IN THE SUPREME COURT OF THE STATE OF NEVADA

CENTURY SURETY COMPANY, Appellant, v. DANA ANDREW, as LEGAL GUARDIANS OF RYAN T. PRETNER; AND RYAN T PRETNER, Respondents.	No. 73756

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PETITIONER'S APPENDIX

Volume 9, Pages 2001-2076

Docket 73756 Document 2017-34690

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I hereby certify that on the 11th day of October, 2017, I served a true and correct copy of the foregoing **PETITIONER'S APPENDIX** by electronic service as follows:

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District of Nevada

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DANA ANDREW, as Legal Guardian of RYAN T. PRETNER, and RYAN T. PRETNER, individually, Plaintiffs, vs. CENTURY SURETY COMPANY, a foreign corporation; DOES I through X, inclusive, Defendants.	CASE NO.: 2:12-cv-00978-APG-PAL REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' DAMAGES

Plaintiffs, by and through their attorneys of record PRINCE | KEATING, hereby submit this Reply in Support of their Motion for Summary Judgment on Plaintiffs' Damages.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

A. Plaintiffs Urge This Court to Revisit The Issue of The Legal Effect of The Default Judgment.

At the September 24, 2014 status conference regarding the scope of the trial on Plaintiffs' damages as a result of Century's breach of the duty to defend, this Court suggested that it may be necessary to revisit the issue of the legal effect of the default judgment. Plaintiffs are urging this Court to revisit the legal effect of the default judgment. See United States v. Martin, 226 F.3d 1042, 1049 (9th Cir.2000) (a district court has "inherent jurisdiction to modify, alter, or revoke" a non-final order.).

In the April 29, 2014 Order, this Court ruled that Century is not bound by the default judgment because "when a default judgment is entered based on failure to answer, issue preclusion is not available because the issues raised in the initial action were never actually litigated." See ECF 168 at 13:8-11 (citing In re Sandoval, 232 P.3d 422, 423 (Nev. 2010). However, Sandoval did not involve an insurance context. Instead, Sandoval involved a bankruptcy context in which the Nevada Supreme Court was asked to determine the effect of a default judgment on the dischargeability of debt against a debtor in bankruptcy. Id.

Sandoval did not recognize the unique relationship between an insured and an insurer with regards to the duty to defend. See Allstate Ins. Co. v. Miller, 125 Nev. 300, 311, 212 P.3d 318, 325-326 (2009)(stating that there is special relationship between the insured and the insurer, which is similar to a fiduciary relationship); see also Ainsworth v. Combined Ins. Co., 104 Nev. 587, 592, 763 P.2d 673, 676 (1988) (describing the insurer-insured relationship as one of "special confidence"); Love v. Fire Ins. Exchange, 221 Cal.App.3d 1136, 271 Cal.Rptr. 246, 251-52 (1990) (refusing

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to characterize the insurer-insured relationship as fiduciary but acknowledging it is a "fiduciary-type" relationship). Unlike in Sandoval, the present case does involve the unique relationship between an insurer and its insureds. In the insurance context, the trio of cases in Pietrosh, Christensen, and LoMastro holds that an insurance company that has notice of a lawsuit against their insured, and fails to provide a defense, which leads to a default judgment, is bound by the findings in the default judgment unless the default judgment is set aside.

Notably, this Court's April 29, 2014 Order ruled that even though Pietrosh, Christensen, and LoMastro involved the insurance context, the ruling from this trio of cases is "best limited to the context of uninsured motorist claims." See ECF #168: 12:8-10. This Court reasoned that the Nevada Supreme Court has never applied the trio of cases in the general liability context. Id. at 12:9-10. Thus, this Court made a distinction between the general liability insurance context versus the uninsured motorist claims context in apply the effect of a default judgment.

Ironically, while this Court chose to make a distinction between the general liability insurance context versus an insured motorist context in applying the effect of a default judgment, this Court did not make this distinction between the insurance context versus the Bankruptcy context in applying its ruling on the effect of a default judgment. Instead, this Court held that the effect of the default judgment as outlined in Sandoval in the bankruptcy context (requiring that the issues be actually litigated), is just as applicable as a default judgment in the insurance general liability context where an insurer breached the duty to defend. Like this Court's reasoning for limiting the effect of the default judgment outlined in the trio of cases to the uninsured motorist context, no other Nevada cases have applied Sandoval's ruling on the effect of the default judgment (requiring the issues to be actually litigated) to the insurance context. Limiting the ruling on the effect of

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the default judgment in Sandoval to the bankruptcy context makes sense in light of the unique relationship between an insurer and an insured.[1]

B. Century Owed Fiduciary Like Duties to Its Insureds To Provide a Defense.

Nevada has long recognized the special relationship between the insurer and its insured. Powers v. United Servs. Auto. Ass'n. 114 Nev. 690, 700, 962 P.2d 596, 603 (1998). That relationship is one of "special confidence," Ainsworth v. Combined Ins. Co. of Am., 104 Nev. 587, 763 P.2d 673, 676 (1988), and is similar to that between a fiduciary and a client. See Powers, 114 Nev. at 701, 962 P.2d at 603. The nature of the relationship requires that the insurer adequately protect the insured's interest. Id. at 701-02, 962 P.2d at 603.

Among the obligations of an insurer to its insured are the duty to defend and the duty to indemnify. Miller, 125 Nev. at 309, 212 P.3d at 324. The duty to defend is broader than the duty to indemnify. Id. The purpose behind construing the duty to defend so broadly is to prevent an insurer from evading its obligation to provide a defense for an insured. Assurance Co. of America v. Ironshore Specialty Ins. Co., 2014 WL 4829709, 3 (D.Nev. 2014). The broad duty to defend exists under Nevada law in order to encourage insurance companies to construe their insurance contract broadly and to defend all actions where there is any potential for coverage. United Nat'l Ins. Co. v. Frontier Ins. Co.,

[1] Interestingly, had Vasquez and Blue Streak provided an Answer in the Underlying Lawsuit and then Vasquez and Streak provided an insufficient defense (because Century failed to provide a defense), then Century would have been bound by the results of the Underlying Lawsuit. For example, if in the Underlying Lawsuit, Plaintiffs propounded some discovery including Requests for Admission that Vasquez was in the course and scope of his employment at the time of the accident, and if Vasquez and Blue Streak failed to respond to the Request for Admission, then the issue whether Vasquez was in the course and scope of his employment would have been deemed admitted. This admission of fact would be binding even if there is ultimately no trial and the issue was not actually litigated. In this hypothetical situation, Century would have been bound by the admitted fact Vasquez was in the course and scope of his employment even though the issue was not actually litigation. Thus, in this case, Century should still be bound by the findings of fact in the default judgment even though Vasquez and Blue Streak failed to answer which ultimately resulted in the default judgment. In both the hypothetical scenario and the instance case, Century had notice of the lawsuit and simply chose not to defend their insureds. Thus, in both scenarios, Century should at least be bound by the findings of fact that Vasquez was not in the course and scope of his employment.

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99 P.3d 1153, 1158 (Nev. 2004) (quoting Gray v. Zurich Ins. Co., 419 P.2d 168, 177 (Cal.1966)).

Courts encourage insurers to broadly construe their duty to defend by imposing consequences on insurers who breach their duty defend. Insurers who fail to provide a defense as required by the terms of their policies and the applicable law, do so at considerable risk as the financial penalties are considerable. Nielsen v. TIG Ins. Co., 442 F. Supp. 2d 972, 980 (D. Mont. 2006). Courts have stated that when an insurer abandons their insured which results in a final judgment against their insured, "such judgment need not be based on a contested or adversarial trial, but may rest upon a default hearing held following a settlement or an uncontested trial where the insured settled with the claimant and thereafter presented no defense." Pruyn v. Agricultural Ins. Co., 36 Cal.App.4th 500, 516-517, 42 Cal.Rptr.2d 295, 304 (Cal.App. 2 Dist.1995). These circumstances necessarily involve significant independent adjudicatory action by the court, thus mitigating the risk of a fraudulent or collusive settlement between an insured and the claimant. Id. Final judgments entered under either of these circumstances are binding on the insurer that has wrongfully abandoned its insured. Id. In Pruyn, the court reasoned as follows:

> The insurer not only had a right to participate in and to control the litigation, it had a duty to do so. An insurer which has wrongfully abandoned its insured should not be heard to complain or allowed to relitigate the trial court's judgment merely because the default or uncontested proceedings followed, and were related to, an agreement between the insured and the claimant. Whatever the terms of the settlement, the entry of judgment was based on an independent review and adjudication of the evidence by the trial court. An insurer who has breached its contract is properly bound by the result of such trial proceedings.

Id.

In Amato v. Mercury Casualty Co., the Court held that when an insurer breaches the duty to defend, the contractual damages sustained by the insured will be the resulting

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default judgment. Id. 53 Cal.App.4th 825, 831 (Cal.App.2.Dist.1997) (stating the insurer will be liable for the resulting judgment as a result of damages under breach of contract.). Also, in Gray v. Zurich Insurance Co., 65 Cal.2d 263, 279-280, the insurer who refused to defend argued that although it was required to reimburse the insured's costs of defense, it should not be required to pay the ensuing judgment, because apparently that judgment did not show whether it was based on a theory within coverage or not within coverage. The Supreme Court rejected that argument and concluded the insurer was liable for the amount of the underlying judgment regardless of the coverage, under the "general rule that an insurer that wrongfully refuses to defend is liable on the judgment against the insured." Id.

An insurer that fails to defend and is later found to have wrongfully denied coverage, is also estopped from raising policy defenses to coverage. Employers Insurance of Wausau v. Ehlco Liquidating Trust, 186 Ill.2d 127, 150–51, 237 Ill.Dec. 82, 708 N.E.2d 1122 (1999); see also Amato, 53 Cal.App. 4th at 833 (stating where the insurer tortiously refuses to defend and as a consequence the insured suffers a default judgment, the insurer is liable on the judgment and cannot rely on hindsight that a subsequent lawsuit establishes noncoverage.). The estoppel doctrine "arose out of the recognition that an insurer's duty to defend under a liability insurance policy is so fundamental an obligation that a breach of that duty constitutes a repudiation of the contract." Employers Insurance of Wausau, 186 Ill. 2d at 151, 237 Ill.Dec. 82, 708 N.E.2d 1122. In fact, the Nevada trio of cases in Peitrosh, Christiansen, and Lomastro which states that an insurance company that has notice of the underlying lawsuit and elected to not defend, will be bound by the resulting judgment demonstrates that Nevada follows the doctrine of estoppel in the insurance context.

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However, an insurer can easily avoid such consequence of a failure to defend. In fact, courts have stated that "the appropriate course of action for an insurer who believes that it is under no obligation to defend, is to provide a defense to the insured under a reservation of rights to seek reimbursement should the facts at trial prove that the incident resulting in liability was not covered by the policy, or to file a declaratory judgment action after the underlying case has been adjudicated." Hecla Min. Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1089-190 (1991); see also Amato 53 Cal.App.4th at 833 (stating insurers can obtain a declaratory judgment determining whether there is coverage ... or it can defend under a reservation of rights and thereby preserve its right to dispute liability for the third-party judgment.").

Here, providing a defense under a reservation of rights would have prevented any financial penalties to Century. In fact, this Court even recognized that "if Century's investigation led it to believe that Vasquez was not driving within the course and scope of his employment with Blue Streak, it could have provide a defense, reserved its rights, and filed a motion for summary judgment in the early stages of the Underlying Lawsuit to resolve that issue up front." See ECF # 168 at 9:26-28 fn 3.

Indeed, there is no dispute that Century had notice of the Underlying Lawsuit before and after it was served but elected not to provide a defense. Century had notice of the defaults and still elected to not provide a defense or intervene to set aside the default. Once defaults were entered, Century knew that Plaintiffs would then seek an entry of default judgment. Century even had eight months from the time the defaults were entered on June 27, 2011, to the time Plaintiffs filed their Application for Default Judgment on February 15, 2012, to hire counsel to provide a defense or to set aside the default. It was not until after default judgment was entered that Century finally filed a Motion for Leave to Intervene to Set Aside Default Judgment on October 17, 2012.

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Century finally sought to intervene after realizing the consequences of the default judgment.

The default judgment was the proximate result of Century's failure to provide a defense. Had Century not breach their duty to defend and simply provided a defense even under a reservation of rights, a timely Answer would have been filed and a default judgment would have never been entered. Instead, as stated by the Judge Herndon, Century "stuck their heads in the sand" and abandoned their insureds. Century, as a sophisticated insurance company and a professional litigant, knew that after the defaults entered against Blue Streak and Vasquez, that Plaintiffs would seek default judgment. See Gourley v. Prudential Property and Cas. Ins. Co., 734 So.2d 940, 944 (La.App. 1 Cir. 1999) (stating an insurer, as a professional defender of lawsuits, is held to a higher standard than an unskilled practitioner, and what may be neglect on the part of the latter may well constitute bad faith on the part of the insurer.). Century knew that the consequence of a default is that the allegation in the Complaint will be deemed admitted. See Foster.v. Dingwall, ___ Nev. ___, 227 P.3d 1042, 1049 -1050 (2010) (citing Estate of LoMastro v. American Family Ins., 124 Nev. 1060, 1067 n. 14, 195 P.3d 339, 345 n. 14 (2008)); NRCP 8(d). The entry of a default also resolves the issues of liability and causation under all theories for relief by operation of law. Lomastro, at 1068, 95 P.3d at 345. Thus, during an NRCP 55(b)(2) prove-up hearing, the district court shall consider the allegations deemed admitted to determine whether the nonoffending party has established a prima facie case for liability. Foster v. 227 P.3d at 1049 -1050. Further, because Century failed to intervene in the Underlying Lawsuit, Century has waived and is estopped from contesting any issue of coverage that was already determined in the default judgment.

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Simply put, Century refused to provide a defense, abandoned its insured, allow defaults to be taken, and even took the position that it had not financial interest in the outcome of the Underlying Lawsuit. Century took the "riskiest of all litigation strategies" and as such, Century must face the consequence of such risky strategy. Transportation Ins. Co. v. Piedmont Construction Group, LLC, 686 S.E.2d 824, 829 (Ga. App. 2009) (holding that an insurer who failed to provide a defense chose the riskiest litigation strategy and must suffer the consequences of such strategy).

C. The Consequence of Century's Breach of the Duty to Defend is that Century has Waived and is Estopped From Raising any Policy Defenses based on Coverage.

Despite breaching its duty to defend in the Underlying Lawsuit, the central theme in Century's Opposition to Plaintiffs' Motion for Summary Judgment continues to be that the Underlying Lawsuit against Michael Vasquez and Blue Streak was not a covered claim under the Century Policy. Century continues to rely on its version of the facts of the Underlying Lawsuit in order to establish that Vasquez was not in the course and scope of his employment with Blue Streak at the time of the accident. Century also relies on Vasquez's Declaration (ECF # 192-3) and concludes that because Vasquez was not in the course and scope of his employment, that the accident was not a covered claim under the Century Policy and Century had no duty to indemnify.

What Century fails to realize is that this case is not about coverage (i.e. the duty to indemnify). Instead, and once again, this case is about the duty to defend. This Court has already ruled that Century breached its duty to defend when it abandoned Vasquez and Blue Streak in the Underlying Lawsuit.

