

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 81510 consolidated with Case No. 81710

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CHEYENNE NALDER,)
Appellant,)
vs.)

GARY LEWIS and)
UNITED AUTOMOBILE)
INSURANCE COMPANY)
Respondents,)

GARY LEWIS, and)
CHEYENNE NALDER)
Appellants,)
vs.)

UNITED AUTOMOBILE)
INSURANCE COMPANY)

Appeal from the Eighth Judicial District Court, Clark County, Nevada
The Honorable Eric Johnson, District Judge
District Court Case No. 07A549111

RESPONDENT GARY LEWIS' APPENDIX
Volume 1 of 2

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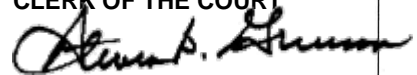
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EIGHTH JUDICIAL DISTRICT COURT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

///

1 ///

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

3 Further Affiant Sayeth Naught.

4 DATED this 14th day of December, 2018.

5
6
7
8
Matthew J. Douglas, Esq.

SUBSCRIBED AND SWORN to before me

This 14th day of December 2018

NOTARY PUBLIC in and for said
Clark County, Nevada



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

I.

INTRODUCTION

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

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

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

19 In short, The Counter Motion for summary judgment is based on Lewis' affidavit, which
is basically pure legal argument made by counsel - *but signed by the client.* It is bereft of personal
knowledge in many places and, most importantly, does not contain facts to support the conclusory
statements of law. In short, there exist grave questions about Mr. Lewis' s personal knowledge
20 much less his ability to attest to the matters set forth herein. First, at no time does Mr. Lewis ever
21 attest how he came to learn any of the legal matters attested to, much less the actions of third
22 parties. Indeed, as Lewis himself admits - he refused to talk to UAIC or retained defense counsel
23 and, thus, how can he be aware of their beliefs, actions or reasoning - much less of their conspiracy.
24 As such, his alleged "personal knowledge" is not evident and the affidavit should be stricken in its
25 entirety for this reason. At the very least, based on the Affidavit of UAIC Claims V.P. Brandon
26 Carroll, material issues abound and the motion should be denied.
27
28

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

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

4
5 **II.**

6 **STATEMENT OF FACTS**

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

19 Rather, the salient points are that Plaintiff Cheyanne Nalder obtained the original judgment
20 against Defendant/Third Party Plaintiff Gary Lewis on August 26, 2008 for personal injuries
21 stemming from a July 7, 2007 accident between Nalder and Lewis. After obtaining the judgment,
22 Counsel for Plaintiff¹ then filed an action against Mr. Lewis' insurer, UAIC, Intervenor/Third
23 Party Defendant herein and that matter proceeded in U.S. Federal District Court for the District of
24 Nevada as *Nalder et al. v UAIC*, case no. 2:09-cv-1348. That complaint was filed upon an
25 assignment of Lewis' causes of action against UAIC for alleged "bad faith", however, the
26 assignment was only obtained after the litigation was filed. The original Complaint by Lewis
27 against UAIC specifically plead improper investigation by UAIC in regard to the claim, improper
28 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.

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

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

Lewis and Nalder appealed again to the Ninth Circuit and that appeal **remains pending**.
Indeed, it is evident from Nalder and Lewis' Opening brief on the appeal that they are arguing
nearly identical issues as Lewis argues herein (indeed the argument is often verbatim). *A copy of*
Nalder and Lewis' Opening brief on Appeal is attached as Exhibit 'I.' Following briefing and
20 argument, the Ninth Circuit certified a *first* certified question to the Nevada Supreme Court asking,
21 in short, whether Plaintiff and Lewis could recover their default judgment from UAIC as a
22 'consequential damage' *even in the absence of bad faith.* During the pendency of this issue it was
23 observed that Plaintiff had failed to renew her 2008 judgment against Lewis pursuant to Nevada
24 law. Specifically, under N.R.S. 11.190(1)(a) the limitation for action to execute on such a
25 law. Specifically, under N.R.S. 11.190(1)(a) the limitation for action to execute on such a
26

27 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.

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

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

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

See *Exh. ‘A.’*

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

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

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

Id.

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

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

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

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

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

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

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

III.

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

A. Motion to Strike Affidavit of Gary Lewis

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

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.3d 1255, 1261 (9th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1983); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 585 (6th Cir. 1992); *Friedel v. City of Madison*, 832 F.2d 965, 970 (7th Cir. 1987); *United States v. M.E. Dibble*, 429 F.2d 598 (9th Cir. 1970).

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

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

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

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

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

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

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

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

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

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

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

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

8 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
19 argument or, simply conclusory in nature, which are insufficient under N.R.C.P. 56(e). Again, many
20 of these allegations appear to be an attempt to "re-litigate" issues now on appeal in the original
21 action filed by Nalder and Lewis against UAIC and, thus, are more evidence of Lewis' forum
22 shopping. These paragraphs are generally located at paragraphs 41-51 and, as can be seen
23 intermingling conclusory legal argument and speculation with a recounting of the history of the
24 case on appeal. UAIC contends these averments are not on personal knowledge of Lewis, are
25 conclusory legal argument of issues on appeal and, are speculative, as follows:

26 41. After the first certified question was fully briefed and pending before the Nevada
27
28

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

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

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

6
7 42. UAIC mischaracterized the law and brought new facts into the appeal process that
8 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
20 appeal process, arguing Nalder's underlying \$3,500,000.00 judgment against me is not
21 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.

22
23 All the above averments are conclusory paragraphs attempting to argue the Plaintiff's
24 position on whether the underlying judgment is expired. Moreover, these are the very issues before
25 the Nevada Supreme Court. See Exhibit 'B.' In short, if Lewis' argument regarding the
26 applicability of tolling statutes is correct and the judgment is not expired – why is the issue on a
27 certified question to the Nevada Supreme Court? The fact is, the Supreme Court took the question
28 to grapple with these arguments and, thus, UAIC's position must be reasonable as there clearly is

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

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

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

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

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

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

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

1 57. This was done appropriately by demonstrating to the court that the judgment was still within
2 the applicable statute of limitations. I have read the *Mandlebaum v. Gregovich*, 24 Nev. 154, 50
3 P. 849, (1897) case. It is exactly my situation and it provides: "The averments of the complaint
4 and the undisputed facts are that, at the time of the rendition and entry of the judgment in 1882,
5 the appellant was out of the state, and continuously remained absent therefrom until March,
6 1897, thereby preserving the judgment and all rights of action of the judgment creditor under the
7 same. Notwithstanding nearly fifteen years had elapsed since the entry of the judgment, yet, for
8 the purposes of action, the judgment was not barred — for that purpose the judgment was valid."
9 *Id.*, *Mandlebaum* at 851.

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

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

24 As can be seen, the above paragraphs cite case law and, make purely conclusory argument
25 regarding the appropriateness of Nalder's actions here and, in California, to revive her expired
26 judgment. Besides that, the arguments reference beliefs of another party (Nalder) and her counsel
27 and, thus, cannot be on personal knowledge. Finally, they are also circular in nature. That is, they
28 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.

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.

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 UAIC's 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:

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

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

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

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

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

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

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

23 ***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

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

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

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

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

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

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

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

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

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

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

Further, paragraphs 108-122 are clearly nothing more than conclusory legal arguments.
The paragraphs read like a complaint -but bereft of factual support. Such conclusory legal
arguments regarding UAIC’s alleged failures under NRS 686A.310 and/or the covenant of good
faith and fair dealing - without specific factual support for each claim - are argument and must be
stricken. Similarly, averments that the actions are oppressive or malicious without factual support
of actions supporting same are likewise argument that must be stricken. Moreover, the self-serving
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

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

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

B. Motion to Stay/Defer pending Appeal

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

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

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

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

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

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

N.R.C.P. 56 (f) provides a mechanism for a district court to grant a continuance when a
party opposing the Motion for summary judgment is unable to marshal facts in support of its
opposition. *Ameritrade Inc. v First Interstate Bank*, 105 Nev. 696, 699, 782 P.2d 1318, 1320
(1989). In order to grant a motion pursuant to rule 56(f) the movant expresses how discovery will
lead to the creation of issues of fact. *Bakerink v. Orthopaedic Assoc. Ltd.*, 94 Nev. 428, 431, 581
P.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).

21
22 ///

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

24 **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the
25 motion that the party cannot for reasons stated present by affidavit facts essential to justify the
26 party's opposition, the court may refuse the application for judgment or may order a continuance
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.

27
28 As can be seen, from the affidavit of counsel for UAIC (above) and, affidavit of Claims

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

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

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

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

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

⁶ See Exhibit 'J.'

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

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

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

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

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

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

IV.

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

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

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

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

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

A. LEGAL STANDARDS

1. Standard for Summary Judgment

19 The defense concurs with the plaintiffs that *Wood v. Safeway*, 121 Nev. 724, 121 P.3d
20 1026 (2005), sets the applicable standard for summary judgment motions.

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

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

1 Motions for summary judgment and responses thereto shall include a concise statement
2 setting forth each fact material to the disposition of the motion which the party claims is
3 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.

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

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

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

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

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

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

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

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

In *Schumacher v. State Farm Fire & Cas. Co.*, 467 F. Supp. 2d 1090 (D. Nev. 2006) the United States District Court, in applying Nevada law, held that "Nevada's definition of bad faith is: (1) an insurer's denial of (or refusal to pay) an insured's claim; (2) without any reasonable basis; and (3) the insurer's knowledge or awareness of the lack of any reasonable basis to deny coverage, or the insurer's reckless disregard as to the unreasonableness of the denial." See *Id.* at 1095-96; citing *Pioneer Chlor Alkali Co., Inc. v. National Union Fire Insurance Co.*, 863 F.Supp. 1237, 1247 (D.Nev. 1994); citing *American Excess Ins. Co. v. MGM Grand Hotel, Inc.*, 102 Nev. 601, 605, 729 P.2d 1352 (1986); *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888 (1991). In *Schumacher*, *supra*, the Court found that where an insurer did not deny coverage but simply paid a different value than the insured requested, the insurer did not commit bad faith). Likewise, in *Pioneer Chlor Alkali Company, Inc. v. National Union Fire Insurance Company*, 863 F. Supp. 1237 (D. Nev. 1994), the U.S. District Court also stated that where a legitimate contractual dispute exists, the insurer "is entitled to its day in court on such an issue without facing a claim for bad faith simply because it disagrees with [the insured]." *Id.* at 1250. (Emphasis Added). Indeed, in its most recent comprehensive case involving insurer bad faith, The Nevada Supreme Court stated, in *Allstate v Miller*, 125 Nev. 300, 212 P.3d 318 (NV. 2009), that "when there is a genuine dispute regarding an insurer's legal obligations, the court can determine if the insurer's actions were reasonable... and the Court "evaluates the insurer's actions at the time it made the decision." *Id.* at 317, 329-330 (Emphasis Added).

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

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

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

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

9 Though not clearly part of the Counter-Motion for Summary judgment, Lewis' brief *at pps.*
10 6-7 purports to set forth his "general principles of insurance", "role of insurance companies" and,
11 "claims handling standards." In response, UAIC merely would like to point out the relevant and
12 appropriate law and statutes governing same in opposition to Lewis' claimed recitation of law.

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

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

21 N.R.S. 686A.310

22 **1. Engaging in any of the following activities is considered to be an unfair practice:**

23 **(a) Misrepresenting to insureds or claimants pertinent facts or insurance policy provisions**
24 **relating to any coverage at issue.**

25 **(b) Failing to acknowledge and act reasonably promptly upon communications with respect to**
26 **claims arising under insurance policies.**

27 **(c) Failing to adopt and implement reasonable standards for the prompt investigation and**
28 **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

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

In short, UAIC would point out the proper standard for bad faith claims in Nevada was
enunciated in *Allstate v Miller*, 125 Nev. 300, 212 P.3d 318 (NV. 2009), that "when there is a
genuine dispute regarding an insurer's legal obligations, the court can determine if the
insurer's actions were reasonable... and the Court "evaluates the insurer's actions at the time
it made the decision." *Id.* at 317, 329-330 (Emphasis Added).

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

24 D. RESPONSE TO COUNTER MOTION FOR SUMMARY JUDGMENT

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

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.

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

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

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

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

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

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

28

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

1 amendment of the expired judgment or, enforcement of same herein, and (4) UAIC was wrong to
2 engage counsel to defend him and file motions to relieve him of a multi-million judgment and
3 disregard his wishes. Each, when actually reviewed, can be easily dispensed with as clearly, at the
4 very least, issues of material fact exist per the affidavit of Brandon Carroll (*Exhibit 'J'*), on behalf
5 of UAIC. Moreover, the case law cited by Lewis is clearly distinguishable. Accordingly, the
6 motion for summary judgment on these claims should be denied.
7

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

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

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

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

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

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

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

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

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

24
25 It has never been contested by Lewis that the original 2008 judgment against him expired
26 and, was not timely renewed. As noted herein, upon realizing the judgment was expired, UAIC
27 moved to dismiss the appeal as the judgment it was seeking damages for was expired. Specifically,
28 *in that Motion*, UAIC argued the judgment is unenforceable – as to Lewis and UAIC.

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

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

See Exhibit 'B.'

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

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

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

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

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

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

In his Motion, Lewis maintains that UAIC has breached the covenant of good faith and fair dealing because either, (1) Attorney Tindall never talked to Lewis, (2) Attorney Tindall and/or UAIC failed to give notice to Counsel for Nalder and Lewis, Tom Christensen, and (3) filed pleadings without his consent and/or that he asked be withdrawn. In support of these claims, Lewis cites *Powers v USAA*, 114 Nev. 690, 962 P.2d 596 (1998) for the broad principle that an insurer cannot "deny a reasonable request of the insured or harass the insured." *Lewis Motion*, p. 15, lines 15-17. The problem is, of course, **nowhere in the Powers case is such a principle noted.** As this Court is probably aware, the *Powers* case is generally cited in regard to two issues – (1) an insurer's burden for alleging a material misrepresentation under the policy to deny coverage and, (2) that a quasi-fiduciary duty between the insured and insurer exists which is *part of the covenant of good faith and fair dealing which requires the insurer to 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 Cheyenne's father) and Gary Lewis have been friends for years. The loss, where Gary hit James' daughter, occurred while they were both in attendance at their biker's club picnic. It is understandable if Lewis feels guilty for his actions and wants to see his friend's daughter compensated. Lewis also has no funds of his own so, of course wants an insurer to pay. Lewis is also represented by the same counsel who represents the creditor – Nalder. UAIC hopes the court see the concern for the same fraud or collusion, as in

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

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

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

1 judgment for Lewis.

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

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

Lewis' claims that, because he asserts a conflict exists between himself and retained
defense counsel, UAIC must pay for independent, "Cumis" counsel, in this case Breen Arntz, Esq.
However, as will be shown an issue remains whether there is an *actual conflict* or merely one
contrived by Nalder's counsel, Tom Christensen, colluding with Lewis. In short, an insurer must
only provide independent, "Cumis" counsel, when an **actual conflict** exists. *State Farm Mut. Auto.*
Ins. Co. v. Hansen, 357 P.3d 338 (2015). In this case, although Lewis' *claims* there is a conflict -
same is not readily apparent. Rather, the conflict is allegedly because Lewis does not want his
retained defense counsel to vacate an expired multi-million dollar judgment against him because
20 of vague references to 'harm to a contractual relationship' which is not supported or explained. As
21 such, this alleged conflict hardly passes the 'smell test.' At the very least, Lewis must come forth
22 with some evidence explaining this claim and, the alleged damage¹², which he has not. Regardless,
23 to be sure, UAIC has filed a declaratory judgment action on the issue, which is now pending before
24 the federal district court and, at the very least, this court should consider this a material issue of
25 fact as to whether a conflict *actually* exists. See Exhibit 'J.' Furthermore, the fact this alleged
26
27

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

1 conflict - and, indeed Lewis 'independent counsel Arntz - appears to be engineered by Counsel for
2 the judgment-creditor Nalder "on Lewis' behalf" further, adds to the aroma of this conflict. As
3 stated herein, the only attorney - Tom Christensen - with an actual conflict in this case - is the one
4 complaining of same. This should not escape the attention of this court. Accordingly, UAIC asks
5 this court to find a genuine dispute exists on this issue or, at the very least, a material issue of fact,
6 preventing summary judgment.
7

8 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.

