed the
14 policy. The records from UAIC specifically list the policy as "RENEWAL". See Exhibit 1 at P.
15 32.
16
17

18 In mid-June 2007 (Invoice Date June 11, 2007) UAIC sent Gary Lewis a "Renewal
19 Statement" offering to "Renew" Gary's policy with UAIC for from June 30, 2007 through July
20 31, 2007. See Exhibit 1 at P. 33. The "Renewal Statement" indicates that payment to "Renew"
21 the policy had to be made by June 30, 2007. The "Renewal Statement" also stated "To avoid
22 lapse in coverage, payment must be received prior to (sic) expiration of your policy." The only
23 expiration date listed on the "Renewal Statement" is "July 31, 2007". Gary Lewis made the
24 payment on July 10, 2007, and renewed the policy. The records from UAIC specifically list the
25 policy as "RENEWAL". See Exhibit 1 at P. 38.
26
27
28

1 UAIC continued to "Renew" Gary's policy in August 2007, *See Exhibit 1* at P. 44,
2 September 2007, *See Exhibit 1* at P. 60¹, October 2007, *See Exhibit 1* at P. 69, November 2007,
3 *See Exhibit 1* at P. 81, December 2007, *See Exhibit 1* at P. 87², and through September 2008.
4 *See Exhibit 1*.

5
6 Gary Lewis, having been insured with UAIC for several months and UAIC having
7 renewed Mr. Lewis insurance through UAIC on multiple occasions as noted above. It was
8 Gary's understanding that he had insurance covering the damages done to Cheyenne Nalder.
9 After the incident however UAIC claimed Mr. Lewis was not its insured, and that there was no
10 coverage for the incident. UAIC nevertheless continued to renew Mr. Lewis' policy for another
11 year, but claimed that the policy had lapsed from July 1, 2007 through July 10, 2007.

12
13 Plaintiff JAMES NALDER, on behalf of his daughter Cheyenne, brought a claim for the
14 proceeds of the UAIC policy. UAIC claimed there was no policy in effect. Suit was then
15 brought against Mr. Lewis with notice being provided to UAIC. UAIC took no steps to defend
16 the lawsuit and did nothing to investigate coverage or to determine whether Gary's payment on
17 July 10, 2007, long before the expiration of the policy, warranted Gary being covered under the
18 policy UAIC renewed with Gary. Because UAIC took no steps to protect Gary, judgment was
19 entered against Gary in the amount of \$3,500,000.00. *See Exhibit 2*. After Judgment Mr.
20 Lewis, along with NALDER on behalf of Cheyenne, the real party in interest, pursued this
21 action against UAIC.
22 .

23
24 Mr. Lewis testified:
25

26 _____
27 ¹ Payment for the September Renewal was made on September 14, 2007 even though the
28 "Due Date" for the Renewal was September 13, 2007. Even though the payment was late,
 UAIC, as it had multiple times previously, renewed the policy nonetheless.

1 I was covered by a policy of insurance through UAIC, which UAIC renewed on
2 multiple occasions with me. It is my understanding I was covered by policy No.
3 NVA020021926, which UAIC advised me it was renewing and that I would have
4 no lapse in coverage as long as payment was made prior to the expiration of my
5 policy, which the "Renewal Notice" said was July 31, 2007. I made the payment
6 long before July 31, 2007 and understood the policy had been renewed again and
7 there was no lapse in coverage.

8 *See Exhibit 3.*

9 The policy's "Renewal Statement" UAIC sent Gary clearly stated that so long as
10 payment was received "prior to (sic) expiration of your policy" there would be no lapse in
11 coverage. Again, the only "Expiration Date" listed on the policy's "Renewal Statement" was
12 "July 31, 2007". *See Exhibit 1.* Gary understood this language to indicate that even though the
13 "Due Date" was June 30, 2007, Gary had a grace period through the "Expiration Date" of July
14 31, 2007 to make the requisite payment, renew the policy, and "avoid lapse in coverage" as the
15 policy's "Renewal Statement" indicated. *See Exhibit 3.* Gary's understanding was more than
16 reasonable and was further supported by the fact that Gary had previously, in May 2007, been
17 given the policy's "Renewal Statement" that specifically indicated Gary could renew his policy
18 with an effective date of April 29, 2007 if he made the payment on or before May 6, 2007,
19 seven days after the "Effective Date" of the policy UAIC sought to renew.³ *See Exhibit 1.* The
20 policy's May "Renewal Statement" thus commenced a course of dealing between Gary and
21 UAIC wherein UAIC advised Gary it was permissible for Gary to pay the policy premium after
22 the "Effective Date" of the policy and yet still renew the policy as of the "Effective Date" and
23 avoid any lapse in coverage. This course of dealing was repeated in September and December
24

25
26
27 ² Payment for the December Renewal was made on December 15, 2007 even though the
28 "Due Date" for the Renewal was December 14, 2007. Even though the payment was late,
UAIC, as it had multiple times previously, renewed the policy nonetheless.

1 2007 when Gary's policy payment was made after the "Due Date" yet the policy was renewed
2 nonetheless with no lapse. See Exhibit 1.

3
4 As discovery proceeded, the PMK of UAIC was asked regarding Gary's understanding
5 that the requirement that he pay prior to the "expiration date" when the only "expiration date"
6 listed on the renewal notice was July 31, 2007, was a fair interpretation by the insured. The
7 PMK acknowledged that the "Renewal Statements" do not contain the words "expiration of
8 your current policy", and simply state "expiration of your policy" without any explanation of
9 what the words "your policy" reference. See Exhibit "4" (the Deposition of Denise Davis, P. 61
10 L. 23 - P. 62 L. 1). The UAIC PMK was unable to point to any language in the "Renewal
11 Statements" that would indicate to a lay person, like Mr. Lewis, that the words "expiration of
12 your policy" meant expiration of your *current* policy rather than the "Expiration Date" stated
13 right on the face of the "Renewal Statements" themselves as Mr. Lewis understood it. See
14 Exhibit 4 (the Deposition of Denise Davis, P. 61 L. 8-15; P. 61 L. 23 - P. 62 L. 1; P. 133 L. 4 -
15 P. 134 L. 22).

16
17
18 Manny Cordova and Lisa Watson, who worked for UAIC at the time the claim was
19 brought against Gary Lewis, but who are no longer employed with UAIC, admitted that the
20 language in the "Renewal Statements" is ambiguous, difficult to understand, and certainly
21 consistent with Gary Lewis' interpretation that "expiration of your policy" meant the "Expiration
22 Date" listed at the top of the "Renewal Statements". Mr. Cordova, when shown the "Renewal
23 Statements", stated that, to him, the "Renewal Statements" indicated that payment had to be
24 made before the expiration of the *prior* policy as UAIC interprets it. When asked about whether
25
26

27
28 ³ Despite the fact that UAIC had informed GARY LEWIS that he had until May 6, 2007 to
make his payment under the policy that would commence April 29, 2007, Gary took it
upon himself to make the payment on April 29, 2007.

1 Mr. Lewis' interpretation that expiration of "your policy" meant the "Expiration Date" on the
2 very face of the "Renewal Statement" itself, Mr. Cordova testified as follows: "certainly people
3 can interpret documents differently. You know, I mean, that's the way I read the document.
4 Could someone else read it differently? Of course, they can." See Exhibit "5" (Cordova
5 Deposition at P. 106 L. 16-20). Mr. Cordova went on to testify, "So this is the way I read the
6 document. Could you interpret it differently? Of course. Could she interpret it differently? Of
7 course. This is the way that I interpret it. I cannot tell you that, you know, my way is right or
8 your way is right, but that's the way I read the document." See Exhibit 5 (Cordova Deposition
9 P. 107 L. 11-16).

12 Lisa Watson, who testified she has worked in insurance for over 20 years, when shown
13 the "Renewal Statements" and asked what the term "expiration of your policy" meant, testified
14 that she does not know what the phrase means. See Exhibit 6 (Watson Deposition P. 52 L. 4-8).

16 In the testimony, Mr. Cordova and Ms. Watson not contest that Gary Lewis'
17 interpretation was valid. When she was told that Mr. Lewis interpreted the language as
18 indicating that payment had to be made before the "Expiration Date" listed right on the
19 "Renewal Statements", Ms. Watson testified that she could not comment on whether Mr. Lewis'
20 interpretation was correct or not. See Exhibit 6 (Watson Deposition P. 53 L. 20 - P. 4 L. 4).

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

26 Plaintiffs came forward with facts supporting their tenable legal position that a
27 reasonable person could have interpreted the renewal statement to mean that
28 Lewis's premium was *due* by June 30, 2007, but that the policy would not *lapse* if

1 his premium were 'received prior to the expiration of [his] policy,' with the
2 'expiration date' specifically stated to be July 31, 2007.

3 See Exhibit 7 Memorandum.

4 III

5 STANDARD FOR GRANTING

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

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

17 The law is well established that in reviewing a motion for summary judgment, the
18 evidence "must be viewed in the light most favorable to the opposing party." *Adickes v. S.H.*
19 *Kress & Co.*, 398 U.S. 144, 159-160 (1970). "[T]he inferences to be drawn from the underlying
20 facts contained in [the moving party's materials] must be viewed in the light most favorable to
21 the party opposing the motion." *Id.*, quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655
22 (1962). Therefore, this Court must view the evidence presented by both parties and the
23 inferences to be drawn there from in the light most favorable to the Plaintiffs.
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1 The standard for summary judgment is essentially the same as the standard for granting a
2 directed verdict or judgment notwithstanding the verdict under Fed. R. Civ. P. 50. See
3 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The inquiry under each is
4 "[W]hether the evidence presents a sufficient disagreement to require submission to a jury."
5 *Id.* Summary judgment is only appropriate if "the evidence . . . is so one-sided that one
6 party must prevail as a matter of law." *Id.* If there are facts sufficient to support a jury
7 verdict for the Plaintiff, the Court is not to interfere with the jury's role as the finder of fact.
8 To do so would deny the Plaintiff's right to a jury trial.
9

10 IV

11 ARGUMENT

12
13 **A. Because the Renewal Statement was Ambiguous, it Must be Strictly Construed**
14 **Against the Insurance Company According to the Nevada Law, therefore,**
15 **Providing Coverage was in Place at the Time of the Incident.**

16 There is no dispute UAIC sent Gary the policy's "Renewal Statement" (invoice date June
17 11, 2007). See Exhibit 1 P. 33. There is no dispute the policy's "Renewal Statement" offered to
18 again renew Gary's policy with UAIC, as Gary had repeatedly done since March 2007. There is
19 no dispute that the policy's "Renewal Statement" says Gary would not have a lapse in coverage
20 if he made the required payment prior to the expiration date. There is no dispute that the only
21 expiration date mentioned on the policy's "Renewal Statement" is "July 31, 2007." See Exhibit
22 1 P. 33. There is no dispute Gary made the requisite payment on July 10, 2007, which was
23 twenty-one days before the "Expiration Date" listed on the policy's "Renewal Statement". See
24 Exhibit 1 P. 38. There is certainly no dispute that Gary Lewis' understanding of the policy's
25 "Renewal Statement" was that as long as he made the premium payment prior to the expiration
26 of the policy, which the policy's "Renewal Statement" said was July 31, 2007, Gary would not
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28

1 have a lapse in coverage. See Exhibit I at P. 6 of 12. There is also no dispute that UAIC had
2 previously advised Gary that he could pay his policy premium after the date the policy became
3 effective, and still be covered from the effective date. See Exhibit 1 P. 15.

4
5 An insurance policy, which would include the renewal statements of the policy, is a
6 contract and is governed by contract law. *United Insurance Co., v. Frontier Insurance*
7 *Company, Inc.*, 120 Nev. 678 684, 99 P.3d 1152, 1156 (2004). Under general contract law, the
8 Nevada Supreme Court has noted, "When a contract is ambiguous, it will be construed against
9 the drafter." *Glenbrook Homeowners Ass'n v. Glenbrook Co.* 111 Nev. 909, 917, 901 P.2d 132,
10 138 (1995). The Court has gone even further in its discussion of insurance contracts, holding,
11 "Contracts of insurance are always construed most strongly against the insurance company.
12 Stated another way, a policy of insurance is to be construed liberally in favor of the insured and
13 strictly against the insurer." *Hartford Ins. Group v. Winkler*, 89 Nev. 131, 135, 508 P.2d 8, 11
14 (1973) (Citations omitted).

15
16
17 In addition, the Nevada Supreme Court has held, "An insurance policy is a contract of
18 adhesion." *Id.* As a result "the language of an insurance policy is broadly interpreted in order
19 to afford 'the greatest possible coverage to the insured.'" *Id.*, citing *Farmers Insurance Group v.*
20 *Stonik*, 110 Nev. 64, 67, 867 P.2d 389, 391 (1994). The pivotal language from the UAIC
21 contract comes from the policy's "Renewal Statements" which UAIC drafted, and which UAIC
22 sent to Gary Lewis on multiple occasions advising Gary how the contract of insurance could be
23 renewed and continue to be in effect with UAIC. The statements provide a due date for
24 payment, but also specifically state that if payment is "received prior the expiration of your
25 policy" there will be no lapse in coverage. The only "Expiration Date" listed in the policy's
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27
28

1 "Renewal Statements" is the expiration date for the offered policy that UAIC invited Gary
2 Lewis to renew.

3 The policy's "Renewal Statement" for June 30, 2007 through July 31, 2007 (Exhibit 1 P.
4 33) had a "Due Date" of 6/20/07, but then contained the statement that payment must be
5 received prior to the expiration of "your policy" in order to avoid a lapse in coverage. The only
6 "Expiration Date" listed in the statement is "July 31, 2007". Such language clearly indicates
7 that UAIC was advising Gary, as the insured, that payment was due 6/30/07, but that if he made
8 the requisite payment before July 31, 2007 he would be covered and would "avoid a lapse in
9 coverage". There is no dispute this was Gary's subjective understanding of the terms of the
10 policy's "Renewal Statement". See Exhibit 3 at P. 6 of 12.

11 Gary's subjective understanding that he could pay for the policy after it was put into
12 effect was all the more reasonable given that in April 2007 UAIC had specifically told Gary that
13 the due date of his premium payment for the policy effective April 29, 2007 through May 29,
14 2007 was after the policy's effective date of "5/6/07". There was an established course of
15 dealing between Gary and UAIC wherein UAIC had previously advised Gary that he could
16 make his payment after the effective date of the policy and still be covered, and wherein UAIC
17 had previously advised Gary that he could make his premium payment after the effective date of
18 the policy, but prior to the expiration date, of the policy and avoid any lapse in coverage.