Century had notice of the underlying lawsuit and an opportunity to participate but still refused to provide a defense. By breaching its duty to defend, Century has waived and is estopped from raising any policy defenses based on coverage. LaGrange Memorial

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Hospital v. St. Paul Insurance Co., 317 Ill.App.3d 863, 870 (2000) (stating "[i]t has long been established that the consequence of an insurer's breach of its duty to defend is that it is estopped from later raising any policy defenses based on noncoverage."); see also Employers Insurance of Wausau, 186 Ill.2d at 150-51 (stating an insurer that fails to defend and is later found to have wrongfully denied coverage, is also estopped from raising policy defenses to coverage); see also Amato, 53 Cal.App. 4th at 833 (stating where the insurer tortiously refuses to defend and as a consequence the insured suffers a default judgment, the insurer is liable on the judgment and cannot rely on hindsight that a subsequent lawsuit establishes noncoverage.).

D. Vasquez and Blue Streak Are Bound by the Default Judgment's Finding That Vasquez was In the Course and Scope of His Employment at The Time of the Accident.

Likewise, the default judgment made findings of fact that:

> 1. On January 12, 2009, Ryan T. Pretner was riding his bicycle traveling eastbound on the paved shoulder of St. Rose Parkway. While riding his bicycle, Defendant Vasquez negligently collided with Pretner violently throwing him from his bicycle to the ground resulting in serious, catastrophic and life altering injuries.
>
> 2. At the time of the accident, Vasquez was an employee and/or agent of Defendant Blue Streak Auto Detailing, LLC. At the time of the accident, Vasquez was in the course and scope of his employment and/or agency of Blue Streak acting in furtherance of its business interests. Accordingly, Defendant Blue Streak is legally liable for the injuries and damages sustained by Pretner caused by Defendant Vasquez's negligence.
>
> 3. As a result of the negligence of the Defendants, Pretner sustained catastrophic and life altering injuries. Among the injuries Pretner sustained was a severe traumatic brain injury. For a significant period of time following the accident, Pretner was in a comatose state. Pretner underwent extensive medical work up and treatment. Pretner is now disabled from working.

See Exhibit 27 to ECF #14 (emphasis added).

The default judgment is unequivocally binding on Vasquez and Blue Streak. As

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emphasized above, the default judgment found that Vasquez was in the course and scope of his employment with Blue Streak. The default judgment also found that Blue Streak is legally liable for the damages sustained by Pretner caused by Vasquez's negligence. These findings of fact were made by a court of proper jurisdiction and is still binding on Vasquez and Blue Streak. See Atlanta Cas. Ins. Co. v. Gardenhire, 248 Ga.App. 42, 545 S.E.2d 182 (Ga.App.2001) (stating "[a] judgment of a court having jurisdiction of both the parties and the subject-matter, however irregular or erroneous, is binding until set aside." (Emphasis added)); Pruyn, 36 Cal.App.4th at 516-517, 42 Cal.Rptr.2d at 304 (stating a default judgment necessarily involve significant independent adjudicatory action by the court, and thus, final judgments entered are binding on the insurer has wrongfully abandoned its insured.); see also Amato, 53 Cal. App. 4th at 831 (stating the insurer will be liable for the resulting judgment as a result of damages under breach of contract.).

Because the issue of whether Vasquez was in the course and scope of his employment with Blue Streak at the time of the accident has already been judicially determined in the default judgment, as a matter of law, this issue cannot be re-litigated in this action. Century cannot continue to argue its version of the facts in order to establish that Vasquez was not in the course and scope of his employment with Blue Streak at the time of the accident because the default judgment is binding on Vasquez and Blue Streak.

E. Century Cannot Be Allowed To Use The Default Judgment As a Sword and As a Shield.

Notably, had the default judgment in the Underlying Lawsuit found that Vasquez was not in the course and scope of his employment with Blue Streak at the time of the accident, then Century would have surely argued in this litigation that there is no

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coverage because the default judgment in the Underlying Lawsuit already made findings of fact which are binding on Vasquez and Blue Streak. Thus, Century cannot be allowed to use the default judgment as a sword (had the default judgment found that Vasquez was not in the course and scope of his employment) and argue that the default judgment is binding on Vasquez and Blue Streak; while at the same time, use the default judgment as a shield (when the default judgment found that Vasquez was in the course and scope of his employment) by arguing that the default judgment has no binding effect of Century.

F. By Breaching the Duty to Defend, Century Is Liable for Consequential Damages Resulting from Century's Breach, Which Includes the Default Judgment.

Because the issue of coverage cannot be relitigated, the only question left for this Court to determine is what are the damages to Vasquez and Blue that are foreseeable and flowed naturally from Century's breach of the duty to defend? In this case, as a direct result and proximate cause of Century's breach of the duty defend, an $18,050,185.45 default judgment was entered against Vasquez and Blue Streak.

The default judgment is a valid judgment that is binding on Vasquez and Blue Streak. However, if this Court maintains that Vasquez and Blue Streak's damages are capped by the $1 million policy limit, then Plaintiffs (through the assignment of rights from Vasquez and Blue Streak) are at least entitled to the $1 million.

G. Holding Century Liable for The Default Judgment as a Result of Its Failure to Defend Its Insureds Will Further Public Policy.

Further, Century argues that "when an insurer breaches the duty to defend (but does not do so in bad faith), it is liable for only fees and costs incurred by the insured in defending the suit." See Opposition (ECF #195) at 2:8-10. Thus, according to Century, an insurer is only liable if the insured hires and pays counsel to do the insurer's job for them. Century believes that this should be the law. Notably, Century's theory does not take into account insureds who cannot afford counsel or who lack the sophistication to hire

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counsel. Thus, under Century's theory, if an insured does not hire counsel, then Century is off the hook for any damages even though it breached its duty to defend, which is the most fundamental duty to its insureds.

In addition, under Century's theory of the law, limiting an insureds damages to only attorney's fees and costs when an insurer breaches the duty to defend would mean that insurers would never have an incentive to provide a defense where the disagrees with factual allegations in the complaint. Instead, insurers could always take the position that there is no coverage, and breach the duty to defend because at best, insurers will only be liable to pay the attorney's fees and costs that they should have paid in the first place. This will also create an incentive for insurers to gamble with the insureds' financial future by not providing a defense because even if there is a judgment entered against the insureds for an amount in excess of the policy limits, the insurers can always go back and relitigate the facts because an insurers will never be bound by any judgment. Under Century's vision of what the law should be, an insurer would never have an incentive to step in and do what they were contractually obligated to do which is to provide a defense to insureds, even under a reservation of rights. In fact, Century's position's position is inconsistent with the law on the duty to defend which is designed to encourage insurers to defend. Simply put, under Century theory, the law of insurance bad faith would essentially be eviscerated. This cannot be the law and this is not the law in Nevada.

II. LEGAL ARGUMENT

A. AS A CONSEQUENCE OF CENTURY'S BREACH OF THE DUTY TO DEFEND, CENTURY HAS WAIVED AND IS ESTOPPED FROM ASSERTING ANY POLICY DEFENSES BASED ON COVERAGE AND IS BOUND BY THE RESULTING JUDGMENT.

Courts have stated that "[i]n purchasing his insurance the insured would reasonably expect that he would stand a better chance of vindication if supported by the resources

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and expertise of his insurer than if compelled to handle and finance the presentation of his case. He would, moreover, expect to be able to avoid the time, uncertainty and capital outlay in finding and retaining an attorney of his own." Gray v. Zurich Insurance Co., 65 Cal.2d 263, 278 [54 Cal.Rptr. 104, 419 P.2d 168]. (1966). "The insured's desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability." Pruyn v. Agricultural Ins. Co., 36 Cal.App.4th 500, 515, 42 Cal.Rptr.2d 295, 303 (Cal.App. 2 Dist. 1995).

"It has long been established that the consequence of an insurer's breach of its duty to defend is that it is estopped from later raising any policy defenses based on noncoverage." LaGrange Memorial Hospital, 317 Ill.App.3d at 870. The estoppel doctrine "arose out of the recognition that an insurer's duty to defend under a liability insurance policy is so fundamental an obligation that a breach of that duty constitutes a repudiation of the contract." Employers Insurance of Wausau, 186 Ill.2d at 150-51. In fact, if an insurer breaches the duty to defend, the insurer will be unable to relitigate issues of fact. Rhodes v. Chicago Ins. Co., a Div. of Interstate Nat. Corp., 719 F.2d 116, 120 (5th Cir. 1983). A general liability insurer who breaches the duty to defend against their insureds which results in a judgment containing findings of facts regarding coverage, will by estopped from contesting coverage in a later litigation. Ridgway v. Gulf Life Ins. Co., 578 F.2d 1026, 1029 (5th Cir. 1978).

For example, in White Mountain Cable Const. Co. v. Transamerica Ins. Co., 137 N.H. 478, 480, 631 A.2d 907, 908 (1993), a general liability insurer had notice of the lawsuit against its insured but refused to provide a defense to its insured in an underlying personal injury action because the general liability insurer did not believe there was coverage. The general liability insurer's refusal to provide a defense led to a default

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judgment against its insureds. Id. In a subsequent indemnification action between the insured and the general liability insurer, the issue was whether the general liability insurer, having breached its duty to defend, is bound by the default judgment in the underlying action. Id. at 484-485, 631 A.2d at 911. There, the court held that the general liability insurer is bound by the default judgment in the underlying action against its insured. Id. The court held that "a final judgment, even by default, made by a court of competent jurisdiction, is conclusive upon an insurer disclaiming coverage and refusing to defend when it had a duty to do so." Id. (citing Howe v. Howe, 87 N.H. 338, 339, 179 A. 362, 363 (1935)). The court noted that the doctrine of equitable estoppel is unique to indemnity law as it is based on the unique relationship between the insurer and the insured. Id. The court reasoned that "the equities of the situation demanded that the insurer be bound by the default judgment because it was a party "directly interested in the subject-matter in issue, who [had] a right to make defense, control the proceedings, or appeal from the judgment." Id. at 486, 631 A.2d at 912. The court then stated that,

> "[If the indemnitor fails to give assistance] at the time when it is of greatest importance, it is fair that he should abide by the result of the trial. The fact that it may be inconvenient to him to respond at the time when the indemnitee is sued does not change the equities of the situation, because of his primary duty to satisfy the claim of the creditor or the injured person; if he permits the matter to result in an action his should be the responsibility to see that it does not result in an improper judgment."

Id.

The court then concluded that not only is the general liability insurer bound by the default judgment, but the general liability insurer has also waived and is estopped from asserting any defense of coverage as those issues were central in the underlying action and have already been determined in the underlying default judgment. Id. 486-487,.631 A.2d at 912.

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Similarly, in Nevada, an insurance company who has notice of the underlying lawsuit involving its insured is bound by the result of the underlying lawsuit when the carrier has notice of the action but elects not to intervene." State Farm Mut. Auto. Ins. v. Wharton, 88 Nev. 183, 187 n. 7, 495 P.2d 359, 362 n. 7 (1972) (citing Christensen, 88 Nev. 160, 494 P.2d 552 (1972); Pietrosh, 85 Nev. 310, 454 P.2d 106 (1969)); Lomastro, 124 Nev. 1060, 195 P.3d 339 (2008). As previously stated, this demonstrates that Nevada follows the doctrine of estoppel in the insurance context.

Numerous cases have also stated that if an insurer refuses to defend its insured, "the insurer will be bound at least to the matters necessarily determined in the lawsuit." McGrath v. Everest Nat. Ins. Co., 668 F.Supp.2d 1085, 1099 1100 (N.D. Ind. 2009) (citing State Farm Fire & Cas. Co. v. T.B. ex rel. Bruce. 762 N.E.2d 1227, 1231 (Ind. 2002)); *Compare* Kelly v. Hamilton, 816 N.E.2d 1188, 1193 (Ind.App.2004) (finding that the judgment did not address the issue of the insurer's coverage and thus the insurer was not collaterally estopped from that defense at the proceedings supplemental stage of the case) *and* Foreman v. Jongkind Brothers, Inc., 625 N.E.2d 463, 469 (Ind.App.1993) (holding that the trial court's articulation of negligence in the default judgment entry supported the notion that the claim was outside the policy coverage and the issue of coverage had not been addressed) *with* Progressive Casualty Insurance v. Morris, 603 N.E.2d 1380, 1383 (Ind.App.1992) (holding that the insurer was collaterally estopped from asserting that the motorcyclist acted intentionally and thus was excluded from coverage when the underlying verdict determined negligence) *and* Liberty Mutual Insurance Co. v. Metzler, 586 N.E.2d 897, 901 (Ind.App.1992) (holding that insurer was collaterally estopped from litigating at the proceedings supplemental stage whether the driver intentionally caused the injury after alleging negligence was not answered and a default judgment of liability for negligence was entered).

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This Court has already ruled that Century owed a duty to defend its insureds in the Underlying Lawsuit and that Century breached its duty to defend. As a consequence of breaching the duty to defend, Century has waived and is estopped from raising issues of non-coverage in this litigation. In addition, Century's breach of the duty to defend proximately caused the default judgment. The default judgment contains findings of fact that "at the time of the accident, Vasquez was in the course and scope of his employment and/or agency of Blue Streak acting in furtherance of its business interests." The default judgment also found that "Defendant Blue Streak is legally liable for the injuries and damages sustained by Pretner caused by Defendant Vasquez's negligence." These findings of fact unequivocally establish that the underlying accident was a covered claim under the Century Policy.

However, despite waiving its rights to assert a coverage defense, and despite the default judgment being binding on Vasquez and Blue Streak, once again, Century argues that even if an insurer breaches the duty to defend, the insurer can still contest coverage and will only be liable for up to the policy limits if the claim was actually covered under the policy. In support, Century cites to Peterson Tractor Co. v. Travelers Indem. Co. of Ill., 156 Fed.Appx. 21, 23, 2005 WL 3134107, 1 (9th Cir. 2005); Dewitt Const. Inc. v. Charter Oak Fire Ins. Co., 307 F.3d 1127 (9th Cir. 2002). However, none of these cases are applicable as the facts are completely different from the facts of this case.

First, Peterson Tractor Co. v. Travelers Indem. Co. of Ill., 156 Fed.Appx. 21, 23, 2005 WL 3134107, 1 (9th Cir. 2005) does not directly address the issue of whether an insurer may still contest issues of coverage even after it breach the duty to defend.[2] Century also misquotes Peterson as Peterson states that "when an insurer breaches its duty to defend, the insured may recover as contract damages the funds it expended

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defending itself, and also any damages that proximately resulted from the insurer's breach of the insurance contract." Id. (citing Amato v. Mercury Cas. Co., 53 Cal.App.4th 825, 61 Cal.Rptr.2d 909, 912-13 (1997)) (emphasis added). As such, Peterson actually supports Plaintiffs' argument that Plaintiffs are at least entitled to the $1 million policy limit.

Dewitt Const. Inc. v. Charter Oak Fire Ins. Co., 307 F.3d 1127 (9th Cir. 2002) is also not applicable to the present case. In Dewitt, the insurer did not provide a defense to its insured after its insured was sued in an underlying lawsuit. Id. at 1132-1133. The insured then filed a declaratory relief action against its insured. Id. In the declaratory relief action, the issue of coverage was contested because the issue of coverage was never resolved in the underlying lawsuit. Id. Notably, the insurer's failure to defend in Dewitt did not result in a default judgment being entered against the insured in the underlying action that contained findings of fact regarding the issue of liability and coverage.