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

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

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 here¹³ but in a separate action under assignment against UAIC, *UAIC did not acknowledge the validity of the original default judgment by satisfying the judgment entered against it by the district court.*

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

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

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

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

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

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

9 (iii) The Mandelbaum case is not persuasive.

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

15 Similarly, Lewis cites to *Los Angeles Airways v Estate of Hughes*, 99 Nev. 166, 659 P. 2d
16 871 (1983) apparently for the same proposition as the *Mandelbaum* case. However, again
17 *Hughes* also offers no support for the argument because in that case to the tolling of statutes for
18 filing of an action and says nothing about extending the time to renew a judgment. *Los Angeles*
19 *Airways v Estate of Hughes*, 99 Nev. 166, 659 P. 2d 871 (1983). Moreover, again, the reliance is
20 also misplaced because, as discussed above, the action against UAIC on appeal is not an action
21 on the judgment sufficient to satisfy the requirements of NRS 11.190.
22

23 Accordingly, for all of the above, these arguments also cannot save Plaintiff or Lewis and,
24 in any event, provide no support for the summary judgment herein.¹⁴
25

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

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

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

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

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

A District Court Judge for the District of Nevada reached this very conclusion in
interpreting Nevada law. In *Nevada Assoc. Servs., Inc. v First Amer. Title Ins. Co.*, 2012 U.S. Dist.
LEXIS 105466 (U.S. Dist. NV 2012), the Court there found Plaintiffs were seeking an implied
insurance contract and, as such, N.R.S. 686A.310 was simply inapplicable to such a constructed
contract and dismissed the claims. In so ruling the Court stated that:

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

23 Id. at 9-10.

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

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

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

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

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

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

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

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

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

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

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

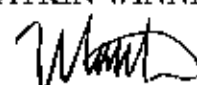
V.

CONCLUSION

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

DATED this 14th day of December, 2018.

ATKIN WINNER & SHERROD


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1117 S. Rancho Drive
Las Vegas, Nevada 89102
Attorneys for UAIC

CERTIFICATE OF SERVICE

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

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An employee of ATKIN WINNER & SHERROD

EXHIBIT “A”

FILED

JAN 11 2018

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

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 70504

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

No. 13-17441

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

v.

UNITED AUTOMOBILE
INSURANCE COMPANY,
Defendant-Appellee.

ORDER CERTIFYING
QUESTION TO THE
NEVADA SUPREME
COURT

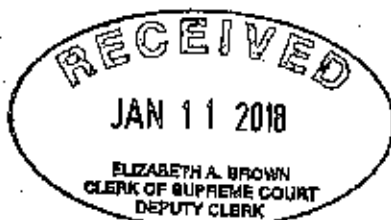
Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, Presiding

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.



18-01192
RespLewis057

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.

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

I

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

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

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

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

II

The question of law to be answered is:

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

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

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

III

A

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

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

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

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

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

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

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

B

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

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

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

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

IV

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

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

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

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

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

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

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

V

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

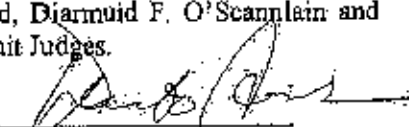
governing the question[] certified . . . shall be res judicata as to the parties." Nev. R. App. P. 5(h).

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

The clerk of this court shall forward a copy of this order, under official seal, to the Nevada Supreme Court, along with copies of all briefs and excerpts of record that have been filed with this court.

IT IS SO ORDERED.

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



Diarmuid F. O'Scannlain
Circuit Judge

EXHIBIT “B”

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 70504

FILED

FEB 23 2018

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

***ORDER ACCEPTING SECOND CERTIFIED QUESTION AND
DIRECTING SUPPLEMENTAL BRIEFING***

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

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

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

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

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

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

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

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

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

It is so ORDERED.¹

Douglas, C.J.
Douglas

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Cherry, J.
Cherry

Pickering, J.
Pickering

Stiglich, J.
Stiglich

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

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

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

EXHIBIT “C”

FILED

May 22 1 48 PM '09

E. Christensen
CLERK OF THE COURT

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

DISTRICT COURT
CLARK COUNTY, NEVADA

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

10 Plaintiffs,)

11 vs.)

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

15 Defendants.)

Case No.: A-09-590967-C

Dept No.: II

COMPLAINT

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

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



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

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

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

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

18 6. That Gary Lewis had in effect on July 8, 2007, a policy of automobile insurance on the
19 Plaintiff's Vehicle with Defendant, UAI (the "Policy"); that the Policy provides certain
20 benefits to Cheyanne Nalder as specified in the Policy; and the Policy included liability
21 coverage in the amount of \$15,000.00/\$30,000.00 per occurrence (hereinafter the "Policy
22 Limits").
23
24

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

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

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

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

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

20 12. That Plaintiff, Cheyanne Nalder, is a third party beneficiary under the Policy as well as a
21 Judgment Creditor of Gary Lewis and is entitled to pursue action against the Defendants directly
22 under Hall v. Enterprise Leasing Co., West, 122 Nev. 685, 137 P.3d 1104, 1109 (2006), as well as
23 Denham v. Farmers Insurance Company, 213 Cal.App.3d 1061, 262 Cal.Rptr. 146 (1989).
24

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

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

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

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

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

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

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

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

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

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

24

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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 Cheyenne 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.



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

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

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

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

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

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

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

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

24

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;

///

///

///

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



EXHIBIT “D”

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JAMES NALDER, Guardian Ad Litem) 2:09-cv-1348-ECR-GWF
for minor Cheyanne Nalder, real)
party in interest, and GARY LEWIS,)
Individually;)

Plaintiffs,)

Order

vs.)

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

Defendants.)

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

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

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

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

18 On March 18, 2010, Defendant filed the MSJ (#17). On April 9,
19 2010, Plaintiffs opposed (#20), and on April 26, 2010, Defendant
20 replied (#21). We granted leave for Plaintiffs to file a supplement
21 (#26), and Defendant filed a supplement (#33) to its reply (#21).

22
23
24
25 ¹ Plaintiffs' complaint originally alleged that the accident
26 occurred in Clark County, Nevada. It is unclear from the documents
27 which site is the correct one, but neither party disputes jurisdiction
and the actual location of the accident is irrelevant to the
disposition of this motion.

II. Summary Judgment Standard

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

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

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

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

22 23 III. Analysis

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

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

7 A. Contract Interpretation Standard

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

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

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

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

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

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

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

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

17 C. Statutory Arguments

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

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

28

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

2 . . .

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

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

26 Nev. Rev. Stat. § 687B.340 provides:
27
28

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

7

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

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

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

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

17

18 IV. Conclusion

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

28

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

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

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

12
13 IT IS, THEREFORE, HEREBY ORDERED that Defendant's motion for
14 summary judgment on all claims (#17) is GRANTED with respect to all
15 of Plaintiffs' claims.

16 The Clerk shall enter judgment accordingly.

17
18
19 DATED: December 17, 2010.

20 
21 UNITED STATES DISTRICT JUDGE

EXHIBIT “E”

MOT

THOMAS CHRISTENSEN, ESQ.

Nevada Bar #2326

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Attorneys for Plaintiff,

JAMES NALDER

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

JAMES NALDER, Guardian Ad Litem for minor)

Cheyenne Nalder, real party in interest, and)

GARY LEWIS, Individually;)

Plaintiffs,)

Case No.: 2:09-cv-1348

vs.)

UNITED AUTOMOBILE INSURANCE CO,)

DOES I through V, and ROE CORPORATIONS)

I through V, inclusive)

Defendants.)

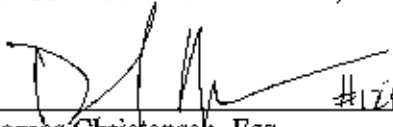
MOTION FOR SUMMARY JUDGMENT

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.

1 DATED this 12th day of February, 2013.

2 CHRISTENSEN LAW OFFICES, LLC

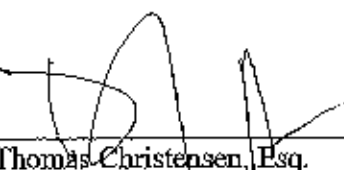
3
4 By:  #12451
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11 courtnotices@injuryhelpnow.com
12 Attorneys for Plaintiff,
13 JAMES NALDER

14 NOTICE OF MOTION

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

20 DATED this 12th day of February, 2013.

21 CHRISTENSEN LAW OFFICES, LLC

22
23 By:  #12451
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Attorneys for Plaintiff,
JAMES NALDER

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I**

3 **INTRODUCTION**

4
5 Ambiguous insurance contracts, such as the one in question presently, must be
6 construed liberally in favor of the insured and strictly against the insurer. As such, because
7 the Renewal Statements were ambiguous, they must be construed in favor of GARY
8 LEWIS, resulting in the policy being effective the date of the accident. Furthermore,
9 UAIC breached the contract in failing to investigate for coverage, failing to provide
10 coverage and other duties of an insurer. Additionally, it should be established as a matter
11 of law that the default judgment, including pre- and post-judgment interest, was
12 proximately caused by the failure to provide coverage.
13

14 **II**

15 **FACTUAL AND PROCEDURAL BACKGROUND**

16
17 This action arose when GARY LEWIS ran over CHEYENNE NALDER, a nine year old
18 girl at the time, with GARY LEWIS's truck. CHEYENNE was nearly killed as a result of the
19 truck running over her head.

20
21 At the time of the incident Mr. Lewis was insured with Defendant UAIC. Mr. Lewis
22 first purchased insurance through UAIC on March 29, 2007. The period of the policy was
23 March 29, 2007 through April 29, 2007. See Exhibit 1 P. 1. The records from UAIC
24 specifically list the policy as "New Business". See Exhibit 1 P. 6. In mid-April 2007 (Invoice
25 Date April 26, 2007) UAIC sent Gary Lewis a "Renewal Statement" offering to "Renew" Gary's
26 policy with UAIC for from April 29, 2007 through May 29, 2007. See Exhibit 1 at P. 15. The
27 "Renewal Statement" indicates that payment to "Renew" the policy had to be made by May 6,
28

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

6
7 In mid-May 2007 (Invoice Date May 9, 2007) UAIC sent Gary Lewis a "Renewal
8 Statement" offering to "Renew" Gary's policy with UAIC for from May 29, 2007 through June
9 29, 2007. See Exhibit 1 at P. 27. The "Renewal Statement" indicates that payment to "Renew"
10 the policy had to be made by May 29, 2007. The "Renewal Statement" also stated "To avoid
11 lapse in coverage, payment must be received prior to (sic) expiration of your policy." The only
12 expiration date listed on the "Renewal Statement" is "June 29, 2007". Gary Lewis made the
13 payment on May 31, 2007, two days after the "Due Date" of "May 29, 2007", and renewed the
14 policy. The records from UAIC specifically list the policy as "RENEWAL". See Exhibit 1 at P.
15 32.
16
17

18 In mid-June 2007 (Invoice Date June 11, 2007) UAIC sent Gary Lewis a "Renewal
19 Statement" offering to "Renew" Gary's policy with UAIC for from June 30, 2007 through July
20 31, 2007. See Exhibit 1 at P. 33. The "Renewal Statement" indicates that payment to "Renew"
21 the policy had to be made by June 30, 2007. The "Renewal Statement" also stated "To avoid
22 lapse in coverage, payment must be received prior to (sic) expiration of your policy." The only
23 expiration date listed on the "Renewal Statement" is "July 31, 2007". Gary Lewis made the
24 payment on July 10, 2007, and renewed the policy. The records from UAIC specifically list the
25 policy as "RENEWAL". See Exhibit 1 at P. 38.
26
27
28

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

5
6 Gary Lewis, having been insured with UAIC for several months and UAIC having
7 renewed Mr. Lewis insurance through UAIC on multiple occasions as noted above. It was
8 Gary's understanding that he had insurance covering the damages done to Cheyenne Nalder.
9 After the incident however UAIC claimed Mr. Lewis was not its insured, and that there was no
10 coverage for the incident. UAIC nevertheless continued to renew Mr. Lewis' policy for another
11 year, but claimed that the policy had lapsed from July 1, 2007 through July 10, 2007.

12
13 Plaintiff JAMES NALDER, on behalf of his daughter Cheyenne, brought a claim for the
14 proceeds of the UAIC policy. UAIC claimed there was no policy in effect. Suit was then
15 brought against Mr. Lewis with notice being provided to UAIC. UAIC took no steps to defend
16 the lawsuit and did nothing to investigate coverage or to determine whether Gary's payment on
17 July 10, 2007, long before the expiration of the policy, warranted Gary being covered under the
18 policy UAIC renewed with Gary. Because UAIC took no steps to protect Gary, judgment was
19 entered against Gary in the amount of \$3,500,000.00. *See Exhibit 2.* After Judgment Mr.
20 Lewis, along with NALDER on behalf of Cheyenne, the real party in interest, pursued this
21 action against UAIC.
22 .

23
24 Mr. Lewis testified:
25

26 ¹ Payment for the September Renewal was made on September 14, 2007 even though the
27 "Due Date" for the Renewal was September 13, 2007. Even though the payment was late,
28 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

² 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.

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

3
4 As discovery proceeded, the PMK of UAIC was asked regarding Gary's understanding
5 that the requirement that he pay prior to the "expiration date" when the only "expiration date"
6 listed on the renewal notice was July 31, 2007, was a fair interpretation by the insured. The
7 PMK acknowledged that the "Renewal Statements" do not contain the words "expiration of
8 your current policy", and simply state "expiration of your policy" without any explanation of
9 what the words "your policy" reference. See Exhibit "4" (the Deposition of Denise Davis, P. 61
10 L. 23 - P. 62 L. 1). The UAIC PMK was unable to point to any language in the "Renewal
11 Statements" that would indicate to a lay person, like Mr. Lewis", that the words "expiration of
12 your policy" meant expiration of your *current* policy rather than the "Expiration Date" stated
13 right on the face of the "Renewal Statements" themselves as Mr. Lewis understood it. See
14 Exhibit 4 (the Deposition of Denise Davis, P. 61 L. 8-15; P. 61 L. 23 - P. 62 L. 1; P. 133 L. 4 -
15 P. 134 L. 22).

16
17
18 Manny Cordova and Lisa Watson, who worked for UAIC at the time the claim was
19 brought against Gary Lewis, but who are no longer employed with UAIC, admitted that the
20 language in the "Renewal Statements" is ambiguous, difficult to understand, and certainly
21 consistent with Gary Lewis' interpretation that "expiration of your policy" meant the "Expiration
22 Date" listed at the top of the "Renewal Statements". Mr. Cordova, when shown the "Renewal
23 Statements", stated that, to him, the "Renewal Statements" indicated that payment had to be
24 made before the expiration of the *prior* policy as UAIC interprets it. When asked about whether
25
26

27
28 ³ Despite the fact that UAIC had informed GARY LEWIS that he had until May 6, 2007 to
make his payment under the policy that would commence April 29, 2007, Gary took it
upon himself to make the payment on April 29, 2007.

1 Mr. Lewis' interpretation that expiration of "your policy" meant the "Expiration Date" on the
2 very face of the "Renewal Statement" itself, Mr. Cordova testified as follows: "certainly people
3 can interpret documents differently. You know, I mean, that's the way I read the document.
4 Could someone else read it differently? Of course, they can." See Exhibit "5" (Cordova
5 Deposition at P. 106 L. 16-20). Mr. Cordova went on to testify, "So this is the way I read the
6 document. Could you interpret it differently? Of course. Could she interpret it differently? Of
7 course. This is the way that I interpret it. I cannot tell you that, you know, my way is right or
8 your way is right, but that's the way I read the document." See Exhibit 5 (Cordova Deposition
9 P. 107 L. 11-16).

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

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

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

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

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

3 See Exhibit 7 Memorandum.

4 III

5 STANDARD FOR GRANTING

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

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

17 The law is well established that in reviewing a motion for summary judgment, the
18 evidence "must be viewed in the light most favorable to the opposing party." *Adickes v. S.H.*
19 *Kress & Co.*, 398 U.S. 144, 159-160 (1970). "[T]he inferences to be drawn from the underlying
20 facts contained in [the moving party's materials] must be viewed in the light most favorable to
21 the party opposing the motion." *Id.*, quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655
22 (1962). Therefore, this Court must view the evidence presented by both parties and the
23 inferences to be drawn there from in the light most favorable to the Plaintiffs.
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1 The standard for summary judgment is essentially the same as the standard for granting a
 2 directed verdict or judgment notwithstanding the verdict under Fed. R. Civ. P. 50. See
 3 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The inquiry under each is
 4 "[W]hether the evidence presents a sufficient disagreement to require submission to a jury."
 5 *Id.* Summary judgment is only appropriate if "the evidence . . . is so one-sided that one
 6 party must prevail as a matter of law." *Id.* If there are facts sufficient to support a jury
 7 verdict for the Plaintiff, the Court is not to interfere with the jury's role as the finder of fact.
 8 To do so would deny the Plaintiff's right to a jury trial.
 9

10 IV

11 ARGUMENT

12 A. Because the Renewal Statement was Ambiguous, it Must be Strictly Construed 13 Against the Insurance Company According to the Nevada Law, therefore, 14 Providing Coverage was in Place at the Time of the Incident.

