IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
FILED
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AMERICAN NATIONAL PROPERTY
AND CASUALTY COMPANY,

Plaintiff/Counter Defendant-Appellant,

vs. No. 30,164

TINA CLEVELAND and ADAM HUDSON,

Defendants/Counter Plaintiffs-Appellees.

APPEAL FROM THE DISTRICT COURT
SECOND JUDICIAL DISTRICT
HON. BEATRICE J. BRICKHOUSE PRESIDING

ANSWER BRIEF

ORAL ARGUMENT IS REQUESTED

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NOTE: TRANSCRIPT REFERENCES. Trial was held on November 5, 6, and 9, 2009. References to the trial transcript will be to the first, second or third day and the page number of that volume of the transcript. For example, a citation to page 23 of the proceedings held on November 6, 2009 will be "2 Tr. 23."

STATEMENT OF COMPLIANCE

By his signature at the end of this document, Steven L. Tucker states that, based on the word-count feature of WordPerfect X4, version 14.0.0.667, the body of this brief contains 9,703 words and, therefore, complies with the word-limitation provision in Rule 12-213(F)(3), NMRA.

This Answer Brief is filed by Appellees Tina Cleveland and Adam Hudson, Defendants/Counter-Plaintiffs (collectively referred to as "Insureds").

SUMMARY OF PROCEEDINGS

Insureds will provide a summary proceedings to supplement that contained in the Brief in Chief.

A. EVEN ASSUMING THAT THE "RACING EXCLUSION" APPLIED TO IMPROMPTU DRAG RACING, INSUREDS OFFER A SUMMARY OF ADDITIONAL FACTS SUPPORTING THE JURY'S DETERMINATION THAT THE DENIAL OF THIS CLAIM WAS FRIVOLOUS AND UNFOUNDED.

Appellant American National Property and Casualty Company ("ANPAC") omits reference to the primary factual basis upon which its liability was argued to, and found by, the jury: the breach of its duty to conduct a timely and fair investigation and evaluation of the claim. That breach, along with the ambiguity in the policy over the "racing" exclusion, supported the jury's verdict that the denial of the claim was frivolous and unfounded.

Three people were potential witnesses to the alleged drag racing: Adam Hudson, Officer McElroy, and the driver of the Lincoln. ANPAC had no direct evidence from any of them to support its determination that Hudson was drag racing. Hudson denied it in a written statement. ("I never attempted to drag-race the black Lincoln LS in the other lane, or, lose control of the car." Exs. G & H.

ANPAC had no statement from Officer McElroy because Officer McElroy did not give ANPAC a statement. 1 Tr. 177; 2 Tr. 30. When the only police officer at the scene declined to give a statement that someone was drag racing, that should have been a huge red flag for the insurer. Finally, the driver of the Lincoln never stopped, so his identity is unknown.

The only scrap of evidence ANPAC had to support its denial of the claim was the statement of another police officer, Officer Compton, who arrived at the scene after the accident and complied the police report. Of course, since he was not present at the scene, he had no direct knowledge. Officer Compton gave a statement to ANPAC in which he related that, while completing his report, he asked one of the other officers if anyone knew what kind of car was involved in the accident. Apparently Hudson overhead the question and, according to Officer Compton, Hudson said something like "it was a black Lincoln LS that I was racing." Ex. 6, pp. 9, 14. Hudson testified that all he said was that the other car was a black Lincoln LS. As Hudson recounted at trial the conversation with Officer Compton:

> Q. [by Mr. Ellis]: At that point, did you say anything about drag racing?

A. [by Adam Hudson]: No. Actually, I believe he actually asked me, as well, "Were you racing," and I denied it, "No. I was just being a stupid kid, trying to take a turn too fast."

Q. An then later on, when you said, to the officers who were having a different conversation – in other words, speaking to Officer Compton, who was asking another officer, "What was the other car," did you say "It was a Lincoln LS I was racing," or just that it was a Lincoln LS?

A. No, I did not. I never said that I was racing. I believe that those words were put in my mouth, I guess you could say. It ended right at "it was black Lincoln LS."

2 Tr. 124-25.

Before denying the claim, ANPAC had a very brief interview with Hudson. Ex. B. Basically, ANPAC agent Williams asked Hudson what kinds of tickets were issued to Hudson, and he responded reckless driving and drag racing. *Id.*, p. 3. Williams did not ask Hudson any questions about the alleged drag racing or ask for Hudson's version of the charge. *Id.* He did not even ask Hudson the simple question, "Well, were you drag racing?"

ANPAC took Officer Compton's statement on December 4, 2007. Ex. 6. On December 20, 2007, the Claims Committee met and decided to deny the Insureds' claim. On December 28, 2007, Williams sent Insureds a letter informing them of the denial of their claim and the reason for the denial.

> The reason for this denial is that we recently had a statement from officer Compton of the Albuquerque Police Department. In his statement, Officer Compton advised that in interviewing Adam, that he indeed did admit that he was racing a black Lincoln LS. With this information from Officer Compton, this will confirm that Adam was indeed racing and we will not be able to provide you any sort of coverage under this policy.

Ex. L, p. 3.

As ANPAC noted, the racing charge was dismissed soon thereafter, and this dismissal was brought to ANPAC's attention in an attempt to get it to change its position. It refused to change its position or even to reinvestigate the claim. Ex. P. When asked why he did not seek an interview with Hudson and ask him about the drag racing, ANPAC's agent just said that he had interviewed Hudson earlier and "I didn't need to do it again."

ANPAC failed to ask Hudson any of the following questions, the answers to which arguably bear on the issue of whether he was drag racing on the night in question:

Were you racing or drag racing?	Hudson would have said "No." He was just speeding and being a stupid kid taking a turn too fast. 2 Tr. 124.
Did you know the driver of the other car?	Hudson would have said "no." 2 Tr. 121.
Did you intend to drag race?	Hudson would have said "No." 2 Tr. 121.

Did you nod or wink or in any way indicate to the other driver that you wanted to drag race or did the other driver give a similar indication to you?	Hudson would have said "No" because he had no intent to drag race and because the Lincoln was "a very heavily-tinted car" and Hudson could not even see the other driver, couldn't tell if "it was a him or a her." 2 Tr. 121.
Was there a starting point for a race?	Hudson testified that he and the other car did not start out together. Hudson was stopped at the light at Osuna and Jefferson and the other car passed Hudson as Hudson was starting out from the light. 2 Tr. 120.
Was there a finish line, or how was the winner of any contest to be determined?	No evidence because the question was not asked.
Did you tell Officer Compton you were racing the Lincoln?	Hudson would have said "No." 2 Tr. 124-25.

All ANPAC asked Hudson was the nature of the tickets he received. Then, with the scrap of Officer Compton's version of his conversation with Hudson, ANPAC denied the claim. Then, after the racing charge was dismissed, ANPAC refused to reinvestigate the claim because the dismissal "does not change the facts." Of course, that assumes ANPAC knew "the facts" to begin with.