19 The policy's "Renewal Statements" which give a due date but then state that the
20 policyholder can avoid a lapse in coverage by paying before the expiration of the policy, and
21 providing an "Expiration Date" for the policy that is different than the "Due Date" are
22 ambiguous. As noted above, ambiguous language in a contract, or in a writing seeking to
23 renew a contract, is construed against the drafter of the contract, or the writing seeking to
24

1 renew the contract. See, *Glenbrook Homeowners Ass'n v. Glenbrook Co.* 111 Nev. 909, 917,
2 901 P.2d 132, 138 (1995). The Nevada Supreme Court has noted that an insurance company
3 does business as a quasi-public institution, and cannot avoid liability under ambiguous
4 provisions of policy. *Hartford Ins. Group v. Winkler*, 89 Nev. 131, 136, 508 P.2d 8, 12 (1973).
5 The language of the "Renewal Statements" from UAIC is ambiguous, and therefore, must be
6 construed against UAIC.
7

8 "Contracts of insurance are always construed most strongly against the insurance
9 company. Stated another way, a policy of insurance is to be construed liberally in favor of the
10 insured and strictly against the insurer." *Hartford Ins. Group v. Winkler*, 89 Nev. 131, 135, 508
11 P.2d 8, 11 (1973) (Citations omitted). The language of the "Renewal Statements" of the policy
12 Gary Lewis had with UAIC, when construed liberally in favor of Gary and construed most
13 strongly against UAIC and broadly interpreted in order to afford the greatest possible coverage
14 to the insured, must be construed as permitting Gary Lewis to pay anytime before July 31, 2007
15 in order to avoid a lapse in coverage and maintain insurance from the "Effective Date" of June
16 30, 2007 to the "Expiration Date" of July 31, 2007. As there is no dispute Gary made the
17 requisite payment on July 10, 2007, and there is no dispute July 10, 2007 is long before July 31,
18 2007, summary judgment as to UAIC's coverage of Gary Lewis under the policy is warranted as
19 the evidence clearly establishes Gary was covered.
20
21
22

23 **B. UAIC Breached the Contract by Failing to Investigate Coverage and Refusing**
24 **to Cover its Insured**

25 In general, there are a few different areas of litigation that involve "bad faith" by an
26 insurance company. All of these actions, regardless of the parties involved, however, are
27 founded in the general principle of contract law that in every contract, including policies of
28 insurance, there is an implied covenant of good faith and fair dealing that neither party will do

1 anything which will injure the right of the other to receive the benefits of the agreement.
2 *Comunale v. Traders & General Insurance Company*, 50 Cal.2d 654, 328 P.2d 198, 68
3 A.L.R.2d 883. Most courts, including Nevada, have held that an insurance company always
4 acts in bad faith whenever it breaches its duty to settle by failing to adequately consider the
5 interest of the insured. Windt, Allan D., *1 Insurance Claims & Disputes 5th*, Section 5:13
6 (Updated March, 2009). This is true whether there is a "genuine dispute" as to whether
7 payment of the third-party policy limits is warranted or not. The Nevada Supreme Court
8 recently defined bad faith by holding that "an insurer must give equal consideration to the
9 insured's interests" and "the nature of the relationship [between insured and insurer] requires
10 that the insurer adequately protect the insured's interests." *Miller v. Allstate*, 125 N.A.O. 28,
11 212 P.3d 318 (2009).

12
13
14 Within the area of first-party bad faith, there are essentially three standards which courts
15 have imposed on liability insurers in determining whether the insurer has met its duty to the
16 insured. Those standards involve strict liability, negligence, and bad faith. *Shamblyn v.*
17 *Nationwide Mutual Insurance Company*, 396 S.E.2d 766 (W.Va. 1990), citing, *Schwartz,*
18 *Statutory Strict Liability for an Insurer's Failure to settle: A Balanced Plan for an Unresolved*
19 *Problem*, 1975 Duke L.J. 901; Annotation, *Liability Insurer's Negligence for Bad Faith in*
20 *Conducting Defense as Ground of Liability to Insured*, 34 A.L.R.3d 533 (1970 & Supp. 1989).

21
22
23 The courts which have applied the strict liability standard have held that an insurer who
24 fails to settle within policy limits does so at its own risk, and even if its position is not entirely
25 groundless, if the failure to settle later exposes the insured, the carrier is liable for the full
26 amount which will compensate the insured for all the detriment caused by the insurer's breach
27 of the express and implied obligations of the contract. *Id.*, citing, *Criset v. Security Ins. Co.*, 66
28

1 Cal2d 425, 58 Cal.Rptr. 13, 426 P.2d 173 (1967); *Rova Farms Resort, Inc. v. Investors*
2 *Insurance Co.*, 65 N.J. 474, 323 A.2d 495 (1974).

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

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

12
13 Can you honestly imagine a situation where an insurance
14 company fails to settle within the policy limits, the
15 policyholder gets stuck with an excess judgment, and this
16 court *does not* require the insurance company to indemnify
17 the policy holder? That will happen the same day the sun
18 rises in the West! As far as I am concerned, even if the
19 insurance company is run by angels, archangels, cherubim
20 and seraphim, and the entire heavenly host sing of due
21 diligence and reasonable care, I will *never*, under any
22 circumstances, vote that a policyholder instead of an
23 insurer pays the excess judgment when it was possible to
24 settle a case within the coverage limits.

25 When I buy insurance, I buy protection from untoward
26 events. I do not object to an insurance company's vigorous
27 defense of a claim, including going to jury trial and
28 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

1 one single penny of my money even when the odds are ten
2 million to one in its favor!

3 *Id.* at 780.

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

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

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

19 Nevada has long recognized that there is a fiduciary relationship between the insurer and
20 the insured. *Powers v. USAA*, 114 Nev. 690, 962 P.2d 596 (1998), citing *Ainsworth v.*
21 *Combined Ins. Co.*, 104 Nev. 587, 763 P.2d 673 (1988). Nevada has also established standards
22 for applying in other types of bad faith situations. In *Pemberton v. Farmers Insurance*
23 *Exchange*, 109 Nev. 789, 858 P.2d 380 (1993), the Nevada Supreme Court established
24 standards to apply when an action is brought related to bad faith denial of first-party benefits
25 under uninsured or underinsured coverage. There, the court noted numerous that appellate court
26 decisions affirm that an insurer's failure to deal fairly and in good faith with an insured's UM
27 claim is actionable. *Id.* at 794 (citations omitted).

1 The Nevada Supreme Court and Federal District Court of Nevada articulated a
2 negligence or reasonableness standard in bad faith cases. "To establish a prima facie case of
3 bad-faith refusal to pay an insurance claim, the plaintiff must establish that there was no
4 reasonable basis for disputing coverage." *Powers v. United Services Auto. Ass'n*, 962 P.2d 596,
5 604 (Nev. 1998), citing *Falline v. GNLV Corp.*, 823 P.2d 888 (Nev. 1991). See also *Pemberton*
6 *v. Farmers Ins. Exch.*, 858 P.2d 380, 384 (Nev. 1990).

8 One of the more instructional cases in Nevada, however, on the standard to be applied
9 when dealing with negative effects resulting from an insurer's failure to settle a claim prior to
10 litigation is *Landow v. Medical Ins. Exchange*, 892 F.Supp. 239 (D.Nev. 1995). The *Landow*
11 Court, following the rationale of California courts in excess verdict situations accepted that, "the
12 litmus test for bad faith is whether the insurer, in determining whether to settle a claim, gave as
13 much consideration to the welfare of its insured as it gave to its own interests," citing, *Egan v.*
14 *Mutual of Omaha Ins. Co.*, 24 Cal.3d. 809, 818, 169 Cal.Rptr. 691, 620 P.2d 141 (1979).

17 The above-noted principles were most recently codified and adopted by the Nevada
18 Supreme Court in *Allstate Ins. Co. v. Miller*, 212 P.3d 318 (2009). In *Miller*, the court held that
19 "an insurer must give equal consideration to the insured's interest". The court further stated that
20 the insurer's duty to its insured is "similar to a fiduciary relationship" and noted "the nature of
21 the relationship requires that the insurer adequately protect the insured's interest." The court's
22 conclusion mirrored that in *Landow* as the *Miller* court recognized "at a minimum, an insurer
23 must equally consider the insured's interests and its own." The court also recognized the
24 wisdom from decisions from California holding that "the insurer must give the interests of the
25 insured at least as much consideration as it gives its own interests, and the insurer must act as a
26 prudent insurer without policy limits." *Id.* (citation omitted).

1 Additionally, insurers have a duty to investigate. *Pemberton v. Farmers Ins. Exchange*,
2 109 Nev. 789, 858 P.2d 380, 382 (Nev., 1993). "Insurers have the duty to investigate claims
3 and coverage in a prompt fashion." *Troutt v. CO W. Ins. Co.*, 246 F.3d 1150, 1162. See also
4 *Tynes v. Bankers Life Co.*, 730 P.2d 1115, 1124 (Mont. 1986) (9th Cir., 2001). The duty to
5 investigate is an extension of the duty of good faith and fair dealing that the insurer owes its
6 insured and, in a claims-made-and-reported policy, extends to the handling of reported claims.
7 *KPFF, Inc. v. California Union Ins. Co.*, 56 Cal.App.4th 963, 66 Cal.Rptr.2d 36, 44 (1997)
8 UAIC utterly failed to investigate whether coverage existed for Gary on the claim, and failed to
9 abide by established insurance claims handling practices in its handling of this claim.
10 Furthermore, as discussed in detail above, there was coverage under this claim. Therefore, their
11 failure to provide such coverage was a breach of contract.

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

20 There is no question that the rejection of a settlement offer within the policy limits is an
21 element of a bad faith claim. *Id.* The *Miller* Court held that the rejection by an insurer of a
22 settlement offer within the policy limits is indeed an element making up a bad faith claim, but
23 also noted that a bad faith claim can be based on far more than just the rejection of such an
24 offer.

1 offer. *Id.* The Court specifically noted that "an insurer's failure to adequately inform an insured
2 of a settlement offer is a factor for the trier of fact to consider when evaluating a bad-faith
3 claim." *Id.* at 325. UAIC never informed Gary Lewis of the settlement offer that was proposed
4 to resolve Cheyenne's claim. This failure to inform, on its own, is sufficient to present the facts
5 to the jury to determine whether the carrier violated the duty of good faith and fair dealing and
6 is thus liable for a judgment entered against its insured in excess of the applicable policy limits.
7 *Id.*

8
9 Plaintiffs have noted in the preceding sections the facts indicating: Gary Lewis properly
10 renewed his policy pursuant to the policy's "Renewal Statements"; that UAIC renewed Gary's
11 policy and nevertheless claimed there was a lapse in coverage; and other such facts, all of which
12 clearly indicate Gary had coverage for the claim Cheyenne brought against him. UAIC never
13 investigated any of the above to determine whether Gary was covered, and instead made the
14 snap decision that there was no coverage, and left Gary completely bereft of protection against
15 Cheyenne's lawsuit. These facts constitute bad faith, provide that there was coverage for
16 Cheyenne's claim and therefore constitute a breach of contract, and warrant UAIC
17 compensating Gary, paying for the judgment currently entered against him, as well as paying
18 other compensatory and even punitive damages.

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22 **C. It Should be Established as a Matter of Law that the Default Judgment,**
23 **Including Pre- and Post-Judgment Interest, was Proximately Caused by the**
24 **Failure to Provide Coverage.**

25 Primary liability insurance policies create a duty to defend and the duty to indemnify.
26 *Allstate Ins. Co. v. Miller*, 125 N.A.O. 28, 212 P.3d 318 (Nev., 2009) citing *Crawford v.*
27 *Weather Shield Mfg. Inc.*, 44 Cal.4th 541, 79 Cal.Rptr.3d 721, 187 P.3d 424, 427 (2008). The
28

1 duty to defend is a "legal duty that arises under the law, as opposed to a contractual duty arising
2 from the policy." *Allstate Ins. Co. v. Miller*, 125 N.A.O. 28, 212 P.3d 318 (Nev., 2009).

3 "If there is any doubt about whether the duty to defend arises, this doubt must be
4 resolved in favor of the insured." *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 120
5 Nev. 678 (Nev., 2004) citing *Aetna Cas. & Sur. Co. v. Centennial Ins. Co.*, 838 F.2d 346, 350
6 (9th Cir. 1988). "The purpose behind construing the duty to defend so broadly is to prevent an
7 insurer from evading its obligation to provide a defense for an insured without at least
8 investigating the facts behind a complaint." *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d
9 1153, 120 Nev. 678 (Nev., 2004) See also *Helca Min. Co. v. New Hampshire Ins. Co.*, 811 P.2d
10 1083, 1090 (Colo. 1991). A potential for coverage only exists when there is arguable or
11 possible coverage. (emphasis added) *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153,
12 120 Nev. 678 (Nev., 2004) See also *Morton v. Safeco Ins. Co.*, 905 F.2d 1208, 1212 (9th Cir.
13 1990).

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

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

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CONCLUSION

Plaintiff respectfully requests that this court grant this Motion for the reasons set forth in the points and authorities noted above.

DATED this 12th day of February, 2013.

CHRISTENSEN LAW OFFICES, LLC

By:  #0856

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Attorneys for Plaintiff,

JAMES NALDER

CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5 and LR 5-1, I certify that I am an employee of
CHRISTENSEN LAW OFFICES, LLC, and that on this ^{4th} ~~12th~~ day of ^{March} ~~February~~,
2013, I served a copy of the foregoing MOTION FOR SUMMARY JUDGMENT as
follows:

☒ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class
postage prepaid and addressed as listed below; and/or

☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile
number(s) shown below and in the confirmation sheet filed herewith. Consent to
service under NRCP 5(b)(2)(D) shall be assumed unless an objection to service by
facsimile transmission is made in writing and sent to the sender via facsimile
within 24 hours of receipt of this Certificate of Service; and/or

☐ Hand Delivery—By hand-delivery to the addresses listed below.

Thomas E. Winner, Esq.
Matthew J. Douglas, Esq.
ATKIN, WINNER, & SHERROD
1117 S. Rancho Dr.
Las Vegas, NV 89102


An employee of CHRISTENSEN LAW OFFICES, LLC

EXHIBIT “F”

1 MATTHEW J. DOUGLAS
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2 ATKIN WINNER & SHERROD
1117 South Rancho Drive
3 Las Vegas, Nevada 89102
Phone (702) 243-7000
4 Facsimile (702) 243-7059
mdouglas@awslawyers.com

5 *Attorneys for Defendant,*
6 *United Automobile Insurance Company*

7 UNITED STATES DISTRICT COURT

8 DISTRICT OF NEVADA

9 JAMES NALDER, Guardian Ad Litem for
10 minor Cheyanne Nalder, real party in
interest, and GARY LEWIS, Individually;

11 Plaintiffs,

12 vs.

13 UNITED AUTOMOBILE INSURANCE
14 COMPANY, DOES I through V, and ROE
CORPORATIONS I through V, inclusive

15 Defendants.
16

CASE NO.: 2:09-cv-1348
DEPT. NO.:

**DEFENDANT UNITED AUTOMOBILE
INSURANCE COMPANY'S
OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

ORAL ARGUMENT REQUESTED

17 UNITED AUTOMOBILE INSURANCE COMPANY, by and through its Counsel of
18 record, Matthew J. Douglas, of ATKIN WINNER & SHERROD, hereby submits this Opposition
19 to Plaintiffs' Motion for Summary Judgment and states and alleges, as follows:

20 This Opposition is made and based upon the pleadings and papers on file with this Court,
21 the Points and Authorities contained below, and any oral argument which the Court may
22 entertain at the time of hearing.

23 ///

24
25
26 ///

1 DATED this 26th day of March, 2013.

2
3 ATKIN WINNER & SHERROD

4
5 /s/Matthew J. Douglas
6 Matthew J. Douglas
7 Nevada Bar No. 11371
8 1117 S. Rancho Drive
9 Las Vegas, Nevada 89102
10 *Attorneys for Defendant*

11 POINTS AND AUTHORITIES

12 I.

13 STATEMENT OF FACTS AND RESPONSE TO
14 PLAINTIFF'S STATEMENT OF FACTS

15 A. Facts relating to this lawsuit.

16 This is an insurance claim which was denied due to termination of a policy after the
17 plaintiff, Gary Lewis, failed to pay his premium.