15 There is no dispute UAIC sent Gary the policy's "Renewal Statement" (invoice date June
 16 11, 2007). See Exhibit 1 P. 33. There is no dispute the policy's "Renewal Statement" offered to
 17 again renew Gary's policy with UAIC, as Gary had repeatedly done since March 2007. There is
 18 no dispute that the policy's "Renewal Statement" says Gary would not have a lapse in coverage
 19 if he made the required payment prior to the expiration date. There is no dispute that the only
 20 expiration date mentioned on the policy's "Renewal Statement" is "July 31, 2007." See Exhibit
 21 1 P. 33. There is no dispute Gary made the requisite payment on July 10, 2007, which was
 22 twenty-one days before the "Expiration Date" listed on the policy's "Renewal Statement". See
 23 Exhibit 1 P. 38. There is certainly no dispute that Gary Lewis' understanding of the policy's
 24 "Renewal Statement" was that as long as he made the premium payment prior to the expiration
 25 of the policy, which the policy's "Renewal Statement" said was July 31, 2007, Gary would not
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1 have a lapse in coverage. See Exhibit I at P. 6 of 12. There is also no dispute that UAIC had
2 previously advised Gary that he could pay his policy premium after the date the policy became
3 effective, and still be covered from the effective date. See Exhibit 1 P. 15.

4
5 An insurance policy, which would include the renewal statements of the policy, is a
6 contract and is governed by contract law. *United Insurance Co., v. Frontier Insurance*
7 *Company, Inc.*, 120 Nev. 678 684, 99 P.3d 1152, 1156 (2004). Under general contract law, the
8 Nevada Supreme Court has noted, "When a contract is ambiguous, it will be construed against
9 the drafter." *Glenbrook Homeowners Ass'n v. Glenbrook Co.* 111 Nev. 909, 917, 901 P.2d 132,
10 138 (1995). The Court has gone even further in its discussion of insurance contracts, holding,
11 "Contracts of insurance are always construed most strongly against the insurance company.
12 Stated another way, a policy of insurance is to be construed liberally in favor of the insured and
13 strictly against the insurer." *Hartford Ins. Group v. Winkler*, 89 Nev. 131, 135, 508 P.2d 8, 11
14 (1973) (Citations omitted).

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16
17 In addition, the Nevada Supreme Court has held, "An insurance policy is a contract of
18 adhesion." *Id.* As a result "the language of an insurance policy is broadly interpreted in order
19 to afford 'the greatest possible coverage to the insured.'" *Id.*, citing *Farmers Insurance Group v.*
20 *Stonik*, 110 Nev. 64, 67, 867 P.2d 389, 391 (1994). The pivotal language from the UAIC
21 contract comes from the policy's "Renewal Statements" which UAIC drafted, and which UAIC
22 sent to Gary Lewis on multiple occasions advising Gary how the contract of insurance could be
23 renewed and continue to be in effect with UAIC. The statements provide a due date for
24 payment, but also specifically state that if payment is "received prior the expiration of your
25 policy" there will be no lapse in coverage. The only "Expiration Date" listed in the policy's
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1 "Renewal Statements" is the expiration date for the offered policy that UAIC invited Gary
2 Lewis to renew.

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

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13 Gary's subjective understanding that he could pay for the policy after it was put into
14 effect was all the more reasonable given that in April 2007 UAIC had specifically told Gary that
15 the due date of his premium payment for the policy effective April 29, 2007 through May 29,
16 2007 was after the policy's effective date of "5/6/07". There was an established course of
17 dealing between Gary and UAIC wherein UAIC had previously advised Gary that he could
18 make his payment after the effective date of the policy and still be covered, and wherein UAIC
19 had previously advised Gary that he could make his premium payment after the effective date of
20 the policy, but prior to the expiration date, of the policy and avoid any lapse in coverage.

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22
23 The policy's "Renewal Statements" which give a due date but then state that the
24 policyholder can avoid a lapse in coverage by paying before the expiration of the policy, and
25 providing an "Expiration Date" for the policy that is different than the "Due Date" are
26 ambiguous. As noted above, ambiguous language in a contract, or in a writing seeking to
27 renew a contract, is construed against the drafter of the contract, or the writing seeking to
28

1 renew the contract. See, *Glenbrook Homeowners Ass'n v. Glenbrook Co.* 111 Nev. 909, 917,
2 901 P.2d 132, 138 (1995). The Nevada Supreme Court has noted that an insurance company
3 does business as a quasi-public institution, and cannot avoid liability under ambiguous
4 provisions of policy. *Hartford Ins. Group v. Winkler*, 89 Nev. 131, 136, 508 P.2d 8, 12 (1973).
5 The language of the "Renewal Statements" from UAIC is ambiguous, and therefore, must be
6 construed against UAIC.
7

8 "Contracts of insurance are always construed most strongly against the insurance
9 company. Stated another way, a policy of insurance is to be construed liberally in favor of the
10 insured and strictly against the insurer." *Hartford Ins. Group v. Winkler*, 89 Nev. 131, 135, 508
11 P.2d 8, 11 (1973) (Citations omitted). The language of the "Renewal Statements" of the policy
12 Gary Lewis had with UAIC, when construed liberally in favor of Gary and construed most
13 strongly against UAIC and broadly interpreted in order to afford the greatest possible coverage
14 to the insured, must be construed as permitting Gary Lewis to pay anytime before July 31, 2007
15 in order to avoid a lapse in coverage and maintain insurance from the "Effective Date" of June
16 30, 2007 to the "Expiration Date" of July 31, 2007. As there is no dispute Gary made the
17 requisite payment on July 10, 2007, and there is no dispute July 10, 2007 is long before July 31,
18 2007, summary judgment as to UAIC's coverage of Gary Lewis under the policy is warranted as
19 the evidence clearly establishes Gary was covered.
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23 **B. UAIC Breached the Contract by Failing to Investigate Coverage and Refusing**
24 **to Cover its Insured**

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

1 anything which will injure the right of the other to receive the benefits of the agreement.
2 *Comunale v. Traders & General Insurance Company*, 50 Cal.2d 654, 328 P.2d 198, 68
3 A.L.R.2d 883. Most courts, including Nevada, have held that an insurance company always
4 acts in bad faith whenever it breaches its duty to settle by failing to adequately consider the
5 interest of the insured. Windt, Allan D., *1 Insurance Claims & Disputes 5th*, Section 5:13
6 (Updated March, 2009). This is true whether there is a "genuine dispute" as to whether
7 payment of the third-party policy limits is warranted or not. The Nevada Supreme Court
8 recently defined bad faith by holding that "an insurer must give equal consideration to the
9 insured's interests" and "the nature of the relationship [between insured and insurer] requires
10 that the insurer adequately protect the insured's interests." *Miller v. Allstate*, 125 N.A.O. 28,
11 212 P.3d 318 (2009).

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

23 The courts which have applied the strict liability standard have held that an insurer who
24 fails to settle within policy limits does so at its own risk, and even if its position is not entirely
25 groundless, if the failure to settle later exposes the insured, the carrier is liable for the full
26 amount which will compensate the insured for all the detriment caused by the insurer's breach
27 of the express and implied obligations of the contract. *Id.*, citing, *Criset v. Security Ins. Co.*, 66
28

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

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

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

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

25 When I buy insurance, I buy protection from untoward
26 events. I do not object to an insurance company's vigorous
27 defense of a claim, including going to jury trial and
28 exhausting every appeal. Furthermore, as a policyholder, I
will diligently assist my insurer to vindicate its rights and
protect its reserves. However, I draw the line when the
insurer decides that in the process of protecting its reserves,
it will play "you bet my house." The insurance company
can bet as much of its own money as it wants, and it can bet
its own money at any odds that it wants, but it cannot bet

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

3 *Id.* at 780.

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

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

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

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

1 The Nevada Supreme Court and Federal District Court of Nevada articulated a
 2 negligence or reasonableness standard in bad faith cases. "To establish a *prima facie* case of
 3 bad-faith refusal to pay an insurance claim, the plaintiff must establish that there was no
 4 reasonable basis for disputing coverage." *Powers v. United Services Auto. Ass'n*, 962 P.2d 596,
 5 604 (Nev. 1998), citing *Falline v. GNLV Corp.*, 823 P.2d 888 (Nev. 1991). See also *Pemberton*
 6 *v. Farmers Ins. Exch.*, 858 P.2d 380, 384 (Nev. 1990).

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

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

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

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

24 There is no question that the rejection of a settlement offer within the policy limits is an
 25 element of a bad faith claim. *Id.* The *Miller* Court held that the rejection by an insurer of a
 26 settlement offer within the policy limits is indeed an element making up a bad faith claim, but
 27 also noted that a bad faith claim can be based on far more than just the rejection of such an
 28

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

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

3 "If there is any doubt about whether the duty to defend arises, this doubt must be
4 resolved in favor of the insured." *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 120
5 Nev. 678 (Nev., 2004) citing *Aetna Cas. & Sur. Co. v. Centennial Ins. Co.*, 838 F.2d 346, 350
6 (9th Cir. 1988). "The purpose behind construing the duty to defend so broadly is to prevent an
7 insurer from evading its obligation to provide a defense for an insured without at least
8 investigating the facts behind a complaint." *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d
9 1153, 120 Nev. 678 (Nev., 2004) See also *Helca Min. Co. v. New Hampshire Ins. Co.*, 811 P.2d
10 1083, 1090 (Colo. 1991). A potential for coverage only exists when there is **arguable or**
11 **possible coverage.** (emphasis added) *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153,
12 120 Nev. 678 (Nev., 2004) See also *Morton v. Safeco Ins. Co.*, 905 F.2d 1208, 1212 (9th Cir.
13 1990).

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

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

Plaintiff respectfully requests that this court grant this Motion for the reasons set forth in the points and authorities noted above.

DATED this 12th day of February, 2013.

CHRISTENSEN LAW OFFICES, LLC

By:  #0856

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5 and LR 5-1, I certify that I am an employee of
CHRISTENSEN LAW OFFICES, LLC, and that on this ^{4th} ~~12th~~ day of ^{March} ~~February~~,
2013, I served a copy of the foregoing MOTION FOR SUMMARY JUDGMENT as
follows:

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

☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile
number(s) shown below and in the confirmation sheet filed herewith. Consent to
service under NRCP 5(b)(2)(D) shall be assumed unless an objection to service by
facsimile transmission is made in writing and sent to the sender via facsimile
within 24 hours of receipt of this Certificate of Service; and/or

☐ Hand Delivery—By hand-delivery to the addresses listed below.

Thomas E. Winner, Esq.
Matthew J. Douglas, Esq.
ATKIN, WINNER, & SHERROD
1117 S. Rancho Dr.
Las Vegas, NV 89102


An employee of CHRISTENSEN LAW OFFICES, LLC

EXHIBIT “F”

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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.

///

///

1 DATED this 26th day of March, 2013.

2
3 ATKIN WINNER & SHERROD

4
5 /s/Matthew J. Douglas
6 Matthew J. Douglas
7 Nevada Bar No. 11371
8 1117 S. Rancho Drive
9 Las Vegas, Nevada 89102
10 *Attorneys for Defendant*

11 **POINTS AND AUTHORITIES**

12 **I.**

13 **STATEMENT OF FACTS AND RESPONSE TO**
14 **PLAINTIFF'S STATEMENT OF FACTS**

15 **A. Facts relating to this lawsuit.**

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

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

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

27 ¹ Attached as Exhibit '5' the deposition of Giselle Molina, which is attached hereto as Exhibit
28 'B', is a copy of the receipt of payment, on July 10th, 2007 (2 days after the accident), for the premium
payment made by Lewis at the U.S. Auto Insurance Agency located at 3909 W. Sahara Ave., Las Vegas,
Nevada. *See also the corresponding receipt of said payment by UAIC, Exhibit 'C' to the Declaration of*
Danice Davis, herein.

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

4 When this case opened, Gary Lewis *first* insisted that he had, in fact, paid for his
 5 premium prior to the expiration of his policy on June 30th, 2007 and *that Defendant had denied*
 6 *receiving it. See attached copy of Plaintiff's original responses to requests for admissions,*
 7 *attached hereto as Exhibit 'C', numbers 4 & 7.* However, Lewis also refused to answer any
 8 discovery or produce any documents evidencing this alleged payment. Moreover, Lewis
 9 objected and refused to produce the assignment of rights under which the Nalder Plaintiffs'
 10 brought the instant suit. These responses necessitated a Motion to Compel discovery responses
 11 and a motion for sanctions. In response to this motion, at the eleventh hour and, on the doorstep
 12 to the courtroom on the day of the hearing, the plaintiff simply *changed his story and admitted*
 13 *that he had not, in fact, ever paid his premium for a renewal policy before the previous policy*
 14 *was terminated. See copies of Plaintiff's 'Supplement' to his Responses to Requests for*
 15 *admission, which are attached hereto as Exhibit 'D, numbers 4 and 8'.* Further, at that time, the
 16 plaintiff also produced an 'Assignment' - which purports to assign Plaintiff Lewis' chose in
 17 action to the Nalder Plaintiffs' - but, which was entered into on February 28, 2010². *See Exhibit*
 18 *'E', attached hereto.* Plaintiffs - by virtue of the amended responses to requests for admissions -
 19 have admitted there exists no material issue of fact concerning that Lewis did not timely pay his
 20 premium for the July 2007 policy. Instead, at that point, Plaintiffs' shifted their argument to
 21 maintain that Lewis was due coverage because of an *ambiguity* in the renewal statement - *not*
 22 *because he paid his premium timely and UAIC 'lost it'.*

23 ///

24 ///

25
 26 ² The court will note that this purported 'assignment' was apparently executed long after the
 27 lawsuit was filed. It begs the obvious question *how*, or *why*, the Nalder Plaintiffs' were able to
 28 commence this lawsuit without any legal basis or authority for bringing it. Again, the 'assignment' was
 only produced after a motion to compel and motion for sanctions was pending before the court.

B. Facts relating to the claims at bar.

Lewis' insurance policy, number NVA 020021926, with Defendant United Automobile Insurance Company had expired, per its terms, on June 30, 2007. The policy, as such, was not in effect on July 7, the date of loss. *See Declaration of Western Regional Marketing and Underwriting Manager for United Automobile Insurance Company, Danice Davis, with copy of policy number NVA 020021926 declarations page and policy, attached thereto as Exhibit 'A.'* Although United Automobile had mailed a renewal notice to Gary Lewis advising that his policy would terminate on June 30 if payment were not received by that date, Mr. Lewis did not pay his premium. *See Declaration of Western Regional Marketing and Underwriting Manager for United Automobile Insurance Company, Danice Davis, with copy of Exhibit renewal notice, attached as Exhibit 'B' thereto.* The renewal notice clearly put Lewis on Notice that his premium for his renewal policy was due "no later than 6/30/07." *See Exhibit 'B' attached to Declaration of Danice Davis.*

It was only after the loss occurred, on July 8, 2007, that Lewis presented a money order for payment of his premium for a new policy, on July 10th, 2007. *See Declaration of Western Regional Marketing and Underwriting Manager for United Automobile Insurance Company, Danice Davis, with copy of cashier's check receipt of premium for said new policy number NVA 030021926 on July 8, 2007 attached as Exhibit 'C', thereto.* At that time a new policy, number NVA 030021926, was initiated with a term of July 10, 2007 to August 10th, 2007. *See Declaration of Western Regional Marketing and Underwriting Manager for United Automobile Insurance Company, Danice Davis, with copy of declarations page for number NVA 030021926, attached as Exhibit 'D,' thereto.*

As stated, the plaintiff initially insisted that he paid his policy premium on time, and that UAIC must have lost or misplaced it. Then, in the wake of discovery and a motion to compel, Gary Lewis has admitted that he did not remit any amount for renewal of UAIC Policy number NVA 020021926 after June 12, 2007 and before June 30, 2007 nor between June 30, 2007 and July 10, 2007. *A copy of Plaintiff Gary Lewis' Answers to requests to admit are attached hereto*

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1 as Exhibit 'D.'