Similarly, Flannery v. Allstate Ins. Co., 49 F.Supp.2d 1223, 1228 (D.Colo. 1999) is also not applicable to this case as Flannery does not address whether an insurer who breaches the duty to defend that results in a default judgment resolving the issues of coverage will still be able to contest coverage in a later litigation. Instead, in Flannery, Flannery filed for declaratory relief immediately regarding the issue of coverage after Allstate failed to provide a defense to Flannery against a counterclaim in the underlying litigation. In Flannery, the issue of coverage in the underlying lawsuit was never resolved by trial or default judgment. In this case, Century's breach of the duty to defend resulted

[2] The Opinion in Petersen does not describe the facts of the case in detail. As such, it is impossible to determine whether the reasoning in Peterson is even applicable to this case.

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in a default judgment that contained findings of fact which resolves the issues of coverage. Thus, Flannery is not applicable.

Enserch Corp. v. Shand Morahan & Co., Inc., 952 F.2d 1485, 1493 (5th Cir. 1992) is also distinguishable. In Enserch, the court stated as follows:

> Both insurers had a duty to defend Ebasco in the MDL suit. Both insurers breached that duty. An insurer that breaches its duty to defend, however, does not necessarily owe its insured complete indemnification for a settlement the insured reached on its own. It is axiomatic insurance law that the duty to defend is broader than the duty to indemnify or pay. Some cases have suggested that by breaching its duty to defend, however, an insurer is estopped from challenging its own liability for the insured 1s settlement of the case it refused to defend. Courts applying Texas law have made such a broad suggestion, however, only in cases where the settlement or judgment below actually addressed whether the liability would be covered by insurance.

Id. (emphasis added).

Here, unlike in Enserch where the issue of coverage was not addressed in the settlement agreement, the default judgment entered by the Eighth Judicial District Court against Vasquez and Blue Streak actually addressed the issue of coverage as it made factual findings that "[at the time of the accident, Vasquez was in the course and scope of his employment and/or agency of Blue Streak acting in furtherance of its business interests. Accordingly, Defendant Blue Streak is legally liable for the injuries and damages sustained by Pretner caused by Defendant Vasquez's negligence." See ECF # 192-23. Thus, all factual issues dispositive of the duty to indemnify (i.e. coverage) has been decided as a matter of law. In fact, the court in Enserch cited to Hartford Cas. Co. v. Cruse, 938 F.2d 601 (5th Cir. 1991) where the court stated that a general liability insurer who breached its duty to defend was estopped from relitigating issues of fact determining coverage were "predicated on an actual determination of coverage in the prior suit." Cruse, 938 F.2d at 605 n. 3. Further, neither Servidone Const. Corp. v. Security Ins. Co. of Hartford, 64 N .Y.2d 419, 422 (1985); nor Colonial Oil Industries Inc. v. Underwriters Subscribing to Policy Nos. T031504670 and T031504671, 268 Ga. 561, 491 S.E.2d

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337 (Ga. 1997) are applicable to this case because those cases also do not involve a default judgment that has been entered in the underling lawsuit that resolved issues of liability and coverage.

In sum, unlike the cases cited by Century, in this case, the issue of whether Vasquez was in the course scope of his employment with Blue Streak was raised in the Underlying Lawsuit and there has been a prior adjudication of this coverage issue in the default judgment. By breaching the duty to defend, Century cannot continue to contest this issue in this litigation.

B. AT A MINIMUM, PLAINTIFFS ARE ENTITLED TO THE $1 MILLION POLICY LIMITS AS A MATTER OF LAW BECAUSE THE $18 MILLION DEFAULT JUDGMENT WAS A FORESEEABLE CONSEQUENCE THAT AROSE NATURALLY FROM CENTURY'S BREACH OF THE DUTY TO DEFEND.

Century argues that even though it breached the duty to defend, the only foreseeable damages from its breach of the duty to defend are the costs in defending the Underlying Lawsuit. Century argues that because there were no costs or attorney's fee incurred by Vasquez or Blue Streak in the Underlying Lawsuit, then Plaintiffs sustained no damage. This argument is legally false as attorney's fees and costs are not the only type of damages that can be sustained from a breach of the duty to defend. This Court has already ruled that,

> When an insurer breaches the duty to defend, damages are characterized as general damages and consequential damages. General damages include attorney's fees and the reasonable costs of defense. Consequential damages include those damages that arise naturally from the breach and were reasonably foreseeable at the time of the contract."

See ECF # 168 at page 15:10-15.

1) Under Nevada Law, Consequential Damages for a Breach of Contract Are Expansive and Can Include Damages in a Resulting Default Judgment.

Under Nevada law, consequential damages that are foreseeable and flow naturally

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from a breach of contract can be expansive. See Clark County School Dist. v. Rolling Plains Const., Inc., 117 Nev. 101, 106, 16 P.3d 1079, 1082 (2001) (holding that consequential damages are also appropriate for breach of contract when the damages are foreseeable and arise naturally from a breach of contract.). For example, in Eaton v. J.H., Inc., 94 Nev. 446, 449, 581 P.2d 14, 16 (1978), the court held that consequence damages for a breach of contract could also include "loss of profits to plaintiff for the remainder of the term of the agreement" and that the damages for defendants' breach of contract should include "losses caused and gains prevented by the defendant's breach." In Hornwood v. Smith's Food King No. 1, 107 Nev. 80, 84, 807 P.2d 208, 211 (1991), the court held that consequential damages of a breach of contract includes not only the remaining rent from the contract, but also consequential damages based on the diminution in value of the shopping center, lost future percentage rents from Smith's and other tenants of the shopping center, and lost rents and other expenses associated with other tenants.[3] Id.

The Ninth Circuit has stated that "[w]hen the insurer refuses 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 Homeowners Ass'n v. United Pacific Ins. Co., 219 F.3d 895, 902 (9th Cir. 2000) (Citing Amato v. Mercury Cas. Co., 53 Cal.App.4th 825, 61 Cal.Rptr.2d 909, 915 (Cal.App.1997)). In fact, other courts have explicitly stated that a consequential damage that naturally flows from an insurer's breach of the duty to defend include the amount of the resulting judgment. Maxwell, 341 Wis. 2d at 262-63, 814 N.W.2d at 496

[3] Thus, contrary to Century's argument, Clark County School Dist., Eaton, Hornwood re-enforces the idea that under Nevada law, consequential damages that are foreseeable and flow naturally from a breach of contract can be expansive.

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(emphasis added) (citing Newhouse v. Citizens Security Mut. Ins. Co., 176 27 Wis.2d 824, 830, 501 N.W.2d 1 (1993)).

Vasquez and Blue Streak did not hire counsel to defend the Underlying Lawsuit and thus, they did not incur attorney's fees and costs. This however, does not end the inquiry. The next issue is whether Vasquez and Blue Streak sustained consequential damages as a result of Century's breach of the duty to defend. Here, as a result of Century's breach of the duty to defend (which is a breach of contract), an $18 million default judgment was entered against Vasquez and Blue Streak. Thus, this Court must determine whether the default judgment was a consequential damage that was reasonably foreseeable and arose natural from Century's breach of the duty to defend.

In Century's Opposition, Century argues that the default judgment was not a foreseeable, consequential damage because "[i]f there is no coverage under the policy, any payments of benefits under the policy could not be foreseeable." See ECF # 195 at 4:1-2. Once again this argument is baseless as Century fails to recognize this case is not about coverage (i.e. the duty to indemnify).[4] In any event, Century has already waived any defenses based on coverage. Likewise, it has already been judicially determined in the default judgment that Vasquez was in the course and scope of his employment with Blue Streak at the time of the accident and that Blue Streak is legally liable for Vasquez's negligence. Thus, the issue of "course and scope," "liability," and ultimately "coverage" has already been judicially adjudicated. These findings of fact are binding on Vasquez and Blue Streak and thus, also binding on Century.

In addition, there is no question that Century, as a sophisticated insurance company, must have known that the risk of breaching its duty to defend by failing to provide a defense or intervene was that after default, the allegations in the Complaint

[4] In fact, by arguing that there is no coverage, Century is essentially "putting the cart before the horse."

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would be accepted as true. Once defaults were entered on June 27, 2011, the defaults were sent to in-house counsel Henderson. See Exhibit 22 of ECF # 14. At that point, Century as a sophisticated insurance company, knew or should have known that Plaintiffs' next step was to pursue default judgment. In fact, Century's litigation claim manager, Daniel Mayer acknowledged in his deposition that "typically a default notice can be followed by an application for a default judgment." See Deposition of Daniel Mayer attached as Exhibit 5 to ECF # 176 at 181:21-182:5; 186:4-14.

Thus, because the default judgment was clearly a foreseeable consequence that arose naturally from Century's breach of the duty to defend, Vasquez and Blue Streak sustained damages by reason of the $18,050,185.45 Default Judgment.

2) The Default Judgment was Foreseeable Because Century Never Eliminated the Potential for Coverage.

Century argues that the $18 million default judgment was not reasonably foreseeable because once Century established that the loss or suit was not covered under the Policy, the only foreseeable damage from its breach of the duty to defend are damages related to the defense, not indemnify. Not only is this not the law, this is also false. See Hecla, 811 P.2d at 1089 (stating "whether coverage is ultimately available under the contract is a question of fact to be decided by the trier of fact.").

(i) Century violated its own claims guidelines when it determined that there was no coverage.

First, contrary to Century's assertion that it eliminated coverage, Century never eliminated coverage. Pursuant to Century's own Guide to Claims Best Practices, a claim investigation should be conducted as follows:

> The starting point for an investigation is to determine what information is needed and to create a preliminary plan for how to best obtain that information.

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> The Claim analyst will identify all potential coverage that may be applicable to a loss and asks "what facts are necessary to determine whether coverage applies?"
>
> Next the analyst considers all possible sources of information about what happened, when it happened, who was involved, where it occurred, and why it happened.
> It is important not to rely on just one version of the events because witnesses, photographs, and documentation of events almost always provide differing perspectives.
>
> Good claim analysts avoid forming an early opinion about what happened and how it occurred. They recognize it is important to keep an open mind throughout the life of a claim, but never more so than during the initial gathering of facts. A common mistake of an inexperienced claim analyst is to accept a particular version of events present by the initial witnesses or by the insured, without critically evaluating whether that version of events may be the result of mistake, misperception, misunderstanding or bias of the individual providing the account.

See ECF # 93 at Exhibit 36 at BP000020 (emphasis added); See ECF # 93 Exhibit 37 at ¶11.

Century's own guideline specifically state that Century's claim handlers cannot rely on one version of the events, and that the claim handlers cannot rely on the insured's version. Despite its clear guidelines prohibiting the sole reliance on the insured's own version of events, Century concedes in its Opposition that Century provided no coverage for the loss simply because "Vasquez has always maintained and continues to assert that he was not in the course and scope of his employment at the time of the accident, and that undisputed evidence binds Plaintiffs. As a result, the Century Policy simply provided no coverage for the loss." See Opposition ECF # 195 at 7:27-8:2. In essence, Century concedes that it violated its own Guidelines by relying solely on Vasquez's statement to eliminate coverage. Even if Vasquez stated that he was not in the course and of his employment with Blue Streak at the time of the accident, Century should not have relied solely on Vasquez's version of the events as it could be the result of a misunderstanding.

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(ii) **The facts of the case demonstrate that there was at least the potential for coverage.**

Second, Contrary to Century's argument, the facts of this case demonstrate that there is at least the potential for coverage under the Century Policy. For example, Blue Streak is a Nevada limited liability company with Vasquez as its member. See Exhibit 3 of ECF# 14. At the time of underwriting, Century knew that Blue Streak provided mobile detailing services such as washing and cleaning customers' cars at the customers' location. See Exhibit 4 of ECF # 14. While Blue Streak had a listed mailing address of 3675 E. Post Rd. Suite B, Las Vegas, NV 89120, Century also recognized and accepted that Blue Streak had no fixed physical location. Id. Instead, Blue Streak operated from Vasquez's residential home address. See Exhibits 4 & 5 of ECF # 14.

Century knew that the primary tools that Blue Streak uses to provide auto detailing services was a truck, trailer, pressure washers, generators, and a water tank. See Exhibit 5 of ECF #14. Century knew that Vasquez drove the "company" trucks home every night including the subject Ford F-150, while the trailers and other work equipment are stored at storage facility located on Dean Martin Drive. Id. Century also knew that the Ford F-150 also had a license plate stating "JSTDTLD" as an acronym for "just detailed." See Exhibit 1 at CFOOO112 of ECF # 14. Century also knew that Vasquez used his cell phone number as his business phone number[5]. See Exhibit 3, 6 of ECF # 14.

In fact, Blue Streak's commercial website states that Blue Streak "is always available." See Printout of Blue Streak Commercial Website Homepage attached to ECF # 93 as Exhibit 38. In essence, Blue Streak was a virtual business and went wherever Vasquez went. Century knew that Vasquez, himself, was the business. Despite Blue

[5] Vasquez listed his business phone number and his cell phone number as (702) 286-8450.

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Streak having no fixed location and being a mobile and virtual business, Century issued a "garage policy" to Blue Streak. The policy also defines "Garage Operations" as follows:

> H. "Garage operations" means the ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that ad join these locations. "Garage operations" includes the ownership, maintenance or use of the "autos" indicated in Section I of this Coverage Form as covered "autos". "Garage operations" also include all operations necessary or incidental to a garage business.

See ECF #93 at Exhibit 2 at POL000036 (emphasis added).

In essence, Vasquez, himself, is the "garage operations." Consistent with the advertising on Blue Streak's website, Vasquez and Blue Streak are "always available" by phone. See ECF # 93 Exhibit 38. Century's claim handlers should have known that under the terms of the Century Policy and industry standards, because Blue Streak is a mobile business, Century accepted the risk that virtually any use of the Ford F-150 could be considered business use or "Garage Operations" as the business essentially moves with Vasquez. See ECF # 93 at Exhibit 37 at ¶ 9. At a minimum, the issue of whether a mobile business can have a garage policy is ambiguous. Thus, this ambiguity must be resolved in favor of their insureds. United National Ins. Co. v. Frontier Ins. Co., Inc., 120 Nev. 678, 684, 99 P.3d 1153, 1156 - 1157 (2004) (stating any ambiguity on whether insurance coverage applies in resolve in favor of the insured).

(iii) Nevada case law regarding the course and scope of employment is broad.

Third, Nevada law regarding what constitutes being in the course and scope of your employment is broad. For example, Evans v. Southwest Gas Corp., 108 Nev. 1002, 842 P.2d 719 (1992), supports that Vasquez was in the course and scope of his employment with Blue Streak at the time of the accident In Evans, an employee was off work hours when he collided with another vehicle. Id. at 1003, 842 P. 2d at 720. There,

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the Nevada Supreme Court held that because the employee was *required* to be on-call and took work vehicle home to respond to emergencies, the employer was deriving a benefit. Id. Thus, the employee was in the course and scope of his employment at the time of the accident. Id. at 1006, 842 P.2d at 722. Notably, in Evans, despite the fact that the employee was driving home when the accident occurred, the Court still found that he was in the course and scope of his employment.

