Case No. _____

In the Supreme Court of Nevada

UNITED AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

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

Respondents,

and

CHEYENNE NALDER and GARY LEWIS,

Real Parties in Interest.

District Court Case Nos.
A549111 & 18-A-772220

PETITIONER'S APPENDIX
VOLUME 2
PAGES 251–500

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DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER,

Plaintiff,

vs.

GARY LEWIS and DOES I through V, inclusive,

Defendants.

CASE NO.: ~~A-549111~~ A-18-772220-C

DEPT NO.: ~~XXIX~~ Department 29

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COMPLAINT

Date: n/a
Time: n/a

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

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

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

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

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

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

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

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

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

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

C. In failing to keep a proper lookout for plaintiffs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CLAIM FOR RELIEF;

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

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

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

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

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

4. Costs of this suit;

5. Attorney's fees; and

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

DATED this 3rd day of April, 2018.

STEPHENS GOURLEY & BYWATER

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

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EXHIBIT "D"

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*, v. UNITED AUTOMOBILE INSURANCE COMPANY, *Defendant-Appellee.*	No. 13-17441 D.C. No. 2:09-cv-01348-RCJ-GWF ORDER CERTIFYING QUESTION TO THE NEVADA SUPREME COURT

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, Presiding

Argued 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.

18-01193

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.

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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

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> 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.

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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

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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

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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

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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,
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).

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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.

Cherry, J.

Gibbons, J.

Pickering, J.

Hardesty, J.

Stiglich, J.

[1]As 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.

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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

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EXHIBIT "F"

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

MTN
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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, Defendants.	07-A-549111 CASE NO.: ~~A549111~~ DEPT NO.: XXIX

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

Date: N/A

Time: N/A

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

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

Dated this 19 day of March, 2018.

STEPHENS GOURLEY & BYWATER

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

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EXHIBIT "1"

JMT
THOMAS CHRISTENSEN, ESQ.,
Nevada Bar #2326
DAVID F. SAMPSON, ESQ.,
Nevada Bar #6811
1000 S. Valley View Blvd.
Las Vegas, Nevada 89107
(702) 870-1000
Attorney for Plaintiff,

CLERK OF THE COURT

Jun 3 1 52 PM '08

FILED

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES NALDER, as Guardian ad Litem for CHEYENNE NALDER, a minor.

Plaintiffs,

vs.

GARY LEWIS, and DOES I through V, inclusive

Defendants.

CASE NO: A549111
DEPT. NO: VI

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:

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

DATED THIS 2 day of June, 2008.

DISTRICT JUDGE

Submitted by:
CHRISTENSEN LAW OFFICES, LLC.

BY: _____
DAVID SAMPSON
Nevada Bar # 6811
1000 S. Valley View
Las Vegas, Nevada 89107
Attorney for Plaintiff

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EXHIBIT "2"

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@sbglawfirm.com
Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER, Plaintiff, vs. GARY LEWIS, Defendant.	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:

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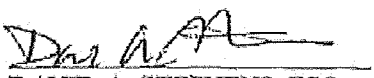
IT IS ORDERED THAT PLAINTIFF HAVE JUDGMENT AGAINST DEFENDANT in the sum of $3,500,000.00, which consists of $65,555.37 in medical expenses, and $3,434,4444.63 in pain, suffering, and disfigurement, with interest thereon at the legal rate from October 9, 2007, until paid in full.

DATED this _____ day of March, 2018.

_____
District Judge

Submitted by:
STEPHENS GOURLEY & BYWATER



DAVID A. STEPHENS, ESQ.
Nevada Bar No. 00902
STEPHENS GOURLEY & BYWATER
3636 North Rancho Dr
Las Vegas, Nevada 89130
Attorneys for Plaintiff

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EXHIBIT "G"

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

NOE
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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

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CERTIFICATE OF MAILING

I hereby certify that I am an employee of the law office of STEPHENS & BYWATER, and that on the 15th 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

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

JMT
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E: dstephens@sbglawfirm.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:

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Case Number: 07A549111

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JMT
DAVID A. STEPHENS, ESQ.
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Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER, Plaintiff, vs. GARY LEWIS, Defendant.	07A549111 CASE NO: ~~A549111~~ DEPT. NO: XXIX

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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:

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...

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

DATED this 26 day of March, 2018.

District Judge

Submitted by:
STEPHENS GOURLEY & BYWATER

DAVID A. STEPHENS, ESQ.
Nevada Bar No. 00902
STEPHENS GOURLEY & BYWATER
3636 North Rancho Dr
Las Vegas, Nevada 89130
Attorneys for Plaintiff

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EXHIBIT "H"

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

COMP
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Facsimile: (702) 656-2776
Email: dstephens@sgblawfirm.com
Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER,

Plaintiff,

vs.

GARY LEWIS and DOES I through V, inclusive,

Defendants.

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

DEPT NO.: ~~XXIX~~ Department 29

COMPLAINT

Date: n/a
Time: n/a

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

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

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

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

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

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

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

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

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

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

C. In failing to keep a proper lookout for plaintiffs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CLAIM FOR RELIEF;

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

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

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

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

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

4. Costs of this suit;

5. Attorney's fees; and

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

DATED this 3rd day of April, 2018.

STEPHENS GOURLEY & BYWATER

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

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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.

DAS:mlg
enclosure

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

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7/18/2018 3:54 PM
Steven D. Grierson
CLERK OF THE COURT

TDNP (CIV)
David A. Stephens, Esq.
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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 and DOES I through V, inclusive, Defendants.	CASE NO.: A-18-772220-C DEPT NO.: XXIX

THREE DAY NOTICE TO PLEAD

Date: n/a
Time: n/a

To: Gary Lewis, Defendant

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

Dated this 17 day of July 2018.

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

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CERTIFICATE OF MAILING

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

Gary Lewis
733 Minnesota Avenue
Glendora, CA 91740

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

An Employee of
Stephens Gourley & Bywater

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EXHIBIT "J"

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

UNITED STATES DISTRICT COURT

DISTRICT OF Nevada

Nalder et al.,

Plaintiffs,

V.

United Automobile Insurance Company,

Defendant.

JUDGMENT IN A CIVIL CASE

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

☐ **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

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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.

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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.

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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

1000 S. Valley View Blvd. Las Vegas, NV 89107 | office@injuryhelpnow.com | P: 702.870.1000 | F: 702.870.6152

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11/27/2018 10:04 AM
Steven D. Grierson
CLERK OF THE COURT

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Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

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

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

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

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

II. Factual Background of the Claims Handling Case Against UAIC

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

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

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

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

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

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

Based on that position, UAIC filed a motion to dismiss Lewis and Nalder's appeal with the Ninth Circuit for lack of standing. This allegation had not been raised in the trial court. It was something UAIC concocted solely for its own benefit. This allegation was brought for the first time in the appellate court. UAIC ignored all of the tolling statutes and presented new evidence in the appeal process, arguing Nalder's underlying $3,500,000.00 judgment against Lewis 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. The only proof that it expired was UAIC counsel's affidavit that no renewal pursuant to NRS 17.124 had been filed.

III. Factual Background of 2018 Litigation

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

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

Nalder then filed a separate action with three distinct claims for relief, pled in the alternative. The first claim is an action on the amended judgment which will result in a new judgment which will 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 claim is for declaratory relief determining if and when a renewal under NRS 17.214 must be filed and when the statute of limitations, which is subject to tolling provisions, will run on the judgment.

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

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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, and most are unnecessarily early; however, out of an abundance of caution, she brings them to maintain and enforce her judgment against Lewis.

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

IV. ARGUMENT

NRCP 42(a) states:

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

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

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

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

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

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

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

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

[1] It is somewhat ironic that UAIC now argues for saving time and money by asking the court to consolidate the cases when UAIC and Mr. Lewis' UAIC attorney each filed separate, but 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.

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

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

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

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

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

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

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apply to the enforcement of a judgment.

VII. CONCLUSION

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

Dated this 27th day of November, 2018.

STEPHENS & BYWATER, P.C.

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

■ VlA 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
Thomas Christensen, Esq.
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courtnotices@injuryhelpnow.com
Attorney for Third Party Plaintiff

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.	

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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

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

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

CHRISTENSEN LAW OFFICES

Thomas Christensen, Esq.
Nevada Bar No. 2326
1000 S. Valley View Blvd.
Las Vegas, Nevada 89107
T: (702) 870-1000
F: (702) 870-6152
courtnotices@injuryhelpnow.com
Attorney for Third Party Plaintiff

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POINTS AND AUTHORITIES

I. OPPOSITION TO UAIC'S MOTION TO CONSOLIDATE

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

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

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

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

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

In Nevada, as in the federal system, consolidation is permitted as a matter of discretion, to avoid unnecessary costs or delays, or as a matter of convenience and economy in administration. NRCP 42(a); FRCP 42(a); *Mikulich*, 68 Nev. 161, 228 P.2d 257, 231 P.2d 603 (1957). The court is given broad discretion to determine when consolidation is proper. *Id.* In *Ward v. Sheeline Banking & Trust Co.*, 54 Nev. 442, 22 P.2d 358 (1933), the Nevada Supreme Court indicated that where

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consolidation is not a matter of right, the trial court is vested with discretion to grant or refuse consolidation, subject to reversal only in case of abuse of that discretion. *Id.* at 452, 22 P.2d at 361.

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

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II. MOTION FOR RELIEF FROM ORDER

A. VOID ORDER ALLOWING INTERVENTION

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

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

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

> Here, real party in interest Liberty Mutual Insurance Company moved to intervene in the underlying action after judgment was entered against real party in interest Tessea Munn. Because "**NRS 12.130 does not permit intervention subsequent to the entry of a final judgment,**" *Lopez v. Merit Ins. Co.*, 109 Nev. 553, 556, 853 P.2d 1266, 1268 (1993), the district court was **required, as a matter of law**, to deny the motion to intervene.As the district court did not deny the motion to intervene, but instead, granted intervention and then improperly set aside the judgment based on Liberty Mutual's motion, *see id.* at 557, 853 P.2d at 1269 (explaining that, where an insurance company was improperly allowed to intervene, it was not a party to the lawsuit and, thus, could not move to set aside the judgment), writ 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**

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

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

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B. UAIC'S DEFENSE IS FRIVOLOUS

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

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

> **The law is well settled** that 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

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

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

> 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.,*(Emphasis added.) *Mandlebaum at 851.*

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

UAIC then makes the claim that judgments in Nevada are required to be renewed in six years. This is not what the Nevada statute says. UAIC purposely misstates the statute: NRS 17.214 says one "may renew a judgment ... by ... filing an affidavit ... within 90 days before the date the judgment expires by limitation." The two misstatements: 1. This procedure is permissive not mandatory, nor exclusive of an action on a judgment; and 2. The renewal

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statute sends one to NRS chapter 11 with its statutes of limitations and tolling statutes regarding the timing of filing an affidavit of renewal if that is the course one wishes to take.

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

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

UAIC does not request that the Court set aside the amended judgment pursuant to NRCP 60, but instead states that it wants to "avoid the Amended Judgment" and have declaratory relief that the "original Judgment has expired." **This is well beyond anything provided by NRCP 60.** All UAIC could possibly ask for is to set aside the amended judgment, which would leave the original judgment as the operative document. This does not change anything other than the caption from the now adult back to her guardian ad litem. Cheyenne is an adult

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she has the right to have the judgment in her name. It is inappropriate in a motion to set aside a judgment to ask for declaratory relief. This request is an unsupported and improper claim.

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

The judgment remains valid even in the absence of an action upon the judgment or renewal of the judgment for three reasons. UAIC made three undisputed payments toward the judgment on June 23, 2014; June 25, 2014; and March 5, 2015. Pursuant to "**NRS 11.200 Computation of time.** The time in NRS 11.190 shall be deemed to date from the last transaction ... the limitation shall commence from the time the last payment was made." Further, when any payment is made,

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"the limitation shall commence from the time the last payment was made." Therefore, UAIC's last payment on the judgment extended the expiration of the six-year statute of limitations to March 5, 2021.

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

> If a person entitled to bring an action other than for the recovery of real property be, at the time the cause of action accrued, either:
> 1. Within the age of 18 years;
> . . .
> the time of such disability ***shall not*** be a part of the time limited for the commencement of the action (emphasis added).

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

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

> 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.

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

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

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

NRS 17.214 was enacted to give an optional, not "mandatory," statutory procedure in addition to the rights already present for an action on the judgment. UAIC claims the plain, permissive language of NRS 17.214: "A judgment creditor...**may** renew a judgment," (emphasis added) mandates use of NRS 17.214 as the only way to obtain a new judgment. UAIC cites no authority for this mandated use of NRS 17.214. The legislative history demonstrates that NRS 17.214 was adopted to give an easier way for creditors to renew judgments not replace the common law action on a judgment to obtain a new judgment. This was to give an option for

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renewal of judgments that was easier and more certain, not make it a trap for the unwary and cut of rights of injured parties. This is contrary to the clear wording of the statute and the case law in Nevada. See *Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (1897)

> The law is well settled that 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.

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

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

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

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

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

UAIC argues "the deadline to renew the Judgment was not tolled by any statute or rule." First UAIC misstates and says that Cheyenne discussed NRS 17.214 in her Ex Parte Motion. This is a fabrication, sophistry and disingenuous. Cheyenne discussed the tolling statutes that obviously apply to the statute of limitations for actions on a judgment to demonstrate that the

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judgment she was seeking to put in her name was still valid. The Court agreed and issued the amended judgment. UAIC states the obvious: that NRS 11.190, the limitation statute, does not have any tolling provision in it. That is because the tolling statutes NRS 11.200, NRS 11.250, NRS 11.300 and others apply to toll it. It being tolled necessarily extends the time to renew under NRS 17.214 because the judgment is not yet expired. The limitation statute is tolled.

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

UAIC's final claim is that NRS 11.300 does not apply to NRS 11.190 and by extension NRS 17.214. UAIC supports this novel claim by misquoting the F/S Manufacturing v. Kensmoe, 798 N.W.2d 853 (N.D. 2011) case. First, this is a North Dakota case, not Nevada. The North Dakota renewal by affidavit statute is 28-20-21 Renewal of judgments by affidavit it provides a **specific time set forth in the statute within which to renew**, unlike Nevada's statute that provides the time to renew by reference to the expiration of the judgment set forth in NRS 11.190. This means that Nevada's statute refers back to the the limitations statute NRS 11.190 and all of the applicable tolling statutes. In North Dakota, the renewal statute has a specific time set forth in the statute:

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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.

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

III BACKGROUND LAW ON INSURANCE CLAIMS HANDLING LITIGATION AND VERDICTS ABOVE POLICY LIMITS

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

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

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

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

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

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

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policy provisions supporting the denial.

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

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

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

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

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

D. CLAIMS HANDLING LITIGATION

In general, there are a few different areas of litigation that involve failure by an insurance company to fulfill the promises of this important product. All of these actions, regardless of the parties involved, however, are founded in the general principle of contract law that in every contract, especially policies of insurance, there is an implied covenant of good faith and fair dealing that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. *Comunale v. Traders & General Insurance Company*, 50 Cal.2d 654, 328 P.2d 198, 68 A.L.R.2d 883. If the alleged failure to act in good faith is claimed by a first-party insured or a third-party beneficiary, the standards may vary between the states. Most courts have held, however, that an insurance company always fails to act in good faith whenever it breaches its duty to settle by failing adequately to consider the interest of the insured. Windt, Allan D., 1 Insurance Claims & Disputes 5th, Section 5:13 (Updated March, 2009).

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Within the area of first-party failure to deal in good faith, there are essentially three standards which other courts have imposed on liability insurers in determining whether the insurer has met its duty to the insured. Those standards involve strict liability, negligence and failure to act in good faith. Shamblin v. Nationwide Mutual Insurance Company, 396 S.E.2d 766(W.Va. 1990), *citing*, *Schwartz, Statutory Strict Liability for an Insurer's Failure to settle: A Balanced Plan for an Unresolved Problem*, 1975 Duke L.J. 901; *Annotation, Liability Insurer's Negligence for Bad Faith in Conducting Defense as Ground of Liability to Insured*, 34 A.L.R.3d 533 (1970 & Supp. 1989).

