

1 Wes Williams Jr. (Nevada Bar #6864)  
2 LAW OFFICES OF WES WILLIAMS JR.  
3 A PROFESSIONAL CORPORATION  
3119 LAKE PASTURE RD.  
4 P.O. BOX 100  
SCHURZ, NEVADA 89427  
5 TELEPHONE (775)773-2838  
FACSIMILE (800)849-4495  
6 wwilliams@stanfordalumni.org  
Attorneys for Defendant York Risk  
Services Group, Inc.

7 UNITED STATES DISTRICT COURT  
8 DISTRICT OF NEVADA

9 BECKY McVAY,

10 Plaintiff,

11 v.

12 ALLIED WORLD ASSURANCE  
13 COMPANY (U.S.), INC., a Delaware  
Company; YORK INSURANCE  
14 SERVICES GROUP, INC.; DOES I  
through X inclusive; DOE  
15 CORPORATION I through X, inclusive;  
DOE ORGANIZATION I through X,  
inclusive

16 Defendants.

3:13-CV-00359-LRH-WGC

**YORK'S REPLY IN SUPPORT OF  
ITS MOTION TO DISMISS**

17  
18 Defendant YORK RISK SERVICES GROUP, INC. ("York") by and through its  
19 undersigned attorney hereby submits its reply in support of its motion to dismiss previously  
20 filed herein (Doc. 15). Plaintiff Becky McVay ("Plaintiff") filed a response (Doc. 16) to the  
21 motion to dismiss, but she does not provide any basis to deny the motion.

22 This reply is supported by the following memorandum of points and authorities.

23 RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of October 2013.

24 LAW OFFICES OF WES WILLIAMS JR., P.C.

25 By /s/ Wes Williams Jr.  
26 Wes Williams Jr.  
3119 Pasture Road  
27 P.O. Box 100  
Schurz, Nevada 89427  
Attorney for YORK RISK SERVICES GROUP, INC.

28

MEMORANDUM OF POINTS AND AUTHORITIES

**1. PLAINTIFF HAS NO LEGALLY PROTECTABLE INTEREST AGAINST ANY INSURANCE COMPANY BECAUSE SHE HAS NOT SUCCESSFULLY LITIGATED HER PERSONAL INJURY CASE.**

Under Nevada law, a pre-judgment tort claimant has no cognizable claim against the alleged tortfeasor's liability carrier. *Knittle v. Progressive Cas. Ins. Co.*, 908 P.2d 724, 726, 112 Nev. 8, 11 (1996). Plaintiff argues that the holding in *Knittle* does not apply to her case because "Ms. McVay currently has no active complaint in any litigation against the insured in her case." Plaintiff's Response (Doc. 16) at 6. These facts do not change the result that the Plaintiff has no cognizable claim against any insurance company.

In *Knittle*, the plaintiff filed an action against an alleged tortfeasor and an insurance company. The insurance company filed a motion to dismiss the claim against it arguing that the plaintiff's claim against it was not ripe for adjudication and was an impermissible direct action against an insurer. *Id.*, 908 P.2d at 725, 112 Nev. at 9. The Nevada Supreme Court relied upon a prior case by the Colorado Supreme Court holding that no claim against an insurance company exists until a plaintiff obtains a judgment against the tortfeasor. The Nevada Supreme Court noted:

The Colorado Supreme Court held that a plaintiff does not have standing to sue for declaratory relief against a defendant's insurer before obtaining a judgment against the defendant. *Farmers Ins. Exchange v. District Court*, 862 P.2d 944 (Colo.1993). The court concluded that the plaintiff had

no legally protected right or cognizable interest at stake unless and until she has established [the defendant's] liability. Her rights are contingent on her successful litigation of the personal injury suit. When the rights of the plaintiff are contingent on the happening of some event which cannot be forecast and which may never take place, a court cannot provide declaratory relief.

*Id.* at 948.

*Knittle*, 908 P.2d at 725-26, 112 Nev. at 10-11.

The Nevada Supreme Court followed the reasoning of the Colorado Court. The Court ruled that any claim against the insurance company was contingent on a successful litigation in the related tort case. "[S]ince [Plaintiff's] rights against [the insurance company] are contingent

on her successful litigation of a pending tort suit, [Plaintiff] can assert no legally protectable interest creating a justiciable controversy ripe for declaratory relief.” *Id.*, 908 P.2d at 726, 112 Nev. at 11. Here, Plaintiff admits she has not successfully litigated a tort suit, so her rights against any insurance company never arose. Plaintiff has no legally protectable interest necessary to have a justiciable controversy ripe for adjudication.