Insureds' expert, Garth Allen, testified that in his opinion, ANPAC's denial of the claim was frivolous and without foundation based on its failure to conduct

any sort of investigation at all into whether the racing exclusion actually applied under the facts.

> A [by Mr. Allen]: ANPAC took an aggressive approach, interpreted [the racing exclusion] broadly, favored their own interests over the interest of the insured, paid little or no attention to what Adam was telling them; instead, said "Hey, you were arrested for racing, and the officer is convinced you were racing." Even when they took his statement, that asked him, "Did you get a ticket?
>
> "Yes.
>
> "For what?
>
> "Racing."
>
> Did they ask the obvious question, "Were you racing?" No, they didn't ask that question, at all. It's as if the police report said it, that's good enough, and once they seized on to that racing issue, they never let go. Later, when he was – those charges were dropped the Claim Committee met again. But did they take a fresh look at it? Sure didn't look like it; rather they continued with the approach that they had taken.
>
> When that charge was dropped, it should have been a completely brand new visitation.
>
> ...
>
> ...[O]nce that charge was dropped – and an exploration would have shown that almost never do the policy get a conviction for racing. The officers told us that they negotiate it down, and if they can never get a conviction, what makes the insurance company think they can prove their exclusion? So from that point forward, ... in my opinion,

should never have been denied, and the denial was without foundation.

Q. [by Mr. Ellis]: Or Frivolous?

A. Or frivolous.

2 Tr. 175-77.

B. INSUREDS OFFER A SUMMARY OF ADDITIONAL FACTS SUPPORTING THE TRIAL COURT'S EXERCISE OF DISCRETION IN ADMITTING THE TESTIMONY OF INSUREDS' EXPERT, GARTH ALLEN.

ANPAC filed this suit on October 9, 2008. RP 1. At a scheduling conference held on March 3, 2009, Insureds' counsel informed ANPAC's counsel and the court that Insureds would be calling Allen as an expert witness and he would be testifying about the language of the policy and how the racing exclusion involved formal car racing and not street drag racing. RP 264-65. Mr Houston, ANPAC's counsel responded "I know Garth Allen. I am familiar with his testimony and I don't plan on taking his deposition." *Id.* Allen was listed on Insureds' witness list filed on May 14, 2009. RP 96-97. On September 28, 2009, Allen signed a lengthy affidavit setting forth his opinions and the bases for his opinions which were to be the subject of his testimony. RP 200-205. That affidavit was filed and served on opposing counsel on October 2, 2009, as part of Insureds' response to ANPAC's motion for summary judgment. RP 178. 200-205.

ANPAC filed its motion in limine regarding Allen's testimony on the grounds that he was not timely disclosed and that he allegedly failed to provide the basis for his testimony. RP 213. Insured's responded by pointing out that Allen's testimony could not be formulated until discovery had been completed and that there was substantial delay due to the failure of ANPAC's agent, Natalie Voskresensky, to timely produce file documents. RP 246. On October 27, 2009, the court issued a letter ruling (RP 279) which was later incorporated in a formal Order. RP 289. The court ruled that Allen would be allowed to testify as to the issues addressed in his affidavit only. *Id.* The court also ruled that if ANPAC wanted to take Allen's deposition Insureds "will bear the cost of the deposition and associated costs." RP 280.

During the 8-month period from March 3, 2009, when ANPAC was first informed that Insureds would be calling Allen as their expert, until November 5, 2009, when trial began, ANPAC did not avail itself of the opportunity to take Allen's deposition – even after the court placed the entire cost on the Insureds.

C. ANPAC HAS NOT APPEALED THE AWARD OF ATTORNEY'S FEES.

After the jury returned its verdict and the court entered judgment in favor of Insureds, Insureds moved for an award of attorney's fees under NMSA 1978, § 39-2-1, which provides as follows:

> In any action where an insured prevails against an insurer who has not paid a claim on any type of first party coverage, the insured person may be awarded reasonable attorney's fees and costs of the action upon a finding by the court that the insurer acted unreasonably in failing to pay the claim.

RP 411.

On December 22, 2009, ANPAC filed its notice of appeal. RP 429. The court thereafter entered its order awarding Insureds attorney's fees. RP 479. ANPAC did not file a notice of appeal from that order.

ARGUMENT

POINT I

SUBSTANTIAL EVIDENCE OF ANPAC'S BREACH OF ITS DUTY TO CONDUCT A FAIR INVESTIGATION OF THIS CLAIM BEFORE DENYING IT SUPPORTS THE JUDGMENT ON THE JURY'S VERDICT.

STANDARD OF REVIEW. ANPAC's Point I is essentially a "substantial evidence" challenge to the verdict below. Brief in Chief at 17. It complains that the court erred in failing to direct a verdict (now, of course, referred to

as a "judgment as a matter of law") in its favor at the close of the evidence.

Id. at 18, 29.

> Our Supreme Court has cautioned that judgment as a matter of law "is a drastic measure that is generally disfavored inasmuch as it may interfere with the jury function and intrude on a litigant's right to a trial by jury." The remedy is appropriate only "when there are no true issues of fact to be presented to a jury" and where "it is clear that the facts and inferences are so strongly and overwhelmingly in favor of the moving party that the judge believes that reasonable people could not arrive at a contrary result."

Provencio v. Wenrich, 2010-NMCA-047, ¶ 5, ___ N.M. ___, ___ P.3d ___, 2010 WL 2560438, *cert. granted,* June 2, 2010.[1]

A. LIABILITY FOR INSURANCE BAD FAITH FLOWS DIRECTLY FROM THE BREACH OF THE DUTY TO FAIRLY INVESTIGATE AND EVALUATE THE CLAIM.

ANPAC leaps over important preliminary questions to reach the issue of whether the denial of the claim was frivolous or unfounded. As noted, it completely ignores the crucial and, indeed, dispositive issue of its failure to fulfill its duty to perform a fair investigation and evaluation of this claim. In accordance with UJI 13-1702, NMRA the court gave the jury this instruction:

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[1]Although ANPAC did not phrase it as such, its Point I might also be viewed as a contention that the trial court abused its discretion in submitting the issue of punitive damages to the jury. *See,* p. 13, below. To that extent, the standard of review is whether the court abused its discretion.

> An insurance company acts in bad faith when it refuses to pay a claim of the policy holder for reasons which are frivolous or unfounded. An insurance company does not act in bad faith by denying a claim for reasons which are reasonable under the terms of the policy.
>
> In deciding whether the pay a claim, the insurance company must act reasonably under the circumstances to conduct a timely and fair investigation and evaluation of the claim.

RP 310. (Emphasis added).