2 As such, Defendant has maintained that this loss occurred during the period of non-
3 coverage that existed from June 30, 2007 to July 10th, 2007. See *Declaration of Western*
4 *Regional Marketing and Underwriting Manager for United Automobile Insurance Company,*
5 *Danice Davis*. UAIC became aware of the loss when Lewis called the Company to check
6 coverage on July 13, 2007 whereupon customer service representative Eric Cook informed him
7 the loss occurred in a period of no coverage after confirming this with the Underwriting
8 Department. See *Deposition of Eric Cook attached hereto as Exhibit 'F', p. 36, Lines 17-23, p.*
9 *53, lines 4-10, and copy of Underwriting notes confirming call with Lewis, attached hereto as*
10 *Exhibit 'I' to deposition of Giselle Molina, Exhibit 'B', hereto*³. Thereafter, when Counsel for
11 the Nalders' made a formal claim upon UAIC, the Company double-checked coverage with
12 underwriting and, contacted the insurance agency, U.S. Auto, who confirmed Lewis had not paid
13 his premium until July 10, 2007 and, provided a copy of the receipt. Additionally, UAIC
14 attempted to contact Lewis, but was unsuccessful. See *copy of deposition testimony of Jan Cook,*
15 *attached hereto as Exhibit 'G', p. 34, lines 8-19, p. 35, lines 7-18, p. 50, lines 11-14, p. 56, lines*
16 *2-15, p. 68, lines 13-16, p. 72, lines 14-20; See Copy of Deposition testimony of Giselle Molina,*
17 *attached hereto as Exhibit 'B', p. 30, lines 4-5, and see copy of UAIC's claims notes, attached*
18 *as Exhibit '4' to the deposition of Giselle Molina, Exhibit 'B', hereto.*

19 After verifying with the agency that no payment had been made prior to expiration of the
20 June policy until July 10, 2007, and attempting to contact Lewis, Plaintiffs' were informed of the
21 fact that no coverage was in force for the loss. See *Declaration of Western Regional Claims*
22 *Manger for United Automobile Insurance Company, Jan Cook, and attached copy of*
23 *correspondence to Counsel for Plaintiff, attached thereto as Exhibit 'A.'* Plaintiff James Nalder,
24 as guardian of Cheyenne Nalder, then filed suit in the Clark County District Court on October 9,
25 2007 under suit number A549111 against Lewis. On October 10, 2007, and again November 1,
26

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

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 Lewis⁴. *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.

on an *ad hoc* legal argument for coverage. The reasonableness of Defendant's position is confirmed by the fact that the prior Judge hearing this case found no coverage and, Plaintiffs' Counsel admitted UAIC's reading of the renewal was reasonable at the hearing on the first Motion for summary judgment. *See Exhibit 'J', hereto, p.35, lines 20-24.*

C. Responses to Plaintiff's Statement of Facts

In order to clear up any misstatements concerning the record in this case, Defendant responds to some of Plaintiff's Statement of facts. First, the "Renewal Notice" discussed by Plaintiff (at pages 3-4 of Plaintiff's Motion for Summary Judgment regarding payment beyond a policy expiration) was clearly titled "Revised Renewal Notice" by UAIC. This was done because Lewis – who had purchased his first month-long policy beginning March 29, 2007⁵ – added a new driver (attached as page 13 of Exhibit "1" to Plaintiff's Motion for summary judgment) as well as a new vehicle (attached as page 14 of Exhibit "1" to Plaintiff's Motion for Summary Judgment) to his policy on April 25, 2007.⁶ Previous to these endorsements, on April 9, 2007, UAIC had sent Lewis a "Renewal Statement" for his May 2007 Policy which specifically informed him that premium needed to be paid prior to expiration of his current policy – or by April 29, 2007. A copy of the initial Renewal statement is attached as page 20 of Exhibit "1" to Plaintiff's Motion for Summary judgment. However, as Lewis' two additions to the policy, on April 25, 2007, increased his premium – a new "Revised Renewal Statement" was issued which did allow him to remit his May 2007 premium by May 6, 2007. *See page 16 of Exhibit '1' to Plaintiff's Motion for summary judgment.* This revised renewal statement only provided additional time, beyond expiration of his current policy – because of the late additions to the

⁵ A copy of the receipt of the first policy premium, on March 29, 2007, is attached as page 7 of Exhibit "1" to Plaintiff's Motion for Summary Judgment

⁶ These endorsements led to an amended policy declarations page to be issued to Lewis on April 25, 2007 for the remaining four days of his policy (April 25, 2007 – April 29, 2007). (A copy of the Amended Declaration is attached as page 10 of Exhibit "1" to Plaintiff's Motion for Summary Judgment)

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

7
 8 Similarly, Plaintiff notes that Lewis' June 2007 Policy required the premium to be
 9 received by May 29, 2007 (the last day of Lewis' May 2007 policy). *See Renewal Notice at page*
 10 *28 of Exhibit '1' to Plaintiff's Motion for Summary judgment.* Thereafter, as Plaintiff points out,
 11 Lewis failed to remit any premium until May 31, 2007. *See Receipt of Payment, page 34 of*
 12 *Exhibit '1' to Plaintiff's Motion for summary judgment*⁷. As such, Lewis' June 2007 policy did
 13 not incept until May 31, 2007 – *when payment was received. See Declarations page for June*
 14 *2007 Policy at page 30 of Exhibit '1' to Plaintiff's Motion for Summary judgment.* As such, like
 15 for the loss in the case at bar, Lewis had a lapse in coverage from 12:01 a.m. May 29, 2007 until
 16 9:12 a.m. on May 31, 2007, when the new policy was paid for and incepted.

17
 18 This was the same situation that occurred for the July 2007 policy, where the renewal
 19 notice clearly stated that the "Renewal Amount" must be paid "No Later than 6/30/07." *See*
 20 *July 2007 Renewal Notice page 34 of Exhibit '1' to Plaintiff's Motion for summary judgment.*
 21 Lewis, as happened with the June policy 2007 policy, was again late with his payment. Now it is
 22 agreed by all parties that Lewis did not remit premium for his July 2007 policy term until July
 23 10, 2007. *See Receipt of Payment at page 39 of Exhibit '1' to Plaintiff's Motion for summary*
 24

25
 26 ⁷ It is important to note that, every subsequent policy term Lewis had with UAIC, after March
 27 2007, would be titled "renewal" and not "new business" on the receipt of payment because Lewis was not
 28 a "new customer" any longer. As such, this designation of "renewal" on a receipt of payment (to
 determine whether a producer has brought in a new customer) has absolutely no bearing on how UAIC
 characterized his policy.

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

5
 6 Plaintiff also notes that, in September and December 2007, Lewis again failed to timely
 7 remit his premium. UAIC does not dispute this. UAIC argues, in fact, this is further proof of
 8 Lewis' "course of conduct" - of **failing to pay for his new policy timely**. In fact, Lewis even
 9 failed to remit premium for his August 2007 policy timely as well. As can be seen from the
 10 records, Lewis was issued a renewal notice to remit his premium for his August 2007 policy by
 11 August 10, 2007 (this was because, of course, his July 2007 policy began July 10, 2007 due to
 12 late payment). *See copy of Renewal Statement for August 2007 Policy at page 40 of Exhibit '1' to*
 13 *Plaintiff's Motion for summary judgment.* Lewis, however, did not pay his August 2007 premium
 14 until August 13, 2007. *See Receipt of Payment at page 45 of Exhibit '1' to Plaintiff's Motion for*
 15 *summary judgment.* Thereafter, UAIC incepted his August 2007 policy on the date of payment,
 16 August 13, 2007. *See Declarations Page for August 2007 Policy at page 42 of Exhibit '1' to*
 17 *Plaintiff's Motion for summary judgment.* Again, his September 2007 Policy then required
 18 remittance of renewal premium by September 13, 2007. *See Renewal Statements at pages 6 and*
 19 *8 of Exhibit '2' to Plaintiff's Opposition to Defendant's original Motion for summary judgment,*
 20 *Document 20, herein.* Lewis, again, failed to remit premium until September 14, 2007 (*See*
 21 *Receipt of Payment at page 13 of Exhibit '2' to Plaintiff's Opposition to Defendant's original*
 22 *Motion for summary judgment, Document 20, herein.*) and corresponding new Policy Declaration
 23 page for the September 2007 policy, issued September 14, 2007 at the time of payment. *See*
 24 *Declaration Page at page 10 of Exhibit '2' to Plaintiff's Opposition to Defendant's original*
 25 *Motion for summary judgment, Document 20, herein.* Lewis went on to make his October and
 26
 27
 28

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

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

18 Also, Defendant would like to note that Plaintiff also mischaracterizes or, does not
 19 completely cite the testimony of several witnesses. For instance, Plaintiff claims that Danice
 20 Davis, the Person Most Knowledgeable (PMK) for UAIC in regards to underwriting issues, is
 21 unable to indicate “expiration of your policy”, on the renewal notice, referred to expiration of
 22 your *current* policy (rather than the expiration date on the top right hand corner for the future
 23 policy as Lewis claims he believed). However, Plaintiff is twisting Danice Davis' testimony.
 24 This is because though Davis told Plaintiff, *time and time again,* what the Defendant believes is
 25 reasonable and unambiguous interpretation of the renewal. Specifically, when you review Davis'
 26 testimony, she clearly told Appellant: “So it's a renewal offer to go another term. So when
 27
 28

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).

1 that will pick this up, you go down there to the looney farm and you give this to a guy and
2 he will think you're handing him Psalms 117 or something. So this is the way I read the
3 document. Could you interpret it differently? Of course. Could she interpret it differently?
Of course. This is the way that I interpret it. I cannot tell you that, you know, my way is
right or your way is right, but that's the way I read the document.

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

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

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

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

25 A: Yes.

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

27 A: I want to say it's outside (her knowledge).
28

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

3 A: Correct.

4 (See Watson deposition attached as Exhibit '6' to Plaintiff Motion for summary judgment, page
5 50, Lines 1-24).

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

14 Accordingly, when a full review of the above-referenced witnesses' testimony is
15 conducted, it is apparent none of them espoused the views argued by Plaintiff. In fact, Cordova
16 and Davis specifically *disagreed with Plaintiffs' argument regarding the ambiguity*. As such,
17 this Court should not countenance Plaintiffs' blatant attempt to 'cherry pick' and/or
18 mischaracterize testimony.
19

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

26 ///

27 ///

28

II.

LEGAL DISCUSSION

Pursuant to F.R.C.P. 56(a), the Court must enter summary judgment when "...there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law." Under this Rule, the moving party has the initial burden of showing the absence of a genuine issue of material fact. Once the movant's burden is met by presenting evidence which, if uncontroverted, will entitle the moving party to a judgment as a matter of law. The burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. Pioneer Chlor Alkali Company, Inc. v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania, 863 F. Supp. 1237, 1238 (D. Nev. 1994), citing Adickes v. S.H. Kres and Company, 398 U.S. 144, 26 L.Ed. 2d 142, 90 S. Ct. 1598 (1970); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 91 L.Ed. 2d 202, 106 S. Ct. 2548 (1986). However, when viewing a case on summary judgment, the pleadings and exhibits must be construed in a light most favorable to the nonmoving party. Wood v. Safeway, Inc., 121 P.3d 1026, 1031 (Nev. 2005); See United States v. Diebold, 369 U.S. 654 (1962).⁹

It is clear from the facts presented and law cited that Gary Lewis had a policy of insurance with United Auto that expired – per the terms of the policy – on June 30th, 2007 if Plaintiff did not renew the policy. Plaintiff admits he did not tender premium payment for his July policy –until July 10, 2007 – after the loss occurred and beyond the time for renewal. As such, Lewis simply had no coverage the day of the loss, July 8, 2006. Plaintiff's Motion does not dare suggest that Lewis' policy with UAIC, number NVA 020021926, did not expire – per its own terms - on June 30, 2007. Nor does Plaintiff dare argue (after altering his responses to requests to admit, previously) that Lewis remitted policy premium for his new policy term, number NVA 020021926, before the loss involved here occurred. Rather, Plaintiff seeks to have

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

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

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

17
 18
 19 **A. The Renewal Statement Issued to Lewis was not Ambiguous and Clearly**
 20 **Demanded Remittance of Policy Premium, for the Subsequent Term, by**
 21 **Expiration of the Present Policy Period and, at the very least, a material issue of**
 22 **fact remains over whether the renewals were 'ambiguous.'**

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

26 (Cont.)

27 ⁹ Defendant must point out that Plaintiffs' incorrectly state in their moving papers that this Court
 28 must view the evidence in a 'light most favorable to Plaintiffs' (See Plaintiffs' Motion at page 9, lines 26-
 27). Obviously, this is the *opposite of the standard that should be applied here.*

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

6
 7 It is axiomatic that unambiguous language in a contract's terms must be upheld. Farmer
 8 Ins. Co. v. Young, 108 Nev. 328 (Nev. 1992). The Supreme Court of Nevada has also stated that
 9 the language of an insurance policy will be given its plain and ordinary meaning from the
 10 viewpoint of one not trained in law. United Insurance Co. v. Frontier Insurance Company, Inc.,
 11 120 Nev. 678 (Nev. 2004)¹⁰. Additionally, the Ninth Circuit Court of Appeals has stated that
 12 where the language of an insurance policy admits of only one meaning, there is no basis for
 13 interpretation of the policy coverage under the guise of ambiguity. Further, that ambiguity does
 14 not exist just because a claimant says so. It can only exist where the wording or phraseology of a
 15 contract is reasonably subject to two different interpretations. State Farm Mut. Auto. Ins. Co. v.
 16 White, 563 F.2d 971 (9th Cir. 1977).

17
 18 As attested to by Danice Davis, in her Declaration herein, Lewis June 2007 policy term
 19 expired per its term on June 30th, 2007. *See Declaration of Danice Davis and copy of June 2007*
 20 *policy attached thereto as Exhibit 'A', p. 11 'Policy Period, Territory.'* Here, it is uncontroverted
 21 that the June 2007 policy expired, per its term, on July 30th, 2007. *See Danice Davis Declaration.*
 22 Further, it is uncontroverted that Lewis did not remit premium until *after* the loss when he paid
 23 for his subsequent policy term on July 10th, 2007. *See Exhibit 'D', hereto.* Accordingly, there
 24 was no policy in place for the loss.

25
 26 Plaintiffs', of course, have altered their theory for coverage (first claiming Lewis made a
 27
 28

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

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

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

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

22 A. I can't tell you why.

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

25 A. Yes, it does.

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Q. Okay. And that matches the date that's starred that says "no later than." Is that fair?

A. That's correct.

Q. Okay. And, in fact, it looks like in the middle of the page, it says, "Please detach and return this bottom portion with your payment." Do you see that?

A. Yes.

Q. So it appears that this bottom part was the stub that you return your payment with. Is that fair?

A. That's correct.

Q. Okay. And you have other bills you pay; is that correct?

A. Yes.

Q. Okay. Have you had bills in your name and accounts in your name before?

A. Of course I have, yeah.

Q. Okay, sure. Everybody knows; right? You have an account in your name, and you get a payment stub that you return with your payment. Is that fair?

A. That is correct.

Q. And all of them have due dates on them; is that right?

THE WITNESS: Dave, can I answer something right now other than yes and no?

BY MR. DOUGLAS:

Q. I would direct the witness not to ask his counsel for an answer. I have a pending question I want to know -

A. Yes.

Q. Okay. And so just like this stub has -

A. I would like to take a break, please. Can I take a break?

(See deposition of Lewis, attached as Exhibit 'A', hereto, p. 55, Lines 17-25, p. 56, Lines 1-20, p. 57, Lines 20-25, p. 58 Lines 1-14).