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

The *Crisci* Court recognized that the insured's expectation of protection provides a basis for imposing strict liability in failure to settle cases because it will always be in the insured's best interest to settle within the policy limits when there is any danger, however slight, of a judgment above those limits. Crisci v. Security Insurance Company of New Haven, Conn. 426 P.2d 173, 66 Cal.2d 425, 58 Cal. Rptr. 13, (1967). And that there is more than a small amount of elementary

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justice in a rule that would require that, in this situation, where the insurer's and insured's interests necessarily conflict, the insurer, which may reap the benefits of its determination not to settle, should also suffer the detriments of its decision. *Id.*

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

> Can you honestly imagine a situation where an insurance company fails to settle within the policy limits, the policyholder gets stuck with an excess judgment, and this court *does not* require the insurance company to indemnify the policy holder? That will happen the same day the sun rises in the West! As far as I am concerned, even if the insurance company is run by angels, archangels, cherubim and seraphim, and the entire heavenly host sing of due diligence and reasonable care, I will *never*, under any circumstances, vote that a policyholder instead of an insurer pays the excess judgment when it was possible to settle a case within the coverage limits.
>
> When I buy insurance, I buy protection from untoward events. I do not object to an insurance company's vigorous defense of a claim, including going to jury trial and exhausting every appeal. Furthermore, as a policyholder, I will diligently assist my insurer to vindicate its rights and protect its reserves. However, I draw the line when the insurer decides that in the process of protecting its reserves, it will play "you bet *my* house." The insurance company can bet as much of its own money as it wants, and it can bet its own money at any odds that it wants, but it cannot bet one single penny of my money even when the odds are ten million to one in its favor!

Id. at 780.

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

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

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

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

Most states apply this sort of standard when evaluating first-party rights against insurance companies. Utah has implemented a reasonableness standard wherein it determined that actions against insurance carriers for failure to resolve a claim in a commercially reasonable manner center on the question of whether the insurance carrier acted reasonably. Campbell v. State Farm, 840 P.2d 130 (Utah App. 1992). In Campbell, State Farm paid the entire verdict against the insured above the policy limits. State Farm was still liable for millions of dollars for the delay in paying the verdict above the policy. Under Oregon law, a liability insurer must exercise good faith and due care in the settlement and defense of claims on behalf of its insured. Baton v. Transamerica Insurance Company, 584 F.2d 907 (1978), *citing, Radcliffe v. Franklin National Insurance Co.,* 208 Or. 1, 298 P.2d 1002 (1956).

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In Nevada, the question of which standard to apply when a verdict is more than the policy was answered in *Allstate Insurance Co. v. Miller*, 125 Nev. 300, 212 P.3d 318 (2009). The court held that an insurance company breaches the covenant of good faith and fair dealing if it fails to inform the insured of opportunities to settle and that the duty to defend includes the duty to inform the insured of settlement opportunities and to treat the insured's interest equal to the insurer's interest. Nevada has long recognized that there is a special relationship between the insurer and the insured. *Powers v. USAA,* 114 Nev. 690, 962 P.2d 596 (1998), *citing, Ainsworth v. Combined Ins. Co.* 104 Nev. 587, 763 P.2d 673 (1988).

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

Perhaps most instructional in Nevada, however, on the standard to be applied when dealing with negative effects resulting from an insurer's failure to settle a claim is *Landow v. Medical Ins. Exchange*, 892 F.Supp. 239 (D.Nev. 1995). The Court's ruling is enlightening because although it does not involve a verdict above the policy limit, it does involve a first-party insured bringing a claim for stress and damage to his reputation related to ongoing litigation that could have exposed

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him to a verdict but was concluded prior to a verdict. The underlying plaintiffs in *Landow* sought damages above Landow's policy limit after previously offering to settle for that limit. Landow requested that his insurance company pay the limit and accept the plaintiff's offer to end the case, but the insurance company refused and forced litigation. The *Landow* Court, following the rationale of California courts in above limit verdict situations accepted that, "the litmus test ... is whether the insurer, in determining whether to settle a claim, gave as much consideration to the welfare of its insured as it gave to its own interests," citing, *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d. 809, 818, 169 Cal.Rptr. 691, 620 P.2d 141 (1979). Ultimately, the Landow Court decided that the insurer has a duty to consider injury to the insured, such as emotional distress and injury to business goodwill that proximately flow from its failure to settle. *Id.* at 241.

CONCLUSION

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

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of CHRISTENSEN LAW OFFICES, LLC and that on this 27th 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

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

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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

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

This Opposition & Counter-Motion is made and based upon the papers and pleadings on file herein, the Memorandum of Points and Authorities attached hereto, and such oral argument 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;

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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

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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;

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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

DEBORAH A. APOSTOLEC-POIRE
NOTARY PUBLIC
STATE OF NEVADA
APPT. No. 02-78740-1
MY APPT. EXPIRES JUNE 29, 2019

ATKIN WINNER & SHERROD
A NEVADA LAW FIRM

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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

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

After all the conclusory and self-serving argument is wiped away, what one is left with is are really speculative claims concerning issues on appeal or, that are clearly in dispute. Further, than when examined closely, they are really all false controversies fomented by Mr. Christensen himself, to benefit himself and his original client, Nalder. This is most clearly evidenced by the 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***.

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 statements of law. In short, there exist grave questions about Mr. Lewis' s personal knowledge much less his ability to attest to the matters set forth herein. First, at no time does Mr. Lewis ever attest how he came to learn any of the legal matters attested to, much less the actions of third parties. Indeed, as Lewis himself admits – he refused to talk to UAIC or retained defense counsel and, thus, how can he be aware of their beliefs, actions or reasoning – much less of their conspiracy. As such, his alleged "personal knowledge" is not evident and the affidavit should be stricken in its entirety for this reason. At the very least, based on the Affidavit of UAIC Claims V.P. Brandon Carroll, material issues abound and the motion should be denied.

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

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

II.

STATEMENT OF FACTS

Intervenor/Third Party Defendant will not re-state the entire history of this matter as it is 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 Plaintiff[1] 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.*),

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

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

In any event, following lengthy and comprehensive discovery, the District Court granted complete summary judgment in favor of UAIC finding no policy of insurance in effect as between Lewis and UAIC[2] and, accordingly, that there was no "bad faith." *A copy of the District Court's Order dated 12/20/10 is attached hereto as Exhibit 'D.'* Lewis and Nalder appealed this judgment to the U.S. Court of Appeals for the Ninth Circuit wherein, following argument, the Ninth Circuit reversed finding a potential ambiguity in the language of Lewis' renewal statement. On remand, the parties again filed cross-motions for summary judgment[3] 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.'*

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

> "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?"

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.

This issue remains pending and, is currently being briefed before the Nevada Supreme Court. Despite the above, in what appears to be a clear case of forum shopping, Plaintiff retained additional Counsel (Plaintiff's Counsel herein, David Stephens, Esq.) who filed an *ex parte* Motion on March 22, 2018 seeking, innocently enough, to "amend" the 2008 expired judgment to be in the name of Cheyenne Nalder individually. Thereafter, the Court obviously not having been informed of the above-noted Nevada Supreme Court case, entered the amended judgment and 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-C[4] 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.

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

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 DISOCVERY PURUANT TO N.R.C.P. 56(f)

A. Motion to Strike Affidavit of Gary Lewis

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

Rule 56(e) of the Nevada Rules of Civil Procedure requires that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." It must be noted that this rule is exactly the same as the Federal counter-part, F.R.C.P. 56(e). The Nevada Supreme Court has confirmed that affidavits pursuant to Rule 56(e) must be on personal knowledge and must present admissible evidence cited to federal court opinions regarding same. *Daugherty v Wabash Life Ins. Co.*, 87 Nev. 32, 482, P.2d 814 (1971); 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.3rd 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).

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

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

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

In the case at bar, Third Party Plaintiff has attached the affidavit of Gary Lewis (See *Exhibit 3 to Lewis motion, herein)* in support of their request for summary judgment. However, UAIC argues this affidavit is clearly not based upon personal knowledge and, additionally, fails to offer 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 Court's have twice found UAIC committed no actionable "bad faith." See *Exhibits 'A', 'D', 'G', & 'H.'* Accordingly, these paragraphs appear to be an attempt to re-litigate these issues – which is the subject of UAIC's Motion to dismiss for claim preclusion.

This is made evident by paragraph 32, which states:

> 32. The district court also granted summary judgment in favor of UAIC on my bad faith allegations even though there were questions of fact regarding the reasonableness of UAIC's actions and their failure to defend me or communicate offers of settlement to me were 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

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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 he 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

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

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.

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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: "T he 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 Cheyanne'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.

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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.

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

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

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

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

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

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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 loose. 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.

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91. I filed a bar complaint against Tindall, but State Actors Daniel Hooge 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 Hooge 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.

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

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

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

99. UAIC and Tindall acting under color of state law deprived me of rights, privileges, and 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

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

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

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

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.

111. UAIC and Tindall, failed to promptly provide to me a reasonable explanation of the basis in 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.

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

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

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

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

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116. UAIC and Tindall, breached the contract existing between me and UAIC, breached the covenant of good faith and fair dealing, acted unreasonably and with knowledge that there was no reasonable basis for their conduct, violated NRS 686A.310 and were negligent by their actions set forth above which include but are not limited to: Unreasonable conduct in investigating the loss; Unreasonable failure to affirm or deny coverage for the loss; Unreasonable delay in making payment on the loss; Failure to make a prompt, fair and equitable settlement for the loss; Unreasonably compelling me to retain an attorney before affording coverage or making 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

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

Next, Lewis claims the actions of UAIC and Tindall have been fraudulent and malicious, but, from what is also alleged, the only evidence of this is the claim that Tindall and, UAIC, should not relieve him of a multi-million dollar expired judgment against him and, should have let a stipulated judgment- *for the full amount sought by Nalder* – be entered. This argument is specious 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 allegations that Lewis has suffered "emotional distress" is again without actual factual support and, thus, pure conclusory argument which must be stricken. Indeed, as noted below, Nevada has not recognized "emotional distress" as a valid extra-contractual claim against an insurer anyway.

Overall, as the Court can see and, as discussed above, Lewis' affidavit 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 statements of law. In short, there exist grave questions about Mr. Lewis' s personal knowledge much less his ability to attest to the matters set forth herein. First, at no time does Mr. Lewis ever attest how he

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

UAIC asks this court to consider this affidavit pursuant to N.R.C.P.56(e) and find that said 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.

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

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

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

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.,m* 94 Nev. 428, 431, 581 P.2df 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).

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

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

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

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V.P. Brandon Carroll[6], UAIC has set forth meaningful discovery it requests to oppose the Motion and how same will lead to genuine issues of material fact. Specifically, 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.;

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.'*

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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;

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

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above requested discovery will lead to material issues of fact because such discovery will reveal the hollowness of Lewis's affidavit or lack of support for same. Moreover, it will likely lead to defenses for UAIC concerning its prejudice by Lewis' failure to cooperate or communicate. As such, 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 and UAIC believes this discovery will reveal same and, thus, the continuance, per rule 56(f), should be granted and the above-requested discovery allowed.

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 disregarded[7]. 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.

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have "damaged" him: (1) that UAIC did not defend him in 2014-1018; (2) That UAIC was incorrect to move for dismissal of the appellate action due to an expired judgment, (3) that UAIC is wrong to try and defend him and vacate the improper amendment of the expired judgment or, enforcement of same herein, and (4) UAIC was wrong to engage counsel to defend him and file motions to relieve him of a multi-million judgment and disregard his wishes. As this Court can see, when one actually looks at the claims being made – without bellicose and conspiratorial argument- *the absurdity of the claims becomes clear*. Overall, Lewis is arguing UAIC should not 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:

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> 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.

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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 Chor 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 Alcholi 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

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

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

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.

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

N.R.S. 686A.310

1. Engaging in any of the following activities is considered to be an unfair practice:
(a) Misrepresenting to insureds or claimants pertinent facts or insurance policy provisions relating to any coverage at issue.
(b) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.
(c) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies.
(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.

(e) Failing to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear.
(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.
(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.
(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.
(i) Failing, upon payment of a claim, to inform insureds or beneficiaries of the coverage under which payment is made.
(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.
(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.
(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.
(m) Failing to comply with the provisions of NRS 687B.310 to 687B.390, inclusive, or 687B.410.
(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.
(o) Advising an insured or claimant not to seek legal counsel.
(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

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

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.

D. **RESPONSE TO COUNTER MOTION FOR SUMMARY JUDGMENT**

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

is expired is squarely before the Nevada Supreme Court and, thus, is clearly an issue of genuine dispute. See *Exhibit 'B.'* Moreover, given the affidavit of Brandon Carroll for UAIC *(Exhibit 'J')*, there also is clearly a genuine over UAIC's duty to defend Lewis and, how they may do so to try and relieve him from a multi-million dollar judgment which it believes expired. If there is a genuine dispute over both the validity of the judgment which forms the basis of this suit as well as UAIC's duties to Lewis in relation thereto, by definition, there can be no bad faith or extra-contractual remedies and, this Court should deny the Motion. The Nevada Supreme Court has held 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.

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

UAIC's intervention was done as a necessity to protect both Lewis and UAIC due to Lewis' 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.

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

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

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

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

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

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

Further any argument that UAIC should have, upon learning of its duty to defend, tried to 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.

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

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

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Accordingly, rather than damage Lewis, the Motion actually sought to confirm that the judgment against Lewis *was expired*. The issue is still on appeal. Indeed, 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?**

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 he was before UAIC moved to dismiss*. That is, if the court finds the action for consequential damages may proceed, regardless of the judgment's expiration, the Court must still find UAIC is responsible for same consequential damages. Whether or not UAIC is successful on that second issue is independent from the judgment issue and, thus, again, Lewis is in no different position than he would have been before the Motion to dismiss – as that issue was currently before the supreme court.

In short, Lewis has not adequately articulated how UAIC moving to dismiss the appeal for 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.

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

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.

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

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

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

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 – who also represents the creditor and, thus, is conflicted. In short, UAIC has a duty to defend per the ruling of the federal district court and UAIC is merely trying to fulfill that duty. At the very least, therefore, a material issue of fact exists as to these issues.

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.[11] *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

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

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.* 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 the case at bar, the federal district court case, in the matter on appeal, the court there has 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.

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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 puts 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 Cheyanne'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

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

Finally, again, Lewis' argument that *if* UAIC's defense through retained defense counsel fails, he will be exposed to a larger judgment than he otherwise would have is completely baseless. First, without any defense, Plaintiff would simply enter the judgment she seeks – adding on interest accrued, etc. So, if the defense fails Lewis' is in no worse a position. Further, 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'.*

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

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judgment for Lewis.

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

Again, though difficult to discern from the disjointed brief, it seems that in addition to the 'main' claims for breach of the covenant of good faith and fair dealing discussed above, Lewis' also make some other accusations. UAIC will discuss each, below, but in short, again they suffer from the same defect as those above- Lewis' claims are speculative or conclusory and, at the very 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, Leewis must come forth with some evidence explaining this claim and, the alleged damage[12], 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.

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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.

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

(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.

Contrary to Plaintiff's assertion, the payments made by UAIC in 2015 were not "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 here[13] 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.

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

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

(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.

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

In this way, for the statutory section for which Lewis has alleged violations by UAIC – the 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:

> "Plaintiff's claims are based on a purported implied contract and Plaintiff has cited no authority suggesting that N.R.S. § 686A applies to implied agreements. Plaintiff's claim 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."

Id. at 9-10.

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

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

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

It is clear that section 686A.310 requires that a claimant's injury be "as a result of" an insurer's action. *See Exhibit 'A', 686A.310 (2).* This reading of the statute is confirmed by the Nevada Supreme Court in *Palmer v . Del Webb's High Sierra*, 108 Nev. 673, 674 (1992), where 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.

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

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

for Lewis. The Court should see through this ruse.

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

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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:

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EXHIBIT “A”

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*, v. UNITED AUTOMOBILE INSURANCE COMPANY, *Defendant-Appellee.*	No. 13-17441 D.C. No. 2:09-cv-01348-RCJ-GWF ORDER CERTIFYING QUESTION TO THE NEVADA SUPREME COURT

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, Presiding

Argued 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

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.

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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

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> 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

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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

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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

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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

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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.

Cherry, J.

Gibbons, J.

Pickering, J.

Hardesty, J.

Stiglich, J.

[1]As 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

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EXHIBIT “C”

COM
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Nevada Bar No. 2326
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Nevada Bar No. 6811
CHRISTENSEN LAW OFFICES, LLC
1000 S. Valley View Blvd.
Las Vegas, Nevada 89107
Attorneys for Plaintiffs

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

UNITED AUTOMOBILE INSURANCE CO, DOES I through V, and ROE CORPORATIONS I through V, inclusive

Defendants.

Case No.: A-09-590967-C
Dept No.: II

COMPLAINT

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

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

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

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

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

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

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

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

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

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

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

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

12. That Plaintiff, Cheyanne Nalder, is a third party beneficiary under the Policy as well as a Judgment Creditor of Gary Lewis and is entitled to pursue action against the Defendants directly under Hall v. Enterprise Leasing Co., West, 122 Nev. 685, 137 P.3d 1104, 1109 (2006), as well as Denham v. Farmers Insurance Company, 213 Cal.App.3d 1061, 262 Cal.Rptr. 146 (1989).

13. That Cheyanne Nalder conveyed to UAI her willingness to settle her claim against Gary Lewis at or within the policy limits of $15,000.00 provided they were paid in a commercially reasonable manner.