The United States District Court for the District of Nevada has followed this reasoning and granted a motion to dismiss based on a plaintiff’s failure to first obtain a judgment.

Plaintiffs' Complaint fails to allege they have obtained a tort judgment against [the alleged tortfeasor]. Prior to obtaining a tort judgment against [the alleged tortfeasor], Plaintiffs' rights are speculative as to the liability of [the alleged tortfeasor’s insurance carrier] to indemnify [the alleged tortfeasor] for any judgment obtained against him by Plaintiffs.

*Vignola v. Gilman*, 804 F.Supp.2d 1072, 1078 (D. Nev. 2011). *See also Probuilders Specialty Ins. Co. v. Thompson*, Case No. 3:12-CV-00332-LRH-WGC, Order dated Jan. 30, 2013 (D. Nev. 2013)(“[I]n Nevada, the rights of a third party against an insurer do not mature until the third party obtains a judgment against the insured, an insurer's rights against a third-party claimant are "speculative and not ripe for declaratory relief.”).

Unless and until Plaintiff successfully litigates her personal injury case, Nevada law dictates that Plaintiff’s speculative claims against the alleged tortfeasor’s insurance carrier do not present a justiciable controversy ripe for adjudication.

**2. PLAINTIFF CANNOT ENFORCE AN INSURANCE POLICY THAT SHE DID NOT PURCHASE, UNDER WHICH SHE IS NOT AN “INSURED” AND THAT SHE DID NOT RELY UPON.**

Plaintiff cites to *Wohlers v. Bartgis*, 969 P.2d 949, 114 Nev. 1249 (1998) to support her claims against Defendants Allied and York. *Wohlers* does hold that a third party administrator may be liable under a “joint venture” theory to an insured. However *Wohlers* does not apply here because the plaintiff in *Wohlers* was the insured who purchased the applicable insurance policy. This point was critical to the holding in *Wohlers*. Here Plaintiff did not purchase any applicable insurance policy and was not an insured under any policy. The facts in *Wohlers* are completely different.

1 It is well settled in Nevada that "every contract imposes upon the contracting  
 2 parties the duty of good faith and fair dealing." *Hilton Hotels Corp. v. Butch*  
 3 *Lewis Productions, Inc.*, 109 Nev. 1043, 1046, 862 P.2d 1207, 1209 (1993). As  
 4 we explained in *Ainsworth v. Combined Insurance Co.*, 104 Nev. 587, 592, 763  
 5 P.2d 673, 676 (1988), "[t]he relationship of an insured to an insurer is one of  
 6 special confidence. A consumer buys insurance for security, protection, and  
 7 peace of mind." While an insured assumes various duties under an insurance  
 8 contract--such as the timely payment of premiums--the insurer assumes the  
 9 concomitant duty "to negotiate with its insureds in good faith and to deal with  
 10 them fairly." *Id.*

11 *Wohlers v. Bartgis*, 969 P.2d at 956.

12 Plaintiff did not purchase the applicable insurance policy. Therefore she cannot argue  
 13 that she purchased it for security, protection and peace of mind. Therefore Plaintiff cannot rely  
 14 upon *Wohlers* to support her claims.

15 Plaintiff admits that under Nevada law a contractual relationship is required to assert a  
 16 claim for bad faith. To get around this requirement, Plaintiff asserts that a third party can make a  
 17 bad faith claim if the plaintiff is a specific intended beneficiary to the insurance contract or  
 18 alleges it relied to its detriment on representations made by the insurer. Plaintiff's Response  
 19 (Doc. 16) at 6. Plaintiff relies upon *Vignola v. Gilman*, 804 F.Supp.2d 1072, 1078 (D. Nev.  
 20 2011) for this contention. However *Vignola* specifically states that in Nevada an insurer does not  
 21 have a duty to negotiate in good faith with a third party.

22 In Nevada, liability for bad faith is strictly tied to the implied covenant of good  
 23 faith and fair dealing created by the contractual relationship between the insured  
 24 and the insurer. *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 780 P.2d 193,  
 25 197 (1989). An insurer's duty to negotiate settlements in good faith arises directly  
 26 from the insurance contract. *Allstate Ins. Co. v. Miller*, 212 P.3d 318, 330  
 27 (Nev.2009). Therefore, a party who lacks a contractual relationship with an  
 28 insurer does not have standing to bring a claim of bad faith. *Gunny v. Allstate Ins.*  
*Co.*, 108 Nev. 344, 830 P.2d 1335, 1335-36 (1992). In Nevada, "[w]here no  
 contract relationship exists, no recovery for bad faith is allowed." *McClelland*,  
 780 P.2d at 197. Other states may recognize a duty to negotiate in good faith  
 between insurers and third parties, however, Nevada does not recognize such a  
 duty.

*Vignola v. Gilman*, 804 F.Supp.2d at 1076. Under Nevada law, neither Allied nor York had a  
 duty to Plaintiff since she had no contractual relationship with either defendant.

Plaintiff argues that *Vignola* support her third party claim for bad faith because the case

1 recognizes that a person has a valid claim if they are a specific intended beneficiary under the  
 2 policy or have relied to their detriment on actions or representations made by the insurer.  
 3 However Plaintiff does not meet either of these requirements, and she does not make any such  
 4 assertion in her amended complaint. This is not surprising considering that Plaintiff was  
 5 unknown to the store and Allied when they negotiated the insurance policy. They could not have  
 6 named Plaintiff as a “specific intended beneficiary” since they did not know she existed. Also  
 7 businesses purchase premises liability policies to protect themselves against potential liability,  
 8 not to protect a specific individual who may be injured on the premises. Plaintiff was unknown  
 9 to the store and Allied, so could not have been a specific intended beneficiary of the premises  
 10 liability insurance policy.

11 At the most, Plaintiff may have been an incidental beneficiary of the insurance policy, but  
 12 incidental beneficiaries cannot enforce the policy under any theory of liability. In *United Fire*  
 13 *Ins. Co. v. McClelland*, 780 P.2d 193, 105 Nev. 504 (1989), the Nevada Supreme Court  
 14 recognized that a wife, who was a dependent under her husband’s health insurance policy, could  
 15 not enforce her husband’s contractual rights against the insurance company.

16 Liability for bad faith is strictly tied to the implied-in-law covenant of good faith  
 17 and fair dealing arising out of an underlying contractual relationship. *K Mart*  
 18 *Corp. v. Ponsock*, 103 Nev. 39, 48, 732 P.2d 1364, 1370 (1987). When no  
 19 contractual relationship exists, no recovery for bad faith is allowed. *Austero v.*  
 20 *Nat. Cas. Co. of Detroit, Mich.*, 62 Cal.App.3d 511, 133 Cal.Rptr. 107, 110  
 (1976); see also *Lowe v. American Medical Intern.*, 494 So.2d 413 (Ala.1986)  
 (holding that the cause of action for the tort of bad faith refusal to pay was created  
 to protect only the person for whose benefit insurance payments were made).

21 The McClellands respond that even though [wife] was not a named insured  
 22 under the certificate, she became an insured as a dependent. However, a wife's  
 23 coverage as a dependent under her husband's health insurance policy does not  
 24 give her standing to enforce her husband's contract rights for bad faith denial of  
 25 health care benefits. *Hatchwell v. Blue Shield of California*, 198 Cal.App.3d 1027,  
 26 244 Cal.Rptr. 249, 253 (1988). In *Hatchwell*, the court reasoned that even though  
 the wife is an insured person and an express beneficiary regarding her own health  
 care benefits, she is merely an incidental beneficiary in regard to her husband's  
 benefits. *Id.* We adopt the reasoning of *Hatchwell*.

27 *United Fire Ins. Co. v. McClelland*, 780 P.2d at 197-98, 105 Nev. at 511-12. See *Gunny v.*  
 28 *Allstate Ins. Co.*, 108 Nev. 344, 355-56, 830 P.2d 1335, 1335-36 (1992)(summarizing *United*

1 *Fire Ins. Co. v. McClelland* as “even though the wife was an insured person and express  
2 beneficiary regarding her own health care benefits, she was merely an incidental beneficiary with  
3 regard to her husband's benefits”). Even if Plaintiff was an incidental beneficiary of the  
4 insurance policy, she would have no right to enforce the terms of the policy.

5 Additionally, Plaintiff does not allege in her amended complaint that she relied to her  
6 detriment on actions or representations made by Allied. Again this is reasonable since she did  
7 not know Allied provided an insurance policy to cover the Fox Peak Station until after the  
8 accident occurred. *See* Plaintiff’s Amended Complaint (Doc. 12) ¶ 20. Based on this, Plaintiff  
9 could not allege that she relied to her detriment on any actions or representations by Allied. If  
10 Plaintiff cannot state a claim against Allied, Plaintiff cannot state a claim against York (Allied’s  
11 third party administrator).

12 Plaintiff attempts to confuse this issue by arguing that she had a “reasonable expectation”  
13 that the store had liability insurance. She does not explain why this expectation was reasonable  
14 or why her belief justifies imposing obligations on the store’s insurance carrier. Curiously  
15 Plaintiff admits that she did not actually think about insurance coverage, or rely upon any actions  
16 by the store or its insurer, but she subconsciously relied on her belief that the store had premises  
17 liability insurance to cover any injuries she may have incurred. Plaintiff’s Response (Doc. 16) at  
18 7. The Plaintiff’s subconscious beliefs do not provide any basis to conclude that Plaintiff relied  
19 to her detriment on actions or representations made by Allied. Again, if Plaintiff cannot state a  
20 claim against Allied, she can state no claim against Allied’s third party administrator.

21 **3. THE FTDC IS COMPLETELY SATISFIED WITH THE ASSERTION OF**  
22 **THE SOVEREIGN IMMUNITY DEFENSE.**

23 Plaintiff asserts that York improperly advanced a sovereign immunity defense in the  
24 Tribal Court action. However York was not a party to that case. The FTDC, which was the  
25 owner of the store where the slip and fall occurred, raised the sovereign immunity defense. That  
26 defense was successful as the Tribal Court granted the FTDC’s motion to dismiss. Plaintiff  
27 confuses who was a party to the Tribal Court case, and who raised the defense that was  
28 successful. If Plaintiff had any legal basis to assert that the sovereign immunity defense did not

1 apply, she should have raised it in the Tribal Court proceeding, but she did not. Just because  
2 Plaintiff's arguments were not successful, or were not properly raised, does not create a cause of  
3 action against Allied or York.

4 Furthermore Plaintiff cannot expect to require strict enforcement of every term of a  
5 contract to which she was not a party. Plaintiff is seeking to enforce an insurance contract  
6 between the FTDC and Allied. If one of the provisions of the contract requires a certain  
7 procedure to be followed prior to asserting the defense of sovereign immunity, then the parties  
8 can agree to amend that provision, or they can simply waive it.

9 Waiver is usually defined as "the voluntary and intentional relinquishment  
10 of a known right" and may be either express or implied. 5 Williston On Contracts  
11 § 678 (3d ed. 1961). Waiver can be implied from conduct such as making  
12 payments for or accepting performance which does not meet contract  
13 requirements; waiver can also be expressed verbally or in writing. 17 Am.Jur.2d  
14 Contracts §§ 393, 396 (1964). Express waiver, when supported by reliance  
15 thereon, excuses nonperformance of the waived condition. 5 Williston On  
16 Contracts § 679 (3d ed. 1961); 17 Am.Jur.2d Contracts § 392 (1964); Restatement  
17 (Second) of Contracts § 84(1) (1981).

18 *Udevco, Inc. v. Wagner*, 100 Nev. 185, 189, 678 P.2d 679, 682 (Nev. 1984).

19 If any conditions existed that were not met related to asserting the sovereign immunity  
20 defense, the FTDC either expressly or impliedly waived any such conditions. At no time has the  
21 FTDC asserted that the sovereign immunity defense was improperly raised. Plaintiff cannot  
22 come in as a third party and require strict enforcement of every term of the contract when the  
23 parties to the contract are satisfied that each has performed as agreed.

## 24 CONCLUSION

25 Plaintiff fails to state a claim against York upon which relief may be granted. York is not  
26 liable for any damages related to Plaintiff's personal injury claims since Plaintiff has not  
27 obtained a judgment against the store where she fell. Even if Plaintiff did acquire a judgment,  
28 York did not provide insurance coverage to the store. Also, Plaintiff was not a specific intended  
beneficiary under any insurance policy, and she did not rely upon any actions or representations  
by Allied, so Plaintiff cannot assert a bad faith claim against Allied or York. Based on these  
reasons, York respectfully requests that the Court enter its order dismissing York from this case.



1           RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of October 2013.

2                                   LAW OFFICES OF WES WILLIAMS JR., P.C.

3                           By /s/ Wes Williams Jr.  
4                               Wes Williams Jr.  
5                               3119 Pasture Road  
6                               P.O. Box 100  
7                               Schurz, Nevada 89427  
8                               Attorney for YORK RISK SERVICES GROUP,  
9                               INC.

10   CERTIFICATE OF SERVICE

11           I hereby certify that on this 18<sup>th</sup> day of October 2013, I electronically filed the foregoing  
12    **“YORK’S REPLY IN SUPPORT OF ITS MOTION TO DISMISS”** with the Clerk of the  
13    Court using the CM/ECF system, which will send notification of such filing to the email  
14    addresses that are registered for this case including to:

15    Nicole M. Harvey  
16    nicole@nicoleharvey.com

17    /s/ Wes Williams Jr.  
18    Wes Williams Jr.