As one can see, when asked directly about the clear "due date" on the renewal - which was also contained on the payment stub - Lewis had to admit that he understood that was the *due date* on the notice. He also had to admit that he could not explain why he chose to focus on the

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

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 6 Moreover, Defendant would like this Court to take note that, if the Court considers
 7 Lewis' subjective beliefs¹¹ about what he thought the renewal notice stated, this Court must also
 8 consider that individual's credibility. Here, Lewis changed his 'testimony' regarding why he
 9 failed to pay the premium, for July 2007, late. First, in answers to Requests to Admit he stated it
 10 was because UAIC lost his timely premium payment. (*See Exhibit 'C', hereto*). However, after a
 11 Motion to Compel was filed, demanding the form or method of this 'lost payment', Appellant
 12 Lewis miraculously *changed his argument* and began advancing this ambiguity argument (*See*
 13 *Lewis' Supplemental Responses to Requests to Admit, no. 8, Exhibit 'D', hereto*). Besides this
 14 change in testimony *in this case, regarding the main issue in this case*, Lewis also has a
 15 credibility issues because he is a convicted forger. (*See Lewis Answers to Interrogatories no. 3,*
 16 *attached as Exhibit '3' to Plaintiffs' Motion for summary judgment*) As this Court knows, F.R.E.
 17 609(a)(2) allows for criminal convictions to be admitted, *without consideration of prejudicial*
 18 *effect* {unlike F.R.E. 609(a)(1) which is subject to F.R.E 403} when the crime involved has an
 19 element that includes an "act of dishonesty or false statement by the witness." F.R.E. 609. In
 20 this case, it is clear forgery contains just such an element. As such, a forgery conviction is
 21 automatically admitted for impeachment under F.R.E. 609 (a)(2). *United States v. Hayes*, 553
 22 F.2d at 827 (1977).

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

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

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

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

15 Plaintiff has also filed this Motion for summary judgment on their causes of action for
 16 breach of the implied covenant of good faith and fair dealing, specifically for a breach of the
 17 duty to defend¹². Defendant has asked, that regardless of the ultimate finding on the ambiguity
 18 issue, that should this Court deny Plaintiff's summary judgment in regards to the extra-
 19 contractual claims as, at the very least, a "Genuine Dispute" existed as to coverage. Here, the
 20 *prior District Judge and, Plaintiff's own counsel at hearing, previously agreed that Defendant's*
 21 *interpretation of the renewals was reasonable*. Further, Plaintiff cites case law that is completely
 22 inapplicable to the case at bar or not binding precedent. Every case cited by Plaintiff involved a
 23 situation where there existed a policy in force at the time of loss making such cases
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26 ¹² It does not appear to Defendant that Plaintiff has brought the Motion for summary judgment as
 27 to any claimed breaches of the Nevada Unfair Claims Practices Act, NRS 686A.310 and, as such, same is
 28 not discussed herein. To the extent Plaintiff is seeking judgment on these claims, Defendant refers this

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

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

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

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

25 _____ (Cont.)
 26 issues.

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

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.

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

1 Company, 863 F. Supp. 1237 (D. Nev. 1994) also stated that where a legitimate contractual
 2 dispute exists, the insurer "is entitled to its day in court on such an issue without facing a claim
 3 for bad faith simply because it disagrees with [the insured]." *Id.* at 1250.

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

22 Additionally, Defendant notes that Lewis cannot, in good faith, complain he did not know
 23 of settlement offers. As he admits in his answers to interrogatories¹⁴, he was in communication
 24 with Counsel for Plaintiff within days after the loss. As such, Counsel for Plaintiff would
 25 certainly have told him he offered settlement for policy and that he planned to seek a multi-
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27 ¹⁴ See Exhibit '3' to Plaintiffs' Motion for summary judgment
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1 million dollar default judgment against Lewis, should his insurer fail to tender same policy
2 limits.

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

22 As such, based on all the evidence available at the time¹⁶ and, after investigating
23 coverage, UAIC denied coverage for the loss based upon a reasonable basis that there was no
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25 ¹⁵ This same note was used at Eric Cook's deposition, but Plaintiff never supplied the Exhibit to
26 the court reporter.

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

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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 its 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

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

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

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

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

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

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

11
12 **C. That in the alternative, even should this Court grant summary judgment on any**
13 **extra-contractual remedies, certainly a material issue of fact remains as to**
14 **whether Plaintiff's damages were proximately caused by any breach.**

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

23 In support of their argument, Plaintiff essentially relies on two cases. Plaintiff cites
24 United Insurance Co. v. Frontier Insurance Company, Inc., 120 Nev. 678 (2004) for the
25 proposition that where there is arguable or possible coverage, Defendant should have resolved
26 the issue in favor of the insured in providing coverage and a defense. Next, Plaintiff relies on
27
28

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

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

16 Finally, the Pershing Park Villas decision is also distinguishable from the case at bar. In
 17 that case, decided on California law, the insurer had withdrew its defense shortly before trial,
 18 disclaiming coverage, however there was never any question as to whether there was a policy *in*
 19 *force*. Thereafter, the policy was found to provide coverage and, while the court found the
 20 insurer responsible for its breach of the duty to defend, it did so based in part on evidence
 21 presented that the insurer revealed documents *showing it knew there was a potential for*
 22 *coverage*. Obviously, then, this case is completely distinguishable from the present case as
 23 Defendant has maintained there was never a policy even in force covering the loss (i.e. not just a
 24 question as to coverage) and, more importantly, there has never been a showing that UAIC had
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1 any reason to believe there was a potential for coverage at that time. In fact, the case history
2 shows Plaintiff changed his argument (to claim ambiguity) during this litigation.

3 Therefore, as the cases cited by Plaintiffs' are clearly distinguishable, Plaintiffs' cannot
4 meet their burden regarding their assertion that Defendant proximately caused their damages
5 (including the default judgment). In this way, even should this Court grant summary judgment on
6 the bad faith claims, Defendant argues that, in the alternative, the court deny Plaintiffs' Motion
7 that this Court find Plaintiffs' damages as a matter of law as, at the very least, questions of fact
8 remain.
9

10 IV.

11 CONCLUSION

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

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

21 DATED this 26th day of March 2013.

22 ATKIN WINNER & SHERROD

23
24 /s/Matthew J. Douglas
25 Matthew J. Douglas
26 Nevada Bar No. 11371
27 1117 S. Rancho Drive
28 Las Vegas, Nevada 89102
Attorneys for Defendant

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

ATKIN WINNER & SHERROD
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EXHIBIT “G”

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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

Plaintiffs,

v.

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

Defendants.

2:09-cv-1348-RCJ-GWF

ORDER

Currently before the Court are a Motion for Summary Judgment (#88) and a Counter-Motion for Summary Judgment (#89). This case, originally ruled upon by the Honorable Edward C. Reed, is on partial remand from the U.S. Court of Appeals for the Ninth Circuit. The Court heard oral argument on October 22, 2013.

BACKGROUND

In July 2009, Defendant United Automobile Insurance Company ("UAIC") filed a petition for removal based on diversity jurisdiction. (Pet. for Removal (#1) at 1-2). Defendant attached Plaintiffs James Nalder, guardian ad litem for minor Cheyanne Nalder, real party in interest, and Gary Lewis's (collectively "Plaintiffs") complaint which had been filed in the Eighth Judicial District in Clark County, Nevada. (Compl. (#1) at 5-16).

The complaint alleged the following. (*Id.* at 5). Lewis was the owner of a 1996 Chevy Silverado and had an automobile insurance policy with Defendant on July 8, 2007. (*Id.* at 6). On July 8, 2007, Lewis drove over top of Cheyanne while Cheyanne was a pedestrian in a residential area and caused Cheyanne serious personal injuries. (*Id.* at 7). Cheyanne made

1 a claim to Defendant for damages and offered to settle the claim for personal injuries and
2 damages against Lewis within the policy limits. (*Id.*). Defendant refused to settle and denied
3 the claim all together indicating that Lewis did not have coverage at the time of the accident.
4 (*Id.*). Defendant was required to provide insurance coverage under the policy. (*Id.* at 9).
5 Defendant never informed Lewis that Cheyanne was willing to settle the claim for the sum of
6 \$15,000, the policy limit. (*Id.*). Due to the dilatory tactics and failure of Defendant to protect
7 its insured, Cheyanne filed a complaint on October 9, 2007 against Lewis for her personal
8 injuries and damages. (*Id.*). Cheyanne procured a default judgment in the amount of
9 \$3,500,000 against Lewis. (*Id.*). Plaintiffs alleged breach of contract, breach of the implied
10 covenant of good faith and fair dealing, bad faith, breach of Nev. Rev. Stat. § 686A.310, and
11 fraud against Defendant. (*Id.* at 9-14).

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

17 Lewis was the owner of a 1996 Chevy Silverado insured, at various times,
18 by Defendant. Lewis had an insurance policy issued by UAIC on his vehicle
19 during the period of May 31, 2007 to June 30, 2007. Lewis received a renewal
20 statement, dated June 11, 2007, instructing him to remit payment by the due
21 date of June 30, 2007 in order to renew his insurance policy. The renewal
22 statement specified that "[t]o avoid lapse in coverage, payment must be received
prior to expiration of your policy." The renewal statement listed June 30, 2007
as effective date, and July 31, 2007 as an "expiration date." The renewal
statement also states that the "due date" of the payment is June 30, 2007, and
repeats that the renewal amount is due no later than June 30, 2007. Lewis
made a payment on July 10, 2007.

23 Defendant then issued a renewal policy declaration and automobile
24 insurance cards indicating that Lewis was covered under an insurance policy
between July 10, 2007 to August 10, 2007.

25 (*Id.* at 2-3).¹

26 The order stated the following. (*Id.* at 5). Defendant sought summary judgment on all
27

28 ¹ Record citations omitted.

1 claims on the basis that Lewis had no insurance coverage on the date of the accident. (*Id.*),
 2 Plaintiffs argued that Lewis was covered on the date of the accident because the renewal
 3 notice was ambiguous as to when payment had to be received in order to avoid a lapse in
 4 coverage and that any ambiguities had to be construed in favor of the insured. (*Id.* at 5-6).
 5 Defendants, in the alternative, requested that the Court dismiss Plaintiffs' extra-contractual
 6 claims or bifurcate the claim of breach of contract from the remaining claims. (*Id.* at 6).

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

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

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

24 Lewis received a "Renewal Policy Declarations" stating that he had
 25 coverage from May 31, 2007 to June 30, 2007 at 12:01 A.M. (Pls' Opp., Exhibit
 26 A at 29 (#20-1); Pls' Supp., Exhibit A at 11-12 (#26-1); Pls' Supp., Exhibit A at
 27 15 (#26-1).) The declarations page stated that "[t]his declaration page with
 28 'policy provisions' and all other applicable endorsements complete your policy."
 (Pls' Opp., Exhibit A at 29 (#20-1).) Lewis also received a Nevada Automobile
 Insurance Card issued by UAIC stating that the effective date of his policy was
 May 31, 2007, and the expiration date was June 30, 2007. (*Id.* at 30; Pls' Supp.,
 Exhibit A at 11-12 (#26-1).) The renewal statement Lewis received in June must
 be read in light of the rest of the insurance policy, contained in the declarations
 page and also summarized in the insurance card.

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

Plaintiffs point to the fact that in April 2007, Lewis was issued a revised
 renewal statement stating that the renewal amount was due on May 6, 2007, a
 date after the effective date of the policy Lewis would be renewing through the

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.

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

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

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

4 "Summary judgment is appropriate in contract cases only if the contract provision or the
5 contract in question is unambiguous." *Econ. Forms Corp. v. Law Co., Inc.*, 593 F.Supp. 539,
6 540 (D. Nev. 1984). A contract is ambiguous if it is reasonably susceptible to more than one
7 interpretation. *Shelton v. Shelton*, 78 P.3d 507, 510 (Nev. 2003). Whether a contract is
8 ambiguous is a question of law. *Margrave v. Dermody Properties, Inc.*, 878 P.2d 291, 293
9 (Nev. 1994). "The interpretation of an ambiguous contract is a mixed question of fact and
10 law." *Econ. Forms Corp.*, 593 F.Supp. at 541. However, in Nevada, "any ambiguity or
11 uncertainty in an insurance policy must be construed against the insurer and in favor of the
12 insured." *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, 99 P.3d 1153, 1156 (Nev. 2004).

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

20 **B. Bad Faith**

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

1 (Id.).

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

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

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

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

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

9 **C. Pre and Post-Judgment Interest**

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

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

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

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

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

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

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

26 **II. Defendant's Counter-Motion for Summary Judgment on All Extra-Contractual** 27 **Claims or Remedies (#89)**

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

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

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

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

11 CONCLUSION

12 For the foregoing reasons, IT IS ORDERED that Plaintiff James Nalder's Motion for
13 Summary Judgment (#88) is GRANTED in part and DENIED in part. The Court grants
14 summary judgment in favor of Nalder and finds that the insurance renewal statement
15 contained an ambiguity and, thus, the statement is construed in favor of coverage during the
16 time of the accident. The Court denies summary judgment on Nalder's remaining bad-faith
17 claims.

18 IT IS FURTHER ORDERED that Defendant's Counter-Motion for Summary Judgment
19 on All Extra-Contractual Claims or Remedies (#89) is GRANTED. The Court grants summary
20 judgment on all extra-contractual claims and/or bad faith claims in favor of Defendant.

21 The Court directs Defendant to pay Cheyanne Nalder the policy limits on Gary Lewis's
22 implied insurance policy at the time of the accident.

23 The Clerk of the Court shall enter judgment accordingly.

24 Dated this 30th of October, 2013.

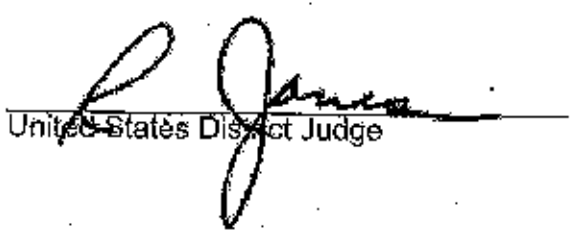
25
26
27 
28 United States District Judge

EXHIBIT “H”

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

EXHIBIT “I”

CASE NO. 13-17441

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

Appellants,

vs.

UNITED AUTOMOILE INSURANCE
COMPANY,

Respondent.

No. 13-17441

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

APPELLANTS' OPENING BRIEF

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CERTIFICATION AS TO INTERESTED PARTIES

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

Dated this 6th day of March, 2014.

CHRISTENSEN LAW OFFICES, LLC

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

CERTIFICATION AS TO RELATED CASES

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

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

Dated this 6th day of March, 2014

CHRISTENSEN LAW OFFICES, LLC

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

1 **INTRODUCTION**¹

2 Insurance companies have strayed from their beginnings in pursuit of
3 greater profits by using the large pool of money from all policy holders to
4 attack the unfortunate few instead of compensate them, to delay instead of
5 timely compensate, and to purchase favorable legislation and influence public
6 opinion against the unfortunate few. The only thing the unfortunate few can
7 do in the face of delay -- is sue -- which causes more delay -- often years -- not
8 the insurance company, but their friends or spouse. Then sue the insurance
9 company -- more delay -- more years. This is what has happened in this case.
10
11
12
13

14 In this case in particular, the insured has the financial power and
15 expertise to defend under a reservation of rights while doing its investigation
16 or filing a declaratory relief action; however, the insured and the claimant has
17 no power. UAIC chose this method, deciding not to defend at all, which
18 posed the most severe downsides for them because it has the most severe
19 downside for the insured. However, they picked it. They should have paid
20 the policy or at the least defended under a reservation of rights and filed a
21 declaratory relief action. Because of UAIC's decisions, its insured has a
22
23
24
25

26
27 ¹ In this Introduction, there are no citations to the appendix as this section
28 constitutes counsel's summary of the events and is thus intended as argument.
The facts supporting this introduction are set forth in the Statement of Facts and
each statement of fact is supported by an appropriate citation to the appendices.