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

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

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

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

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

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

20. That UAI denied coverage for non-renewal.

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

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

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 Cheyyene'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, Cheyanne 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 Cheyanne Nalder and Gary Lewis.

29. Cheyanne 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 Cheyanne 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.

38. That as a further proximate result of the aforementioned breach of the implied covenant of good faith and fair dealing, 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.

39. That as a further proximate result of the aforementioned breach of the implied covenant of good faith and fair dealing, 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.

40. That Defendants, and each of them, acted unreasonably and with knowledge that there was no reasonable basis for its conduct, in its actions which include but are not limited to: wrongfully refusing to cover the 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 the coverage.

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

42. That as a further proximate result of the aforementioned bad faith, 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.

43. That as a further proximate result of the aforementioned bad faith, 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.

44. That Defendants, and each of them, violated NRS 686A.310 by their actions, including but not limited to: wrongfully refusing to cover the 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.

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

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

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

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

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

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

51. That as a proximate result of the aforementioned violation of NRS 686A.310, Plaintiffs have suffered and will continue to suffer in the future, damages in the amount of $3,500.000.00 plus continuing interest.

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

DATED this 17 day of April, 2009.

CHRISTENSEN LAW OFFICES, LLC.

By: _____
Thomas Christensen, Esq.
David F. Sampson, Esq.
Nevada Bar No. 6811
1000 South Valley View Blvd
Las Vegas, Nevada 89107
Attorneys for Plaintiffs

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EXHIBIT "D"

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, vs. UNITED AUTOMOBILE INSURANCE COMPANY, DOES I through V, and ROE CORPORATIONS I through V, inclusive Defendants.	2:09-cv-1348-ECR-GWF **Order**

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

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

I. Background

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

Lewis was the owner of a 1996 Chevy Silverado insured, at various times, by Defendant. (Compl. at ¶ 5-6 (#1).) Lewis had an insurance policy issued by UAIC on his vehicle during the period of May 31, 2007 to June 30, 2007. (MSJ at 3 (#17).) Lewis received a renewal statement, dated June 11, 2007, instructing him to remit payment by the due date of June 30, 2007 in order to renew his insurance policy. (Id. at 3-4.) The renewal statement specified that "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy." (Pls.' Opp. at 3 (#20).) The renewal statement listed June 30, 2007 as effective date, and July 31, 2007 as an "expiration date." (Id.) 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. (MSJ at 7-8 (#17).) Lewis made a payment on July 10, 2007. (Id.)

Defendant then issued a renewal policy declaration and automobile insurance cards indicating that Lewis was covered under

an insurance policy between July 10, 2007 to August 10, 2007. (Pls' Opp. Exhibit 1 at 35-36; MSJ at 4.)

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

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

On March 18, 2010, Defendant filed the MSJ (#17). On April 9, 2010, Plaintiffs opposed (#20), and on April 26, 2010, Defendant replied (#21). We granted leave for Plaintiffs to file a supplement (#26), and Defendant filed a supplement (#33) to its reply (#21).

[1] Plaintiffs' complaint originally alleged that the accident occurred in Clark County, Nevada. It is unclear from the documents 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

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

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

III. Analysis

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

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

A. Contract Interpretation Standard

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

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

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

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

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

Lewis received a "Renewal Policy Declarations" stating that he had coverage from May 31, 2007 to June 30, 2007 at 12:01 A.M. (Pls' Opp., Exhibit A at 29 (#20-1); Pls' Supp., Exhibit A at 11-12 (#26-1); Pls' Supp., Exhibit A at 15 (#26-1).) The declarations page stated that "[t]his declaration page with '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 renewal amount. This isolated occasion occurred due to the fact that Lewis added a driver to his insurance policy, resulting in an increase in the renewal amount, after UAIC had previously sent a renewal notice indicating that a lower renewal amount was due on April 29, 2007. UAIC issued a revised renewal statement dated April 26, 2007, and gave Lewis an opportunity to pay by May 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.

C. Statutory Arguments

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

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

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

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

Nev. Rev. Stat. § 687B.340 provides:

> 1. Subject to subsection 2, a policyholder has a right to have his or her policy renewed, on the terms then being applied by the insurer to persons, similarly situated, for an additional period equivalent to the expiring term if the agreed term is 1 year or less, or for 1 year if the agreed term is longer than 1 year, unless:
>
> . . .
>
> (b) At least 30 days for all other policies,
>
> before the date of expiration provided in the policy the insurer mails or delivers to the policyholder a notice of intention not to renew the policy beyond the agreed expiration date. If an insurer fails to provide a timely notice of nonrenewal, the insurer shall provide the insured with a policy of insurance on the identical terms as in the expiring policy.

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

Plaintiffs, however, fail to give credit to the entirety of the Nevada statute. The statute does not say that the policyholder's policy must be renewed, it says that the insurer shall provide the insured with a policy on "the identical terms as in the expiring policy." One of the terms of the expiring policy was payment of the renewal amount. UAIC did provide Lewis, the policyholder, with a renewal statement indicating that UAIC would renew the insurance policy as long as all the terms of the previous policy were met, i.e., payment.

Defendant correctly points out that this statute does not fit the circumstances of this case. Lewis' policy was not renewed not because UAIC had an intention not to renew, but because Lewis failed to carry out his end of the contract, that is, to pay a renewal amount. Lewis' policy was renewed on the date payment was received, but this date was after the date of the accident. Plaintiffs' statutory arguments, therefore, do not pass muster.

IV. Conclusion

Defendant's motion for summary judgment on all claims shall be granted because Lewis had no insurance coverage on the date of the accident. The renewal statement was not ambiguous in light of the entire contract and history between Lewis and UAIC. The term "expiration of your policy" referred to the expiration of Lewis' current policy, and Lewis was never issued retroactive coverage when his payments were late. His renewal policy would always begin on the date payment was received. We cannot find that Lewis was covered between the expiration of his policy in June and payment for

his next policy without straining to find an ambiguity where none exists, and creating an obligation on the part of insurance companies that would be untenable, i.e., to provide coverage when the insured has not upheld his own obligations under the contract to submit a payment.

The statutes cited by Plaintiffs simply do not apply. The expiration of Lewis' policy was not a midterm cancellation, and UAIC was not obligated to provide an insurance policy despite Lewis' failure to adhere to the terms of that policy.

Defendant's other requests are moot in light of our decision granting summary judgment.

IT IS, THEREFORE, HEREBY ORDERED that Defendant's motion for summary judgment on all claims (#17) is **GRANTED** with respect to all of Plaintiffs' claims.

The Clerk shall enter judgment accordingly.

DATED: December 17, 2010.

Edward C. Reed.
UNITED STATES DISTRICT JUDGE

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EXHIBIT "E"

MOT

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

JAMES NALDER, Guardian Ad Litem for minor Cheyanne Nalder, real party in interest, and GARY LEWIS, Individually; Plaintiffs, vs. UNITED AUTOMOBILE INSURANCE CO, DOES I through V, and ROE CORPORATIONS I through V, inclusive Defendants.	Case No.: 2:09-cv-1348

MOTION FOR SUMMARY JUDGMENT

COMES NOW, Plaintiff, JAMES NALDER, by and through his attorney of record, Thomas Christensen, Esq., of the law firm of CHRISTENSEN LAW OFFICES, LLC, and moves this Honorable Court for partial summary judgment as to liability as against Defendant, UNITED AUTOMOBILE INSURANCE CO.

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 hereof.

DATED this 12th day of February, 2013.

CHRISTENSEN LAW OFFICES, LLC

By: _____ #12451

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NOTICE OF MOTION

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the above and foregoing MOTION FOR SUMMARY JUDGMENT on for hearing before the above-entitled Court on the _____ day of _____, 2012 at in Dept _____ of the above referenced court at _____ __.m. or as soon thereafter as counsel may be heard.

DATED this 12th day of February, 2013.

CHRISTENSEN LAW OFFICES, LLC

By: _____ #12451

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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,

2007, which was seven days after the policy's "Effective Date" of April 29, 2007". The "Renewal Statement" also stated "To avoid lapse in coverage, payment must be received prior to (sic) expiration of your policy." The only expiration date listed on the "Renewal Statement" is "May 29, 2007". Gary Lewis made the payment and renewed the policy. The records from UAIC specifically list the policy as "RENEWAL". *See* Exhibit 1 at P. 25.

In mid-May 2007 (Invoice Date May 9, 2007) UAIC sent Gary Lewis a "Renewal Statement" offering to "Renew" Gary's policy with UAIC for from May 29, 2007 through June 29, 2007. *See* Exhibit 1 at P. 27. The "Renewal Statement" indicates that payment to "Renew" the policy had to be made by May 29, 2007. The "Renewal Statement" also stated "To avoid lapse in coverage, payment must be received prior to (sic) expiration of your policy." The only expiration date listed on the "Renewal Statement" is "June 29, 2007". Gary Lewis made the payment on May 31, 2007, two days after the "Due Date" of "May 29, 2007", and renewed the policy. The records from UAIC specifically list the policy as "RENEWAL". *See* Exhibit 1 at P. 32.

In mid-June 2007 (Invoice Date June 11, 2007) UAIC sent Gary Lewis a "Renewal Statement" offering to "Renew" Gary's policy with UAIC for from June 30, 2007 through July 31, 2007. *See* Exhibit 1 at P. 33. The "Renewal Statement" indicates that payment to "Renew" the policy had to be made by June 30, 2007. The "Renewal Statement" also stated "To avoid lapse in coverage, payment must be received prior to (sic) expiration of your policy." The only expiration date listed on the "Renewal Statement" is "July 31, 2007". Gary Lewis made the payment on July 10, 2007, and renewed the policy. The records from UAIC specifically list the policy as "RENEWAL". *See* Exhibit 1 at P. 38.

UAIC continued to "Renew" Gary's policy in August 2007, *See* Exhibit 1 at P. 44, September 2007, *See* Exhibit 1 at P. 60[1], October 2007, *See* Exhibit 1 at P. 69, November 2007, *See* Exhibit 1 at P. 81, December 2007, *See* Exhibit 1 at P. 87[2], and through September 2008. *See* Exhibit 1.

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

Plaintiff JAMES NALDER, on behalf of his daughter Cheyenne, brought a claim for the proceeds of the UAIC policy. UAIC claimed there was no policy in effect. Suit was then brought against Mr. Lewis with notice being provided to UAIC. UAIC took no steps to defend the lawsuit and did nothing to investigate coverage or to determine whether Gary's payment on July 10, 2007, long before the expiration of the policy, warranted Gary being covered under the policy UAIC renewed with Gary. Because UAIC took no steps to protect Gary, judgment was entered against Gary in the amount of $3,500,000.00. *See* Exhibit 2. After Judgment Mr. Lewis, along with NALDER on behalf of Cheyenne, the real party in interest, pursued this action against UAIC.

Mr. Lewis testified:

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[1] Payment for the September Renewal was made on September 14, 2007 even though the "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.

> I was covered by a policy of insurance through UAIC, which UAIC renewed on multiple occasions with me. It is my understanding I was covered by policy No. NVA020021926, which UAIC advised me it was renewing and that I would have no lapse in coverage as long as payment was made prior to the expiration of my policy, which the "Renewal Notice" said was July 31, 2007. I made the payment long before July 31, 2007 and understood the policy had been renewed again and there was no lapse in coverage.

See Exhibit 3.

The policy's "Renewal Statement" UAIC sent Gary clearly stated that so long as payment was received "prior to (sic) expiration of your policy" there would be no lapse in coverage. Again, the only "Expiration Date" listed on the policy's "Renewal Statement" was "July 31, 2007". *See* Exhibit 1. Gary understood this language to indicate that even though the "Due Date" was June 30, 2007, Gary had a grace period through the "Expiration Date" of July 31, 2007 to make the requisite payment, renew the policy, and "avoid lapse in coverage" as the policy's "Renewal Statement" indicated. *See* Exhibit 3. Gary's understanding was more than reasonable and was further supported by the fact that Gary had previously, in May 2007, been given the policy's "Renewal Statement" that specifically indicated Gary could renew his policy with an effective date of April 29, 2007 if he made the payment on or before May 6, 2007, seven days after the "Effective Date" of the policy UAIC sought to renew.[3] *See* Exhibit 1. The policy's May "Renewal Statement" thus commenced a course of dealing between Gary and UAIC wherein UAIC advised Gary it was permissible for Gary to pay the policy premium after the "Effective Date" of the policy and yet still renew the policy as of the "Effective Date" and avoid any lapse in coverage. This course of dealing was repeated in September and December

---

[3] Payment for the December Renewal was made on December 15, 2007 even though the "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.

2007 when Gary's policy payment was made after the "Due Date" yet the policy was renewed nonetheless with no lapse. *See* Exhibit 1.

As discovery proceeded, the PMK of UAIC was asked regarding Gary's understanding that the requirement that he pay prior to the "expiration date" when the only "expiration date" listed on the renewal notice was July 31, 2007, was a fair interpretation by the insured. The PMK acknowledged that the "Renewal Statements" do not contain the words "expiration of your current policy", and simply state "expiration of your policy" without any explanation of what the words "your policy" reference. *See* Exhibit "4" (the Deposition of Denise Davis, P. 61 L. 23 - P. 62 L. 1). The UAIC PMK was unable to point to any language in the "Renewal Statements" that would indicate to a lay person, like Mr. Lewis", that the words "expiration of your policy" meant expiration of your *current* policy rather than the "Expiration Date" stated right on the face of the "Renewal Statements" themselves as Mr. Lewis understood it. *See* Exhibit 4 (the Deposition of Denise Davis, P. 61 L. 8-15; P. 61 L. 23 - P. 62 L. 1; P. 133 L. 4 - P. 134 L. 22).

Manny Cordova and Lisa Watson, who worked for UAIC at the time the claim was brought against Gary Lewis, but who are no longer employed with UAIC, admitted that the language in the "Renewal Statements" is ambiguous, difficult to understand, and certainly consistent with Gary Lewis' interpretation that "expiration of your policy" meant the "Expiration Date" listed at the top of the "Renewal Statements". Mr. Cordova, when shown the "Renewal Statements", stated that, to him, the "Renewal Statements" indicated that payment had to be made before the expiration of the *prior* policy as UAIC interprets it. When asked about whether

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[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.

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Mr. Lewis' interpretation that expiration of "your policy" meant the "Expiration Date" on the very face of the "Renewal Statement" itself, Mr. Cordova testified as follows: "certainly people can interpret documents differently. You know, I mean, that's the way I read the document. Could someone else read it differently? Of course, they can." *See* Exhibit "5" (Cordova Deposition at P. 106 L. 16-20). Mr. Cordova went on to testify, "So this is the way I read the 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." *See* Exhibit 5 (Cordova Deposition P. 107 L. 11-16).

Lisa Watson, who testified she has worked in insurance for over 20 years, when shown the "Renewal Statements" and asked what the term "expiration of your policy" meant, testified that she does not know what the phrase means. *See* Exhibit 6 (Watson Deposition P. 52 L. 4-8).

In the testimony, Mr. Cordova and Ms. Watson not contest that Gary Lewis' interpretation was valid. When she was told that Mr. Lewis interpreted the language as indicating that payment had to be made before the "Expiration Date" listed right on the "Renewal Statements", Ms. Watson testified that she could not comment on whether Mr. Lewis' interpretation was correct or not. *See* Exhibit 6 (Watson Deposition P. 53 L. 20 - P. 4 L. 4).

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

> Plaintiffs came forward with facts supporting their tenable legal position that a reasonable person could have interpreted the renewal statement to mean that Lewis's premium was *due* by June 30, 2007, but that the policy would not *lapse* if

his premium were 'received prior to the expiration of [his] policy,' with the 'expiration date' specifically stated to be July 31, 2007.

See Exhibit 7 Memorandum.

III

STANDARD FOR GRANTING

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

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

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

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

IV

ARGUMENT

A. Because the Renewal Statement was Ambiguous, it Must be Strictly Construed Against the Insurance Company According to the Nevada Law, therefore, Providing Coverage was in Place at the Time of the Incident.

There is no dispute UAIC sent Gary the policy's "Renewal Statement" (invoice date June 11, 2007). *See* Exhibit 1 P. 33. There is no dispute the policy's "Renewal Statement" offered to again renew Gary's policy with UAIC, as Gary had repeatedly done since March 2007. There is no dispute that the policy's "Renewal Statement" says Gary would not have a lapse in coverage if he made the required payment prior to the expiration date. There is no dispute that the only expiration date mentioned on the policy's "Renewal Statement" is "July 31, 2007." *See* Exhibit 1 P. 33. There is no dispute Gary made the requisite payment on July 10, 2007, which was twenty-one days before the "Expiration Date" listed on the policy's "Renewal Statement". *See* Exhibit 1 P. 38. There is certainly no dispute that Gary Lewis' understanding of the policy's "Renewal Statement" was that as long as he made the premium payment prior to the expiration of the policy, which the policy's "Renewal Statement" said was July 31, 2007, Gary would not

have a lapse in coverage. *See* Exhibit 1 at P. 6 of 12. There is also no dispute that UAIC had previously advised Gary that he could pay his policy premium after the date the policy became effective, and still be covered from the effective date. *See* Exhibit 1 P. 15.