An insurance company is liable for insurance bad faith if it denies a claim without conducting a timely and fair investigation of the claim – before and without reaching the issue of whether its denial of the claim was otherwise frivolous or unfounded. In such a case, the insurer is liable for at least compensatory damages.

> We acknowledge, however, that the reasonableness of the insurer's conduct is generally an element of the jury's inquiry in determining whether compensatory damages should be awarded. For this reason, the bracketed second sentence of our jury instruction reads, "In deciding whether to pay a claim, the insurance company must act reasonably under the circumstances to conduct a timely and fair [investigation or evaluation] of the claim." UJI 13-1702 NMRA 2003. In failure-to-pay claims, therefore, a plaintiff under these circumstances might make a proper showing that the insurer acted unreasonably in denying or delaying a claim, entitling the plaintiff to compensatory damages, without having made a prima facie showing that the refusal to pay was frivolous or unfounded. In such circumstances, it is

> proper for the trial court to submit the plaintiff's bad-faith claim to the jury for consideration of an award of compensatory damages but withhold the punitive-damages instruction.

Sloan v. State Farm Mutual Auto. Ins. Co., 2004-NMSC-004, ¶ 19, 135 N.M. 106, 85 P.3d 230. (Emphasis added).

Here, there was ample evidence to support the submission to the jury the issue of whether ANPAC breached its duty to conduct a timely investigation and evaluation of the claim, and ANPAC does not contend otherwise. Therefore, there was ample evidence on which the jury could find ANPAC liable for insurance bad faith, which it did. RP 335.

The *Sloan* Court held that in "rare" (*id.*, ¶ 6) cases there might be sufficient evidence to support an award of compensatory damages but not a sufficient showing that the denial of the claim was frivolous or unfounded to submit the issue of punitive damages. So, the question becomes, is this such a case?

B. EVIDENCE SUFFICIENT TO SUPPORT THE SUBMISSION OF BAD FAITH WILL "ORDINARILY" AND IN "MOST" CASES BE SUFFICIENT TO SUPPORT THE SUBMISSION OF THE ISSUE OF PUNITIVE DAMAGES.

In *Jessen v. National Excess Ins. Co.*, 108 N.M. 625, 627, 776 P.2d 1244, 1246 (1989), the Court held that "[b]ad faith supports punitive damages upon a finding of entitlement to compensatory damages." The issue in *Sloan* was whether

the submission of the issue of punitive damages was required in every insurance bad faith case in which the plaintiff has produced evidence supporting compensatory damages. *Id.* ¶ 1. The answer given by the *Sloan* Court could be fairly summarized as "except in the rare case, yes."

> [W]e reaffirm our statement in *Jessen* [...] that "[b]ad faith supports punitive damages upon a finding of entitlement to compensatory damages. Accordingly an instruction on punitive damages will ordinarily be given whenever the plaintiff's insurance-bad-faith claim is allowed to proceed to the jury. We do, however, somewhat limit the per se *Jessen* rule by affording the trial court the discretion to withhold a punitive-damages instruction in those rare instances in which the plaintiff has failed to advance any evidence tending to support an award of punitive damages.

Id. ¶ 6. (Emphasis added).

The *Sloan* Court also overruled the holding in *Teague-Strebeck Motors, Inc. v. Chrysler Ins. Co.*, 1999-NMCA-109 127 N.M. 603, 985 P.2d 83, to the effect that, in bad faith cases, the submission of the issue of punitive damages would "require a showing of an additional culpable mental state." *Id.* ¶ 6. In insurance bad faith cases, there is no "stricter standard" required for the submission of the issue of punitive damages than for the submission of compensatory damages. *Akin v. United Steel Workers of America,* 2010-NMSC-031, ¶ 31, ___ N.M. ___, 237 P.3d 744.

Basically, the *Sloan* Court held that "ordinarily" (*id.* ¶s 6, 24) and "in most cases," (*id.* ¶ 24), evidence sufficient to support the submission of the issue of compensatory damages for insurance bad faith will be sufficient to support the submission of punitive damages as well. In duty-to-investigate cases, like *Jessen* for example, evidence of the breach of the duty to investigate is ordinarily sufficient to support the determination that the denial was frivolous or unfounded and, therefore, sufficient to support the submission and award of punitive damages as well. However, the Court left the door open for "those rare instances" (*id.* ¶ 6) in which plaintiff has failed to advance any evidence tending to support an award of punitive damages. In weighing that evidence, the Court held, the standard is whether the conduct of the insurance company was in reckless disregard for the interests of the plaintiff, was the result of the failure of the insurer to honestly and fairly balance its own interests and the interests of the insured, or was otherwise malicious, willful, or wanton. *Id.* ¶ 23.

Finally, the Court set the standard for the trial court to exercise its discretion, in those rare cases, to submit the issue of compensatory damages but withhold the issue of punitive damages.

> Where the trial court determines, based on the evidence, that no reasonable jury could find the insurer's conduct to have manifested a

culpable mental state, then the trial court may withhold the giving of a punitive-damage instruction.

Id. ¶ 24. (Emphasis added).

C. LIKE MOST CASES, THE EVIDENCE OF BAD FAITH HERE SUPPORTED THE SUBMISSION OF THE ISSUES OF COMPENSATORY AND PUNITIVE DAMAGES AND SUPPORTED THE JURY'S FINDING THAT THE DENIAL OF COVERAGE WAS FRIVOLOUS AND UNFOUNDED.

The jury's express finding, by special verdict, that ANPAC's denial of the Insured's claim was "for reasons which were frivolous or unfounded" (RP 334) finds support in either, or both, of two sources.

First, the so-called "racing exclusion" in the policy is ambiguous: does it exclude (a) pre-arranged racing contests taking place in facilities designed for that purpose, (b) impromptu street "drag racing," (c) racing against time but not another contestant, (d) some combination of these, or (e) something else? If ambiguous, the law of New Mexico, and elsewhere, requires that the policy be construed in favor of the insured which would be (a) above, only pre-arranged racing contests taking place in facilities designed for that purpose. If so construed, there is no evidence here of any pre-arranged contest in a facility designed for that purpose and, therefore, the denial of coverage was frivolous and without foundation.

Second, and in the alternative, evidence of ANPAC's intentional and willful failure to conduct a fair investigation and evaluation of this claim before denying it supports a finding of bad faith for compensatory damages and exhibits the culpable mental state which supports the submission of the issue punitive damages.

1. THIS POLICY DID NOT EXCLUDE COVERAGE FOR IMPROMPTU DRAG RACING.

ANPAC based its denial of this claim on the so-called "racing exclusion" clause of the policy. Insureds contend that the clause is ambiguous and should be construed in their favor or ignored altogether.

a. Exclusionary clauses are interpreted narrowly and, if ambiguous, are to be interpreted in favor of the insured.

> "[E]xclusionary [provisions] in insurance contracts shall be enforced so long as their meaning is clear;" however, if the exclusion is ambiguous or conflicts with legislative intent it is rendered void.

Phoenix Indemnity Ins. Co. v. Pulis, 2000-NMSC-023, ¶20, 129 N.M. 395, 9 P.3d 639. (Emphasis added). Stated otherwise:

> [A]mbiguities in an insurance policy are construed in favor of the insured and against the insurer, as a matter of public policy. *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶ 26, 129 N.M. 698, 12 P.3d 960. Our construction of an unclear and ambiguous insurance policy is therefore guided by the reasonable expectations of the insured. *Id.*; 16 Richard A. Lord, *Williston on Contracts* § 49:20, at 112 (4th ed. 2000) ("The reasonable expectations doctrine has been

> said to be consistent with the rule that ambiguous language in an insurance policy is to be liberally construed in favor of the insured and against the insurer[.]" (footnote omitted)).

Bird v. State Farm Mut. Auto. Ins. Co., 2007-NMCA-088, ¶ 12, 142 N.M. 346, 165 P.3d 343. Speaking of Williston:

> Under the doctrine that gives effect to the "reasonable expectations of the insured, an attempt to exclude or except from coverage specific risks will not be enforced unless the language of exclusion is so "clear, plain, and conspicuous" that a lay person would not reasonably expect that coverage of the excluded risks would exist.

Richard A. Lord, *Williston on Contracts* § 49:111.

A clause in an insurance contract is ambiguous if it is "reasonably and fairly susceptible of different constructions." *Knowles v. United Servs. Auto. Ass'n,* 113 N.M. 703, 705, 832 P.2d 394, 396 (1992).

Insurance Services Office ("ISO") which is a nonprofit corporation supported by membership fees from 200-300 insurance companies. *Id.* ISO drafts standard forms such as automobile policies and files them in all 50 states. 2 Tr. 158. The ISO has drafted a "racing exclusion" that makes it clear that it applies only to a pre-arranged or organized racing or speed contest inside a facility designed for that purpose. 2 Tr. 160-161. Insurance companies are free to use the ISO exclusion or draft their own. 2 Tr. 158-60, 193. ANPAC decided to draft its own.

The so-called "racing exclusion" in the policy ANPAC issued to the Insureds is as follows:

> There is no coverage ... (18) for **bodily injury** or **property damage** resulting from the use of **your insured car** in or in preparation for, any race, speed contest, hill climbing exhibition, or any other contest or demonstration.

Ex. 1. (Emphasis in original).

In the case at bar, ANPAC's approach is to pluck the word "race" from this clause and put it under the microscope. Brief in Chief, pp 19-24. First, it goes to Webster's dictionary and chooses the definition that fits its purpose. Then it cites a case from Florida with materially different policy language. Finally it cites a criminal statute which has a purpose materially different from this policy provision. These sources do not support its position.

b. Because the word "race" has different meanings in different contexts and in common usage, the dictionary definition does not resolve the ambiguity.

"[T]he meaning of language is inherently contextual, ..." *State v. Edmondson,* 112 N.M. 654, 658, 818 P.2d 855, 859 (Ct. App. 1991). You like to sleep in a "bed," as long as we're not talking about the bottom of a river. A word can have one meaning in one context or when used for one purpose, and a totally different meaning in another context. ANPAC notes that Webster's New

Collegiate Dictionary defines "race" as a "contest of speed." Brief in Chief at 1. However, in Webster's Collegiate Dictionary, race is also defined as "a set course or duration of time." There is no evidence of a "set course" or "set ... duration of time" in this case. So was this a "race?" "Race" is also defined as "to drive or ride at high speed." *Id.* So is "race" synonymous with driving at high speed? Allen testified that the clause was "definitely" and "absolutely" ambiguous because, among other reasons, it could conceivably exclude coverage for one who was "racing" to the airport. 2 Tr. 166. But ANPAC's agent Williams testified that, under the Insureds' policy, there was no exclusion for "speeding" and that if, for example, if Hudson had been going 110 miles per hour in a 45-mile per hour zone, the policy would have provided coverage. 2 Tr. 38. So apparently there is no exclusion for "racing" to the airport. How is the insured to know what kind of racing is covered and what kind is excluded? Webster's does not supply the answer.

c. When the words in the clause are read together, the clause could reasonably be understood to apply to pre-arranged racing and not to impromptu drag racing.

Next, ANPAC relies on *Continental Ins. Co. v. Collinsworth,* 898 So.2d 1085 (Fla. Dist. App. 2005). In that case, the policy excluded coverage for powerboats engaged in "any speed race or test." The court held that the exclusion

applied literally to any speed race "whether it is sanctioned, unsanctioned, official or unofficial." *Id.* at 1089.[2]

More persuasive, Insureds submit, is the opinion of the Georgia Supreme Court in *Anderson v. Southeastern Fidelity Ins. Co.*, 251 Ga. 556, 307 S.E.2d 499 (1983). In that case, the policy excluded coverage for an automobile "while used or operated in any racing event, speed contest or exhibition." It was undisputed that the insured vehicle was engaged in an "impromptu acceleration contest with another vehicle, commonly called 'drag racing'" at the time of the accident. The Georgia intermediate appellate court interpreted the exclusion in a manner similar to that of the Florida court in *Collinsworth.* The Georgia Supreme Court reversed, holding that this policy language was ambiguous and did not exclude coverage for the accident.

> Words, like people, are judged by the company they keep. The critical phrase, "any racing event," thus must be gauged by the words surrounding it – and in this case, by the two levels of its syntagmatic framework.

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[2]On remand for a bench trial, the court found that the two boats were not racing, within the meaning of the exclusion. It disregarded the testimony of the eye witnesses who merely assumed the two boats were "racing" because they were "traveling side by side at what the witnesses considered a high rate of speed." *Continental Ins. Co. v. Collinsworth,* 2006 WL 1389613, *8 (Fla. Cir. Ct. 2006).

Id. 307 S.E.2d at 500. The court then noted that it was difficult to discern any substantive distinction between the phrases "racing event" and "speed contest."

> These terms are associated with a third term "exhibition" which might be understood to impart a semantic content to the preceding two terms. That is to say, the juxtaposition to the term "exhibition" can be understood to mean that a racing event and a speed contest are but instances wherein the operation of an automobile in an exhibition will be grounds for the exclusion. ... The final term, "exhibition," can be thus interpreted as one which encompasses the preceding two terms.

Id. 307 S.E.2d at 500.

The *Anderson* decision is more persuasive here because the language in the *Anderson* policy is much closer to that involved in the case at bar than the language in the *Collinsworth* policy. Here, the exclusion was for use of the insured car in "any race, speed contest, hill climbing exhibition, or any other contest or demonstration." Ex. 1. The words "exhibition" and "demonstration" inform and give context to the terms "race" and "speed." Reading the words together is the proper approach to understanding what they mean in context. "We construe the insurance policy as a whole and determine whether ambiguities exist in the language of the contract." *Davis v. Farmers Ins. Co. of Arizona,* 2006-NMCA-099, ¶ 7, 140 N.M. 249, 142 P.3d 17.

The *Anderson* court also found support from two provisions preceding the "racing" exclusion, *i.e.* an exclusion for leasing and for hired use such as a

taxicab. The racing exclusion here is preceded by similar exclusions. Ex. 1, exclusion number 1 ("while any vehicle is used to carry persons or property for a charge") and number 16 (while any insured vehicle is rented, leased ...").

Finally, the court was concerned with the practical and public policy consequences of holding for the insurance company in the case before it.

> [T]o hold the contrary might interject a new factual issue relative to the coverage in practically every automobile collision – that is, whether or not the driver were engaged in a race, be it against another vehicle or against time itself.

Anderson, 307 S.E.2d at 501.

d. The statutory definition is not helpful because it serves a purpose materially different from the insurance policy.

Finally, ANPAC cites a criminal statute, NMSA 1978, § 66-8-115 which contains a very broad definition of a "drag race" for the purpose of defining it as a misdemeanor. The purpose of the statute is public safety. The purpose of the policy is to provide coverage in the event of an accident, not public safety. ANPAC's agent Williams testified that this policy would provide coverage even if the insured were driving while intoxicated, on drugs, and speeding – all at the same time. 2 Tr. 38. The statute and the insurance policy have very different purposes. It is illogical to automatically lift a definition provided by the

legislature for one purpose and to superimpose it on a contract between private parties in an attempt to arrive at their "intentions."

> "[S]tatutes can serve merely as another extrinsic source to be taken into account along with ... dictionaries ... We are here interpreting a contract between private parties and, absent evidence of an intention by those parties to incorporate the statutory definition into their agreement, we are not bound by that definition. Simpson v. State Mut. Life Assur. Co of America, 135 Vt. 554, 382 A.2d 198, 200 (1977); ..." Thus, although a statutory definition of racing may be used as a guide toward ascertaining the common meaning of the term racing, similar arguments exist for the proposition that if the contract does not incorporate a specific statute into the policy, statutory definitions are not applicable.

Steven Pitt, *The Claim Adjuster's Automobile Liability Handbook* § 4:30.

As Allen testified, consistent with New Mexico law, the adjuster here was required to interpret this exclusion narrowly and to interpret any ambiguity in favor of the insured. 2 Tr. 156. Instead, "ANPAC took an aggressive approach, interpreted it broadly, favored their own interest over the interest of the insured, ..." 2 Tr. 175.

This exclusion is, at the very least, ambiguous in its attempt to exclude coverage for impromptu drag racing. Because it is ambiguous, it should be ignored or construed in favor of Insureds. In either event, ANPAC had no basis for denying this claim and its denial was frivolous and unfounded.

2. ALTERNATIVELY, EVEN ASSUMING THE PARTIES INTENDED IMPROMPTU DRAG RACING TO BE EXCLUDED, ANPAC'S BREACH OF ITS DUTY TO CONDUCT A FAIR INVESTIGATION AND EVALUATION OF THE CLAIM, UNDER THESE FACTS, ALLOWED THE JURY TO FIND THAT THE DENIAL OF THE CLAIM WAS FRIVOLOUS AND UNFOUNDED.

ANPAC's argument that its conduct was not frivolous or unfounded as a matter of law consists of the following: (1) it is not liable for bad faith if its denial was "fairly debatable" and it had evidence that Hudson was drag racing and, therefore, its denial was fairly debatable; (2) the trial court's denial of Insured's motion for directed verdict establishes, as a matter of law, that ANPAC's denial of the claim was fairly debatable, and (3) the dismissal of the criminal charges does not "change the fact" that Hudson was drag racing at the time of the accident.

a. Under the Facts of This Case, the Breach of the Duty to Fairly Investigate Supports a Verdict of Liability for Insurance Bad Faith.

ANPAC frames the issue too narrowly. Its position is that, if it finds one piece of evidence to support denial of the claim, it is entitled to cease its investigation and deny the claim. That is not correct.

First, as a factual matter ANPAC overstates the evidence. It contends that it could base its denial not only on Officer Compton's overhearing of Hudson "admitting" that he was drag racing but also on Officer McElroy's observations of

two cars in his rear-view mirror. Brief in Chief at 26-27. For the McElroy observations, ANPAC cites Exhibit H, p. 8 and Officer McElroy's trial testimony. Brief in Chief at 27. Exhibit H has only two pages and neither of them pertain to Officer McElroy's observations. Further, ANPAC did not have a statement from Officer McElroy when it denied this claim; his trial testimony came 18 months later. The issue of bad faith is determined based upon the facts and law available to the insurer at the time it made the decision to deny coverage. *Dakota Minnesota & Eastern RR. v. Acuity,* 771 N.W.2d 623, 629 (S.D. 2009); *Bosetti v. United States Life Ins. Co.,* 175 Cal.App.4th 1208, 1238, n. 21, 96 Cal.Rptr.3d 744, 770, n. 21 (2009). So, all ANPAC had to support its denial was the statement of Officer Compton and the criminal charges which were dismissed. In its denial letter, it cited only the statement of Officer Compton as its reason for denying this claim. Ex. L, p. 3.

Turning to the law, ANPAC's focus is too narrow because it ignores (throughout its brief) its failure to fulfill its duty to conduct a fair investigation and evaluation of this claim. The starting point is *Jessen.* In that case, the Supreme Court of New Mexico affirmed a judgment for compensatory and punitive damages against an insurer based on the insurer's failure to conduct a timely and fair investigation of the claim. *Jessen* is surely the source for the language in UJI

13-1702, NMRA stating the duty of the insurer to conduct a fair and timely investigation and evaluation of the claim, failing which it may be liable on a bad faith claim.

ANPAC's contention that its denial was "fairly debatable" is misplaced for several reasons. First, the phrase "fairly debatable" has been used only once in an insurance case and that was in a concurring opinion by Judge Bivins, sitting by designation, in *United Nuclear Corp. v. Allendale Mutual Ins. Co.,* 103 N.M. 480, 492, 709 P.2d 649, 661 (1985). The fact that no justice concurred with the statement then, and no justice or judge has used the phrase since then is significant. That standard is not established as the law of New Mexico.

The California courts use the term "genuine dispute" to describe the circumstances under which an insurer cannot be held liable for bad faith. But note the emphasis on the word "genuine."

> "[A]n insurer denying or delaying the payment of policy benefits due to the existence of a *genuine dispute* with its insured as to the existence of coverage liability of the amount of the insured's coverage is not liable in bad faith even though it might be liable for breach of contract. This is known as the genuine dispute" or "genuine issue" doctrine, ... The dispute, however, must be *genuine*. An insurer cannot claim the benefit of the genuine dispute doctrine based on an investigation or evaluation of the insured's claim that is not full, fair and thorough.

Bosetti, 175 Cal.App.4th at 1237, 96 Cal.Rptr.3d at 769-70. (Italics in original, underscoring added). To conduct this "full, fair and thorough investigation," the insurer cannot "ignore[] evidence available to it which supports the claim" (such as Hudson's statement and the other evidence negating a finding of drag racing), "nor may it just focus on those facts which justify denial of the claim" (Compton's statement). *Wilson v. 21st Century Ins. Co.,* 42 Cal.4th 713, 721, 68 Cal.Rptr.3d 746, 752, 171 P.3d 1082, 1087 (2007). An insurer which seeks to discover only evidence that defeats the claim holds its own interest above that of its insured. *Mariscal v. Old Republic Life Ins. Co.,* 42 Cal.App.4th 1617, 1620, 50 Cal.Rptr.2d 224, 225 (1996). When an insurer is presented with conflicting evidence, it has a duty to make a reasonable investigation in order to rationally resolve the conflict; it has no right to say "Aha! we've got something to support denial, so we can deny the claim and stop the investigation."

In *Scanlon v. Life Ins. Co. of North America, Inc.,* 670 F.Supp.2d 1181 (W.D. Wash 2009), for example, the insurance claim was covered if the decedent died in an accident, but not if a result of natural causes. One doctor opined that the cause of death was a natural cause – a heart attack. But there was other evidence which strongly suggested that death was the result of an accidental fall. The insurer relied on the evidence that the cause of death was a heart attack and

denied coverage. The court granted summary judgment to the plaintiff on the grounds that there was no genuine issue of material fact that the insurer was liable for insurance bad faith by its failure to conduct a timely and fair investigation.

> ... Ms. Leister [on behalf of the insurer] was confronted with conflicting conclusions. If she had referred the case to another investigator, such as Dr. Denton, she would have learned that the cause of death was "best certified as accidental." Ms. Leister failed to resolve the conflicting opinions, however. In fact she failed to perform any further investigation whatsoever. Immediately hearing from the first doctor who gave her a reason to deny Plaintiff's claim, she sent a denial letter. Such behavior manifests bad faith.

Id. at 1196. (Emphasis added).

Other jurisdictions agree in principle. Rhode Island, for example, uses the "fairly debatable" standard for drawing the line for the insurer's liability for bad faith. But an insurer who fails to conduct a fair and adequate investigation with what in New Mexico would be called a "culpable mental state" is precluded from contending that the claim was "fairly debatable," regardless of the merits of the claim.

> [A]lthough we decline to abandon the fairly debatable standard and recognize that an insurer is entitled to debate a claim that is fairly debatable, we are not persuaded that an insurer is relieved of its obligations to deal with its insured consistent with its implied in law obligations of good faith and fair dealing simply because the claim is fairly debatable. ... An intentional failure on the part of the insurer to

> determine whether there is a lawful basis to deny the claim, standing alone, is bad faith. This can be established by proof that the insurer "either intentionally or recklessly failed to properly investigate the claim or to subject the results of the investigation to a cognitive evaluation and review. The insurer's failure to conduct an appropriate and timely investigation may subject the insurer to bad faith liability notwithstanding the merits of the claim.

Skaling v. Aetna Ins. Co., 799 A.2d 997, 1011 (R.I. 2002). (Emphasis added; citations omitted). South Dakota has followed *Skaling*. *Dakota*, 771 N.W.2d at 630. The *Skaling* court followed the Arizona Supreme Court in *Zilisch v. State Farm Mut. Auto. Ins. Co.,* 196 Ariz. 234, 238, 995 P.2d 276, 280 (2000) which also held that"[w]hile fair debatablility is a necessary condition to avoid a claim of bad faith, it is not always a sufficient condition." *Id.* In other words, these cases hold that a breach of the duty to fairly investigate the claim, accompanied by a culpable mental state, will permit a finding of bad faith whether or not the claim might otherwise be "fairly debatable." At the risk of sounding like the late Johnnie Cochran, you can't fairly debate if you didn't fairly investigate.

See also, *United American Ins. Co. v. Merrill,* 978 So.2d 613, 635 (Miss. 2007) ("The denial of a claim without proper investigation may give rise to punitive damages") (citation omitted); *Berry v. Nationwide Mut. Fire Ins. Co.,* 181 W.Va. 168, 381 S.E.2d 367 (1989) (approving instructing the jury that "punitive damages may be awarded in your discretion if you find that the insurance

company's actions evidence an intentional, reckless or willful failure to determine whether or not there was any lawful basis for its refusal to pay its insured at the time of refusal").

At the end of the day, there was ample evidence that ANPAC not only breached its duty to conduct a fair investigation of this claim but that its failure was either reckless or intentional. The jury was properly instructed on the basis of liability for liability and compensatory and punitive damages. There is no room for ANPAC to stand on Officer Compton's testimony in the absence of a fair investigation.

b. The Court's Denial of Insureds' Motion for Directed Verdict Does Not Compel a Verdict in Favor of ANPAC.

Citing a single law review article as authority , ANPAC argues that, by denying Insureds' motion for directed verdict on its breach of contract cause of action, the court determined that reasonable minds could differ as to ANPAC's denial of this insurance claim and, the conclusion that its position is "fairly debatable" is thereby compelled. Brief in Chief at 27.

This argument was advanced originally by the Alabama Supreme Court and is known as the "directed verdict rule." It has been rejected by the "vast majority" of jurisdictions.

> Although we recognize that some jurisdictions have adopted the directed verdict rule, ... the rule adhered to by a vast majority of jurisdictions is that a plaintiff need not establish that it is entitled to a directed verdict on the contract claim in order to establish a prima facie bad faith claim. *See* William M. Shernoff et al., *Insurance Bad Faith Litigation* § 5.02[3], at 5'21 (1998). We believe that the majority rule represents the more reasoned approach and, thus, we decline to adopt the directed verdict rule.

Albert H. Howlers & Co. v. Bartgis, 114 Nev. 1249, 1257, n. 2, 969 P.2d 949, 955, n. 2 (1999). One reason for rejecting this rule was expressed by the Supreme Court of South Dakota thus:

> The directed verdict rule is not consistent with our established case law. The directed verdict rule focuses on the question of whether a defense of law or fact exists at the time of the trial on the underlying claim. This is not the standard for bad faith in South Dakota. The question for bad faith is whether the insurer's investigation or decision to deny a claim was unreasonable and was made in knowing or reckless disregard of the facts at the time the insurer made its decision to litigate rather than to settle.

Dakota, 632. In other words, the focus of the bad faith claim is the information the insurer had and the nature of actions when it denied the claim. While the insurer is entitled to contest coverage for purposes of the contract claim at trial (here, litigating the issue of whether Hudson was racing) and adduce any evidence it might now have, that evidence does not foreclose the insured's ability to litigate the bad faith claim and to demonstrate that, when it denied the claim, its position was frivolous and unfounded.

The Washington Supreme Court adopted the directed verdict rule in 2001. *Ellwein v. Hartford Accident & Indem. Co.*, 142 Wash.2d 766, 777, 15 P.3d 640, 645 (2001). Two years later, it reconsidered, rejected the rule, and overruled its prior decision. *Smith v. Safeco Ins. Co.*, 150 Wash.2d 478, 78 P.3d 1274 (2003). It reasoned that even where the insurer adduces evidence of a reasonable basis for its decision, the insured should be able to present evidence "that the insurer's alleged reasonable basis was not the actual basis for its action, or that other factors outweighed the alleged reasonable basis." *Id.*, 150 Wash.2d at 486, 78 P.3d at 1278.

For these reasons, the directed verdict rule should not be adopted in New Mexico.

c. ANPAC Failed To Preserve a Challenge to the Admission of the Dismissal of the Racing Charges and, in any event, ANPAC's Refusal To Reinvestigate the Claim After the Dismissal of Those Charges Supports, but Is Not Necessary To, the Verdict on the Bad Faith Claim.

ANPAC argues that the dismissal of the drag racing charge is "irrelevant" to the question of whether it acted in bad faith in denying this claim. Brief in Chief at 28-29.

First, it has failed to preserve this argument for appellate review as required by Rule 12-216, NMRA. It has failed to comply with the requirement that it state

in its brief where and how it preserved this argument for appellate review. Rule 12-213(A)(4), NMRA. It cites five cases for the proposition that "... the non-prosecution of a criminal charge has no bearing on whether an insurance company's denial of coverage was in bad faith." Brief in Chief at 29. Four of those cases involved objections to the admission of evidence of non-prosecution after objections to the admission of that evidence were properly made in the lower court. *Munoz v. Sate Farm Lloyd's of Texas*, 522 F.3d 568, 571 (5th Cir. 2008) "State Farm timely objected to the non-indictment evidence"); *Kelly's Auto Parts v. Boughton,* 809 F.2d 1247, 1250 (6th Cir. 1987) ("A pretrial motion *in limine* was filed by Lloyd's"); *Rabon v. Great Southwest Fire Ins. Co.,* 818 F.2d 306, 309 (4th Cir. 1987) ("Great Southwestern promptly objected" and "Great Southwestern plainly attempted to keep what it correctly perceived to be irrelevant and prejudicial evidence from the jury"); *American Home Assur. Co. v. Sunshine Supermarket, Inc.,* 753 F.2d 321, 324 (3rd Cir. 1985) ("American Home filed a motion *in limine* to prevent the introduction of the evidence of non-prosecution for arson.") The issue presented and decided in those cases was the admissibility of non-prosecution evidence where a proper and timely objection to its admission has been made.

Here, ANPAC does not show where it objected to the admission of the evidence that the charge for drag racing was dropped and, indeed, the record demonstrates unequivocally that it raised no objection to that evidence. The official document showing the dismissal of the charge (Exhibit M) was admitted on stipulation. 2 Tr. 11. Testimony from virtually every witness came in alluding to the dismissal of the charge for drag racing – sometimes through ANPAC's counsel. *See e.g.*, 1 Tr. 179-180.2 Tr. 28, 50, 85. ANPAC never objected. ANPAC is in no position to complaint that the evidence of the dropped charges was "inadmissible."

Moreover, in none of the four cases cited above involving the admissibility of this evidence was the evidence offered to prove the insurer's bad faith. In each case the evidence was offered on the issue of whether the insured actually committed the crime – in each case arson. So these cases do not stand for the proposition for which ANPAC cited them.

Likewise *Suggs v. State Farm Fire & Casualty Co.*, 833 F.2d 883 (10th Cir. 1987) does not stand for the broad proposition for which it is cited. In that case, there was "substantial conflicting evidence" as to the cause of the fire. In light of that quantity of evidence supporting the insurer's denial, the court held that directed verdict in favor of the insurer on the bad faith claim was required. The

court held only that the fact that the arson charge was dismissed was not sufficient to create jury issue on the issue of bad faith under the facts and circumstances of that case.

> The fact that the criminal arson charges against Suggs were ultimately dropped is immaterial and is not controlling in our review of the jury's verdict in this case.

Id. at 891.

Contrary to ANPAC's argument, the court was not making the broad statement it tries to advance that in no case, under no set of facts, is the fact-finder allowed to consider evidence – admitted on stipulation – that a criminal charge was dismissed in evaluating the conduct of an insurer in denying a claim.

An insurer has been found to have breached its duty to conduct a fair investigation and evaluation of a claim by failing to re-open or renew its investigation after new facts have come to light. *Smith v. Allstate Ins. Co.,* 52 Fed.Appx. 349 (9th Cir. 2002); *Simmons v. Congress Life Ins. Co.,* 791 So.2d 371 (Ala. 2000); *Frommoethelydo v. Fire Ins. Exchange,* 42 Cal.3d 208, 228 Cal.Rptr. 160, 721 P.2d 41 (1986). In *Frommoethelydo*, the court said "the evidence shows that after the dismissal of the criminal charges the insurer breached its duty to investigate." *Id.*, 721 P.2d at 48. Each case stands on its own facts.

Finally, Allen's testimony that, in his opinion, ANPAC's conduct was not frivolous or unfounded until after the racing charge was dismissed was not critical to the jury's findings. There was ample evidence upon which the jury could have based its findings of bad faith on ANPAC's reckless or intentionally flawed investigation before the charges were dismissed. There was no need for their determination to be supported by Allen or any other expert.

> [T]here is considerable authority ... to the effect that expert testimony is not generally required to establish bad faith or other improper handling of claims.

Tracey v. American Family Mut. Ins. Co., ___ F.Supp.2d ___, 2010 WL 372486 (D.Nev. 2010). *See also*, *Talmage v. Harris,* 486 F.3d 968, 977 (7th Cir. 2007) (rejecting argument that motion for judgment as a matter of law is required where bad faith claim is not supported by expert testimony).

POINT II

THE COURT DID NOT CLEARLY ABUSE ITS "BROAD DISCRETION" IN ALLOWING ALLEN TO TESTIFY OR, ALTERNATIVELY, ANPAC HAS FAILED TO DEMONSTRATE PREJUDICE FROM ANY ABUSE OF DISCRETION.

A. ANPAC MUST DEMONSTRATE BOTH AN ABUSE OF THE COURT'S BROAD DISCRETION AND PREJUDICE RESULTING FROM THE ADMISSION OF THE EVIDENCE.

"[B]road discretion is intentionally given to the trial court to determine whether expert testimony will assist the trier of fact." *State v. Downey,* 2008-NMSC-061, ¶ 26, 145 N.M. 232, 195 P.3d 1244. *See also, Lopez v. Reddy,* 2005-NMCA-054, ¶ 14, 137 N.M. 554, 113 P.3d 377 ("In determining whether an expert witness is competent or qualified to testify, '[t]he trial court has wide discretion.'") (citation omitted).

> Admission or exclusion of evidence is a matter within the discretion of the trial court and the court's determination will not be disturbed on appeal in the absence of a clear abuse of that discretion. *State v. Valdez*, 83 N.M. 632, 637, 495 P.2d 1079, 1084 (Ct.App.), *aff'd* 83 N.M. 720, 497 P.2d 231 (1972). An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. A trial court abuses its discretion by its ruling only if we can characterize it as clearly untenable or not justified by reason.

Coates v. Wal-Mart Stores, Inc., 1999-NMSC-013, ¶ 36, 127 N.M. 47, 976 P.2d 999. (Internal quotation marks and citations omitted).

Moreover, "the complaining party on appeal must show the erroneous admission or exclusion of evidence was prejudicial to obtain a reversal." *Coates*, ¶ 37. (Quotation and citation omitted). *Accord, Hourigan v. Cassidy,* 2001-NMCA-085, ¶ 21, 131 N.M. 141, 33 P.3d 891. ANPAC did not carry this burden. In fact, it did not even allege any prejudice from the admission of the evidence at issue. Brief in Chief, at 32-33. Of course allegations of prejudice would not have

been sufficient; "an assertion of prejudice is not a showing of prejudice." *Deaton v. Gutierrez,* 2004-NMCA-043, ¶ 31, 135 N.M. 423, 89 P.3d 672. (Internal quotation marks and citations omitted). Any error in the admission of evidence is not prejudicial if the verdict is substantially supported by other admissible evidence. *Leigh v. Village of Los Lunas,* 2005-NMCA-025, ¶ 19, 137 N.M. 119, 108 P.3d 525. Without a showing of prejudice, there is no abuse of discretion. *Hourigan*, ¶25.

B. THE COURT DID NOT ABUSE ITS DISCRETION IN THE ADMISSION OF EVIDENCE AND ANPAC HAS FAILED TO DEMONSTRATE PREJUDICE.

ANPAC's attack is directed to Allen's affidavit furnished to its counsel on October 2, 2009, prior to trial as part of discovery. Brief in Chief, p. 32. ANPAC filed a motion *in limine* directed to the testimony in that affidavit of October 7, 2009. RP 213. The court ruled that Allen would be permitted to testify but would be limited to the issues addressed in the affidavit. RP 279, 289. The affidavit itself was neither offered nor admitted into evidence.

Although ANPAC makes a broadside attack on the affidavit, it cites four areas as to which Allen allegedly failed to fully state the bases for his opinions. First, ANPAC argues that Allen did not properly state the basis for his opinion that "a race is necessarily a contest" and that "it is impossible for a person to race

against themselves" Brief in Chief at 32. ANPAC is quoting Allen's affidavit. *Id.* ANPAC fails to demonstrate that these opinions were presented to the jury. Without a demonstration that the jury heard these opinions, ANPAC failed to show any prejudice as a result of what Allen said in a pre-trial affidavit.

Second, ANPAC complains about Allen's testimony that the racing exclusion in the policy issued by ANPAC to Insureds was "contrary to industry standards" and "different" from the racing exclusion contained in an ISO policy. Brief in Chief at 21. Again, it cites only the affidavit – not any evidence presented to the jury. *Id.* Thus, ANPAC failed to show prejudice. Another reason ANPAC failed to show prejudice is that this evidence would not have been prejudicial anyway. Allen testified that insurance companies are fee to draft their own exclusion clauses, they sometimes do, and there is no legal requirement that their policies conform to the ISO model. 2 Tr. 158-60, 193.

Third, ANPAC complains about Allen's testimony that ANPAC "failed to adopt and implement reasonable standards for the prompt investigation and processing of insurance claims." Brief in Chief at 33. Again, it cites only the affidavit – not any evidence presented to the jury. *Id.* Thus, ANPAC failed to show prejudice. Moreover, that affidavit testimony was expressly offered in support of Insureds' claim under the Unfair Practices Act (RP 235) which includes

"failing to adopt and implement reasonable standards for the prompt investigation and processing of insureds' claims arising under policies" among the prohibited unfair claims practices. NMSA 1978, § 59A-16-20(C) (1997). The court dismissed Insureds' claim under the Unfair Practices Act at the close of the evidence on ANPAC's motion. 2 Tr. 213.

Finally, ANPAC complains about Allen's testimony that ANPAC "clearly and unequivocally" favored its own interests to the detriment of its insureds' interest. Brief in Chief at 33. Again, it cites only the affidavit – not any evidence presented to the jury. *Id.* It makes no attempt to show where Allen used the quoted words at trial. Thus, ANPAC failed to show prejudice.

So absent any showing of prejudice, the trial court did not abuse its discretion. *Hourigan*, ¶ 25.

Moreover, there was no abuse of discretion even if the court reaches the merits. A large part of the bases for Allen's opinions comes from his lengthy and broad experience. He is one of the few people with an undergraduate degree in insurance. 2 Tr. 157-59. After law school, he became a professor of insurance "and that's also rather unusual." 2 Tr. 159. He has had an active involvement with the ISO. *Id.* He has testified approximately 120 times in New Mexico courts and in other courts. 2 Tr. 144-145. Garth Allen's expert testimony has been

recognized and well-received in New Mexico. *See, e.g., Jessen,* 108 N.M. at 628, 776 P.2d at, 1247 (1989); *G & G Services, Inc. v. Agora Syndicate, Inc.,* 2000-NMCA-003, ¶50, 128 N.M. 434, *cert. quashed*, 129 N.M. 520, 10 P.3d 844 (2000). His curriculum vitae and affidavit amply demonstrate the basis for his opinion, and the trial court was well within its broad discretion in permitting him to testify.

CONCLUSION

Insureds ask the Court to affirm the judgment below and to award them reasonable attorney's fees for legal services rendered on their behalf on this appeal in an amount to be determined by the district court on remand.

> Section 39-2-1 does not limit an award of attorney fees and costs only to trial. In the appropriate case, a first party insured who prevails on appeal may be awarded reasonable attorney fees and costs for the appeal.

Jessen, 108 N.M. at 631, 776 P.2d at 1250.

STATEMENT REGARDING ORAL ARGUMENT

Insureds request oral argument because they believe that this case involves issues important to the development of the law of insurance bad faith in New Mexico and oral argument would give the Court the opportunity to engage in a discussion of those issues with counsel.

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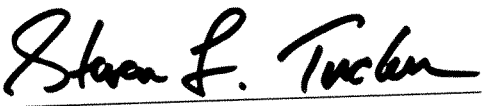

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I hereby certify that on October 18, 2010, I served a copy of the foregoing by mailing a copy of the same to:

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