1 judgment against it, and its insured and the claimant were forced to incur
2 substantial attorneys fees and costs to receive the insurance proceeds that
3 should have been paid many years ago. The measure of damages for this is, at
4 a minimum, the excess judgment. Further, interest, attorneys fees and costs,
5 and all consequential damages should have been awarded for this.
6
7

8 Respondent's liability for breaching its duty to defend, misrepresenting
9 coverage, breaching its duty to investigate, breaching its duty to inform, and
10 violating N.R.S. 686A.310 is, at the very least, an issue of fact to be
11 determined by a jury. As such, this case should be reversed and remanded.
12
13

14 **JURISDICTIONAL STATEMENT**

15 The district court had jurisdiction of this action by virtue of 28 U.S.C. §
16 1332(a). This court of appeals has jurisdiction under 28 U.S.C. § 1291 as an
17 appeal from a final judgment. The district court Order on Motion for
18 Summary Judgment (#102) and Clerk's Judgment (#103) were entered on
19 October 30, 2013. Appellants filed their Notice of Appeal on November 27,
20 2013.
21
22
23

24 **ISSUES PRESENTED FOR REVIEW**

25 A. Whether a valid state court judgment is the minimum measure of
26 damages as a matter of law in a failure to defend case.
27
28

1 B. Whether, on summary judgment, the Court can disregard a valid state
2 court judgment, interest, attorney fees and costs as contractual or bad
3 faith damages.
4

5 C. Whether all consequential damages should be awarded for Appellee
6 breaching the duty to defend.
7

8 D. Whether the reasonableness of the insurers conduct is a question of fact
9 that precludes summary judgment on bad faith issues where the insured
10 wins on the coverage issue by summary judgment.
11

12 E. Whether Plaintiffs are entitled to the opportunity to present evidence to
13 a jury on the non-contractual claims.
14

15 **STATEMENT OF THE CASE**
16

17 This action arose when GARY LEWIS ran over CHEYANNE
18 NALDER, a nine year old girl at the time, with GARY LEWIS's truck.
19 CHEYANNE was nearly killed as a result of the truck running over her head
20 on July 8, 2007.
21

22 Plaintiff JAMES NALDER, on behalf of his daughter Cheyanne,
23 brought a claim for the proceeds of the UAIC policy. UAIC claimed there
24 was no policy in effect. Suit was then brought against Mr. Lewis with notice
25 being provided to UAIC. UAIC took no steps to defend the lawsuit and did
26 nothing to investigate. Because UAIC took no steps to protect Gary,
27
28

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

4 Action was instituted in July of 2009 in the Eighth Judicial District
5 Court of the State of Nevada and removed by Defendant based on diversity
6 jurisdiction. Summary judgment was entered against Plaintiffs in favor of
7 Defendant on December 20, 2010. Plaintiff appealed that decision, and the
8 Ninth Circuit Court of Appeals reversed the District Court's grant of summary
9 judgment with respect to whether there was coverage by virtue of the way the
10 renewal statement was worded. *See* AA I:0002.
11
12
13

14 Upon remand, the District Court found that there was in fact coverage
15 and that UAIC breached its duty to defend. *See* AA IV:0734. However, the
16 court entered summary judgment on behalf of UAIC finding that there was no
17 bad faith. *See* Id.. Further, the court failed to award any damages for UAIC's
18 failure to defend. *See* Id.. Appellants now appeal the District Court's refusal
19 to grant summary judgment for contractual damages in appellants favor, grant
20 of summary judgment on behalf of UAIC on the issue of bad faith and its
21 finding of no damages for the failure to defend.
22
23
24

25 //

26 //

27 //

28 //

STATEMENT OF FACTS

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

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

1 In mid-May 2007 (Invoice Date May 9, 2007) UAIC sent Gary Lewis a
2 "Renewal Statement" offering to "Renew" Gary's policy with UAIC for from
3 May 29, 2007 through June 29, 2007. See AA I:0054. The "Renewal
4 Statement" indicates that payment to "Renew" the policy had to be made by
5 May 29, 2007. The "Renewal Statement" also stated "To avoid lapse in
6 coverage, payment must be received prior to (sic) expiration of your policy."
7 The only expiration date listed on the "Renewal Statement" is "June 29,
8 2007". Gary Lewis made the payment on May 31, 2007, two days after the
9 "Due Date" of "May 29, 2007", and renewed the policy. The records from
10 UAIC specifically list the policy as "RENEWAL". See AA I:0059.

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

1 UAIC continued to "Renew" Gary's policy in August 2007, *See* AA
2 I:0071, and September 2007 through September 2008. *See* AA I:0027-0074.
3

4 Gary Lewis, having been insured with UAIC for several months and
5 UAIC having renewed Mr. Lewis insurance through UAIC on multiple
6 occasions as noted above. It was Gary's understanding that he had insurance
7 covering the damages done to Cheyenne Nalder. After the incident however
8 UAIC claimed Mr. Lewis was not its insured, and that there was no coverage
9 for the incident. UAIC nevertheless continued to renew Mr. Lewis' policy for
10 another year, but claimed that the policy had lapsed from July 1, 2007 through
11 July 10, 2007.
12
13
14

15 Plaintiff JAMES NALDER, on behalf of his daughter Cheyenne,
16 brought a claim for the proceeds of the UAIC policy. UAIC claimed there
17 was no policy in effect. Suit was then brought against Mr. Lewis with notice
18 being provided to UAIC. UAIC took no steps to defend the lawsuit and did
19 nothing to investigate coverage or to determine whether Gary's payment on
20 July 10, 2007, long before the expiration of the policy, warranted Gary being
21 covered under the policy UAIC renewed with Gary. Because UAIC took no
22 steps to protect Gary, judgment was entered against Gary in the amount of
23 \$3,500,000.00. *See* AA I:0075. After Judgment Mr. Lewis, along with
24
25
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27
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1 NALDER on behalf of Cheyanne, the real party in interest, initiated this
2 action against UAIC.
3

4 UAIC was granted Summary Judgment on all of Plaintiff's claims.
5 However, on Appeal, the Ninth Circuit Court of Appeals reversed the District
6 Court's grant of summary judgment with respect to whether there was
7 coverage by virtue of the way the renewal statement was worded. The Court
8 found that
9
10

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

17 See AA I:0002.

18 Upon remand, the District Court found that there was in fact coverage
19 and that UAIC breached its duty to defend. See AA IV:0734. However, the
20 court entered summary judgment on behalf of UAIC finding that there was no
21 bad faith. See *Id.* Further, the court failed to award any damages for UAIC's
22 failure to defend. See *Id.* Appellants now appeal the District Court's grant of
23 summary judgment on behalf of UAIC on the issue of bad faith and its finding
24 of no damages for the failure to defend.
25

26 //

27 //

1 **SUMMARY OF ARGUMENT**

2 Because the District Court found that there was coverage and that
3
4 UAIC breached its duty to defend, damages should have been awarded to
5 Appellants. Appellants should have been awarded consequential and
6
7 compensatory damages of the state court judgment, attorneys fees and costs,
8
9 and interest.

10 Additionally, the District Court erred in granting summary judgment on
11 behalf of UAIC finding that there was no bad faith as a matter of law.
12 Appellants presented evidence, which construed in the light most favorable to
13
14 them as the non-moving party, provided a question of fact, and because bad
15 faith is a question of fact for the jury, summary judgment is precluded. As
16
17 such, this case should be reversed and remanded.

18 **ARGUMENT**

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

22 The district court's legal conclusion that damages are available is
23
24 reviewed de novo. *See Hemmings v. Tidyman's, Inc.*, 285 F.3d 1174, 1197
25 (9th Cir. 2002); *EEOC v. Wal-Mart Stores, Inc.*, 156 F.3d 989, 992 (9th Cir.
26
27 1998). Whether the district court selected the correct legal standard in
28
computing damages is also reviewed de novo. *See Mackie v. Rieser*, 296 F.3d

1 909, 916 (9th Cir. 2002); *Neptune Orient Lines, Ltd. v. Burlington Northern*
2 *and Santa Fe Ry Co.*, 213 F.3d 1118, 1119 (9th Cir. 2000); *Evanow v. M/V*
3 *NEPTUNE*, 163 F.3d 1108, 1113-14 (9th Cir. 1998). The district court's
4 award of damages is reviewed for an abuse of discretion. *See McLean v.*
5 *Runyon*, 222 F.3d 1150, 1155 (9th Cir. 2000) (Rehabilitation Act); *Rolex*
6 *Watch, U.S.A., Inc. v. Michel Co.*, 179 F.3d 704, 712 (9th Cir. 1999) (Lanham
7 Act).

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

14 Primary liability insurance policies create a duty to defend and the duty
15 to indemnify. *Miller v. Allstate*, 212 P.3d 318 (Nev., 2009) citing *Crawford v.*
16 *Weather Shield Mfg. Inc.*, 44 Cal.4th 541, 79 Cal.Rptr.3d 721, 187 P.3d 424,
17 427 (2008). The duty to defend is a "legal duty that arises under the law, as
18 opposed to a contractual duty arising from the policy." *Miller v. Allstate*, 212
19 P.3d 318 (Nev., 2009).

22 "If there is any doubt about whether the duty to defend arises, this
23 doubt must be resolved in favor of the insured." *United Nat'l Ins. Co. v.*
24 *Frontier Ins. Co.*, 99 P.3d 1153, 120 Nev. 678 (Nev., 2004) citing *Aetna Cas.*
25 *& Sur. Co. v. Centennial Ins. Co.*, 838 F.2d 346, 350 (9th Cir. 1988). "The
26 purpose behind construing the duty to defend so broadly is to prevent an
27
28

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

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

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

1 As, such, the full judgment is the minimum measure of damages for both the
2 contractual claims and the bad faith claims, as a matter of law.
3

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

6 The District court in granting summary judgment to UAIC regarding
7 the amount of damages. First, Appellants were not given the ability to submit
8 the amount of damages for consideration. Therefore, there is a question of
9 fact remaining as to the damages.
10

11 Further, if an insurer breaches the duty to defend, the insured is entitled
12 to at least attorney's fees and costs as damages incurred by the insured to
13 defend the action. *See Home Sav. Ass'n v. Aetna Cas. & Sur. Co.*, 854 P.2d
14 851, 855 (Nev. 1993) (holding that an insured was not barred from further
15 pursuing recovery from insurance company for fees and costs incurred in
16 defending an action). The California Supreme Court held that once an insurer
17 violates its duty of good faith and fair dealing, it is liable to pay all
18 compensatory damages proximately caused by its breach. *Neal v. Farmers*
19 *Ins. Exchange*, 21 Cal.3d 910, 148 Cal.Rptr. 389, 582 P.2d 980, 986 (1978).
20 The insurer may challenge the reasonableness of a damages amount, but its
21 breach of duty is a proximate cause of the insurer's reasonable damages. *Noya*
22 *v. A.W. Coulter Trucking*, 49 Cal.Rptr.3d 584, 589-90 (Ct. App. 2006).
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1 As the District Court found that UAIC breached its duty to defend,
2 Appellants are entitled to all compensatory damages, which at a minimum
3 include Costs, Attorney's Fees, and interest on the policy limits that were
4 withheld.
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7 **3. All consequential damages should be awarded for**
8 **Appellee breaching the duty to defend**

9 "When the insurer refused to defend and the insured does not employ
10 counsel and presents no defense, it can be said the ensuing default judgment is
11 proximately caused by the insurer's breach of the duty to defend." *Pershing*
12 *Park Villas v. United Pac. Ins. Co.*, 219 F.3d 895 (9th Cir. 2000). Further the
13 California Court of Appeals held that a carrier who breached the duty to
14 defend may be liable for consequential damages above policy limits. *Carlson*
15 *v. Century Surety Co.*, 2012 U.S. Dist. LEXIS 23119 (N.D. Cal. Feb 23,
16 2012). In *Carlson*, the Court held that because "a judgment in excess of the
17 policy limits is a foreseeable outcome of the breach of the duty to defend,"
18 even if the insurance company did not violate the implied covenant of good
19 faith and fair dealing, if the insurer violated its duty to defend, it may be liable
20 for the default judgment, even if in excess of the policy limit. *Id.*
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26 Because there was "arguable or possible coverage" under the policy,
27 UAIC had a duty to defend GARY LEWIS. Further, as explained in detail
28 above, there was actual coverage under the policy. If an insurer breaches the

1 duty to defend, the insured is entitled to at least attorney's fees and costs as
2 damages incurred by the insured to defend the action. *See Home Sav. Ass'n v.*
3 *Aetna Cas. & Sur. Co.*, 854 P.2d 851, 855 (Nev. 1993) (holding that an
4 insured was not barred from further pursuing recovery from insurance
5 company for fees and costs incurred in defending an action). As such, the
6 District Courts order denying any consequential damages should be reversed
7 and the action remanded for a determination of the appropriate amount of
8 consequential damages.
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12 **B. SUMMARY JUDGMENT SHOULD BE REVERSED ON THE**
13 **NON-CONTRACTUAL CLAIMS**

14 **1. Standard for Granting Summary Judgment**

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16 A district court's decision to grant, partially grant, or deny summary
17 judgment or a summary adjudication motion is reviewed de novo. *See, e.g.,*
18 *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir.
19 2004). A district court's decision on cross motions for summary judgment is
20 also reviewed de novo. *See Travelers Prop. Cas. Co. of Am. V.*
21 *ConocoPhillips Co.*, 546 F.3d 1142, 1145 (9th Cir. 2008); *Arakaki v. Hawaii*,
22 314 F.3d 1091, 1094 (9th Cir. 2002). The appellate court's review is
23 governed by the same standard used by the trial court under Federal Rule of
24 Civil Procedure 56(c). *See Suzuki Motor Corp. v. Consumers Union, Inc.*, 330
25 F.3d 1110, 1131 (9th Cir.), *cert. denied*, 540 U.S. 983 (2003).
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1 Summary judgment under Fed. R. Civ. P. 56 may be granted only if the
2 evidence presented shows that there is no genuine issue as to any material fact
3 and that the moving party is entitled to a judgment as a matter of law. The
4 party moving for summary judgment has "the burden of showing the absence
5 of a genuine issue as to any material fact . . ." *Adickes v. S.H. Kress & Co.*,
6 398 U.S. 144, 158 (1970).
7

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9 "[S]ummary judgment will not lie if the dispute about a material fact is
10 'genuine,' that is, if the evidence is such that a reasonable jury could return a
11 verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
12 242, 248 (1986) (citation omitted). "[A]t the summary judgment stage the
13 judge's function is not himself to weigh the evidence and determine the truth
14 of the matter, but to determine whether there is a genuine issue for trial." *Id.*
15 at 249.
16

17
18 The law is well established that in reviewing a motion for summary
19 judgment, the evidence "must be viewed in the light most favorable to the
20 opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-160 (1970).
21 "[T]he inferences to be drawn from the underlying facts contained in [the
22 moving party's materials] must be viewed in the light most favorable to the
23 party opposing the motion." *Id.*, quoting *United States v. Diebold, Inc.*, 369
24 U.S. 654, 655 (1962). Therefore, this Court must view the evidence presented
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1 by both parties and the inferences to be drawn there from in the light most
2 favorable to the Plaintiffs.
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4 The standard for summary judgment is essentially the same as the
5 standard for granting a directed verdict or judgment notwithstanding the
6 verdict under Fed. R. Civ. P. 50. *See Anderson v. Liberty Lobby, Inc.*, 477
7 U.S. 242, 251-52 (1986). The inquiry under each is "[W]hether the evidence
8 presents a sufficient disagreement to require submission to a jury." *Id.*
9 Summary judgment is only appropriate if "the evidence . . . is so one-sided
10 that one party must prevail as a matter of law." *Id.* If there are facts sufficient
11 to support a jury verdict for the Plaintiff, the Court is not to interfere with the
12 jury's role as the finder of fact. To do so would deny the Plaintiff's right to a
13 jury trial.
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18 2. Background on Bad Faith

19 In general, there are a few different areas of litigation that involve "bad
20 faith" by an insurance company. All of these actions, regardless of the parties
21 involved, however, are founded in the general principle of contract law that in
22 every contract, including policies of insurance, there is an implied covenant of
23 good faith and fair dealing that neither party will do anything which will
24 injure the right of the other to receive the benefits of the agreement. *Comunale*
25 *v. Traders & General Insurance Company*, 50 Cal.2d 654, 328 P.2d 198, 68
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1 A.L.R.2d 883. Most courts, including Nevada, have held that an insurance
2 company always acts in bad faith whenever it breaches its duty to settle by
3 failing to adequately consider the interest of the insured. Windt, Allan D., *I*
4 *Insurance Claims & Disputes 5th*, Section 5:13 (Updated March, 2009). This
5 is true whether there is a "genuine dispute" as to whether payment of the third-
6 party policy limits is warranted or not.