An insurance policy, which would include the renewal statements of the policy, is a contract and is governed by contract law. *United Insurance Co., v. Frontier Insurance Company, Inc.*, 120 Nev. 678 684, 99 P.3d 1152, 1156 (2004). Under general contract law, the Nevada Supreme Court has noted, "When a contract is ambiguous, it will be construed against the drafter." *Glenbrook Homeowners Ass'n v. Glenbrook Co.* 111 Nev. 909, 917, 901 P.2d 132, 138 (1995). The Court has gone even further in its discussion of insurance contracts, holding, "Contracts of insurance are always construed most strongly against the insurance company. Stated another way, a policy of insurance is to be construed liberally in favor of the insured and strictly against the insurer." *Hartford Ins. Group v. Winkler*, 89 Nev. 131, 135, 508 P.2d 8, 11 (1973) (Citations omitted).

In addition, the Nevada Supreme Court has held, "An insurance policy is a contract of adhesion." *Id.* As a result "the language of an insurance policy is broadly interpreted in order to afford 'the greatest possible coverage to the insured.'" *Id*, citing *Farmers Insurance Group v. Stonik*, 110 Nev. 64, 67, 867 P.2d 389, 391 (1994). The pivotal language from the UAIC contract comes from the policy's "Renewal Statements" which UAIC drafted, and which UAIC sent to Gary Lewis on multiple occasions advising Gary how the contract of insurance could be renewed and continue to be in effect with UAIC. The statements provide a due date for payment, but also specifically state that if payment is "received prior the expiation of your policy" there will be no lapse in coverage. The only "Expiration Date" listed in the policy's

"Renewal Statements" is the expiration date for the offered policy that UAIC invited Gary Lewis to renew.

The policy's "Renewal Statement" for June 30, 2007 through July 31, 2007 (Exhibit 1 P. 33) had a "Due Date" of 6/20/07, but then contained the statement that payment must be received prior to the expiration of "your policy" in order to avoid a lapse in coverage. The only "Expiration Date" listed in the statement is "July 31, 2007". Such language clearly indicates that UAIC was advising Gary, as the insured, that payment was due 6/30/07, but that if he made the requisite payment before July 31, 2007 he would be covered and would "avoid a lapse in coverage". There is no dispute this was Gary's subjective understanding of the terms of the policy's "Renewal Statement". *See* Exhibit 3 at P. 6 of 12.

Gary's subjective understanding that he could pay for the policy after it was put into effect was all the more reasonable given that in April 2007 UAIC had specifically told Gary that the due date of his premium payment for the policy effective April 29, 2007 through May 29, 2007 was after the policy's effective date of "5/6/07". There was an established course of dealing between Gary and UAIC wherein UAIC had previously advised Gary that he could make his payment after the effective date of the policy and still be covered, and wherein UAIC had previously advised Gary that he could made his premium payment after the effective date of the policy, but prior to the expiration date, of the policy and avoid any lapse in coverage.

The policy's "Renewal Statements" which give a due date but then state that the policyholder can avoid a lapse in coverage by paying before the expiration of the policy, and providing an "Expiration Date" for the policy that is different than the "Due Date" are ambiguous. As noted above, **ambiguous language in a contract, or in a writing seeking to renew a contract, is construed against the drafter of the contract, or the writing seeking to**

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renew the contract. See, *Glenbrook Homeowners Ass'n v. Glenbrook Co.* 111 Nev. 909, 917, 901 P.2d 132, 138 (1995). The Nevada Supreme Court has noted that an insurance company does business as a quasi-public institution, and cannot avoid liability under ambiguous provisions of policy. *Hartford Ins. Group v. Winkler*, 89 Nev. 131, 136, 508 P.2d 8, 12 (1973). The language of the "Renewal Statements" from UAIC is ambiguous, and therefore, must be construed against UAIC.

"Contracts of insurance are always construed most strongly against the insurance company. Stated another way, a policy of insurance is to be construed liberally in favor of the insured and strictly against the insurer." *Hartford Ins. Group v. Winkler*, 89 Nev. 131, 135, 508 P.2d 8, 11 (1973) (Citations omitted). The language of the "Renewal Statements" of the policy Gary Lewis had with UAIC, when construed liberally in favor of Gary and construed most strongly against UAIC and broadly interpreted in order to afford the greatest possible coverage to the insured, must be construed as permitting Gary Lewis to pay anytime before July 31, 2007 in order to avoid a lapse in coverage and maintain insurance from the "Effective Date" of June 30, 2007 to the "Expiration Date" of July 31, 2007. As there is no dispute Gary made the requisite payment on July 10, 2007, and there is no dispute July 10, 2007 is long before July 31, 2007, summary judgment as to UAIC's coverage of Gary Lewis under the policy is warranted as the evidence clearly establishes Gary was covered.

B. UAIC Breached the Contract by Failing to Investigate Coverage and Refusing to Cover its Insured

In general, there are a few different areas of litigation that involve "bad faith" by an insurance company. All of these actions, regardless of the parties involved, however, are founded in the general principle of contract law that in every contract, including policies of insurance, there is an implied covenant of good faith and fair dealing that neither party will do

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anything which will injure the right of the other to receive the benefits of the agreement. *Comunale v. Traders & General Insurance Company*, 50 Cal.2d 654, 328 P.2d 198, 68 A.L.R.2d 883. Most courts, including Nevada, have held that an insurance company always acts in bad faith whenever it breaches its duty to settle by failing to adequately consider the interest of the insured. Windt, Allan D., *1 Insurance Claims & Disputes 5th*, Section 5:13 (Updated March, 2009). This is true whether there is a "genuine dispute" as to whether payment of the third-party policy limits is warranted or not. The Nevada Supreme Court recently defined bad faith by holding that "an insurer must give equal consideration to the insured's interests" and "the nature of the relationship [between insured and insurer] requires that the insurer adequately protect the insured's interests." *Miller v. Allstate*, 125 N.A.O. 28, 212 P.3d 318 (2009).

Within the area of first-party bad faith, there are essentially three standards which courts have imposed on liability insurers in determining whether the insurer has met its duty to the insured. Those standards involve strict liability, negligence, and bad faith. *Shamblin v. Nationwide Mutual Insurance Company*, 396 S.E.2d 766 (W.Va. 1990), citing, *Schwartz, Statutory Strict Liability for an Insurer's Failure to settle: A Balanced Plan for an Unresolved Problem*, 1975 Duke L.J. 901; Annotation, *Liability Insurer's Negligence for Bad Faith in Conducting Defense as Ground of Liability to Insured*, 34 A.L.R.3d 533 (1970 & Supp. 1989).

The courts which have applied the strict liability standard have held that an insurer who fails to settle within policy limits does so at its own risk, and even if its position is not entirely groundless, if the failure to settle later exposes the insured, the carrier is liable for the full amount which will compensate the insured for all the detriment caused by the insurer's breach of the express and implied obligations of the contract. *Id.*, citing, *Crisci v. Security Ins. Co.*, 66

Cal2d 425, 58 Cal.Rptr. 13, 426 P.2d 173 (1967); *Rova Farms Resort, Inc. v. Investors Insurance Co.*, 65 N.J. 474, 323 A.2d 495 (1974).

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

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

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

> one single penny of my money even when the odds are ten million to one in its favor!

Id. at 780.

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

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

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

Nevada has long recognized that there is a fiduciary relationship between the insurer and the insured. *Powers v. USAA*, 114 Nev. 690, 962 P.2d 596 (1998), citing *Ainsworth v. Combined Ins. Co.*, 104 Nev. 587, 763 P.2d 673 (1988). Nevada has also established standards for applying in other types of bad faith situations. In *Pemberton v. Farmers Insurance Exchange*, 109 Nev. 789, 858 P.2d 380 (1993), the Nevada Supreme Court established standards to apply when an action is brought related to bad faith denial of first-party benefits under uninsured or underinsured coverage. There, the court noted numerous that appellate court decisions affirm that an insurer's failure to deal fairly and in good faith with an insured's UM claim is actionable. *Id.* at 794 (citations omitted).

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

One of the more instructional cases in Nevada, however, on the standard to be applied when dealing with negative effects resulting from an insurer's failure to settle a claim prior to litigation is *Landow v. Medical Ins. Exchange*, 892 F.Supp. 239 (D.Nev. 1995). The *Landow* Court, following the rationale of California courts in excess verdict situations accepted that, "the litmus test for bad faith is whether the insurer, in determining whether to settle a claim, gave as much consideration to the welfare of its insured as it gave to its own interests," citing, *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d. 809, 818, 169 Cal.Rptr. 691, 620 P.2d 141 (1979).

The above-noted principles were most recently codified and adopted by the Nevada Supreme Court in *Allstate Ins. Co. v. Miller*, 212 P.3d 318 (2009). In *Miller*, the court held that "an insurer must give equal consideration to the insured's interest". The court further stated that the insurer's duty to its insured is "similar to a fiduciary relationship" and noted "the nature of the relationship requires that the insurer adequately protect the insured's interest." The court's conclusion mirrored that in *Landlow* as the *Miller* court recognized "at a minimum, an insurer must equally consider the insured's interests and its own." The court also recognized the wisdom from decisions from California holding that "the insurer must give the interests of the insured at least as much consideration as it gives its own interests, and the insurer must act as a prudent insurer without policy limits." *Id.* (citation omitted).

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Additionally, insurers have a duty to investigate. *Pemberton v. Farmers Ins. Exchange*, 109 Nev. 789, 858 P.2d 380, 382 (Nev., 1993). "Insurers have the duty to investigate claims and coverage in a prompt fashion." *Troutt v. CO W. Ins. Co.*, 246 F.3d 1150, 1162. *See* also *Tynes v. Bankers Life Co.*, 730 P.2d 1115, 1124 (Mont. 1986) (9th Cir., 2001). The duty to investigate is an extension of the duty of good faith and fair dealing that the insurer owes its insured and, in a claims-made-and-reported policy, extends to the handling of reported claims. *KPFF, Inc. v. California Union Ins. Co.*, 56 Cal.App.4th 963, 66 Cal.Rptr.2d 36, 44 (1997) UAIC utterly failed to investigate whether coverage existed for Gary on the claim, and failed to abide by established insurance claims handling practices in its handling of this claim. Furthermore, as discussed in detail above, there was coverage under this claim. Therefore, their failure to provide such coverage was a breach of contract.

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

There is no question that the rejection of a settlement offer within the policy limits is an element of a bad faith claim. *Id.* The *Miller* Court held that the rejection by an insurer of a settlement offer within the policy limits is indeed an element making up a bad faith claim, but also noted that a bad faith claim can be based on far more than just the rejection of such an

offer. *Id.* The Court specifically noted that "an insurer's failure to adequately inform an insured of a settlement offer is a factor for the trier of fact to consider when evaluating a bad-faith claim." *Id* at 325. UAIC never informed Gary Lewis of the settlement offer that was proposed to resolve Cheyenne's claim. This failure to inform, on its own, is sufficient to present the facts to the jury to determine whether the carrier violated the duty of good faith and fair dealing and is thus liable for a judgment entered against its insured in excess of the applicable policy limits. *Id.*

Plaintiffs have noted in the preceding sections the facts indicating: Gary Lewis properly renewed his policy pursuant to the policy's "Renewal Statements"; that UAIC renewed Gary's policy and nevertheless claimed there was a lapse in coverage; and other such facts, all of which clearly indicate Gary had coverage for the claim Cheyenne brought against him. UAIC never investigated any of the above to determine whether Gary was covered, and instead made the snap decision that there was no coverage, and left Gary completely bereft of protection against Cheyenne's lawsuit. These facts constitute bad faith, provide that there was coverage for Cheyenne's claim and therefore constitute a breach of contract, and warrant UAIC compensating Gary, paying for the judgment currently entered against him, as well as paying other compensatory and even punitive damages.

C. 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.

Primary liability insurance policies create a duty to defend and the duty to indemnify. *Allstate Ins. Co. v. Miller*, 125 N.A.O. 28, 212 P.3d 318 (Nev., 2009) citing *Crawford v. Weather Shield Mfg. Inc.*, 44 Cal.4th 541, 79 Cal.Rptr.3d 721, 187 P.3d 424, 427 (2008). The

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duty to defend is a "legal duty that arises under the law, as opposed to a contractual duty arising from the policy." *Allstate Ins. Co. v. Miller*, 125 N.A.O. 28, 212 P.3d 318 (Nev., 2009).

"If there is any doubt about whether the duty to defend arises, this doubt must be resolved in favor of the insured." *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 120 Nev. 678 (Nev., 2004) citing *Aetna Cas. & Sur. Co. v. Centennial Ins. Co.*, 838 F.2d 346, 350 (9th Cir. 1988). "The purpose behind construing the duty to defend so broadly is to prevent an insurer from evading its obligation to provide a defense for an insured without at least investigating the facts behind a complaint." *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 120 Nev. 678 (Nev., 2004) See also *Helca Min. Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1090 (Colo. 1991). A potential for coverage only exists when there is **arguable or possible coverage**. (emphasis added) *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 120 Nev. 678 (Nev., 2004) See also *Morton v. Safeco Ins. Co.*, 905 F.2d 1208, 1212 (9th Cir. 1990).

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

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

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: _____ #1456

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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 day of March, 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

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EXHIBIT “F”

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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, vs. UNITED AUTOMOBILE INSURANCE COMPANY, DOES I through V, and ROE CORPORATIONS I through V, inclusive Defendants.	CASE NO.: 2:09-cv-1348 DEPT. NO.: **DEFENDANT UNITED AUTOMOBILE INSURANCE COMPANY'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** **ORAL ARGUMENT REQUESTED**

UNITED AUTOMOBILE INSURANCE COMPANY, by and through its Counsel of record, Matthew J. Douglas, of ATKIN WINNER & SHERROD, hereby submits this Opposition to Plaintiffs' Motion for Summary Judgment and states and alleges, as follows:

This Opposition is made and based upon the pleadings and papers on file with this Court, the Points and Authorities contained below, and any oral argument which the Court may entertain at the time of hearing.

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DATED this 26th day of March, 2013.

ATKIN WINNER & SHERROD

/s/Matthew J. Douglas
Matthew J. Douglas
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Attorneys for Defendant

POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS AND RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS

A. Facts relating to this lawsuit.

This is an insurance claim which was denied due to termination of a policy after the plaintiff, Gary Lewis, failed to pay his premium.

Defendant has very little information regarding the subject accident which the Plaintiff underlies this suit but, it appears that Gary Lewis was operating his vehicle in Pioche, Nevada on July 8, 2007 wherein he struck minor pedestrian, Cheyenne Nalder. *See copy of Plaintiff Lewis' deposition, attached as Exhibit 'A', hereto, p. 14, lines 1-15, p. 15, lines 12-15.* Thereafter, Nalder and her father commenced a personal injury action against Lewis.

However, Mr. Lewis' policy of insurance had expired, and had not been renewed, due to nonpayment of renewal premium at the time of this accident. Presumably sensing this might be a problem, Mr. Lewis hastily made arrangements to pay a premium and acquire a new policy after he caused the accident. [1] After Attorneys for the Nalder Plaintiffs' obtained a $3.5 million

[1] Attached as *Exhibit '5'* the deposition of Giselle Molina, *which is attached hereto as Exhibit '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.*

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dollar default judgment against Lewis, Attorneys for the Nalders' and Lewis commenced this lawsuit for 'bad faith,' claiming UAIC should have covered Lewis, even though his policy had expired.

When this case opened, Gary Lewis *first* insisted that he had, in fact, paid for his premium prior to the expiration of his policy on June 30th, 2007 and ***that Defendant had denied receiving it.*** *See attached copy of Plaintiff's original responses to requests for admissions, attached hereto as Exhibit 'C', numbers 4 & 7.* However, Lewis also refused to answer any discovery or produce any documents evidencing this alleged payment. Moreover, Lewis objected and refused to produce the assignment of rights under which the Nalder Plaintiffs' brought the instant suit. These responses necessitated a Motion to Compel discovery responses and a motion for sanctions. In response to this motion, at the eleventh hour and, on the doorstep to the courtroom on the day of the hearing, the plaintiff simply *changed his story* and ***admitted that he had not, in fact, ever paid his premium for a renewal policy before the previous policy was terminated.*** *See copies of Plaintiff's 'Supplement' to his Responses to Requests for admission, which are attached hereto as Exhibit 'D, numbers 4 and 8'.* Further, at that time, the plaintiff also produced an 'Assignment' - which purports to assign Plaintiff Lewis' chose in action to the Nalder Plaintiffs' – but, which was entered into on February 28, 2010[2]. *See Exhibit 'E', attached hereto.* Plaintiffs – by virtue of the amended responses to requests for admissions – have admitted there exists no material issue of fact concerning that Lewis did not timely pay his premium for the July 2007 policy. Instead, at that point, Plaintiffs' shifted their argument to maintain that Lewis was due coverage because of an *ambiguity* in the renewal statement – *not because he paid his premium timely and UAIC 'lost it'.*

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[2] The court will note that this purported 'assignment' was apparently executed long after the lawsuit was filed. It begs the obvious question how, or why, the Nalder Plaintiffs' were able to 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.