In National Convenience Stores, Inc. v. Fantauzzi, 94 Nev. 655, 657, 584 P.2d 689, 691 (1978), the Nevada Supreme Court held that if an employee, who is not on work hours, temporarily abandoned his personal objective and turned to accomplish a task reasonably within the scope of his employment and of benefit to his master, then the employee could be said to be in the course and scope of his employment. Fantauzzi, 94 Nev. at 659, 584 P.2d at 692. As such, Fantauzzi found that an employee can be on a personal errand and still be in the course and scope of employment. Id.

In Prell Hotel Corp. v. Antonacci 86 Nev. 390, 469 P.2d 399 (1970), a casino dealer punched a hotel guess while at the dealer table. Id. at 391, 469 P.2d at 400. There, the Nevada Supreme Court held that even if an employee commits a willful tort while in the course of the very task assigned to the employee, the employer may still be liable for the employee's actions under Respondeat Superior. Id. at 391, 469 P.2d at 400.

Further, in Colonial Ins. Co. of California v. American Hardware Mut. Ins. Co., 969 P.2d 796 (Colo.App.1998), an employee was driving a truck owned by his employer when it collided with a second vehicle. Id. at 797. At the time of the accident, the employee was acting outside of the course of his employee duties with his employer. Id. The employer was the named insured under a liability policy issued by American which covered the truck the employee was driving. Id. The employee was the named insured under a liability

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policy issued by Colonial. Id. American denied coverage under its policy and refused to defend the employee claiming that the employee was not an insured according to the terms of its insurance contract with the employer and was not acting within the course and scope of his employment at the time of the accident.

Given the broad scope of Nevada cases law regarding respondeat superior and other courts finding that coverage applies even when an employee is outside the scope of employment, whether an employee is in the course and scope of his employment is not determined at the moment of the accident. Instead, the determination is made by looking at the totality of the circumstances.

Here, Century failed to evaluate the fact that Blue Streak was a mobile detailing business with no fixed location; that the Ford F-150 had a license plate with an acronym for "just detailed"; that Blue Streak operated the business from Vasquez's home; that Vasquez used his cell phone number as the business number; that trucks and equipment were kept at a rental storage facility; that Vasquez was the sole owner and as such, Vasquez was, in fact, Blue Streak. See Exhibit 37 at p. 5 ¶ 11. In fact, Vasquez's cell phone was the lifeline of the business as all business was conducted through his cell phone. Similarly, Blue Streak was advertised as being "always available." Pursuant to Century's own guidelines, Evans, Fantauzzi, Prell, and Colonial, because Vasquez was essentially always on call for the benefit of Blue Streak, the potential for coverage is not eliminated based solely on Vasquez's statement that he was not in the course and scope of his employment at the time of the accident.

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C. VASQUEZ'S DECLARATION MUST BE STRICKEN BECAUSE IT CONTRADICTS FINDINGS OF FACTS IN THE DEFAULT JUDGMENT THAT ARE BINDING ON VASQUEZ AND BLUE STREAK.

Plaintiffs incorporate by reference arguments made in Plaintiffs' Motion to Strike Michael Vasquez's declaration. See ECF # 197.

D. CENTURY'S ATTEMPT TO SMEAR PLAINTIFFS' COUNSEL IS SIMPLY A RED HERRING.

Century attempts to argue that public policy supports Century's position. In an attempt smear Plaintiffs' counsel, Century argues "it would be against public policy to reward a claimant's attorney, who is in possession of facts to the contrary, for misrepresenting as fact in a default judgment, statement that have no evidentiary support, solely to bring the judgment within the confines of an insurance policy." See Opposition at ECF # 195 at 19-22. Century even argues that the default judgment was the result of "Plaintiffs' counsel's attempt to 'set-up' Century with false facts designed solely to create coverage, knowing that there was no evidence to support those facts." See ECF 195: 8:6-12. Not only is this argument offensive, it is simply untrue.

As stated above, there is no dispute that Century had notice of the Underlying Lawsuit before and after it was served but elected not to provide a defense. If Century thought the allegations in the Complaint were false or even frivolous, it could have provided a defense and the challenge those very facts. Century chooses to ignore those facts, which if accepted as true would have been covered under the Century Policy. Thus, the Default Judgment was not the product of any fraud or any attempt to "set up" Century for a Default Judgment. Instead, the Default Judgment is the product of Century's arrogance and decision to abandon their insureds in the face of a default which ultimately led to the default judgment.

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insurer must defend any suit brought against its insured that potentially seeks damages within the coverage of the policy. Rockwood Ins. Co. v. Federated Capital Corp., 694 F.Supp. 772, 776 (D. Nev.1988).

III. CONCLUSION

Based on the foregoing, Plaintiffs urges the Court to revisit the issue of the effect of the default judgment in the insurance context. Specifically, Plaintiffs request that this Court hold that Century is liable for the resulting default judgment which was a foreseeable consequence that flowed naturally from Century's breach of the duty to defend. Likewise, Plaintiffs request that this Court rule that Century can no longer contest the issue of coverage. However, if this Court maintains that Plaintiffs' damages are capped by the $1 million policy limit, Plaintiffs request that this Court rule that Plaintiffs are at least entitled to the $1 million in consequential damages as a result of Century's Breach of the duty to defend.

PRINCE | KEATING

/s/ Eric N. Tran

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CERTIFICATE OF SERVICE

Pursuant to Local Rule 5-4 and the Federal Rules of Civil Procedure, I hereby certify that I am an employee of PRINCE|KEATING and that on the 23rd day of January, 2015, I served the above and foregoing on the following parties in compliance with the Electronic Filing and Conversion Rules:

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Maritz, Maxine

From:	cmecf@nvd.uscourts.gov
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United States District Court

District of Nevada

Notice of Electronic Filing

The following transaction was entered by Prince, Dennis on 1/23/2015 at 3:40 PM PST and filed on 1/23/2015

Case Name: Andrew et al v. Century Surety Company et al
Case Number: 2:12-cv-00978-APG-PAL
Filer: Dana Andrew
Document Number: 202

Docket Text:
REPLY to Response to [194] MOTION for Summary Judgment filed by Plaintiff Dana Andrew. *on Plaintiffs' Damages* (Prince, Dennis)

2:12-cv-00978-APG-PAL Notice has been electronically mailed to:

Alan J. Lefebvre alefebvre@klnevada.com, mburns@klnevada.com, usdistrict@klnevada.com

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468df213ae2128a9d2abbb0e63d691808d78b5c3f00f032a39840ce358464]]

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DANA ANDREW, as legal guardian on behalf of Ryan T. Pretner, and RYAN T. PRETNER,

Plaintiffs,

v.

CENTURY SURETY COMPANY,

Defendant.

Case No. 2:12-cv-00978-APG-PAL

NOTICE OF INTENT TO RECONSIDER AND ORDER SETTING HEARING

(DKT. #192, #194, #197)

I have reconsidered a portion of my prior order (Dkt. #168) regarding whether defendant Century Surety Company is bound by the default judgment entered in the underlying litigation, and whether *Allstate Insurance Co. v. Pietrosh*, 454 P.2d 106 (Nev. 1969) and its progeny apply in the general liability context. On reconsideration, I am inclined to rule that Century is bound by the default judgment's findings on liability and damages (capped at $1 million because there was no bad faith). But Century may challenge the binding nature of the default judgment if it was obtained through fraud or collusion.

IT IS THEREFORE ORDERED that oral argument on defendant's motion for summary judgment (Dkt. #192), plaintiffs' motion for summary judgment (Dkt. #194), plaintiffs' motion to strike (Dkt. #197), and this Notice of Intent to Reconsider will be held **on Thursday, September 17, 2015 on a stacked calendar at 2:00 p.m. at the Thomas & Mack Moot Court Room at UNLV's Boyd School of Law.**

DATED this 2nd day of September, 2015.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

Maritz, Maxine

From:	cmecf@nvd.uscourts.gov
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District of Nevada

Notice of Electronic Filing

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Case Name: Andrew et al v. Century Surety Company et al
Case Number: 2:12-cv-00978-APG-PAL
Filer:
Document Number: 207

Docket Text:
Notice of Intent to Reconsider and Order Setting Hearing. IT IS THEREFORE ORDERED that oral argument on [192] Defendants motion for Summary Judgment, [194] Plaintiffs Motion for Summary Judgment, and [197] Plaintiffs Motion to Strike, and this Notice of Intent to Reconsider will be held on Thursday, September 17, 2015 on a stacked calendar at 2:00 p.m. at the Thomas & Mack Moot Court Room at UNLVs Boyd School of Law. Signed by Judge Andrew P. Gordon on 9/2/15. (Copies have been distributed pursuant to the NEF - PS)

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DANA ANDREW, as legal guardian on behalf of Ryan T. Pretner, and RYAN T. PRETNER,

Plaintiffs,

v.

CENTURY SURETY COMPANY,

Defendant.

Case No. 2:12-cv-00978-APG-PAL

ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT AND TO STRIKE

(DKT. #192, #194, #197)

This is an insurance dispute arising out of a car accident and subsequent personal injury lawsuit. I have already ruled that defendant Century Surety Company breached its duty to defend its insured, Blue Streak Auto Detailing, as a matter of law. The parties now dispute what damages, if any, were caused by the breach. It is undisputed that Blue Streak incurred no costs of defense because it defaulted in the underlying tort action. The only questions are whether the default judgment against Blue Streak constitutes damages for which Century is liable and, if so, to what extent.

I reconsider and modify my prior ruling that Century's liability in this case is capped at the policy limit of $1 million. Instead, I hold that the default judgment was a reasonably foreseeable consequential damage caused by Century's breach of its duty to defend its insured. I also reconsider my prior ruling that Century is not bound by the default judgment. I now hold that Century is bound by the default judgment, absent unreasonableness, fraud, or collusion. Century has shown the $5 million attorney fee award in the default judgment was unreasonable, so Century is not bound by that portion of the judgment. However, genuine issues of fact remain regarding whether the settlement agreement and subsequent default judgment were obtained through fraud or collusion. That issue, and the amount of recoverable damages, must be tried to a jury.

I. BACKGROUND

Plaintiff Ryan Pretner suffered catastrophic brain injuries after he was struck from behind by the side-view mirror of a truck while he was riding his bicycle on the shoulder of a road.[1] The truck was driven by Michael Vasquez. Vasquez worked for Blue Streak, a mobile auto detailing business. Vasquez was personally insured by non-party Progressive Insurance. Blue Streak was insured by Century. Prior to any lawsuit being filed, Century declined to defend Blue Streak on the ground that Vasquez was not working in the course and scope of his employment for Blue Streak at the time of the accident. Century based its decision on Vasquez's statements to the police and to Century's employee that he was not working at the time of the accident.

Pretner sued Vasquez and Blue Streak in state court. The complaint alleged that Vasquez was driving in the course and scope of employment for Blue Streak at the time of the accident. Pretner's attorney forwarded the lawsuit to Century, but Century again declined to defend Blue Streak. Vasquez and Blue Streak then defaulted in the state court action. Pretner's attorney forwarded the entry of default to Century. Century responded that the claim was not covered.

Pretner, Vasquez, and Blue Streak then entered into a settlement agreement. Vasquez and Blue Streak agreed to allow Pretner to pursue a default judgment against them, and Blue Streak assigned to Pretner all of its claims against Century. In exchange, Pretner agreed to a covenant not to execute against Vasquez and Blue Streak. Additionally, Progressive agreed to tender the $100,000 limits of its policy covering Vasquez.

Pretner moved for a default judgment in the state court action. After a hearing, the state court entered a default judgment against Vasquez and Blue Streak. The default judgment set forth factual findings that were deemed admitted by the default. Those findings include that Vasquez negligently injured Pretner, that Vasquez was working in the course and scope of his employment with Blue Streak at the time, and that consequently Blue Streak was also liable. The default judgment entered against both Vasquez and Blue Streak was for over $18 million.

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[1] I previously set forth the facts of this case in more detail at Dkt. #123.

Pretner, as assignee of Blue Streak, then filed this lawsuit against Century for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair claims practices. I previously ruled that Century breached its contractual duty to defend Blue Streak as a matter of law because the underlying complaint alleged facts that potentially fell within the policy's coverage, thereby triggering the duty to defend. (Dkt. #168 at 8-9.) As to the parties' dispute about whether Century was bound by the default judgment against its insured, I reviewed a line of decisions issued by the Supreme Court of Nevada that hold an insurer is bound by a judgment if it has notice of a lawsuit that implicates coverage but does not intervene. I predicted the Supreme Court of Nevada would not extend this line of cases beyond the uninsured motorist context. (*Id.* at 9-13.) I therefore concluded Century was not bound by the default judgment. (*Id.*) Finally, I set forth the measure of damages for breaching the duty to defend as the reasonable costs of defense in the underlying action plus "the damages reasonably foreseeable at the time of the contract, capped at $1 million." (*Id.* at 15-16.) I concluded the recoverable damages were capped at the policy limit of $1 million because no genuine issue of fact remained that Century did not act in bad faith. (*Id.* at 17.)

The parties agreed that the issue of damages could be resolved without a jury trial. Accordingly, they filed motions for summary judgment on the issue of damages arising from Century's breach of its duty to defend.

An insured is entitled to recover its costs of defense when an insurer breaches its duty to defend, but it is undisputed that Blue Streak did not incur any defense costs because it defaulted in the underlying personal injury lawsuit. The only other evidence of damages is the default judgment entered against Blue Streak after Century refused to defend it. The parties dispute whether this judgment constitutes recoverable damages caused by Century's breach of the duty to defend. They also dispute what preclusive effect the underlying default judgment should have.

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II. ANALYSIS

A. Consequential Damages and the Policy Limits

Pretner bears the burden of showing the default judgment constitutes damages to Blue Streak caused by Century's breach. *See Clark Cnty. Sch. Dist. v. Richardson Constr., Inc.*, 168 P.3d 87, 96 (Nev. 2007). As stated in my prior order, the Supreme Court of Nevada has not specifically set forth the measure of damages for an insurer's contractual breach of the duty to defend. (Dkt. #168 at 14.) However, in the related context of an indemnitor's breach of the duty to defend, the Court stated that the breach "may give rise to damages in the form of reimbursement of the defense costs the indemnitee was thereby forced to incur in defending against claims encompassed by the indemnity provision." *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 255 P.3d 268, 278 (Nev. 2011) (quotation omitted).

Nevada law provides that in a breach of contract case, a plaintiff may seek compensatory damages, which "are awarded to make the aggrieved party whole and . . . should place the plaintiff in the position he would have been in had the contract not been breached." *Hornwood v. Smith's Food King No. 1*, 807 P.2d 208, 211 (Nev. 1991). This includes expectancy damages, which are determined by the method set forth in the Restatement (Second) of Contracts § 347 (1981). *Road & Highway Builders v. N. Nev. Rebar*, 284 P.3d 377, 382 (Nev. 2012). Under § 347:

> [s]ubject to the limitations stated in §§ 350-53, the injured party has a right to damages based on his expectation interest as measured by
>
> (a) the loss in value to him of the other party's performance caused by its failure or deficiency, plus
>
> (b) any other loss, including incidental or consequential loss, caused by the breach, less
>
> (c) any cost or other loss that he has avoided by not having to perform.

Under the contract, Blue Streak expected Century to provide a defense and, if Blue Streak is found liable on a covered claim, the payment of $1 million. Thus, under § 347(a), Blue Streak's expectancy damages are the costs of defense plus the policy limit of $1 million (applied to any award entered against Blue Streak in the underlying lawsuit).