7
8 The Nevada Supreme Court recently defined bad faith by holding that
9 "an insurer must give equal consideration to the insured's interests" and "the
10 nature of the relationship [between insured and insurer] requires that the
11 insurer adequately protect the insured's interests." *Miller v. Allstate*, 212 P.3d
12 318 (2009). There is no question that the rejection of a settlement offer within
13 the policy limits is an element of a bad faith claim. *Id.* The *Miller* Court held
14 that the rejection by an insurer of a settlement offer within the policy limits is
15 indeed an element making up a bad faith claim, but also noted that a bad faith
16 claim can be based on far more than just the rejection of such an offer. *Id.*
17 The Court specifically noted that "an insurer's failure to adequately inform an
18 insured of a settlement offer is a factor for the trier of fact to consider when
19 evaluating a bad-faith claim." *Id.* at 325; see also *Allen v. Allstate Ins. Co.*,
20 656 F.2d 487, 489 (9th Cir. 1981) (recognizing that under California law
21 "What is 'good faith' or 'bad faith' on an insurer's part has not yet proved
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1 susceptible to [definitive] legal definition. An insurer's 'good faith' is
2 essentially a matter of fact."). *Id.*
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4 Within the area of first-party bad faith, there are essentially three
5 standards which courts have imposed on liability insurers in determining
6 whether the insurer has met its duty to the insured. Those standards involve
7 strict liability, negligence, and bad faith. *Shamblin v. Nationwide Mutual*
8 *Insurance Company*, 396 S.E.2d 766 (W.Va. 1990), citing, *Schwartz,*
9 *Statutory Strict Liability for an Insurer's Failure to settle: A Balanced Plan*
10 *for an Unresolved Problem*, 1975 Duke L.J. 901; Annotation, *Liability*
11 *Insurer's Negligence for Bad Faith in Conducting Defense as Ground of*
12 *Liability to Insured*, 34 A.L.R.3d 533 (1970 & Supp. 1989).
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17 The courts which have applied the strict liability standard have held that
18 an insurer who fails to settle within policy limits does so at its own risk, and
19 even if its position is not entirely groundless, if the failure to settle later
20 exposes the insured, the carrier is liable for the full amount which will
21 compensate the insured for all the detriment caused by the insurer's breach of
22 the express and implied obligations of the contract. *Id.*, citing, *Crisci v.*
23 *Security Ins. Co.*, 66 Cal2d 425, 58 Cal.Rptr. 13, 426 P.2d 173 (1967); *Rova*
24 *Farms Resort, Inc. v. Investors Insurance Co.*, 65 N.J. 474, 323 A.2d 495
25 (1974).
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1 The *Crisci* Court recognized that the insured's expectation of protection
2 provides a basis for imposing strict liability in failure to settle cases because it
3 will always be in the insured's best interest to settle within the policy limits
4 when there is any danger, no matter how slight, of a judgment in excess of
5 those limits. *Crisci v. Security Insurance Company of New Haven, Conn.*, 426
6 P.2d 173, 66 Cal.2d 425, 58 Cal. Rptr. 13, (1967). *Crisci* recognized there is
7 more than a small amount of elementary justice in a rule that would require
8 that, in this situation, where the insurer's and insured's interests necessarily
9 conflict, the insurer, which may reap the benefits of its determination not to
10 settle, should also suffer the detriments of its decision. *Id.*

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

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

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

8 *Id.* at 780.

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

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

20 *Johansen v. California State Automobile Association Inter-Insurance Bureau*,
21 15 Cal.3d 9, 123 Cal.Rptr. 288, 538 P.2d 744, (1975) (emphasis added).

22 Moreover, in deciding whether or not to compromise the claim, the insurer
23 must conduct itself as though it alone were liable for the entire amount of the
24 judgment. *Id.*, citing *Crisci*.

25 Nevada has long recognized that there is a fiduciary relationship
26 between the insurer and the insured. *Powers v. USAA*, 114 Nev. 690, 962 P.2d
27 596 (1998), citing *Ainsworth v. Combined Ins. Co.*, 104 Nev. 587, 763 P.2d
28

1 673 (1988). Nevada has also established standards for applying in other types
2 of bad faith situations. In *Pemberton v. Farmers Insurance Exchange*, 109
3 Nev. 789, 858 P.2d 380 (1993), the Nevada Supreme Court established
4 standards to apply when an action is brought related to bad faith denial of
5 first-party benefits under uninsured or underinsured coverage. There, the
6 court noted numerous appellate court decisions that hold an insurer's failure to
7 deal fairly and in good faith with an insured's UM claim is actionable. *Id.* at
8 794 (citations omitted).

12 The Nevada Supreme Court and Federal District Court of Nevada
13 articulated a negligence or reasonableness standard in bad faith cases. "To
14 establish a prima facie case of bad-faith refusal to pay an insurance claim, the
15 plaintiff must establish that there was no reasonable basis for disputing
16 coverage." *Powers v. United Services Auto. Ass'n*, 962 P.2d 596, 604 (Nev.
17 1998), citing *Falline v. GNLV Corp.*, 823 P.2d 888 (Nev. 1991). See also
18 *Pemberton v. Farmers Ins. Exch.*, 858 P.2d 380, 384 (Nev. 1990).

22 One of the more instructional cases in Nevada, however, on the
23 standard to be applied when dealing with negative effects resulting from an
24 insurer's failure to settle a claim prior to litigation is *Landow v. Medical Ins.*
25 *Exchange*, 892 F.Supp. 239 (D.Nev. 1995). The *Landow* Court, following the
26 rationale of California courts in excess verdict situations accepted that, "the
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1 litmus test for bad faith is whether the insurer, in determining whether to settle
2 a claim, gave as much consideration to the welfare of its insured as it gave to
3 its own interests," citing, *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d. 809,
4 818, 169 Cal.Rptr. 691, 620 P.2d 141 (1979).
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7 The above-noted principles were most recently codified and adopted by
8 the Nevada Supreme Court in *Miller v. Allstate*, 212 P.3d 318 (2009). In
9 *Miller*, the court held that "an insurer must give equal consideration to the
10 insured's interest". The court further stated that the insurer's duty to its
11 insured is "similar to a fiduciary relationship" and noted "the nature of the
12 relationship requires that the insurer adequately protect the insured's interest."
13
14 The court's conclusion mirrored that in *Landlow* as the *Miller* court
15 recognized "at a minimum, an insurer must equally consider the insured's
16 interests and its own." The court also recognized the wisdom from decisions
17 from California holding that "the insurer must give the interests of the insured
18 at least as much consideration as it gives its own interests, and the insurer
19 must act as a prudent insurer without policy limits." *Id.* There is no question
20 that the rejection of a settlement offer within the policy limits is an element of
21 a bad faith claim. *Id.* The *Miller* Court held that the rejection by an insurer of
22 a settlement offer within the policy limits is indeed an element making up a
23 bad faith claim, but also noted that a bad faith claim can be based on far more
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1 than just the rejection of such an offer. *Id.* The Court specifically noted that
2 "an insurer's failure to adequately inform an insured of a settlement offer is a
3 factor for the trier of fact to consider when evaluating a bad-faith claim." *Id.* at
4 325; see also *Allen*, 656 F.2d at 489 (recognizing that under California law
5 "What is 'good faith' or 'bad faith' on an insurer's part has not yet proved
6 susceptible to [definitive] legal definition. An insurer's 'good faith' is
7 essentially a matter of fact."). *Id.*

11 3. UAIC Breached its Duty to Defend

12 Primary liability insurance policies create a duty to defend and the duty
13 to indemnify. *Miller v. Allstate*, 212 P.3d 318 (Nev., 2009) citing *Crawford v.*
14 *Weather Shield Mfg. Inc.*, 44 Cal.4th 541, 79 Cal.Rptr.3d 721, 187 P.3d 424,
15 427 (2008). The duty to defend is a "legal duty that arises under the law, as
16 opposed to a contractual duty arising from the policy." *Miller v. Allstate*, 212
17 P.3d 318 (Nev., 2009).

18 "If there is any doubt about whether the duty to defend arises, this
19 doubt must be resolved in favor of the insured." *United Nat'l Ins. Co. v.*
20 *Frontier Ins. Co.*, 99 P.3d 1153, 120 Nev. 678 (Nev., 2004) (emphasis added)
21 citing *Aetna Cas. & Sur. Co. v. Centennial Ins. Co.*, 838 F.2d 346, 350 (9th
22 Cir. 1988). "The purpose behind construing the duty to defend so broadly is
23 to prevent an insurer from evading its obligation to provide a defense for an
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1 insured without at least investigating the facts behind a complaint.” *United*
2 *Nat’l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 120 Nev. 678 (Nev., 2004)
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4 See also *Helca Min. Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1090
5 (Colo. 1991). A potential for coverage only exists when there is **arguable or**
6 **possible coverage**. *United Nat’l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153,
7 120 Nev. 678 (Nev., 2004) (emphasis added); see also *Morton v. Safeco Ins.*
8 *Co.*, 905 F.2d 1208, 1212 (9th Cir. 1990). “The duty to defend arises when
9 there is a potential for coverage based on the allegations in a complaint and
10 the duty to indemnify arises when there is actual coverage under an insurance
11 policy. *Id.* at 1155.
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15 Here, UAIC evaded “its obligation to provide a defense for an insured
16 without at least investigating the facts behind a complaint.” *United Nat’l Ins.*
17 *Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 120 Nev. 678 (Nev., 2004). UAIC
18 received a copy of the complaint in October, 2007. See AA I:0001. UAIC did
19 not investigate the facts of the complaint. Further, UAIC’s failure to provide
20 coverage and their breach of their duty to defend was the proximate cause of
21 the Default Judgment being entered against GARY LEWIS.
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25 Although the District Court found that UAIC breached its duty to
26 defend, it found that there was no bad faith. As a failure to defend can be bad
27 faith, this presents a question of fact for the jury which prevents summary
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1 judgment. As such, the District Court's order should be reversed and
2 remanded.
3

4 4. UAIC Misrepresented Coverage

5 UAIC misrepresented to its insured that there was no coverage under
6 his policy. An insurance policy, which would include the renewal statements
7 of the policy, is a contract and is governed by contract law. *United Insurance*
8 *Co., v. Frontier Insurance Company, Inc.*, 120 Nev. 678 684, 99 P.3d 1152,
9 1156 (2004). Under general contract law, the Nevada Supreme Court has
10 noted, "When a contract is ambiguous, it **will** be construed against the
11 drafter." *Glenbrook Homeowners Ass'n v. Glenbrook Co.*, 111 Nev. 909, 917,
12 901 P.2d 132, 138 (1995) (emphasis added). The Court has gone even further
13 in its discussion of insurance contracts, holding, "Contracts of insurance are
14 **always** construed most strongly against the insurance company. Stated
15 another way, a policy of insurance **is** to be construed liberally in favor of the
16 insured and **strictly against the insurer.**" *Hartford Ins. Group v. Winkler*, 89
17 Nev. 131, 135, 508 P.2d 8, 11 (1973) (Citations omitted) (emphasis added).
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24 In addition, the Nevada Supreme Court has held, "An insurance policy
25 is a contract of adhesion." *Id.* As a result "the language of an insurance
26 policy is broadly interpreted in order to afford 'the greatest possible coverage
27 to the insured.'" *Id.*, citing *Farmers Insurance Group v. Stonik*, 110 Nev. 64,
28

1 67, 867 P.2d 389, 391 (1994). The pivotal language from the UAIC contract
2 comes from the policy's "Renewal Statements" which UAIC drafted, and
3 which UAIC sent to Gary Lewis on multiple occasions advising Gary how the
4 contract of insurance could be renewed and continue to be in effect with
5 UAIC. The statements provide a due date for payment, but also specifically
6 state that if payment is "received prior the expiration of your policy" there will
7 be no lapse in coverage. The only "Expiration Date" listed in the policy's
8 "Renewal Statements" is the expiration date for the offered policy that UAIC
9 invited Gary Lewis to renew.
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14 The policy's "Renewal Statements" which give a due date but then state
15 that the policyholder can avoid a lapse in coverage by paying before the
16 expiration of the policy, and providing an "Expiration Date" for the policy that
17 is different than the "Due Date" are ambiguous. As noted above, **ambiguous**
18 **language in a contract, or in a writing seeking to renew a contract, is**
19 **construed against the drafter of the contract, or the writing seeking to**
20 **renew the contract.** See, *Glenbrook Homeowners Ass'n v. Glenbrook Co.*,
21 111 Nev. 909, 917, 901 P.2d 132, 138 (1995). The Nevada Supreme Court
22 has noted that an insurance company does business as a quasi-public
23 institution, and cannot avoid liability under ambiguous provisions of policy.
24 *Hartford Ins. Group v. Winkler*, 89 Nev. 131, 136, 508 P.2d 8, 12 (1973).
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1 Although the District Court found that there was coverage due to the
2 ambiguity, it failed to acknowledge that the insurance company has the
3 knowledge of how policies work, and that ambiguities are construed in favor
4 of coverage. Despite there being evidence of ambiguity, UAIC
5 misrepresented that there was no coverage for the policy. As such, there is
6 evidence of bad faith, that prevents granting summary judgment in favor of
7 UAIC. As such, As such, the District Court's order should be reversed and
8 remanded.
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12 5. UAIC Breached its Duty to Investigate

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14 Insurers have a duty to investigate. *Pemberton v. Farmers Ins.*
15 *Exchange*, 109 Nev. 789, 858 P.2d 380, 382 (Nev., 1993). "Insurers have the
16 duty to investigate claims and coverage in a prompt fashion." *Troutt v. CO*
17 *W. Ins. Co.*, 246 F.3d 1150, 1162. See also *Tynes v. Bankers Life Co.*, 730
18 P.2d 1115, 1124 (Mont. 1986) (9th Cir., 2001). The duty to investigate is an
19 extension of the duty of good faith and fair dealing that the insurer owes its
20 insured and, in a claims-made-and-reported policy, extends to the handling of
21 reported claims. *KPFF, Inc. v. California Union Ins. Co.*, 56 Cal.App.4th 963,
22 66 Cal.Rptr.2d 36, 44 (1997). UAIC utterly failed to investigate whether
23 coverage existed for Gary on the claim, made no attempt to investigate the
24 claim made against Gary Lewis, and failed to abide by established insurance
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1 claims handling practices in its handling of this claim. Although UAIC claims
2 that it investigated the claim, "confirming the lapse through their underwriting
3 department" is not an investigation. Furthermore, as discussed in detail
4 above, there was coverage under this claim.
5

6
7 As explained in detail above, Lewis had coverage under the policy and
8 UAIC failed to investigate. Therefore, summary judgment was not proper in
9 finding that UAIC did not commit bad faith. As such, the District Court's
10 order should be reversed and remanded.
11

12 **6. UAIC Breached its Duty to Inform**

13

14 UAIC also made absolutely no efforts to inform Gary Lewis of the
15 demand for the policy limits and the offer to settle Cheyanne's significant
16 claim for a mere \$15,000.00. UAIC completely ignored Cheyanne's claim
17 and did absolutely nothing other than send Cheyanne's counsel a letter stating
18 that there was no coverage. As noted above, the Court has continually held
19 "at a minimum, an insured must equally consider the insured's interest and its
20 own." *Allstate v. Miller*, 212 P.3d 318, 326 (Nev. 2009). If the insurer fails to
21 equally consider its insured's interests and its own it violates the implied
22 covenant of good faith and fair dealing and can be held responsible for any
23 resulting damages suffered by its insured. *Id.* The undisputed fact is that
24 UAIC made absolutely no efforts to inform Gary Lewis of the demand for the
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1 policy limits and the offer to settle Cheyanne's significant claim for a mere
2 \$15,000.00. Therefore, they breached their duty to inform. This failure to
3 inform, on its own, is sufficient to present the facts to the jury to determine
4 whether the carrier violated the duty of good faith and fair dealing and is thus
5 liable for a judgment entered against its insured in excess of the applicable
6 policy limits. *Id.* As such, the District Court's order should be reversed and
7 remanded.