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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*

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as Exhibit 'D.'

As such, Defendant has maintained that this loss occurred during the period of non-coverage that existed from June 30, 2007 to July 10th, 2007. *See Declaration of Western Regional Marketing and Underwriting Manager for United Automobile Insurance Company, Danice Davis.* UAIC became aware of the loss when Lewis called the Company to check coverage on July 13, 2007 whereupon customer service representative Eric Cook informed him the loss occurred in a period of no coverage after confirming this with the Underwriting Department. *See Deposition of Eric Cook attached hereto as Exhibit 'F', p. 36, Lines 17-23,p. 53, lines 4- 10, and copy of Underwriting notes confirming call with Lewis, attached hereto as Exhibit '1' to deposition of Giselle Molina, Exhibit 'B', hereto*[3]. Thereafter, when Counsel for the Nalders' made a formal claim upon UAIC, the Company double-checked coverage with underwriting and, contacted the insurance agency, U.S. Auto, who confirmed Lewis had not paid his premium until July 10, 2007 and, provided a copy of the receipt. Additionally, UAIC attempted to contact Lewis, but was unsuccessful. *See copy of deposition testimony of Jan Cook, attached hereto as Exhibit 'G', p. 34, lines 8-19, p. 35, lines 7-18, p. 50, lines 11-14, p. 56, lines 2-15, p. 68, lines 13-16, p. 72, lines 14-20; See Copy of Deposition testimony of Giselle Molina, attached hereto as Exhibit 'B', p. 30, lines 4-5, and see copy of UAIC's claims notes, attached as Exhibit '4' to the deposition of Giselle Molina, Exhibit 'B', hereto.*

After verifying with the agency that no payment had been made prior to expiration of the June policy until July 10, 2007, and attempting to contact Lewis, Plaintiffs' were informed of the fact that no coverage was in force for the loss. *See Declaration of Western Regional Claims Manger for United Automobile Insurance Company, Jan Cook, and attached copy of correspondence to Counsel for Plaintiff, attached thereto as Exhibit 'A.'* Plaintiff James Nalder, as guardian of Cheyenne Nalder, then filed suit in the Clark County District Court on October 9, 2007 under suit number A549111 against Lewis. On October 10, 2007, and again November 1,

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

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2007, the Company informed both claimant attorneys via correspondence of the fact there was no coverage due to non-renewal for failure to pay premium. *See Declaration of Western Regional Claims Manger for United Automobile Insurance Company, Jan Cook, and attached copy of correspondence to Counsel for Plaintiff, attached thereto as Exhibits 'A' and 'B.'*

Lewis' *current attorneys* commenced suit ***against him*** after they were advised that Lewis had no insurance for this loss. Lewis' current attorneys then took a default against their now client. On May 15, 2008 Plaintiff's petitioned the Court for a default Judgment in the amount of $3.5 million. *See copy of default judgment, attached to Plaintiff's Motion for Summary Judgment as Exhibit '2.'* On May 16, 2008 the plaintiff attempted to amend that petition to seek $5 million. On June 2, 2008 the court entered a default judgment against Lewis for $3.5 million.

On May 22, 2009 Nalder and Lewis filed the present suit against the UAIC seeking payment of the default judgment against Lewis[4]. *See Plaintiff's Complaint, attached hereto as Exhibit 'H.'* Plaintiffs have also made several 'extra-contractual' or 'bad faith' claims against Defendant UNITED AUTOMOBILE INSURANCE COMPANY (hereinafter "UAIC or United Auto"). *See Plaintiff's Complaint, attached hereto as Exhibit 'H.'* Namely, Plaintiff alleges UAIC has breached its duty of good faith and fair dealing towards Plaintiffs, and failed to abide by Nevada's Fair Claims and Practices Act, N.R.S. 686A.310. Plaintiffs' bad faith claims are set forth in their Complaint. *See Exhibit 'H.'* Defendant has denied Plaintiffs' claims. *See Copy of United Auto's Answer and Affirmative Defenses, attached hereto as Exhibit 'I.'*

Defendant has, from the outset, disputed coverage for Plaintiff's claims. It is clear that there was no policy was in effect the date of loss and, therefore, UAIC argues no coverage would be owed to Lewis for Plaintiffs' claims. However, Defendant argues that regardless of this Court's ultimate determination regarding any ambiguity in the renewal statement, Defendant had a reasonable belief no coverage existed based on the failure to timely remit premium and, as such, cannot be liable for any extra-contractual damages, in hindsight, several years later based

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

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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, 2007[5] – **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)*

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policy and increased premium required a Revised Renewal Statement to be sent out. In no way did same Revised Renewal Statement create a "course of conduct" allowing for payment of premium beyond expiration of the current policy term. This conclusion is supported by the fact that Lewis actually paid for his May 2007 policy on April 28, 2007 and the new policy term incepted, on schedule, April 29, 2007. *See Receipt of Payment dated April 28, 2007, page 26 of Exhibit '1' to Plaintiff's Motion for Summary Judgment.*

Similarly, Plaintiff notes that Lewis' June 2007 Policy required the premium to be received by May 29, 2007 (the last day of Lewis' May 2007 policy). *See Renewal Notice at page 28 of Exhibit '1' to Plaintiff's Motion for Summary judgment.* Thereafter, as Plaintiff points out, Lewis failed to remit any premium until May 31, 2007. *See Receipt of Payment, page 34 of Exhibit '1' to Plaintiff's Motion for summary judgment*[7]. As such, Lewis' June 2007 policy did not incept until May 31, 2007 – *when payment was received. See Declarations page for June 2007 Policy at page 30 of Exhibit '1' to Plaintiff's Motion for Summary judgment.* As such, like for the loss in the case at bar, Lewis had a lapse in coverage from 12:01 a.m. May 29, 2007 until 9:12 a.m. on May 31, 2007, when the new policy was paid for and incepted.

This was the same situation that occurred for the July 2007 policy, where the renewal notice clearly stated that the "Renewal Amount" must be paid "**No Later than 6/30/07.**" *See July 2007 Renewal Notice page 34 of Exhibit '1' to Plaintiff's Motion for summary judgment.* Lewis, as happened with the June policy 2007 policy, was again late with his payment. Now it is agreed by all parties that Lewis did not remit premium for his July 2007 policy term until July 10, 2007. *See Receipt of Payment at page 39 of Exhibit '1' to Plaintiff's Motion for summary*

[7] It is important to note that, every subsequent policy term Lewis had with UAIC , after March 2007, would be titled "renewal" and not "new business" on the receipt of payment because Lewis was not 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.

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judgment. Therefore, as occurred with the June 2007 policy, UAIC incepted Lewis' July 2007 policy term late on July 10, 2007. *See copy of Declarations for July 2007 policy at page 36 of Exhibit '1' to Plaintiff's Motion for summary judgment.* In this way, it is undisputed that Lewis, again, had a lapse in coverage from 12:01 a.m. June 30, 2007 to 12:50 p.m. July 10, 2007.

Plaintiff also notes that, in September and December 2007, Lewis again failed to timely remit his premium. UAIC does not dispute this. UAIC argues, in fact, this is further proof of Lewis' "course of conduct" - of **failing to pay for his new policy timely**. In fact, Lewis even failed to remit premium for his August 2007 policy timely as well. As can be seen from the records, Lewis was issued a renewal notice to remit his premium for his August 2007 policy by August 10, 2007 (this was because, of course, his July 2007 policy began July 10, 2007 due to late payment). *See copy of Renewal Statement for August 2007 Policy at page 40 of Exhibit '1' to Plaintiff's Motion for summary judgment.* Lewis, however, did not pay his August 2007 premium until August 13, 2007. *See Receipt of Payment at page 45 of Exhibit '1' to Plaintiff's Motion for summary judgment.* Thereafter, UAIC incepted his August 2007 policy on the date of payment, August 13, 2007. *See Declarations Page for August 2007 Policy at page 42 of Exhibit '1' to Plaintiff's Motion for summary judgment.* Again, his September 2007 Policy then required remittance of renewal premium by September 13, 2007. *See Renewal Statements at pages 6 and 8 of Exhibit '2' to Plaintiff's Opposition to Defendant's original Motion for summary judgment, Document 20, herein.* Lewis, again, failed to remit premium until September 14, 2007 (*See Receipt of Payment at page 13 of Exhibit '2' to Plaintiff's Opposition to Defendant's original Motion for summary judgment, Document 20, herein.)* and corresponding new Policy Declaration page for the September 2007 policy, issued September 14, 2007 at the time of payment. *See Declaration Page at page 10 of Exhibit '2' to Plaintiff's Opposition to Defendant's original Motion for summary judgment, Document 20, herein.* Lewis went on to make his October and

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November 2007 policy term premium payments timely (*See Receipts of Payments at pages 22 and 34 of Exhibit '2' to Plaintiff's Opposition to Defendant's original Motion for summary judgment, Document 20, herein.)* before failing to remit his December 2007 premium on time. As such, once again, UAIC did not issue a new policy term until said payment was received on December 15, 2007. See Receipt of Payment and Declarations Page at *pages 40 and 37, respectively, of Exhibit '2' to Plaintiff's Opposition to Defendant's original Motion for summary judgment, Document 20, herein.*

As such, when one actually reviews the UAIC records, it is clear, UAIC did not issue any new policy term for Lewis ***until payment was received***. During any period between expiration of a previous monthly policy – and remittance of policy premium for the new monthly term – Lewis would have a lapse in coverage. From a review of the records this happened on several occasions – *both before and after* July 2007 policy. Therefore, the evidence this case actually proves a course of dealing where Lewis, contrary to his self-serving interrogatory answers, had a prior course of dealing with UAIC wherein he knew his new policy term did not incept until he paid his premium.

Also, Defendant would like to note that Plaintiff also mischaracterizes or, does not completely cite the testimony of several witnesses. For instance, Plaintiff claims that Danice Davis, the Person Most Knowledgeable (PMK) for UAIC in regards to underwriting issues, is unable to indicate "expiration of your policy", on the renewal notice, referred to expiration of your *current* policy (rather than the expiration date on the top right hand corner for the future policy as Lewis claims he believed). However, Plaintiff is twisting Danice Davis' testimony. This is because though Davis told Plaintiff, *time and time again*, what the Defendant believes is reasonable and unambiguous interpretation of the renewal. Specifically, when you review Davis' testimony, she clearly told Appellant: **"So it's a renewal offer to go another term. So when**

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I'm referencing your policy, it would be your policy that you have in force at the time you get this offer in order to extend to another term. " *See Exhibit '4' to Plaintiff's Motion for summary judgment, Davis Deposition, p. 62, Lines 11-25 and page 63, Lines 1-8.*

Accordingly, when one examines a full testimony of Ms. Davis' testimony it is clear she does explain her interpretation of the renewal. That is, since it is an offer for the next term, the only reasonable interpretation would be for an insured to pay his premium, by the **due date** to extend to the new term. As such, Davis would not agree with Plaintiff's attempt to force his interpretation on her and she explained the words "your policy" clearly reference the "current policy term" and the offer would be to extend to another term.[8]

Next, Plaintiff again misquotes or mischaracterizes the testimony of the former employees of UAIC, Manny Cordova and Lisa Watson for their argument that these individuals state the renewal is ambiguous. First, Plaintiffs' allege Mr. Cordova stated "certainly people can interpret a document differently" for 'proof' that the document here is ambiguous. Plaintiffs', however, fails to fully cite Mr. Cordova because, when one does, it is apparent he *never* said the document was ambiguous. In fact, Mr. Cordova agreed with UAIC's interpretation of the renewal notice and, where he did state one could view a document 'differently' he did so in a purely *philosophical* manner. That is, in response to Plaintiffs' Counsel again attempting to get a witness to agree with his interpretation of the document, Mr. Cordova testified:

BY MR. SAMPSON:
Q: Okay. It's subject to multiple interpretations, fair statement?

MR. DOUGLAS: Objection, that mischaracterizes his testimony, calls for a legal conclusion. That's not what he said, Counsel.

THE WITNESS: I would have to agree, that's not what I said. What I said was, again, this 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

[8] The Court can read on in the Davis deposition to notice Plaintiffs' Counsel continued attempt to force the witness to adopt his interpretation of the document (*Exhibit '4' to Plaintiff's Motion. 358-362).*

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that will pick this up, you go down there to the looney farm and you give this to a guy and he will think you're handing him Psalms 117 or something. So this is the way I read the 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.

(See Cordova Deposition, attached as Exhibit '5' to Plaintiff's Motion for summary Judgment, p. 105, Lines 5-25, p. 106, and p. 107, Lines 1-16.)

In this way, Mr. Cordova ***never*** stated the document was "ambiguous" or subject to two different reasonable meanings as espoused by Plaintiffs'. In fact, clearly, Mr. Cordova disagreed directly with this interpretation of his testimony – when asked by Plaintiff- as shown above. Accordingly, like with Danice Davis, for Plaintiffs' to use Mr. Cordova's testimony in support of their arguments is simply baseless.

Finally, Plaintiffs' quote testimony of Lisa Watson, another former UAIC employee as further "support" for their arguments. However, the fact is it is quite clear from her testimony as a whole that Ms. Watson was scared *and simply was denying knowledge about anything to avoid being involved in this lawsuit.* This Court can review the transcript, but it is clear from the outset of Ms. Watson's deposition that she answered "she did not know" or that a subject was "outside the scope of her knowledge" *scores of times.* When viewed in this light, it is clear Appellant is, once again attempting to mischaracterize a witnesses' testimony as support for their theory that the renewal notice is ambiguous. Ms. Watson actually testified in her deposition to the plain meaning of the renewal (as put forth by UAIC) but, then, she stated she had *no knowledge* concerning the renewal notices. Specifically, Ms. Watson's full testimony stated, as follows:

Q: Then we have a sentence here that says, "To avoid a lapse in coverage, payment must be received prior to expiration of your policy." Did I read that correctly?

A: Yes.

Q: Do you have an understanding as to what that sentence means or is it outside of what you were involved in?

A: I want to say it's outside (her knowledge).

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Q: Okay, fair enough. And so what they're referring to in terms of expiration, as you sit here right now, you don't have any knowledge or recollection, correct?

A: Correct.

(See Watson deposition attached as Exhibit '6' to Plaintiff' Motion for summary judgment, page 50, Lines 1-24).

As such, when one views the ***full*** testimony of Ms. Watson, like the others, one sees that her testimony just does not support the arguments made by Plaintiff. Here, Watson clearly stated the due date on the renewal was clear and, when pressed by Plaintiff about the meaning of the sentence at issue, Watson agreed that she *had no recollection* of what it referred too. Therefore, clearly, this is not the clear cut endorsement of Plaintiffs' viewpoint they claim it to be. Moreover, it is equally clear that Watson testified the issue *was outside the scope of her knowledge.* Therefore, if anything, Watson testified that she is not the person to decide the issue of ambiguity.

Accordingly, when a full review of the above-referenced witnesses' testimony is conducted, it is apparent none of them espoused the views argued by Plaintiff. In fact, Cordova and Davis specifically ***disagreed with Plaintiffs' argument regarding the ambiguity***. As such, this Court should not countenance Plaintiffs' blatant attempt to 'cherry pick' and/or mischaracterize testimony.

Quite simply, as set forth in Defendant's Counter-Motion for summary judgment, herein, Mr. Lewis' policy of insurance had expired, and had not been renewed, due to nonpayment of renewal premium at the time of this accident. Presumably sensing this might be a problem, Mr. Lewis hastily made arrangements to pay a premium and acquire a new policy after he caused the accident. This should not be a basis for coverage and, cannot be a basis for any 'bad faith' or extra-contractual remedies.'

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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

this Court form an 'implied' or, constructive, insurance contract covering the loss in question (July 8, 2007) based on alleged ambiguity in the renewal notice.

Plaintiff's Summary Judgment amounts to three arguments. First, Plaintiff argues that the "Renewal Statements" sent by UAIC were ambiguous and, therefore, should be construed against UAIC and this court should imply a constructive policy of insurance (contract) for the date of loss. Next, that, if the Court finds coverage based on the ambiguity, that Defendant should be found to have breached the implied covenant of the duty of good faith and fair dealing. Finally, if Defendant is guilty of such 'bad faith', this Court should find the default judgment was proximately caused by the alleged breaches and award Plaintiff the amount of the default judgment plus interest and fees, etc.