18 Defendant has very little information regarding the subject accident which the Plaintiff
19 underlies this suit but, it appears that Gary Lewis was operating his vehicle in Pioche, Nevada on
20 July 8, 2007 wherein he struck minor pedestrian, Cheyenne Nalder. *See copy of Plaintiff Lewis'*
21 *deposition, attached as Exhibit 'A', hereto, p. 14, lines 1-15, p. 15, lines 12-15.* Thereafter,
22 Nalder and her father commenced a personal injury action against Lewis.

23 However, Mr. Lewis' policy of insurance had expired, and had not been renewed, due to
24 nonpayment of renewal premium at the time of this accident. Presumably sensing this might be
25 a problem, Mr. Lewis hastily made arrangements to pay a premium and acquire a new policy
26 after he caused the accident. ¹ After Attorneys for the Nalder Plaintiffs' obtained a \$3.5 million

27 ¹ Attached as Exhibit '5' the deposition of Giselle Molina, which is attached hereto as Exhibit
28 'B', is a copy of the receipt of payment, on July 10th, 2007 (2 days after the accident), for the premium
payment made by Lewis at the U.S. Auto Insurance Agency located at 3909 W. Sahara Ave., Las Vegas,
Nevada. *See also the corresponding receipt of said payment by UAIC, Exhibit 'C' to the Declaration of*
Danice Davis, herein.

1 dollar default judgment against Lewis, Attorneys for the Nalders' and Lewis commenced this
 2 lawsuit for 'bad faith,' claiming UAIC should have covered Lewis, even though his policy had
 3 expired.

4 When this case opened, Gary Lewis *first* insisted that he had, in fact, paid for his
 5 premium prior to the expiration of his policy on June 30th, 2007 and *that Defendant had denied*
 6 *receiving it. See attached copy of Plaintiff's original responses to requests for admissions,*
 7 *attached hereto as Exhibit 'C', numbers 4 & 7.* However, Lewis also refused to answer any
 8 discovery or produce any documents evidencing this alleged payment. Moreover, Lewis
 9 objected and refused to produce the assignment of rights under which the Nalder Plaintiffs'
 10 brought the instant suit. These responses necessitated a Motion to Compel discovery responses
 11 and a motion for sanctions. In response to this motion, at the eleventh hour and, on the doorstep
 12 to the courtroom on the day of the hearing, the plaintiff simply *changed his story and admitted*
 13 *that he had not, in fact, ever paid his premium for a renewal policy before the previous policy*
 14 *was terminated. See copies of Plaintiff's 'Supplement' to his Responses to Requests for*
 15 *admission, which are attached hereto as Exhibit 'D, numbers 4 and 8'.* Further, at that time, the
 16 plaintiff also produced an 'Assignment' - which purports to assign Plaintiff Lewis' chose in
 17 action to the Nalder Plaintiffs' - but, which was entered into on February 28, 2010². *See Exhibit*
 18 *'E', attached hereto.* Plaintiffs - by virtue of the amended responses to requests for admissions -
 19 have admitted there exists no material issue of fact concerning that Lewis did not timely pay his
 20 premium for the July 2007 policy. Instead, at that point, Plaintiffs' shifted their argument to
 21 maintain that Lewis was due coverage because of an *ambiguity* in the renewal statement - *not*
 22 *because he paid his premium timely and UAIC 'lost it'.*

23 ///

24 ///

25
 26 ² The court will note that this purported 'assignment' was apparently executed long after the
 27 lawsuit was filed. It begs the obvious question *how*, or *why*, the Nalder Plaintiffs' were able to
 28 commence this lawsuit without any legal basis or authority for bringing it. Again, the 'assignment' was
 only produced after a motion to compel and motion for sanctions was pending before the court.

B. Facts relating to the claims at bar.

Lewis' insurance policy, number NVA 020021926, with Defendant United Automobile Insurance Company had expired, per its terms, on June 30, 2007. The policy, as such, was not in effect on July 7, the date of loss. *See Declaration of Western Regional Marketing and Underwriting Manager for United Automobile Insurance Company, Danice Davis, with copy of policy number NVA 020021926 declarations page and policy, attached thereto as Exhibit 'A.'* Although United Automobile had mailed a renewal notice to Gary Lewis advising that his policy would terminate on June 30 if payment were not received by that date, Mr. Lewis did not pay his premium. *See Declaration of Western Regional Marketing and Underwriting Manager for United Automobile Insurance Company, Danice Davis, with copy of Exhibit renewal notice, attached as Exhibit 'B' thereto.* The renewal notice clearly put Lewis on Notice that his premium for his renewal policy was due "no later than 6/30/07." *See Exhibit 'B' attached to Declaration of Danice Davis.*

It was only after the loss occurred, on July 8, 2007, that Lewis presented a money order for payment of his premium for a new policy, on July 10th, 2007. *See Declaration of Western Regional Marketing and Underwriting Manager for United Automobile Insurance Company, Danice Davis, with copy of cashier's check receipt of premium for said new policy number NVA 030021926 on July 8, 2007 attached as Exhibit 'C', thereto.* At that time a new policy, number NVA 030021926, was initiated with a term of July 10, 2007 to August 10th, 2007. *See Declaration of Western Regional Marketing and Underwriting Manager for United Automobile Insurance Company, Danice Davis, with copy of declarations page for number NVA 030021926, attached as Exhibit 'D,' thereto.*

As stated, the plaintiff initially insisted that he paid his policy premium on time, and that UAIC must have lost or misplaced it. Then, in the wake of discovery and a motion to compel, Gary Lewis has admitted that he did not remit any amount for renewal of UAIC Policy number NVA 020021926 after June 12, 2007 and before June 30, 2007 nor between June 30, 2007 and July 10, 2007. *A copy of Plaintiff Gary Lewis' Answers to requests to admit are attached hereto*

1 as Exhibit 'D.'

2 As such, Defendant has maintained that this loss occurred during the period of non-
3 coverage that existed from June 30, 2007 to July 10th, 2007. See *Declaration of Western*
4 *Regional Marketing and Underwriting Manager for United Automobile Insurance Company,*
5 *Danice Davis*. UAIC became aware of the loss when Lewis called the Company to check
6 coverage on July 13, 2007 whereupon customer service representative Eric Cook informed him
7 the loss occurred in a period of no coverage after confirming this with the Underwriting
8 Department. See *Deposition of Eric Cook attached hereto as Exhibit 'F', p. 36, Lines 17-23, p.*
9 *53, lines 4-10, and copy of Underwriting notes confirming call with Lewis, attached hereto as*
10 *Exhibit 'I' to deposition of Giselle Molina, Exhibit 'B', hereto*³. Thereafter, when Counsel for
11 the Nalders' made a formal claim upon UAIC, the Company double-checked coverage with
12 underwriting and, contacted the insurance agency, U.S. Auto, who confirmed Lewis had not paid
13 his premium until July 10, 2007 and, provided a copy of the receipt. Additionally, UAIC
14 attempted to contact Lewis, but was unsuccessful. See *copy of deposition testimony of Jan Cook,*
15 *attached hereto as Exhibit 'G', p. 34, lines 8-19, p. 35, lines 7-18, p. 50, lines 11-14, p. 56, lines*
16 *2-15, p. 68, lines 13-16, p. 72, lines 14-20; See Copy of Deposition testimony of Giselle Molina,*
17 *attached hereto as Exhibit 'B', p. 30, lines 4-5, and see copy of UAIC's claims notes, attached*
18 *as Exhibit '4' to the deposition of Giselle Molina, Exhibit 'B', hereto.*

19 After verifying with the agency that no payment had been made prior to expiration of the
20 June policy until July 10, 2007, and attempting to contact Lewis, Plaintiffs' were informed of the
21 fact that no coverage was in force for the loss. See *Declaration of Western Regional Claims*
22 *Manger for United Automobile Insurance Company, Jan Cook, and attached copy of*
23 *correspondence to Counsel for Plaintiff, attached thereto as Exhibit 'A.'* Plaintiff James Nalder,
24 as guardian of Cheyenne Nalder, then filed suit in the Clark County District Court on October 9,
25 2007 under suit number A549111 against Lewis. On October 10, 2007, and again November 1,
26

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

1 2007, the Company informed both claimant attorneys via correspondence of the fact there was
 2 no coverage due to non-renewal for failure to pay premium. *See Declaration of Western*
 3 *Regional Claims Manger for United Automobile Insurance Company, Jan Cook, and attached*
 4 *copy of correspondence to Counsel for Plaintiff, attached thereto as Exhibits 'A' and 'B.'*

5 Lewis' current attorneys commenced suit *against him* after they were advised that Lewis
 6 had no insurance for this loss. Lewis' current attorneys then took a default against their now
 7 client. On May 15, 2008 Plaintiff's petitioned the Court for a default Judgment in the amount of
 8 \$3.5 million. *See copy of default judgment, attached to Plaintiff's Motion for Summary Judgment*
 9 *as Exhibit '2.'* On May 16, 2008 the plaintiff attempted to amend that petition to seek \$5 million.
 10 On June 2, 2008 the court entered a default judgment against Lewis for \$3.5 million.

11 On May 22, 2009 Nalder and Lewis filed the present suit against the UAIC seeking
 12 payment of the default judgment against Lewis⁴. *See Plaintiff's Complaint, attached hereto as*
 13 *Exhibit 'H.'* Plaintiffs have also made several 'extra-contractual' or 'bad faith' claims against
 14 Defendant UNITED AUTOMOBILE INSURANCE COMPANY (hereinafter "UAIC or United
 15 Auto"). *See Plaintiff's Complaint, attached hereto as Exhibit 'H.'* Namely, Plaintiff alleges
 16 UAIC has breached its duty of good faith and fair dealing towards Plaintiffs, and failed to abide
 17 by Nevada's Fair Claims and Practices Act, N.R.S. 686A.310. Plaintiffs' bad faith claims are set
 18 forth in their Complaint. *See Exhibit 'H.'* Defendant has denied Plaintiffs' claims. *See Copy of*
 19 *United Auto's Answer and Affirmative Defenses, attached hereto as Exhibit 'I.'*

20 Defendant has, from the outset, disputed coverage for Plaintiff's claims. It is clear that
 21 there was no policy was in effect the date of loss and, therefore, UAIC argues no coverage would
 22 be owed to Lewis for Plaintiffs' claims. However, Defendant argues that regardless of this
 23 Court's ultimate determination regarding any ambiguity in the renewal statement, Defendant had
 24 a reasonable belief no coverage existed based on the failure to timely remit premium and, as
 25 such, cannot be liable for any extra-contractual damages, in hindsight, several years later based
 26

27 ⁴ The current suit was UAIC's first notice that Lewis had been served and, that a default judgment
 28 had been taken against him.

on an *ad hoc* legal argument for coverage. The reasonableness of Defendant's position is confirmed by the fact that the prior Judge hearing this case found no coverage and, Plaintiffs' Counsel admitted UAIC's reading of the renewal was reasonable at the hearing on the first Motion for summary judgment. *See Exhibit 'J', hereto, p.35, lines 20-24.*

C. Responses to Plaintiff's Statement of Facts

In order to clear up any misstatements concerning the record in this case, Defendant responds to some of Plaintiff's Statement of facts. First, the "Renewal Notice" discussed by Plaintiff (at pages 3-4 of Plaintiff's Motion for Summary Judgment regarding payment beyond a policy expiration) was clearly titled "Revised Renewal Notice" by UAIC. This was done because Lewis – who had purchased his first month-long policy beginning March 29, 2007⁵ – added a new driver (attached as page 13 of Exhibit "1" to Plaintiff's Motion for summary judgment) as well as a new vehicle (attached as page 14 of Exhibit "1" to Plaintiff's Motion for Summary Judgment) to his policy on April 25, 2007.⁶ Previous to these endorsements, on April 9, 2007, UAIC had sent Lewis a "Renewal Statement" for his May 2007 Policy which specifically informed him that premium needed to be paid prior to expiration of his current policy – or by April 29, 2007. A copy of the initial Renewal statement is attached as page 20 of Exhibit "1" to Plaintiff's Motion for Summary judgment. However, as Lewis' two additions to the policy, on April 25, 2007, increased his premium – a new "Revised Renewal Statement" was issued which did allow him to remit his May 2007 premium by May 6, 2007. *See page 16 of Exhibit '1' to Plaintiff's Motion for summary judgment.* This revised renewal statement only provided additional time, beyond expiration of his current policy – because of the late additions to the

⁵ A copy of the receipt of the first policy premium, on March 29, 2007, is attached as page 7 of Exhibit "1" to Plaintiff's Motion for Summary Judgment

⁶ These endorsements led to an amended policy declarations page to be issued to Lewis on April 25, 2007 for the remaining four days of his policy (April 25, 2007 – April 29, 2007). (A copy of the Amended Declaration is attached as page 10 of Exhibit "1" to Plaintiff's Motion for Summary Judgment)

1 policy and increased premium required a Revised Renewal Statement to be sent out. In no way
 2 did same Revised Renewal Statement create a "course of conduct" allowing for payment of
 3 premium beyond expiration of the current policy term. This conclusion is supported by the fact
 4 that Lewis actually paid for his May 2007 policy on April 28, 2007 and the new policy term
 5 incepted, on schedule, April 29, 2007. *See Receipt of Payment dated April 28, 2007, page 26 of*
 6 *Exhibit '1' to Plaintiff's Motion for Summary Judgment.*

8 Similarly, Plaintiff notes that Lewis' June 2007 Policy required the premium to be
 9 received by May 29, 2007 (the last day of Lewis' May 2007 policy). *See Renewal Notice at page*
 10 *28 of Exhibit '1' to Plaintiff's Motion for Summary judgment.* Thereafter, as Plaintiff points out,
 11 Lewis failed to remit any premium until May 31, 2007. *See Receipt of Payment, page 34 of*
 12 *Exhibit '1' to Plaintiff's Motion for summary judgment*⁷. As such, Lewis' June 2007 policy did
 13 not incept until May 31, 2007 – *when payment was received. See Declarations page for June*
 14 *2007 Policy at page 30 of Exhibit '1' to Plaintiff's Motion for Summary judgment.* As such, like
 15 for the loss in the case at bar, Lewis had a lapse in coverage from 12:01 a.m. May 29, 2007 until
 16 9:12 a.m. on May 31, 2007, when the new policy was paid for and incepted.

18 This was the same situation that occurred for the July 2007 policy, where the renewal
 19 notice clearly stated that the "Renewal Amount" must be paid "No Later than 6/30/07." *See*
 20 *July 2007 Renewal Notice page 34 of Exhibit '1' to Plaintiff's Motion for summary judgment.*
 21 Lewis, as happened with the June policy 2007 policy, was again late with his payment. Now it is
 22 agreed by all parties that Lewis did not remit premium for his July 2007 policy term until July
 23 10, 2007. *See Receipt of Payment at page 39 of Exhibit '1' to Plaintiff's Motion for summary*
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25
 26 ⁷ It is important to note that, every subsequent policy term Lewis had with UAIC, after March
 27 2007, would be titled "renewal" and not "new business" on the receipt of payment because Lewis was not
 28 a "new customer" any longer. As such, this designation of "renewal" on a receipt of payment (to
 determine whether a producer has brought in a new customer) has absolutely no bearing on how UAIC
 characterized his policy.