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

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

19 UAIC violated N.R.S. § 686A.030. UAIC wrongfully refused to cover
20 the value of the claim of Cheyanne Nalder, wrongfully failed to settle within
21 the Policy Limits when they had the opportunity to do so, wrongfully denied
22 coverage, failed to adopt and implement reasonable standards for the prompt
23 investigation and processing of claims arising under its insurance policies, and
24 failed to effectuate the prompt, fair and/or equitable settlement of the claims
25 in which liability of the insurer was very clear, and which clarity was
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1 conveyed to UAIC. This is sufficient to present the facts to the jury to
2 determine whether the carrier violated the duty of good faith and fair. As
3 such, the District Court's order should be reversed and remanded.
4

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

9 Entitlement to a jury trial is a question of law reviewed de novo. *See*
10 *Hale v. United States Trustee*, 509 F.3d 1139, 1146 (9th Cir. 2007); *California*
11 *Scents v. Surco Prods., Inc.*, 406 F.3d 1102, 1105 (9th Cir. 2005).
12

13 Although the District Court found that there was coverage; however, he
14 found as a matter of law there was no bad faith. Pursuant to *Miller*, bad faith
15 is a question of fact. The Court specifically noted that "an insurer's failure to
16 adequately inform an insured of a settlement offer is a factor for the trier of
17 fact to consider when evaluating a bad-faith claim." *Id* at 325; see also *Allen*,
18 656 F.2d at 489 (recognizing that under California law "What is 'good faith'
19 or 'bad faith' on an insurer's part has not yet proved susceptible to [definitive]
20 legal definition. An insurer's 'good faith' is essentially a matter of fact.").
21 Thus, the District Court should have submitted this issue to the jury. As such,
22 the case should be reversed and remanded.
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1 CONCLUSION

2 For the foregoing reasons, Appellant respectfully requests that this
3
4 Court reverse and remand with instructions to enter judgment for the verdict
5 amount plus interest, cost, attorney fees and submit the question of bad faith
6
7 and other compensatory damages to the jury.

8 DATED this 6th day of March, 2014

9
10 CHRISTENSEN LAW OFFICES, LLC

11 /s/ Thomas Christensen

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

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

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

DATED this 6th day of March, 2014

CHRISTENSEN LAW OFFICES, LLC

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Attorneys for Appellants

PROOF OF SERVICE

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

Matthew Douglass, Esq.
ATKIN WINNER & SHERROD
1117 S. Rancho Dr.
Las Vegas NV 89102

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

EXHIBIT “J”

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.

I, BRANDON CARROLL, declare:

CASE NO.: A-18-772220-C

DEPT. NO.: 19

**AFFIDAVIT OF VICE PRESIDENT OF
BODILY INJURY CLAIMS BRANDON
CARROLL IN SUPPORT OF
INTERVENOR/THIRD PARTY
DEFENDANT UNITED AUTOMOBILE
INSURANCE COMPANY'S
OPPOSITION TO COUNTER-MOTION
FOR SUMMARY JUDGMENT AND
COUNTER-MOTION FOR STAY OF
SUMMARY JUDGMENT FOR
DISCOVERY PURSUANT
TO N.R.C.P. 56 (f)**

1. That I am the Vice President of Bodily Injury claims employed at United Automobile Insurance Company ("UAIC"). I make this declaration in support of UAIC's Opposition to Third Party Plaintiff Lewis' Counter-Motion for Summary Judgment and, alternatively Motion to Stay

hearing on same summary judgment for discovery pursuant to N.R.C.P. 56(f). I have personal knowledge of the facts set forth below and, if called as a witness, could and would competently testify to them under oath.

2. I have familiarized myself with the claims file for the claims made by James Nalder, as Guardian for Minor, Cheyanne Nalder, as well as Cheyanne Nalder, individually, against Gary Lewis' implied policy of insurance with UAIC. I have familiarized myself with the Nalder's claim file since its opening. As part of that process, I reviewed claims notes made and correspondence sent and received in connection with the handling of the claim. The claims adjuster makes notes at or near the time of the activities in question occur. The creation and maintenance of the claims notes is a regularly conducted business activity of UAIC and said notes are true and accurate. Similarly, all correspondence sent by or, to, an adjuster is kept in the Claims file in the usual and ordinary course of business and those documents are true and accurate.

3. A review of the claims reveals the following: that the Nalder's made a claim under Gary Lewis' policies with UAIC for the loss, on July 8, 2007, occurring to minor Cheyanne Nalder.

4. A review of the claims reveals the following: that the Nalders and their Counsel were informed in writing on October 10, 2007 that no coverage existed for Lewis on the date of the accident, July 8, 2007, as his policy had expired June 30, 2007 and no new policy term was incepted until July 10, 2007.

5. That, thereafter, the claims file reveals that following a judgment being entered on Nalders claim, in 2008, an action was filed against UAIC by Lewis and the Nalders alleging bad

faith and extra-contractual remedies which was removed to U.S. Federal District Court for the District of Nevada and the case proceed there as *Nalder et al. v UAIC*, case no. 2:09-cv-01348.

6. A review of the claims reveals the following: Following Motions for summary judgment, the first District Court Judge hearing the matter, the Honorable Edward Reed, granted summary judgment in favor of UAIC finding no policy in force for Lewis for the subject loss and, as such, found no bad faith or extra-contractual breaches had been committed by UAIC.

7. A review of the claims reveals the following: Following Nalder's appeal to the U.S. Court of Appeals for the Ninth circuit, the case was remanded to the District Court due to an ambiguity in the renewal notice that had been sent to Lewis for his policy.

8. A review of the claims reveals the following: After the matter was remanded, a new round of cross-motions for summary judgment before the Federal District court proceeded where the new judge hearing the case, The Honorable R. Clive Jones, again found that UAIC had been reasonable and granted summary judgment in favor of UAIC on all the claims for bad faith and/or extra-contractual damages; however, due to the ambiguity in the renewal, the Court implied a policy of insurance for the loss and ordered UAIC to tender its \$15,000 policy limits for Gary Lewis. Said Order was entered October 30, 2013 and also, for the first time, found UAIC had a duty to defend Lewis under the implied policy for claims arising out of the July 2007 loss.

9. A review of the claims reveals the following: UAIC paid said \$15,000 policy limits, in one payment, on November 1, 2013, two days following the judgment. A true and accurate copy proof of the November 1, 2013 check payment for \$15,000, kept in usual and ordinary course of business by UAIC, is attached hereto as Exhibit 'A.'

10. A review of the claims reveals the following: Nalders then appealed the October 30, 2013 ruling, again to the to the U.S. Court of appeals for the Ninth Circuit and, following briefing and oral argument, that Court certified a first certified question to the Nevada Supreme Court, on June 1, 2016, regarding whether Nalders could collect consequential damages, on the 2008 judgment against Lewis, from UAIC in the absence of bad faith by UAIC. This question was accepted by the Nevada Supreme Court.

11. A review of the claims reveals the following: While that question was pending, UAIC discovered that, pursuant to Nevada law, the Nalders' 2008 judgment against Lewis had not been renewed pursuant to N.R.S. 17.214 and, thus, the judgment had expired in June 2014, pursuant N.R.S. 11.190(1)(a).

12. A review of the claims reveals the following: Upon learning of the expiration of the judgment against Lewis, UAIC filed a Motion to dismiss the Nalders' appeal for lack of standing on March 14, 2017.

13. A review of the claims reveals the following: Upon learning of the Motion to dismiss, the Nevada Supreme Court stayed the first certified question for ruling on the Motion to dismiss by the U.S. Court of Appeals for the Ninth Circuit. However, that the Ninth Circuit then certified a second question to the Nevada Supreme Court on December 27, 2017, which the Nevada Supreme Court accepted on January 11, 2018. This second certified question concerns whether the potential liability for consequential damages is extinguished if the judgment has expired.

14. A review of the claims reveals the following: This second certified question is still being briefed before the Nevada Supreme Court and it UAIC's belief that the Supreme Court's ruling will confirm whether or not the Nalder's 2008 judgment against Lewis is expired.

15. A review of the claims reveals the following: On about July 19, 2018 UAIC's received notice from a new counsel for Nalder, David Stephens, Esq., that a new suit had been filed by Nalder against Lewis, concerning the same expired 2008 judgment currently on appeal, under *Nalder v Lewis*, case no. A-18-772220-C, and that he had served Lewis with same and was giving 3 days notice of his intent to take default against Lewis. A true and accurate copy letter from David Stephens dated July 17, 2018, kept in usual and ordinary course of business by UAIC, is attached hereto as Exhibit 'B.'

16. A review of the claims reveals the following: Upon learning of this new action, and given the October 30, 2013 ruling of the Federal District court that an implied policy in effect for Lewis for the July 2007 loss - from which case no. A-18-772220-C arises - UAIC immediately sought to retain counsel for Lewis to defend him in this new action and prevent this default

17. A review of the claims reveals the following: UAIC also discovered that David Stephens had "amended" the expired 2008 judgment, *ex parte*, in about March 2018 - while the above-referenced appeal was pending and, accordingly, UAIC also sought to have retained defense counsel for Lewis vacate this improperly amended expired judgment.

18. A review of the claims reveals the following: UAIC engaged attorney Steven Rogers, Esq. to represent Lewis in regard to both this "amended" expired judgment in case no. 07A549111 as well as in regard to the new action case no. A-18-772220-C.

19. A review of the claims reveals the following: In early August 2018 attorney Rogers attempted to represent his client, Mr. Lewis, but was immediately met with resistance from Nalder's Counsel, Thomas Christensen, Esq., who claimed to also represent Lewis, whereby he asked Rogers if he believed his defense would cause "problems" for Lewis. Accordingly, on August 10, 2018 attorney Rogers sent a letter to attorney Christensen specifically responding to his concerns by noting Rogers did not believe his defense, seeking to relieve Lewis of a multi-million dollar judgment, would cause him any "problems." Attorney Rogers also attached copies of motions his office drafted on behalf of Lewis, to be filed in the 07A549111 action as well as in regard to the new action case no. A-18-772220-C. A true and accurate copy of the letter from Steve Rogers to Christensen dated August 10, 2018, kept in usual and ordinary course of business by UAIC, is attached hereto as Exhibit 'C.'

20. A review of the claims reveals the following: In response to Attorney Rogers August 10, 2018 letter, Attorney Christensen responded, with a letter dated August 13, 2018, wherein he specifically advised Attorney Rogers he could neither speak to Lewis nor file the planned motions he had drafted on his behalf. A true and accurate copy of the letter from Christensen to Rogers dated August 13, 2018, kept in usual and ordinary course of business by UAIC, is attached hereto as Exhibit 'D.'

21. A review of the claims reveals the following: In response to Christensen's August 13, 2018 letter, Rogers advised he could not represent Lewis due to Christensen's interference in preventing him from speaking to his client and he confirmed same in a letter to Christensen on August 23, 2018. A true and accurate copy of the letter from Rogers to Christensen dated August 23, 2018, kept in usual and ordinary course of business by UAIC, is attached hereto as Exhibit 'E.'

22. A review of the claims reveals the following: Learning of the interference by Christensen in preventing retained defense counsel from defending Lewis in regard to both the 07A549111 action as well as in regard to the new action case no. A-18-772220-C, UAIC had counsel for UAIC file Motions to intervene in both actions on about August 17, 2018 and August 16, 2018, respectively.

23. A review of the claims reveals the following: Thereafter, on about September 6-7, 2018, Christensen indicated to Rogers that he was retaining Attorney Breen Arntz, Esq., to represent Lewis and confirmed same in an email to Rogers. A true and accurate copy of the emails from Christensen to Rogers dated September 6-7, 2018, kept in usual and ordinary course of business by UAIC, is attached hereto as Exhibit 'F.'

24. A review of the claims reveals the following: Fearing the 6 month deadline to seek to vacate the improperly amended judgment on the expired 2008 judgment would run in late September 2018, UAIC engaged Randy Tindall, Esq. to file the necessary Motions to protect Lewis in both actions, noted above.

25. A review of the claims reveals the following: Christensen then threatened Tindall to withdraw all Motions on behalf of Lewis and, eventually, filed a Third Party Complaint against Tindall and his law firm as well as UAIC. The third Party Complaint also makes allegations against Nevada Bar counsel and the sitting judge that was hearing the case as co-conspirators.

26. A review of the claims reveals the following: Now Lewis has moved for summary judgment on this Third Party complaint alleging many things against UAIC, all of which UAIC disputes.

27. UAIC is not in a conspiracy with Bar Counsel and District Judge David Jones, nor any counsel in this matter, against Christensen and Lewis.

28. UAIC has been motivated by utmost good faith to comply with Federal Court's order of October 30, 2013, finding a policy for Lewis with UAIC, at law, for the first time regarding the 2007 loss, in seeking to retain counsel and defend him in regard to the 07A549111 action as well as in regard to the new action case no. A-18-772220-C.

29. That UAIC is seeking to relieve Lewis of an improperly amended expired judgment for over \$3.5 million and, dismiss the new action filed against him.

30. That UAIC, through retained counsel, tried to discuss Lewis' defense with him, but this was refused by Counsel for Nalder and Lewis, Thomas Christensen.

31. That UAIC never misinformed Attorney Steve Rogers of the legal basis for the representation of Lewis.

32. The UAIC has not engaged in trickery, delay or misrepresentation to harm Lewis.

33. That due to the prevention of retained defense counsel from ever putting forth a defense on Lewis' behalf in regard to the 07A549111 action as well as in regard to the new action case no. A-18-772220-C, UAIC has filed a declaratory judgment action regarding lack of cooperation as well as seeking a determination whether UAIC owes Lewis "Cumis Counsel" due to the conflict alleged by attorney Christensen.

34. Accordingly, at this time, Lewis has not complied with all policy conditions as he is not cooperating in his defense or investigation of this amended judgment and new suit.

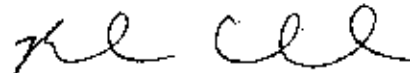
35. UAIC has never delayed investigation of this claim, or failed to respond to settlement requests or, done a one-sided investigation or, committed any other violation of the covenant of good faith and fair dealing and/or N.R.S. 686A.310.

36. Indeed, UAIC has thus far been precluded from even speaking to its insured, Lewis and, accordingly, has filed a Counter Motion for stay of the instant summary judgment for discovery pursuant to N.R.C.P. 56(f).

37. Specifically, UAIC needs discovery including, but not limited to, depositions and written interrogatories of Gary Lewis, which UAIC believes will lead to material issues of fact to understand if Lewis has been informed that UAIC's attempts to defend him seek to relieve him a multi-million dollar expired judgment such that he will owe nothing to Nalder and how and why he believes UAIC is injuring him or, in bad faith, for doing so.

38. Additionally, UAIC seeks the depositions of Lewis and Attorneys Arntz, Christensen and Stephens to understand all of their relationships vis-à-vis Nalder as UAIC believes this reveal material issues of fact concerning a fraud perpetrated on the Court

DATED this 12th day of December, 2018.



Brandon Carroll, As VP of Bodily Injury Claims
and Duly authorized representative of United
Automobile Insurance Company

SUBSCRIBED AND SWORN to before me

This 12th day of December 2018

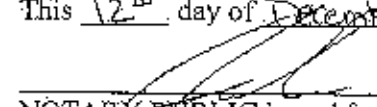

NOTARY PUBLIC in and for said
Miami Dade County, Florida



EXHIBIT "A"
TO AFFIDAVIT

UNITED AUTOMOBILE INSURANCE COMPANY

DETACH AND RETAIN THIS STATEMENT

DATE: 11/01/13 CHECK#: 0956661 CHECK AMOUNT: \$ *****15,000.00
POLICY#: NVA -030021926 LOSS DATE: 7/08/07 ADJ: V03
PAYEE: Christensen Law Office
& James Nalder, Guardian Ad Litem for minor Cheyenne Nalder
FULL AND FINAL SETTLEMENT OF ALL CLAIMS

CLAIM #: 0006000455 Claimant: 002 - CHEYANNE NALDER
Unit # : 001 - 96 CHEV PICKUP1500 Coverage: BI - BODILY INJURY
REASON:

ATKIN WINNER AND SHERROD
1117 S RANCHO DR
LAS VEGAS NV 89102-2216

EXHIBIT "B"
TO AFFIDAVIT

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:

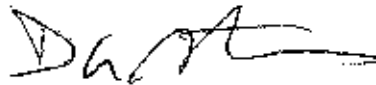
I am enclosing with this letter a Three Day Notice to Plead which I filed in the above entitled matter.

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



RespLewis226

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

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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-18-772220-C

DEPT NO.: XXIX

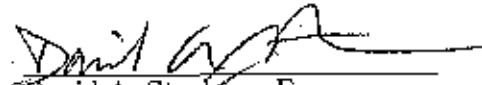
THREE DAY NOTICE TO PLEAD

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.

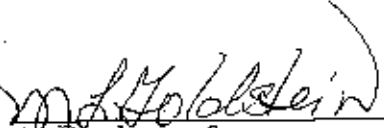

David A. Stephens, Esq.
Nevada Bar No. 00902
Stephens Gourley & Bywater
3636 N. Rancho Drive
Las Vegas, NV 89130
Attorney for Plaintiff

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