Defendant, will address each argument, in turn, but, in short believes all of these arguments to be incorrect in fact and in law. However, and in the alternative, *even should this Court find as a matter of law that an ambiguity existed in the renewal*, and the Court implies an insurance contract, the Court should deny Plaintiff's Motions for summary Judgment on the extra-contractual claims and/or that any breaches caused Plaintiff's damages as Defendant's actions were reasonable.

A. <u>The Renewal Statement Issued to Lewis was not Ambiguous and Clearly Demanded Remittance of Policy Premium, for the Subsequent Term, by Expiration of the Present Policy Period and, at the very least, a material issue of fact remains over whether the renewals were 'ambiguous.'</u>

In support of their argument for this Court to form an implied insurance contract, Plaintiff claims that the "Renewal Statement", issued by UAIC to Lewis were ambiguous because an insured could somehow confuse the expiration date of his *next policy* with expiration

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[9] Defendant must point out that Plaintiffs' incorrectly state in their moving papers that this Court 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.*

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of his *current one*. Moreover, that an insured could somehow fail to notice the clearly labeled "renewal amount" with the words "**Not later than**" followed by a date surrounded by stars. Not only does Defendant believe that Plaintiff's argument defies commons sense but, also that the case law cited by Plaintiff is dissimilar to the case at bar. As such, Defendant asks this Court to conclusively find these renewals to be unambiguous.

It is axiomatic that unambiguous language in a contract's terms must be upheld. Farmer Ins Co. v. Young, 108 Nev. 328 (Nev. 1992). The Supreme Court of Nevada has also stated that the language of an insurance policy will be given its plain and ordinary meaning from the viewpoint of one not trained in law. United Insurance Co. v. Frontier Insurance Company, Inc., 120 Nev. 678 (Nev. 2004)[10]. Additionally, the Ninth Circuit Court of Appeals has stated that where the language of an insurance policy admits of only one meaning, there is no basis for interpretation of the policy coverage under the guise of ambiguity. Further, that ambiguity does not exist just because a claimant says so. It can only exist where the wording or phraseology of a contract is reasonably subject to two different interpretations. State Farm Mut. Auto. Ins. Co. v. White, 563 F.2d 971 (9th Cir. 1977).

As attested to by Danice Davis, in her Declaration herein, Lewis June 2007 policy term **expired** per its term on June 30th, 2007. *See Declaration of Danice Davis and copy of June 2007 policy attached thereto as Exhibit 'A', p. 11 'Policy Period, Territory.'* Here, it is uncontroverted that the June 2007 policy expired, per its term, on July 30th, 2007. *See Danice Davis Declaration.* Further, it is uncontroverted that Lewis did not remit premium until *after* the loss when he paid for his subsequent policy term on July 10th, 2007. *See Exhibit 'D', hereto.* Accordingly, there was no policy in place for the loss.

Plaintiffs', of course, have altered their theory for coverage (first claiming Lewis made a

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timely payment and UAIC lost it) to claim that this court should imply a policy of insurance due to an alleged ambiguity in the renewal statement issued to Lewis. For purposes of this discussion, Defendant will focus only on the renewal important to the case at bar – for the July 2007 policy. *See Renewal Statement at page 34 of Exhibit 'I' of Plaintiff's Motion for summary judgment.* As such, prior to expiration of the June 2007 monthly policy, United Auto sent Lewis a 'Renewal Statement' that clearly provided he needed to remit premium for his July 2007 Policy by June 30, 2007. *See Declaration of Danice Davis and Exhibit 'B', thereto.* This Renewal statement is clear and unambiguous. It states quite prominently that Lewis premium was due "no later than 6/30/07." *See Declaration of Danice Davis and Exhibit 'B', thereto.* This Date was specifically surrounded by stars on the Renewal Notice. Plaintiff argues that because the paragraph in the body of the notice mentioned that Lewis needed to remit the premium before "expiration of the policy" and the expiration date for *the new policy* is located in the upper right hand corner – an insured might think he/she had until expiration of the subsequent policy term to remit premium *for* that term. This interpretation defies logic and reason as a straightforward review of the renewal reveals there is only one meaning for the due date for remittance of the new premium. Not only does the due date coincide with the *expiration of the current policy term* (there June 30, 2007) but, that same date is surrounded by stars on the top of the notice and listed, again, at the bottom left hand corner of the Renewal as "**Due Date.**"

Moreover, common sense would dictate the expiration date refers to expiration of the current policy of insurance and not the new subsequent policy. Car insurance is mandated by law and all drivers have purchased policies of insurance and paid renewal premiums. As such, unlike *interpretation of policy provisions* – where a layman may not be exposed to contract language or construction – understanding of a renewal notice *is a common experience*. As such, the Court

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should review this renewal notice under the same familiarity that most people would – and understand the clearly marked "**Due Date**" for their renewal premium *was the date required for renewal premium*. This conclusion is the straightforward interpretation of the notice.

Moreover, this conclusion is supported by the history of dealings between Lewis and UAIC (set forth above) where Lewis' new policy term was *never* issued prior to receipt of his new premium payment. Despite Plaintiff's arguments to contrive a 'prior course of dealing' where 'Lewis could pay his premium late', the record actually shows that 1) UAIC ***never issued*** a new term without receiving payment and, 2) Lewis was late and had lapses in coverage more often than he paid timely. These facts belies Plaintiff's self-serving remarks that he "understood" the renewal notice to allow him to pay his renewal premium late. Rather, it is clear this argument was manufactured, *post hoc*, by Plaintiff. This is further supported by the fact that, even after the loss in question, and UAIC's disclaimer of coverage, *Lewis continued to pay for new policy terms with UAIC*. If he had really "believed" he would be covered for the loss at bar after paying his premium late – common sense dictates a rational consumer would have, thereafter, sought coverage from one of the multitude of other insurers available to him. The fact that he did not seek coverage from another company reveals that Lewis must not have actually believed UAIC should have covered him herein.

This conclusion is supported by the testimony of Lewis himself which betrays the ad-*hoc* explanation of what he believed the "due date" was. Specifically, Lewis, at his deposition testified to the following in discussing one of the renewal notices from UAIC:

Q: So can you tell me why? You said you didn't ignore it (in reference to the due date).

A.I can't tell you why.

Q. Okay. Can you look down at the bottom left-hand corner. Does it say due date with a date there?

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

'expiration date' rather than the clearly marked 'due date' as the date for payment. Later, after a break where he met with his counsel, Lewis tried to claim he thought he had a 'grace period' after the due date, but the fact is such an interpretation is not reasonable when one examines the document and history of the parties' transactions.

Moreover, Defendant would like this Court to take note that, if the Court considers Lewis' subjective beliefs[11] about what he thought the renewal notice stated, this Court must also consider that individual's credibility. Here, Lewis changed his 'testimony' regarding why he failed to pay the premium, for July 2007, late. First, in answers to Requests to Admit he stated it was because UAIC lost his timely premium payment. (*See Exhibit 'C', hereto*). However, after a Motion to Compel was filed, demanding the form or method of this 'lost payment', Appellant Lewis miraculously *changed his argument* and began advancing this ambiguity argument (*See Lewis' Supplemental Responses to Requests to Admit, no. 8, Exhibit 'D', hereto*). Besides this change in testimony ***in this case, regarding the main issue in this case***, Lewis also has a credibility issues because he is a convicted forger. (*See Lewis Answers to Interrogatories no. 3, attached as Exhibit '3' to Plaintiffs' Motion for summary judgment*) As this Court knows, F.R.E. 609(a)(2) allows for criminal convictions to be admitted, *without consideration of prejudicial effect* {unlike F.R.E. 609(a)(1) which is subject to F.R.E 403} when the crime involved has an element that includes an "**act of dishonesty or false statement by the witness**." F.R.E. 609. In this case, it is clear forgery contains just such an element. As such, a forgery conviction is automatically admitted for impeachment under F.R.E. 609 (a)(2). *United States v. Hayes*, 553 F.2d at 827 (1977).

The fact is, to adopt the interpretation Plaintiff seeks is to stretch both the facts and

[11] The subjective statements of witnesses are really not relevant to the Court's inquiry regarding the ambiguity issue. Farmers Ins. Exch. v. Neal, 119 Nev. 62, 64 P.3d 472, 473 (Nev. 2003).

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common sense to manufacture an ambiguity where none exists. This court should not tolerate Plaintiff's *ad hoc* argument for coverage. The clear, plain, and unambiguous reading of the Renewal Statement shows Plaintiff Lewis was notified his premium, for his July 2007 policy term, needed to be received on or before the "Due Date" of June 30, 2007 to avoid a lapse in coverage. That due date is noted twice on the Renewal Statement. Lewis failed to remit same premium prior to July 10, 2007. As such, this Court can conclude no policy insurance existed for Lewis on July 8, 2007 and deny Plaintiff's Motion for summary judgment. At the very least Defendant argues that certainly a material issue of fact remains as to the ambiguity prohibiting summary judgment.

B. **Alternatively, regardless of the finding concerning the ambiguity issue, Defendant opposes summary judgment on Plaintiff's claims for extra-contractual remedies, and 'bad faith', in favor of Plaintiff as a Genuine Dispute as to coverage exists.**

Plaintiff has also filed this Motion for summary judgment on their causes of action for breach of the implied covenant of good faith and fair dealing, specifically for a breach of the duty to defend[12]. Defendant has asked, that regardless of the ultimate finding on the ambiguity issue, that should this Court deny Plaintiff's summary judgment in regards to the extra-contractual claims as, at the very least, a "Genuine Dispute" existed as to coverage. Here, the *prior District Judge and, Plaintiff's own counsel at hearing, previously agreed that Defendant's interpretation of the renewals was reasonable*. Further, Plaintiff cites case law that is completely inapplicable to the case at bar or not binding precedent. **Every case** cited by Plaintiff involved a situation where there *existed a policy in force at the time of loss* making such cases

(Cont.)

[12] It does not appear to Defendant that Plaintiff has brought the Motion for summary judgment as to any claimed breaches of the Nevada Unfair Claims Practices Act, NRS 686A.310 and, as such, same is not discussed herein. To the extent Plaintiff is seeking judgment on these claims, Defendant refers this

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distinguishable from the one at bar where there the parties admit there *was no policy* and, instead, *Plaintiffs' have asked this Court to find an implied policy from an ambiguity in the renewal.* In this way, these cases simply do not correctly reflect a situation where the insurer's records revealed **no policy to be in force for the loss.** Rather, based upon Nevada law and, case from the Ninth Circuit, it seems clear, as a matter of law, that Defendant cannot be held liable for extra-contractual remedies when, at the very least, a "genuine dispute" existed as to whether there *even was a policy in effect.*

1. The case law cited by Plaintiff is non-binding or inapplicable to the case at bar and simply does not state the correct standard to be applied here.

First, it must be noted that Plaintiff cites to a West Virginia opinion, Shamblin v. Nationwide Mut. Ins. Co., 396 S.E. 2d 766 (W.Va. 1990) suggesting an insurer strictly liable for insurer bad faith. However, as this Court plainly knows this precedent is not binding on this Court and, moreover, does not accurately set forth the standard for insurer bad faith liability in Nevada. Accordingly, this case and, argument, is of little use in the case at bar. Moreover, the Shamblin case and, several California decisions relied upon by Plaintiff, are distinguishable for the simple reason that ***all*** of those cases involved instances where ***there was no dispute as to a policy even being in force*** (and, therefore, the loss occurring during a policy term) and the insurers had failed to settle the claim within limits, thus exposing the insureds to excess judgments. Accordingly, the standards applied in those cases are distinguishable from the case at bar where there was a genuine dispute as to the *existence of a policy at the time of loss.*

Indeed the California precedents all state merely that an insurer who failed to settle within an insured's policy limits, may later be responsible for the detriment caused by the insurer's breach of the covenant of good faith and fair dealing. *See* Comunale v Traders &

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Court to it discussion of these claims in Defendants Counter-Motion for summary judgment on these very

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General Ins. Co., 50, Cal.2d 654, 328 P.2d 198; Crisci v. Sec. Ins. Co., 66 Cal.2d 425 (1967); Johansen v Calif. State Auto. Assn. Inter-Ins. Bureau, 538 P.2d 744 (1975). Again, while this may be a correct recitation of the law *in California* – as it applies to traditional "third-party" defense claims made against an insured when a policy is *in force* – it has absolutely no application to the case at bar where *no policy was in effect.* This is evident from a review of the Crisci, Comunale, and Johansen decisions wherein there was *no question as to a policy being in force*[13] and, moreover, there existed evidence that the insurer had no reasonable defense for the insured to refuse a settlement offer within the policy.

The same problem arises with the other cases cited by Plaintiff. For instance, Plaintiff cites to Powers v.U.S.A.A., 114 Nev. 690 (1998), for the proposition that a quasi-fiduciary relationship exists between an insurer and insured. Once again, however, this is a correct interpretation *when a policy in force* but, does not apply to the situation at bar. Further, Plaintiff places much reliance upon Landow v. Medical Ins. Exch. of Cal., 892 F. Supp. 239 (1995) for the proposition that an insurer could be held liable for harm caused to an insured by a failure to settle a claim prior to litigation. However, in that case there **was no issue as to coverage or of a policy being in force.** In fact, in Landow the parties *acknowledged coverage was in effect* and merely disagreed over whether the insurer should subject an insured to the stress of litigating the claim. Id. Accordingly, that case in no way stands for the proposition that UAIC would have owed such a duty to Lewis, here, when there was no evidence at the time that a policy was even in effect.

Additionally, Plaintiff cites to in Pemberton v. Farmers Ins. Exch., 109 Nev. 789, 858

(Cont.)

issues.

[13] The Comunale and Johansen cases did involve an issue of coverage under the policy, which was resolved against the insurer, but they are dissimilar to this case where UAIC had a reasonable belief there was no policy in force and, not merely an argument against coverage for the loss.

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P.2d 380 (1993), broadly, for the proposition that Nevada established standards for insurers in Uninsured or Underinsured motorist coverage claims and, also, for the proposition that 'insurers have a duty to investigate.' Whether or not that case stands for those propositions, it is clear that in that case the Nevada Supreme Court held that a claim for insurance bad faith *does not accrue until the underlying contractual action is resolved.* Id. As such, the Court there felt the insurer's duties did not accrue to the insured until *legal entitlement to benefits was established.* Here, the Plaintiff's **have yet to prove a policy in force on the date of loss** (and, therefore, legal entitlement) and, in fact, one Judge has already found that there was not. As such, this case also does not lend Plaintiff support for the proposition that UAIC committed any actionable bad faith in this case.

Finally, the Plaintiff also relies on Allstate v. Miller, 212 P.3d 318 (2009), for the proposition that the implied covenant of good faith and fair dealing included a duty to notify of settlement offers. Again, however, Plaintiff fails to address the fact that, in Miller, there *was simply no question as to whether a policy was in effect.* This is an important factor that distinguishes this case from the one at bar as the implied covenant of good faith and fair dealing necessarily *flows from the existence of a valid policy*. Besides being distinguishable on that point, it cannot be understated that Allstate v Miller also stands for the proposition that Nevada has *followed the genuine dispute doctrine*, as set forth in Guebara v. Allstate Insurance Company, 237 F.3d 987, 992 (9th Cir. 2001), as the Court in Allstate v Miller, stated:

> "**When there is a genuine dispute regarding an insurer's legal obligations, the district court can determine if the insurer's actions were reasonable.** *See* Lunsford v. American Guarantee & Liability Ins. Co., 18 F.3d 653, 656 (9th Cir. 1994) (interpreting California law); CalFarm Ins. Co. v. Krusiewicz, 131 Cal. App. 4th 273, 31 Cal. Rptr. 3d 619, 629 (Ct. App. 2005)
> 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.

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> In Homeowners Ass'n v. Associated Internat. Ins. Co., 90 Cal. App. 4th 335, 108 Cal. Rptr. 2d 776, 783 (Ct. App. 2001), the California Court of Appeals held that a bad-faith claim requires a showing that the insurer acted in deliberate refusal to discharge its contractual duties. **Thus, if the insurer's actions resulted from "'an honest mistake, bad judgment or negligence,'" then the insurer is not liable under a bad-faith theory**. *Id.* (quoting Careau & Co. v. Security Pacific Business Credit, Inc, 222 Cal. App. 3d 1371, 272 Cal. Rptr. 387 (Ct. App. 1990)) Pemberton v. Farmers Ins. Exchange, 109 Nev. 789, 793, 858 P.2d 380, 382 (1993) (holding that bad faith exists when an insurer acts without proper cause); Feldman v. Allstate Ins. Co., 322 F.3d 660, 669 (9th Cir. 2003)
> bad faith, plaintiff must show insurer unreasonably or without cause withheld benefits due under the policy).