1 judgment. Therefore, as occurred with the June 2007 policy, UAIC incepted Lewis' July 2007
2 policy term late on July 10, 2007. *See copy of Declarations for July 2007 policy at page 36 of*
3 *Exhibit '1' to Plaintiff's Motion for summary judgment.* In this way, it is undisputed that Lewis,
4 again, had a lapse in coverage from 12:01 a.m. June 30, 2007 to 12:50 p.m. July 10, 2007.

5
6 Plaintiff also notes that, in September and December 2007, Lewis again failed to timely
7 remit his premium. UAIC does not dispute this. UAIC argues, in fact, this is further proof of
8 Lewis' "course of conduct" - of failing to pay for his new policy timely. In fact, Lewis even
9 failed to remit premium for his August 2007 policy timely as well. As can be seen from the
10 records, Lewis was issued a renewal notice to remit his premium for his August 2007 policy by
11 August 10, 2007 (this was because, of course, his July 2007 policy began July 10, 2007 due to
12 late payment). *See copy of Renewal Statement for August 2007 Policy at page 40 of Exhibit '1' to*
13 *Plaintiff's Motion for summary judgment.* Lewis, however, did not pay his August 2007 premium
14 until August 13, 2007. *See Receipt of Payment at page 45 of Exhibit '1' to Plaintiff's Motion for*
15 *summary judgment.* Thereafter, UAIC incepted his August 2007 policy on the date of payment,
16 August 13, 2007. *See Declarations Page for August 2007 Policy at page 42 of Exhibit '1' to*
17 *Plaintiff's Motion for summary judgment.* Again, his September 2007 Policy then required
18 remittance of renewal premium by September 13, 2007. *See Renewal Statements at pages 6 and*
19 *8 of Exhibit '2' to Plaintiff's Opposition to Defendant's original Motion for summary judgment,*
20 *Document 20, herein.* Lewis, again, failed to remit premium until September 14, 2007 (*See*
21 *Receipt of Payment at page 13 of Exhibit '2' to Plaintiff's Opposition to Defendant's original*
22 *Motion for summary judgment, Document 20, herein.*) and corresponding new Policy Declaration
23 page for the September 2007 policy, issued September 14, 2007 at the time of payment. *See*
24 *Declaration Page at page 10 of Exhibit '2' to Plaintiff's Opposition to Defendant's original*
25 *Motion for summary judgment, Document 20, herein.* Lewis went on to make his October and
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1 November 2007 policy term premium payments timely (*See Receipts of Payments at pages 22*
2 *and 34 of Exhibit '2' to Plaintiff's Opposition to Defendant's original Motion for summary*
3 *judgment, Document 20, herein.*) before failing to remit his December 2007 premium on time.
4 As such, once again, UAIC did not issue a new policy term until said payment was received on
5 December 15, 2007. See Receipt of Payment and Declarations Page at *pages 40 and 37,*
6 *respectively, of Exhibit '2' to Plaintiff's Opposition to Defendant's original Motion for summary*
7 *judgment, Document 20, herein.*

9 As such, when one actually reviews the UAIC records, it is clear, UAIC did not issue any
10 new policy term for Lewis *until payment was received.* During any period between expiration of
11 a previous monthly policy – and remittance of policy premium for the new monthly term – Lewis
12 would have a lapse in coverage. From a review of the records this happened on several occasions
13 – *both before and after* July 2007 policy. Therefore, the evidence this case actually proves a
14 course of dealing where Lewis, contrary to his self-serving interrogatory answers, had a prior
15 course of dealing with UAIC wherein he knew his new policy term did not incept until he paid
16 his premium.

18 Also, Defendant would like to note that Plaintiff also mischaracterizes or, does not
19 completely cite the testimony of several witnesses. For instance, Plaintiff claims that Danice
20 Davis, the Person Most Knowledgeable (PMK) for UAIC in regards to underwriting issues, is
21 unable to indicate “expiration of your policy”, on the renewal notice, referred to expiration of
22 your *current* policy (rather than the expiration date on the top right hand corner for the future
23 policy as Lewis claims he believed). However, Plaintiff is twisting Danice Davis' testimony.
24 This is because though Davis told Plaintiff, *time and time again,* what the Defendant believes is
25 reasonable and unambiguous interpretation of the renewal. Specifically, when you review Davis'
26 testimony, she clearly told Appellant: “So it's a renewal offer to go another term. So when
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1 I'm referencing your policy, it would be your policy that you have in force at the time you
 2 get this offer in order to extend to another term. " See Exhibit '4' to Plaintiff's Motion for
 3 summary judgment, Davis Deposition, p. 62, Lines 11-25 and page 63, Lines 1-8.

4 Accordingly, when one examines a full testimony of Ms. Davis' testimony it is clear she
 5 does explain her interpretation of the renewal. That is, since it is an offer for the next term, the
 6 only reasonable interpretation would be for an insured to pay his premium, by the due date to
 7 extend to the new term. As such, Davis would not agree with Plaintiff's attempt to force his
 8 interpretation on her and she explained the words "your policy" clearly reference the "current
 9 policy term" and the offer would be to extend to another term.⁸

11 Next, Plaintiff again misquotes or mischaracterizes the testimony of the former
 12 employees of UAIC, Manny Cordova and Lisa Watson for their argument that these individuals
 13 state the renewal is ambiguous. First, Plaintiffs' allege Mr. Cordova stated "certainly people can
 14 interpret a document differently" for 'proof' that the document here is ambiguous. Plaintiffs',
 15 however, fails to fully cite Mr. Cordova because, when one does, it is apparent he *never* said the
 16 document was ambiguous. In fact, Mr. Cordova agreed with UAIC's interpretation of the
 17 renewal notice and, where he did state one could view a document 'differently' he did so in a
 18 purely *philosophical* manner. That is, in response to Plaintiffs' Counsel again attempting to get a
 19 witness to agree with his interpretation of the document, Mr. Cordova testified:

21 BY MR. SAMPSON:

22 Q: Okay. It's subject to multiple interpretations, fair statement?

23 MR. DOUGLAS: Objection, that mischaracterizes his testimony, calls for a legal
 24 conclusion. That's not what he said, Counsel.

25 THE WITNESS: I would have to agree, that's not what I said. What I said was, again, this
 26 is the way that I interpret the document, this is the way I read the document. If someone
 else were to read it differently, well, then that -- you know, I mean, there's guys out there

27 ⁸ The Court can read on in the Davis deposition to notice Plaintiffs' Counsel continued attempt to
 28 force the witness to adopt his interpretation of the document (*Exhibit '4' to Plaintiff's Motion*, 358-362).

1 that will pick this up, you go down there to the looney farm and you give this to a guy and
2 he will think you're handing him Psalms 117 or something. So this is the way I read the
3 document. Could you interpret it differently? Of course. Could she interpret it differently?
Of course. This is the way that I interpret it. I cannot tell you that, you know, my way is
right or your way is right, but that's the way I read the document.

4 (See Cordova Deposition, attached as Exhibit '5' to Plaintiff's Motion for summary Judgment, p.
5 105, Lines 5-25, p. 106, and p. 107, Lines 1-16.)

6 In this way, Mr. Cordova *never* stated the document was "ambiguous" or subject to two
7 different reasonable meanings as espoused by Plaintiffs'. In fact, clearly, Mr. Cordova disagreed
8 directly with this interpretation of his testimony – when asked by Plaintiff- as shown above.
9 Accordingly, like with Danice Davis, for Plaintiffs' to use Mr. Cordova's testimony in support of
10 their arguments is simply baseless.

11 Finally, Plaintiffs' quote testimony of Lisa Watson, another former UAIC employee as
12 further "support" for their arguments. However, the fact is it is quite clear from her testimony as
13 a whole that Ms. Watson was scared *and simply was denying knowledge about anything to avoid*
14 *being involved in this lawsuit.* This Court can review the transcript, but it is clear from the outset
15 of Ms. Watson's deposition that she answered "she did not know" or that a subject was "outside
16 the scope of her knowledge" *scores of times.* When viewed in this light, it is clear Appellant is,
17 once again attempting to mischaracterize a witnesses' testimony as support for their theory that
18 the renewal notice is ambiguous. Ms. Watson actually testified in her deposition to the plain
19 meaning of the renewal (as put forth by UAIC) but, then, she stated she had *no knowledge*
20 concerning the renewal notices. Specifically, Ms. Watson's full testimony stated, as follows:

23 Q: Then we have a sentence here that says, "To avoid a lapse in coverage, payment must be
24 received prior to expiration of your policy." Did I read that correctly?

25 A: Yes.

26 Q: Do you have an understanding as to what that sentence means or is it outside of what you
were involved in?

27 A: I want to say it's outside (her knowledge).
28

1 Q: Okay, fair enough. And so what they're referring to in terms of expiration, as you sit here
2 right now, you don't have any knowledge or recollection, correct?

3 A: Correct.

4 (See Watson deposition attached as Exhibit '6' to Plaintiff Motion for summary judgment, page
5 50, Lines 1-24).

6 As such, when one views the *full* testimony of Ms. Watson, like the others, one sees that
7 her testimony just does not support the arguments made by Plaintiff. Here, Watson clearly stated
8 the due date on the renewal was clear and, when pressed by Plaintiff about the meaning of the
9 sentence at issue, Watson agreed that she *had no recollection* of what it referred too. Therefore,
10 clearly, this is not the clear cut endorsement of Plaintiffs' viewpoint they claim it to be.
11 Moreover, it is equally clear that Watson testified the issue *was outside the scope of her*
12 *knowledge*. Therefore, if anything, Watson testified that she is not the person to decide the issue
13 of ambiguity.

14 Accordingly, when a full review of the above-referenced witnesses' testimony is
15 conducted, it is apparent none of them espoused the views argued by Plaintiff. In fact, Cordova
16 and Davis specifically *disagreed with Plaintiffs' argument regarding the ambiguity*. As such,
17 this Court should not countenance Plaintiffs' blatant attempt to 'cherry pick' and/or
18 mischaracterize testimony.

19 Quite simply, as set forth in Defendant's Counter-Motion for summary judgment, herein,
20 Mr. Lewis' policy of insurance had expired, and had not been renewed, due to nonpayment of
21 renewal premium at the time of this accident. Presumably sensing this might be a problem, Mr.
22 Lewis hastily made arrangements to pay a premium and acquire a new policy after he caused the
23 accident. This should not be a basis for coverage and, cannot be a basis for any 'bad faith' or
24 extra-contractual remedies.'

25 ///

26 ///

II.

LEGAL DISCUSSION

Pursuant to F.R.C.P. 56(a), the Court must enter summary judgment when "...there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law." Under this Rule, the moving party has the initial burden of showing the absence of a genuine issue of material fact. Once the movant's burden is met by presenting evidence which, if uncontroverted, will entitle the moving party to a judgment as a matter of law. The burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. Pioneer Chlor Alkali Company, Inc. v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania, 863 F. Supp. 1237, 1238 (D. Nev. 1994), citing Adickes v. S.H. Kres and Company, 398 U.S. 144, 26 L.Ed. 2d 142, 90 S. Ct. 1598 (1970); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 91 L.Ed. 2d 202, 106 S. Ct. 2548 (1986). However, when viewing a case on summary judgment, the pleadings and exhibits must be construed in a light most favorable to the nonmoving party. Wood v. Safeway, Inc., 121 P.3d 1026, 1031 (Nev. 2005); See United States v. Diebold, 369 U.S. 654 (1962).⁹

It is clear from the facts presented and law cited that Gary Lewis had a policy of insurance with United Auto that expired – per the terms of the policy – on June 30th, 2007 if Plaintiff did not renew the policy. Plaintiff admits he did not tender premium payment for his July policy –until July 10, 2007 – after the loss occurred and beyond the time for renewal. As such, Lewis simply had no coverage the day of the loss, July 8, 2006. Plaintiff's Motion does not dare suggest that Lewis' policy with UAIC, number NVA 020021926, did not expire – per its own terms - on June 30, 2007. Nor does Plaintiff dare argue (after altering his responses to requests to admit, previously) that Lewis remitted policy premium for his new policy term, number NVA 020021926, before the loss involved here occurred. Rather, Plaintiff seeks to have

1 this Court form an 'implied' or, constructive, insurance contract covering the loss in question
2 (July 8, 2007) based on alleged ambiguity in the renewal notice.

3 Plaintiff's Summary Judgment amounts to three arguments. First, Plaintiff argues that the
4 "Renewal Statements" sent by UAIC were ambiguous and, therefore, should be construed
5 against UAIC and this court should imply a constructive policy of insurance (contract) for the
6 date of loss. Next, that, if the Court finds coverage based on the ambiguity, that Defendant
7 should be found to have breached the implied covenant of the duty of good faith and fair dealing.
8 Finally, if Defendant is guilty of such 'bad faith', this Court should find the default judgment
9 was proximately caused by the alleged breaches and award Plaintiff the amount of the default
10 judgment plus interest and fees, etc.

11 Defendant, will address each argument, in turn, but, in short believes all of these
12 arguments to be incorrect in fact and in law. However, and in the alternative, *even should this*
13 *Court find as a matter of law that an ambiguity existed in the renewal*, and the Court implies an
14 insurance contract, the Court should deny Plaintiff's Motions for summary Judgment on the
15 extra-contractual claims and/or that any breaches caused Plaintiff's damages as Defendant's
16 actions were reasonable.

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19 **A. The Renewal Statement Issued to Lewis was not Ambiguous and Clearly**
20 **Demanded Remittance of Policy Premium, for the Subsequent Term, by**
21 **Expiration of the Present Policy Period and, at the very least, a material issue of**
22 **fact remains over whether the renewals were 'ambiguous.'**

23 In support of their argument for this Court to form an implied insurance contract,
24 Plaintiff claims that the "Renewal Statement", issued by UAIC to Lewis were ambiguous
25 because an insured could somehow confuse the expiration date of his *next policy* with expiration

26 (Cont.)

27 ⁹ Defendant must point out that Plaintiffs' incorrectly state in their moving papers that this Court
28 must view the evidence in a 'light most favorable to Plaintiffs' (See Plaintiffs' Motion at page 9, lines 26-
27). Obviously, this is the *opposite of the standard that should be applied here.*

1 of his *current one*. Moreover, that an insured could somehow fail to notice the clearly labeled
2 "renewal amount" with the words "Not later than" followed by a date surrounded by stars. Not
3 only does Defendant believe that Plaintiff's argument defies commons sense but, also that the
4 case law cited by Plaintiff is dissimilar to the case at bar. As such, Defendant asks this Court to
5 conclusively find these renewals to be unambiguous.

6
7 It is axiomatic that unambiguous language in a contract's terms must be upheld. Farmer
8 Ins. Co. v. Young, 108 Nev. 328 (Nev. 1992). The Supreme Court of Nevada has also stated that
9 the language of an insurance policy will be given its plain and ordinary meaning from the
10 viewpoint of one not trained in law. United Insurance Co. v. Frontier Insurance Company, Inc.,
11 120 Nev. 678 (Nev. 2004)¹⁰. Additionally, the Ninth Circuit Court of Appeals has stated that
12 where the language of an insurance policy admits of only one meaning, there is no basis for
13 interpretation of the policy coverage under the guise of ambiguity. Further, that ambiguity does
14 not exist just because a claimant says so. It can only exist where the wording or phraseology of a
15 contract is reasonably subject to two different interpretations. State Farm Mut. Auto. Ins. Co. v.
16 White, 563 F.2d 971 (9th Cir. 1977).