Under § 347(b), Blue Streak also is entitled to consequential damages for Century's breach of the duty to defend. Consequential losses are those damages that "aris[e] naturally, or were reasonably contemplated by both parties at the time they made the contract." *Hornwood v. Smith's Food King No. 1*, 772 P.2d 1284, 1286 (Nev. 1989) (quotation omitted); *see also* Restatement (Second) of Contracts § 351(1) (1981) ("Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made."). A loss "may be foreseeable as a probable result of a breach because it follows from the breach (a) in the ordinary course of events, or (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know." Restatement (Second) of Contracts § 351(2).

The insurer's duty to defend "is of vital importance to the insured." *Amato v. Mercury Cas. Co.*, 53 Cal. App. 4th 825, 832 (Cal. Ct. App. 1997); *see also Dewitt Constr. Inc. v. Charter Oak Fire Ins. Co.*, 307 F.3d 1127, 1137 (9th Cir. 2002) ("The duty to defend is one of the main benefits of the insurance contract.") (quotation omitted). "The insured's desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability." *Amato*, 53 Cal. App. 4th at 832 (quotation omitted). When the insurer breaches the duty to defend, a default judgment is a reasonably foreseeable result because, in the ordinary course, when an insurer refuses to defend its insured, a probable result is that the insured will default. *See Hamlin Inc. v. Hartford Acc. & Indem. Co.*, 86 F.3d 93, 94 (7th Cir. 1996) ("An insurance company that refuses a tender of defense by its insured takes the risk not only that it may eventually be forced to pay the insured's legal expenses but also that it may end up having to pay for a loss that it did not insure against. If the lack of a defender causes the insured to throw in the towel in the suit against it, the insurer may find itself obligated to pay the entire resulting judgment or settlement even if it can prove lack of coverage."); *Delatorre v. Safeway Ins. Co.*, 989 N.E.2d 268, 276 (Ill. Ct. App. 2013) (stating a default judgment against the insured was "the natural consequence of his insurer's breach of contract"); *Maxwell v. Hartford Union High Sch.*

Dist., 814 N.W.2d 484, 496 (Wis. 2012) (stating that one form of damages that "naturally flow[s] from an insurer's breach of its duty to defend" is "the amount of the judgment or settlement against the insured plus interest," because this is a "measure of damages actually caused by an insurer's breach of the contractual duty to defend") (quotation omitted); *Amato*, 53 Cal. App. 4th at 834 ("When the insurer refuses 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.") (emphasis omitted).

Courts disagree, however, on whether, in the absence of bad faith, an insured can recover in excess of the policy limits when the insurer breaches the duty to defend. Some courts state that in the absence of bad faith, an insurer who breaches the duty to defend is liable on the underlying settlement or judgment only to the extent of the policy limits. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Paynter*, 593 P.2d 948, 954-55 (Ariz. Ct. App. 1979) (holding that the insurer's liability for refusing to defend "should be confined to the limits of the policy"); *Waite v. Aetna Cas. & Sur. Co.*, 467 P.2d 847, 851 (Wash. 1970) (stating an insurer who wrongfully refuses to defend "will be required to pay the judgment or settlement to the extent of its policy limits" and reimburse the defense costs); *Schurgast v. Schumann*, 242 A.2d 695, 705 (Conn. 1968) (stating that an insurer that breached its contractual duty to defend was "under a duty to pay the judgment obtained against [the insured] up to the limit of liability fixed by its policy"); *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 659 (Cal. 1958) ("Where there is no opportunity to compromise the claim and the only wrongful act of the insurer is the refusal to defend, the liability of the insurer is ordinarily limited to the amount of the policy plus attorneys' fees and costs."). Courts adhering to this rule do not always explain why the damages for a breach of the duty to defend are capped by the policy limit on the separate duty to indemnify.

One explanation of the reasoning behind this rule is that "the measure of damages for the breach of a contract for the payment of money is the amount agreed to be paid with interest," and a breach of the duty to defend "cannot be held to enlarge the limitation as to the amount fixed as reimbursement for injuries to persons." *Mannheimer Bros. v. Kansas Cas. & Sur. Co.*, 184 N.W.

189, 191 (Minn. 1921). This explanation does not address consequential damages resulting from the breach of the duty to defend. The duty to defend is not based on the contractual promise to pay a certain amount of money to an injured person. Instead, it is a promise to provide a defense, the breach of which may result in consequential damages to the insured beyond the policy limits. *Mannheimer*'s reasoning makes sense in terms of the duty to indemnify because absent bad faith, the parties would expect the insurer to pay only the policy limits on indemnification. But it does not explain why a breach of the duty to defend should be subject to the policy's indemnification limit, which is a separate duty with separate remedies for its breach. *See Stockdale v. Jamison*, 330 N.W.2d 389, 393 (Mich. 1982), *holding limited by Frankenmuth Mut. Ins. Co. v. Keeley*, 447 N.W.2d 691 (Mich. 1989), ("Some cases state that an insurance contract is for the payment of a specific sum of money, ignoring the separate duty to defend.").

Courts that have limited damages to the policy limits have suggested that there may be circumstances where the breach of the duty to defend may require the insurer to pay in excess of the policy limits. *See Rogan v. Auto-Owners Ins. Co.*, 832 P.2d 212, 218 n.4 (Ariz. Ct. App. 1991) ("Obviously, there may be other circumstances in which a causal connection between . . . the refusal to defend and the excess judgment occurs," and offering the example where "the insured suffers a default or final judgment without the benefit of an attorney."); *Mannheimer Bros.*, 184 N.W. at 191 (declining to address whether damages would be capped by the policy limits if, for example, the insurer had a duty to defend but failed to appeal and the appeal would have been successful). Other courts have affirmatively held that the breach of the duty to defend may require the insurer to pay in excess of the policy limits where that breach proximately causes the excess judgment against the insured, such as where the insured defaulted, because the judgment constitutes consequential damages. *See Khan v. Landmark Am. Ins. Co.*, 757 S.E.2d 151, 156 (Ga. Ct. App. 2014) (stating that "the possible damages at issue are not merely those within the indemnity coverage of the policy, but are those further damages that may flow from breach of the contract to defend" as consequential damages); *Delatorre*, 989 N.E.2d at 276 (holding insurer's failure to defend caused default and insurer therefore was liable for judgment

in excess of policy limits as consequential damages); *Maxwell*, 814 N.W.2d at 496-97 ("When an insurer breaches a duty to defend its insured, the insurer is on the hook for all damages that result from that breach of its duty . . . includ[ing] damages beyond the policy limits."); *Reis v. Aetna Cas. & Sur. Co. of Ill.*, 387 N.E.2d 700, 710 (Ill. Ct. App. 1978) (stating that "damages for a breach of the duty to defend are not inexorably imprisoned within the policy limits, but are measured by the consequences proximately caused by the breach"); *Thomas v. W. World Ins. Co.*, 343 So.2d 1298, 1302 (Fla. Ct. App. 1977) (stating "the insurer may be liable for an excess judgment where (1) due to the actions of the insurer, the insured suffers a default or final judgment without benefit of an attorney, and (2) the insured can prove the final judgment would have been lower had the suit been properly defended").

Thus, in the context of a breach of the duty to defend, bad faith is not required to impose liability on the insurer in excess of the policy limits. This does not negate the distinction between a breach of the contractual duty to defend and a bad faith breach of the contract. There are still consequences for an insurer acting in bad faith, including that it may require the insurer to pay even unforeseeable consequential damages as well as punitive damages. *See Bainbridge, Inc. v. Travelers Cas. Co. of Conn.*, 159 P.3d 748, 756 (Colo. Ct. App. 2006) ("If the circumstances are sufficiently egregious to constitute a tort, then the consequential damages include all damages that were proximately caused by the breach, regardless of foreseeability."); *White v. Unigard Mut. Ins. Co.*, 730 P.2d 1014, 1017-18 (Idaho 1986) (same); *United Fire Ins. Co. v. McClelland*, 780 P.2d 193, 198 (Nev. 1989) (punitive damages). Moreover, there is no justification for making a special rule about consequential damages for insurers. Nevada's usual rule is that any party that breaches a contract is liable for consequential damages. Insurers should be held to the same standard. *Stockdale*, 330 N.W.2d at 392 ("If the insurer had an obligation to defend and failed to fulfill that obligation, then, like any other party who fails to perform its contractual obligations, it becomes liable for all foreseeable damages flowing from the breach."); *Thomas*, 343 So.2d at 1304 ("It seems only fair that an insurer whose contracts are by their very nature 'adhesive' should be held to at least the same standard of damages applicable to other contracting parties.").

In Nevada, the amount expected to be paid under a contract is not the only measure of damages for a breach. Nevada also allows recovery of consequential losses. Thus, if the default judgment was a reasonably foreseeable consequence of Century's breach, then Century is liable for the entire amount of the default judgment as consequential damages resulting from the breach of its duty to defend, regardless of the policy limits.

Century argues that if it is liable for the entire default judgment amount, then the insured is receiving policy benefits he did not contract for and the insurer is paying for a risk it did not contractually agree to cover. But Century is confusing its indemnification obligations with its duty to defend. Century agreed to defend its insured, and under Nevada law it is liable for consequential damages arising from a breach of that duty, even if its separate duty to indemnify would limit recovery to $1 million for a breach of that contractual provision.

Century next argues that if it is liable for the entire default judgment without capping it at the policy limit, the insured is placed in a better position than it would have been in had Century performed its contractual obligations. According to Century, if it had performed, the most Blue Streak could have hoped for is $1 million plus costs of defense. This again confuses the duty to indemnify with the duty to defend. If Century had performed, by Century's own arguments Blue Streak would have had a complete defense to any liability (that is, Blue Streak would not be liable because Vasquez was not driving in the course and scope of his employment). Blue Streak therefore would have been entitled to a judgment in its favor against Pretner. Instead, Blue Streak defaulted and now has an $18 million judgment against it. *See Delatorre*, 989 N.E.2d at 276 (stating the "general rule . . . for breach of contract [is to] place the injured party in the same position it would have been in had the contract been fully performed. Here, no default, no default judgment.") (internal citation omitted).

As to foreseeability, Century argues that it was not reasonably foreseeable at the time of contracting that it would have to pay for a non-covered claim. But holding Century liable for the default judgment would not be based on Century indemnifying Blue Streak for a non-covered claim. It is based on Century having to pay for all consequential damages arising out of a breach

of its duty to defend its insured. Century has not argued it was unforeseeable that its insured, a mobile auto detailing business, could cause a car accident resulting in catastrophic injuries. It also was foreseeable that a plaintiff's attorney would allege that the business's vehicle was being used in the course and scope of employment at the time of the accident. It therefore was foreseeable at the time of contracting that if Century refused to provide a defense in the face of such allegations, a substantial default judgment against its insured could result.

As for proximate cause, Century has consistently asserted that Vasquez was not in the course and scope of employment at the time of the accident. Thus, by Century's own position, had it defended Blue Streak, Blue Streak would have obtained a judgment in its favor instead of an $18 million judgment against it. Consequently, Century's breach of its duty to defend proximately caused the default judgment. *See Thomas*, 343 So.2d at 1302; *Rogan*, 832 P.2d at 218 n.4 (stating "there may be . . . circumstances in which a causal connection between . . . the refusal to defend and the excess judgment occurs," such as where "the insured suffers a default or final judgment without the benefit of an attorney").[2]

In sum, Nevada law allows for recovery of all reasonably foreseeable consequential damages for a breach of contract, regardless of the good or bad faith of the breaching party. There is no special rule for insurers that caps their liability at the policy limits for a breach of the duty to defend. I therefore reconsider my prior ruling that because Century did not act in bad faith, its liability is capped at the $1 million policy limits. A district court "possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient," so long as it has jurisdiction. *City of L.A., Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001) (quotation and emphasis omitted); *see also Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013) ("It is common for both trial and appellate courts to reconsider and change positions when they conclude that they made a mistake."). The

[2] For an example of when the breach of the duty to defend would not proximately cause an excess judgment, *see Rogan*, 832 P.2d at 217 (stating there is no causal connection between the breach of the duty to defend and an excess judgment where the insured defends itself because "[g]iven competent counsel to represent the insured, the judgment would be the same as if the defense had been conducted by the insurer's counsel").

default judgment represents consequential damages to Blue Streak that may be recoverable as a result of Century's breach of the duty to defend.

B. Reconsideration of the Binding Effect of the Underlying Judgment

Century contends that it should not be bound by the default judgment, including the amount of the judgment. In a prior order, I agreed with Century's position. I noted that the "Nevada Supreme Court has held that where an insurer has notice of an adversarial proceeding that implicates uninsured motorist coverage under its policy but refuses to intervene, the insurer will be bound by the judgment thereafter obtained." (Dkt. #168 at 9-10 (citing *Allstate Ins. Co. v. Pietrosh*, 454 P.2d 106, 111 (Nev. 1969)).) I noted that the *Pietrosh* court subverted the normal privity requirement for claim and issue preclusion, but that the "public policy favoring intervention and 'avoiding multiple litigation . . . carries greater weight' than the policy requiring privity for application of preclusion in the insurance context." (*Id.* at 10 (quoting *Pietrosh*, 454 P.2d at 111).)

I considered two other cases in the uninsured motorist context, *State Farm Mutual Automobile Insurance Company v. Christensen*, 494 P.2d 552 (Nev. 1972) and *Estate of Lomastro v. American Family Insurance Group*, 195 P.3d 339 (Nev. 2008). (*Id.* at 10-11.) *Christensen* held that an insurer who elects not to intervene in its insured's lawsuit against an uninsured motorist is bound by a default judgment entered against the uninsured motorist. 494 P.2d at 553. The Supreme Court of Nevada reached a similar result in *Lomastro*. There, the insurer did not intervene in its insured's lawsuit against the uninsured motorist until after the uninsured motorist had defaulted. 195 P.3d at 1063. The trial court allowed intervention, but it held that the entry of default barred the insurer from contesting the uninsured motorist's liability. *Id.* The Supreme Court of Nevada affirmed, holding that the entry of default was sufficient to bind the insurer. *Id.* at 1067-69.