Id. at 317, 329. (emphasis added) As can be seen from a full reading of the Miller decision, the case actually supports Defendant's position. Namely, that a court can review an insurer's actions – at the time they were made – to determine if they were reasonable as a matter of law. Moreover, that 'bad faith' cannot be premised upon an 'honest mistake, bad judgment or negligence.' Here, Defendant argues, UAIC actions at the time must be found to have been reasonable and, certainly were not in 'bad faith' based on a reasonable review of the record.

Further, it is clear that other Nevada decisions have followed this reasoning and held that "[b]ad faith is established where the insurer acts unreasonably and with knowledge that there was no reasonable basis for its conduct." Guarantee National Insurance Company v. Potter, 112 Nev. 199, 206, 912 P.2d 267, 272 (1996). In American Excess Insurance Company v. MGM, 102 Nev. 601, 729 P.2d 1352 (1986), the Nevada Supreme Court held that an insurer cannot be found liable for bad faith, as a matter of law, if it had a reasonable basis to contest coverage. The Court in American Excess, supra, defined bad faith as "an actual or implied awareness of the absence of a reasonable basis for denying benefits of the policy." Id. at 605. The Court stated that "because we conclude that AEI's interpretation of the contract was reasonable, there was no 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

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Company, 863 F. Supp. 1237 (D. Nev. 1994) 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.

Accordingly, from the Allstate holding and, other decisions cited herein, it is clear that the key to a bad faith claim **is whether or not the insurer's decision regarding coverage is reasonable** and, that when the insureds actions are reasonable, the Court *can decide so as a matter of law and dismiss the extra-contractual claims*. Moreover, that the insurer's decisions must be reviewed from the facts *at the time it made the decision* – not in hindsight. Here, Plaintiffs claims that they are entitled to $3.5 million dollar default judgment, far in excess of Mr. Lewis' $15,000 policy limits, apparently because of Defendant's 'bad faith' for their failure to defend under Lewis' policy. However it seems clear from the discussion above, regarding Defendant's actions on related to a policy which all evidence shows was not in force at the time - by plaintiff's admission **no payment was made between June 12, 2007 and July 10, 2007** – that Defendant's actions were reasonable. Now, years later, after an ambiguity is claimed in a renewal, while Defendant may be found to owe coverage on an implied contract, the Plaintiffs' must admit that a *genuine dispute* existed as to coverage for the loss at the time. In fact, Plaintiffs' Counsel admitted just this fact at hearing on the initial Motion for summary judgment when he admitted Defendant's *reading of the renewal was reasonable. See transcript of 12/7/10 hearing, attached hereto as Exhibit 'J', p. 35, Lines 20-24.* Indeed a Federal District Court Judge has also already found UAIC's interpretation of the renewals (and, therefore their actions thereafter) was a reasonable one in granting summary judgment. *See Document No. 42, herein.*

Additionally, Defendant notes that Lewis cannot, in good faith, complain he did not know of settlement offers. As he admits in his answers to interrogatories[14], he was in communication with Counsel for Plaintiff within days after the loss. As such, Counsel for Plaintiff would certainly have told him he offered settlement for policy and that he planned to seek a multi-

[14] See Exhibit '3' to Plaintiffs' Motion for summary judgment

million dollar default judgment against Lewis, should his insurer fail to tender same policy limits.

Moreover, contrary to Plaintiff's arguments that UAIC did 'no investigation' is also misstating the record. The fact is, UAIC also investigated this coverage issue several times before declining coverage and defense of the underlying suit. In this case, UAIC investigated coverage when notified of the loss by both confirming the lapse through their underwriting department. This was done when Lewis initially called to check coverage (on July 13, 2007) as documented by the underwriting note, whereupon customer service representative Eric Cook informed him the loss occurred in a period of no coverage after confirming this with the Underwriting Department. *See Deposition of Eric Cook attached hereto as Exhibit 'F', p. 36, Lines 17-23,p. 53, lines 4- 10, and copy of Underwriting notes confirming call with Lewis, attached hereto as Exhibit '1' to deposition of Giselle Molina, Exhibit 'B', hereto*[15]. Thereafter, when Counsel for the Nalders' made a formal claim upon UAIC, the Company double-checked coverage with underwriting and, contacted the insurance agency, U.S. Auto, who confirmed Lewis had not paid his premium until July 10, 2007 and provided a copy of the receipt. Additionally, UAIC attempted to contact Lewis, but was unsuccessful. *See copy of deposition testimony of Jan Cook, attached hereto as Exhibit 'G', p. 34, lines 8-19, p. 35, lines 7-18, p. 50, lines 11-14, p. 56, lines 2-15, p. 68, lines 13-16, p. 72, lines 14-20; See Copy of Deposition testimony of Giselle Molina, attached hereto as Exhibit 'B', p. 30, lines 4-5, and see copy of UAIC's claims notes, atached as Exhibit '4' to the deposition of Giselle Molina, Exhibit 'B', hereto.*

As such, based on all the evidence available at the time[16] and, after investigating coverage, UAIC denied coverage for the loss based upon a reasonable basis that there was no

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

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

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policy in force and, therefore, no coverage for the loss. Under the case law cited herein, this cannot be a basis for bad faith remedies against UAIC. This is a simple disagreement about the coverage for a loss where the putative insured, Lewis, *admitted he made no timely payment under the terms of the policy* and only in this case claimed an ambiguity in the renewal that he did not understand. At the time of the claim UAIC reviewed coverages, confirmed the payment was late with the insurance agent and, tried to contact Lewis. Based on the information available to it at the time, UAIC made a reasonable decision that there was *no policy in effect.* The former Judge hearing this case and, Plaintiff's counsel, have agreed UAIC's position regarding the renewal statement and, therefore, coverage, was a reasonable one. Under these circumstances, even if this Court ultimately implies a contract due to the ambiguity, there can be no basis for a claim for "bad faith," other extra-contractual claims, or punitive damages. Plaintiff cannot, as a matter of law, establish that Defendant's determination that no policy was in force for the loss is unreasonable or without proper cause. Rather, under the "genuine dispute" doctrine, it is the Defendant whom is entitled to summary judgment as to Plaintiffs' extra-contractual claims (for breach of the covenant of good faith and fair dealing and for violations of the Nevada Unfair Claims Practices Act and Nevada Administrative Code) and claim for punitive damages.

2. The standard for insurer bad faith in this case is whether UAIC acted reasonably and/or, whether tits denial was based upon a "genuine dispute" as to coverage.

Cases which are more analogous to the case at bar hold that the duty to defend is not absolute. Further, that a potential for coverage only exists when there is arguable or possible coverage. United Insurance Co. v. Frontier Insurance Company, Inc., 120 Nev. 678 (2004.); Turk v. TIG Ins. Co., 616 F. Supp. 2d 1044 (2009). Determining whether an insurer owes a duty to defend is achieved by comparing the allegations of the complaint with the terms of the policy. Id. In Turk v. TIG Ins. Co., 616 F. Supp. 2d 1044 (2009), the policy did not list the company the

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insured was president of as an additional insured and, as such, there was no possibility for potential coverage for that company and, therefore, no duty to defend. Defendant believes the situation in that case, where an insured was clearly not listed on the policy, is more similar to the case at bar where no policy was in existence. Clearly, an insurer who looks at a policy's declarations and determines and insured is not listed must be comparable to a situation where the insurer finds no policy to even be in effect for the loss. In this way, like the insurer in Turk, it was reasonable for UAIC to believe there was no *potential for coverage.*

In short, in Nevada, the key to a bad faith claim is whether or not the insurer's decision regarding coverage is reasonable. "Bad faith is established where the insurer acts unreasonably and with knowledge that there was no reasonable basis for its conduct." Guarantee National Insurance Company v. Potter, 112 Nev. 199, 206, 912 P.2d 267, 272 (1996). In American Excess Insurance Company v. MGM, 102 Nev. 601, 729 P.2d 1352 (1986), the Nevada Supreme Court held that an insurer cannot be found liable for bad faith, as a matter of law, if it had a reasonable basis to contest coverage. The Court in American Excess, supra, defined bad faith as "an actual or implied awareness of the absence of a reasonable basis for denying benefits of the policy." Id. at 605. The Court stated that "because we conclude that AEI's interpretation of the contract was reasonable, there was no basis for concluding that AEI acted in bad faith." Id. The Ninth Circuit has thus recognized the "genuine dispute" doctrine. The "genuine dispute" doctrine protects insurers from bad faith claims where the insurer can show that there was a genuine dispute about coverage. See Beltran v. Allstate, 2001 U.S. Dist. LEXIS 9614 (2001).

Similarly, the Ninth Circuit has recognized the "genuine dispute" doctrine. This doctrine stems from the recognition that insurance companies have to investigate claims and should be allowed to do so without fear of accusations of bad faith. Courts hold that the implied duty to investigate claims allows the insurer to give its own interests consideration equal to that it gives its insureds. The "genuine dispute" doctrine protects insurers from bad faith claims where the

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insurer can show that there was a genuine dispute about coverage. See Beltran v. Allstate, 2001 U.S. Dist. LEXIS 9614 (2001). The existence of a genuine dispute as to Defendant's legal liability to pay benefits precludes, as a matter of law, extra-contractual recovery against the insurer for breach of the implied covenant of good faith and fair dealing. Opsal v. United Services Auto Association, 10 Cal. Rptr. 2d 353 (1991). The key to a bad faith claim is whether or not the insurer's denial of coverage was reasonable. Under the "genuine dispute" doctrine a bad faith claim can be dismissed on summary judgment if the defendant can show that there was a genuine dispute as to coverage. See Guebara v. Allstate Insurance Company, 237 F.3d 987, 992 (9th Cir. 2001) (citations omitted). As discussed in more detail in section '1' above, the Nevada Supreme Court has recognized the 'genuine dispute' doctrine in its holding in Allstate v Miller, 125 Nev. 300, 212 P.3d 318 (NV. 2009).

Nevada law states that a potential for coverage only exists when there is arguable or possible coverage. United Insurance Co. v. Frontier Insurance Company, Inc., 120 Nev. 678 (2004). In United Insurance Co. v. Frontier Insurance Co., the Nevada Supreme court found that the insurer was not liable for breach of the duty to defend when it failed to defend a loss that did not occur within the policy term. Also, two cases from the Ninth Circuit Court of Appeals are instructive here and, although based on California law, one has been cited and, relied upon by the Nevada Supreme Court in the Allstate v Miller, 125 Nev. 300, 212 P.3d 318 (NV. 2009), holding, cited above. In Lunsford v . American Guarantee Liab. Ins. Co., 18 F.3d 653 (9th Cir. 1994), the Court held that an insurer who investigated coverage and based its decision not to defend on reasonable construction of policy was not liable for bad faith breach of the duty to defend *even after* the Court resolved the ambiguity in the contract in favor of the insured. Similarly, in a prior case, Franceschi v Amer. Motor. Ins. Co., 852 F.2d 1217 (9th Cir. 1988) the Court again resolved an ambiguity in favor of insured, but held the insurer's position had been reasonable and granted summary judgment as to bad faith claims.

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Accordingly, from the Allstate and Guebara holdings and, other decisions cited herein, it is clear that the key to a bad faith claim **is whether or not the insurer's decision regarding coverage is reasonable** and, that when the insurer's actions are reasonable, the Court can decide so as a matter of law and dismiss extra-contractual claims. Moreover, under the United Ins. v Frontier decision Nevada courts have held an insurer is not liable for bad faith breach of the duty to defend for a loss occurring outside a policy term – even when the insured argued the Complaint alleged actions within the term. Finally, the holdings of the Lunsford and Franceschi cases hold that an insurer will not be found liable for bad faith even if an ambiguity is later resolved in favor of the insured.

Here, Plaintiffs claims that they are entitled to $3.5 million dollar default judgment, far in excess of Mr. Lewis' $15,000 policy limits, apparently because of Defendant's 'bad faith' for their failure to defend under Lewis' policy. However it seems clear from the discussion above, regarding Defendant's actions on the policy - which was not in force at the time by plaintiff's admission **no payment was made between June 12, 2007 and July 10, 2007** - that Plaintiffs' must admit a *genuine dispute* exists as to coverage for the loss. In fact, Plaintiffs' Counsel admitted just this fact at hearing on the initial Motion for summary judgment when he admitted Defendant's reading of the renewal was reasonable. *See Exh. 'J', hereto, p. 35, lines 20-24.*. Indeed a Federal District Court Judge has also already found UAIC's interpretation of the renewals (and, therefore their actions thereafter) was a reasonable one in granting summary judgment. Therefore, again, this lawsuit arises from a contested claim for liability insurance on the date of the loss underlying the Nalders' claims. Defendants – with good reason – argue Plaintiff Lewis simply had no coverage in effect on the date of loss. At the very least, regardless of this Court's ultimate determination regarding coverage the Defendant, United Auto, had a ***reasonable basis*** to deny coverage for the loss and lawsuit underlying Plaintiff's Complaint as the records clearly indicate a failure to make timely payment and expiration of the policy before the loss. Under Nevada law the Defendant need not be correct in denial – merely that it has a reasonable basis for doing so. Defendants maintain that Plaintiff's admission that he failed to pay

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his renewal premium for his July 2007 policy until after the loss occurring July 8, 2007 clearly created a reasonable basis for United Auto to disclaim coverage for the loss.

As such, in the alternative to the Motion for Summary Judgment, even if this Court ultimately determines that Defendant was wrong with respect to its determination of Plaintiff's coverage for this loss, there still is no basis for Plaintiff's extra-contractual claims or claim for punitive damages. Under the "genuine dispute" doctrine, therefore, Defendant argues it is entitled to summary judgment as to Plaintiffs' extra-contractual claims (for breach of the covenant of good faith and fair dealing and for violations of the Nevada Unfair Claims Practices Act and Nevada Administrative Code) and claim for punitive damages. *See Defendant's Counter Motion for summary judgment, herein.*

C. That in the alternative, even should this Court grant summary judgment on any extra-contractual remedies, certainly a material issue of fact remains as to whether Plaintiff's damages were proximately caused by any breach.

Finally, Plaintiffs' neatly try to 'tie up' their Motion for summary judgment that arguing that, if Defendant is found guilty of breach of the implied covenant of good faith and fair dealing, this Court should also find all damages (included the $3.5 million dollar default judgment and costs and fees, etc.) were proximately caused by Defendant as a matter of law. Defendant of course vehemently disputes it committed any 'bad faith.' However, even should this Court so find summary judgment on these issues, Defendant argues that, in the alternative, these damages not be found against Defendant as a matter of law. Neither the cases nor facts of this case support such a finding.

In support of their argument, Plaintiff essentially relies on two cases. Plaintiff cites United Insurance Co. v. Frontier Insurance Company, Inc., 120 Nev. 678 (2004) for the proposition that where there is arguable or possible coverage, Defendant should have resolved the issue in favor of the insured in providing coverage and a defense. Next, Plaintiff relies on

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Pershing Park Villas v. United Pac. Ins. Co., 219 F.3d 895 (9th Cir. 2000) for the proposition that by not providing a defense, the ensuing default judgment is proximately caused by the Defendant's breach. However, when one reviews these cases it is clear that Plaintiff's argument falls apart.

In United Insurance Co. v. Frontier Insurance Co., the Nevada Supreme court actually found that the insurer was ***not liable*** for breach of the duty to defend when it failed to defend a loss that did not occur within the policy term. Accordingly, United Insurance actually supports the Defendant's position as here Defendant argues the policy expired *prior to the loss.* Similarly, two cases cited above, also support Defendant's position. In Lunsford v . American Guarantee Liab. Ins. Co., 18 F.3d 653 (9th Cir. 1994), the Court held that an insurer who investigated coverage and based its decision not to defend on reasonable construction of policy was not liable for bad faith breach of the duty to defend ***even after*** the Court resolved the ambiguity in the contract in favor of the insured. Also, in a prior case, Franceschi v Amer. Motor. Ins. Co., 852 F.2d 1217 (9th Cir. 1988) the Court again resolved an ambiguity in favor of insured, but held the insurer's position had been reasonable and granted summary judgment as to bad faith claims.

Finally, the Pershing Park Villas decision is also distinguishable from the case at bar. In that case, decided on California law, the insurer had withdrew its defense shortly before trial, disclaiming coverage, however there was never any question as to whether there was a policy *in force*. Thereafter, the policy was found to provide coverage and, while the court found the insurer responsible for its breach of the duty to defend, it did so based in part on evidence presented that the insurer revealed documents *showing it knew there was a potential for coverage.* Obviously, then, this case is completely distinguishable from the present case as Defendant has maintained there was never a policy even in force covering the loss (i.e. not just a question as to coverage) and, more importantly, there has never been a showing that UAIC had

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any reason to believe there was a potential for coverage at that time. In fact, the case history shows Plaintiff changed his argument (to claim ambiguity) **during this litigation.**

Therefore, as the cases cited by Plaintiffs' are clearly distinguishable, Plaintiffs' cannot meet their burden regarding their assertion that Defendant proximately caused their damages (including the default judgment). In this way, even should this Court grant summary judgment on the bad faith claims, Defendant argues that, in the alternative, the court deny Plaintiffs' Motion that this Court find Plaintiffs' damages as a matter of law as, at the very least, questions of fact remain.