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18 As attested to by Danice Davis, in her Declaration herein, Lewis June 2007 policy term
19 expired per its term on June 30th, 2007. *See Declaration of Danice Davis and copy of June 2007*
20 *policy attached thereto as Exhibit 'A', p. 11 'Policy Period, Territory.'* Here, it is uncontroverted
21 that the June 2007 policy expired, per its term, on July 30th, 2007. *See Danice Davis Declaration.*
22 Further, it is uncontroverted that Lewis did not remit premium until *after* the loss when he paid
23 for his subsequent policy term on July 10th, 2007. *See Exhibit 'D', hereto.* Accordingly, there
24 was no policy in place for the loss.

25
26 Plaintiffs', of course, have altered their theory for coverage (first claiming Lewis made a
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1 timely payment and UAIC lost it) to claim that this court should imply a policy of insurance due
2 to an alleged ambiguity in the renewal statement issued to Lewis. For purposes of this
3 discussion, Defendant will focus only on the renewal important to the case at bar – for the July
4 2007 policy. *See Renewal Statement at page 34 of Exhibit 'I' of Plaintiff's Motion for summary*
5 *judgment.* As such, prior to expiration of the June 2007 monthly policy, United Auto sent Lewis
6 a 'Renewal Statement' that clearly provided he needed to remit premium for his July 2007 Policy
7 by June 30, 2007. *See Declaration of Danice Davis and Exhibit 'B', thereto.* This Renewal
8 statement is clear and unambiguous. It states quite prominently that Lewis premium was due "no
9 later than 6/30/07." *See Declaration of Danice Davis and Exhibit 'B', thereto.* This Date was
10 specifically surrounded by stars on the Renewal Notice. Plaintiff argues that because the
11 paragraph in the body of the notice mentioned that Lewis needed to remit the premium before
12 "expiration of the policy" and the expiration date for *the new policy* is located in the upper right
13 hand corner – an insured might think he/she had until expiration of the subsequent policy term to
14 remit premium *for that term.* This interpretation defies logic and reason as a straightforward
15 review of the renewal reveals there is only one meaning for the due date for remittance of the
16 new premium. Not only does the due date coincide with the *expiration of the current policy term*
17 (there June 30, 2007) but, that same date is surrounded by stars on the top of the notice and
18 listed, again, at the bottom left hand corner of the Renewal as "Due Date."

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22 Moreover, common sense would dictate the expiration date refers to expiration of the
23 current policy of insurance and not the new subsequent policy. Car insurance is mandated by law
24 and all drivers have purchased policies of insurance and paid renewal premiums. As such, unlike
25 *interpretation of policy provisions* – where a layman may not be exposed to contract language or
26 construction – understanding of a renewal notice is a common experience. As such, the Court
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28 _____ (Cont.)

1 should review this renewal notice under the same familiarity that most people would – and
2 understand the clearly marked “Due Date” for their renewal premium *was the date required for*
3 *renewal premium*. This conclusion is the straightforward interpretation of the notice.

4 Moreover, this conclusion is supported by the history of dealings between Lewis and
5 UAIC (set forth above) where Lewis’ new policy term was *never* issued prior to receipt of his
6 new premium payment. Despite Plaintiff’s arguments to contrive a ‘prior course of dealing’
7 where ‘Lewis could pay his premium late’, the record actually shows that 1) UAIC *never issued*
8 a new term without receiving payment and, 2) Lewis was late and had lapses in coverage more
9 often than he paid timely. These facts belie Plaintiff’s self-serving remarks that he “understood”
10 the renewal notice to allow him to pay his renewal premium late. Rather, it is clear this argument
11 was manufactured, *post hoc*, by Plaintiff. This is further supported by the fact that, even after the
12 loss in question, and UAIC’s disclaimer of coverage, *Lewis continued to pay for new policy*
13 *terms with UAIC*. If he had really “believed” he would be covered for the loss at bar after paying
14 his premium late – common sense dictates a rational consumer would have, thereafter, sought
15 coverage from one of the multitude of other insurers available to him. The fact that he did not
16 seek coverage from another company reveals that Lewis must not have actually believed UAIC
17 should have covered him herein.

18 This conclusion is supported by the testimony of Lewis himself which betrays the *ad-hoc*
19 explanation of what he believed the “due date” was. Specifically, Lewis, at his deposition
20 testified to the following in discussing one of the renewal notices from UAIC:

21 Q: So can you tell me why? You said you didn't ignore it (in reference to the due date).

22 A. I can't tell you why.

23 Q. Okay. Can you look down at the bottom left-hand corner. Does it say due date with a date
24 there?

25 A. Yes, it does.
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Q. Okay. And that matches the date that's starred that says "no later than." Is that fair?

A. That's correct.

Q. Okay. And, in fact, it looks like in the middle of the page, it says, "Please detach and return this bottom portion with your payment." Do you see that?

A. Yes.

Q. So it appears that this bottom part was the stub that you return your payment with. Is that fair?

A. That's correct.

Q. Okay. And you have other bills you pay; is that correct?

A. Yes.

Q. Okay. Have you had bills in your name and accounts in your name before?

A. Of course I have, yeah.

Q. Okay, sure. Everybody knows; right? You have an account in your name, and you get a payment stub that you return with your payment. Is that fair?

A. That is correct.

Q. And all of them have due dates on them; is that right?

THE WITNESS: Dave, can I answer something right now other than yes and no?

BY MR. DOUGLAS:

Q. I would direct the witness not to ask his counsel for an answer. I have a pending question I want to know -

A. Yes.

Q. Okay. And so just like this stub has -

A. I would like to take a break, please. Can I take a break?

(See deposition of Lewis, attached as Exhibit 'A', hereto, p. 55, Lines 17-25, p. 56, Lines 1-20, p. 57, Lines 20-25, p. 58 Lines 1-14).

As one can see, when asked directly about the clear "due date" on the renewal - which was also contained on the payment stub - Lewis had to admit that he understood that was the *due date* on the notice. He also had to admit that he could not explain why he chose to focus on the

1 'expiration date' rather than the clearly marked 'due date' as the date for payment. Later, after a
 2 break where he met with his counsel, Lewis tried to claim he thought he had a 'grace period'
 3 after the due date, but the fact is such an interpretation is not reasonable when one examines the
 4 document and history of the parties' transactions.

5
 6 Moreover, Defendant would like this Court to take note that, if the Court considers
 7 Lewis' subjective beliefs¹¹ about what he thought the renewal notice stated, this Court must also
 8 consider that individual's credibility. Here, Lewis changed his 'testimony' regarding why he
 9 failed to pay the premium, for July 2007, late. First, in answers to Requests to Admit he stated it
 10 was because UAIC lost his timely premium payment. (*See Exhibit 'C', hereto*). However, after a
 11 Motion to Compel was filed, demanding the form or method of this 'lost payment', Appellant
 12 Lewis miraculously *changed his argument* and began advancing this ambiguity argument (*See*
 13 *Lewis' Supplemental Responses to Requests to Admit, no. 8, Exhibit 'D', hereto*). Besides this
 14 change in testimony *in this case, regarding the main issue in this case*, Lewis also has a
 15 credibility issues because he is a convicted forger. (*See Lewis Answers to Interrogatories no. 3,*
 16 *attached as Exhibit '3' to Plaintiffs' Motion for summary judgment*) As this Court knows, F.R.E.
 17 609(a)(2) allows for criminal convictions to be admitted, *without consideration of prejudicial*
 18 *effect* {unlike F.R.E. 609(a)(1) which is subject to F.R.E 403} when the crime involved has an
 19 element that includes an "**act of dishonesty or false statement by the witness.**" F.R.E. 609. In
 20 this case, it is clear forgery contains just such an element. As such, a forgery conviction is
 21 automatically admitted for impeachment under F.R.E. 609 (a)(2). *United States v. Hayes*, 553
 22 F.2d at 827 (1977).

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 25 The fact is, to adopt the interpretation Plaintiff seeks is to stretch both the facts and
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27 ¹¹ The subjective statements of witnesses are really not relevant to the Court's inquiry regarding
 28 the ambiguity issue. *Farmers Ins. Exch. v. Neal*, 119 Nev. 62, 64 P.3d 472, 473 (Nev. 2003).

1 common sense to manufacture an ambiguity where none exists. This court should not tolerate
 2 Plaintiff's *ad hoc* argument for coverage. The clear, plain, and unambiguous reading of the
 3 Renewal Statement shows Plaintiff Lewis was notified his premium, for his July 2007 policy
 4 term, needed to be received on or before the "Due Date" of June 30, 2007 to avoid a lapse in
 5 coverage. That due date is noted twice on the Renewal Statement. Lewis failed to remit same
 6 premium prior to July 10, 2007. As such, this Court can conclude no policy insurance existed for
 7 Lewis on July 8, 2007 and deny Plaintiff's Motion for summary judgment. At the very least
 8 Defendant argues that certainly a material issue of fact remains as to the ambiguity prohibiting
 9 summary judgment.

11 **B. Alternatively, regardless of the finding concerning the ambiguity issue,**
 12 **Defendant opposes summary judgment on Plaintiff's claims for extra-**
 13 **contractual remedies, and 'bad faith', in favor of Plaintiff as a Genuine Dispute**
 14 **as to coverage exists.**

15 Plaintiff has also filed this Motion for summary judgment on their causes of action for
 16 breach of the implied covenant of good faith and fair dealing, specifically for a breach of the
 17 duty to defend¹². Defendant has asked, that regardless of the ultimate finding on the ambiguity
 18 issue, that should this Court deny Plaintiff's summary judgment in regards to the extra-
 19 contractual claims as, at the very least, a "Genuine Dispute" existed as to coverage. Here, the
 20 *prior District Judge and, Plaintiff's own counsel at hearing, previously agreed that Defendant's*
 21 *interpretation of the renewals was reasonable*. Further, Plaintiff cites case law that is completely
 22 inapplicable to the case at bar or not binding precedent. Every case cited by Plaintiff involved a
 23 situation where there existed a policy in force at the time of loss making such cases

25 _____ (Cont.)

26 ¹² It does not appear to Defendant that Plaintiff has brought the Motion for summary judgment as
 27 to any claimed breaches of the Nevada Unfair Claims Practices Act, NRS 686A.310 and, as such, same is
 28 not discussed herein. To the extent Plaintiff is seeking judgment on these claims, Defendant refers this

1 distinguishable from the one at bar where there the parties admit there *was no policy* and,
 2 instead, *Plaintiffs' have asked this Court to find an implied policy from an ambiguity in the*
 3 *renewal*. In this way, these cases simply do not correctly reflect a situation where the insurer's
 4 records revealed **no policy to be in force for the loss**. Rather, based upon Nevada law and, case
 5 from the Ninth Circuit, it seems clear, as a matter of law, that Defendant cannot be held liable for
 6 extra-contractual remedies when, at the very least, a "genuine dispute" existed as to whether
 7 there *even was a policy in effect*.

9 ***1. The case law cited by Plaintiff is non-binding or inapplicable to the case at bar and***
 10 ***simply does not state the correct standard to be applied here.***

11 First, it must be noted that Plaintiff cites to a West Virginia opinion, Shamblin v.
 12 Nationwide Mut. Ins. Co., 396 S.E. 2d 766 (W.Va. 1990) suggesting an insurer strictly liable for
 13 insurer bad faith. However, as this Court plainly knows this precedent is not binding on this
 14 Court and, moreover, does not accurately set forth the standard for insurer bad faith liability in
 15 Nevada. Accordingly, this case and, argument, is of little use in the case at bar. Moreover, the
 16 Shamblin case and, several California decisions relied upon by Plaintiff, are distinguishable for
 17 the simple reason that *all* of those cases involved instances where *there was no dispute as to a*
 18 *policy even being in force* (and, therefore, the loss occurring during a policy term) and the
 19 insurers had failed to settle the claim within limits, thus exposing the insureds to excess
 20 judgments. Accordingly, the standards applied in those cases are distinguishable from the case at
 21 bar where there was a genuine dispute as to the *existence of a policy at the time of loss*.

23 Indeed the California precedents all state merely that an insurer who failed to settle
 24 within an insured's policy limits, may later be responsible for the detriment caused by the
 25 insurer's breach of the covenant of good faith and fair dealing. See Comunale v Traders &

27 _____ (Cont.)
 28 Court to it discussion of these claims in Defendants Counter-Motion for summary judgment on these very

1 General Ins. Co., 50, Cal.2d 654, 328 P.2d 198; Crisci v. Sec. Ins. Co., 66 Cal.2d 425 (1967);
 2 Johansen v. Calif. State Auto. Assn. Inter-Ins. Bureau, 538 P.2d 744 (1975). Again, while this
 3 may be a correct recitation of the law in *California* – as it applies to traditional “third-party”
 4 defense claims made against an insured when a policy is *in force* – it has absolutely no
 5 application to the case at bar where *no policy was in effect*. This is evident from a review of the
 6 Crisci, Comunale, and Johansen decisions wherein there was *no question as to a policy being in*
 7 *force*¹³ and, moreover, there existed evidence that the insurer had no reasonable defense for the
 8 insured to refuse a settlement offer within the policy.

9
 10 The same problem arises with the other cases cited by Plaintiff. For instance, Plaintiff
 11 cites to Powers v. U.S.A.A., 114 Nev. 690 (1998), for the proposition that a quasi-fiduciary
 12 relationship exists between an insurer and insured. Once again, however, this is a correct
 13 interpretation *when a policy in force* but, does not apply to the situation at bar. Further, Plaintiff
 14 places much reliance upon Landow v. Medical Ins. Exch. of Cal., 892 F. Supp. 239 (1995) for
 15 the proposition that an insurer could be held liable for harm caused to an insured by a failure to
 16 settle a claim prior to litigation. However, in that case there *was no issue as to coverage or of a*
 17 *policy being in force*. In fact, in Landow the parties *acknowledged coverage was in effect* and
 18 merely disagreed over whether the insurer should subject an insured to the stress of litigating the
 19 claim. Id. Accordingly, that case in no way stands for the proposition that UAIC would have
 20 owed such a duty to Lewis, here, when there was no evidence at the time that a policy was even
 21 in effect.

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 23
 24 Additionally, Plaintiff cites to in Pemberton v. Farmers Ins. Exch., 109 Nev. 789, 858

25 _____ (Cont.)
 26 issues.

27 ¹³ The Comunale and Johansen cases did involve an issue of coverage under the policy, which
 28 was resolved against the insurer, but they are dissimilar to this case where UAIC had a reasonable belief
 there was no policy in force and, not merely an argument against coverage for the loss.

1 P.2d 380 (1993), broadly, for the proposition that Nevada established standards for insurers in
 2 Uninsured or Underinsured motorist coverage claims and, also, for the proposition that 'insurers
 3 have a duty to investigate.' Whether or not that case stands for those propositions, it is clear that
 4 in that case the Nevada Supreme Court held that a claim for insurance bad faith *does not accrue*
 5 *until the underlying contractual action is resolved. Id.* As such, the Court there felt the insurer's
 6 duties did not accrue to the insured until *legal entitlement to benefits was established.* Here, the
 7 Plaintiff's have yet to prove a policy in force on the date of loss (and, therefore, legal
 8 entitlement) and, in fact, one Judge has already found that there was not. As such, this case also
 9 does not lend Plaintiff support for the proposition that UAIC committed any actionable bad faith
 10 in this case.