After reviewing these cases, I concluded they were "best limited to the context of uninsured motorist claims" because the Supreme Court of Nevada had not extended the principles to the general liability context. (Dkt. #168 at 12-13.) Additionally, the cases eliminated the

privity requirement in this particular context where it would be virtually impossible for the insured to show his insurer was in privity with the uninsured motorist. (*Id.*) I noted that the Supreme Court of Nevada later held, in a case not involving insurance, that a default judgment based on a defendant's failure to answer does not have preclusive effect because the issues have not been actually litigated under these circumstances. (*Id.* at 13 (citing *In re Sandoval*, 232 P.3d 422, 425 (Nev. 2010)).) As a result of this analysis, I held the *Pietrosh*, *Christensen*, and *Lomastro* line of cases is best limited to the uninsured motorist context and Century therefore is not bound by the default judgment against Blue Streak. (*Id.*)

After reevaluating relevant authority, including *Pietrosh*'s reasoning and other jurisdictions' decisions, I now reconsider my earlier decision. Many jurisdictions hold that when an insurer has notice of the lawsuit against its insured and breaches its duty to defend, it is bound by the resulting judgment, default judgment, or settlement, in the absence of fraud or collusion, with respect to all material findings of fact necessary to the judgment or settlement.[3] This is a

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[3] *See Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 901 (9th Cir. 2000) (applying California law and stating it is the "general rule . . . that an insurer that wrongfully refuses to defend is liable on the judgment against the insured," and it is "no defense that the ultimate judgment against the insured is not rendered on a theory within the coverage of the policy."); *Hamlin Inc.*, 86 F.3d at 94; *St. Paul Fire & Marine Ins. Co. v. Vigilant Ins. Co.*, 919 F.2d 235, 240-41 (4th Cir. 1990) (applying North Carolina law that an insurer who breaches the duty to defend "is estopped from denying coverage and is obligated to pay the amount of any reasonable settlement made in good faith by the insured") (quotation omitted); *Colorado Cas. Ins. Co. v. Safety Control Co.*, 288 P.3d 764, 770 (Ariz. Ct. App. 2012) ("As long as the stipulated judgment is not fraudulent or collusive, an insurer that has failed to defend is bound by the judgment with respect to all matters which were litigated or could have been litigated in that action.") (quotation omitted); *Chandler v. Doherty*, 702 N.E. 2d 634, 639 (Ill. Ct. App. 1998) (stating that when an insurer breaches its duty to defend, "the insurer is estopped from asserting any policy exclusions or defenses in a later garnishment action by the insured or a judgment creditor"); *Willcox v. Am. Home Assur. Co.*, 900 F. Supp. 850, 855 (S.D. Tex. 1995) ("As a consequence of the breach, the insurer is liable for any damages assessed against the insured, up to the policy limits, subject only to the condition that any settlement be reasonable."); *Pruyn v. Agric. Ins. Co.*, 36 Cal. App. 4th 500, 514 (Cal. Ct. App. 1995) ("It is the general rule that a liability insurer who has had an opportunity to defend the underlying action brought against its insured is bound by the judgment against its insured as to all issues which were litigated in the action.") (quotation omitted); *Paynter*, 593 P.2d at 950 (collecting cases applying the "general rule" that "in the absence of fraud or collusion, an insurance company which refuses to defend its insured is bound by a judgment against its insured with respect to all matters which were litigated or could have been litigated in that action"); *Kelly v. Cherokee Ins. Co.*, 574 S.W.2d 735, 737 (Tenn. 1978) ("We have no quarrel with the general rule that in the absence of fraud or collusion an insurer, who has the duty to defend, has timely notice and defends or elects not to defend, is bound by the judgment in such a case as to issues which were or might have been litigated therein."); *Hogan v. Midland Nat'l Ins. Co.*, 476 P.2d 825, 832 (Cal. 1970) ("An insurer that has been notified of an action and refuses

consequence of the insurer's breach of the duty to defend. *Pruyn v. Agric. Ins. Co.*, 36 Cal. App. 4th 500, 515 n.15 (Cal. Ct. App. 1995) ("One of the consequences of an insurer's failure to defend is that it may be bound, in a subsequent suit to enforce the policy . . . by the express or implied resolution in the underlying action of the factual matters upon which coverage turns."). It is designed to encourage the insurer to participate to avoid multiple lawsuits over the same issues and to prevent inconsistent judgments. *See Hamilton v. Maryland Cas. Co.*, 41 P.3d 128, 135 (Cal. 2002) ("In effect, when the insured tenders the suit, the carrier is receiving its chance to be heard. Having rejected the opportunity and waived the chance to contest liability, it cannot reach back for due process to void a deal the insured has entered to eliminate personal liability.") (quotation omitted); *Exec. Risk Indem., Inc. v. Jones*, 171 Cal. App. 4th 319, 333-35 (Cal. Ct. App. 2009) ("It is not unfair that an insurance company is not entitled to relitigate issues in a second lawsuit that it had the right to litigate in the initial lawsuit. Rather, that potential result will encourage the insurance company to participate in the initial action.").

These policy concerns are similar to those identified by the Supreme Court of Nevada in *Pietrosh*. There, the Court noted that insurance policies are not "ordinary" contracts because they are "complex instrument[s], unilaterally prepared and seldom understood by the insured." 454 P.2d at 110. Consequently, the insured and insurer "are not similarly situated. The company and its representatives are expert in the field; the insured is not." *Id.* The Supreme Court of Nevada therefore "place[s] the burden of affirmative action upon the insurance company." *Id.* Additionally, the Court concluded that "the avoidance of multiple litigation" carried "greater weight" than concerns about privity and forcing the insurer to intervene. *Id.* at 111.

These policy considerations, along with the related concern of preventing inconsistent judgments, are not unique to the uninsured/underinsured motorist context. Rather, they are magnified when an insurer breaches its duty to defend its insured because the insurer not only had

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to defend on the ground that the alleged claim is not within the policy coverage is bound by a judgment in the action, in the absence of fraud or collusion, as to all material findings of fact essential to the judgment of liability of the insured. The insurer is not bound, however, as to issues not necessarily adjudicated in the prior action and can still present any defenses not inconsistent with the judgment against the insured.") (quotation omitted).

the opportunity to participate, it had a contractual obligation to do so. Further, binding an insurer to the underlying judgment when it breaches its duty to defend incentivizes it to resolve all doubts about the duty to defend in the insured's favor by raising the risk level for an insurer who opts not to defend. *See United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, 99 P.3d 1153, 1158 (Nev. 2004) (en banc) ("If there is any doubt about whether the duty to defend arises, this doubt must be resolved in favor of the insured."); Restatement (Second) of Judgments § 58 cmt. a ("The duty to provide a defense is enforced by rules creating strong disincentives against default in performance of the duty.").

This is consistent with the Restatement (Second) of Judgments § 58:

> (1) When an indemnitor has an obligation to indemnify an indemnitee (such as an insured) against liability to third persons and also to provide the indemnitee with a defense of actions involving claims that might be within the scope of the indemnity obligation, and an action is brought against the indemnitee involving such a claim and the indemnitor is given reasonable notice of the action and an opportunity to assume its defense, a judgment for the injured person has the following effects on the indemnitor in a subsequent action by the indemnitee for indemnification:
>
> > (a) The indemnitor is estopped from disputing the existence and extent of the indemnitee's liability to the injured person; and
> >
> > (b) The indemnitor is precluded from relitigating those issues determined in the action against the indemnitee as to which there was no conflict of interest between the indemnitor and the indemnitee.

See also id. cmt. a, illus. 1; Restatement (First) of Judgments § 107 cmts. c, f (1942) (stating that if an indemnitor owes a duty to defend and "fails to give this assistance at the time when it is of greatest importance, it is fair that he should abide by the result of the trial" even in the case of a default judgment, so long as there is no fraud or collusion). The Supreme Court of Nevada looks to the Restatement of Judgments for guidance. *See, e.g., Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 321 P.3d 912, 915-18 (Nev. 2014); *Personhood Nevada v. Bristol*, 245 P.3d 572, 576 (Nev. 2010). Thus, I predict[4] that the Supreme Court of Nevada would extend the *Pietrosh* line

[4] When a federal court interprets state law, it is bound by the decisions of the state's highest court. *Assurance Co. of Am. v. Wall & Assocs. LLC of Olympia*, 379 F.3d 557, 560 (9th Cir. 2004). Where the state's highest court has not decided the issue, a federal court must predict how the state's highest court would decide. *Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007). I may use "decisions from other

of cases beyond the uninsured/underinsured motorist context to bind an insurer who breaches its duty to defend in the general liability context and would preclude the insurer from re-litigating material findings of fact essential to the judgment against the insured.

This includes precluding the insurer from re-litigating a coverage defense that contradicts the facts necessary to the underlying judgment. Some courts allow an insurer who breaches its duty to defend to contest whether the underlying judgment or settlement actually falls within the policy's coverage.[5] These courts reason that the duty to defend and the duty to indemnify are separate contractual obligations, so allowing an insured to recover the amount of the judgment or settlement for a non-covered claim confuses the two duties and their appropriate remedies. *See Flannery v. Allstate Ins. Co.*, 49 F. Supp. 2d 1223, 1227-28 (D. Colo. 1999); *Sentinel Ins. Co., Ltd. v. First Ins. Co. of Hawai'i, Ltd.*, 875 P.2d 894, 912 (Haw. 1994) (stating that binding an insurer to a finding of coverage based on a breach of the duty to defend "subverts any meaningful distinction between the duty to defend and the separate duty to indemnify and, in many cases, serves no more than to punish the insurer for the breach of a contractual duty"). These courts also reason that precluding the insurer from challenging coverage creates a bargain the parties did not agree to by extending coverage to non-covered claims. *See Colonial Oil Indus. Inc. v. Underwriters Subscribing to Policy Nos. TO31504670 & TO31504671*, 491 S.E.2d 337, 339 (Ga.

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jurisdictions, statutes, treatises, and restatements as guidance." *Assurance Co.*, 379 F.3d at 560 (quotation omitted).

[5] *See, e.g., Dewitt Constr. Inc.*, 307 F.3d at 1137 (applying Washington law); *Enserch Corp. v. Shand Morahan & Co., Inc.*, 952 F.2d 1485, 1493 (5th Cir. 1992) (stating that although the breaching insurer is bound by a finding of the insured's liability, coverage is a different question, and coverage cannot be created through estoppel); *Underwriters at Lloyds v. Denali Seafoods, Inc.*, 927 F.2d 459, 464 (9th Cir. 1991) (stating "an insurer's failure to defend a claim ultimately found not to be covered by the policy should not be subject to reimbursement within the policy limits"); *Flannery v. Allstate Ins. Co.*, 49 F. Supp. 2d 1223, 1227-28 (D. Colo. 1999) (noting disagreement and collecting cases on both sides, and ultimately adopting the rule that an insurer is not precluded from contesting coverage); *Colo. Cas. Ins. Co.*, 288 P.3d at 771 (stating an insurer "is liable for the stipulated judgment only if the judgment constituted a liability falling within its policy"); *Colonial Oil Indus. Inc. v. Underwriters Subscribing to Policy Nos. TO31504670 & TO31504671*, 491 S.E.2d 337, 339 (Ga. 1997); *Missouri Terrazzo Co. v. Iowa Nat'l Mut. Ins. Co.*, 740 F.2d 647, 652 (Mo. Ct. App. 1984) (stating that "an insurance company is liable to the limits of its policy plus attorney fees, expenses and other damages where it refuses to defend an[] insured who is in fact covered") (quotation omitted).

1997) (stating that the duty to indemnify is independent of the duty to defend, and breach of the duty to defend "should not enlarge indemnity coverage beyond the parties' contract"); *Sentinel Ins. Co., Ltd.*, 875 P.2d at 912 (citing cases); *Servidone Constr. Corp. v. Sec. Ins. Co. of Hartford*, 64 N.Y.2d 419, 424 (1985) ("By holding the insurer liable to indemnify on the mere 'possibility' of coverage perceived from the face of the complaint . . . the court has enlarged the bargained-for coverage as a penalty for breach of the duty to defend, and this it cannot do.").

But other courts allow the breaching insurer to contest coverage only so long as it does not contradict any findings in the underlying judgment against its insured. These courts reason that the insurer had not only the opportunity but the obligation to participate in the litigation, and the insurer therefore cannot re-litigate any issue decided in the judgment, default judgment, or settlement against its insured. Additionally, requiring the insurer to participate or be bound prevents multiple lawsuits on the same questions and avoids potential inconsistent results. *See* n.2 *supra*.

Because the Supreme Court of Nevada has already expressed its policy preferences in favor of putting the burden on the insurer to intervene and avoiding multiple lawsuits, and because that Court tends to follow the Restatement, I predict it would hold that an insurer cannot re-litigate any issue of coverage that would contradict the facts necessary to the insured's liability in the underlying action. However, the insurer is bound only to those matters necessary to resolve the insured's liability. Thus, if an insurer has other coverage defenses that do not deny the factual findings in the underlying judgment or settlement, the insurer still may raise those defenses. *See, e.g.*, *Hogan v. Midland Nat'l Ins. Co.*, 476 P.2d 825, 832 (Cal. 1970) (stating the insurer is not bound "as to issues not necessarily adjudicated in the prior action and can still present any defenses not inconsistent with the judgment against the insured") (quotation omitted); *Pruyn*, 36 Cal. App. 4th at 515 n.15 (stating that "where the issues upon which coverage depends are not raised or necessarily adjudicated in the underlying action, then the insurer is free to litigate those issues in the subsequent action and present any defenses not inconsistent with the judgment

against its insured"); Restatement (Second) of Judgments § 58(1)(b); Restatement (First) Judgments § 107 cmt. g (1942).

Here, Century knew the underlying complaint alleged Vasquez was working in the course and scope of his employment for Blue Streak, and it knew an entry of default had been entered against Blue Streak. Under Nevada law, facts in the complaint are deemed admitted by an entry of default. *Lomastro*, 195 P.3d at 345. Thus, Century assumed the risk that these facts would be found against its insured if a default judgment was entered. If Century wanted to litigate the issue of whether Vasquez was in the course and scope of his employment, it should have "provided a defense, reserved its rights, and filed a motion for summary judgment in the early stages of the [u]nderlying [l]awsuit to resolve that issue up front." (Dkt. #168 at 9 n.3.) Or it could have provided a defense and filed a separate lawsuit for a declaration that it owed no duty to defend. But what it cannot do is abandon its insured, allow a default judgment to be taken, and then re-litigate any fact necessarily decided in the default judgment. Permitting it to do so would contravene the Supreme Court of Nevada's policy choice to give greater weight to avoiding multiple lawsuits than to concerns about privity or forcing an insurer to intervene. Additionally, precluding Century from re-litigating these issues prevents inconsistent judgments and encourages insurers to comply with their duty to defend.

At the September 17, 2015 hearing, Century argued that it should not be bound by the underlying judgment because an insurer who denies coverage has a conflict of interest with its insured. Some courts acknowledge an exception from the usual rule that an insurer is bound by the underlying judgment where the insurer and insured have a conflict of interest. *See Farm Bureau Mut. Auto. Ins. Co. v. Hammer*, 177 F.2d 793, 801 (4th Cir. 1949); *State Farm Fire & Cas. Co. v. Garrity*, 785 F.2d 1225, 1226 (4th Cir. 1986); *Fireman's Fund Ins. Co. v. Rairigh*, 475 A.2d 509, 514-15 (Md. Ct. App. 1984); *Kelly v. Cherokee Ins. Co.*, 574 S.W.2d 735, 737 (Tenn. 1978).