IV.

CONCLUSION

Based upon the foregoing, Defendants UNITED AUTOMOBILE INSURANCE COMPANY respectfully requests that this Court deny Plaintiffs' Motion for Summary Judgment in its entirety.

In the alternative, should this Court find an ambiguity in the renewal statement and, create an implied contract, that this Court find that Defendant did not breach the implied covenant of good faith and fair dealing. Finally, and in the alternative, that should this Court grant summary judgment on the breach of the covenant of good faith and fair dealing that this Court find a material issue remains as to whether any such breach proximately caused Plaintiffs' claimed damages.

DATED this 26th day of March 2013.

ATKIN WINNER & SHERROD

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CERTIFICATE OF ELECTRONIC SERVICE

I DO HEREBY CERTIFY that I am an employee of ATKIN WINNER & SHERROD and on the 26th day of March, 2013, I did serve, via electric service, the foregoing **DEFENDANT UNITED AUTOMOBILE INSURANCE COMPANY'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

ORAL ARGUMENT REQUESTED

/s/ Victoria Hall
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

a claim to Defendant for damages and offered to settle the claim for personal injuries and damages against Lewis within the policy limits. (*Id.*). Defendant refused to settle and denied the claim all together indicating that Lewis did not have coverage at the time of the accident. (*Id.*). Defendant was required to provide insurance coverage under the policy. (*Id.* at 9). Defendant never informed Lewis that Cheyanne was willing to settle the claim for the sum of $15,000, the policy limit. (*Id.*). Due to the dilatory tactics and failure of Defendant to protect its insured, Cheyanne filed a complaint on October 9, 2007 against Lewis for her personal injuries and damages. (*Id.*). Cheyanne procured a default judgment in the amount of $3,500,000 against Lewis. (*Id.*). Plaintiffs alleged breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, breach of Nev. Rev. Stat. § 686A.310, and fraud against Defendant. (*Id.* at 9-14).

In March 2010, Defendant filed a motion for summary judgment on all claims. (*See* Mot. for Summ. J. (#17)). In December 2010, Judge Reed issued an order granting Defendant's motion for summary judgment on all claims and directed the Clerk of the Court to enter judgment accordingly. (Order (#42) at 13). The order provided the following factual history:

> Lewis was the owner of a 1996 Chevy Silverado insured, at various times, by Defendant. Lewis had an insurance policy issued by UAIC on his vehicle during the period of May 31, 2007 to June 30, 2007. Lewis received a renewal statement, dated June 11, 2007, instructing him to remit payment by the due date of June 30, 2007 in order to renew his insurance policy. The renewal 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.
>
> Defendant then issued a renewel policy declaration and automobile insurance cards indicating that Lewis was covered under an insurance policy between July 10, 2007 to August 10, 2007.

(*Id.* at 2-3).[1]

The order stated the following. (*Id.* at 5). Defendant sought summary judgment on all

[1] Record citations omitted.

claims on the basis that Lewis had no insurance coverage on the date of the accident. (*Id.*). Plaintiffs 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 in order to avoid a lapse in coverage and that any ambiguities had to be construed in favor of the insured. (*Id.* at 5-6). Defendants, in the alternative, requested that the Court dismiss Plaintiffs' extra-contractual claims or bifurcate the claim of breach of contract from the remaining claims. (*Id.* at 6).

The order stated the following regarding Lewis's insurance coverage on July 8, 2007:

> Plaintiffs contend that Lewis was covered under an insurance policy on July 8, 2007, the date of the accident, because Lewis' payment on July 10, 2007 was timely. Plaintiffs rely on the sentence "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy" contained in the renewal statement. Defendant contends that "expiration of your policy" did not refer to the expiration date of the renewal policy listed on the renewal statement, but to the expiration of Lewis' current policy, which coincided with the listed due date on the renewal statement. Plaintiffs contend that Lewis reasonably believed that while there was a due date on which UAIC preferred to receive payment, there was also a grace period within which Lewis could pay and avoid any lapse in coverage.
>
> The renewal statement cannot be considered without considering the entirety of the contract between Lewis and UAIC. Plaintiff attached exhibits of renewal statements, policy declarations pages, and Nevada automobile insurance cards issued by UAIC for Lewis. The contract, taken as a whole, cannot reasonably be interpreted in favor of Plaintiffs' argument.
>
> Lewis received a "Renewal Policy Declarations" stating that he had coverage from May 31, 2007 to June 30, 2007 at 12:01 A.M. (Pls' Opp., Exhibit A at 29 (#20-1); Pls' Supp., Exhibit A at 11-12 (#26-1); Pls' Supp., Exhibit A at 15 (#26-1).) The declarations page stated that "[t]his declaration page with '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

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> renewal amount. This isolated occasion occurred due to the fact that Lewis added a driver to his insurance policy, resulting in an increase in the renewal amount, after UAIC had previously sent a renewal notice indicating that a lower renewal amount was due on April 29, 2007. UAIC issued a revised renewal statement dated April 26, 2007, and gave Lewis an opportunity to pay by May 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.

(*Id.* at 7-9).

Plaintiffs appealed. (Notice of Appeal (#46)). In a two-page memorandum disposition, the Ninth Circuit held, *inter alia*, the following:

> We reverse the district court's grant of United Automobile Insurance Company's motion for summary judgment with respect to whether there was coverage by virtue of the way the renewal statement was worded. Plaintiffs came forward with facts supporting their tenable legal position that a reasonable person could have interpreted the renewal statement to mean that Lewis's premium was due by June 30, 2007, but that the policy would not lapse if his premium were "received prior to 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.

(Ninth Cir. Mem. Dispo. (#82) at 2-3).

The pending motions now follow.

LEGAL STANDARD

In reviewing a motion for summary judgment, the court construes the evidence in the light most favorable to the nonmoving party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). Pursuant to Fed.R.Civ.P. 56, a court will grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). Material facts are "facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*

The moving party bears the initial burden of identifying the portions of the pleadings and evidence that the party believes to demonstrate the absence of any genuine issue of material

fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). A party asserting that a fact cannot be or is genuinely disputed must support the assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A)-(B). Once the moving party has properly supported the motion, the burden shifts to the nonmoving party to come forward with specific facts showing that a genuine issue for trial exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512. The nonmoving party cannot defeat a motion for summary judgment "by relying solely on conclusory allegations unsupported by factual data." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356.

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DISCUSSION

I. Plaintiff James Nalder's Motion for Summary Judgment (#88)

Nalder moves for partial summary judgment as to liability against Defendant. (Mot. for Summ. J. (#88) at 1). Nalder makes three arguments which will be addressed in turn.

A. Ambiguous Contract

Nalder argues that because the renewal statement was ambiguous it must be strictly construed against the insurance company pursuant to Nevada law and, thus, Lewis had coverage at the time of the accident. (Mot. for Summ. J. (#88) at 10).

In response, Defendant argues that Lewis's renewal statement is not ambiguous and clearly demanded remittance of the policy premium for the subsequent term by the expiration

of the present policy period. (Opp'n to Mot. for Summ. J. (#90) at 15). Defendant argues that a material issue of fact remains over whether the renewals were ambiguous. (*Id.*).

Nalder filed a reply. (Reply to Mot. for Summ. J. (#95)).

"Summary judgment is appropriate in contract cases only if the contract provision or the contract in question is unambiguous." *Econ. Forms Corp. v. Law Co., Inc.*, 593 F.Supp. 539, 540 (D. Nev. 1984). A contract is ambiguous if it is reasonably susceptible to more than one interpretation. *Shelton v. Shelton*, 78 P.3d 507, 510 (Nev. 2003). Whether a contract is ambiguous is a question of law. *Margrave v. Dermody Properties, Inc.*, 878 P.2d 291, 293 (Nev. 1994). "The interpretation of an ambiguous contract is a mixed question of fact and law." *Econ. Forms Corp.*, 593 F.Supp. at 541. However, in Nevada, "any ambiguity or uncertainty in an insurance policy must be construed against the insurer and in favor of the insured." *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, 99 P.3d 1153, 1156 (Nev. 2004).

In this case, the Court finds that the renewal statement is ambiguous based on the Ninth Circuit's reverse and remand. The Court finds that the renewal statement is reasonably susceptible to more than one interpretation as demonstrated by both Judge Reed and the Ninth Circuit's conflicting interpretations. As such, the Court finds that, pursuant to Nevada law, this ambiguity is construed against Defendant and in favor of the insured such that Lewis was covered by the insurance policy on the date of the accident. The Court grants summary judgment on this issue in favor of Plaintiffs.

B. Bad Faith

Nalder argues that Defendant's actions constitute bad faith. (Mot. for Summ. J. (#88) at 19). Specifically, Nalder argues that Lewis properly renewed his policy pursuant to the policy's renewal statements, Defendant renewed Lewis's policy, and then Defendant claimed that there was a lapse in coverage. (*Id.*). Nalder asserts that Defendant never investigated to determine whether Lewis was covered, made a snap decision that there was no coverage, and left Lewis bereft of protection against Cheyanne's lawsuit. (*Id.*). Nalder contends that these facts constitute bad faith which requires Defendant to compensate Lewis, pay for the judgment currently entered against him, and pay for compensatory and punitive damages.

(*Id.*).

In response, Defendant argues that every case cited by Nalder involves a situation where there existed a policy in force at the time of the loss. (Opp'n to Mot. for Summ. J. (#90) at 21). Defendant asserts that, in this case, Nalder asks the Court to find an implied policy from an ambiguity in the renewal. (*Id.* at 22). Defendant argues that Nevada law provides that a court may review an insurer's actions at the time they were made to determine whether the insurer's actions were reasonable as a matter of law and that bad faith cannot be premised upon an honest mistake, bad judgment, or negligence. (*Id.* at 25). Defendant asserts that Nevada law provides that an insurer cannot be found liable for bad faith, as a matter of law, if it had a reasonable basis to contest coverage. (*Id.*). Defendant contends that if an insurer's actions are reasonable the court can decide as a matter of law to dismiss the extra-contractual claims. (*Id.* at 26). Defendant asserts that because Lewis admits that he did not make any policy payments between June 12, 2007 and July 10, 2007 its actions were reasonable. (*Id.*). Defendant contends that even if it may be found to owe coverage on an implied contract, Plaintiffs must admit that a genuine dispute existed as to coverage at the time of the accident. (*Id.*).

Nalder filed a reply. (Reply to Mot. for Summ. J. (#95)).

Nevada law imposes the covenant of good faith and fair dealing on insurers. *Allstate Ins. Co. v. Miller*, 212 P.3d 318, 324 (Nev. 2009). A violation of the covenant gives rise to a bad-faith tort claim. *Id.* The Nevada Supreme Court has defined "bad faith as 'an actual or implied awareness of the absence of a reasonable basis for denying benefits of the [insurance] policy.'" *Id.* (quoting *Am. Excess Ins. Co. v. MGM*, 729 P.2d 1352, 1354-55 (Nev. 1986). "To establish a prima facie case of bad-faith refusal to pay an insurance claim, the plaintiff must establish that the insurer had no reasonable basis for disputing coverage, and that the insurer knew or recklessly disregarded the fact that there was no reasonable basis for disputing coverage." *Powers v. United Servs. Auto. Ass'n*, 962 P.2d 596, 604 (Nev. 1998) *opinion modified on denial of reh'g*, 979 P.2d 1286 (Nev. 1999).

In this case, the Court denies Nalder's motion for summary judgment on the bad faith

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claims. The procedural history of this case demonstrates that Defendant had a reasonable basis for disputing coverage during the time of the incident. As demonstrated by Judge Reed's original order, there was arguably sufficient evidence to find a basis for Defendant to deny Lewis benefits of the insurance policy. Even though the Ninth Circuit reversed and remanded Judge Reed's original order, this Court finds that the procedural history of this case demonstrates that Defendant had a reasonable basis to dispute coverage and, on one occasion, had succeeded in that argument. The Court denies Nalder's motion for summary judgment on this issue.

C. Pre and Post-Judgment Interest

Nalder argues that because there was arguable or possible coverage under the policy, Defendant had a duty to defend Lewis. (Mot. for Summ. J. (#88) at 20). Nalder asserts that Defendant's failure to provide coverage and its breach of the duty to defend was the proximate cause of the default judgment being entered against Lewis. (*Id.*). Nalder contends that Defendant has the duty to indemnify Lewis. (*Id.*).

In response, Defendant argues that there are court cases where an insurer who investigated coverage and based its decision not to defend on a reasonable construction of the policy was not liable for bad faith breach of the duty to defend even after the court resolved the ambiguity in the contract in favor of the insured. (Opp'n to Mot. for Summ. J. (#90) at 33).

Nalder filed a reply. (Reply to Mot. for Summ. J. (#95)).

The Nevada Supreme Court has held that primary liability insurance policies create a hierarchy of duties between the insurer and the insured. *Allstate Ins.*, 212 P.3d at 324. One of these contractual duties is the duty to defend. *Id.* A breach of the duty to defend is a breach of a contractual obligation. *See id.* at 324-25. An insurer bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy. *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, 99 P.3d 1153, 1158 (Nev. 2004). Once the duty to defend arises, it continues through the course of litigation. *Id.* "If there is any doubt about whether the duty to defend arises, this doubt must be resolved in favor of the insured." *Id.* "The purpose behind construing the duty to defend so broadly is to prevent an insurer from

evading its obligation to provide a defense for an insured without at least investigating the facts behind a complaint." *Id.* However, the duty to defend is not absolute. *Id.* "A potential for coverage only exists when there is arguable or possible coverage." *Id.* "Determining whether an insurer owes a duty to defend is achieved by comparing the allegations of the complaint with the terms of the policy." *Id.* If an insurer breaches the duty to defend, damages are limited to attorneys' fees and costs incurred by the insured to defend the action. *See Home Sav. Ass'n v. Aetna Cas. & Sur. Co.*, 854 P.2d 851, 855 (Nev. 1993) (holding that an insured was not barred from further pursuing recovery from insurance company for fees and costs incurred in defending an action); *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 255 P.3d 268, 278 (Nev. 2011) (discussing damages related to an indemnitor's duty to defend an indemnitee).

In this case, as discussed at oral argument, the Court finds that Defendant breached its contractual duty to defend Gary Lewis in the underlying action. As such, Gary Lewis's damages are limited to the attorneys' fees and costs he incurred in defending that action. However, the Court awards no damages to Gary Lewis because he did not incur any fees or costs in defending the underlying action because he chose not to defend and, instead, took a default judgment.

As such, the Court grants in part and denies in part Nalder's motion for summary judgment. The Court grants summary judgment for Nalder on the ambiguity issue and finds that there is an ambiguity in the renewal statement and, thus, the policy is construed in favor of coverage at the time of the accident. Defendant must pay the policy limits of the implied insurance policy. The Court denies summary judgment for Nalder on the remaining bad-faith claims. The Court grants in part and denies in part summary judgment for Nalder on the duty to defend issue. The Court finds that Defendant did breach its contractual duty to defend but denies Nalder's request for damages for that breach.

II. Defendant's Counter-Motion for Summary Judgment on All Extra-Contractual Claims or Remedies (#89)

Defendant seeks summary judgment on all of Plaintiff's claims for extra-contractual

remedies and/or bad faith claims because there was a genuine dispute as to whether coverage existed at the time and its actions were reasonable. (Counter Mot. for Summ. J. (#89) at 15). Defendant argues that because it had a reasonable basis to deny coverage there can be no bad faith. (*Id.* at 16).

Nalder filed a response and Defendant filed a reply. (Opp'n to Counter Mot. for Summ. J. (#96); Reply to Counter Mot. for Summ. J. (#97)).

The Court grants Defendant's counter-motion for summary judgment on Plaintiffs' extra-contractual claims and/or bad faith claims. As discussed above, the procedural history of this case demonstrates that Defendant had a reasonable basis for disputing coverage during the time of the accident and, thus, there is no bad faith on the part of Defendant.

CONCLUSION

For the foregoing reasons, IT IS ORDERED that Plaintiff James Nalder's Motion for Summary Judgment (#88) is GRANTED in part and DENIED in part. 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.

IT IS FURTHER ORDERED that Defendant's Counter-Motion for Summary Judgment on All Extra-Contractual Claims or Remedies (#89) is GRANTED. 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.

The Clerk of the Court shall enter judgment accordingly.

Dated this 30th of October, 2013.

United States District Judge

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EXHIBIT “H”