11
 12 Finally, the Plaintiff also relies on Allstate v. Miller, 212 P.3d 318 (2009), for the
 13 proposition that the implied covenant of good faith and fair dealing included a duty to notify of
 14 settlement offers. Again, however, Plaintiff fails to address the fact that, in Miller, there was
 15 simply no question as to whether a policy was in effect. This is an important factor that
 16 distinguishes this case from the one at bar as the implied covenant of good faith and fair dealing
 17 necessarily flows from the existence of a valid policy. Besides being distinguishable on that point,
 18 it cannot be understated that Allstate v Miller also stands for the proposition that Nevada has
 19 followed the genuine dispute doctrine, as set forth in Guebara v. Allstate Insurance Company,
 20 237 F.3d 987, 992 (9th Cir. 2001), as the Court in Allstate v Miller, stated:

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 22
 23 "When there is a genuine dispute regarding an insurer's legal obligations, the
 24 district court can determine if the insurer's actions were reasonable. See Lunsford v.
 25 American Guarantee & Liability Ins. Co., 18 F.3d 653, 656 (9th Cir. 1994) (interpreting
 26 California law); CalFarm Ins. Co. v. Krusiewicz, 131 Cal. App. 4th 273, 31 Cal. Rptr. 3d
 27 619, 629 (Ct. App. 2005)
 28 precedent, then the issue is reviewed de novo). 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.

1 In Homeowners Ass'n v. Associated Internat. Ins. Co., 90 Cal. App. 4th 335, 108 Cal.
 2 Rptr. 2d 776, 783 (Ct. App. 2001), the California Court of Appeals held that a bad-faith
 3 claim requires a showing that the insurer acted in deliberate refusal to discharge its
 4 contractual duties. Thus, if the insurer's actions resulted from "an honest mistake,
 5 bad judgment or negligence," then the insurer is not liable under a bad-faith
 6 theory. *Id.* (quoting Careau & Co. v. Security Pacific Business Credit, Inc., 222 Cal. App.
 7 3d 1371, 272 Cal. Rptr. 387 (Ct. App. 1990)) Pemberton v. Farmers Ins.
 8 Exchange, 109 Nev. 789, 793, 858 P.2d 380, 382 (1993) (holding that bad faith exists
 9 when an insurer acts without proper cause); Feldman v. Allstate Ins. Co., 322 F.3d 660,
 10 669 (9th Cir. 2003)

11 bad faith, plaintiff must show insurer unreasonably or without cause withheld benefits
 12 due under the policy).

13 *Id.* at 317, 329. (emphasis added) As can be seen from a full reading of the Miller decision, the
 14 case actually supports Defendant's position. Namely, that a court can review an insurer's actions
 15 – at the time they were made – to determine if they were reasonable as a matter of law.
 16 Moreover, that 'bad faith' cannot be premised upon an 'honest mistake, bad judgment or
 17 negligence.' Here, Defendant argues, UAIC actions at the time must be found to have been
 18 reasonable and, certainly were not in 'bad faith' based on a reasonable review of the record.

19 Further, it is clear that other Nevada decisions have followed this reasoning and held that
 20 "[b]ad faith is established where the insurer acts unreasonably and with knowledge that there was
 21 no reasonable basis for its conduct." Guarantee National Insurance Company v. Potter, 112 Nev.
 22 199, 206, 912 P.2d 267, 272 (1996). In American Excess Insurance Company v. MGM, 102
 23 Nev. 601, 729 P.2d 1352 (1986), the Nevada Supreme Court held that an insurer cannot be found
 24 liable for bad faith, as a matter of law, if it had a reasonable basis to contest coverage. The Court
 25 in American Excess, *supra*, defined bad faith as "an actual or implied awareness of the absence
 26 of a reasonable basis for denying benefits of the policy." *Id.* at 605. The Court stated that
 27 "because we conclude that AEI's interpretation of the contract was reasonable, there was no
 28 basis for concluding that AEI acted in bad faith." *Id.* In applying Nevada law, the United States
 District Court in Pioneer Chlor Alcholi Company, Inc. v. National Union Fire Insurance

1 Company, 863 F. Supp. 1237 (D. Nev. 1994) also stated that where a legitimate contractual
2 dispute exists, the insurer "is entitled to its day in court on such an issue without facing a claim
3 for bad faith simply because it disagrees with [the insured]." *Id.* at 1250.

4 Accordingly, from the Allstate holding and, other decisions cited herein, it is clear that
5 the key to a bad faith claim is **whether or not the insurer's decision regarding coverage is**
6 **reasonable** and, that when the insureds actions are reasonable, the Court *can decide so as a*
7 *matter of law and dismiss the extra-contractual claims.* Moreover, that the insurer's decisions
8 must be reviewed from the facts *at the time it made the decision* – not in hindsight. Here,
9 Plaintiffs claims that they are entitled to \$3.5 million dollar default judgment, far in excess of
10 Mr. Lewis' \$15,000 policy limits, apparently because of Defendant's 'bad faith' for their failure
11 to defend under Lewis' policy. However it seems clear from the discussion above, regarding
12 Defendant's actions on related to a policy which all evidence shows was not in force at the time -
13 by plaintiff's admission **no payment was made between June 12, 2007 and July 10, 2007** –
14 that Defendant's actions were reasonable. Now, years later, after an ambiguity is claimed in a
15 renewal, while Defendant may be found to owe coverage on an implied contract, the Plaintiffs'
16 must admit that a *genuine dispute* existed as to coverage for the loss at the time. In fact,
17 Plaintiffs' Counsel admitted just this fact at hearing on the initial Motion for summary judgment
18 when he admitted Defendant's *reading of the renewal was reasonable.* See transcript of 12/7/10
19 hearing, attached hereto as Exhibit 'J', p. 35, Lines 20-24. Indeed a Federal District Court Judge
20 has also already found UAIC's interpretation of the renewals (and, therefore their actions
21 thereafter) was a reasonable one in granting summary judgment. See Document No. 42, herein.

22 Additionally, Defendant notes that Lewis cannot, in good faith, complain he did not know
23 of settlement offers. As he admits in his answers to interrogatories¹⁴, he was in communication
24 with Counsel for Plaintiff within days after the loss. As such, Counsel for Plaintiff would
25 certainly have told him he offered settlement for policy and that he planned to seek a multi-

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28 ¹⁴ See Exhibit '3' to Plaintiffs' Motion for summary judgment

1 million dollar default judgment against Lewis, should his insurer fail to tender same policy
2 limits.

3 Moreover, contrary to Plaintiff's arguments that UAIC did 'no investigation' is also
4 misstating the record. The fact is, UAIC also investigated this coverage issue several times
5 before declining coverage and defense of the underlying suit. In this case, UAIC investigated
6 coverage when notified of the loss by both confirming the lapse through their underwriting
7 department. This was done when Lewis initially called to check coverage (on July 13, 2007) as
8 documented by the underwriting note, whereupon customer service representative Eric Cook
9 informed him the loss occurred in a period of no coverage after confirming this with the
10 Underwriting Department. *See Deposition of Eric Cook attached hereto as Exhibit 'F', p. 36,*
11 *Lines 17-23, p. 53, lines 4- 10, and copy of Underwriting notes confirming call with Lewis,*
12 *attached hereto as Exhibit '1' to deposition of Giselle Molina, Exhibit 'B', hereto*¹⁵. Thereafter,
13 when Counsel for the Nalders' made a formal claim upon UAIC, the Company double-checked
14 coverage with underwriting and, contacted the insurance agency, U.S. Auto, who confirmed
15 Lewis had not paid his premium until July 10, 2007 and provided a copy of the receipt.
16 Additionally, UAIC attempted to contact Lewis, but was unsuccessful. *See copy of deposition*
17 *testimony of Jan Cook, attached hereto as Exhibit 'G', p. 34, lines 8-19, p. 35, lines 7-18, p. 50,*
18 *lines 11-14, p. 56, lines 2-15, p. 68, lines 13-16, p. 72, lines 14-20; See Copy of Deposition*
19 *testimony of Giselle Molina, attached hereto as Exhibit 'B', p. 30, lines 4-5, and see copy of*
20 *UAIC's claims notes, attached as Exhibit '4' to the deposition of Giselle Molina, Exhibit 'B',*
21 *hereto.*

22 As such, based on all the evidence available at the time¹⁶ and, after investigating
23 coverage, UAIC denied coverage for the loss based upon a reasonable basis that there was no
24

25 ¹⁵ This same note was used at Eric Cook's deposition, but Plaintiff never supplied the Exhibit to
26 the court reporter.

27 ¹⁶ The Nevada Supreme Court in *Allstate v Miller*, cited above, specifically followed the
28 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

1 policy in force and, therefore, no coverage for the loss. Under the case law cited herein, this
2 cannot be a basis for bad faith remedies against UAIC. This is a simple disagreement about the
3 coverage for a loss where the putative insured, Lewis, *admitted he made no timely payment*
4 *under the terms of the policy* and only in this case claimed an ambiguity in the renewal that he
5 did not understand. At the time of the claim UAIC reviewed coverages, confirmed the payment
6 was late with the insurance agent and, tried to contact Lewis. Based on the information available
7 to it at the time, UAIC made a reasonable decision that there was *no policy in effect*. The former
8 Judge hearing this case and, Plaintiff's counsel, have agreed UAIC's position regarding the
9 renewal statement and, therefore, coverage, was a reasonable one. Under these circumstances,
10 even if this Court ultimately implies a contract due to the ambiguity, there can be no basis for a
11 claim for "bad faith," other extra-contractual claims, or punitive damages. Plaintiff cannot, as a
12 matter of law, establish that Defendant's determination that no policy was in force for the loss is
13 unreasonable or without proper cause. Rather, under the "genuine dispute" doctrine, it is the
14 Defendant whom is entitled to summary judgment as to Plaintiffs' extra-contractual claims (for
15 breach of the covenant of good faith and fair dealing and for violations of the Nevada Unfair
16 Claims Practices Act and Nevada Administrative Code) and claim for punitive damages.

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18
19 2. *The standard for insurer bad faith in this case is whether UAIC acted reasonably*
20 *and/or, whether its denial was based upon a "genuine dispute" as to coverage.*

21
22 Cases which are more analogous to the case at bar hold that the duty to defend is not
23 absolute. Further, that a potential for coverage only exists when there is arguable or possible
24 coverage. United Insurance Co. v. Frontier Insurance Company, Inc., 120 Nev. 678 (2004.); Turk
25 v. TIG Ins. Co., 616 F. Supp. 2d 1044 (2009). Determining whether an insurer owes a duty to
26 defend is achieved by comparing the allegations of the complaint with the terms of the policy. Id.
27 In Turk v. TIG Ins. Co., 616 F. Supp. 2d 1044 (2009), the policy did not list the company the
28

1 insured was president of as an additional insured and, as such, there was no possibility for
 2 potential coverage for that company and, therefore, no duty to defend. Defendant believes the
 3 situation in that case, where an insured was clearly not listed on the policy, is more similar to the
 4 case at bar where no policy was in existence. Clearly, an insurer who looks at a policy's
 5 declarations and determines and insured is not listed must be comparable to a situation where the
 6 insurer finds no policy to even be in effect for the loss. In this way, like the insurer in Turk, it
 7 was reasonable for UAIC to believe there was no *potential for coverage*.

8
 9 In short, in Nevada, the key to a bad faith claim is whether or not the insurer's decision
 10 regarding coverage is reasonable. "Bad faith is established where the insurer acts unreasonably
 11 and with knowledge that there was no reasonable basis for its conduct." Guarantee National
 12 Insurance Company v. Potter, 112 Nev. 199, 206, 912 P.2d 267, 272 (1996). In American
 13 Excess Insurance Company v. MGM, 102 Nev. 601, 729 P.2d 1352 (1986), the Nevada Supreme
 14 Court held that an insurer cannot be found liable for bad faith, as a matter of law, if it had a
 15 reasonable basis to contest coverage. The Court in American Excess, *supra*, defined bad faith as
 16 "an actual or implied awareness of the absence of a reasonable basis for denying benefits of the
 17 policy." *Id.* at 605. The Court stated that "because we conclude that AEI's interpretation of the
 18 contract was reasonable, there was no basis for concluding that AEI acted in bad faith." *Id.* The
 19 Ninth Circuit has thus recognized the "genuine dispute" doctrine. The "genuine dispute" doctrine
 20 protects insurers from bad faith claims where the insurer can show that there was a genuine
 21 dispute about coverage. See Beltran v. Allstate, 2001 U.S. Dist. LEXIS 9614 (2001).

22 Similarly, the Ninth Circuit has recognized the "genuine dispute" doctrine. This doctrine
 23 stems from the recognition that insurance companies have to investigate claims and should be
 24 allowed to do so without fear of accusations of bad faith. Courts hold that the implied duty to
 25 investigate claims allows the insurer to give its own interests consideration equal to that it gives
 26 its insureds. The "genuine dispute" doctrine protects insurers from bad faith claims where the
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1 insurer can show that there was a genuine dispute about coverage. See Beltran v. Allstate, 2001
2 U.S. Dist. LEXIS 9614 (2001). The existence of a genuine dispute as to Defendant's legal
3 liability to pay benefits precludes, as a matter of law, extra-contractual recovery against the
4 insurer for breach of the implied covenant of good faith and fair dealing. Opsal v. United
5 Services Auto Association, 10 Cal. Rptr. 2d 353 (1991). The key to a bad faith claim is whether
6 or not the insurer's denial of coverage was reasonable. Under the "genuine dispute" doctrine a
7 bad faith claim can be dismissed on summary judgment if the defendant can show that there was
8 a genuine dispute as to coverage. See Guebara v. Allstate Insurance Company, 237 F.3d 987, 992
9 (9th Cir. 2001) (citations omitted). As discussed in more detail in section '1' above, the Nevada
10 Supreme Court has recognized the 'genuine dispute' doctrine in its holding in Allstate v Miller,
11 125 Nev. 300, 212 P.3d 318 (NV. 2009).

12
13 Nevada law states that a potential for coverage only exists when there is arguable or
14 possible coverage. United Insurance Co. v. Frontier Insurance Company, Inc., 120 Nev. 678
15 (2004). In United Insurance Co. v. Frontier Insurance Co., the Nevada Supreme court found that
16 the insurer was not liable for breach of the duty to defend when it failed to defend a loss that did
17 not occur within the policy term. Also, two cases from the Ninth Circuit Court of Appeals are
18 instructive here and, although based on California law, one has been cited and, relied upon by the
19 Nevada Supreme Court in the Allstate v Miller, 125 Nev. 300, 212 P.3d 318 (NV. 2009),
20 holding, cited above. In Lunsford v. American Guarantee Liab. Ins. Co., 18 F.3d 653 (9th Cir.
21 1994), the Court held that an insurer who investigated coverage and based its decision not to
22 defend on reasonable construction of policy was not liable for bad faith breach of the duty to
23 defend *even after* the Court resolved the ambiguity in the contract in favor of the insured.
24 Similarly, in a prior case, Franceschi v Amer. Motor. Ins. Co., 852 F.2d 1217 (9th Cir. 1988) the
25 Court again resolved an ambiguity in favor of insured, but held the insurer's position had been
26 reasonable and granted summary judgment as to bad faith claims.
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1 Accordingly, from the Allstate and Guebara holdings and, other decisions cited herein, it
2 is clear that the key to a bad faith claim is **whether or not the insurer's decision regarding**
3 **coverage is reasonable** and, that when the insurer's actions are reasonable, the Court can decide
4 so as a matter of law and dismiss extra-contractual claims. Moreover, under the United Ins. v
5 Frontier decision Nevada courts have held an insurer is not liable for bad faith breach of the duty
6 to defend for a loss occurring outside a policy term – even when the insured argued the
7 Complaint alleged actions within the term. Finally, the holdings of the Lunsford and Franceschi
8 cases hold that an insurer will not be found liable for bad faith even if an ambiguity is later
9 resolved in favor of the insured.

10 Here, Plaintiffs claims that they are entitled to \$3.5 million dollar default judgment, far in
11 excess of Mr. Lewis' \$15,000 policy limits, apparently because of Defendant's 'bad faith' for
12 their failure to defend under Lewis' policy. However it seems clear from the discussion above,
13 regarding Defendant's actions on the policy - which was not in force at the time by plaintiff's
14 admission **no payment was made between June 12, 2007 and July 10, 2007** - that Plaintiffs'
15 must admit a *genuine dispute* exists as to coverage for the loss. In fact, Plaintiffs' Counsel
16 admitted just this fact at hearing on the initial Motion for summary judgment when he admitted
17 Defendant's reading of the renewal was reasonable. *See Exh. J, hereto, p. 35, lines 20-24.*
18 Indeed a Federal District Court Judge has also already found UAIC's interpretation of the
19 renewals (and, therefore their actions thereafter) was a reasonable one in granting summary
20 judgment. Therefore, again, this lawsuit arises from a contested claim for liability insurance on
21 the date of the loss underlying the Nalders' claims. Defendants – with good reason – argue
22 Plaintiff Lewis simply had no coverage in effect on the date of loss. At the very least, regardless
23 of this Court's ultimate determination regarding coverage the Defendant, United Auto, had a
24 *reasonable basis* to deny coverage for the loss and lawsuit underlying Plaintiff's Complaint as
25 the records clearly indicate a failure to make timely payment and expiration of the policy before
26 the loss. Under Nevada law the Defendant need not be correct in denial – merely that it has a
27 reasonable basis for doing so. Defendants maintain that Plaintiff's admission that he failed to pay
28

1 his renewal premium for his July 2007 policy until after the loss occurring July 8, 2007 clearly
2 created a reasonable basis for United Auto to disclaim coverage for the loss.

3 As such, in the alternative to the Motion for Summary Judgment, even if this Court
4 ultimately determines that Defendant was wrong with respect to its determination of Plaintiff's
5 coverage for this loss, there still is no basis for Plaintiff's extra-contractual claims or claim for
6 punitive damages. Under the "genuine dispute" doctrine, therefore, Defendant argues it is
7 entitled to summary judgment as to Plaintiffs' extra-contractual claims (for breach of the
8 covenant of good faith and fair dealing and for violations of the Nevada Unfair Claims Practices
9 Act and Nevada Administrative Code) and claim for punitive damages. *See Defendant's Counter*
10 *Motion for summary judgment, herein.*

12 **C. That in the alternative, even should this Court grant summary judgment on any**
13 **extra-contractual remedies, certainly a material issue of fact remains as to**
14 **whether Plaintiff's damages were proximately caused by any breach.**

15 Finally, Plaintiffs' neatly try to 'tie up' their Motion for summary judgment that arguing
16 that, if Defendant is found guilty of breach of the implied covenant of good faith and fair
17 dealing, this Court should also find all damages (included the \$3.5 million dollar default
18 judgment and costs and fees, etc.) were proximately caused by Defendant as a matter of law.
19 Defendant of course vehemently disputes it committed any 'bad faith.' However, even should
20 this Court so find summary judgment on these issues, Defendant argues that, in the alternative,
21 these damages not be found against Defendant as a matter of law. Neither the cases nor facts of
22 this case support such a finding.

23 In support of their argument, Plaintiff essentially relies on two cases. Plaintiff cites
24 United Insurance Co. v. Frontier Insurance Company, Inc., 120 Nev. 678 (2004) for the
25 proposition that where there is arguable or possible coverage, Defendant should have resolved
26 the issue in favor of the insured in providing coverage and a defense. Next, Plaintiff relies on
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1 Pershing Park Villas v. United Pac. Ins. Co., 219 F.3d 895 (9th Cir. 2000) for the proposition that
2 by not providing a defense, the ensuing default judgment is proximately caused by the
3 Defendant's breach. However, when one reviews these cases it is clear that Plaintiff's argument
4 falls apart.

5
6 In United Insurance Co. v. Frontier Insurance Co., the Nevada Supreme court actually
7 found that the insurer was *not liable* for breach of the duty to defend when it failed to defend a
8 loss that did not occur within the policy term. Accordingly, United Insurance actually supports
9 the Defendant's position as here Defendant argues the policy expired *prior to the loss*. Similarly,
10 two cases cited above; also support Defendant's position. In Lunsford v. American Guarantee
11 Liab. Ins. Co., 18 F.3d 653 (9th Cir. 1994), the Court held that an insurer who investigated
12 coverage and based its decision not to defend on reasonable construction of policy was not liable
13 for bad faith breach of the duty to defend *even after* the Court resolved the ambiguity in the
14 contract in favor of the insured. Also, in a prior case, Franceschi v Amer. Motor. Ins. Co., 852
15 F.2d 1217 (9th Cir. 1988) the Court again resolved an ambiguity in favor of insured, but held the
16 insurer's position had been reasonable and granted summary judgment as to bad faith claims.

17
18 Finally, the Pershing Park Villas decision is also distinguishable from the case at bar. In
19 that case, decided on California law, the insurer had withdrew its defense shortly before trial,
20 disclaiming coverage, however there was never any question as to whether there was a policy *in*
21 *force*. Thereafter, the policy was found to provide coverage and, while the court found the
22 insurer responsible for its breach of the duty to defend, it did so based in part on evidence
23 presented that the insurer revealed documents *showing it knew there was a potential for*
24 *coverage*. Obviously, then, this case is completely distinguishable from the present case as
25 Defendant has maintained there was never a policy even in force covering the loss (i.e. not just a
26 question as to coverage) and, more importantly, there has never been a showing that UAIC had
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1 any reason to believe there was a potential for coverage at that time. In fact, the case history
2 shows Plaintiff changed his argument (to claim ambiguity) during this litigation.

3 Therefore, as the cases cited by Plaintiffs' are clearly distinguishable, Plaintiffs' cannot
4 meet their burden regarding their assertion that Defendant proximately caused their damages
5 (including the default judgment). In this way, even should this Court grant summary judgment on
6 the bad faith claims, Defendant argues that, in the alternative, the court deny Plaintiffs' Motion
7 that this Court find Plaintiffs' damages as a matter of law as, at the very least, questions of fact
8 remain.
9

10 IV.

11 CONCLUSION

12 Based upon the foregoing, Defendants UNITED AUTOMOBILE INSURANCE
13 COMPANY respectfully requests that this Court deny Plaintiffs' Motion for Summary Judgment
14 in its entirety.

15 In the alternative, should this Court find an ambiguity in the renewal statement and,
16 create an implied contract, that this Court find that Defendant did not breach the implied
17 covenant of good faith and fair dealing. Finally, and in the alternative, that should this Court
18 grant summary judgment on the breach of the covenant of good faith and fair dealing that this
19 Court find a material issue remains as to whether any such breach proximately caused Plaintiffs'
20 claimed damages.

21 DATED this 26th day of March 2013.

22 ATKIN WINNER & SHERROD

23
24 /s/Matthew J. Douglas
25 Matthew J. Douglas
26 Nevada Bar No. 11371
27 1117 S. Rancho Drive
28 Las Vegas, Nevada 89102
Attorneys for Defendant

1 CERTIFICATE OF ELECTRONIC SERVICE

2 I DO HEREBY CERTIFY that I am an employee of ATKIN WINNER & SHERROD
3 and on the 26th day of March, 2013, I did serve, via electric service, the foregoing
4 **DEFENDANT UNITED AUTOMOBILE INSURANCE COMPANY'S OPPOSITION**
5 **TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

6 **ORAL ARGUMENT REQUESTED**

7
8 /s/ Victoria Hall

9 An employee of ATKIN WINNER & SHERROD

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EXHIBIT “G”

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JAMES NALDER, Guardian Ad Litem for
minor Cheyanne Nalder, real party in
interest, and GARY LEWIS, Individually,

Plaintiffs,

v.

UNITED AUTOMOBILE INSURANCE
COMPANY, DOES I through V, and ROE
CORPORATIONS I through V, inclusive,

Defendants.

2:09-cv-1348-RCJ-GWF

ORDER

Currently before the Court are a Motion for Summary Judgment (#88) and a Counter-Motion for Summary Judgment (#89). This case, originally ruled upon by the Honorable Edward C. Reed, is on partial remand from the U.S. Court of Appeals for the Ninth Circuit. The Court heard oral argument on October 22, 2013.

BACKGROUND

In July 2009, Defendant United Automobile Insurance Company ("UAIC") filed a petition for removal based on diversity jurisdiction. (Pet. for Removal (#1) at 1-2). Defendant attached Plaintiffs James Nalder, guardian ad litem for minor Cheyanne Nalder, real party in interest, and Gary Lewis's (collectively "Plaintiffs") complaint which had been filed in the Eighth Judicial District in Clark County, Nevada. (Compl. (#1) at 5-16).

The complaint alleged the following. (*Id.* at 5). Lewis was the owner of a 1996 Chevy Silverado and had an automobile insurance policy with Defendant on July 8, 2007. (*Id.* at 6). On July 8, 2007, Lewis drove over top of Cheyanne while Cheyanne was a pedestrian in a residential area and caused Cheyanne serious personal injuries. (*Id.* at 7). Cheyanne made

1 a claim to Defendant for damages and offered to settle the claim for personal injuries and
2 damages against Lewis within the policy limits. (*Id.*). Defendant refused to settle and denied
3 the claim all together indicating that Lewis did not have coverage at the time of the accident.
4 (*Id.*). Defendant was required to provide insurance coverage under the policy. (*Id.* at 9).
5 Defendant never informed Lewis that Cheyanne was willing to settle the claim for the sum of
6 \$15,000, the policy limit. (*Id.*). Due to the dilatory tactics and failure of Defendant to protect
7 its insured, Cheyanne filed a complaint on October 9, 2007 against Lewis for her personal
8 injuries and damages. (*Id.*). Cheyanne procured a default judgment in the amount of
9 \$3,500,000 against Lewis. (*Id.*). Plaintiffs alleged breach of contract, breach of the implied
10 covenant of good faith and fair dealing, bad faith, breach of Nev. Rev. Stat. § 686A.310, and
11 fraud against Defendant. (*Id.* at 9-14).

12 In March 2010, Defendant filed a motion for summary judgment on all claims. (See
13 Mot. for Summ. J. (#17)). In December 2010, Judge Reed issued an order granting
14 Defendant's motion for summary judgment on all claims and directed the Clerk of the Court
15 to enter judgment accordingly. (Order (#42) at 13). The order provided the following factual
16 history:

17 Lewis was the owner of a 1996 Chevy Silverado insured, at various times,
18 by Defendant. Lewis had an insurance policy issued by UAIC on his vehicle
19 during the period of May 31, 2007 to June 30, 2007. Lewis received a renewal
20 statement, dated June 11, 2007, instructing him to remit payment by the due
21 date of June 30, 2007 in order to renew his insurance policy. The renewal
22 statement specified that "[t]o avoid lapse in coverage, payment must be received
prior to expiration of your policy." The renewal statement listed June 30, 2007
as effective date, and July 31, 2007 as an "expiration date." The renewal
statement also states that the "due date" of the payment is June 30, 2007, and
repeats that the renewal amount is due no later than June 30, 2007. Lewis
made a payment on July 10, 2007.

23 Defendant then issued a renewal policy declaration and automobile
24 insurance cards indicating that Lewis was covered under an insurance policy
between July 10, 2007 to August 10, 2007.

25 (*Id.* at 2-3).¹

26 The order stated the following. (*Id.* at 5). Defendant sought summary judgment on all
27

28 ¹ Record citations omitted.

1 claims on the basis that Lewis had no insurance coverage on the date of the accident. (*Id.*),
2 Plaintiffs argued that Lewis was covered on the date of the accident because the renewal
3 notice was ambiguous as to when payment had to be received in order to avoid a lapse in
4 coverage and that any ambiguities had to be construed in favor of the insured. (*Id.* at 5-6).
5 Defendants, in the alternative, requested that the Court dismiss Plaintiffs' extra-contractual
6 claims or bifurcate the claim of breach of contract from the remaining claims. (*Id.* at 6).

7 The order stated the following regarding Lewis's insurance coverage on July 8, 2007:

8 Plaintiffs contend that Lewis was covered under an insurance policy on
9 July 8, 2007, the date of the accident, because Lewis' payment on July 10, 2007
10 was timely. Plaintiffs rely on the sentence "[t]o avoid lapse in coverage, payment
11 must be received prior to expiration of your policy" contained in the renewal
12 statement. Defendant contends that "expiration of your policy" did not refer to
13 the expiration date of the renewal policy listed on the renewal statement, but to
14 the expiration of Lewis' current policy, which coincided with the listed due date
15 on the renewal statement. Plaintiffs contend that Lewis reasonably believed that
16 while there was a due date on which UAIC preferred to receive payment, there
17 was also a grace period within which Lewis could pay and avoid any lapse in
18 coverage.

19 The renewal statement cannot be considered without considering the
20 entirety of the contract between Lewis and UAIC. Plaintiff attached exhibits of
21 renewal statements, policy declarations pages, and Nevada automobile
22 insurance cards issued by UAIC for Lewis. The contract, taken as a whole,
23 cannot reasonably be interpreted in favor of Plaintiffs' argument.

24 Lewis received a "Renewal Policy Declarations" stating that he had
25 coverage from May 31, 2007 to June 30, 2007 at 12:01 A.M. (Pls' Opp., Exhibit
26 A at 29 (#20-1); Pls' Supp., Exhibit A at 11-12 (#26-1); Pls' Supp., Exhibit A at
27 15 (#26-1).) The declarations page stated that "[t]his declaration page with
28 'policy provisions' and all other applicable endorsements complete your policy."
(Pls' Opp., Exhibit A at 29 (#20-1).) Lewis also received a Nevada Automobile
Insurance Card issued by UAIC stating that the effective date of his policy was
May 31, 2007, and the expiration date was June 30, 2007. (*Id.* at 30; Pls' Supp.,
Exhibit A at 11-12 (#26-1).) The renewal statement Lewis received in June must
be read in light of the rest of the insurance policy, contained in the declarations
page and also summarized in the insurance card.

"In interpreting a contract, 'the court shall effectuate the intent of the
parties, which may be determined in light of the surrounding circumstances if not
clear from the contract itself.'" *Anvui, LLC v. G.L. Dragon, LLC*, 163 P.3d 405,
407 (Nev. 2007). Plaintiffs contend that there was a course of dealing between
Lewis and UAIC supporting a reasonable understanding that there was a grace
period involved in paying the insurance premium for each month-long policy. In
fact, the so-called course of dealing tilts, if at all, in favor of Defendant. Lewis
habitually made payments that were late. UAIC never retroactively covered
Lewis on such occasions. Lewis' new policy, clearly denoted on the declarations
page and insurance cards Lewis was issued, would always become effective on
the date of the payment.

Plaintiffs point to the fact that in April 2007, Lewis was issued a revised
renewal statement stating that the renewal amount was due on May 6, 2007, a
date after the effective date of the policy Lewis would be renewing through the

1 renewal amount. This isolated occasion occurred due to the fact that Lewis
2 added a driver to his insurance policy, resulting in an increase in the renewal
3 amount, after UAIC had previously sent a renewal notice indicating that a lower
4 renewal amount was due on April 29, 2007. UAIC issued a revised renewal
5 statement dated April 26, 2007, and gave Lewis an opportunity to pay by May
6 6, 2007, instead of April 29, 2007, when the original renewal amount had been
due upon expiration of his April policy. In that case, Lewis made a timely
payment on April 28, 2007, and therefore there is not a single incident Plaintiffs
can point to in which Lewis was retroactively covered for a policy before
payment was made, even in the single instance UAIC granted him such an
opportunity due to a unique set of circumstances.

7 (*Id.* at 7-9).

8 Plaintiffs appealed. (Notice of Appeal (#46)). In a two-page memorandum disposition,
9 the Ninth Circuit held, *inter alia*, the following:

10 We reverse the district court's grant of United Automobile Insurance
11 Company's motion for summary judgment with respect to whether there was
12 coverage by virtue of the way the renewal statement was worded. Plaintiffs
13 came forward with facts supporting their tenable legal position that a reasonable
14 person could have interpreted the renewal statement to mean that Lewis's
15 premium was due by June 30, 2007, but that the policy would not lapse if his
premium were "received prior to expiration of [his] policy," with the "expiration
date" specifically stated to be July 31, 2007. We remand to the district court for
trial or other proceedings consistent with this memorandum. The portion of the
order granting summary judgment with respect to the statutory arguments is
affirmed.

16 (Ninth Cir. Mem. Dispo. (#82) at 2-3).

17 The pending motions now follow.

18 LEGAL STANDARD

19 In reviewing a motion for summary judgment, the court construes the evidence in the
20 light most favorable to the nonmoving party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.
21 1996). Pursuant to Fed.R.Civ.P. 56, a court will grant summary judgment "if the movant shows
22 that there is no genuine dispute as to any material fact and the movant is entitled to judgment
23 as a matter of law." Fed.R.Civ.P. 56(a). Material facts are "facts that might affect the outcome
24 of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106
25 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A material fact is "genuine" if the evidence is such
26 that a reasonable jury could return a verdict for the nonmoving party. *Id.*

27 The moving party bears the initial burden of identifying the portions of the pleadings and
28 evidence that the party believes to demonstrate the absence of any genuine issue of material

1 fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265
2 (1986). A party asserting that a fact cannot be or is genuinely disputed must support the
3 assertion by "citing to particular parts of materials in the record, including depositions,
4 documents, electronically stored information, affidavits or declarations, stipulations (including
5 those made for purposes of the motion only), admissions, interrogatory answers, or other
6 materials" or "showing that the materials cited do not establish the absence or presence of a
7 genuine dispute, or that an adverse party cannot produce admissible evidence to support the
8 fact." Fed. R. Civ. P. 56(c)(1)(A)-(B). Once the moving party has properly supported the
9 motion, the burden shifts to the nonmoving party to come forward with specific facts showing
10 that a genuine issue for trial exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
11 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). "The mere existence of a
12 scintilla of evidence in support of the plaintiff's position will be insufficient; there must be
13 evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252,
14 106 S.Ct. at 2512. The nonmoving party cannot defeat a motion for summary judgment "by
15 relying solely on conclusory allegations unsupported by factual data." *Taylor v. List*, 880 F.2d
16 1040, 1045 (9th Cir. 1989). "Where the record taken as a whole could not lead a rational trier
17 of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita*, 475
18 U.S. at 587, 106 S.Ct. at 1356.

19 DISCUSSION

20 I. Plaintiff James Nalder's Motion for Summary Judgment (#88)

21 Nalder moves for partial summary judgment as to liability against Defendant. (Mot. for
22 Summ. J. (#88) at 1). Nalder makes three arguments which will be addressed in turn.

23 A. Ambiguous Contract

24 Nalder argues that because the renewal statement was ambiguous it must be strictly
25 construed against the insurance company pursuant to Nevada law and, thus, Lewis had
26 coverage at the time of the accident. (Mot. for Summ. J. (#88) at 10).

27 In response, Defendant argues that Lewis's renewal statement is not ambiguous and
28 clearly demanded remittance of the policy premium for the subsequent term by the expiration

1 of the present policy period. (Opp'n to Mot. for Summ. J. (#90) at 15). Defendant argues that
2 a material issue of fact remains over whether the renewals were ambiguous. (*Id.*).

3 Nalder filed a reply. (Reply to Mot. for Summ. J. (#95)).

4 "Summary judgment is appropriate in contract cases only if the contract provision or the
5 contract in question is unambiguous." *Econ. Forms Corp. v. Law Co., Inc.*, 593 F.Supp. 539,
6 540 (D. Nev. 1984). A contract is ambiguous if it is reasonably susceptible to more than one
7 interpretation. *Shelton v. Shelton*, 78 P.3d 507, 510 (Nev. 2003). Whether a contract is
8 ambiguous is a question of law. *Margrave v. Dermody Properties, Inc.*, 878 P.2d 291, 293
9 (Nev. 1994). "The interpretation of an ambiguous contract is a mixed question of fact and
10 law." *Econ. Forms Corp.*, 593 F.Supp. at 541. However, in Nevada, "any ambiguity or
11 uncertainty in an insurance policy must be construed against the insurer and in favor of the
12 insured." *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, 99 P.3d 1153, 1156 (Nev. 2004).

13 In this case, the Court finds that the renewal statement is ambiguous based on the
14 Ninth Circuit's reverse and remand. The Court finds that the renewal statement is reasonably
15 susceptible to more than one interpretation as demonstrated by both Judge Reed and the
16 Ninth Circuit's conflicting interpretations. As such, the Court finds that, pursuant to Nevada
17 law, this ambiguity is construed against Defendant and in favor of the insured such that Lewis
18 was covered by the insurance policy on the date of the accident. The Court grants summary
19 judgment on this issue in favor of Plaintiffs.

20 B. Bad Faith

21 Nalder argues that Defendant's actions constitute bad faith. (Mot. for Summ. J. (#88)
22 at 19). Specifically, Nalder argues that Lewis properly renewed his policy pursuant to the
23 policy's renewal statements, Defendant renewed Lewis's policy, and then Defendant claimed
24 that there was a lapse in coverage. (*Id.*). Nalder asserts that Defendant never investigated
25 to determine whether Lewis was covered, made a snap decision that there was no coverage,
26 and left Lewis bereft of protection against Cheyanne's lawsuit. (*Id.*). Nalder contends that
27 these facts constitute bad faith which requires Defendant to compensate Lewis, pay for the
28 judgment currently entered against him, and pay for compensatory and punitive damages.

1 (Id.).

2 In response, Defendant argues that every case cited by Nalder involves a situation
3 where there existed a policy in force at the time of the loss. (Opp'n to Mot. for Summ. J. (#90)
4 at 21). Defendant asserts that, in this case, Nalder asks the Court to find an implied policy
5 from an ambiguity in the renewal. (Id. at 22). Defendant argues that Nevada law provides that
6 a court may review an insurer's actions at the time they were made to determine whether the
7 insurer's actions were reasonable as a matter of law and that bad faith cannot be premised
8 upon an honest mistake, bad judgment, or negligence. (Id. at 25). Defendant asserts that
9 Nevada law provides that an insurer cannot be found liable for bad faith, as a matter of law,
10 if it had a reasonable basis to contest coverage. (Id.). Defendant contends that if an insurer's
11 actions are reasonable the court can decide as a matter of law to dismiss the extra-contractual
12 claims. (Id. at 26). Defendant asserts that because Lewis admits that he did not make any
13 policy payments between June 12, 2007 and July 10, 2007 his actions were reasonable. (Id.).
14 Defendant contends that even if it may be found to owe coverage on an implied contract,
15 Plaintiffs must admit that a genuine dispute existed as to coverage at the time of the accident.
16 (Id.).

17 Nalder filed a reply. (Reply to Mot. for Summ. J. (#95)).

18 Nevada law imposes the covenant of good faith and fair dealing on insurers. *Allstate*
19 *Ins. Co. v. Miller*, 212 P.3d 318, 324 (Nev. 2009). A violation of the covenant gives rise to a
20 bad-faith tort claim. *Id.* The Nevada Supreme Court has defined "bad faith as 'an actual or
21 implied awareness of the absence of a reasonable basis for denying benefits of the [insurance]
22 policy.'" *Id.* (quoting *Am. Excess Ins. Co. v. MGM*, 729 P.2d 1352, 1354-55 (Nev. 1986)). "To
23 establish a prima facie case of bad-faith refusal to pay an insurance claim, the plaintiff must
24 establish that the insurer had no reasonable basis for disputing coverage, and that the insurer
25 knew or recklessly disregarded the fact that there was no reasonable basis for disputing
26 coverage." *Powers v. United Servs. Auto. Ass'n*, 962 P.2d 596, 604 (Nev. 1998) *opinion*
27 *modified on denial of reh'g*, 979 P.2d 1286 (Nev. 1999).

28 In this case, the Court denies Nalder's motion for summary judgment on the bad faith

1 claims. The procedural history of this case demonstrates that Defendant had a reasonable
2 basis for disputing coverage during the time of the incident. As demonstrated by Judge
3 Reed's original order, there was arguably sufficient evidence to find a basis for Defendant to
4 deny Lewis benefits of the insurance policy. Even though the Ninth Circuit reversed and
5 remanded Judge Reed's original order, this Court finds that the procedural history of this case
6 demonstrates that Defendant had a reasonable basis to dispute coverage and, on one
7 occasion, had succeeded in that argument. The Court denies Nalder's motion for summary
8 judgment on this issue.

9 **C. Pre and Post-Judgment Interest**

10 Nalder argues that because there was arguable or possible coverage under the policy,
11 Defendant had a duty to defend Lewis. (Mot. for Summ. J. (#88) at 20). Nalder asserts that
12 Defendant's failure to provide coverage and its breach of the duty to defend was the proximate
13 cause of the default judgment being entered against Lewis. (*Id.*). Nalder contends that
14 Defendant has the duty to indemnify Lewis. (*Id.*).

15 In response, Defendant argues that there are court cases where an insurer who
16 investigated coverage and based its decision not to defend on a reasonable construction of
17 the policy was not liable for bad faith breach of the duty to defend even after the court resolved
18 the ambiguity in the contract in favor of the insured. (Opp'n to Mot. for Summ. J. (#90) at 33).

19 Nalder filed a reply. (Reply to Mot. for Summ. J. (#95)).

20 The Nevada Supreme Court has held that primary liability insurance policies create a
21 hierarchy of duties between the insurer and the insured. *Allstate Ins.*, 212 P.3d at 324. One
22 of these contractual duties is the duty to defend. *Id.* A breach of the duty to defend is a
23 breach of a contractual obligation. *See id.* at 324-25. An insurer bears a duty to defend its
24 insured whenever it ascertains facts which give rise to the potential of liability under the policy.
25 *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, 99 P.3d 1153, 1158 (Nev. 2004). Once the duty
26 to defend arises, it continues through the course of litigation. *Id.* "If there is any doubt about
27 whether the duty to defend arises, this doubt must be resolved in favor of the insured." *Id.*
28 "The purpose behind construing the duty to defend so broadly is to prevent an insurer from

1 evading its obligation to provide a defense for an insured without at least investigating the facts
2 behind a complaint." *Id.* However, the duty to defend is not absolute. *Id.* "A potential for
3 coverage only exists when there is arguable or possible coverage." *Id.* "Determining whether
4 an insurer owes a duty to defend is achieved by comparing the allegations of the complaint
5 with the terms of the policy." *Id.* If an insurer breaches the duty to defend, damages are
6 limited to attorneys' fees and costs incurred by the insured to defend the action. *See Home*
7 *Sav. Ass'n v. Aetna Cas. & Sur. Co.*, 854 P.2d 851, 855 (Nev. 1993) (holding that an insured
8 was not barred from further pursuing recovery from insurance company for fees and costs
9 incurred in defending an action); *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev.*
10 *Co., Inc.*, 255 P.3d 268, 278 (Nev. 2011) (discussing damages related to an indemnitor's duty
11 to defend an indemnitee).

12 In this case, as discussed at oral argument, the Court finds that Defendant breached
13 its contractual duty to defend Gary Lewis in the underlying action. As such, Gary Lewis's
14 damages are limited to the attorneys' fees and costs he incurred in defending that action.
15 However, the Court awards no damages to Gary Lewis because he did not incur any fees or
16 costs in defending the underlying action because he chose not to defend and, instead, took
17 a default judgment.

18 As such, the Court grants in part and denies in part Nalder's motion for summary
19 judgment. The Court grants summary judgment for Nalder on the ambiguity issue and finds
20 that there is an ambiguity in the renewal statement and, thus, the policy is construed in favor
21 of coverage at the time of the accident. Defendant must pay the policy limits of the implied
22 insurance policy. The Court denies summary judgment for Nalder on the remaining bad-faith
23 claims. The Court grants in part and denies in part summary judgment for Nalder on the duty
24 to defend issue. The Court finds that Defendant did breach its contractual duty to defend but
25 denies Nalder's request for damages for that breach.

26 **II. Defendant's Counter-Motion for Summary Judgment on All Extra-Contractual**
27 **Claims or Remedies (#89)**

28 Defendant seeks summary judgment on all of Plaintiff's claims for extra-contractual

1 remedies and/or bad faith claims because there was a genuine dispute as to whether
2 coverage existed at the time and its actions were reasonable. (Counter Mot. for Summ. J.
3 (#89) at 15). Defendant argues that because it had a reasonable basis to deny coverage there
4 can be no bad faith. (*Id.* at 16).

5 Nalder filed a response and Defendant filed a reply. (Opp'n to Counter Mot. for Summ.
6 J. (#96); Reply to Counter Mot. for Summ. J. (#97)).

7 The Court grants Defendant's counter-motion for summary judgment on Plaintiffs' extra-
8 contractual claims and/or bad faith claims. As discussed above, the procedural history of this
9 case demonstrates that Defendant had a reasonable basis for disputing coverage during the
10 time of the accident and, thus, there is no bad faith on the part of Defendant.

11 CONCLUSION

12 For the foregoing reasons, IT IS ORDERED that Plaintiff James Nalder's Motion for
13 Summary Judgment (#88) is GRANTED in part and DENIED in part. The Court grants
14 summary judgment in favor of Nalder and finds that the insurance renewal statement
15 contained an ambiguity and, thus, the statement is construed in favor of coverage during the
16 time of the accident. The Court denies summary judgment on Nalder's remaining bad-faith
17 claims.

18 IT IS FURTHER ORDERED that Defendant's Counter-Motion for Summary Judgment
19 on All Extra-Contractual Claims or Remedies (#89) is GRANTED. The Court grants summary
20 judgment on all extra-contractual claims and/or bad faith claims in favor of Defendant.

21 The Court directs Defendant to pay Cheyanne Nalder the policy limits on Gary Lewis's
22 implied insurance policy at the time of the accident.

23 The Clerk of the Court shall enter judgment accordingly.

24 Dated this 30th of October, 2013.

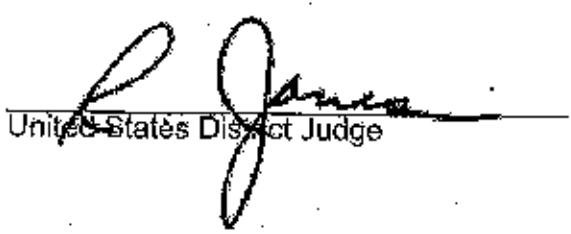
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United States District Judge

EXHIBIT “H”