I need not decide whether the Supreme Court of Nevada would recognize an exception for a conflict of interest and what an insurer must do to validly invoke this exception[6] because there is no conflict of interest in this case. After the September 17, 2015 hearing in this case, the Supreme Court of Nevada issued a decision which addresses whether an insurer must provide independent counsel for its insured when there is a conflict of interest between the insurer and its insured. *State Farm Mut. Auto. Ins. Co. v. Hansen*, --- P.3d ----, Adv. Op. No. 74 (Sept. 24, 2015) (en banc). There, the Court held that if a conflict exists, "Nevada law requires the insurer to satisfy its contractual duty to provide representation by permitting the insured to select independent counsel and by paying the reasonable costs of such counsel." *Id.*, Adv. Op. at 9. The Court also held that "a reservation of rights does not create a per se conflict." *Id.* at 11. Rather, the question is whether there is "an actual conflict of interest." *Id.* Nevada Rule of Professional Conduct 1.7(a) is the standard to determine whether there is an actual conflict. *Id.* Under that Rule, there is a conflict of interest for a lawyer to represent two clients if: "(1) [t]he representation of one client will be directly adverse to another client; or (2) [t]here is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

There is no such conflict here because Century's reason for denying coverage would have given Blue Streak a complete defense to the claims against it. If Century was correct that Vasquez was not working in the course and scope of employment with Blue Streak, then the very reason Century denied it owed Blue Streak a defense would have entitled Blue Streak to a judgment in Blue Streak's favor against Pretner. Century's and its insured's interests were therefore aligned in showing that Vasquez was not driving in the course and scope of employment

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[6] *See Wear v. Farmers Ins. Co. of Wash.*, 745 P.2d 526, 528 (Wash. Ct. App. 1987) (stating an insurer is not bound by the underlying judgment if a conflict exists and the insurer defended under a reservation of rights); *State Farm Mut. Auto. Ins. Co. v. Glasgow*, 478 N.E.2d 918, 923 (Ind. Ct. App. 1985) (stating a conflict of interest "preclude[s] the application of collateral estoppel . . . only where: (1) the insurance company actually participates in some part of the insured's defense in the underlying tort action, either directly or by reimbursing the insured's personal attorney, . . . and (2) the insurance company gives its insured clear and prompt notice of the existence and nature of the conflict of interest, and its implications for the insured"); Restatement (Second) of Judgments § 58(2) cmt. a.

at the time of the accident. *See also Spring Vegetable Co. v. Hartford Cas. Ins. Co.*, 801 F. Supp. 385, 393 (D. Or. 1992); Restatement (Second) of Judgments § 58(2) (stating a conflict of interest "exists when the injured person's claim against the indemnitee is such that it could be sustained on different grounds, one of which is within the indemnitor's obligation to indemnify and another of which is not").

Because Blue Streak could be liable only if Vasquez was working in the course and scope of his employment at the time of the accident, that fact necessarily was decided by the default judgment against Blue Streak. The default judgment recited this specific finding. The default judgment also determined the judgment amount, which in this case reflects the measure of damages suffered by Blue Streak as a result of the breach of the duty to defend. Century therefore cannot relitigate those issues. It is bound by the default judgment unless, as discussed below, the settlement agreement and subsequent default judgment were unreasonable, fraudulent, or collusive.[7]

C. Unreasonable, Fraudulent, or Collusive Settlement

When an insurer refuses to defend its insured, the insured "may, without forfeiture of his right to indemnity, settle with the [injured party] upon the best terms possible, taking a covenant not to execute." *Samson v. Transamerica Ins. Co.*, 30 Cal. 3d 220, 240 (Cal. 1981) (quotation omitted); *see also Willcox v. Am. Home Assur. Co.*, 900 F. Supp. 850, 855 (S.D. Tex. 1995) ("It is well settled under Texas law that once an insurer has breached its duty to defend, as in the instant case, the insured is free to proceed as he sees fit; he may engage his own counsel and either settle or litigate, at his option."). In this context, "the covenant not to execute is not a release which would permit the insurer to escape its obligations." *Paynter*, 593 P.2d at 953; *see also Willcox*, 900 F. Supp. at 856 (stating that "in Texas, a covenant not to execute against the insured, given by the plaintiff in an underlying suit, does not release the insurance carrier from

[7] At the September 17, 2015 hearing, Pretner argued that Century has never contended the settlement agreement and resulting default judgment were unreasonable or the product of fraud or collusion. But Century has raised these issues from the beginning of the case. (Dkt. #7 at 19; Dkt. #22 at 20-25.) Century did not continue to argue the point in subsequent filings because I previously ruled that Century was not bound by the default judgment.

liability"). A "covenant not to execute is merely a contract and not a release." *Globe Indem. Co. v. Blomfield*, 562 P.2d 1372, 1375 (Ariz. Ct. App. 1977). "[T]herefore, . . . the insured's tort liability remains but . . . he has an action for breach of contract if the plaintiff attempts to collect the judgment in violation of the covenant." *Id.* Allowing the breaching insurer to argue that the insured suffered no damages because of the covenant not to execute would "wholly undermine the purpose of such agreements." *Paynter*, 593 P.2d at 953. It also would deprive the insured who has been abandoned by its insurer of a means to protect itself. *Globe Indem. Co.*, 562 P.2d at 1376. Consequently, an insurer is bound by its insured's settlement (and any resulting judgment) so long as the settlement and judgment are reasonable and not collusive or fraudulent. *Pruyn*, 36 Cal. App. 4th at 515 ("Courts have for some time accepted the principle that an insured who is abandoned by its liability insurer is free to make the best settlement possible with the third party claimant, including a stipulated judgment with a covenant not to execute. Provided that such settlement is not unreasonable and is free from fraud or collusion, the insurer will be bound thereby."); *see also* n.2 *supra*.

Here, Century is bound by the default judgment's damage amount as a measure of Blue Streak's consequential damages, unless it can show that the default judgment amount was unreasonable or that it was procured through fraud or collusion. As discussed below, the default judgment amount is unreasonable because it awards $5 million in attorney's fees without a legal basis. Additionally, genuine issues of fact remain as to whether the default judgment was procured through fraud or collusion.

1. Unreasonable Judgment Amount

The state court entered a judgment in the amount of $12,888,492.66 in damages plus $6,295.99 in costs. (Dkt. #14-27 at 6.) The state court added another $5,155,396.80 in attorney's fees. (*Id.*)

Century argued at summary judgment that the default judgment was unreasonable in amount because it included the attorney's fee award even though Pretner did not seek attorney's fees in the application for default judgment and even though there was no legal basis to award the

fees. (Dkt. #22 at 24.) Pretner responded that a district court has discretion to award attorney's fees following a default judgment. (Dkt. #49 at 26 (citing *Foster v. Dingwall*, 227 P.3d 1042, 1052 (Nev. 2010) (en banc).)

In Nevada, a district court generally may not award attorney's fees "unless authorized to do so by a statute, rule or contract." *Davis v. Beling*, 278 P.3d 501, 515 (Nev. 2012). Nevada statutorily allows recovery of attorney's fees where (1) "the prevailing party has not recovered more than $20,000" or (2) the court finds that a claim or defense "was brought or maintained without reasonable ground or to harass the prevailing party." Nev. Rev. Stat. §§ 18.010(2)(a)-(b).

Here, Pretner recovered more than $20,000, so the attorney fee award could not have been based on § 18.010(2)(a). Because Vasquez and Blue Streak defaulted, they did not maintain any defense. As a result, there was not (and could not have been) a finding that they acted without reasonable grounds or to harass under § 18.101(2)(b). Consequently, there was no legal basis to award attorney's fees.

Additionally, the award of over $5 million in attorney's fees for prosecuting a default judgment was unsupported. Pretner did not request attorney's fees in the application for default judgment and presented no documentary evidence to support the award. (Dkt. #14-26 at 12-13.)

Pretner's reliance on *Foster* is misplaced. There, the district court awarded attorney's fees for discovery violations and for frivolous claims and defenses, as allowed under § 18.010(2)(b). 227 P.3d at 1052. That court therefore had a basis to award attorney's fees under a discovery rule and by statute. In contrast, Pretner has not identified any statute, rule, or contract to support the fee award.

The attorney's fee award was unreasonable because it had no legal or factual basis. However, Century has never challenged the settlement (as opposed to the judgment) as being unreasonable. Nor has Century argued that the remaining $12 million judgment was unreasonable. Accordingly, the maximum amount of the default judgment that Century may be liable for is $12,494,788.65 ($12,488,492.66 in damages and $6,295.99 in costs).

2. Fraudulent or Collusive Settlement and Resulting Judgment

It is not fraudulent or collusive for the insured to assign its rights against its insurer and to receive a covenant not to execute in return. *Samson*, 30 Cal. 3d at 240-41. By executing such an agreement, the insured "attempt[s] only to shield himself from the danger to which [his insurer] exposed him." *Id.* at 241 (quotation omitted); *see also Damron v. Sledge*, 460 P.2d 997, 1001 (Ariz. 1969) ("It cannot be held that as a matter of law collusion exists simply because a defendant chooses not to defend when he can escape all liability by such an agreement, and must take large financial risks by defending."). And where there is "significant independent adjudicatory action by the court," the "risk of a fraudulent or collusive settlement between an insured and the claimant" is mitigated. *Pruyn*, 36 Cal. App. 4th at 517.

But an insurer is not bound by "those trial proceedings which are clearly a patent sham collusively designed to create a judgment for which liability insurance coverage would then exist." *Id.* at 517 n.16. A "stipulated or consent judgment which is coupled with a covenant not to execute against the insured brings with it a high potential for fraud or collusion" because "the insured's best interests are served by agreeing to damages in any amount as long as the agreement requires the insured will not be personally responsible for those damages." *Id.* at 518 (quotation omitted). Consequently, "a stipulated judgment should only bind an insurer under circumstances which protect against the potential for fraud and collusion." *Id.*

The Supreme Court of Nevada has not addressed what constitutes fraud or collusion in this context. But other courts have indicated that fraud and collusion occur "when the purpose is to injure the interests of an absent or nonparticipating party, such as an insurer or nonsettling defendant." *Cent. Mut. Ins. Co. v. Tracy's Treasures, Inc.*, 19 N.E. 3d 1100, 1120 (Ill. Ct. App. 2014); *see also Andrade v. Jennings*, 54 Cal. App. 4th 307, 327 (Cal. Ct. App. 1997). Some examples of fraud or collusion are self-evident, such as where the insured agrees to testify falsely to create coverage or the parties collusively agree to an unsupportable amount of damages. *Damron*, 460 P.2d at 1001.

But generally what may constitute fraud or collusion is a fact-intensive inquiry determined on a case-by-case basis. *Andrade*, 54 Cal. App. 4th at 327. Factors to consider include, but are not limited to, whether the settlement was unreasonable; whether it involved any misrepresentation or concealment of material facts; whether there was a lack of arms-length negotiation; whether there were "attempts to affect the insurance coverage" or to "artificially increase damages flowing from the insurer's breach of the duty to defend"; and whether there is "profit to the insured." *Cent. Mut. Ins. Co.*, 19 N.E. 3d at 1120 (quotation omitted). Additionally, the fact finder may consider the settlement amount compared to the value of the case or awards in similar cases, the facts known to the settling insured, whether there is a covenant not to execute, and the failure of the settling insured to consider viable available defenses. *Id.* at 1121; *Andrade*, 54 Cal. App. 4th at 331. Other relevant factors may include whether the non-participating insurer knew about the prove-up hearing and whether the presiding judge was informed that there was a covenant not to execute. *Andrade*, 54 Cal. App. 4th at 325-26, 332-33.

Whether a settlement agreement was fraudulent or collusive is an issue of fact. *Cent. Mut. Ins. Co.*, 19 N.E. 3d at 1121. The insurer who breached its duty to defend bears the burden of showing by a preponderance of the evidence that the agreement was fraudulent or collusive. *See Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116, 123 (Colo. 2010) (characterizing the issue of collusion as an affirmative defense for the insurer to raise and prove); *Pruyn*, 36 Cal. App. 4th at 530 ("It is sound and rational to conclude that the burden of showing that the settlement does not reflect the fact and amount of the insured's liability should fall upon the insurer whose breach has occasioned the settlement.") (quotation and emphasis omitted); *see also Clark Cnty. Sch. Dist.*, 168 P.3d at 94 (stating an affirmative defense raises "new facts and arguments that, if true, will defeat the plaintiff's . . . claim, even if all allegations in the complaint are true") (quotation omitted).

Genuine issues of material fact remain regarding whether the settlement agreement was the product of fraud or collusion. Viewing the facts in the light most favorable to Century, a reasonable jury could find the settlement agreement was fraudulent or collusive. The underlying

complaint alleged that Vasquez was in the course and scope of his employment despite Vasquez's steadfast position from the day of the accident that he was on a personal errand and was not working at the time of the accident. Vasquez told Century and Progressive that he was not working at the time of the accident. (Dkt. #192-3 at 3-5.)[8] After Pretner sued Vasquez, Progressive (Vasquez's personal insurer) did not defend Vasquez despite Vasquez's insistence that he had defenses based on Pretner's potential negligence. (*Id.* at 3.) Instead, Progressive provided him an attorney only to advise him about signing the settlement agreement. (*Id.* at 5; Dkt. #192-17.) When confronted with the agreement, Vasquez did not want to sign it because he maintained his position that he was not at work at the time of the accident and therefore Century should not be liable. (Dkt. #192-3 at 5; Dkt. #192-21.) He nevertheless agreed to take a default on both his own and Blue Streak's behalf in exchange for a covenant not to execute. A reasonable jury could find that agreement set the stage for Pretner's counsel to obtain a default judgment that manufactured coverage even though there was no evidence supporting coverage under the Century policy.

Although there was a default judgment hearing before an independent judge in state court, there is no evidence the judge was advised that both Century and Vasquez disputed whether Vasquez was driving in the course and scope of employment at the time of the accident and that this fact was important because it would trigger liability for a non-participating insurer. No evidence was presented to the judge showing Vasquez in fact was driving in the course and scope of his employment at the time of the accident. (Dkt. #192-22.) There also is no evidence the

---

[8] Pretner moves to strike Vasquez's declaration, arguing that Century cannot rely on after-acquired evidence to support its decision not to defend Blue Streak. Pretner also argues Vasquez cannot submit an affidavit contradicting the facts recited in the default judgment against him. I deny the motion to strike. The question of whether Century breached its duty to defend has been resolved against Century, and Century does not offer the Vasquez declaration on that issue. As to whether Vasquez can offer testimony contradicting the default judgment's findings, nothing in the settlement agreement precludes him from providing an affidavit in litigation between other parties. Indeed, if the settlement agreement required Vasquez to testify falsely about whether he was acting in the course and scope of his employment, that would weigh heavily in favor of finding fraud and collusion. The default judgment is not Vasquez's sworn testimony on the subject, and he therefore is not contradicting his own prior sworn testimony. Vasquez's testimony is competent and probative on the remaining questions in this lawsuit. Accordingly, I deny the motion to strike.

judge was told about the settlement agreement with the covenant not to execute. Although Century had notice of the lawsuit and the entry of default, there is no evidence Century knew Vasquez and Blue Streak had settled in exchange for a covenant not to execute. Nor is there evidence Century was notified of the application for default judgment or the date and time of the default judgment hearing. (Dkt. #73-2 at 230, 235 (certificates of service showing application for default judgment and date and time of hearing served only on Progressive attorney).) Viewing the totality of these circumstances in the light most favorable to Century, a reasonable jury could find the settlement agreement and resulting default judgment were the product of fraud or collusion designed to manufacture coverage where none existed under the Century policy.

On the other hand, viewing the facts in the light most favorable to Pretner, a reasonable jury could find that the settlement and resulting default judgment were not fraudulent or collusive. The complaint alleged the facts potentially triggering coverage under the Century policy before the parties entered into the settlement agreement. Although Vasquez denied he was acting in the course and scope of employment, he is a layperson who may not understand all of the factors that would inform the inquiry. Pretner advised Century of the lawsuit and of the default, and thus Century had the opportunity and the duty to litigate the issue. Instead, Century abandoned its insured.

A reasonable jury could find that Vasquez then did the only thing he could to avoid substantial liability for both Blue Streak and himself personally based on the catastrophic injuries Pretner suffered. *Samson*, 636 P.2d at 240-41 ("When the insurer exposes its policyholder to the sharp thrust of personal liability by breaching its obligations, the insured need not indulge in financial masochism.") (quotation omitted). Indeed, a reasonable jury may find it ironic that Century would expect Vasquez to forego a settlement and expose Blue Streak and himself to substantial liability in order to protect Century's interests when Century had breached its duty to defend Blue Streak as it was contractually required to do.

Moreover, Vasquez did not agree to testify falsely that he was driving in course and scope of employment, and the parties did not agree to any damages amount, much less an inflated

amount. Instead, Vasquez and Blue Streak agreed to default, as they had already done anyway. They also agreed that a state court judge would decide whether a default judgment was warranted and, if so, in what amount. A reasonable jury could conclude Century knew the complaint alleged facts potentially triggering coverage and knew its insured had defaulted and thereby admitted those facts. Century therefore should have monitored the litigation and attended the default judgment hearing if it wanted to contest Blue Streak's liability and the amount of that liability. Accordingly, a reasonable jury could conclude that "[a]ny resulting damage to [Century] was caused not by [Vasquez's] supposed misconduct but by [Century's] own intransigence." *Id.*

Material issues of fact remain regarding whether the settlement agreement and the default judgment were the product of fraud or collusion. That issue therefore must be presented to a jury.[9]

III. CONCLUSION

IT IS THEREFORE ORDERED that defendant Century Surety Company's motion for summary judgment **(Dkt. #192) is DENIED.**

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment **(Dkt. #194) is DENIED.**

IT IS FURTHER ORDERED that plaintiffs' motion to strike **(Dkt. #197) is DENIED.**

IT IS FURTHER ORDERED that the parties shall file a proposed joint pretrial order as required under the Local Rules.

DATED this 28th day of September, 2015.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

[9] Century stated at the September 17, 2015 hearing that discovery should be re-opened on the issue of fraud and collusion. However, Century raised this defense from the outset and discovery proceeded for over a year before I ruled Century was not bound by the default judgment. Century therefore had ample opportunity to investigate its fraud or collusion defense.

Maritz, Maxine

From: Cousineau, Maria
Sent: Monday, September 28, 2015 3:08 PM
To: Maritz, Maxine
Subject: FW: Activity in Case 2:12-cv-00978-APG-PAL Andrew et al v. Century Surety Company et al Order on Motion for Summary Judgment

Please send this to me asap

COZEN O'CONNOR

Maria Louise (Ria) Cousineau
Vice Chair, Office Managing Partner | Cozen O'Connor
601 S. Figueroa Street, Suite 3700 | Los Angeles, CA 90017
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From: cmecf@nvd.uscourts.gov [mailto:cmecf@nvd.uscourts.gov]
Sent: Monday, September 28, 2015 3:06 PM
To: cmecfhelpdesk@nvd.uscourts.gov
Subject: Activity in Case 2:12-cv-00978-APG-PAL Andrew et al v. Century Surety Company et al Order on Motion for Summary Judgment

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United States District Court

District of Nevada

Notice of Electronic Filing

The following transaction was entered on 9/28/2015 at 3:05 PM PDT and filed on 9/28/2015
Case Name: Andrew et al v. Century Surety Company et al
Case Number: 2:12-cv-00978-APG-PAL
Filer:
Document Number: 210

Docket Text:
ORDER DENYING Defendant's [192] Motion for Summary Judgment.

IT IS FURTHER ORDERED that Plaintiffs' [194] Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that Plaintiff's [197] Motion to Strike is DENIED.

IT IS FURTHER ORDERED that the parties shall file a proposed Joint Pretrial Order as required under the Local Rules.

Signed by Judge Andrew P. Gordon on 9/28/15. (Copies have been distributed pursuant to the NEF - PS)

2:12-cv-00978-APG-PAL Notice has been electronically mailed to:

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c0ccadf1b04b815001d6aabc13b82577ef4a832a25d86ea69b1c21f7acb4f]]

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DANA ANDREW, as legal guardian on behalf of Ryan T. Pretner, and RYAN T. PRETNER,

Plaintiffs,

v.

CENTURY SURETY COMPANY,

Defendant.

Case No. 2:12-cv-00978-APG-PAL

ORDER STAYING CASE

On June 14, 2016, I ordered the parties to file a joint or separate briefs about whether this case should be stayed pending an answer from the Supreme Court of Nevada on the certified question in *Nalder v. United Automobile Ins. Co.*, Ninth Cir. Case No. 13-17441. ECF No. 223. The parties submitted separate briefs despite the fact that both parties agree that this case should be stayed. ECF Nos. 223, 224.[1] Regardless, both parties agree that staying this case would conserve the resources of the court and the parties. I will stay this case. The parties are free to continue their settlement discussions and resolve this matter.

IT IS THEREFORE ORDERED that this case is stayed pending an answer from the Supreme Court of Nevada on the certified question in *Nalder*. The parties shall notify the court within 10 days of the Supreme Court issuing its decision.

DATED this 1st day of July, 2016.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

[1] I do not understand why the parties could not file a joint brief, or why Century Surety Company felt the need to file an 11 page brief to say "yes."

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DANA ANDREW, as legal guardian on behalf of Ryan T. Pretner, and RYAN T. PRETNER,

Plaintiffs,

v.

CENTURY SURETY COMPANY,

Defendant.

Case No. 2:12-cv-00978-APG-PAL

ORDER (1) GRANTING MOTION TO LIFT STAY, (2) SETTING A BRIEFING SCHEDULE, (3) DIRECTING PARTIES TO MEET AND CONFER REGARDING CERTIFYING QUESTIONS, AND (4) GRANTING MOTION FOR LEAVE TO FILE EXCESS PAGES

I previously stayed this matter in light of the Ninth Circuit Court of Appeals certifying to the Supreme Court of Nevada a question of law which could have a significant impact on the outcome of this case. ECF No. 227; *Nalder v. United Automobile Ins. Co.*, Ninth Cir. Case No. 13-17441. Prior to the stay, defendant Century Surety Company filed a motion for reconsideration of one of my prior orders. ECF No. 218. Briefing on that motion has been stayed.

Recently, the plaintiffs filed a motion to lift the stay because, given developments in the *Nalder* case, it appears the Supreme Court of Nevada's answer to the certified question will be delayed and possibly mooted altogether. ECF No. 245. Defendant Century does not oppose lifting the stay and requests I set a briefing schedule for its motion for reconsideration.

I grant the motion to lift stay. The plaintiffs shall have until August 9, 2017 to respond to the motion for reconsideration. Defendant Century shall have until August 18, 2017 to file a reply.

Additionally, I direct the parties to meet and confer and submit a joint status report regarding whether I ought to certify to the Supreme Court of Nevada the same question of law as in *Nalder*: "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?" The parties shall also address whether any other questions of law should be certified to the Supreme Court of Nevada.

IT IS THEREFORE ORDERED that the plaintiffs' motion to lift stay **(ECF No. 245) is GRANTED**.

IT IS FURTHER ORDERED that the plaintiffs shall file a response to the defendant's motion for reconsideration (ECF No. 218) on or before August 9, 2017. The defendant shall file a reply on or before August 18, 2017.

IT IS FURTHER ORDERED that the parties shall meet and confer and submit a joint status report on or before August 11, 2017 regarding whether I ought to certify to the Supreme Court of Nevada the same question that was certified in *Nalder* and/or any other questions of law.

IT IS FURTHER ORDERED that the defendant's motion for leave to file excess pages **(ECF No. 217) is GRANTED**.

DATED this 24th day of July, 2017.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DANA ANDREW, as Legal Guardian of RYAN T. PRETNER, and RYAN T. PRETNER, individually, Plaintiffs, vs. CENTURY SURETY COMPANY, a foreign corporation; MEADOWBROOK INSURANCE GROUP, a foreign corporation; and DOES I through X, inclusive, Defendants.	CASE NO.: 2:12-cv-00978-APG-PAL **JOINT STATUS REPORT**

Plaintiffs DANA ANDREW, as Legal Guardian of RYAN T. PRETNER, and RYAN T. PRETNER, individually, by and through their attorneys of record, DENNIS M. PRINCE, ESQ., TRACY A. EGLET, ESQ., and KEVIN T. STRONG, ESQ. of EGLET PRINCE, and Defendant CENTURY SURETY COMPANY, by and through its attorneys of record, MARTIN J. KRAVITZ, ESQ. of CHRISTIAN, KRAVITZ, DICHTER, JOHNSON & SLUGA; JAMES RIC GASS, ESQ. (admitted *pro hac vice*) and MICHAEL B. BRENNAN, ESQ. (admitted *pro hac vice*) of GASS WEBER MULLINS LLC; and MARIA LOUISE COUSINEAU, ESQ. of

COZEN O'CONNOR, hereby submit the parties' joint status report pursuant to the Court's July 24, 2017 Order.

During the parties' meet and confer telephone conference held on August 9, 2017, counsel agreed that this Court should certify the same question of law as in *Nalder v. United Automobile Insurance Company*, District Court Case No. 2:09-cv-01348-RCJ-GWF, to the Nevada Supreme Court:

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?

DATED this 11th day of August 2017.

EGLET PRINCE

/s/ Dennis M. Prince
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Dana Andrew as Legal Guardian of
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DATED this 11th day of August 2017.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DANA ANDREW, as legal guardian on behalf of Ryan T. Pretner, and RYAN T. PRETNER,

Plaintiffs,

v.

CENTURY SURETY COMPANY,

Defendant.

Case No. 2:12-cv-00978-APG-PAL

ORDER CERTIFIYING QUESTION TO THE SUPREME COURT OF NEVADA

Pursuant to Rule 5 of the Nevada Rules of Appellate Procedure, this Court seeks guidance from and respectfully certifies to the Supreme Court of Nevada the following question of law that may be determinative of matters before this Court and as to which there is no clearly controlling precedent in the decisions of the Supreme Court or Court of Appeals of Nevada:

> 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?

I. BACKGROUND

Plaintiff Ryan Pretner suffered catastrophic brain injuries after he was struck from behind by the side-view mirror of a truck while he was riding his bicycle on the shoulder of a road. The truck was driven by Michael Vasquez. Vasquez worked for Blue Streak, a mobile auto detailing business. Vasquez was personally insured by non-party Progressive Insurance. Blue Streak was insured by Century. Prior to any lawsuit being filed, Century declined to defend Blue Streak on the ground that Vasquez was not working in the course and scope of his employment for Blue Streak at the time of the accident. Century based its decision on Vasquez's statements to the police and to Century's employee that he was not working at the time of the accident.

////

Pretner sued Vasquez and Blue Streak in state court. The complaint alleged that Vasquez was driving in the course and scope of employment for Blue Streak at the time of the accident. Pretner's attorney forwarded the lawsuit to Century, but Century again declined to defend Blue Streak. Vasquez and Blue Streak then defaulted in the state court action. Pretner's attorney forwarded the entry of default to Century. Century responded that the claim was not covered. Pretner, Vasquez, and Blue Streak then entered into a settlement agreement. Vasquez and Blue Streak agreed to allow Pretner to pursue a default judgment against them, and Blue Streak assigned to Pretner all of its claims against Century. In exchange, Pretner agreed to not execute against Vasquez and Blue Streak. Additionally, Progressive agreed to tender the $100,000 limits of its policy covering Vasquez.

Pretner moved for a default judgment in the state court action. After a hearing, the state court entered a default judgment against Vasquez and Blue Streak. The default judgment set forth factual findings that were deemed admitted by the default. Those findings include that Vasquez negligently injured Pretner, that Vasquez was working in the course and scope of his employment with Blue Streak at the time, and that consequently Blue Streak was also liable. The default judgment entered against both Vasquez and Blue Streak was for over $18 million. Pretner, as assignee of Blue Streak, then filed this lawsuit against Century for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair claims practices.

I previously ruled that Century breached its contractual duty to defend Blue Streak as a matter of law because the underlying complaint alleged facts that potentially fell within the policy's coverage, thereby triggering the duty to defend. ECF No. 168. As to the parties' dispute about whether Century was bound by the default judgment against its insured, I reviewed a line of decisions issued by the Supreme Court of Nevada that hold an insurer is bound by a judgment if it has notice of a lawsuit that implicates coverage but does not intervene. I predicted the Supreme Court of Nevada would not extend this line of cases beyond the uninsured motorist context. I therefore concluded Century was not bound by the default judgment. Finally, I set forth the measure of damages for breaching the duty to defend as the reasonable costs of defense in the

underlying action plus the damages reasonably foreseeable at the time of the contract, capped at the policy limit of $1 million. I concluded the recoverable damages were capped at the policy limit because Century did not act in bad faith.

The parties agreed that the issue of damages could be resolved without a jury trial. Accordingly, they filed motions for summary judgment on the damages arising from Century's breach of its duty to defend.

An insured is entitled to recover its costs of defense when an insurer breaches its duty to defend, but it is undisputed that Blue Streak did not incur any defense costs because it defaulted in the underlying personal injury lawsuit. The only other evidence of damages is the default judgment entered against Blue Streak after Century refused to defend it. The parties thus disputed whether this judgment constituted recoverable damages caused by Century's breach of the duty to defend. They also disputed what preclusive effect the underlying default judgment should have.

In ruling on the cross motions for summary judgment, I reconsidered my prior ruling that recovery was capped at the policy limit. ECF No. 210. I predicted that the Supreme Court of Nevada would allow Blue Streak to recover consequential damages for Century's breach of the duty to defend, and that a default judgment is a reasonably foreseeable result of a breach of the duty to defend. I also predicted that the Supreme Court of Nevada would rule that in the context of a breach of the duty to defend, bad faith is not required to impose liability on the insurer in excess of the policy limits.

Century moved for reconsideration of my ruling. ECF No. 218. Shortly thereafter, the United States Court of Appeals for the Ninth Circuit certified to the Supreme Court of Nevada the following question of law:

> 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?

Nalder v. United Automobile Ins. Co., Ninth Cir. Case No. 13-17441. Given the similarities between the question certified in *Nalder* and the issues present in this case, I stayed this case in anticipation of the Supreme Court of Nevada deciding the question certified in *Nalder*. ECF No. 227.

Recent developments in the *Nalder* case have made it unclear whether the Supreme Court of Nevada will answer the question certified to it by the Ninth Circuit. The parties in this case have agreed that I shoulder certify the same question. ECF No. 251. I agree and therefore certify the same question of law to the Supreme Court of Nevada that was certified in *Nalder*.

II. PARTIES' NAMES AND DESIGNATION OF APPELLANT AND APPELLEE

Plaintiffs: Dana Andrew, as legal guardian on behalf of Ryan T. Pretner, and Ryan T. Pretner.

Defendant: Century Surety Company.

Because my last ruling was in favor of the plaintiffs, defendant Century Surety Company shall be the appellant.

III. NAMES AND ADDRESSES OF COUNSEL FOR THE PARTIES

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IV. ANY OTHER MATTERS THE CERTIFYING COURT DEEMS RELEVANT TO A DETERMINATION OF THE QUESTIONS CERTIFIED

The Court defers to the Supreme Court of Nevada to decide whether it requires any other information to answer the certified question. The Court does not intend its framing of the question to limit the Supreme Court of Nevada's consideration of the issue.

V. CONCLUSION

Having complied with the provisions of Nevada Rule of Appellate Procedure 5(c), the Court hereby directs the clerk of court to forward this Order under official seal, along with ECF Nos. 168 and 210, to the Supreme Court of the State of Nevada, 201 South Carson Street, Suite 201, Carson City, Nevada 89701-4702.

DATED this 14th day of August, 2017.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE