

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

---

JAMES MCNAMEE,  
Petitioner,

Electronically Filed  
Nov 28 2018 08:54 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

v.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN  
AND FOR THE COUNTY OF CLARK; and THE HONORABLE DOUGLAS E.  
SMITH, DISTRICT JUDGE,  
Respondent,

and

GIANN BIANCHI and DARA DEL PRIORE,  
Real Parties in Interest,

---

Extraordinary Writ from the Eighth Judicial District Court of the State of Nevada,  
in and for County of Clark

---

**REAL PARTIES IN INTEREST'S APPENDIX, VOLUME I of II**

---

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*(continued on next page)*

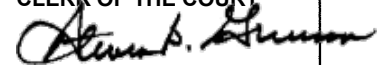
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*Counsel for Real Parties in Interest*

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5 Attorney for Defendant  
6 JAMES MCNAMEE

7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA

9 GIANN BIANCHI, individually, DARA )  
10 DELPRIORE, individually )

CASE NO. A-13-691887-C  
DEPT. NO.: VIII

11 Plaintiffs,

12 vs.

13 JAMES MCNAMEE, individually,  
DOES I - X, and ROE CORPORATIONS  
I - X, inclusive

14 Defendants.

15  
16 SUGGESTION OF DEATH UPON THE RECORD

17 Pursuant to Rule 25(a)(1) of the Nevada Rules of Civil Procedure, Jeffrey J. Orr, Esq.,  
18 of the law firm of Pyatt & Silvestri, suggests on the record the death of Defendant, JAMES  
19 McNAMEE, during the pendency of this litigation. The date of death of Defendant, JAMES  
20 McNAMEE was August 12, 2017.

21 DATED this 20 day of September, 2017.

22 PYATT SILVESTRI

23  
24  
25   
JEFFREY J. ORR, ESQ.

26 Nevada Bar No. 7854  
701 Bridger Avenue, Suite 600  
27 Las Vegas, NV 89101  
Attorneys for Defendant  
28 JAMES MCNAMEE

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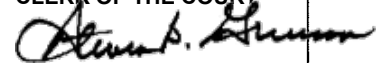
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**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I certify that I am an employee of Pyatt Silvestri and that on the 20th day of September, 2017, I caused the above and foregoing document, **SUGGESTION OF DEATH**, to be served as follows: Pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; to the attorney(s) listed below:

Corey M. Eshweiler, Esq.  
Glen J. Lerner & Associates  
4795 South Durango Drive  
Las Vegas, NV 89147  
Attorney for Plaintiffs  
GIANN BIANCHI and  
DARA DELPRIORE

  
Employee of PYATT SILVESTRI



1 JEFFREY J. ORR, ESQ.  
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8 [jorr@pyattsilvestri.com](mailto:jorr@pyattsilvestri.com)

9 Attorneys for Defendant  
10 JAMES MCNAMEE

11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

13 GIANN BIANCHI, individually, DARA  
14 DELPRIORE, individually

Case No.: A-13-691887-C  
Dept. No.: VIII

15 Plaintiffs

16 v.

17 JAMES MCNAMEE, individually, DOES I-X,  
18 and ROE CORPORATIONS I-X, inclusive

Hearing Date: \_\_\_\_\_  
Hearing Time: \_\_\_\_\_

19 Defendants.

20 **DEFENDANT JAMES MCNAMEE'S MOTION TO SUBSTITUTE SPECIAL**  
21 **ADMINISTRATOR IN PLACE AND STEAD OF DEFENDANT JAMES MCNAMEE AND**  
22 **TO AMEND CAPTION**

23 COMES NOW, Defendant James McNamee, by and through its attorneys of record, Jeffrey  
24 J. Orr, Esq. of Pyatt Silvestri and hereby submits this Motion to Substitute Special Administrator of  
25 Susan Clokey in place and stead of James McNamee as the Defendant in this action. Defendant  
26 also requests that the caption be amended to reflect the substitution of the new Defendant in this  
27 matter.

28 ///


///

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LAS VEGAS, NEVADA 89101-3941  
PHONE (702) 383-6000 FAX (702) 477-0088

1 This Motion is made and based upon the papers and pleadings on file herein, as well as the  
2 Memorandum of Points and Authorities and any oral argument at the time of hearing of this matter.

3 DATED this 14 day of December, 2017.

4 PYATT SILVESTRI

5  
6   
7 JEFFREY J. ORR, ESQ.  
8 Nevada Bar No. 7854  
9 701 Bridger Avenue, Suite 600  
10 Las Vegas, Nevada 89101  
11 Attorneys for Defendant  
12 JAMES MCNAMEE

13 **NOTICE OF MOTION**

14 TO: PLAINTIFFS GIANN BIANCHI & DARA DELPRIORE

15 TO: PLAINTIFF'S COUNSEL, COREY ESCHWEILER ESQ. & D. LEE ROBERTS, ESQ.

16 PLEASE TAKE NOTICE that the undersigned will bring the foregoing


17 **DEFENDANT JAMES MCNAMEE'S MOTION TO SUBSTITUTE SPECIAL**

18 **ADMINISTRATOR IN PLACE AND STEAD OF DEFENDANT JAMES MCNAMEE**

19 **AND TO AMEND CAPTION** for hearing in Department VIII on the 22 day of  
20 January, 2018, at the hour of \_\_\_\_\_m., or as soon thereafter as counsel may  
21 be heard.

22 DATED this 14 day of December, 2017.

23 PYATT SILVESTRI

24   
25 JEFFREY J. ORR, ESQ.  
26 Nevada Bar No. 7854  
27 701 Bridger Avenue, Suite 600  
28 Las Vegas, Nevada 89101  
Attorneys for Defendant  
JAMES MCNAMEE

**I.  
FACTUAL BACKGROUND**

This matter is a negligence action by Plaintiffs Gianni Bianchi and Dara Delpriore against Defendant James McNamee. On July 17, 2013, a vehicle driven by Defendant McNamee collided with Plaintiffs' vehicle. As a result of the collision, both Plaintiffs claim personal injury damages.

James McNamee passed away on August 12, 2017. On November 15, 2017, this Court granted a petition for Special Letters of Administration to appoint Special Administrator Susan Clokey as the Special Administrator of the Estate of James McNamee. (See Order Granting Petition for Special Letters of Administration, attached as Exhibit A).

A Suggestion of Death was filed in this matter on September 20, 2017. Trial is set for April 16, 2018. This motion seeks to substitute Special Administrator Susan Clokey as the Special Administrator of the Estate of James McNamee as Defendant in this action in place and stead of Defendant James McNamee who is deceased. This court has already determined that Special Administrator Susan Clokey has the authority to act as the Special Administrator and to defend this action. (Exhibit A).

**II.  
SUBSTITUTION OF THE PROPER DEFENDANT IS NECESSARY**

Because Defendant James McNamee has passed, this matter can no longer proceed against James McNamee. NRCP 25 (a)(1) states:

"If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party." NRCP 25(a)(1)

This court has already appointed Susan Clokey as Special Administrator of the Estate of James McNamee and has already determined that Ms. Clokey is the appropriate representative to


1 defend this action and allow it to proceed as to the insurance proceeds of the GEICO automobile  
2 insurance policy. NRCP 25(a)(1) states that the court may order substitution of the proper parties  
3 upon the death of a party. Because Defendant McNamee has passed, the Special Administrator of  
4 his estate is the proper party to this action.

5 **III.**  
6 **CONCLUSION**

7 This Court has already granted Special Letters of Administration and has appointed Susan  
8 Clokey as the Special Administrator. Because Mr. McNamee has passed, he can no longer be the  
9 Defendant in this matter. Pursuant to NRS 140.040(3)(b) and NRCP 25(a)(1), this court should order  
10 that Susan Clokey, Special Administrator of the Estate of James McNamee be substituted as the  
11 Defendant in this matter in place and stead of James McNamee. It is also requested that the caption  
12 be amended to reflect the new Defendant. (See proposed new caption, attached as Exhibit B).

13 DATED this 14 day of December, 2017

14 **PYATT SILVESTRI**

15  
16   
17 \_\_\_\_\_  
18 JEFFREY J. ORR, ESQ.  
19 Nevada Bar No. 7854  
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23 Attorney for Defendant  
24 James McNamee  
25  
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**CERTIFICATE OF SERVICE**

Pursuant to NRCp 5(b), I certify that I am an employee of Pyatt Silvestri and that on the 14th day of December, 2017, I caused the above and foregoing document **DEFENDANT JAMES MCNAMEE'S MOTION TO SUBSTITUTE SPECIAL ADMINISTRATOR IN PLACE AND STEAD OF DEFENDANT JAMES MCNAMEE AND TO AMEND CAPTION,** to be served as follows: Pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail to the attorney(s) listed below:

Corey M. Eschweiler, Esq.  
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Attorney for Plaintiffs

D. Lee Roberts, Esq.  
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC  
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Las Vegas, NV 89118  
Attorney for Plaintiffs

Robert McNamee  
2472 230<sup>th</sup> Street  
Mahnomen, MN 56557-9034

  
An Employee of PYATT SILVESTRI

# Exhibit A

ORIGINAL

Electronically Filed  
11/16/2017 4:41 PM  
Steven D. Grierson  
CLERK OF THE COURT

*Steven D. Grierson*

1 **ORDR**

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10 [jorr@pyattsilvestri.com](mailto:jorr@pyattsilvestri.com)  
11 Attorney for Petitioner,  
12 Special Administrator Susan Clokey

13 **EIGHTH JUDICIAL DISTRICT COURT**  
14 **CLARK COUNTY, NEVADA**

15 In the Matter of the Estate of James Allen ) Case No.: P-17-093041-E  
16 McNamee, Deceased ) Dept No.: S  
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29 **ORDER GRANTING**  
30 **PETITION FOR SPECIAL LETTERS OF ADMINISTRATION**

31 Upon submission of the Petition for Special Letters of Administration, representing  
32 as follows:

- 33 1. That Decedent, James Allen McNamee died on the 12<sup>th</sup> day of August, 2017, in  
34 the County of Mohave, State of Arizona.
- 35 2. That Decedent was a resident of Mohave County, Arizona, at the time of his  
36 death.
- 37 3. That at the time of Decedent's death, Decedent was a Defendant in a personal  
38 injury lawsuit, *Bianchi et. al v. James Allen McNamee*, Eighth Judicial District Court, Clark  
39 County, Nevada Case No. A-13-691887-C.
- 40 4. Petitioner has conducted a search of assets for James Allen McNamee,  
41 decedent. Upon information and belief, the Estate of James Allen McNamee has no assets  
42 to satisfy any judgment other than an automobile insurance policy with GEICO. That

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1 insurance policy, GEICO policy #4180457162 provides automobile liability insurance  
2 coverage of \$30,000 per person and \$60,000 per accident.

3 5. Petitioner is a resident of the State of Nevada, and is employed at the law firm of  
4 Pyatt Silvestri located at 701 Bridger Avenue, Suite, 600, Las Vegas, NV 89101.

5 6. Special Administration is needed to allow *Bianchi et. al. v. McNamee*, Case No.  
6 A-13-691887-C to continue and substitute the real party in interest, the Special  
7 Administrator.

8 7. Petitioner is willing to act as Special Administrator of the estate to defend  
9 *Bianchi et. al. v. McNamee*, Case No. A-13-691887-C.

10 8. Petitioner has never been convicted of a felony. Petitioner is qualified under  
11 NRS 139.010 to serve as Special Administrator of the Estate.

12 **NOW, THEREFORE, IT IS HEREBY ORDERED** that Susan Clokey is appointed as  
13 Special Administrator and that Special Letters of Administration be issued, without bond,  
14 pursuant to Nevada Revised Statutes 140(2)(a) and 140(3)(b).

15 The sole purpose of this order is to allow *Bianchi et. al. v. McNamee*, Case No.  
16 A-13-691887-C to proceed as to the insurance proceeds of the GEICO automobile insurance  
17 policy pursuant to Nevada Revised Statutes 140.040(2)(a) and 140.040(3)(b). Petitioner  
18 intends to defend that action as the real party in interest.

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1 The Special Administrator does not have any other authority beyond Nevada  
2 Revised Statutes 140(2)(a) and 140(3)(b) and may not distribute any property other than the  
3 GEICO automobile insurance policy with automobile liability insurance coverage of \$30,000  
4 per person and \$60,000 per accident.

5 Any funds will be held in a blocked account or attorney trust account.

6 IT IS FURTHER ORDERED that the settlement of the decedent's lawsuit is subject to  
7 this court's approval.

8 DATED this 15<sup>th</sup> day of <sup>NOV.</sup> ~~October~~, 2017.

*Vincent Ochoa*  
DISTRICT COURT JUDGE *sa*

9 Submitted by:

10 *Jeffrey J. Orr*  
11  
12 Jeffrey J. Orr, Esq.  
13 Nevada Bar No. 7854  
14 PYATT SILVESTRI  
15 701 Bridger Avenue, Suite 600  
16 Las Vegas, NV 89101  
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18 [jorr@pyattsilvestri.com](mailto:jorr@pyattsilvestri.com)  
19 Attorney for Petitioner,  
20 Special Administrator Susan Clokey  
21  
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EXHIBIT A

**NRS 140.040 Powers, duties and immunity from liability for certain claims.**

1. A special administrator shall:

(a) Collect and preserve for the executor or administrator when appointed all the goods, chattels and receivables of the decedent, and all incomes, rents, issues, profits, claims and demands of the estate.

(b) Take charge and management of the real property and enter upon and preserve it from damage, waste and injury.

2. A special administrator may:

(a) For all necessary purposes, commence, maintain or defend actions and other legal proceedings as a personal representative.

(b) Without prior order of the court, sell any perishable property of the estate, as provided in

NRS 148.170.

(c) Exercise such other powers as have been conferred by the order of appointment.

(d) Obtain leave of the court to borrow money or to lease or mortgage real property in the same manner as an executor or administrator.

3. A special administrator is not liable:

(a) To any creditor on any claim against the estate; or

(b) For any claim against the decedent except a claim involving wrongful death, personal injury or property damage if the estate contains no assets other than a policy of liability insurance.

[Part 86:107:1941; 1931 NCL § 9882.86] – (NRS A 1971, 647; 1983, 668; 1999, 2276)

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of Pyatt Silvestri and that on the 10<sup>th</sup> day of November, 2017, I caused the above **ORDER GRANTING PETITION FOR SPECIAL LETTERS OF ADMINISTRATION**, to be served pursuant to NRCP 5(b) to be electronically served through the *Eighth Judicial District Court's electronic filing system* and via *U.S. Mail* to the following party listed below:

Robert McNamee  
2472 230<sup>th</sup> Street  
Mahnomen, MN 56557-9034

  
An Employee of PYATT SILVESTRI

# Exhibit B

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5 Attorneys for Defendant  
6 SUSAN CLOKEY, Special  
Administrator of the Estate of  
7 James McNamee

8 **DISTRICT COURT**  
9 **CLARK COUNTY, NEVADA**

10  
11 GIANN BIANCHI, individually, DARA  
DELPRIORE, individually

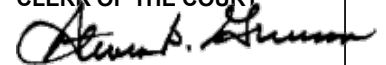
12 Plaintiffs

13 v.

14 SUSAN CLOKEY, Special Administrator of the  
Estate of James McNamee, DOES I-X, and ROE  
15 CORPORATIONS I-X, inclusive

16 Defendants.  
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Case No.: A-13-691887-C  
Dept. No.: VIII



**MOT**

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*Attorneys for Plaintiffs Gianni Bianchi  
and Dara Del Priore*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

GIANN BIANCHI, individually,  
DARA DELPRIORE, individually,

Plaintiff,

vs.

JAMES McNAMEE, individually, DOES I - X,  
and ROE CORPORATIONS I - X, inclusive,

Defendants.

CASE NO.: A691887  
DEPT NO.: VIII

**OPPOSITION TO DEFENDANT JAMES  
ALLEN McNAMEE'S MOTION TO  
SUBSTITUTE SPECIAL  
ADMINISTRATOR IN THE PLACE  
AND STEAD OF DEFENDANT JAMES  
McNAMEE AND TO AMEND CAPTION**

**Date of Hearing: Jan. 22, 2018  
Time of Hearing: In chambers**

Plaintiffs Gianni Bianchi and Dara Del Priore, through their attorneys of record, Corey M. Eschweiler, Esq., Craig A. Henderson, Esq., and Joshua L. Benson, Esq., of GLEN LERNER INJURY ATTORNEYS, and Lee D. Roberts, Esq., of WEINBERG WHEELER HUDGINS GUNN

1 & DIAL, file this Opposition to Defendant James McNamee's Motion to Substitute Special  
2 Administrator in Place and Stead of Defendant James McNamee and To Amend Caption. As set  
3 forth in detail in the attached Petition, Plaintiff has petitioned the Probate Court to appoint the public  
4 administration to administer McNamee's estate. See Petition for Issuance of General Letters of  
5 Administration and For Appointment of *Cumis* Counsel for the Estate of James Allen McNamee,  
6 attached as Exhibit 1. This, because a special administrator is proper only if the estate's sole asset is  
7 a liability insurance policy. *Jacobson v. Estate of Clayton*, 121 Nev. 518, 522, 119 P.3d 132, 134  
8 (2005). That is not the case here, as the Estate of James Allen McNamee has assets in the form of  
9 bad faith causes of action against McNamee's automobile liability insurer, GEICO. As explained  
10 below, Plaintiffs, therefore, request this court defer ruling on this instant motion to substitute special  
11 administrator until the Probate Court adjudicates Plaintiff's Petition.

12 **PLAINTIFF'S OPPOSITION TO MOTION TO SUBSTITUTE SPECIAL**  
13 **ADMINISTRATION IN PLACE AND STEAD OF DEFENDANT JAMES ALLEN**  
14 **McNAMEE**

15 Plaintiffs' allegations are detailed in their Petition, but by way of brief background, Plaintiffs  
16 Gianni Bianchi and Dara DelPriore were injured when the decedent, Defendant James Allen  
17 McNamee, crashed his vehicle into the rear of Plaintiffs vehicle on July 17, 2013. Since then,  
18 decedent's automobile liability insurer, GEICO, exposed decedent, and, now, decedent's Estate, to  
19 liability well in excess of the available automobile liability insurance coverage. This, by GEICO  
20 refusing to compromise Plaintiffs' negligence claims against decedent within the liability insurance  
21 policy limits. In fact, GEICO has since admitted that Plaintiffs' damages exceed the available  
22 liability insurance coverage. In other words, the Estate's assets consist not only of decedent's  
23 liability insurance policy through GEICO, but the Estate's causes of action against GEICO for  
24 breach of contract and tortious breach of the implied covenant of good faith and fair dealing, or  
25 insurance "bad faith."

26 Notwithstanding all of this, decedent's insurance-appointed defense counsel, the Pyatt  
27 Silverstri law firm, came before the probate court seeking to have a special administrator appointed  
28 claiming, inaccurately, that the Estate possesses no assets, other than the insurance policy, to satisfy

1 Plaintiffs' negligence claims. In other words, the Petition for Letters of Special Administration did  
2 not disclose the true extent of the Estate's liability to Plaintiffs, or that the Estate's liability to  
3 Plaintiffs already exceeds the GEICO insurance policy. The Petition for Letters of Special  
4 Administration also did not identify the true nature of the Estate's assets, assets that include causes  
5 of action for bad faith against GEICO. The Petition for Letters of Special Administration also did  
6 not advise the court of the actual conflict of interest that exists between GEICO and the Estate of  
7 James Allen McNamee that requires appointment of *Cumis* counsel for the Estate pursuant to recent  
8 Nevada Supreme Court jurisprudence.

9 More problematic, the law firm sought appointment of its own employee as the special  
10 administrator to make decisions regarding the litigation. This only further compounds the conflict  
11 where the law firm being paid by GEICO to represent the insured now has decision making  
12 authority on behalf of the estate for the underlying personal injury litigation. In short, because the  
13 decedent's Estate does possess assets beyond the liability insurance policy, the Estate must be  
14 generally administrated, and the administrator substituted in place of the decedent McNamee under  
15 NRCp 25(a)(1). Further, because of the actual conflict of interest that exists between the Estate of  
16 James Allen McNamee and GEICO, the Estate is entitled to *Cumis* counsel at GEICO's expense, to  
17 advise the Estate of its rights against GEICO. *See State Farm v. Hansen*, 131 Nev. Adv. Rep. 74,  
18 357 P.3d 338, 341 (Sep. 24, 2015). Otherwise, the interests of the Estate will continue to be placed  
19 behind the financial interests of GEICO.

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1 In light of the foregoing and the arguments set forth in Plaintiffs' Petition, Plaintiffs request  
2 that this Court defer ruling on the present motion to substitute special administration until the  
3 Probate Court rules on Plaintiffs' Petition.

4  
5  
6 GLEN LERNER INJURY ATTORNEYS

7  
8 By: /s/ Craig A. Henderson  
9 Corey M. Eschweiler, Esq.  
10 Nevada Bar No. 6635  
11 Craig A. Henderson, Esq.  
12 Nevada Bar No. 10077  
13 4795 South Durango Drive  
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15 (702) 877-1500

16 WEINBERG WHEELER HUDGINS  
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18 Lee D. Roberts, Esq.,  
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20 6385 South Rainbow Blvd., Suite 400  
21 Las Vegas, NV 89118  
22 *Attorneys for Plaintiffs Gianni Bianchi*  
23 *and Dara Del Priore*  
24  
25  
26  
27  
28

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of GLEN LERNER INJURY  
3 ATTORNEYS and that on the 3<sup>rd</sup> day of January, 2018, I caused the above **OPPOSITION TO**  
4 **DEFENDANT JAMES ALLEN McNAMEE'S MOTION TO SUBSTITUTE SPECIAL**  
5 **ADMINISTRATOR IN THE PLACE AND STEAD OF DEFENDANT JAMES McNAMEE**  
6 **AND TO AMEND CAPTION** to be served pursuant to NRCP 5(b) to be electronically served  
7 through the Eighth Judicial District Court's electronic filing system and via US Mail to the  
8 following parties listed below:

9 (VIA US MAIL)

10 Robert McNamee  
11 2472 230<sup>th</sup> Street  
12 Mahnommen, MN 56557-9034

13 Jeffrey J. Orr, Esq.  
14 PYATT SILVESTRI  
15 701 Bridger Avenue, Suite 600  
16 Las Vegas, NV 89101  
17 *Attorneys for Special Administrator Susan Clokey*

18 /s/ Miriam Alvarez  
19 An employee of Glen Lerner Injury Attorneys  
20  
21  
22  
23  
24  
25  
26  
27  
28

# EXHIBIT 1

# EXHIBIT 1

1 **PET**  
Corey M. Eschweiler, Esq.  
2 Nevada Bar No. 6635  
Craig A. Henderson, Esq.  
3 Nevada Bar No. 10077  
Joshua L. Benson, Esq.  
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12 Email: LRoberts@wwhgd.com

13 *Attorneys for Petitioners Gianni Bianchi*  
*and Dara Del Priore*

14 EIGHTH JUDICIAL DISTRICT COURT

15 CLARK COUNTY, NEVADA

16 In the matter of the Estate of JAMES ALLEN  
17 MCNAMEE, Deceased.

CASE NO.: P-17-093041-E  
DEPT NO.: PC-1

**PETITION FOR ISSUANCE OF  
GENERAL LETTERS OF  
ADMINISTRATION AND FOR  
APPOINTMENT OF *CUMIS* COUNSEL  
FOR THE ESTATE OF JAMES ALLEN  
MCNAMEE**

**Date of Hearing:**  
**Time of Hearing:**

24  
25 ///

26 ///

Petitioners Gianni Bianchi and Dara Del Priore, through their attorneys of record, Corey M. Eschweiler, Esq., Craig A. Henderson, Esq., and Joshua L. Benson, Esq., of GLEN LERNER INJURY ATTORNEYS, and Lee D. Roberts, Esq., of WEINBERG WHEELER HUDGINS GUNN & DIAL, petition this court:

(1) pursuant to NRS 139.040 (g)-(h), NRS 139.050, and NRS 139.090, issue letters of general administration to John J. Cahill, the Clark County Public Administrator, for the Estate of James Allen McNamee;

(2) pursuant to NRCP 25(a) order substitution of the proper parties in place of the decedent,  
James Allen McNamee and

(2) pursuant to *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338 (Sep. 24, 2015), order appointment of *Cumis* counsel for the Estate of James Allen McNamee based on the actual conflict of interest that exists between the Estate of James Allen McNamee, and GEICO (Decedent James Allen McNamee's automobile liability insurer).

This Petition is based upon the following memorandum of points and authorities, the Declaration of Corey M. Eschweiler, Esq., the papers and Pleadings on file with the court, and the oral argument of the parties.

GLEN LERNER INJURY ATTORNEYS

By: /s/ Craig A. Henderson  
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*Attorneys for Petitioners Gianni Bianchi  
and Dara Del Priore*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In this probate matter that involves pending personal injury litigation against the decedent,  
4 James Allen McNamee, petitioners Giann Bianchi and Dara DelPriore were injured when the  
5 decedent crashed his vehicle into the rear of petitioners' vehicle on July 17, 2013. Since then,  
6 decedent's automobile liability insurer, GEICO, exposed decedent, and, now, decedent's Estate, to  
7 liability well in excess of the available automobile liability insurance coverage. This, by GEICO  
8 refusing to compromise Petitioners' negligence claims against decedent within the liability  
9 insurance policy limits. In fact, GEICO has since admitted that Petitioners' damages exceed the  
10 available liability insurance coverage. In other words, the Estate's assets consist not only of  
11 decedent's liability insurance policy through GEICO, but the Estate's causes of action against  
12 GEICO for breach of contract and tortious breach of the implied covenant of good faith and fair  
13 dealing, or insurance "bad faith."

14 Notwithstanding all of this, decedent's insurance-appointed defense counsel, the Pyatt  
15 Silverstri law firm, came before this court seeking to have a special administrator appointed  
16 claiming, inaccurately, that the Estate possesses no assets, other than the insurance policy, to satisfy  
17 Petitioners' negligence claims. In other words, the Petition for Letters of Special Administration did  
18 not disclose the true extent of the Estate's liability to Petitioners, or that the Estate's liability to  
19 Petitioners already exceeds the GEICO insurance policy. The Petition for Letters of Special  
20 Administration also did not identify the true nature of the Estate's assets, assets that include causes  
21 of action for bad faith against GEICO. The Petition for Letters of Special Administration also did  
22 not advise the court of the actual conflict of interest that exists between GEICO and the Estate of  
23 James Allen McNamee that requires appointment of *Cumis* counsel for the Estate pursuant to recent  
24 Nevada Supreme Court jurisprudence. More problematic, the law firm sought appointment of its  
25 own employee as the special administrator to make decisions regarding the litigation. This only  
26 further compounds the conflict where the law firm being paid by GEICO to represent the insured  
27 now has decision making authority on behalf of the estate for the underlying personal injury  
28 litigation. In short, because the decedent's Estate does possess assets beyond the liability insurance

1 policy, the Estate must be generally administrated. Further, because of the actual conflict of interest  
2 that exists between the Estate of James Allen McNamee and GEICO, the Estate is entitled to *Cum is*  
3 counsel at GEICO's expense, to advise the Estate of its rights against GEICO. *See State Farm v.*  
4 *Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338, 341 (Sep. 24, 2015). Otherwise, the interests of the  
5 Estate will continue to be placed behind the financial interests of GEICO.

## 6 II. FACTS

### 7 A. Background of the underlying negligence litigation.

8 On July 17, 2013, decedent James Allen McNamee, was driving a Ford van on East Sahara  
9 Avenue approaching a red light at the intersection of Sahara and McLeod. Decedent failed to slow  
10 the van in time and the van crashed into the rear of a Nissan Pathfinder that was stopped at the red  
11 traffic signal. The Nissan Pathfinder was driven by Petitioner Gianni Bianchi. Petitioner Dara  
12 DelPriore occupied the front passenger seat of the Nissan. Both Gianni and Dara suffered severe  
13 injuries in the collision.

### 14 B. GEICO has exposed decedent's estate to excess liability.

15 At the time of the July 17, 2013, collision, decedent was covered by an automobile liability  
16 insurance policy issued by GEICO, policy number 4180457162. *See* Petition for Letters of Special  
17 Administration, at 2 ¶ 6, filed with this Court Sep. 20, 2017. The GEICO policy provided decedent  
18 with liability insurance coverage of \$30,000 per person up to \$60,000 per occurrence. *Id.* Since the  
19 collision on July, 2013, decedent's automobile liability insurer, GEICO, has repeatedly refused to  
20 settle Gianni and Dara's claims within decedent's policy limits, despite knowing Gianni and Dara's  
21 damages far exceed the \$30,000 per person liability insurance coverage. By way of brief  
22 background:

- 23 • On October 25, 2013, Gianni and Dara each served GEICO with a demand requesting  
24 decedent's \$30,000 per person policy limit in exchange for a release of all claims against  
25 decedent. At the time, Gianni had incurred \$10,707.78 in medical bills and was  
26 recommended for pain management medical treatment at an estimated cost of \$12,050. Dara  
27 had incurred \$10,797.25 in medical bills and had also been recommended for pain  
28 management treatment at an estimated cost of \$12,050. GEICO did not tender decedent's  
policy limits. Gianni and Dara, then, proceeded with the recommended injections.

1 • On November 19, 2013, Giann and Dara sued decedent for damages arising out of the July  
2 17, 2013, crash. *See Bianchi and Del Priore v. James McNamee*, Case Number A-13-  
691887-C, Eighth Judicial District Court, Clark County, Nevada.

3 • On April 3, 2014, decedent served Dara, only, with an offer to settle in the amount of  
4 \$30,000. Dara rejected this offer, as her medical bills, alone, totaled \$36,214.35. Shortly  
5 thereafter, Giann and Dara's counsel advised GEICO to appoint separate counsel to advise  
6 decedent of his potential bad faith claim against GEICO. Less than three months later,  
decedent filed a substitution of attorney retaining new, outside counsel (the Pyatt Silvestri  
law firm).

7 • By spring of 2015, Giann's medical bills had increased to \$329,494, including the cost of  
8 the spinal surgery Giann's doctor recommended. This, in addition to \$348,948 for Giann's  
9 future medical care; \$277,832 for Giann's loss of household services; and \$1,867,000 for  
10 Giann's loss of enjoyment of life -- a total of more than \$2,800,000 in damages.  
Consequently, on April 21, 2015, Giann served McNamee with an offer to settle for  
\$435,000. Decedent did not accept Giann's offer.

11 • Also by Spring, 2015, Dara's medical bills had increased to \$93,980. This, in addition to  
12 \$296,537 in lost wages; \$384,361 in loss of household services; and \$1,700,000 in loss of  
13 enjoyment of life -- a total of more than \$2,470,000 in damages. On April 21, 2015, Dara  
14 served decedent with an offer to settle in the amount of \$345,000. Decedent did not accept  
the offer.

15 In other words, despite knowing Giann and Dara's medical special damages were going to exceed  
16 decedent's policy limits, GEICO refused to pay the policy to petitioners.

17 **C. GEICO admits Petitioners' damages exceed decedent's liability insurance  
18 coverage.**

19 By July, 2015, Giann's total damages had increased to \$2,850,136.97, including \$356,306 in  
20 medical special damages alone. Dara's total damages had increased to \$2,481,097, including  
21 \$99,280 in medical special damages. On July 13, 2015, decedent offered to settle Giann and Dara's  
claims, each for an amount in excess of McNamee's automobile liability insurance policy limit.<sup>1</sup>

22 Petitioners rejected these offers that did not even compensate them for their medical special  
23 damages. The two offers are critical, however, because through the offers, GEICO admitted  
24 the value of Giann and Dara's claims exceed decedent's \$60,000 of insurance coverage. Put  
25 differently, GEICO has already admitted the Estate of James Allen McNamee will be exposed

26  
27  
28 <sup>1</sup> Defendant's written offers to Plaintiffs and Plaintiffs' written correspondence to Defendant's counsel's insurer will be  
provided to the court for in camera review upon request.

1 to excess liability as a result of GEICO's bad faith refusal to compromise Petitioners' claims  
2 for the policy limits.

3 **D. Decedent died before Petitioners' claims went to trial in the Eighth Judicial**  
4 **District Court.**

5 On September 20, 2017, decedent's counsel in the *Bianchi v. McNamee* litigation, Pyatt  
6 Silvestri, served a Suggestion of Death on the Record indicating decedent had passed on August 12,  
7 2017. See Suggestion of Death Upon the Record, attached as Ex. 1-A; see also Death Certificate,  
8 attached as Ex. 1-B. This, five days before Giann and Dara's negligence claims against decedent  
9 were scheduled to proceed to trial on September 25, 2017, in the Eighth Judicial District Court. The  
10 District Court trial in *Bianchi v. McNamee* has since been continued to April 16, 2018.

11 **E. GEICO sought appointment of a special administrator.**

12 Also on September 20, 2017, Pyatt Silvestri filed a Petition for Special Letters of  
13 Administration. The Petition sought to have Susan Clokey, an employee of Pyatt Silvestri,  
14 appointed as the Special Administrator of the Estate of James Allen McNamee based on Pyatt  
15 Silvestri's representations to this Court that "the Estate of James Allen McNamee has no assets to  
16 satisfy any judgment other than an automobile policy with GEICO [providing] automobile liability  
17 insurance coverage of \$30,000 per person and \$60,000 per accident." See Petition for Letters of  
18 Special Administration, at 2 ¶ 6, filed with this Court Sep. 20, 2017.

19 **F. A general administrator must be appointed.**

20 To the contrary, based on GEICO's failure to settle Giann and Dara's claims within  
21 decedent's policy limits, GEICO, admittedly, has exposed the Estate of James Allen McNamee to  
22 liability in excess of decedent's \$60,000 liability insurance policy. In other words, the Estate of  
23 James Allen McNamee has causes of action against GEICO for, *inter alia*, breach of contract and  
24 tortious breach of the implied covenant of good faith and fair dealing. As important, there exists,  
25 and has existed for some time, an actual conflict of interest between GEICO and the Estate of James  
26 Allen McNamee, both of whom are currently represented by the same law firm, Pyatt Silvestri. See  
27 *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338, 340 (Sep. 24,

1 2015) (“Nevada, in contrast, is a dual-representation state: Insurer-appointed counsel represents both  
2 the insurer and the insured.”)

3 It is patently obvious that Pyatt Silvestri is not representing the interests of the Estate of  
4 James Allen McNamee, including failing to advise the Estate of its excess liability and failing to  
5 advise the Estate or even this Court, regarding the Estate’s bad faith rights against GEICO. *See*  
6 Petition for Letters of Special Administration, at 2 ¶ 6, filed with this Court Sep. 20, 2017 (“the  
7 Estate of James Allen McNamee has no assets to satisfy any judgment other than an automobile  
8 policy with GEICO [providing] automobile liability insurance coverage of \$30,000 per person and  
9 \$60,000 per accident”). Consequently, Petitioners’ counsel sent Pyatt Silvestri a second letter on  
10 November 8, 2017, advising them of these developments and that the Estate of James Allen  
11 McNamee is entitled to separate counsel. Petitioners’ counsel has received no response to the letter.

12 **G. The special administrator must be removed and separate *Cumis* counsel**  
13 **appointed for the Estate of James Allen McNamee.**

14 This Court, having not been fully apprised of the facts and circumstances surrounding the  
15 Estate’s liability to Giann and Dara, or the true nature of the Estate’s assets, granted the petition and  
16 issued an Order Granting Petition for Special Letters of Administration to Susan Clokey. *See* Nov.  
17 16, 2017, Order Granting Petition for Special Letters of Administration, on file with this Court. The  
18 purpose of this petition, therefore, is (1) appoint the Clark County Public Administrator John J.  
19 Cahill, as the general administrator of the Estate of James Allen McNamee, and (2) order the  
20 retention by GEICO of *Cumis* counsel for the Estate of James Allen McNamee pursuant to the  
21 Nevada Supreme Court’s holding in *State Farm v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338,  
22 341 (Sep. 24, 2015).

23 **III. ARGUMENT**

24 **A. A general administrator must be appointed to administer decedent’s estate.**

25 Pursuant to NRS 140.040(3)(b), a special administrator is not liable “[f]or any claim against  
26 the decedent except a claim involving wrongful death, personal injury or property damage if the  
27 estate contains no assets other than a policy of liability insurance.” NRS 140.040(3)(b) (emphasis  
28

1 added). As the Nevada Supreme Court has made clear, however, this statute is applicable only  
2 when the estate's sole asset is a liability insurance policy:

3 [A]fter the 1971 amendment, NRS 140.040(3) permits the special administrator to  
4 pay wrongful death, personal injury, and property damage claims when the  
5 estate's only asset is a liability insurance policy. NRS 140.040(3) promotes  
6 judicial economy and efficient resolution of claims by enabling a plaintiff with  
such claims to avoid lengthy, costly, formal probate procedures when the sole  
asset is a liability insurance policy.

7 *Jacobson v. Estate of Clayton*, 121 Nev. 518, 522, 119 P.3d 132, 134 (2005). If, however, the estate  
8 has other assets, or the claim exceeds the insurance coverage and will diminish the estate, the estate  
9 must be administered by a general administrator:

10 The claim procedure specified by ch. 147 must be followed whenever the estate of  
11 the deceased may be diminished if the creditor is successful. This, of course,  
12 might happen in a wrongful death action against the estate of a deceased  
13 tortfeasor. The loss for which damages are claimed may not be covered by  
liability insurance. If covered, the insurance limits might prove to be inadequate.  
In either instance the estate is diminished if the claimant is successful.

14 *Bodine v. Stinson*, 85 Nev. 657, 661, 461 P.2d 868, 871 (1969) (superseded by statute on other  
15 grounds as explained in *Jacobson v. Estate of Clayton*, 121 Nev. 518, 522, 119 P.3d 132, 134  
16 (2005)). Here, Giann and Dara's negligence claims against decedent exceed the available liability  
17 insurance and will diminish the Estate. Furthermore, the Estate of James Allen McNamee has assets  
18 above and beyond the \$60,000 liability insurance policy issued by GEICO, i.e., claims for breach of  
19 contract and tortious breach of the implied covenant of good faith and fair dealing against GEICO.  
20 Consequently, special administration of the McNamee Estate is not authorized by the special  
21 administrator statutes. *Id.*

22 **B. The Estate of James Allen McNamee possesses claims for insurance bad faith**  
23 **against GEICO.**

24 It is well settled that:

25 Nevada law recognizes the existence of an implied covenant of good faith and fair  
26 dealing in every contract. An insurer fails to act in good faith when it refuses  
27 'without proper cause' to compensate the insured for a loss covered by the policy.  
28 Such conduct gives rise to a breach of the covenant of good faith and fair dealing.  
This breach or failure to perform constitutes 'bad faith' where the relationship  
between the parties is that of insurer and insured.

1 *See Pemberton v. Farmers Ins. Exch.*, 109 Nev. 789, 792-93, 858 P.2d 380, 382 (1993) (internal  
2 citations omitted). As the court has further explained, “[t]he law, not the insurance contract,  
3 imposes this covenant on insurers. A violation of the covenant gives rise to a bad-faith tort claim.  
4 This court has defined bad faith as an actual or implied awareness of the absence of a reasonable  
5 basis for denying benefits of the [insurance] policy.” *See Allstate Ins. Co. v. Miller*, 125 Nev. 300,  
6 308, 212 P.3d 318, 324 (2009) (internal citations omitted); *see also United States Fid. & Guar. Co.*  
7 *v. Peterson*, 91 Nev. 617, 619-20, 540 P.2d 1070, 1071 (1975) (“We approve and adopt the rule that  
8 allows recovery of consequential damages where there has been a showing of bad faith by the  
9 insurer. Where an insurer fails to deal fairly and in good faith with its insured by refusing without  
10 proper cause to compensate its insured for a loss covered by the policy such conduct may give rise  
11 to a cause of action in tort for breach of an implied covenant of good faith and fair dealing. The  
12 duty violated arises not from the terms of the insurance contract but is a duty imposed by law, the  
13 violation of which is a tort”). An insurer who fails to settle a claim in good faith and exposes its  
14 insurer to excess liability is liable for the full amount of the judgment: “since the insurer has  
15 reserved control over the litigation and settlement **it is liable for the entire amount of a judgment**  
16 **against the insured, including any portion in excess of the policy limits**, if in the exercise of such  
17 control it is guilty of bad faith in refusing a settlement.” *See Comunale v. Traders & Gen. Ins. Co.*,  
18 50 Cal. 2d 654, 660, 328 P.2d 198, 201 (1958) (emphasis added).<sup>2</sup> This case is no different.

19 **C. GEICO acted in bad faith when it exposed decedent and his estate to excess**  
20 **liability.**

21 Petitioners provided GEICO with opportunities to compromise their negligence claims  
22 against decedent for the \$60,000 liability insurance policy. GEICO refused. This, even when  
23 GEICO was well aware the value of Gianni and Dara’s claims exceeded decedent’s insurance  
24 coverage:

25 Obviously, it will always be in the insured’s interest to settle within the policy  
26 limits when there is any danger, however slight, of a judgment in excess of those  
27 limits. Accordingly the rejection of a settlement within the limits where there is  
any danger of a judgment in excess of the limits can be justified, if at all, only on

28 <sup>2</sup> “Nevada looked to California law when it established the implied covenant of good faith and fair dealing in the insurance context.” *See Landow v. Medical Ins. Exch.*, 892 F. Supp. 239, 240 (D. Nev. 1995).

1 the basis of interests of the insurer, and, in light of the common knowledge that  
2 settlement is one of the usual methods by which an insured receives protection  
3 under a liability policy, it may not be unreasonable for an insured who purchases  
4 a policy with limits to believe that a sum of money equal to the limits is available  
5 and will be used so as to avoid liability on his part with regard to any covered  
6 accident. In view of such expectation an insurer should not be permitted to further  
7 its own interests by rejecting opportunities to settle within the policy limits unless  
8 it is also willing to absorb losses which may result from its failure to settle.

9 *Crisci v. Sec. Ins. Co.*, 66 Cal. 2d 425, 430-31, 58 Cal. Rptr. 13, 17, 426 P.2d 173, 177 (1967).

10 Since then, GEICO has admitted Gianna and Dara's damages exceed decedent's insurance coverage  
11 by extending settlement offers to both Giann and Dara, each, in amounts that exceed the available  
12 insurance coverage. This confirms GEICO's bad faith:

13 whenever it is likely that the judgment against the insured will exceed policy  
14 limits so that the most reasonable manner of disposing of the claim is a settlement  
15 which can be made within those limits, a consideration in good faith of the  
16 insured's interest requires the insurer to settle the claim.... Moreover, in deciding  
17 whether or not to compromise the claim, the insurer must conduct itself as though  
18 it alone were liable for the entire amount of the judgment. Thus, the only  
19 permissible consideration in evaluating the reasonableness of the settlement offer  
20 becomes whether, in light of the victim's injuries and the probable liability of the  
21 insured, the ultimate judgment is likely to exceed the amount of the settlement  
22 offer.

23 *Johansen v. Cal. State Auto. Ass'n Inter-Ins. Bureau*, 15 Cal. 3d 9, 16, 123 Cal. Rptr. 288, 292, 538  
24 P.2d 744, 748 (1975). In this case, GEICO refused to tender decedent's insurance limits when  
25 Giann and Dara's damages clearly exceeded \$60,000. Once Giann and Dara's medical bills did  
26 exceed \$60,000, GEICO made a series of low ball offers concluding with offers to Giann, and Dara,  
27 each in amounts that exceed the \$30,000 per-person insurance coverage available to decedent.  
28 GEICO has always known the value of Giann and Dara's claims exceed decedent's policy limits,  
and GEICO has always known the value of Giann and Dara's claims exceeded every settlement  
offer GEICO has extended to Giann and Dara.

**D. Petitioners nominate the Clark County Public Administrator for appointment  
as the general administrator of McNamee's Estate.**

Based on the foregoing, and pursuant to NRS 139.050 and NRS 139.040(g), Petitioners  
nominate the Clark County Public Administrator John J. Cahill for appointment as general  
administrator of the Estate of James Allen McNamee. *See* NRS 139.040(h) (authorizing "Creditors

1 who have become such during the lifetime of the decedent” to seek letters of general  
2 administration); *see also* NRS 139.050 (“Administration may be granted upon petition to one or  
3 more qualified persons, although not otherwise entitled to serve, at the written request of the person  
4 entitled, filed in the court.”). Mr. Cahill has not been convicted of a felony, is over the age of  
5 majority, is a resident of the State of Nevada, and is otherwise qualified. *See* NRS 139.010(1)-(4).

6 This court has jurisdiction because James Allen McNamee left an estate that consists of, at a  
7 minimum, the liability insurance policy issued by GEICO, and the Estate’s potential bad faith  
8 claims against GEICO. *See Bodine v. Stinson*, 85 Nev. 657, 659, 461 P.2d 868, 870 (1969) (“It is  
9 well established that a deceased insured’s potential right of exoneration under an insurance policy is  
10 a sufficient estate to justify a grant of administration, and we think, satisfies the requirement of *In*  
11 *re Dickerson’s Estate*, 51 Nev. 69, 268 P. 769 (1928), that an estate exist before administration is  
12 justified.”). A listing of all of James Allen McNamee’s known heirs is attached to this petition.<sup>3</sup>

13 **E. The Estate of James Allen McNamee has not been advised of its rights against**  
14 **GEICO.**

15 The Nevada Supreme Court recently confirmed the applicability in Nevada of the California  
16 Supreme Court’s seminal decision in *San Diego Navy Federal Credit Union v. Cumis Insurance*  
17 *Society, Inc.*, 162 Cal. App. 3d 358, 208 Cal. Rptr. 494, 506 (Ct. App. 1984). In *State Farm v.*  
18 *Hansen*, the Nevada Supreme Court confirmed that “[b]ecause Nevada is a dual-representation  
19 state, counsel may not represent both the insurer and the insured when their interests conflict and no  
20 special exception applies. RPC 1.7. This suggests that the *Cumis* rule, where the insurer must  
21 satisfy its contractual duty to provide counsel by paying for counsel of the insured’s choosing, is  
22 appropriate for Nevada.” *See State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74,  
23 357 P.3d 338, 341 (Sep. 24, 2015). As the court further explained:

24 In sum, Nevada, like California, recognizes that the insurer and the insured are  
25 dual clients of insurer-appointed counsel. Where the clients’ interests conflict, the  
26 rules of professional conduct prevent the same lawyer from representing both  
clients. California’s *Cumis* rule is well-adapted to this scenario. It requires

27 <sup>3</sup> The Division of Health Care Financing and Policy for the Department of Health and Human Services of the State of  
28 Nevada filed a Waiver of Notice required by NRS 155.020 on October 18, 2017. *See* Waiver of Notice, on file with this  
Court.

1 insurers to fulfill their duty to defend by allowing insureds to select their own  
2 counsel and paying the reasonable costs for the independent counsel's  
representation.

3 *Id.* Under NRPC 1.7(a)(1), “[a] concurrent conflict of interest exists if: The representation of one  
4 client will be directly adverse to another client.” Here, GEICO is obviously adverse to decedent’s  
5 Estate. While GEICO has admittedly exposed decedent’s estate to excess liability giving rise to  
6 causes of action for bad faith against GEICO, GEICO’s counsel, Pyatt Silvestri, did not disclose  
7 any of these critical facts to this Court when seeking appointment of a special administrator.  
8 Instead, GEICO, in collusion with Pyatt Silvestri, represented to this Court that the “the Estate of  
9 James Allen McNamee has no assets to satisfy any judgment other than an automobile policy with  
10 GEICO,” something that is clearly inaccurate. In reality, Pyatt Silvestri is only looking out for  
11 GEICO’s interests, and is clearly taking action to benefit GEICO in total disregard of the rights of  
12 decedent’s estate. Indeed, the Estate has not even been advised of its potential excess liability, its  
13 potential bad faith claims against GEICO as a result of that excess liability, or the actual conflict of  
14 interest between GEICO and the Estate. Because neither GEICO nor Pyatt Silvestri is properly  
15 advising the Estate of James Allen McNamee of its rights against GEICO, and because there is an  
16 actual conflict of interest between the insurer and the insured, the Estate is entitled to *Cumis*  
17 counsel of its choosing at GEICO’s expense.

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**VI. CONCLUSION**

For the reasons set forth above, Petitioners request that the Clark County Public Administrator John J. Cahill be issued letters of general administration over the Estate of James Allen McNamee. Petitioners further request an order from this Court requiring the appointment of separate counsel for the Estate of James Allen McNamee, to be chosen by the Estate and at the expense of the decedent's insurer, GEICO. *See State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338, 341 (Sep. 24, 2015).

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and Dara Del Priore*

EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA

In the matter of the Estate of JAMES ALLEN  
MCNAMEE, Deceased.

CASE NO.: P-17-093041-E  
DEPT NO.: PC-1

**LISTING OF ALL HEIRS**

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Name	Relationship to Decedent	Age	Address
Robert McNamee	Father	Unknown	2472 230 <sup>th</sup> St. Mahnomen, MN 56557-9034
Other heirs unknown			

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14 EIGHTH JUDICIAL DISTRICT COURT

15 CLARK COUNTY, NEVADA

16 In the matter of the Estate of JAMES ALLEN  
17 MCNAMEE, Deceased.

CASE NO.: P-17-093041-E  
DEPT NO.: PC-1

**NOTICE OF HEARING FOR  
APPOINTMENT OF GENERAL  
ADMINISTRATOR**

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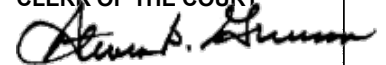
1 Notice is hereby given that Petitioners Gianni Bianchi and Dara DelPriore, by and through  
2 their counsel Corey M. Eschweiler, Esq., Craig A. Henderson, Esq., and Joshua D. Benson, Esq., of  
3 GLEN LERNER INJURY ATTORNEYS, and Lee D. Roberts, Esq., of WEINBERG WHEELER  
4 HUDGINS GUNN & DIAL, have filed in this court a petition for letters of general administration,  
5 of the Estate of JAMES ALLEN MCNAMEE, deceased, and a hearing has been set for the \_\_\_\_  
6 day of the month of \_\_\_\_\_, of the year 2018, at \_\_\_\_\_ (a.m. or p.m.) at the  
7 courthouse of the above-entitled court, Phoenix Building, 330 South 3rd Street Las Vegas, NV  
8 89101. All persons interested in the estate are notified to appear and show cause why the petition  
9 should not be granted. Further details concerning this Petition can be obtained by reviewing the  
10 Court file and the Office of the County Clerk, Clark County Courthouse, or by contacting the  
11 attorney for the Petitioners.

12  
13 GLEN LERNER INJURY ATTORNEYS

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**PET**

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and Dara Del Priore*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

In the matter of the Estate of JAMES ALLEN  
MCNAMEE, Deceased.

CASE NO.: P-17-093041-E  
DEPT NO.: PC-1

**PETITION FOR ISSUANCE OF  
GENERAL LETTERS OF  
ADMINISTRATION AND FOR  
APPOINTMENT OF CUMIS COUNSEL  
FOR THE ESTATE OF JAMES ALLEN  
McNAMEE**

**Date of Hearing:**  
**Time of Hearing:**

///

///

Petitioners Gianni Bianchi and Dara Del Priore, through their attorneys of record, Corey M. Eschweiler, Esq., Craig A. Henderson, Esq.. and Joshua L. Benson, Esq., of GLEN LERNER INJURY ATTORNEYS, and Lee D. Roberts, Esq., of WEINBERG WHEELER HUDGINS GUNN & DIAL, petition this court:

(1) pursuant to NRS 139.040 (g)-(h), NRS 139.050, and NRS 139.090, issue letters of general administration to John J. Cahill, the Clark County Public Administrator, for the Estate of James Allen McNamee;

(2) pursuant to NRCP 25(a) order substitution of the proper parties in place of the decedent,  
James Allen McNamee and

(2) pursuant to *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338 (Sep. 24, 2015), order appointment of *Cumis* counsel for the Estate of James Allen McNamee based on the actual conflict of interest that exists between the Estate of James Allen McNamee, and GEICO (Decedent James Allen McNamee's automobile liability insurer).

This Petition is based upon the following memorandum of points and authorities, the Declaration of Corey M. Eschweiler, Esq., the papers and Pleadings on file with the court, and the oral argument of the parties.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In this probate matter that involves pending personal injury litigation against the decedent,  
4 James Allen McNamee, petitioners Gianni Bianchi and Dara DelPriore were injured when the  
5 decedent crashed his vehicle into the rear of petitioners' vehicle on July 17, 2013. Since then,  
6 decedent's automobile liability insurer, GEICO, exposed decedent, and, now, decedent's Estate, to  
7 liability well in excess of the available automobile liability insurance coverage. This, by GEICO  
8 refusing to compromise Petitioners' negligence claims against decedent within the liability  
9 insurance policy limits. In fact, GEICO has since admitted that Petitioners' damages exceed the  
10 available liability insurance coverage. In other words, the Estate's assets consist not only of  
11 decedent's liability insurance policy through GEICO, but the Estate's causes of action against  
12 GEICO for breach of contract and tortious breach of the implied covenant of good faith and fair  
13 dealing, or insurance "bad faith."

14 Notwithstanding all of this, decedent's insurance-appointed defense counsel, the Pyatt  
15 Silverstri law firm, came before this court seeking to have a special administrator appointed  
16 claiming, inaccurately, that the Estate possesses no assets, other than the insurance policy, to satisfy  
17 Petitioners' negligence claims. In other words, the Petition for Letters of Special Administration did  
18 not disclose the true extent of the Estate's liability to Petitioners, or that the Estate's liability to  
19 Petitioners already exceeds the GEICO insurance policy. The Petition for Letters of Special  
20 Administration also did not identify the true nature of the Estate's assets, assets that include causes  
21 of action for bad faith against GEICO. The Petition for Letters of Special Administration also did  
22 not advise the court of the actual conflict of interest that exists between GEICO and the Estate of  
23 James Allen McNamee that requires appointment of *Cumis* counsel for the Estate pursuant to recent  
24 Nevada Supreme Court jurisprudence. More problematic, the law firm sought appointment of its  
25 own employee as the special administrator to make decisions regarding the litigation. This only  
26 further compounds the conflict where the law firm being paid by GEICO to represent the insured  
27 now has decision making authority on behalf of the estate for the underlying personal injury  
28 litigation. In short, because the decedent's Estate does possess assets beyond the liability insurance

1 policy, the Estate must be generally administrated. Further, because of the actual conflict of interest  
2 that exists between the Estate of James Allen McNamee and GEICO, the Estate is entitled to *Cumis*  
3 counsel at GEICO's expense, to advise the Estate of its rights against GEICO. *See State Farm v.*  
4 *Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338, 341 (Sep. 24, 2015). Otherwise, the interests of the  
5 Estate will continue to be placed behind the financial interests of GEICO.

## 6 II. FACTS

### 7 A. Background of the underlying negligence litigation.

8 On July 17, 2013, decedent James Allen McNamee, was driving a Ford van on East Sahara  
9 Avenue approaching a red light at the intersection of Sahara and McLeod. Decedent failed to slow  
10 the van in time and the van crashed into the rear of a Nissan Pathfinder that was stopped at the red  
11 traffic signal. The Nissan Pathfinder was driven by Petitioner Gianni Bianchi. Petitioner Dara  
12 DelPriore occupied the front passenger seat of the Nissan. Both Gianni and Dara suffered severe  
13 injuries in the collision.

### 14 B. GEICO has exposed decedent's estate to excess liability.

15 At the time of the July 17, 2013, collision, decedent was covered by an automobile liability  
16 insurance policy issued by GEICO, policy number 4180457162. *See* Petition for Letters of Special  
17 Administration, at 2 ¶ 6, filed with this Court Sep. 20, 2017. The GEICO policy provided decedent  
18 with liability insurance coverage of \$30,000 per person up to \$60,000 per occurrence. *Id.* Since the  
19 collision on July, 2013, decedent's automobile liability insurer, GEICO, has repeatedly refused to  
20 settle Gianni and Dara's claims within decedent's policy limits, despite knowing Gianni and Dara's  
21 damages far exceed the \$30,000 per person liability insurance coverage. By way of brief  
22 background:

- 23 • On October 25, 2013, Gianni and Dara each served GEICO with a demand requesting  
24 decedent's \$30,000 per person policy limit in exchange for a release of all claims against  
25 decedent. At the time, Gianni had incurred \$10,707.78 in medical bills and was  
26 recommended for pain management medical treatment at an estimated cost of \$12,050. Dara  
27 had incurred \$10,797.25 in medical bills and had also been recommended for pain  
28 management treatment at an estimated cost of \$12,050. GEICO did not tender decedent's  
policy limits. Gianni and Dara, then, proceeded with the recommended injections.

1 • On November 19, 2013, Giann and Dara sued decedent for damages arising out of the July  
2 17, 2013, crash. *See Bianchi and Del Priore v. James McNamee*, Case Number A-13-  
691887-C, Eighth Judicial District Court, Clark County, Nevada.

3 • On April 3, 2014, decedent served Dara, only, with an offer to settle in the amount of  
4 \$30,000. Dara rejected this offer, as her medical bills, alone, totaled \$36,214.35. Shortly  
5 thereafter, Giann and Dara's counsel advised GEICO to appoint separate counsel to advise  
6 decedent of his potential bad faith claim against GEICO. Less than three months later,  
decedent filed a substitution of attorney retaining new, outside counsel (the Pyatt Silvestri  
law firm).

7 • By spring of 2015, Giann's medical bills had increased to \$329,494, including the cost of  
8 the spinal surgery Giann's doctor recommended. This, in addition to \$348,948 for Giann's  
9 future medical care; \$277,832 for Giann's loss of household services; and \$1,867,000 for  
10 Giann's loss of enjoyment of life -- a total of more than \$2,800,000 in damages.  
Consequently, on April 21, 2015, Giann served McNamee with an offer to settle for  
\$435,000. Decedent did not accept Giann's offer.

11 • Also by Spring, 2015, Dara's medical bills had increased to \$93,980. This, in addition to  
12 \$296,537 in lost wages; \$384,361 in loss of household services; and \$1,700,000 in loss of  
13 enjoyment of life -- a total of more than \$2,470,000 in damages. On April 21, 2015, Dara  
served decedent with an offer to settle in the amount of \$345,000. Decedent did not accept  
the offer.

14 In other words, despite knowing Giann and Dara's medical special damages were going to exceed  
15 decedent's policy limits, GEICO refused to pay the policy to petitioners.

16  
17 **C. GEICO admits Petitioners' damages exceed decedent's liability insurance  
coverage.**

18 By July, 2015, Giann's total damages had increased to \$2,850,136.97, including \$356,306 in  
19 medical special damages alone. Dara's total damages had increased to \$2,481,097, including  
20 \$99,280 in medical special damages. On July 13, 2015, decedent offered to settle Giann and Dara's  
21 claims, each for an amount in excess of McNamee's automobile liability insurance policy limit.<sup>1</sup>  
22 Petitioners rejected these offers that did not even compensate them for their medical special  
23 damages. **The two offers are critical, however, because through the offers, GEICO admitted**  
24 **the value of Giann and Dara's claims exceed decedent's \$60,000 of insurance coverage. Put**  
25 **differently, GEICO has already admitted the Estate of James Allen McNamee will be exposed**  
26

27  
28 <sup>1</sup> Defendant's written offers to Plaintiffs and Plaintiffs' written correspondence to Defendant's counsel's insurer will be  
provided to the court for in camera review upon request.

1 to excess liability as a result of GEICO's bad faith refusal to compromise Petitioners' claims  
2 for the policy limits.

3 **D. Decedent died before Petitioners' claims went to trial in the Eighth Judicial**  
4 **District Court.**

5 On September 20, 2017, decedent's counsel in the *Bianchi v. McNamee* litigation, Pyatt  
6 Silvestri, served a Suggestion of Death on the Record indicating decedent had passed on August 12,  
7 2017. See Suggestion of Death Upon the Record, attached as Ex. 1-A; see also Death Certificate,  
8 attached as Ex. 1-B. This, five days before Giann and Dara's negligence claims against decedent  
9 were scheduled to proceed to trial on September 25, 2017, in the Eighth Judicial District Court. The  
10 District Court trial in *Bianchi v. McNamee* has since been continued to April 16, 2018.

11 **E. GEICO sought appointment of a special administrator.**

12 Also on September 20, 2017, Pyatt Silvestri filed a Petition for Special Letters of  
13 Administration. The Petition sought to have Susan Clokey, an employee of Pyatt Silvestri,  
14 appointed as the Special Administrator of the Estate of James Allen McNamee based on Pyatt  
15 Silvestri's representations to this Court that "the Estate of James Allen McNamee has no assets to  
16 satisfy any judgment other than an automobile policy with GEICO [providing] automobile liability  
17 insurance coverage of \$30,000 per person and \$60,000 per accident." See Petition for Letters of  
18 Special Administration, at 2 ¶ 6, filed with this Court Sep. 20, 2017.

19 **F. A general administrator must be appointed.**

20 To the contrary, based on GEICO's failure to settle Giann and Dara's claims within  
21 decedent's policy limits, GEICO, admittedly, has exposed the Estate of James Allen McNamee to  
22 liability in excess of decedent's \$60,000 liability insurance policy. In other words, the Estate of  
23 James Allen McNamee has causes of action against GEICO for, *inter alia*, breach of contract and  
24 tortious breach of the implied covenant of good faith and fair dealing. As important, there exists,  
25 and has existed for some time, an actual conflict of interest between GEICO and the Estate of James  
26 Allen McNamee, both of whom are currently represented by the same law firm, Pyatt Silvestri. See  
27 *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338, 340 (Sep. 24,

1 2015) (“Nevada, in contrast, is a dual-representation state: Insurer-appointed counsel represents both  
2 the insurer and the insured.”)

3 It is patently obvious that Pyatt Silvestri is not representing the interests of the Estate of  
4 James Allen McNamee, including failing to advise the Estate of its excess liability and failing to  
5 advise the Estate or even this Court, regarding the Estate’s bad faith rights against GEICO. *See*  
6 Petition for Letters of Special Administration, at 2 ¶ 6, filed with this Court Sep. 20, 2017 (“the  
7 Estate of James Allen McNamee has no assets to satisfy any judgment other than an automobile  
8 policy with GEICO [providing] automobile liability insurance coverage of \$30,000 per person and  
9 \$60,000 per accident”). Consequently, Petitioners’ counsel sent Pyatt Silvestri a second letter on  
10 November 8, 2017, advising them of these developments and that the Estate of James Allen  
11 McNamee is entitled to separate counsel. Petitioners’ counsel has received no response to the letter.

12 **G. The special administrator must be removed and separate *Cumis* counsel**  
13 **appointed for the Estate of James Allen McNamee.**

14 This Court, having not been fully apprised of the facts and circumstances surrounding the  
15 Estate’s liability to Giann and Dara, or the true nature of the Estate’s assets, granted the petition and  
16 issued an Order Granting Petition for Special Letters of Administration to Susan Clokey. *See* Nov.  
17 16, 2017, Order Granting Petition for Special Letters of Administration, on file with this Court. The  
18 purpose of this petition, therefore, is (1) appoint the Clark County Public Administrator John J.  
19 Cahill, as the general administrator of the Estate of James Allen McNamee, and (2) order the  
20 retention by GEICO of *Cumis* counsel for the Estate of James Allen McNamee pursuant to the  
21 Nevada Supreme Court’s holding in *State Farm v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338,  
22 341 (Sep. 24, 2015).

23 **III. ARGUMENT**

24 **A. A general administrator must be appointed to administer decedent’s estate.**

25 Pursuant to NRS 140.040(3)(b), a special administrator is not liable “[f]or any claim against  
26 the decedent except a claim involving wrongful death, personal injury or property damage if the  
27 estate contains no assets other than a policy of liability insurance.” NRS 140.040(3)(b) (emphasis  
28

1 added). As the Nevada Supreme Court has made clear, however, this statute is applicable only  
2 when the estate's sole asset is a liability insurance policy:

3 [A]fter the 1971 amendment, NRS 140.040(3) permits the special administrator to  
4 pay wrongful death, personal injury, and property damage claims when the  
5 estate's only asset is a liability insurance policy. NRS 140.040(3) promotes  
6 judicial economy and efficient resolution of claims by enabling a plaintiff with  
7 such claims to avoid lengthy, costly, formal probate procedures when the sole  
8 asset is a liability insurance policy.

9 *Jacobson v. Estate of Clayton*, 121 Nev. 518, 522, 119 P.3d 132, 134 (2005). If, however, the estate  
10 has other assets, or the claim exceeds the insurance coverage and will diminish the estate, the estate  
11 must be administered by a general administrator:

12 The claim procedure specified by ch. 147 must be followed whenever the estate of  
13 the deceased may be diminished if the creditor is successful. This, of course,  
14 might happen in a wrongful death action against the estate of a deceased  
15 tortfeasor. The loss for which damages are claimed may not be covered by  
16 liability insurance. If covered, the insurance limits might prove to be inadequate.  
17 In either instance the estate is diminished if the claimant is successful.

18 *Bodine v. Stinson*, 85 Nev. 657, 661, 461 P.2d 868, 871 (1969) (superseded by statute on other  
19 grounds as explained in *Jacobson v. Estate of Clayton*, 121 Nev. 518, 522, 119 P.3d 132, 134  
20 (2005)). Here, Giann and Dara's negligence claims against decedent exceed the available liability  
21 insurance and will diminish the Estate. Furthermore, the Estate of James Allen McNamee has assets  
22 above and beyond the \$60,000 liability insurance policy issued by GEICO, i.e., claims for breach of  
23 contract and tortious breach of the implied covenant of good faith and fair dealing against GEICO.  
24 Consequently, special administration of the McNamee Estate is not authorized by the special  
25 administrator statutes. *Id.*

26 **B. The Estate of James Allen McNamee possesses claims for insurance bad faith  
27 against GEICO.**

28 It is well settled that:

Nevada law recognizes the existence of an implied covenant of good faith and fair  
dealing in every contract. An insurer fails to act in good faith when it refuses  
'without proper cause' to compensate the insured for a loss covered by the policy.  
Such conduct gives rise to a breach of the covenant of good faith and fair dealing.  
This breach or failure to perform constitutes 'bad faith' where the relationship  
between the parties is that of insurer and insured.

1 *See Pemberton v. Farmers Ins. Exch.*, 109 Nev. 789, 792-93, 858 P.2d 380, 382 (1993) (internal  
2 citations omitted). As the court has further explained, “[t]he law, not the insurance contract,  
3 imposes this covenant on insurers. A violation of the covenant gives rise to a bad-faith tort claim.  
4 This court has defined bad faith as an actual or implied awareness of the absence of a reasonable  
5 basis for denying benefits of the [insurance] policy.” *See Allstate Ins. Co. v. Miller*, 125 Nev. 300,  
6 308, 212 P.3d 318, 324 (2009) (internal citations omitted); *see also United States Fid. & Guar. Co.*  
7 *v. Peterson*, 91 Nev. 617, 619-20, 540 P.2d 1070, 1071 (1975) (“We approve and adopt the rule that  
8 allows recovery of consequential damages where there has been a showing of bad faith by the  
9 insurer. Where an insurer fails to deal fairly and in good faith with its insured by refusing without  
10 proper cause to compensate its insured for a loss covered by the policy such conduct may give rise  
11 to a cause of action in tort for breach of an implied covenant of good faith and fair dealing. The  
12 duty violated arises not from the terms of the insurance contract but is a duty imposed by law, the  
13 violation of which is a tort”). An insurer who fails to settle a claim in good faith and exposes its  
14 insurer to excess liability is liable for the full amount of the judgment: “since the insurer has  
15 reserved control over the litigation and settlement **it is liable for the entire amount of a judgment**  
16 **against the insured, including any portion in excess of the policy limits**, if in the exercise of such  
17 control it is guilty of bad faith in refusing a settlement.” *See Comunale v. Traders & Gen. Ins. Co.*,  
18 50 Cal. 2d 654, 660, 328 P.2d 198, 201 (1958) (emphasis added).<sup>2</sup> This case is no different.

19 **C. GEICO acted in bad faith when it exposed decedent and his estate to excess**  
20 **liability.**

21 Petitioners provided GEICO with opportunities to compromise their negligence claims  
22 against decedent for the \$60,000 liability insurance policy. GEICO refused. This, even when  
23 GEICO was well aware the value of Giann and Dara’s claims exceeded decedent’s insurance  
24 coverage:

25 Obviously, it will always be in the insured’s interest to settle within the policy  
26 limits when there is any danger, however slight, of a judgment in excess of those  
27 limits. Accordingly the rejection of a settlement within the limits where there is  
any danger of a judgment in excess of the limits can be justified, if at all, only on

28 <sup>2</sup> “Nevada looked to California law when it established the implied covenant of good faith and fair dealing in the insurance context.” *See Landow v. Medical Ins. Exch.*, 892 F. Supp. 239, 240 (D. Nev. 1995).

1 the basis of interests of the insurer, and, in light of the common knowledge that  
2 settlement is one of the usual methods by which an insured receives protection  
3 under a liability policy, it may not be unreasonable for an insured who purchases  
4 a policy with limits to believe that a sum of money equal to the limits is available  
5 and will be used so as to avoid liability on his part with regard to any covered  
6 accident. In view of such expectation an insurer should not be permitted to further  
7 its own interests by rejecting opportunities to settle within the policy limits unless  
8 it is also willing to absorb losses which may result from its failure to settle.

9 *Crisci v. Sec. Ins. Co.*, 66 Cal. 2d 425, 430-31, 58 Cal. Rptr. 13, 17, 426 P.2d 173, 177 (1967).

10 Since then, GEICO has admitted Gianna and Dara's damages exceed decedent's insurance coverage  
11 by extending settlement offers to both Giann and Dara, each, in amounts that exceed the available  
12 insurance coverage. This confirms GEICO's bad faith:

13 whenever it is likely that the judgment against the insured will exceed policy  
14 limits so that the most reasonable manner of disposing of the claim is a settlement  
15 which can be made within those limits, a consideration in good faith of the  
16 insured's interest requires the insurer to settle the claim.... Moreover, in deciding  
17 whether or not to compromise the claim, the insurer must conduct itself as though  
18 it alone were liable for the entire amount of the judgment. Thus, the only  
19 permissible consideration in evaluating the reasonableness of the settlement offer  
20 becomes whether, in light of the victim's injuries and the probable liability of the  
21 insured, the ultimate judgment is likely to exceed the amount of the settlement  
22 offer.

23 *Johansen v. Cal. State Auto. Ass'n Inter-Ins. Bureau*, 15 Cal. 3d 9, 16, 123 Cal. Rptr. 288, 292, 538  
24 P.2d 744, 748 (1975). In this case, GEICO refused to tender decedent's insurance limits when  
25 Giann and Dara's damages clearly exceeded \$60,000. Once Giann and Dara's medical bills did  
26 exceed \$60,000, GEICO made a series of low ball offers concluding with offers to Giann, and Dara,  
27 each in amounts that exceed the \$30,000 per-person insurance coverage available to decedent.  
28 GEICO has always known the value of Giann and Dara's claims exceed decedent's policy limits,  
and GEICO has always known the value of Giann and Dara's claims exceeded every settlement  
offer GEICO has extended to Giann and Dara.

**D. Petitioners nominate the Clark County Public Administrator for appointment  
as the general administrator of McNamee's Estate.**

Based on the foregoing, and pursuant to NRS 139.050 and NRS 139.040(g), Petitioners  
nominate the Clark County Public Administrator John J. Cahill for appointment as general  
administrator of the Estate of James Allen McNamee. See NRS 139.040(h) (authorizing "Creditors

1 who have become such during the lifetime of the decedent” to seek letters of general  
2 administration); *see also* NRS 139.050 (“Administration may be granted upon petition to one or  
3 more qualified persons, although not otherwise entitled to serve, at the written request of the person  
4 entitled, filed in the court.”). Mr. Cahill has not been convicted of a felony, is over the age of  
5 majority, is a resident of the State of Nevada, and is otherwise qualified. *See* NRS 139.010(1)-(4).

6 This court has jurisdiction because James Allen McNamee left an estate that consists of, at a  
7 minimum, the liability insurance policy issued by GEICO, and the Estate’s potential bad faith  
8 claims against GEICO. *See Bodine v. Stinson*, 85 Nev. 657, 659, 461 P.2d 868, 870 (1969) (“It is  
9 well established that a deceased insured’s potential right of exoneration under an insurance policy is  
10 a sufficient estate to justify a grant of administration, and we think, satisfies the requirement of *In*  
11 *re Dickerson’s Estate*, 51 Nev. 69, 268 P. 769 (1928), that an estate exist before administration is  
12 justified.”). A listing of all of James Allen McNamee’s known heirs is attached to this petition.<sup>3</sup>

13 **E. The Estate of James Allen McNamee has not been advised of its rights against**  
14 **GEICO.**

15 The Nevada Supreme Court recently confirmed the applicability in Nevada of the California  
16 Supreme Court’s seminal decision in *San Diego Navy Federal Credit Union v. Cumis Insurance*  
17 *Society, Inc.*, 162 Cal. App. 3d 358, 208 Cal. Rptr. 494, 506 (Ct. App. 1984). In *State Farm v.*  
18 *Hansen*, the Nevada Supreme Court confirmed that “[b]ecause Nevada is a dual-representation  
19 state, counsel may not represent both the insurer and the insured when their interests conflict and no  
20 special exception applies. RPC 1.7. This suggests that the *Cumis* rule, where the insurer must  
21 satisfy its contractual duty to provide counsel by paying for counsel of the insured’s choosing, is  
22 appropriate for Nevada.” *See State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74,  
23 357 P.3d 338, 341 (Sep. 24, 2015). As the court further explained:

24 In sum, Nevada, like California, recognizes that the insurer and the insured are  
25 dual clients of insurer-appointed counsel. Where the clients’ interests conflict, the  
26 rules of professional conduct prevent the same lawyer from representing both  
clients. California’s *Cumis* rule is well-adapted to this scenario. It requires

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27 <sup>3</sup> The Division of Health Care Financing and Policy for the Department of Health and Human Services of the State of  
28 Nevada filed a Waiver of Notice required by NRS 155.020 on October 18, 2017. *See* Waiver of Notice, on file with this  
Court.

1 insurers to fulfill their duty to defend by allowing insureds to select their own  
2 counsel and paying the reasonable costs for the independent counsel's  
representation.

3 *Id.* Under NRPC 1.7(a)(1), “[a] concurrent conflict of interest exists if: The representation of one  
4 client will be directly adverse to another client.” Here, GEICO is obviously adverse to decedent’s  
5 Estate. While GEICO has admittedly exposed decedent’s estate to excess liability giving rise to  
6 causes of action for bad faith against GEICO, GEICO’s counsel, Pyatt Silvestri, did not disclose  
7 any of these critical facts to this Court when seeking appointment of a special administrator.  
8 Instead, GEICO, in collusion with Pyatt Silvestri, represented to this Court that the “the Estate of  
9 James Allen McNamee has no assets to satisfy any judgment other than an automobile policy with  
10 GEICO,” something that is clearly inaccurate. In reality, Pyatt Silvestri is only looking out for  
11 GEICO’s interests, and is clearly taking action to benefit GEICO in total disregard of the rights of  
12 decedent’s estate. Indeed, the Estate has not even been advised of its potential excess liability, its  
13 potential bad faith claims against GEICO as a result of that excess liability, or the actual conflict of  
14 interest between GEICO and the Estate. Because neither GEICO nor Pyatt Silvestri is properly  
15 advising the Estate of James Allen McNamee of its rights against GEICO, and because there is an  
16 actual conflict of interest between the insurer and the insured, the Estate is entitled to *Cumis*  
17 counsel of its choosing at GEICO’s expense.

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**VI. CONCLUSION**

For the reasons set forth above, Petitioners request that the Clark County Public Administrator John J. Cahill be issued letters of general administration over the Estate of James Allen McNamee. Petitioners further request an order from this Court requiring the appointment of separate counsel for the Estate of James Allen McNamee, to be chosen by the Estate and at the expense of the decedent’s insurer, GEICO. *See State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338, 341 (Sep. 24, 2015).

GLEN LERNER INJURY ATTORNEYS

By: /s/ Craig A. Henderson  
Corey M. Eschweiler, Esq.  
Nevada Bar No. 6635  
Craig A. Henderson, Esq.  
Nevada Bar No. 10077  
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(702) 877-1500  
Attorneys for Plaintiffs

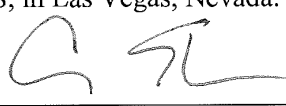
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**DECLARATION OF COREY M. ESCHWEILER**

I, COREY M. ESCHWEILER, hereby declare the following under penalty of perjury of the laws of the State of Nevada:

1. I am an attorney at Glen Lerner Injury Attorneys, and counsel of record for Petitioners Gianni Bianchi and Dara DelPriore in the above captioned action. I have read the foregoing Petition and know the contents thereof. The Petition is true of my own knowledge except as to those matters that are stated on information and belief, as to those matters, I believe them to be true.

Executed this 3<sup>rd</sup> day of January, 2018, in Las Vegas, Nevada.

  
COREY M. ESCHWEILER

1 Corey M. Eschweiler, Esq.  
2 Nevada Bar No. 6635  
3 Craig A. Henderson, Esq.  
4 Nevada Bar No. 10077  
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21 Email: LRoberts@wwhgd.com

22 *Attorneys for Petitioners Gianni Bianchi*  
23 *and Dara Del Priore*

24 EIGHTH JUDICIAL DISTRICT COURT

25 CLARK COUNTY, NEVADA

26 In the matter of the Estate of JAMES ALLEN  
27 MCNAMEE, Deceased.

CASE NO.: P-17-093041-E  
DEPT NO.: PC-1

**LISTING OF ALL HEIRS**

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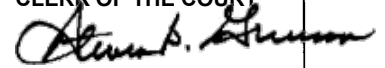
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1	<b>Name</b>	<b>Relationship to Decedent</b>	<b>Age</b>	<b>Address</b>
2	Robert McNamee	Father	Unknown	2472 230 <sup>th</sup> St. Mahnomen, MN 56557-9034
3				
4	Other heirs unknown			
5				
6				
7	GLEN LERNER INJURY ATTORNEYS			
8				
9	By: <u>/s/ Craig A. Henderson</u>			
10	Corey M. Eschweiler, Esq.			
11	Nevada Bar No. 6635			
12	Craig A. Henderson, Esq.			
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25	<i>Attorneys for Petitioners Gianni Bianchi</i>			
26	<i>and Dara Del Priore</i>			
27				
28				



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Attorneys for Defendant  
JAMES MCNAMEE

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

GIANN BIANCHI, individually, DARA  
DELPRIORE, individually

Plaintiffs

v.

JAMES MCNAMEE, individually, DOES I – X,  
and ROE CORPORATIONS I – X, inclusive

Defendants.

Case No.: A-13-691887-C  
Dept. No.: VIII

DATE: January 22, 2018  
TIME: In Chambers

**DEFENDANT JAMES MCNAMEE'S REPLY TO PLAINTIFF'S OPPOSITION TO  
MOTION TO SUBSTITUTE SPECIAL ADMINISTRATOR IN PLACE AND STEAD OF  
DEFENDANT JAMES MCNAMEE AND TO AMEND CAPTION**

COMES NOW, Defendant James McNamee, by and through its attorneys of record, Jeffrey J. Orr, Esq. of Pyatt Silvestri and hereby submits his Reply to Opposition to Motion to Substitute Special Administrator of Susan Clokey in place and stead of James McNamee as the Defendant in this action. Defendant also requests that the caption be amended to reflect the substitution of the new Defendant in this matter.

This Reply is made and based upon the papers and pleadings on file herein, as well as the Memorandum of Points and Authorities and any oral argument at the time of hearing of this matter.

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**I.  
FACTUAL BACKGROUND**

Defendant James McNamee passed away on August 12, 2017. As such, James McNamee can no longer be the Defendant in this matter. A Suggestion of Death was filed in this matter on September 20, 2017. (See Suggestion of Death Upon the Record, attached as Exhibit A). The pending motion to substitute the Special Administrator as the Defendant in place and stead of James McNamee was filed on December 14, 2017. As such, Defendant's motion to substitute the Special Administrator as the Defendant in place and stead of James McNamee was filed within the 90 day time period mandated in NRCP 25 (a)(1).

It has been more than 90 days since the Suggestion of Death was filed in this matter and there have not been any other motions to substitute the Defendant in this matter. In fact, the Petition to appoint a General Administrator in probate court was not even filed until January 3, 2018. (See Page 1 of Petition for Issuance of General Letters of Administration and for Appointment of Cumis Counsel for the Estate of James Allen McNamee, attached as Exhibit B). This petition to appoint a General Administrator may or may not be granted by the probate court. Trial is set for April 16, 2018, which is in approximately 90 days.

**II.  
ANY FUTURE MOTION TO SUBSTITUTE DEFENDANT WOULD BE UNTIMELY**

Plaintiffs' opposition implies that Plaintiffs intend to move to substitute the general administrator as the Defendant in this action. However, NRCP 25 (a)(1) clearly states that any motion to substitute a deceased party must be filed within 90 days of the suggestion of death:

"If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party." NRCP 25(a)(1)

1 Notably, NRCP 25(a)(1) uses the word “shall” as it states that the action shall be dismissed  
2 if the motion is not filed within 90 days of the Suggestion of Death. The Nevada Supreme Court  
3 has held that the failure to move to substitute a deceased party within the 90 day time period  
4 mandates dismissal: “...Wharton's counsel failed to comply with NRCP 25(a)(1) by not moving the  
5 court to substitute Wharton's surviving spouse as his personal representative within the 90-day  
6 period. Therefore, we conclude that the district court erred in granting Wharton's counsel's untimely  
7 motion for substitution of parties and by denying the defendant's motions to dismiss the action.  
8 Accordingly, we reverse the district court's judgment and remand this matter with instructions to  
9 enter judgment in favor of respondents.” *Wharton v. City of Mesquite*, 113 Nev. 796, 798, 942 P.2d  
10 155 (1997).

11  
12 As such, the rule is mandatory, not discretionary. Pursuant to NRCP 25(a)(1), the court  
13 cannot consider any future motion to substitute any other Defendant in place and stead of the  
14 deceased Defendant. Therefore, there is no reason to defer ruling on the instant motion as requested  
15 by Plaintiffs.  
16

17 **III.**  
18 **PLAINTIFF’S REQUEST TO DEFER THIS MOTION IS NOT A VIABLE OPTION**

19 Trial is set for April 16, 2018, which is in approximately 90 days. Currently, there is no  
20 Defendant in this action. There is no set timetable upon which the probate court will rule on the  
21 petition for General Letters of Administration. Moreover, the petition in probate court may or may  
22 not be granted. At this time, there is no other motion to bring any other party into this action. Given  
23 the upcoming trial date and the uncertainty regarding the petition for General Letters of  
24 Administration, deferring the instant motion is not feasible.

25 ///

26 ///

27 ///

IV.  
**THERE IS NO BAD FAITH OR CONFLICT OF INTEREST**

Although not pertinent to the instant motion to substitute, Plaintiffs' Opposition incorrectly states that there are "bad faith causes of action" against Mr. McNamee's insurance carrier. Defendant is not aware of any such causes of action. The Complaint on file in this action only alleges Negligence and Negligence Per Se and makes no reference to "bad faith". Additionally, no fact finder has made any determination as to the amount of damages, if any, sustained by Plaintiffs. Plaintiffs' claim that the damages exceed the insurance policy limits are, at a minimum, premature and speculative. Contrary to Plaintiffs' contention, Defendant has never admitted that there is bad faith in this matter. In fact, there hasn't even been a determination as to the amount of damages in this matter. As such, Plaintiffs' claim that there is an asset above and beyond the insurance policy is not true. For these reasons, Plaintiffs' contention that there are assets beyond the liability insurance policy is not accurate.

Plaintiffs also incorrectly allege that the Special Administrator has a "conflict" because the Special Administrator has decision making authority on behalf of the estate. The order granting the Special Administration does not give such authority. Instead, the order granting the Special Administration only permits the Special Administrator to defend the instant litigation and to distribute the insurance proceeds should there be a judgment against the Special Administrator. (See Order Granting Petition for Special Letters of Administration, attached as Exhibit C). The Special Administrator does not have any other authority to deal with the estate. Because the Special Administrator has such limited authority, there is no potential for any conflict as alleged by Plaintiffs.

Nevada case law specifically states that the special administrator can defend personal injury lawsuits when the only asset is a liability insurance policy. "... NRS 140.040(3) permits the special administrator to pay wrongful death, personal injury, and property damage claims when the estate's only asset is a liability insurance policy. NRS 140.040(3) promotes judicial economy and efficient

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1 resolution of claims by enabling a plaintiff with such claims to avoid lengthy, costly, formal probate  
2 procedures when the sole asset is a liability insurance policy. *Jacobson v. Estate of Clayton*, 121  
3 Nev. 518, 522, 119 P.3d 132 (2005).

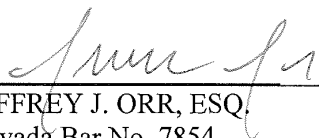
4 In this case, the only asset available to satisfy any judgment is the liability insurance policy.  
5 Although Plaintiffs claim that there is a bad faith claim, such a claim is speculative at this time as  
6 there has not been any determination as to the amount of Plaintiffs' damages.

7 **V.**  
8 **CONCLUSION**

9 Plaintiffs' Opposition implies that Plaintiffs may move to bring a Defendant into this action  
10 sometime in the future. However, pursuant to NRCP 25(a)(1) and *Wharton v. City of Mesquite*, 113  
11 Nev. 796, 798, 942 P.2d 155 (1997) the Court cannot consider any future motion to bring a  
12 Defendant into this action because more than 90 days has passed since the Suggestion of Death was  
13 filed. As a practical matter, trial is in approximately 90 days and there is currently no Defendant.  
14 For these reasons, it is requested that this Court grant Defendant's Motion to substitute the Special  
15 Administrator of the Estate of James McNamee in place and stead of Defendant James McNamee.  
16

17 DATED this 12 day of January, 2018

18 **PYATT SILVESTRI**

19  
20   
21 \_\_\_\_\_  
22 JEFFREY J. ORR, ESQ.  
23 Nevada Bar No. 7854  
24 PYATT SILVESTRI  
25 701 Bridger Ave., Suite 600  
26 Las Vegas, Nevada 89101  
27 Attorney for Defendant  
28 James McNamee

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Pyatt Silvestri and that on the 12th day of January, 2018, I caused the above and foregoing document **DEFENDANT JAMES MCNAMEE'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO SUBSTITUTE SPECIAL ADMINISTRATOR IN PLACE AND STEAD OF DEFENDANT JAMES MCNAMEE AND TO AMEND CAPTION**, to be served as follows: Pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the **electronic service substituted for the date and place of deposit in the mail to the attorney(s) listed below and via U.S. Mail:**

Corey M. Eschweiler, Esq.  
Glen J. Lerner & Associates  
4795 South Durango Drive  
Las Vegas, NV 89147  
Attorney for Plaintiffs

D. Lee Roberts, Esq.  
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC  
6385 S. Rainbow Blvd., #400  
Las Vegas, NV 89118  
Attorney for Plaintiff

Robert McNamee  
2472 230<sup>th</sup> Street  
Mahnomen, MN 56557-9034

  
An Employee of PYATT SILVESTRI

# Exhibit A



1 JEFFREY J. ORR, ESQ.  
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4 F. (702) 477-0088  
[jorr@pyattsilvestri.com](mailto:jorr@pyattsilvestri.com)

5 Attorney for Defendant  
6 JAMES MCNAMEE

7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA

9 GIANN BIANCHI, individually, DARA )  
10 DELPRIORE, individually )

CASE NO. A-13-691887-C  
DEPT. NO.: VIII

11 Plaintiffs,

12 vs.

13 JAMES MCNAMEE, individually,  
DOES I - X, and ROE CORPORATIONS )  
I - X, inclusive )

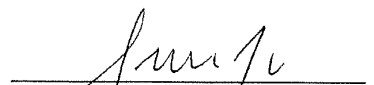
14 Defendants.  
15

16 SUGGESTION OF DEATH UPON THE RECORD

17 Pursuant to Rule 25(a)(1) of the Nevada Rules of Civil Procedure, Jeffrey J. Orr, Esq.,  
18 of the law firm of Pyatt & Silvestri, suggests on the record the death of Defendant, JAMES  
19 McNAMEE, during the pendency of this litigation. The date of death of Defendant, JAMES  
20 McNAMEE was August 12, 2017.

21 DATED this 20 day of September, 2017.

22 PYATT SILVESTRI

23  
24   
25 JEFFREY J. ORR, ESQ.  
26 Nevada Bar No. 7854  
27 701 Bridger Avenue, Suite 600  
28 Las Vegas, NV 89101  
Attorneys for Defendant  
JAMES McNAMEE


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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of Pyatt Silvestri and that on the 20th day of September, 2017, I caused the above and foregoing document, **SUGGESTION OF DEATH**, to be served as follows: Pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; to the attorney(s) listed below:

Corey M. Eshweiler, Esq.  
Glen J. Lerner & Associates  
4795 South Durango Drive  
Las Vegas, NV 89147  
Attorney for Plaintiffs  
GIANN BIANCHI and  
DARA DELPRIORE

  
Employee of PYATT SILVESTRI

# Exhibit B



**PET**

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Craig A. Henderson, Esq.  
Nevada Bar No. 10077  
Joshua L. Benson, Esq.  
Nevada Bar No. 10514  
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*Attorneys for Petitioners Giann Bianchi  
and Dara Del Priore*

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

In the matter of the Estate of JAMES ALLEN  
MCNAMEE, Deceased.

CASE NO.: P-17-093041-E  
DEPT NO.: PC-1

**PETITION FOR ISSUANCE OF  
GENERAL LETTERS OF  
ADMINISTRATION AND FOR  
APPOINTMENT OF CUMIS COUNSEL  
FOR THE ESTATE OF JAMES ALLEN  
MCNAMEE**

**Date of Hearing:  
Time of Hearing:**

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# Exhibit C

ORIGINAL

Electronically Filed  
11/16/2017 4:41 PM  
Steven D. Grierson  
CLERK OF THE COURT

*Steven D. Grierson*

1 **ORDR**

2 Jeffrey J. Orr, Esq.  
3 Nevada Bar No. 7854  
4 PYATT SILVESTRI  
5 701 Bridger Avenue  
6 Suite 600  
7 Las Vegas, NV 89101  
8 T. (702) 383-6000  
9 F. (702) 477-0088  
10 [jorr@pyattsilvestri.com](mailto:jorr@pyattsilvestri.com)  
11 Attorney for Petitioner,  
12 Special Administrator Susan Clokey

13 **EIGHTH JUDICIAL DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 In the Matter of the Estate of James Allen ) Case No.: P-17-093041-E  
16 McNamee, Deceased ) Dept No.: S  
17 )  
18 )  
19 )  
20 )  
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22 )  
23 )

24 **ORDER GRANTING**  
25 **PETITION FOR SPECIAL LETTERS OF ADMINISTRATION**

26 Upon submission of the Petition for Special Letters of Administration, representing  
27 as follows:

- 28 1. That Decedent, James Allen McNamee died on the 12<sup>th</sup> day of August, 2017, in the County of Mohave, State of Arizona.
2. That Decedent was a resident of Mohave County, Arizona, at the time of his death.
3. That at the time of Decedent's death, Decedent was a Defendant in a personal injury lawsuit, *Bianchi et. al v. James Allen McNamee*, Eighth Judicial District Court, Clark County, Nevada Case No. A-13-691887-C.
4. Petitioner has conducted a search of assets for James Allen McNamee, decedent. Upon information and belief, the Estate of James Allen McNamee has no assets to satisfy any judgment other than an automobile insurance policy with GEICO. That

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insurance policy, GEICO policy #4180457162 provides automobile liability insurance coverage of \$30,000 per person and \$60,000 per accident.

5. Petitioner is a resident of the State of Nevada, and is employed at the law firm of Pyatt Silvestri located at 701 Bridger Avenue, Suite, 600, Las Vegas, NV 89101.

6. Special Administration is needed to allow *Bianchi et. al. v. McNamee*, Case No. A-13-691887-C to continue and substitute the real party in interest, the Special Administrator.

7. Petitioner is willing to act as Special Administrator of the estate to defend *Bianchi et. al. v. McNamee*, Case No. A-13-691887-C.

8. Petitioner has never been convicted of a felony. Petitioner is qualified under NRS 139.010 to serve as Special Administrator of the Estate.

**NOW, THEREFORE, IT IS HEREBY ORDERED** that Susan Clokey is appointed as Special Administrator and that Special Letters of Administration be issued, without bond, pursuant to Nevada Revised Statutes 140(2)(a) and 140(3)(b).

The sole purpose of this order is to allow *Bianchi et. al. v. McNamee*, Case No. A-13-691887-C to proceed as to the insurance proceeds of the GEICO automobile insurance policy pursuant to Nevada Revised Statutes 140.040(2)(a) and 140.040(3)(b). Petitioner intends to defend that action as the real party in interest.

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1 The Special Administrator does not have any other authority beyond Nevada  
2 Revised Statutes 140(2)(a) and 140(3)(b) and may not distribute any property other than the  
3 GEICO automobile insurance policy with automobile liability insurance coverage of \$30,000  
4 per person and \$60,000 per accident.

5 Any funds will be held in a blocked account or attorney trust account.

6 IT IS FURTHER ORDERED that the settlement of the decedent's lawsuit is subject to  
7 this court's approval.

8 DATED this 15<sup>th</sup> day of NOV. 2017.

*Vincent Ochoa*

DISTRICT COURT JUDGE *sa*

11 Submitted by:

12 *Jeffrey J. Orr*

13  
14 Jeffrey J. Orr, Esq.  
15 Nevada Bar No. 7854  
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16 701 Bridger Avenue, Suite 600  
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17 T. (702) 383-6000  
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18 Attorney for Petitioner,  
Special Administrator Susan Clokey

19 ///

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EXHIBIT A

**NRS 140.040 Powers, duties and immunity from liability for certain claims.**

1. A special administrator shall:

(a) Collect and preserve for the executor or administrator when appointed all the goods, chattels and receivables of the decedent, and all incomes, rents, issues, profits, claims and demands of the estate.

(b) Take charge and management of the real property and enter upon and preserve it from damage, waste and injury.

2. A special administrator may:

(a) For all necessary purposes, commence, maintain or defend actions and other legal proceedings as a personal representative.

(b) Without prior order of the court, sell any perishable property of the estate, as provided in

NRS 148.170.

(c) Exercise such other powers as have been conferred by the order of appointment.

(d) Obtain leave of the court to borrow money or to lease or mortgage real property in the same manner as an executor or administrator.

3. A special administrator is not liable:

(a) To any creditor on any claim against the estate; or

(b) For any claim against the decedent except a claim involving wrongful death, personal injury or property damage if the estate contains no assets other than a policy of liability insurance.

[Part 86:107:1941; 1931 NCL § 9882.86] – (NRS A 1971, 647; 1983, 668; 1999, 2276)

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of Pyatt Silvestri and that on the 16<sup>th</sup> day of November, 2017, I caused the above **ORDER GRANTING PETITION FOR SPECIAL LETTERS OF ADMINISTRATION**, to be served pursuant to NRCP 5(b) to be electronically served through the *Eighth Judicial District Court's electronic filing system* and via U.S. Mail to the following party listed below:

Robert McNamee  
2472 230<sup>th</sup> Street  
Mahnomen, MN 56557-9034

  
An Employee of PYATT SILVESTRI

10/15/2018

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=11212206&HearingID=194496076&SingleViewMode=Minutes>

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Search Close

Location : District Court Civil/Criminal Help

**REGISTER OF ACTIONS****CASE No. A-13-691887-C****Giann Bianchi, Plaintiff(s) vs. Estate of James McNamee, Defendant(s)**§  
§  
§  
§  
§  
§Case Type: **Negligence - Auto**Date Filed: **11/19/2013**Location: **Department 8**Cross-Reference Case Number: **A691887****PARTY INFORMATION**

		Lead Attorneys
<b>Defendant</b>	<b>Estate of James McNamee Formerly Known As McNamee, James</b>	
<b>Plaintiff</b>	<b>Bianchi, Giann</b>	<b>D Lee Roberts, Jr.</b> <i>Retained</i> 702-938-3838(W)
<b>Plaintiff</b>	<b>Delpriore, Dara</b>	<b>D Lee Roberts, Jr.</b> <i>Retained</i> 702-938-3838(W)

**EVENTS & ORDERS OF THE COURT**

01/22/2018 **Motion** (3:00 AM) (Judicial Officer Smith, Douglas E.)  
*Defendant James McNamee's Motion to Substitute Special Administrator in Place and Stead of Defendant James McNamee and to Amend Caption*

**Minutes**

01/22/2018 3:00 AM

- Defendant James McNamee's Motion to Substitute Special Administrator in Place and Stead of Defendant James McNamee and to Amend Caption came before the Court on the January 22, 2018, Chamber Calendar. Having reviewed the Motion, its Opposition, and Reply thereto, COURT ORDERED, this Motion is DENIED. Court directed the parties to submit three (3) proposed names to the Court for consideration as to who they want to serve as Administrator of the Estate. CLERK'S NOTE: A copy of this minute order was placed in the attorney folders of Jeffrey Orr, Esq., (Pyatt Silvestri) and Craig A. Henderson, Esq., (Glen Lerner Injury Attorneys).

[Return to Register of Actions](#)

*Steven D. Grierson*

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*Attorneys for Susan Clokey,  
Special Administrator*

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

In the Matter of the Estate of

JAMES ALLEN MCNAMEE,

Deceased.

Case No.: P-17-093041-E  
Dept. No.: PC-1

Date of Hearing: February 9, 2018  
Time of Hearing: 9:30 a.m.

**OBJECTION TO PETITION FOR ISSUANCE OF GENERAL LETTERS  
OF ADMINISTRATION AND FOR APPOINTMENT OF CUMIS  
COUNSEL FOR THE ESTATE OF JAMES ALLEN MCNAMEE**

Petitioners, Gianni Bianchi and Dara Del Priore (hereinafter "Petitioners"), requested relief – to open a general administration for the purposes of administering a speculative bad faith personal injury claim before such cause of action has even accrued – is wholly improper under both legal and factual grounds. In so doing, Petitioners misread Nevada law to reach the conclusion that a special administrator cannot defend a lawsuit when an estate has assets in the form of future legal claims. Petitioners' position is, however, entirely misplaced because: (1) the purpose of a special

1 administrator is to act as the real party in interest in lawsuits involving an estate; and (2) Nevada  
2 does not recognize a hypothetical, contingent and unripe claim for bad faith as an estate asset.  
3 Moreover, Nevada law precludes this Court from initiating a general administration because James  
4 Allen McNamee (hereinafter, "Decedent") died as a resident of Arizona without holding any  
5 property in this State. Thus, this Court properly limited the instant proceeding to a special  
6 administration for the sole purpose of allowing Petitioners to properly adjudicate their pending  
7 claims against Decedent after his death.

8 Petitioners' claim that a removable conflict of interest exists should also be rejected by this  
9 Court. There is no actual conflict of interest between GEICO and the Special Administrator. To the  
10 contrary, GEICO and the Special Administrator are presently aligned and share an interest in  
11 defending the Petitioners' tort claims, the primary duty of a special administrator under Nevada  
12 law. Accordingly, the Petitioners' Petition should be denied and the special administration already  
13 in place should be preserved to allow the Special Administrator to defend the Estate against the  
14 Petitioners' pending lawsuit.

## 15 MEMORANDUM OF POINTS AND AUTHORITIES

### 16 I.

#### 17 **FACTUAL BACKGROUND**

18 The instant probate matter stems from an action for negligence brought by Petitioners  
19 against Decedent prior to his death. In July 2013, Decedent's vehicle and the vehicle driven by  
20 Petitioners collided. On November 19, 2013, Petitioners initiated a lawsuit against Decedent for  
21 personal injury damages allegedly caused by such collision. Such action is currently pending before  
22 Department VIII of the Eighth Judicial District Court, Case No. A-13-691887-C (hereinafter, the  
23 "MVA Lawsuit"), and is set on a five-week trial stack commencing April 16, 2018. GEICO is  
24 Decedent's automobile liability insurer. During 2014 and 2015, Petitioners and Decedent  
25 exchanged offers to settle; however, the Parties were ultimately unable to compromise Petitioners'  
26 claims.

27 On August 12, 2017, Decedent died in and as a resident of in Mohave County, Arizona.  
28 Decedent left no property in the State of Nevada. Because of the unresolved MVA Lawsuit, this

1 Court appointed Susan Clokey as the Estate's Special Administrator to substitute the Estate as the  
2 real party in interest.<sup>1</sup> Ms. Clokey is an employee of Pyatt Silversetri, the Decedent's attorney in  
3 the MVA Lawsuit. Counsel for Decedent then filed a motion to substitute the Special Administrator  
4 as Defendant in the MVA Lawsuit in place and stead of Decedent. Petitioners opposed such motion  
5 in the MVA Lawsuit and herein filed the instant Petition for Issuance of General Letters of  
6 Administration and For Appointment of Cumis Counsel for the Estate of James Allen McNamee  
7 (hereinafter, "Petition"). Ms. Cokey and GEICO now jointly oppose the Petition, with GEICO  
8 making a special appearance herein for such purposes.<sup>2</sup>

9 **II.**

10 **ARGUMENT**

11 **A. The Current Special Administration is the Only Proper Probate Proceeding that**  
12 **Applies to the Estate of James Allen McNamee.**

13 1. The Special Administrator's Sole Purpose is to Defend the MVA Lawsuit.

14 This Court properly limited the instant proceeding to a special administration initiated for  
15 the sole purpose of adjudicating Petitioners' claims against Decedent's Estate. This Court has the

16 \_\_\_\_\_  
17 <sup>1</sup> The Special Administrator's authority is limited to defending the MVA Lawsuit and distributing insurance  
18 proceeds to Petitioners if they prevail at trial. Indeed, in establishing the special administration, on November  
15, 2017, this Court entered the following orders:

19 The sole purpose of this order is to allow Bianchi et al. v. McNamee, Case No.  
20 A-13-691887-C to proceed as to the insurance proceeds of the GEICO  
21 automobile insurance policy pursuant to Nevada Revised Statutes  
140.040(2)(a) and 140.040(3)(b). Petitioner intends to defend that action as the  
real party in interest.

22 The Special Administrator does not have any other authority beyond Nevada  
23 Revised Statutes 140(2)(a) [sic] and 140(3)(b) [sic] and may not distribute any  
24 property other than the GEICO automobile insurance policy with automobile  
liability insurance coverage of \$30,000 per person and \$60,000 per accident.

25 See Order Granting Special Letters of Administration, attached hereto as **Exhibit A**.

26 <sup>2</sup> As a preliminary matter, the Petition is not properly before this Court as Petitioners failed to issue GEICO  
27 a citation as required under NRS 155, *et seq.* Out of an abundance of caution, however, GEICO and the  
28 Special Administrator hereby object to the Petition as it relates to Petitioners' request to initiate a general  
administration and issue letters of administration. Janine C. Prupas, Esq., of the law firm of Snell & Wilmer  
will be opposing Petitioners' request for the appointment of Cumis counsel on GEICO's behalf.

1 authority to appoint a special administrator in any proper case to exercise powers as may be  
2 necessary for the estate's preservation. NRS 140.010. Such appointment may occur where, as here,  
3 no assets are subject to administration, but good cause nevertheless exists for the appointment of a  
4 personal representative of the decedent.<sup>3</sup> NRS 140.010(6) and (7). A special administrator, at her  
5 discretion, may, for all necessary purposes, defend actions and other legal proceedings as a personal  
6 representative of the Estate. NRS 140.040(1)(b).

7 As a general rule, special administrators cannot accept, reject or negotiate creditor claims.  
8 NRS 140.040(3). A general administration is necessary for such a procedure or an order from the  
9 Court granting a special administrator such power. The exception to this rule is when an estate's  
10 sole asset is a policy of liability insurance and a claim is made where such liability insurance would  
11 cover the loss. NRS 140.040(3)(b).

12 Petitioners' argument that the Special Administrator cannot defend the MVA Lawsuit  
13 because the Estate has another asset – namely, a speculative bad faith claim against GEICO – is  
14 entirely misplaced. As an initial matter, defending a lawsuit and satisfying creditors are two separate  
15 and distinct functions a personal representative performs. A special administrator is not divested of  
16 his or her authority under NRS 140.040(1)(b) to defend a civil action as the personal representative  
17 of the Estate if the Estate has more than one asset.<sup>4</sup> That is not the purpose and effect of NRS  
18 140.040(1)(b). Rather, its purpose is to permit a special administrator – who otherwise has no  
19 powers to compromise and pay creditors – to pay a claim when such a claim would be satisfied  
20 with proceeds from a liability insurance policy that covered the loss.<sup>5</sup>

21  
22 <sup>3</sup> "Personal Representative" includes an executor, an administrator, a successor personal representative, a  
23 special administrator and persons who perform substantially the same function under the law governing their  
status. NRS 132.265.

24 <sup>4</sup> Indeed, NRS 140.140(2)(a) expressly authorizes a special administrator to "commence" and "maintain"  
25 legal proceedings as the personal representative of the estate. How could a special administrator pursue an  
asset of the estate through litigation if he or she is divested of power because the asset exists?

26 <sup>5</sup> Ironically, the Petitioners are attacking a statute that was enacted for their benefit. Indeed, as recognized  
27 by the Nevada Supreme Court, NRS 140.040(3) promotes judicial economy and efficient resolutions of  
28 claims by enabling a plaintiff with such claims to avoid lengthy, costly, formal probate procedures when the  
sole asset is a liability insurance policy. *See Jacobsen v. Estate of Clayton*, 121 Nev. 518, 522, 119 P.3d 132,  
134 (2005).

Moreover, the Petitioners' reliance on *Bodine* for the proposition that the Estate must be converted to a general administration is misguided and otherwise misleading as it fails to account for subsequently enacted law. Despite Petitioners' claim to the contrary, the entire *Bodine* decision was superseded by NRS 140.040(3).<sup>6</sup> Moreover, even if *Bodine* were good law, which it is not, it merely stands for the proposition that "[t]he claim procedure specified by Ch. 147 must be followed whenever the estate of the deceased may be diminished if the creditor is successful."<sup>7</sup>

First, the claim procedure is not necessary at this time. Second, even if it were necessary, a special administrator can initiate such a procedure. The claim procedure involving notice to creditors need not be followed under the current circumstances because, unlike in *Bodine*, the Estate has no current assets that can be diminished by a creditor thereby rendering any notice to creditors an exercise in futility. Indeed, the general administration procedure could only potentially be beneficial to the Estate and its creditors if and when (1) the Petitioners successfully obtain a judgment in the underlying MVA Litigation which creates excess liability for the Estate; and (2) the Estate obtains a judgment against GEICO under an insurance bad faith theory.

Moreover, NRS 143.335, a statute enacted in 2011, further belies the Petitioners' argument that a special administrator cannot exist when an estate has assets other than a policy of liability insurance. NRS 143.335 provides: "[a] special administrator may be granted authority to administer the estate pursuant to NRS 143.300 to 143.815, inclusive, if the special administrator is appointed with, or has been granted, the power of a general personal representative." A special administrator can, therefore, initiate a claims process and independently administer an estate if the Court so orders it. Accordingly, this Court should summarily dismiss Petitioners' claims for want of any legal support.

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<sup>6</sup> See *Jacobsen*, 121 Nev. at 519, 119 P.3d at 132 (concluding that "*Bodine* is superseded by the Legislature's 1971 amendment of NRS 140.040 to specifically allow suits against a special administrator, in place of probate proceedings, when the estate's sole asset is a liability insurance policy.") (emphasis added).

<sup>7</sup> See *Jacobsen*, 121 Nev. at 521, 119 P.3d at 134.

2. The Alleged Bad Faith Insurance Claim has Not Accrued and, Therefore, Cannot be a Basis to Establish a General Administration Where no Proper Basis Otherwise Exists.

Petitioners' allegation that the Estate has an interest in yet-to-be accrued bad faith claims does not somehow provide this Court with the jurisdiction to generally administer Decedent's Estate where no proper basis otherwise exists. As this Court is well aware, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998). In the case of Petitioners' purported claim for bad faith, such claim only ripens upon a determination that claimants suffered damages in excess of the benefits available under the controlling insurance policy and such determination is affirmed on appeal.<sup>8</sup>

Even if the Petitioners' erroneous interpretation of NRS 140.040(3)(b) were accepted by this Court, the purported bad faith claim is neither a claim nor an asset of the Estate. Petitioners have not even taken the MVA Lawsuit to trial yet. Petitioners still have to win and obtain judgments in excess of the policy limit of \$30,000.00 for even a prima facie "refusal to settle" claim to exist. Such claim would also require a showing that: (1) GEICO has no reasonable basis for disputing coverage; (2) GEICO knew or recklessly disregarded the fact that there was no reasonable basis for disputing coverage.<sup>9</sup> The Court should then need to find that the damages sustained by Petitioners exceeded the limits available under the GEICO policy and the affirmation of such determination on appeal. This fact has been conceded by the Petitioners.<sup>10</sup> Thus, as this matter has yet to even go to trial, absolutely no basis exists to establish a general administration at this time.

<sup>8</sup> See *Branch Baking and Trust Co. v. Nevada Title Co.*, 2011 WL 1399810 (D.Nev.2011) (holding that a claim for insurance bad faith for denying a claim "without any reasonable basis" and with "knowledge that no reasonable basis exists to deny the claim" does not become ripe until after a determination of the underlying claim is final); *Western Nat. Ins. Group v. Halon*, 2017 WL 6614258 (D.Nev.2017) (distinguishing ripeness of an insurance bad faith claim and a legal malpractice claim); *Vest v. Travelers Ins. Co.*, 753 So.2d 1270, 1276 (Fla.2000) ("a cause of action in court for [bad faith] is premature until there is a determination of liability and extent of damages owed on the first-party insurance contract."); *Lausell v. GEICO*, 2017 WL 3720890 (M.D.Fla.2017) ("a claim for bad faith requires: (1) a determination of liability and (2) a judgment awarding damages in excess of the policy limits.").

<sup>9</sup> See *Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 730, 962 P.2d 596, 621 (1998).

<sup>10</sup> See Petition at 11:7-8 ("James Allen McNamee left an estate that consist of...the Estate's potential bad faith claims against GEICO.") (emphasis added).

Moreover, in addition to the extreme unripeness of the alleged bad faith claim, Petitioners seem to forget that they have no standing to complain about the contractual relationship between GEICO and the Decedent. Indeed, Nevada law “does not recognize a right a right of action on the part of a third-party claimant against an insurance company for bad-faith refusal to settle.”<sup>11</sup> Thus, Petitioners – third parties to the relationship between the insurance and the insured – have absolutely no standing to request that this Court open a general administration for the purposes of administering claims that can only be asserted by Decedent against GIECO.

**B. This Court Lacks Jurisdiction to Administer the Estate of James Allen McNamee Because he was not a Nevada Resident at the Time of his Death and Died Without Holding any Property in the State of Nevada.**

The initiation of a general administration is fundamentally improper because, at the time of this death, Decedent was not a Nevada resident and did not own any assets in this State as expressly required under Nevada law. NRS 132.275 defines “probate” as “a legal proceeding in which the court has jurisdiction to administer, pay out and distribute the assets of a decedent to the persons entitled to them, including devisees, heirs, creditors and others.” Nevada’s probate jurisdiction is set forth in NRS 136.010. Under that statute, Nevada district courts sitting in probate may hear and make rulings on cases where: (1) the decedent was a resident of Nevada at the date of death [NRS 136.010(1)]; or (2) the decedent was a non-resident but owns property located within the State of Nevada [NRS 136.010(2)].

The Decedent died on August 12, 2017, in Mohave County, Arizona.<sup>12</sup> At the time of his death, the Decedent was a resident of Arizona.<sup>13</sup> Accordingly, this Court has no jurisdiction to entertain a general probate administration under NRS 136.010(1). Notwithstanding the Decedent being a resident of Arizona at the time of his death, this Court could still open a general probate administration if an interested party establishes that the Decedent died with property located within

<sup>11</sup> *AAA Nevada Ins. Co. v. Chau*, 463 Fed. Appx. 627, 628 (9th Cir. 2011) (unpublished) (citing *Tweet v. Webster*, 610 F.Supp. 104, 105 (D.Nev.1985) and *Hunt v. State Farm Mut. Auto. Ins. Co.*, 655 F.Supp. 284, 286–88 (D.Nev.1987)).

<sup>12</sup> See **Ex. A** at ¶¶ 1-2.

<sup>13</sup> *Id.*

1 the State of Nevada.<sup>14</sup> “Property” in this context is defined as “anything that may be the subject of  
2 ownership, and includes both real and personal property and any interest therein.” NRS 132.285.

3 The Petitioners argue that the Estate’s nonexistent bad faith claim is “property” and,  
4 therefore, a general probate administration is appropriate. For the reasons already explained, a  
5 theoretical, unripe and contingent claim for bad faith is not property. You cannot own something  
6 that does not exist.<sup>15</sup> A general probate administration, therefore, is unavailable.

7 **C. There is no Conflict of Interest Between the Special Administrator and the Estate.**

8 As no conflict of interest presently exists between the Special Administrator and GIECO,  
9 no grounds exist to disqualify Ms. Clokey from so serving. Only an actual conflict of interest can  
10 justify disqualification of the Special Administrator. The suggestion of a potential conflict of  
11 interest is not sufficient.<sup>16</sup> The Estate and the Petitioners are adverse: the Petitioners are suing the  
12 Estate’s personal representative for tort damages. GEICO and the Estate are presently aligned: they  
13 both have an interest in defending the Petitioners’ claim for more than \$5.27 million of damages  
14 allegedly caused by the Decedent in the MVA Litigation. There is no present conflict between  
15 GEICO and its insured.

16  
17  
18 <sup>14</sup> NRS 136.010(2) states that “[t]he estate of a nonresident decedent may be settled by the district court of  
19 any county in which any part of the estate is located.” “‘Estate’ includes the property of the decedent or trust  
20 whose affairs are subject to [Title of the NRS] as it is originally constituted and as it exists from time to time  
during administration.” NRS 132.120.

21 <sup>15</sup> Moreover, an estate that has no assets cannot be damaged by an insurer that fails to protect the interests  
22 of the estate. *See McDaniel v. GEICO*, 55 F.Supp.3d 1244 (E.D.Cal.2014) (“an insolvent estate that becomes  
23 subject to an excess judgment due to the insurer’s unreasonable refusal to settle has no bad faith claim  
because the estate has no interests to be damaged.”) (reversed in part on unrelated grounds) (citing *Shapero*  
*v. Allstate*, 14 Cal.App.3d 433, 92 Cal.Rptr. 244 (1971)).

24 <sup>16</sup> *See e.g. Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd.*, 124 Nev. 1206, 197 P.3d 1051, n. 33  
25 (2008) (declining to disqualify an attorney because a suggestion of a potential conflict was not sufficient);  
26 *State Farm v. Hansen*, 131 Nev. Adv. Op. 74, 357 P.3d 342-43 (“The *Cumis* rule is not based on insurance  
27 law but on the ethical duty of an attorney to avoid representing conflicting interests. For independent counsel  
28 to be required, the conflict of interest must be significant, not merely theoretical, actual, not merely  
potential.”) (quotations omitted); *In re Shaw*, 186 A.D. 809, 589 N.Y.S.2d 97 (1992) (“A potential conflict  
of interest between a fiduciary and a party interested in the estate does not warrant the denial of letter to, or  
removal of, a fiduciary. Rather, it is the actual misconduct, not a conflict of interest, that justifies the removal  
of a fiduciary.”) (quotations omitted).

1 Petitioners claim that a hypothetical, unripe and contingent bad faith claim that the Estate  
2 may have against GEICO divests the Special Administrator of her ability aggressively defend the  
3 MVA Lawsuit. This is nonsensical. At best, the Special Administrator has a potential conflict of  
4 interest which only becomes actual if and when (1) the Petitioners obtain judgments in excess of  
5 the policy limits in the MVA Litigation which are upheld on appeal; and (2) the Estate has assets  
6 other than the potential bad faith claim, which it does not.

7 Again, the Petitioners are putting the cart before the horse. The Special Administrator has  
8 no actual conflict of interest with the Estate. If anything, under the Petitioners' theory of conflict,  
9 the Estate and GEICO share the goal of defending the Petitioners' claim for damages. The Estate's  
10 primary interest is to minimize and/or eliminate creditor claims for the benefit of beneficiaries;  
11 GEICO's primary interest is also to minimize and or eliminate the Petitioners' claim for damages  
12 because it will have to pay at least a portion of such claim if adjudicated in the Petitioners' favor.

13 The elephant in the room is the Petitioners' end-game: to seek the assignment of the  
14 purported bad faith claim from the Estate because Nevada law prohibits a right of action on the part  
15 of a third-party claimant against an insurance company for bad-faith refusal to settle. Petitioners,  
16 however, have a lot of hurdles to jump over before there is an assignable claim, the highest of which  
17 is convincing this Court that Nevada should not follow *McDaniel and Shapero* which hold that a  
18 "refusal to settle" bad faith claim does not exist when an estate has no assets that are subject to  
19 creditors.

20 The conflicts complained of by the Petitioners are potential and highly speculative.  
21 Accordingly, the Special Administrator should not be removed and replaced by the Public  
22 Administrator. Moreover, the Petitioners are asking this Court for Clark County and its taxpayers  
23 to shoulder the expense of hiring the Public Administrator because there are no assets in the Estate  
24 to pay the Public Administrator. Indeed, the current special administration is being paid for  
25 voluntarily by GEICO in order to properly dispense the Estate's duty to substitute in as the real  
26 party of interest as a result of Decedent's death.

27 ///


28 ///

III.

CONCLUSION

WHEREFORE, GEICO and the Special Administrator respectfully request that the Court deny Giann Bianchi and Dara Del Priore's Petition for Issuance of General Letters of Administration and for Appointment of *Cumis* Counsel for the Estate of James Allen McNamee in its entirety.

DATED January 24, 2018.

  
Brian P. Eagan  
Nevada Bar No. 09395  
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Alexander G. LeVeque  
Nevada Bar No. 11183  
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-- and --

Jeffrey J. Orr  
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PYATT SILVESTRI  
701 Bridger Avenue, Suite 600  
Las Vegas, Nevada 89101  
Telephone: (702) 383-6000  
Facsimile: (702) 477-0088

*Attorneys for Susan Clokey,  
Special Administrator*

**CERTIFICATE OF SERVICE**

PURSUANT to NRCP 5(b), I HEREBY CERTIFY that on January 24, 2018, I served a true and correct copy of the OBJECTION TO PETITION FOR ISSUANCE OF GENERAL LETTERS OF ADMINISTRATION AND FOR APPOINTMENT OF *CUMIS* COUNSEL FOR THE ESTATE OF JAMES ALLEN MCNAMEE the following in the manner set forth below:

**Via:**

☐ Hand Delivery  
☐ U.S. Mail, Postage Prepaid  
☐ Certified Mail, Receipt No.: \_\_\_\_\_  
☐ Return Receipt Request  
☒ E-Service through Wiznet as follows:

Corey M. Eschweiler, Esq. ([ceschweiler@glenlerner.com](mailto:ceschweiler@glenlerner.com))

Craig A. Henderson, Esq. ([chenderson@glenlerner.com](mailto:chenderson@glenlerner.com))

*Counsel for Gianni Bianchi and Dara Del Priore*

Jeffrey J. Orr, Esq. ([jorr@pyattsilvestri.com](mailto:jorr@pyattsilvestri.com))

*Counsel for Susan Clokey, Special Administrator of the Estate of James Allen McNamee and GEICO*

**Via:**

☐ Hand Delivery  
☐ U.S. Mail, Postage Prepaid  
☐ Certified Mail, Receipt No.: \_\_\_\_\_  
☐ Return Receipt Request  
☒ E-Service through Wiznet as follows:

Robert McNamee  
2472 230<sup>th</sup> Street  
Mahnomen, MN 56557-9034

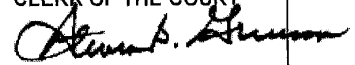
  
An employee of SOLOMON DWIGGINS & FREER, LTD.

EXHIBIT “A”

EXHIBIT “A”

ORIGINAL

Electronically Filed  
11/16/2017 4:41 PM  
Steven D. Grierson  
CLERK OF THE COURT



1 **ORDER**  
2 Jeffrey J. Orr, Esq.  
3 Nevada Bar No. 7854  
4 PYATT SILVESTRI  
5 701 Bridger Avenue  
6 Suite 600  
7 Las Vegas, NV 89101  
8 T. (702) 383-6000  
9 F. (702) 477-0088  
10 [jorr@pyattsilvestri.com](mailto:jorr@pyattsilvestri.com)  
11 Attorney for Petitioner,  
12 Special Administrator Susan Clokey

8 **EIGHTH JUDICIAL DISTRICT COURT**  
9 **CLARK COUNTY, NEVADA**

10 In the Matter of the Estate of James Allen ) Case No.: P-17-093041-E  
11 McNamee, Deceased ) Dept No.: S  
12 )  
13 )  
14 )  
15 )

16 **ORDER GRANTING**  
17 **PETITION FOR SPECIAL LETTERS OF ADMINISTRATION**

18 Upon submission of the Petition for Special Letters of Administration, representing  
19 as follows:

20 1. That Decedent, James Allen McNamee died on the 12<sup>th</sup> day of August, 2017, in  
21 the County of Mohave, State of Arizona.

22 2. That Decedent was a resident of Mohave County, Arizona, at the time of his  
23 death.

24 3. That at the time of Decedent's death, Decedent was a Defendant in a personal  
25 injury lawsuit, *Bianchi et. al v. James Allen McNamee*, Eighth Judicial District Court, Clark  
26 County, Nevada Case No. A-13-691887-C.

27 4. Petitioner has conducted a search of assets for James Allen McNamee,  
28 decedent. Upon information and belief, the Estate of James Allen McNamee has no assets  
to satisfy any judgment other than an automobile insurance policy with GEICO. That

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LAS VEGAS, NEVADA 89101-8941  
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1 insurance policy, GEICO policy #4180457162 provides automobile liability insurance  
2 coverage of \$30,000 per person and \$60,000 per accident.

3 5. Petitioner is a resident of the State of Nevada, and is employed at the law firm of  
4 Pyatt Silvestri located at 701 Bridger Avenue, Suite, 600, Las Vegas, NV 89101.

5 6. Special Administration is needed to allow *Bianchi et. al. v. McNamee*, Case No.  
6 A-13-691887-C to continue and substitute the real party in interest, the Special  
7 Administrator.

8 7. Petitioner is willing to act as Special Administrator of the estate to defend  
9 *Bianchi et. al. v. McNamee*, Case No. A-13-691887-C.

10 8. Petitioner has never been convicted of a felony. Petitioner is qualified under  
11 NRS 139.010 to serve as Special Administrator of the Estate.

12 **NOW, THEREFORE, IT IS HEREBY ORDERED** that Susan Clokey is appointed as  
13 Special Administrator and that Special Letters of Administration be issued, without bond,  
14 pursuant to pursuant to Nevada Revised Statutes 140(2)(a) and 140(3)(b).

15 The sole purpose of this order is to allow *Bianchi et. al. v. McNamee*, Case No.  
16 A-13-691887-C to proceed as to the insurance proceeds of the GEICO automobile insurance  
17 policy pursuant to Nevada Revised Statutes 140.040(2)(a) and 140.040(3)(b). Petitioner  
18 intends to defend that action as the real party in interest.

19 ///

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1 The Special Administrator does not have any other authority beyond Nevada  
2 Revised Statutes 140(2)(a) and 140(3)(b) and may not distribute any property other than the  
3 GEICO automobile insurance policy with automobile liability insurance coverage of \$30,000  
4 per person and \$60,000 per accident.

5 Any funds will be held in a blocked account or attorney trust account.

6 IT IS FURTHER ORDERED that the settlement of the decedent's lawsuit is subject to  
7 this court's approval.

8 DATED this 15<sup>th</sup> day of <sup>NOV.</sup> ~~October~~, 2017.

*Vincent Ochoa*

DISTRICT COURT JUDGE *su*

11 Submitted by:

*Jeffrey J. Orr*

14 Jeffrey J. Orr, Esq.  
15 Nevada Bar No. 7854  
16 PYATT SILVESTRI  
17 701 Bridger Avenue, Suite 600  
18 Las Vegas, NV 89101  
19 T. (702) 383-6000  
20 [jorr@pyattsilvestri.com](mailto:jorr@pyattsilvestri.com)  
21 Attorney for Petitioner,  
22 Special Administrator Susan Clokey

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

EXHIBIT A

**NRS 140.040 Powers, duties and immunity from liability for certain claims.**

1. A special administrator shall:

(a) Collect and preserve for the executor or administrator when appointed all the goods, chattels and receivables of the decedent, and all incomes, rents, issues, profits, claims and demands of the estate.

(b) Take charge and management of the real property and enter upon and preserve it from damage, waste and injury.

2. A special administrator may:

(a) For all necessary purposes, commence, maintain or defend actions and other legal proceedings as a personal representative.

(b) Without prior order of the court, sell any perishable property of the estate, as provided in

NRS 148.170.

(c) Exercise such other powers as have been conferred by the order of appointment.

(d) Obtain leave of the court to borrow money or to lease or mortgage real property in the same manner as an executor or administrator.

3. A special administrator is not liable:

(a) To any creditor on any claim against the estate; or

(b) For any claim against the decedent except a claim involving wrongful death, personal injury or property damage if the estate contains no assets other than a policy of liability insurance.

[Part 86:107:1941; 1931 NCL § 9882.86] – (NRS A 1971, 647; 1983, 668; 1999, 2276)

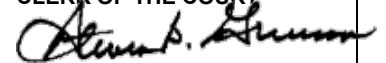
PYATT SILVESTRI  
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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of Pyatt Silvestri and that on the 16<sup>th</sup> day of November, 2017, I caused the above **ORDER GRANTING PETITION FOR SPECIAL LETTERS OF ADMINISTRATION**, to be served pursuant to NRCP 5(b) to be electronically served through the *Eighth Judicial District Court's electronic filing system* and via *U.S. Mail* to the following party listed below:

Robert McNamee  
2472 230<sup>th</sup> Street  
Mahnomen, MN 56557-9034

  
An Employee of PYATT SILVESTRI



1 Corey M. Eschweiler, Esq.  
Nevada Bar No. 6635  
2 Craig A. Henderson, Esq.  
Nevada Bar No. 10077  
3 Joshua L. Benson, Esq.  
Nevada Bar No. 10514  
4 GLEN LERNER INJURY ATTORNEYS  
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5 Las Vegas, Nevada 89147  
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6 Facsimile: (702) 933-7043  
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8 Lee D. Roberts, Esq.  
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9 WEINBERG WHEELER HUDGINS GUNN & DIAL  
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11 Facsimile: (702) 938-3864  
Email: LRoberts@wwhgd.com

12 *Attorneys for Petitioners Gianni Bianchi*  
13 *and Dara Del Priore*

14 EIGHTH JUDICIAL DISTRICT COURT

15 CLARK COUNTY, NEVADA

16 In the matter of the Estate of JAMES ALLEN  
17 MCNAMEE, Deceased.

CASE NO.: P-17-093041-E  
DEPT NO.: PC-1

**REPLY IN SUPPORT OF PETITION  
FOR ISSUANCE OF GENERAL  
LETTERS OF ADMINISTRATION AND  
FOR APPOINTMENT OF CUMIS  
COUNSEL FOR THE ESTATE OF  
JAMES ALLEN MCNAMEE;**

**AND**

**RESPONSE TO OBJECTION TO  
PETITION FOR ISSUANCE OF  
LETTERS OF ADMINISTRATION AND  
FOR APPOINTMENT OF CUMIS  
COUNSEL FOR THE ESTATE OF  
JAMES ALLEN MCNAMEE**

**Date of Hearing: Feb. 9, 2018  
Time of Hearing: 9:30 a.m.**

Petitioners Gianni Bianchi and Dara Del Priore, through their attorneys of record, Corey M. Eschweiler, Esq., Craig A. Henderson, Esq., and Joshua L. Benson, Esq., of GLEN LERNER INJURY ATTORNEYS, and Lee D. Roberts, Esq., of WEINBERG WHEELER HUDGINS GUNN & DIAL, submit this Reply in support of their Petition For Issuance of Letters of General Administration and For Appointment of *Cumis* Counsel for The Estate of James Allen McNamee and Response to Objection to For issuance of Letters of General Administration and For Appointment of *Cumis* Counsel for the Estate of James Allen McNamee.

While Petitioners maintain their request that this court appoint a general administrator for the Estate of James Allen McNamee, Petitioners withdraw the portion of their Petition seeking an order from this Court appointing *Cumis* counsel pursuant to *See State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338 (Sep. 24, 2015). This Reply and Response are based upon the following memorandum of points and authorities, the papers and Pleadings on file with the court, and the oral argument of the parties.

GLEN LERNER INJURY ATTORNEYS

By: /s/ Craig A. Henderson  
Corey M. Eschweiler, Esq.  
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Craig A. Henderson, Esq.  
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WEINBERG WHEELER HUDGINS  
GUNN & DIAL

Lee D. Roberts, Esq.,  
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6385 South Rainbow Blvd., Suite 400  
Las Vegas, NV 89118  
*Attorneys for Petitioners Giann Bianchi  
and Dara Del Priore*



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///

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 GEICO and the Special Administrator claim there is no bad faith because GEICO never  
4 denied the decedent's insurance coverage, and without a claim for bad faith there is no conflict of  
5 interest between GEICO and decedent's estate. This is not the law. Instead, "[t]he implied  
6 covenant requires the insurer to settle the case within policy limits when there is a substantial  
7 likelihood of recovery in excess of those limits." *Kelly v. CSE Safeguard Ins., Co.*, No. 2:08-CV-  
8 0088-KJD-RJJ, 2011 U.S. Dist. LEXIS 111136, at \*10 (D. Nev. Sep. 27, 2011). Here, the trial  
9 court has already issued an order precluding McNamee from disputing his liability in the MVA  
10 Lawsuit, and GEICO offered to settle each of Petitioner's claims for more than McNamee's liability  
11 insurance policy limits. This, on July 13, 2015. In other words, McNamee's bad faith claims arose  
12 at the time GEICO exposed him to liability in excess of his insurance, or July 13, 2015 – more than  
13 two years before McNamee's passing. As GEICO and the Special Administrator's own case law  
14 makes clear, "[i]f [an insurer] breached its implied covenant with [the insured] while he was alive,  
15 then, under Nevada law, the Estate would retain any such claims as if [the insured] were still alive"  
16 and is entitled to seek damages from the insurer. *Avila v. Century Nat'l Ins. Co.*, 473 F. App'x 554,  
17 556 (9th Cir. 2012) (insertions added). Simply put, McNamee's bad faith claims arose on July 13,  
18 2015, at the latest, and those claims passed to his Estate upon his death on August 12, 2017. GEICO  
19 and the Special Administrator's various arguments seeking to side step this are not persuasive.

20 Most obviously, that the Estate possesses bad faith claims against GEICO presents an actual  
21 conflict of interest between GEICO and the Estate. As even GEICO indirectly acknowledges in its  
22 briefing, "[t]he insured's remedy to protect himself from an excess judgment is to assign to the  
23 claimant his cause of action for bad faith refusal to settle in exchange for a covenant not to enforce  
24 the judgment against the insured's personal assets." *Safeco Ins. Co. of Am. v. Superior Court*, 71  
25 Cal. App. 4th 782, 788-89, 84 Cal. Rptr. 2d 43, 46 (1999); see Objection, at 9 ("The elephant in the  
26 room is Petitioners' end-game: to seek the assignment of the purported bad faith claims from the  
27 Estate"). GEICO's team of law firms, however, obviously cannot advise the Estate of its rights  
28 against GEICO because that would be directly adverse to those lawyers' other client, GEICO. In

1 short, without *Cumis* counsel there is no one to protect the interests of the Estate from the  
2 forthcoming excess judgment (although Petitioners are withdrawing their request that this court  
3 issue an order appointing *Cumis* counsel and intend to seek that relief from the court in the MVA  
4 Lawsuit).

5 GEICO and the Special Administrator also claim that any bad faith claims have not ripened  
6 into assertable causes of action because there has been no excess judgment entered against  
7 McNamee in the MVA Lawsuit. GEICO, again, misapprehends the law: “[t]he insured’s action for  
8 breach of the contractual duty to settle may be assigned to the claimant, regardless of whether  
9 assignments are permitted by the policy. Such an assignment may be made before trial, but the  
10 assignment does not become operative, and the claimant’s action against the insurer does not  
11 mature, until a judgment in excess of the policy limits has been entered against the insured.”  
12 *Hamilton v. Maryland Casualty Co.*, 27 Cal. 4th 718, 725 (2002). In other words, McNamee’s  
13 claims were immediately assignable upon the failure to settle, regardless of whether those rights  
14 may yet be asserted.

15 GEICO and the Special Administrator further contend that even if the estate has assets in  
16 addition to the GEICO insurance policy, this does not preclude the Special Administrator from  
17 paying out the insurance proceeds to compromise Petitioners’ claims. GEICO and the Special  
18 Administrator even go so far as to claim that the Legislature’s 1971 enactment of NRS 140.040(3)  
19 operates for Petitioners’ benefit and that it is ironic that Petitioners seek to avoid operation of the  
20 statute. To the contrary, NRS 140.040(3) permits a special administrator to administer an estate  
21 only if the Estate’s assets consist solely of a liability insurance policy to satisfy the claim. That is  
22 simply not the case here, as the McNamee Estate also possesses assets in the form of bad faith  
23 claims against GEICO. Moreover, as the Special Administrator concedes, her authority is limited to  
24 paying out insurance proceeds, only, and in this case, GEICO has already offered to settle  
25 Petitioners’ claims for more than the policy. In other words, the insurance proceeds are insufficient  
26 to satisfy Petitioners’ claims, the Estate’s assets do not consist solely of the GEICO policy, and the  
27 Special Administrator cannot administer Petitioners’ claims under these facts. This is particularly  
28 problematic here where the Special Administrator is an employee of the law firm that was appointed

1 by GEICO and paid by GEICO to defend McNamee in the MVA Lawsuit. In other words, this also  
2 implicates *Cumis* and *Hansen* as the Special Administrator now has the responsibility of advising  
3 the Estate of its rights against GEICO – while admittedly being compensated by GEICO. *See State*  
4 *Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338, 341 (Sep. 24, 2015)  
5 (still can be a conflict of interest when “the lawyer is selected by and receives compensation from  
6 someone with legal interests opposed to the lawyer’s client”); Objection at 9:24-26 (GEICO is  
7 paying for the special administration). Consequently, Petitioners request that the public  
8 administrator be appointed to administer McNamee’s estate and to protect the Estate’s interests.  
9 Petitioners withdraw their request to this Court for appointment of *Cumis* counsel subject to seeking  
10 that relief from the court in the MVA Lawsuit.

## 11 II. ARGUMENT

### 12 A. GEICO has exposed McNamee’s estate to excess liability in bad faith.

13 In an attempt to muddy the waters and distract this court from the true issue at hand, GEICO  
14 merely claims there is no conflict of interest because GEICO and the Estate “share an aligned desire  
15 to resolve this litigation – avoid and defeat liability.” Opposition, at 4. GEICO also claims “before  
16 his death, the insured never brought a cause of action against GEICO for any reason,” and “he did  
17 not do so because GEICO never denied coverage.” *Id.*, at 5. GEICO, then, engages in a lengthy  
18 discussion of insurance bad faith in the context of a coverage dispute, then merely claims that  
19 GEICO has not denied coverage, continues to defend the Estate, and, therefore, there can be no bad  
20 faith. Contrary to the thrust of GEICO’s Opposition, it is well settled that “[t]he implied covenant  
21 requires the insurer to settle the case within policy limits when there is a substantial likelihood of  
22 recovery in excess of those limits.” *Kelly v. CSE Safeguard Ins., Co.*, No. 2:08-CV-0088-KJD-RJJ,  
23 2011 U.S. Dist. LEXIS 111136, at \*10 (D. Nev. Sep. 27, 2011).<sup>1</sup> “The duty to settle is implied in  
24 law to protect the insured from exposure to liability in excess of coverage as a result of the insurer’s  
25 gamble — on which only the insured might lose. When the insurer breaches its duty to settle, the

26  
27  
28 <sup>1</sup> Unpublished federal court dispositions may be cited “for their persuasive, if nonbinding, precedential value.” *Schuck*  
*v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 440 n.2, 245 P.3d 542, 546 (2010).

1 insured has been allowed to recover excess award over policy limits and other damages.” *Id.*,  
2 quoting *Murphy v. Allstate Ins. Co.*, 17 Cal. 3d 937, 941 (1976). As another court explained:

3       An offer to settle for a sum approaching the monetary limit on liability confronts  
4       the insurer with a conflict of interest, a conflict described in some detail in *Brown*  
5       *v. Guarantee Ins. Co.*, *supra*, 155 Cal.App.2d at pages 682-683. In brief, by  
6       rejecting the settlement, the insurer may subject its policyholder to the risk of  
7       personal liability far exceeding the policy limit; by accepting it, the company may  
8       be paying a sum greater than the minimum possible settlement. Confronted with  
9       such a conflict, the insurer is obligated to give the interests of its policyholder at  
10       least as much consideration as its own.

11       *See Critz v. Farmers Ins. Grp.*, 230 Cal. App. 2d 788, 795-96 (1964), cited with approval in  
12       *Hamilton v. Maryland Casualty Co.*, 27 Cal. 4th 718, 725 (2002).<sup>2</sup> This case is no different. In fact,  
13       there is not merely a substantial likelihood the insured will be exposed to an excess judgment in this  
14       case – it is imminent. More importantly, GEICO admits this fact when it made offers to resolve the  
15       case above policy limits. In other words, GEICO admits its unreasonable handling of the claim.

16       GEICO claims “the underlying issue of this litigation is still whether Mr. McNamee  
17       negligently caused the harm for which Petitioners now seek to recover,” yet GEICO fails to disclose  
18       to this Court that the district court has already entered a pre-trial order in limine “precluding  
19       McNamee from contesting liability at trial.” *See* July 19, 2017, Order Regarding Plaintiff’s Motions  
20       in Limine Numbers 1 through 28, on file in the MVA Lawsuit and attached hereto as Ex. 1-A.  
21       McNamee is, therefore, liable for the causing the collision. GEICO does not dispute that it refused  
22       to settle Petitioners’ claims prior to litigation knowing their medical special damages would exceed  
23       McNamee’s \$60,000 liability insurance coverage, nor does GEICO dispute that on July 13, 2015, it  
24       offered to settle each of Petitioner’s claims for more than McNamee’s \$30,000 per person  
25       automobile liability insurance limit, thereby admitting that Petitioners damages exceeded the  
26       available insurance. In other words, it is all but undisputed that GEICO failed to compromise  
27       Petitioners’ claims within McNamee’s policy limits and, as of July 13, 2015, admitted there is  
28       excess liability by offering to settle for more than McNamee’s policy. GEICO even admits as much  
29       in its Objection to the Petition: “GEICO’s primary interest is also to minimize and/or eliminate the

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<sup>2</sup> “Nevada courts often look to California law, particularly in the bad faith setting.” *Clark Cty. Sch. Dist. v. Travelers*  
*Cas. & Sur. Co. of Am.*, No. 2:13-CV-1100 JCM (PAL), 2015 U.S. Dist. LEXIS 46537, at \*13 (D. Nev. Apr. 8, 2015).

1 Petitioners’ claim for damages because it will have to pay at least a portion of such claim if  
2 adjudicated in Petitioners’ favor.” Objection, at 9:9-12 (emphasis added). Simply put, GEICO  
3 intends to gamble with the interests of its insured at trial by rolling the dice with a jury and paying  
4 its \$60,000 of insurance, all while leaving the insured exposed to the imminent excess liability.

5 **B. There is an actual conflict of interest between GEICO and McNamee’s Estate.**

6 This is precisely why *Cumis* counsel is required for the Estate – there is no one advising the  
7 Estate how to protect itself from the excess liability, e.g., by assigning its bad faith claims against  
8 GEICO to Petitioners in exchange for a covenant not to execute, as GEICO acknowledges. *See*  
9 Objection, at 9 (“The elephant in the room is Petitioners’ end-game: to seek assignment of the  
10 purported bad faith claims from the Estate”). The problem for GEICO’s three law firms, though, is  
11 that providing any such advice to the Estate is directly adverse to GEICO’s interests and constitutes  
12 a textbook conflict of interest. *See* NRPC 1.7; *see also State Farm Mut. Auto. Ins. Co. v. Hansen*,  
13 131 Nev. Adv. Rep. 74, 357 P.3d 338 (Sep. 24, 2015) (“For independent counsel to be required, the  
14 conflict of interest must be significant, not merely theoretical, actual, not merely potential”). This is  
15 precisely why the Nevada Supreme Court has mandated that independent, *Cumis* counsel be paid for  
16 by the insurer in these circumstances: “Nevada is a dual-representation state, [and] counsel may not  
17 represent both the insurer and the insured when their interests conflict and no special exception  
18 applies.” *Hansen*, 357 P.3d at 341.

19 Despite that Petitioners’ counsel advised GEICO and its counsel of the obvious conflict  
20 through written correspondence at the time, GEICO did not retain separate counsel for McNamee,  
21 but hired outside counsel – Pyatt Silvestri – to represent both parties in the MVA Litigation. *See*  
22 Ex. 1-B. Since then, nothing has been done to protect McNamee, and, now, his estate, from excess  
23 liability. This, even after Petitioners’ counsel sent GEICO a second letter advising it of the conflict  
24 of interest and need for *Cumis* counsel. *See* Ex. 1-C. Rather than retaining *Cumis* counsel for the  
25 Estate, however, GEICO retained two, additional law firms solely for the purpose of further  
26 protecting GEICO’s own interests in these proceedings. It is not merely that Petitioners seek  
27 damages against the Estate in excess of the policy limits that has given rise to the conflict, nor is it  
28 that “the Estate’s bad faith claim signifies an actual conflict,” as GEICO claims. Opposition, at 4.

1 Instead, it is GEICO's failure to settle within policy limits and exposing McNamee and his estate to  
2 excess liability that gave rise to the bad faith claims, and it is the existence of the bad faith claims  
3 that creates the conflict of interest because GEICO's attorneys cannot ethically advise the Estate of  
4 its rights against GEICO.

5 **C. GEICO's bad faith occurred while McNamee was alive.**

6 To get around this, GEICO suggests McNamee's death somehow affects the Estate's ability  
7 to prosecute his claims for bad faith against GEICO. GEICO's own case law provides otherwise:

8 **because Manuel Avila was alive when Century refused to indemnify, defend,**  
9 **and settle, whether or not he had any assets at the time would be irrelevant to**  
10 **Century's duties.** *See Shapero v. Allstate Ins. Co.*, 14 Cal. App. 3d 433, 92 Cal.  
11 Rptr. 244, 247-48 & n.1 (Ct. App. 1971). If Century breached its implied  
12 covenant with Avila while he was alive, then, under Nevada law, the Estate would  
13 retain any such claims as if Manuel Avila were still alive. Nev. Rev. Stat. §  
14 41.100(3). **Thus, Manuel Avila's or the Estate's assets at any point in time**  
15 **would be irrelevant to Century's liability for a breach of the implied**  
16 **covenant of good faith and fair dealing, and the Estate may be able to claim**  
17 **damages based on a bad faith refusal to indemnify, defend, or settle.**

18 *See Avila v. Century Nat'l Ins. Co.*, 473 F. App'x 554, 556 (9th Cir. 2012) (emphasis added) (cited  
19 by GEICO on page 3 of its Opposition). This case is no different. It is undisputed that on July 13,  
20 2015, GEICO offered to settle each Petitioner's claim for more than McNamee's insurance policy.  
21 This, while McNamee was still alive. Under GEICO's own case law, McNamee's bad faith claims  
22 against GEICO arose more than two years before McNamee's death, and his estate is  
23 unquestionably retains those claims and seek damages "as if [McNamee] was still alive." *See*  
24 *Avila*, 473 F. App'x at 556.

25 GEICO's suggestion that the Estate would be entitled to no damages because of McNamee's  
26 death also mischaracterizes GEICO's own case law. *Avila* also makes clear, because the claims  
27 arose while McNamee was alive, "the Estate may be able to claim damages based on a bad faith  
28 refusal to indemnify, defend, or settle," including damages for any emotional distress McNamee  
suffered as a result of GEICO's bad faith. *Id.* ("We also agree with the district court that the Estate  
remains eligible to collect any emotional distress damages that Manuel Avila suffered if Century  
acted in bad faith"). While GEICO places an inordinate amount of reliance on the *Shapero*

1 decision, even *Shapero* recognized that “[a] different case is also made where the insured is a living  
2 person,” the same rule cited by the Ninth Circuit in *Avila*. *Shapero v. Allstate Ins. Co.*, 14 Cal.  
3 App. 3d 433, 438 n.1, 92 Cal. Rptr. 244, 248 (1971). This, aside from the fact that in *Shapero* the  
4 insured died in the underlying car crash such that any breach by her insurer of the covenant of good  
5 faith and fair dealing occurred after the insured’s death, and recognition by “everyone concerned”  
6 “that a judgment against Wohlner, as administrator, would produce nothing except the Allstate  
7 insurance. The fact that Wohlner, an employee associate of the [plaintiffs’] attorney, was selected  
8 to serve as administrator, reflects an early recognition that the administrator’s duties would be  
9 purely formal.” See *Shapero*, 14 Cal. App. 3d at 436. Petitioners have never made such a  
10 concession in this case, as evidenced by their opposition to having an employee of McNamee’s law  
11 firm appointed as the special administrator. Even so, the other case GEICO cites acknowledges that  
12 *Shapero* is limited to its facts and limited by its own language: “In the 43 years since *Shapero* was  
13 decided, it does not appear that California courts have expanded on *Shapero*’s rationale. Instead,  
14 cases such as *Hamilton* and *Purdy* have confirmed the general rule that the measure of damages in a  
15 failure to settle case is the amount of the excess judgment. Also, *Shapero* itself appears to have put  
16 a limit on its reach through Footnote 1.” *McDaniel v. GEICO Gen. Ins. Co.*, 55 F. Supp. 3d 1244,  
17 1270 (E.D. Cal. 2014) (cited on page 8 of the Objection). Simply put, even GEICO’s own case law  
18 recognizes that McNamee had bad faith claims when GEICO failed to settle Petitioners’ claims in  
19 bad faith and exposed McNamee to excess liability two years before his passing. The same case  
20 law also confirms that McNamee’s estate, now, possesses his claims “as if he were still alive” and  
21 is entitled “to claim damages based on a bad faith refusal to...settle,” including “any emotional  
22 distress damages that [McNamee] suffered” because of GEICO’s bad faith. See *Avila*, 473 F.  
23 App’x at 556.

24 **D. The Estate’s claims against GEICO are assignable.**

25 After that, the Special Administrator claims in her Objection that the Estate’s bad faith  
26 causes of action against GEICO have not ripened because there has been no judgment entered in the  
27 MVA Lawsuit in excess of GEICO’s policy limits. In fact, GEICO and the Special Administrator  
28 go so far as to claim:

1       The elephant in the room is the Petitioners' end-game: to seek an assignment of  
2       the purported bad faith claim from the Estate because Nevada law prohibits a  
3       right of action on the part of a third-party claimant against an insurance company  
4       for bad-faith refusal to settle. Petitioners, however, have a lot of hurdles to jump  
5       over before there is an assignable claim...

6       Obj., at 9. While GEICO the and Special Administrator repeatedly contend that "Petitioners'  
7       purported claim for bad faith...only ripens upon a determination that claimants suffered damages in  
8       excess of the benefits available under the controlling insurance policy and such determination is  
9       affirmed on appeal," this is simply not the law. As the California courts have explained:  
10       there is no explicit requirement for bad faith liability that an excess judgment is  
11       actually suffered by the insured, since the reasonableness analysis of settlement  
12       decisions is performed in terms of the probability or risk that such a judgment  
13       may be forthcoming in the future

14       *Camelot by the Bay Condo. Owners' Ass'n v. Scottsdale Ins. Co.*, 27 Cal. App. 4th 33, 48, 32 Cal.  
15       Rptr. 2d 354, 362 (1994). Similarly, GEICO and the Special Administrator claim, with no authority,  
16       that Petitioners have several hurdles to overcome before being entitled to an assignment of the  
17       Estate's bad faith claims against GEICO. This is also contrary to the law:  
18       The insured's remedy to protect himself from an excess judgment is to assign to  
19       the claimant his cause of action for bad faith refusal to settle in exchange for a  
20       covenant not to enforce the judgment against the insured's personal assets. This  
21       assignment, however, is not immediately assertable, and it does not settle the third  
22       party's claim. As long as the insurer is providing a defense, the insurer is allowed  
23       to proceed through trial to judgment. The assignment of the bad faith cause of  
24       action becomes operative after the excess judgment has been rendered.

25       *Safeco Ins. Co. of Am. v. Superior Court*, 71 Cal. App. 4th 782, 788-89, 84 Cal. Rptr. 2d 43, 46  
26       (1999). It is well settled this assignment may occur before trial and even before an action has been  
27       asserted against the third-party tortfeasor.

28       **E.       McNamee possessed the claims, and they passed to his Estate at the time of his death.**

      In *Critz v. Farmers Insurance Group*, the plaintiff made a settlement demand near policy  
limits that the third-party insurer rejected. At that point, the plaintiff obtained an assignment from  
the third-party tortfeasor of "any right of action [the tortfeasor] might have against his insurance  
company," and the plaintiff agreed to hold the tortfeasor harmless from any injury judgment entered

1 against him. After receiving the assignment, the plaintiff sued the tortfeasor and obtained an excess  
2 judgment. Then, the plaintiff sued the insurer on the assigned causes of action and the insurer  
3 claimed, as GEICO and the Special Administrator do here, that the tortfeasor “had no existing cause  
4 of action against it when he made his purported assignment to Mrs. Critz; that a possibility, a merely  
5 potential chose in action, cannot be assigned; thus, that [the tortfeasor] possessed nothing to transfer  
6 to Mrs. Critz but a potential, inchoate claim which could not be the subject of an assignment.” See  
7 *Critz v. Farmers Ins. Grp.*, 230 Cal. App. 2d 788, 794 (1964). The court rejected the argument:

8       Where the potential value of the claim is large in relation to the policy limit,  
9       where the claimant’s case is comparatively strong and the potential defendant’s  
10       weak, rejection of an initial offer to settle at or near the policy limit may then and  
11       there constitute a breach of the implied covenant of good faith.

11       \*\*\*

12       That [the tortfeasor’s] claim against the insurer was incomplete at the time of the  
13       attempted transfer to Mrs. Critz is not crucial, in our view. Common law and  
14       statutory rules against assignment of expectations may prevent the transferee from  
15       immediate assertion of his claim. The attempted transfer of a future right may  
16       operate as an equitable assignment or contract to assign, which becomes operative  
17       as soon as the right comes into existence. The modern tendency is to recognize  
18       assignment of a prospective right to arise under an existing contract.

19       *Critz*, 230 Cal.App. 2d at 798-801 (emphasis added), cited with approval in *Hamilton v. Maryland*  
20       *Casualty Co.*, 27 Cal. 4th 718, 725 (2002). In other words, “[t]he insured’s action for breach of the  
21       contractual duty to settle may be assigned to the claimant, regardless of whether assignments are  
22       permitted by the policy. Such an assignment may be made before trial, but the assignment does not  
23       become operative, and the claimant’s action against the insurer does not mature, until a judgment in  
24       excess of the policy limits has been entered against the insured.” *Hamilton v. Maryland Casualty*  
25       *Co.*, 27 Cal. 4th 718, 725 (2002); see also *Gallegos v. Malco Enters. of Nev.*, 127 Nev. 579, 583,  
26       255 P.3d 1287, 1289 (2011) (holding that causes of action are property and are assignable). In  
27       contrast, the case law cited by the Special Administrator on page 6 of the Objection is not applicable  
28       because those decisions only address when bad faith claims may be asserted, not when they can be  
      assigned. In short, all of the Special Administrator’s discussion regarding ripeness of the Estate’s  
      bad faith claims against GEICO is a red herring because the claims are immediately assignable upon

1 the insurer's failure to settle, in this case on July 13, 2015, at the latest. This also reveals the  
2 fundamental error in GEICO and the Special Administrator's argument in Section II.B of their  
3 Objection claiming this Court lacks jurisdiction because McNamee possessed no property in Nevada  
4 when he died. To the contrary, McNamee possessed fully assignable claims for bad faith against  
5 GEICO when he died, claims that are now in possession of McNamee's estate. *See Gallegos*, 127  
6 Nev. at 582, 255 P.3d at 1289 (causes of action are property).

7 **F. The Special Administrator cannot administer Petitioners' claims that exceed the**  
8 **GEICO insurance proceeds.**

9 The Special Administrator further argues that just because the Estate possesses an asset, in  
10 addition to a liability insurance policy, the Special Administrator is not "divested" "of his or her  
11 authority under NRS 140.040(1)(b) to defend a civil action as the personal representative of the  
12 Estate." *Obj.*, at 4. This, by claiming the purpose of NRS 140.040(1)(b) "is to permit a special  
13 administrator – who otherwise has no powers to compromise and pay creditors – to pay a claim  
14 when such a claim would be satisfied with proceeds from a liability insurance policy that covered  
15 the loss." *Id.* (emphasis added); *see also id.*, at 3, n.1 (noting that this Court's order appointing the  
16 special administrator states she "may not distribute any property other than the GEICO automobile  
17 insurance policy with automobile liability insurance coverage of \$30,000 per person and \$60,000  
18 per accident."). These contentions miss the entire point of the Petition: the Special Administrator  
19 cannot administer McNamee's estate because Petitioners' damages far exceed the available liability  
20 insurance proceeds. In fact, GEICO completely disregards the fact that liability in the MVA  
21 Lawsuit is undisputed and that GEICO already offered to compromise each of Petitioners' claims  
22 for more than \$30,000 each. *See Obj.*, at 8. In other words, a judgment in excess of the \$30,000 per  
23 person liability insurance limit is hardly hypothetical or contingent.

24 Contrary to GEICO and the Special Administrator's assertions that Petitioners are "attacking  
25 a statute that was enacted for their benefit" and that "*Bodine* is superseded by the Legislature's 1971  
26 amendment of NRS 140.040 to specifically allow suits against a special administrator, in place of  
27 probate proceedings, when the estate's sole asset is a liability insurance policy," the statute is simply  
28

1 not applicable here.<sup>3</sup> Obj., at 6 n.6, citing *Jacobson v. Estate of Clayton*, 121 Nev. 518, 522, 119  
2 P.3d 132, 134 (2005)). This, because (1) Petitioners’ damages exceed the \$60,000 of GEICO  
3 liability insurance coverage that is available, and, as Defendants admit, “the Special Administrator’s  
4 authority is limited to defending the MVA Lawsuit and distributing insurance proceeds to  
5 Petitioners if they prevail at trial,” and (2) the Legislature’s 1971 amendment to NRS 140.040  
6 specifically allowed suits against a special administrator in place of probate proceedings “to pay a  
7 claim when such a claim would be satisfied with proceeds from a liability insurance policy that  
8 covered the loss,” but the insurance in this action is insufficient to satisfy Petitioners’ claims, as  
9 GEICO conceded when it offered to settle each of Petitioner’s claims in excess of the per person  
10 liability insurance policy limit nearly three years ago. In short, based on the nature of Petitioners’  
11 claims, the amount of liability insurance available, GEICO’s previous offers to compromise  
12 Petitioners’ claims in excess of McNamee’s insurance policy limits, and GEICO and the Special  
13 Administrator’s concessions that a special administrator “cannot accept, reject, or negotiate creditor  
14 claims,” a Special Administrator lacks authority to administer Petitioners’ claims on behalf of the  
15 Estate, claims that undisputedly exceed the amount of available automobile liability insurance.

16 The Special Administrator’s suggestion that this Court can simply order the Special  
17 Administrator, Susan Clokey, “who is an employee of Pyatt Silvestri, the Decedent’s attorney  
18 [appointed by GEICO] in the MVA Lawsuit,” to generally administer the Estate, further evidences  
19 GEICO and the Special Administrator’s misunderstanding of this issue. Obj., at 3; 5. This,  
20 because that arrangement would result in a situation where Ms. Clokey would be attempting to  
21 administer Petitioners’ excess claims against McNamee’s estate while having her strings pulled by  
22 GEICO and Pyatt Silvestri – the same insurer and law firm whose conduct resulted in Petitioners’  
23 excess claims against McNamee and his estate in the first place. As the Nevada Supreme Court  
24

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25 <sup>3</sup> *Bodine* held that even though the decedent’s sole asset did consist of a liability insurance policy, Nevada’s probate  
26 statutes at the time required the claimant’s claims be submitted to probate nonetheless and the court would not disregard  
27 the clear statutory language, despite the inefficiencies of requiring a general administration. In 1971 the Legislature  
28 amended NRS 140.040 in response to *Bodine* and *Klosterman v. Cummings* to allow special administration when the  
estate’s sole asset is an insurance policy, but that amendment is not relevant here. Unlike *Bodine* and *Klosterman*, the  
decedent’s assets in this case do not consist solely of an automobile liability insurance policy, but also include bad faith  
claims against GEICO. Consequently, the “exception” to the general administration requirement that permit a Special  
Administrator when the sole asset is insurance, has not been triggered. Obj., at 4:9-10.

1 made clear in *Hansen*, this arrangement still presents a conflict of interest. *Hansen*, 357 P.3d at 341  
2 (still the potential for a conflict when “the lawyer is selected by and receives compensation from  
3 someone with legal interests opposed to the lawyer’s client”).

4 **G. GEICO received actual notice of the hearing and, then, arranged for a**  
5 **continuance.**

6 GEICO contends Petitioners failed to serve it with a citation pursuant to NRS 155.050, but  
7 GEICO never explains why a citation is required. To the contrary, NRS 139.090 to 139.130  
8 identifies the procedure for petitioning for letters of administration, and its does not appear to  
9 contain a requirement that notice of the petition and hearing be provided by citation.<sup>4</sup> Instead, NRS  
10 139.100 provides that upon filing of a petition for letters of administration, “[t]he clerk shall set the  
11 petition for hearing, and notice must be given to the heirs of the decedent and to the Director of the  
12 Department of Health and Human Services as provided in NRS 155.020. The notice must state the  
13 filing of the petition, the object and the time for hearing.”<sup>5</sup> NRS 139.100. Petitioners filed their  
14 Petition with this Court on January 3, 2018. At the same time, the Clerk of the Court issued a  
15 Notice of Hearing stating that a Petition for letters of general administration had been filed, and  
16 identifying the object of the petition and the time and location of the hearing. *See* Notice of  
17 Hearing, on file with this Court. Petitioners served the notice on decedent’s only known heir,  
18 Robert McNamee, and the Special Administrator’s counsel, the Pyatt Silvestri law firm, who was  
19 GEICO’s counsel at the time. *See* Certificate of Mailing, on file with this Court; *see also Nev.*  
20 *Yellow Cab Corp. v. Dist. Court*, 123 Nev. 44, 52, 152 P.3d 737, 742 (2007) (“In the absence of a  
21 conflict, counsel represents both the insured and the insurer”). GEICO simply cannot claim it did  
22 not receive notice of the Petition or the hearing.

23 Regardless, even if a citation was required, the Nevada Supreme Court has made clear that  
24 “[t]he same as in case of a summons, service of a citation is only necessary to bring the party into  
25 court. If he voluntarily appears without it, such service is unnecessary.” *Deegan v. Deegan*, 22 Nev.

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26 <sup>4</sup> Although NRS 139.150 provides that a citation is required when a petition to revoke letters of administration is filed  
27 with the court, Petitioners are not seeking to revoke the Special Administrator, but merely to replace the Special  
Administration with a general administrator.

28 <sup>5</sup> As Petitioners noted in the Petition, the Department of Health and Human Services filed written notice with the court  
that it waived any notice of these proceedings. *See* Petition, at 11 n.3, on file with this Court.

1 185, 196-97, 37 P. 360, 361 (1894). This is confirmed by NRS 155.010(3) that says “[t]he court, for  
2 good cause shown, may provide for a different method or time of giving notice for any hearing, or  
3 may dispense with the notice otherwise required to be given to a person under this title.” Here,  
4 GEICO not only knew about the Petition and the original January 19, 2018, hearing, that hearing  
5 was continued at GEICO’s request:

6 Craig,

7 The hearing on your motion to appoint a general administrator in probate court is  
8 set for January 19. I’d like another week to respond to that motion in probate  
9 court. That would necessitate moving the hearing from January 19 to January 26.  
Please advise if you are agreeable to moving the hearing date one week.

10 Thanks  
Jeff

11 See Jan. 11, 2018, email from Jeffrey Orr to Craig Henderson, attached as Ex. 1-D. In fact,  
12 GEICO’s counsel undertook the task of facilitating the continuance with the court:

13 Corey,

14 The probate court will gladly move the hearing from January 19th to either  
15 January 26th or February 2nd. Next week is a short week, so probate has less time  
16 to review everything in advance of the probate calendar and is looking to reduce  
its docket. In other words, the court would prefer February 2.

17 \*\*\*

18 Please advise if you are agreeable to this.  
19 Thanks,  
Jeff

20 *Id.* Ultimately, the parties agreed to continue the hearing to February 9, 2018, as well as a briefing  
21 schedule regarding the Petition, all to ensure GEICO had an adequate opportunity to respond to the  
22 Petition. *Id.* Any claim by GEICO that it did not have notice of the hearing, or a proper opportunity  
23 to respond to the Petition, is inaccurate and provides no basis withholding the appropriate relief  
24 from Petitioners. Even so, this court has discretion to waive the citation requirement, to the extent it  
25 applies, and, most importantly, all necessary parties received actual, timely notice of the initial  
26 hearing that GEICO, then, sought to have continued.

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**H. Petitioners withdraw their request to this Court for appointment of *Cumis* counsel.**

GEICO further contends in its Opposition to the Petition that this court lacks authority to order appointment of *Cumis* counsel. While Petitioners disagree with GEICO and the Special Administrator’s assessment of the scope of this Court’s authority, Petitioners hereby withdraw the portion of the Petition seeking an order from this Court appointing *Cumis* counsel without prejudice, and intend to seek relief from Judge Smith in the MVA Lawsuit now that GEICO and the Special Administrator admit that Judge Smith has jurisdiction over this issue.

**VI. CONCLUSION**

For the reasons set forth above, Petitioners request that the Clark County Public Administrator John J. Cahill be issued letters of general administration over the Estate of James Allen McNamee.

GLEN LERNER INJURY ATTORNEYS

By: /s/ Craig A. Henderson  
Corey M. Eschweiler, Esq.  
Nevada Bar No. 6635  
Craig A. Henderson, Esq.  
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Attorneys for Plaintiffs

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**CERTIFICATE OF SERVICE**

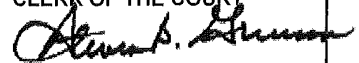
Pursuant to NRCP 5(b), I certify that I am an employee of GLEN LERNER INJURY ATTORNEYS and that on 1<sup>st</sup> day of February, 2018, I caused the above **REPLY IN SUPPORT OF PETITION FOR ISSUANCE OF GENERAL LETTERS OF ADMINISTRATION AND FOR APPOINTMENT OF CUMIS COUNSEL FOR THE ESTATE OF JAMES ALLEN MCNAMEE; AND RESPONSE TO OJECTION TO PETITION FOR ISSUANCE OF LETTERS OF ADMINISTRATION AND FOR APPOINTMENT OF CUMIS COUNSEL FOR THE ESTATE OF JAMES ALLEN MCNAMEE** to be served pursuant to NRCP 5(b) to be electronically served through the Eighth Judicial District Court’s electronic filing system and via US Mail to the following parties listed below:

- Jeffrey J. Orr, Esq.  
PYATT SILVESTRI  
701 Bridger Avenue, Suite 600  
Las Vegas, NV 89101  
*Attorneys for Special Administrator Susan Clokey*
- Brian P. Eagan, Esq.  
Alexander G. LeVeque, Esq.  
SOLOMON DWIGGINS & FREER, LTD.  
9060 W. Cheyenne Avenue  
Las Vegas, NV 89129  
*Attorneys for GEICO and Special Administrator Susan Clokey*
- Janine C. Prupas, Esq.  
Justin L. Carley, Esq.  
SNELL & WILMER, LLP  
50 W. Liberty Street, Suite 510  
Reno, NV 89501-1961  
*Attorneys for GEICO*

/s/ Miriam Alvarez  
An employee of Glen Lerner Injury Attorneys

EXHIBIT 1-A

EXHIBIT 1-A



1  
2 **ORDR**

3  
4 DISTRICT COURT  
5 CLARK COUNTY, NEVADA

6 GIANN BIANCHI, individually,  
7 DARA DELPRIORE, individually,

8 Plaintiff,

9 vs.

10 JAMES McNAMEE, individually, DOES I - X,  
11 and ROE CORPORATIONS I - X, inclusive,

12 Defendants.

) CASE NO.: A-13-691887-C

) DEPT NO.: VIII

) **ORDER REGARDING PLAINTIFFS'  
13 MOTIONS IN LIMINE NUMBERS 1  
14 THROUGH 28**

) **Date of hearing: June 13, 2017**

) **Time of hearing: 8:00 a.m.**

15  
16 Plaintiffs Gianni Bianchi and Dara Del Priore's Motions in Limine Numbers 1 through  
17 28 came on for hearing before this Court on June 13, 2017. Plaintiffs were represented by  
18 COREY M. ESCHWEILER, ESQ. and JOSHUA L. BENSON, ESQ., of Glen Lerner Injury  
19 Attorneys; Defendant James McNamee was represented by JEFFREY J. ORR, ESQ. of  
20 PYATT SILVESTRI.

21 The Court, having considered Plaintiffs' Motions in Limine Numbers 1 through 28, the  
22 oppositions thereto, and Plaintiffs' replies in support of the motions, hereby:

23 ORDERS Plaintiffs' Motion in Limine Number 1 to Preclude Closing Argument That  
24 Plaintiffs Asked for a Greater Amount of Money Than Was Expected is GRANTED;

25 IT IS FURTHER ORDERED Plaintiffs' Motion in Limine Number 2 to Preclude  
26 Hypothetical Medical Questions Designed to Confuse Jury is GRANTED in part and DENIED  
27 in part. Hypothetical questions to expert witnesses will be permitted subject to court approval  
28 of the questioning;

IT IS FURTHER ORDERED Plaintiffs' Motion in Limine Number 3 To Preclude  
Defendant from Suggesting to The Jury There Might Be Related Medical Records Prior to the  
Crash that Have Not Been Disclosed is GRANTED;

IT IS FURTHER ORDERED Plaintiffs' Motion in Limine Number 4 Precluding  
Defendant From Referring to Case as "Attorney-Driven Litigation" or a "Medical Buildup"

**DOUGLAS E. SMITH**  
DISTRICT JUDGE

DEPARTMENT EIGHT  
LAS VEGAS NV 89155

1 Case, and Precluding any Statements Insinuating that Plaintiffs Sought Treatment at the  
2 Direction of Attorneys, or Because of this Litigation is GRANTED.

3 IT IS FURTHER ORDERED Plaintiffs' Motion in Limine Number 5 Precluding  
4 Defendant From Referring to any Ongoing or Past Federal Investigation or Allegations of  
5 Conspiracy Between Plaintiffs' Doctors and Attorneys is GRANTED.

6 IT IS FURTHER ORDERED Plaintiffs' Motion in Limine Number 6 Precluding  
7 Reference to Plaintiffs' Retention of Counsel is GRANTED.

8 IT IS FURTHER ORDERED Plaintiffs' Motion in Limine Number 7 Precluding  
9 Reference to Plaintiffs' Counsel Working with Plaintiffs' Treating Physicians on Other  
10 Unrelated Cases is GRANTED.

11 IT IS FURTHER ORDERED Plaintiffs' Motion in Limine Number 8 Precluding  
12 Negative References to Attorney Advertising is GRANTED.

13 IT IS FURTHER ORDERED Plaintiffs' Motion in Limine Number 9 that Closing  
14 Arguments Must Be Limited to Evidence Presented at Trial is GRANTED.

15 IT IS FURTHER ORDERED Plaintiffs' Motion in Limine Number 10 Precluding  
16 Reference to Recent Allegations Against Plaintiffs' Counsel Relating to the BP Oil Spill cases  
17 is GRANTED.

18 IT IS FURTHER ORDERED Plaintiffs' Motion in Limine Number 11 Allowing Voir  
19 Dire Questions Regarding Relationship to Any Insurance Company GRANTED.

20 IT IS FURTHER ORDERED Plaintiffs' Motion in Limine Number 12 Allowing Voir  
21 Dire Questioning Regarding Tort Reform Exposure is GRANTED.

22 IT IS FURTHER ORDERED Plaintiffs' Motion in Limine Number 13 Allowing Voir  
23 Dire Questioning Regarding Verdict Amounts is GRANTED.

24 IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 14 Permitting  
25 Treating Physicians to Testify as to Causation, Diagnosis, Prognosis, Future Treatment, and  
26 Extent of Disability — Without a Formal Expert Report is GRANTED.

27 IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 15 Regarding  
28

1 Exclusion of Non-Party Witnesses from Courtroom is GRANTED, and non-party, non-expert  
2 witnesses are not allowed in the courtroom until called to testify.

3 IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 16 Precluding  
4 Evidence Regarding How a Judgment Will Regarding Exclusion of Non-Party Witnesses from  
5 Courtroom is GRANTED.

6 IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 17 Precluding  
7 Negative Inference for Failing to Call Cumulative Witness is GRANTED.

8 IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 18 Precluding  
9 Reference to Filing Motions in Limine is GRANTED.

10 IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 19 Precluding  
11 References to Taxation is GRANTED.

12 IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 20 Precluding  
13 Evidence of Offers of Settlement or Compromise is GRANTED.

14 IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 20 Precluding  
15 References to Collateral Sources is GRANTED with respect to all collateral sources other than  
16 medical liens, but DENIED with respect to evidence of medical liens.

17 IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 21 Excluding  
18 Evidence of Prior and Subsequent Unrelated Injuries, Medical Conditions or Medical  
19 Treatment, Prior and Subsequent Claims or Lawsuits is GRANTED.

20 IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 22 Excluding Lack  
21 of Other Injuries from the Crash is GRANTED.

22 IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 23 Admitting  
23 Plaintiffs' treating providers' medical records and bills into evidence is GRANTED.

24 IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 24 Precluding  
25 Reference to Giann's Felony Conviction is GRANTED.

26 IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 25 to exclude video  
27 surveillance of Plaintiffs is DENIED. Video surveillance of Plaintiffs may be admissible if  
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Defendant can lay a proper foundation for admission of the surveillance video.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 26 to Exclude Evidence of Dr. Mark Kabins' felony conviction is GRANTED.

IT IS FURTHER ORDERED Plaintiffs' Motion in Limine Number 27 to Preclude Defendant James McNamee From Testifying at Trial and to Preclude McNamee from Contesting Liability at trial is GRANTED.

IT IS FURTHER ORDERED Plaintiffs' Motion in Limine Number 28 To Preclude Defendant from Arguing Apportionment of Plaintiff Dara Del Priore's Lumbar Spine Pain is GRANTED.

Dated this 18 day of July, 2017.

  
DISTRICT COURT JUDGE  
Ba

EXHIBIT 1-B

EXHIBIT 1-B

Glen J. Lerner, Esq.  
Porter C. Allred, Esq.  
Corey M. Eschweiler, Esq.  
Scott P. Guido, Esq. ††  
Craig A. Henderson, Esq.\*  
Michael A. Kristof, Esq.  
Benjamin R. Lund, Esq.\*\*  
Justin G. Randall, Esq.\*\*\*

## GLEN LERNER INJURY ATTORNEYS

James Rolshouse, Esq.\*\*\*†  
Joseph F. Schmitt, Esq.  
Adam D. Smith, Esq.

\*Also Admitted in CA  
\*\*Also Admitted in ID  
\*\*\*Also Admitted in AZ  
†Also Admitted in MN  
††Also Admitted in IL

April 11, 2014

**VIA FACSIMILE: (702) 233-9343**

Robert Eaton, Esq.  
LAW OFFICE OF KATHERINE M. BARKER  
823 South Las Vegas Boulevard, Suite 300  
Las Vegas, Nevada 89101

**Re: Bianchi v. McNamee**

Dear Mr. Eaton:

As you know, Plaintiffs attempted to settle this matter with Geico in 2013 for policy limits of \$30,000. Geico instead offered [REDACTED] for Plaintiff Dara DelPriore and [REDACTED] for Plaintiff Giann Bianchi. In fact, Geico made no attempt at a resolution as both Plaintiffs' medical bills were more than \$22,000 each, including future estimates. Now, Defendant has offered [REDACTED] to settle Dara's case. This, while knowing both Plaintiffs' medical bills have greatly increased with additional treatment. The timing of Defendant's recent offer is anything but reasonable. Based on Plaintiffs' medical bills, this case is worth far more than the policy limits.

Geico's business gamble in failing to tender limits before the filing of litigation creates conflict for you as defense counsel. You were hired by Geico. Ultimately, you must provide Defendant with advice that is potentially detrimental to Geico. To alleviate this conflict, we would suggest that Defendant consult with independent bad faith counsel. We can suggest several competent bad faith attorneys who can advise Defendant of potential rights at no cost.

Do not take this responsibility lightly. As you are aware, a failure by counsel to protect Defendant with independent bad faith counsel could result in malpractice liability exposure at the conclusion of this case.

Plaintiffs extended the olive branch to settle this case and it was rejected. Plaintiffs are again willing to extend the olive branch to resolve the claim, although their situation has changed. If you desire to discuss the possibilities, please contact me immediately.

Sincerely,

GLEN LERNER INJURY ATTORNEYS

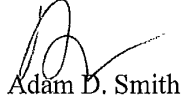
  
Adam D. Smith

EXHIBIT 1-C

EXHIBIT 1-C

Glen J. Lerner, Esq.  
Porter C. Allred, Esq. ★  
Joshua L. Benson, Esq.  
Jeffrey D. Cahill, Esq. ††  
Corey M. Eschweiler, Esq.  
Scott P. Guido, Esq. ††  
Craig A. Henderson, Esq. †  
Justin G. Randall, Esq. ††★  
Joseph F. Schmitt, Esq.

Randolph L. Westbrook, Esq. ★★

## GLEN LERNER INJURY ATTORNEYS

★★ Also Admitted in Arizona  
† Also Admitted in California  
†† Also Admitted in Illinois  
★★★ Also Admitted in Michigan  
††† Only Admitted in Minnesota & Florida  
★ Also Admitted in Utah

November 8, 2017

**Via First Class mail and**  
**Email (jorr@pyattsilvestri.com)**

James P.C. Silvestri, Esq.  
Jeffrey J. Orr, Esq.  
PYATT SILVESTRI  
701 Bridger Avenue, Suite 600  
Las Vegas, Nevada 89101

**Re: Bianchi v. McNamee**

Dear counsel and all insurance company decision makers:

Please allow this letter to follow up on our April 11, 2014, letter to prior counsel, Katherine Barker and Robert Eaton, regarding GEICO's repeated failure to settle Plaintiffs' claims within policy limits, thereby exposing Mr. McNamee (and now his estate) to significant excess damages. As detailed below, GEICO's bad faith continues to this day.

In our prior letter, we provided a detailed history of the pre-litigation settlement negotiations in this case, including GEICO's repeated refusal to settle Plaintiffs' claims within Mr. McNamee's policy limits, despite that Mr. McNamee's liability clearly exceeds those insurance limits. In that letter, we also urged Defendant's counsel to retain separate *Cumis* counsel for Mr. McNamee to advise of his potential bad faith claims against GEICO. This, because Ms. Barker and Mr. Eaton – who were employed by GEICO, retained by GEICO, and paid by GEICO – were under an obligation to advise their client, Mr. McNamee, of his rights against their other client, GEICO, for rejecting Plaintiffs' reasonable settlement demands and exposing Mr. McNamee to significant excess liability. In other words, Ms. Barker and Mr. Eaton had a conflict of interest because they were obligated to provide advice to the insured that was detrimental to their other client, the insurer.

Less than three months later, Mr. McNamee filed a substitution of attorney replacing GEICO's inside counsel with new outside counsel, i.e., your office. This change of counsel, however, was superficial and did not ameliorate GEICO's bad faith refusal to settle Plaintiffs' claims or resolve the conflict of interest, as GEICO has

James P.C. Silvestri, Esq.  
Jeffrey J. Orr, Esq.  
November 8, 2017  
Page 2 of 4

continued to operate in bad faith, the conflict of interest still exists, and the insurer and the insured are still represented by the same law firm.

**A. GEICO admits the policy limits are no longer a cap on Plaintiffs' recovery.**

In particular, by spring of 2015, after the substitution of Mr. McNamee's counsel, Giann's medical bills had increased to \$329,494, including the cost of the surgery Dr. Kabins recommended. This, in addition to \$348,948 for Giann's future care needs; \$277,832 for Giann's loss of household services; and \$1,867,000 for Giann's loss of enjoyment of life, or a total of more than \$2,800,000 in damages. Consequently, on April 21, 2015, Giann served Defendant with an offer [REDACTED]. Defendant did not accept Giann's offer.

At the same time, Dara's medical bills had increased to \$93,980. This, in addition to \$296,537 in lost wages; \$384,361 in loss of household services; and \$1,700,000 in loss of enjoyment of life, or a total of more than \$2,470,000 in damages. On April 21, 2015, Dara served Defendant with an offer [REDACTED]. Defendant did not accept Dara's offer.

In July, 2015, Giann's total damages had increased to \$2,850,136.97, including \$356,306 in medical special damages alone. Dara's total damages had increased to \$2,481,097, including \$99,280 in medical special damages. Despite these damage amounts, on July 13, 2015, Defendant served Giann and Dara, each, with a [REDACTED] offer. Plaintiffs rejected these offers, but these offers are telling because Defendant now admits, by its offers, that policy limits are not a cap on recovery. Stated differently, by offering to settle each Plaintiff's claims in excess of Mr. McNamee's liability insurance policy limits, GEICO admits its prior refusal to settle Plaintiffs' claims within policy limits was unreasonable, and its subsequent failure to accept Plaintiffs' April 21, 2015, offers [REDACTED] was unreasonable. This, because in both cases, GEICO was well aware the value of Plaintiffs' claims far exceeded the amounts for which Plaintiffs were offering to compromise their claims.

**B. GEICO continues to gamble with its insured's interests.**

GEICO, now, seeks to further gamble with the interests of Mr. McNamee's estate by taking Plaintiffs' claims to trial on April 16, 2018, after already having admitted the value of Plaintiffs' claims exceeds Mr. McNamee's liability insurance policy limits. In other words, the only remaining question for trial is the amount by which Plaintiffs' damages exceed Mr. McNamee's insurance. Despite this, GEICO is, once again, willing to roll the dice by risking an excess judgment at trial in lieu of resolving Plaintiffs' claims for a reasonable amount and mitigating its own bad faith damages. This is a particularly interesting strategy considering there is no dispute regarding Mr. McNamee's liability for the collision and the defense is precluded from challenging Mr. McNamee's liability

James P.C. Silvestri, Esq.  
Jeffrey J. Orr, Esq.  
November 8, 2017  
Page 3 of 4

during trial by order of the court. Even more critical, Defendant's surgeon, Dr. Hugh Selznick, is precluded from offering medical causation opinions regarding either Plaintiff's spine surgery. The reason: Dr. Selznick failed to supplement his expert opinions for nearly three years and Dr. Selznick's untimely supplemental expert reports were stricken by order of the court. Similarly, Defendant has no expert billing testimony to challenge the cost of Gianni's lumbar fusion or Dara's cervical fusion because Defendant's billing expert, Dr. Edson Parker, also failed to timely supplement his expert opinions. Along the same lines, Defendant's economist, Mark Erwin, has been precluded by order of the court from offering any opinions at trial regarding Dara's lost wages or loss of future earning capacity, or any testimony rebutting the opinions of Plaintiffs' economist, Dr. Stan Smith. The reason is the same: Mr. Erwin did not timely supplement his expert opinions during discovery.

In other words, rather than having appointed separate counsel to advise Mr. McNamee of his rights against GEICO as soon their interests diverged, GEICO simply hired an outside law firm to continue representing both the insurer and the insured. See *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338 (Sep. 24, 2015). Notwithstanding all of that, the firm and the insurer seek to plow headlong into a jury trial, regardless of the evidence supporting their defenses and regardless of the exposure to Mr. McNamee's estate. All of these risks were at the expense of its insured and, now, his estate.

GEICO now has a new problem. It has apparently allowed an employee of Pyatt Silvestri to act as Mr. McNamee's special administrator. The "primary duty [of a special administrator] is to take possession of and preserve the decedent's property." *Bodine v. Stinson*, 85 Nev. 657, 661, 461 P.2d 868, 871 (1969) (superseded by statute on other grounds). Once again, GEICO and its hired counsel are putting the interests of GEICO ahead of Mr. McNamee's estate by having an employee of the same law firm that is already in conflict with Mr. McNamee's estate make decisions regarding the litigation and oversee the estate. This is a law firm being paid by GEICO to defend its insured, while exposing the insured and now his estate to a judgment in the millions of dollars. As the Nevada Supreme Court held in *State Farm v. Hansen*, when there is a conflict of interest between the insurer and the insured, the "insurer is obligated to provide independent counsel of the insured's choosing." *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338, 343 (Sep. 24, 2015). In other words, unlike when our initial letter was mailed in 2014, separate counsel for the insured is no longer a recommendation in Nevada. It is the law. The conflict of interest in this case is obvious and has been obvious for some time. The conflict can only be alleviated by retaining separate, independent counsel to advise Mr. McNamee's estate, and appointing an independent administrator.

As a creditor of the estate, the Plaintiffs hereby OBJECTS to the appointment of a special administrator of the estate with a conflict of interest (i.e., who is being paid by the

James P.C. Silvestri, Esq.  
Jeffrey J. Orr, Esq.  
November 8, 2017  
Page 4 of 4


largest debtor to the estate and has a financial interest in not zealously pursuing that debtor).

GEICO's bad faith in this case has continued for years. GEICO has continually put its interests above those of Mr. McNamee, and, now, his estate. The failure to hire separate counsel for Mr. McNamee and his estate is but one piece of that bad faith, and it continues with the other improper actions by GEICO and its outside counsel. Once again, we encourage you to notify the true representative of Mr. McNamee's estate of its right to independent counsel of its choosing, at GEICO's expense. We also ask that you forward our correspondence to your contact at GEICO and any coverage counsel representing GEICO for their review. Please let us know if and when separate counsel is hired.

Please also be advised we reserve our rights to seek costs for any unreimbursed expert payments that may be outstanding following the recent trial continuance that you requested. As a courtesy to your firm we withdrew the motion prior to the last status check. We will, however, include any unreimbursed amounts in our post-trial motions following the conclusion of the upcoming trial.

Very truly yours,

GLEN DERNER INJURY ATTORNEYS



Corey M. Eschweiler

EXHIBIT 1-D

EXHIBIT 1-D

**Craig A. Henderson**

---

**From:** Jeff Orr <Jorr@pyattsilvestri.com>  
**Sent:** Thursday, January 11, 2018 9:36 AM  
**To:** Craig A. Henderson  
**Subject:** Bianchi v. McNamee

Craig,

The hearing on your motion to appoint a general administrator in probate court is set for January 19. I'd like another week to respond to that motion in probate court. That would necessitate moving the hearing from January 19 to January 26. Please advise if you are agreeable to moving the hearing date one week.

Thanks

Jeff  
Jeffrey J. Orr

701 Bridger Avenue, Suite 600  
Las Vegas, Nevada 89101  
Telephone: (702) 383-6000  
Facsimile: (702) 477-0088  
[jorr@pyattsilvestri.com](mailto:jorr@pyattsilvestri.com)  
[www.pyattsilvestri.com](http://www.pyattsilvestri.com)

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## Craig A. Henderson

---

**From:** Jeff Orr <Jorr@pyattsilvestri.com>  
**Sent:** Thursday, January 11, 2018 11:23 AM  
**To:** Corey M. Eschweiler; Craig A. Henderson  
**Subject:** RE: Bianchi v. McNamee

Corey,

The probate court will gladly move the hearing from January 19<sup>th</sup> to either January 26<sup>th</sup> or February 2<sup>nd</sup>. Next week is a short week, so probate has less time to review everything in advance of the probate calendar and is looking to reduce its docket. In other words, the court would prefer February 2.

Given the circumstances, I would propose moving the hearing until February 2<sup>nd</sup> with my objection due Wednesday, January 24 and your reply due the following Wednesday, January 31, 2018, at 4:00 p.m.

Please advise if you are agreeable to this.

Thanks,

Jeff

---

**From:** Corey M. Eschweiler [mailto:[ceschweiler@glenlerner.com](mailto:ceschweiler@glenlerner.com)]  
**Sent:** Thursday, January 11, 2018 10:06 AM  
**To:** Jeff Orr <[Jorr@pyattsilvestri.com](mailto:Jorr@pyattsilvestri.com)>; Craig A. Henderson <[chenderson@glenlerner.com](mailto:chenderson@glenlerner.com)>  
**Subject:** RE: Bianchi v. McNamee

What are you proposing as the date you will serve the opposition? There must be time for us to reply prior to the hearing. Have you checked with probate to see if they can accommodate us on the 26th? Thanks.

Corey M. Eschweiler | Attorney at Law  
GLEN LERNER INJURY ATTORNEYS  
4795 S. Durango Dr. Las Vegas, NV 89147 | Main: 702-877-1500 | Fax: 702-933-7043  
[ceschweiler@glenlerner.com](mailto:ceschweiler@glenlerner.com)

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-----Original Message-----

**From:** Jeff Orr [mailto:[Jorr@pyattsilvestri.com](mailto:Jorr@pyattsilvestri.com)]  
**Sent:** Thursday, January 11, 2018 9:38 AM  
**To:** Craig A. Henderson  
**Cc:** Corey M. Eschweiler  
**Subject:** RE: Bianchi v. McNamee

Corey,

I got an "out of office response" from Craig. Please advise if you will agree to this continuance.

Thanks

-----Original Message-----

From: Jeff Orr

Sent: Thursday, January 11, 2018 9:36 AM

To: 'Craig A. Henderson' <[chenderson@glenlerner.com](mailto:chenderson@glenlerner.com)>

Subject: Bianchi v. McNamee

Craig,

The hearing on your motion to appoint a general administrator in probate court is set for January 19. I'd like another week to respond to that motion in probate court. That would necessitate moving the hearing from January 19 to January 26. Please advise if you are agreeable to moving the hearing date one week.

Thanks

Jeff

Jeffrey J. Orr

701 Bridger Avenue, Suite 600

Las Vegas, Nevada 89101

Telephone: (702) 383-6000

Facsimile: (702) 477-0088

[jorr@pyattsilvestri.com](mailto:jorr@pyattsilvestri.com)

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**Craig A. Henderson**


---

**From:** Corey M. Eschweiler  
**Sent:** Monday, January 15, 2018 8:47 AM  
**To:** Roberts, Lee; Bonney, Audra R.  
**Cc:** Craig A. Henderson  
**Subject:** FW: James McNamee

[REDACTED]

Corey M. Eschweiler | Attorney at Law  
GLEN LERNER INJURY ATTORNEYS  
4795 S. Durango Dr. Las Vegas, NV 89147 | Main: 702-877-1500 | Fax: 702-933-7043  
[ceschweiler@glenlerner.com](mailto:ceschweiler@glenlerner.com)



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---

**From:** Jeff Orr [<mailto:Jorr@pyattsilvestri.com>]  
**Sent:** Friday, January 12, 2018 4:49 PM  
**To:** Corey M. Eschweiler  
**Subject:** James McNamee

Corey,

This will confirm our conversation wherein we agreed that the opposition/objection to the General Administration in probate court will be due Wednesday January 24 and you can submit any Reply by Wednesday January 31. I understand that the probate court moved the hearing to February 9.

Thanks

*Jeff*

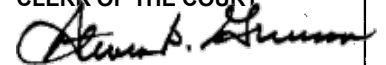
Jeffrey J. Orr



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A PROFESSIONAL LAW CORPORATION

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[www.pyattsilvestri.com](http://www.pyattsilvestri.com)

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**ERR**

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Craig A. Henderson, Esq.  
Nevada Bar No. 10077  
Joshua L. Benson, Esq.  
Nevada Bar No. 10514  
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Facsimile: (702) 938-3864  
Email: LRoberts@wwhgd.com  
*Attorneys for Petitioners Giann Bianchi  
and Dara Del Priore*

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

In the Matter of the Estate of:	)	
	)	
JAMES ALLEN MCNAMEE,	)	Case No. P093041
	)	
	)	
Deceased.	)	

**ERRATA TO PETITION FOR ISSUANCE OF GENERAL LETTERS OF ADMINISTRATION  
AND FOR APPOINTMENT OF CUMIS COUNSEL FOR THE ESTATE OF JAMES ALLEN  
MCNAMEE**

Petitioners GIANN BIANCHI and DARA DEL PRIORE, by and through their counsel Craig A. Henderson, Esq., of Glen Lerner Injury Attorneys, files this Errata to include the listing of known heirs of Decedent:

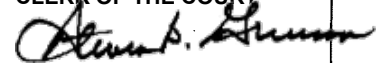
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Name	Relationship to Decedent	Age	Address
Robert McNamee	Father	Adult	2472 230 <sup>th</sup> St. Mahnomen, MN 56557-9034

GLEN LERNER INJURY ATTORNEYS

By: 

Craig A. Henderson, Esq.  
Nevada Bar No. 10077  
4795 South Durango Drive  
Las Vegas, NV 89147  
*Attorneys for Petitioners Gianni Bianchi  
and Dara Del Priore*



1 **MOT**

2 Corey M. Eschweiler, Esq.  
3 Nevada Bar No. 6635  
4 Craig A. Henderson, Esq.  
5 Nevada Bar No. 10077  
6 Joshua L. Benson, Esq.  
7 Nevada Bar No. 10514  
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13 E-mail: ceschweiler@glenlerner.com  
14 chenderson@glenlerner.com

15 Lee D. Roberts, Esq.  
16 Nevada Bar No. 8877  
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18 6385 South Rainbow Blvd., Suite 400  
19 Las Vegas, NV 89118  
20 Telephone: (702) 938-3838  
21 Facsimile: (702) 938-3864  
22 Email: LRoberts@wwhgd.com

23 *Attorneys for Petitioners Gianni Bianchi*  
24 *and Dara Del Priore*

25 EIGHTH JUDICIAL DISTRICT COURT

26 CLARK COUNTY, NEVADA

27 GIANN BIANCHI, individually,  
28 DARA DELPRIORE, individually,

Plaintiff,

vs.

JAMES McNAMEE, individually, DOES I - X,  
and ROE CORPORATIONS I - X, inclusive,

Defendants.

CASE NO.: A691887  
DEPT NO.: VIII

**MOTION FOR APPOINTMENT OF  
CUMIS COUNSEL FOR THE ESTATE  
OF JAMES ALLEN McNAMEE ON  
ORDER SHORTENING TIME**

**Date of Hearing: 2/13/18**  
**Time of Hearing: 8:00 a.m.**

Plaintiffs Gianni Bianchi and Dara Del Priore, through their attorneys of record, Corey M. Eschweiler, Esq., Craig A. Henderson, Esq., and Joshua L. Benson, Esq., of GLEN LERNER INJURY ATTORNEYS, and Lee D. Roberts, Esq., of WEINBERG WHEELER HUDGINS GUNN & DIAL, move this court for an order, pursuant to *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338 (Sep. 24, 2015), requiring the appointment of *Cumis* counsel for

1 Defendant James Allen McNamee's Estate, to be chosen by the Estate and at the expense of the  
2 Estate's insurer.

3 Because trial in this matter is scheduled to commence on April 16, 2018, and the issues  
4 raised in the motion must be heard before trial, Plaintiffs request the motion be set for hearing on  
5 shortened time pursuant to EDCR 2.26. This Motion is based upon the following memorandum of  
6 points and authorities, the Declaration of Corey M. Eschweiler, Esq., the papers and Pleadings on  
7 file with the court, and the oral argument of the parties.

8

9

GLEN LERNER INJURY ATTORNEYS

10

11

By: s/ Craig A. Henderson  
Corey M. Eschweiler, Esq.  
Nevada Bar No. 6635  
Craig A. Henderson, Esq.  
Nevada Bar No. 10077  
4795 South Durango Drive  
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(702) 877-1500

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WEINBERG WHEELER HUDGINS  
GUNN & DIAL

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*Attorneys for Petitioners Gianni Bianchi  
and Dara Del Priore.*

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1                                    **EX PARTE APPLICATION FOR ORDER SHORTENING TIME**

2            Through their motion, Plaintiffs seek an order requiring the appointment of *Cumis* counsel  
3 for the Estate of James Allen McNamee. This, because the Estate possesses bad faith claims against  
4 its insurer, and there is a conflict of interest between the insurer and McNamee's estate. Trial in this  
5 matter is scheduled for April 16, 2018, and the issues raised in this motion must be addressed before  
6 trial. Plaintiffs, therefore, request this motion be heard on shortened time pursuant to EDCR 2.26 as  
7 soon as the Court's calendar permits.

8                                    GLEN J. LERNER & ASSOCIATES

9                                    By: /s/ Craig A. Henderson  
10                                    Corey M. Eschweiler  
11                                    Nevada Bar No. 6635  
12                                    Craig A. Henderson, Esq.  
13                                    Nevada Bar No. 10077  
14                                    4795 South Durango Drive  
15                                    Las Vegas, NV 89147  
16                                    (702) 877-1500  
17                                    Attorneys for Plaintiffs

18                                    **ORDER SHORTENING TIME**

19            Based on the Declaration of Craig A. Henderson and Plaintiffs' Application for Order  
20 Shortening Time, Plaintiffs' Motion for Appointment of *Cumis* Counsel for the Estate of James  
21 Allen McNamee will be heard before the above-captioned Court on the 13<sup>th</sup> day of Feb., 2018,  
22 at   :00 a.m., or as soon thereafter as counsel may be heard.

23                                    Dated this 8 day of February, 2018.

24                                      
25                                    DISTRICT COURT JUDGE

26                                    GLEN J. LERNER & ASSOCIATES

27                                    By: /s/ Craig A. Henderson  
28                                    Corey M. Eschweiler  
                                     Nevada Bar No. 6635  
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                                     4795 South Durango Drive  
                                     Las Vegas, NV 89147  
                                     Attorneys for Plaintiffs

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In this personal injury action, the Defendant's insurer failed to settle Plaintiffs' negligence  
4 claims within the limits of the Defendant's automobile liability insurance policy, exposing the  
5 Defendant to significant excess liability. Because it is well settled in Nevada that "[t]he implied  
6 covenant requires the insurer to settle the case within policy limits when there is a substantial  
7 likelihood of recovery in excess of those limits," the insurer's failure to settle gave rise to bad faith  
8 claims against the insurer by the Defendant. *Kelly v. CSE Safeguard Ins., Co.*, No. 2:08-CV-0088-  
9 KJD-RJJ, 2011 U.S. Dist. LEXIS 111136, at \*10 (D. Nev. Sep. 27, 2011). On August 12, 2017, the  
10 Defendant died, and his bad faith claims passed to his Estate. This created an un-waivable conflict  
11 between the Estate and the insurer, however, because "[t]he insured's remedy to protect himself  
12 from an excess judgment is to assign to the claimant his cause of action for bad faith refusal to settle  
13 in exchange for a covenant not to enforce the judgment against the insured's personal assets."  
14 *Safeco Ins. Co. of Am. v. Superior Court*, 71 Cal. App. 4th 782, 788-89, 84 Cal. Rptr. 2d 43, 46  
15 (1999). The problem here is that GEICO's team of law firms obviously cannot advise the Estate of  
16 its rights against GEICO or effectuate an assignment because that would be directly adverse to those  
17 lawyers' other client, GEICO. The solution is to order the appointment of independent *Cumis* to  
18 advise the Estate of its rights against GEICO pursuant to the Nevada Supreme Court's *State Farm v.*  
19 *Hansen* decision. Only then can the Estate determine the optimal strategy to protect itself against  
20 the imminent excess liability that will be imposed against it at the April 16, 2018, trial of Plaintiffs'  
21 negligence claims against the Estate.

22 **II. FACTS**

23 **A. Background of the underlying negligence litigation.**

24 On July 17, 2013, James Allen McNamee (deceased as of August 12, 2017, and, hereinafter  
25 the "Decedent"), was driving a Ford van on East Sahara Avenue approaching a red light at the  
26 intersection of Sahara and McLeod. Decedent failed to slow the van in time and the van crashed  
27 into the rear of a Nissan Pathfinder that was stopped at the red traffic signal. The Nissan Pathfinder  
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1 was driven by Plaintiff Giann Bianchi. Plaintiff Dara DelPriore occupied the front passenger seat of  
2 the Nissan. Both Giann and Dara suffered severe injuries in the collision.

3 **B. GEICO has exposed decedent's estate to excess liability.**

4 At the time of the July 17, 2013, collision, Decedent was covered by an automobile liability  
5 insurance policy issued by GEICO, policy number 4180457162. *See* Petition for Letters of Special  
6 Administration, at 2 ¶ 6, filed with the probate Court on Sep. 20, 2017. The GEICO policy provided  
7 Decedent with liability insurance coverage of \$30,000 per person up to \$60,000 per occurrence. *Id.*  
8 Since the collision on July, 2013, Decedent's automobile liability insurer, GEICO, has repeatedly  
9 refused to settle Giann and Dara's claims within decedent's policy limits, despite knowing Giann  
10 and Dara's damages far exceed the \$30,000 per person liability insurance coverage. By way of brief  
11 background:

12 • On October 25, 2013, Giann and Dara each served GEICO with a demand requesting  
13 McNamee's \$30,000 per person policy limit in exchange for a release of all claims against  
14 decedent. At the time, Giann had incurred \$10,707.78 in medical bills and was  
15 recommended for pain management medical treatment at an estimated cost of \$12,050. Dara  
16 had incurred \$10,797.25 in medical bills and had also been recommended for pain  
management treatment at an estimated cost of \$12,050. GEICO did not tender the policy  
limits. Giann and Dara, then, proceeded with the recommended injections.

17 • On November 19, 2013, Giann and Dara sued McNamee for damages arising out of the  
18 July 17, 2013, crash. *See Bianchi and Del Priore v. James McNamee*, Case Number A-13-  
691887-C, Eighth Judicial District Court, Clark County, Nevada.

19 • On April 3, 2014, McNamee served Dara, only, with an offer to settle in the amount of  
20 \$30,000. Dara rejected this offer, as her medical bills, alone, totaled \$36,214.35. Shortly  
21 thereafter, Giann and Dara's counsel advised GEICO to appoint separate counsel to advise  
22 McNamee of his bad faith claims against GEICO. Less than three months later, McNamee  
filed a substitution of attorney retaining new, outside counsel (the Pyatt Silvestri law firm) to  
represent GEICO and McNamee.

23 • By spring of 2015, Giann's medical bills had increased to \$329,494, including the cost of  
24 the spinal surgery Giann's doctor recommended. This, in addition to \$348,948 for Giann's  
25 future medical care; \$277,832 for Giann's loss of household services; and \$1,867,000 for  
26 Giann's loss of enjoyment of life -- a total of more than \$2,800,000 in damages.  
Consequently, on April 21, 2015, Giann served McNamee with an offer to settle for  
\$435,000. Decedent did not accept Giann's offer.

27 • Also by Spring, 2015, Dara's medical bills had increased to \$93,980. This, in addition to  
28 \$296,537 in lost wages; \$384,361 in loss of household services; and \$1,700,000 in loss of

1 enjoyment of life -- a total of more than \$2,470,000 in damages. On April 21, 2015, Dara  
2 served McNamee with an offer to settle in the amount of \$345,000. McNamee did not accept  
the offer.

3 In other words, despite knowing Giann and Dara's medical special damages were going to exceed  
4 McNamee's policy limits, GEICO refused to pay the policy to Plaintiffs.

5 **C. GEICO admits Petitioners' damages exceed decedent's liability insurance**  
6 **coverage.**

7 By July, 2015, Giann's total damages had increased to \$2,850,136.97, including \$356,306 in  
8 medical special damages alone. Dara's total damages had increased to \$2,481,097, including  
9 \$99,280 in medical special damages. On July 13, 2015, decedent offered to settle Giann and Dara's  
10 claims, each for an amount in excess of McNamee's automobile liability insurance policy limit.<sup>1</sup>

11 Plaintiffs rejected these offers that did not even compensate them for their medical special damages.  
12 The two offers are critical, however, because through the offers, GEICO admitted the value of  
13 Giann and Dara's claims exceed decedent's \$60,000 of insurance coverage. Put differently,  
14 GEICO admitted McNamee, and now his Estate, will be exposed to excess liability as a result  
15 of GEICO's bad faith refusal to compromise Plaintiffs' claims for the policy limits.

16 **D. Decedent died before Plaintiffs claims were to proceed to trial.**

17 On September 20, 2017, Decedent's counsel, Pyatt Silvestri, served a Suggestion of Death  
18 on the Record indicating McNamee had passed on August 12, 2017. *See* Suggestion of Death Upon  
19 the Record, on file with this Court. This, five days before Giann and Dara's negligence claims  
20 against decedent were scheduled to proceed to trial on September 25, 2017. The trial has since been  
21 continued to April 16, 2018.

22 **E. GEICO sought appointment of a special administrator.**

23 Also on September 20, 2017, Pyatt Silvestri filed a Petition for Special Letters of  
24 Administration. The Petition sought to have Susan Clokey, an employee of Pyatt Silvestri,  
25 appointed as the Special Administrator of the Estate of James Allen McNamee based on Pyatt  
26 Silvestri's representations to this Court that "the Estate of James Allen McNamee has no assets to

27 \_\_\_\_\_  
28 <sup>1</sup> Defendant's written offers to Plaintiffs and Plaintiffs' written correspondence to Defendant's counsel's insurer will be  
provided to the court for in camera review upon request.

1 satisfy any judgment other than an automobile policy with GEICO [providing] automobile liability  
2 insurance coverage of \$30,000 per person and \$60,000 per accident.” See Petition for Letters of  
3 Special Administration, at 2 ¶ 6, filed with the Probate Court on Sep. 20, 2017.

4 **F. A general administrator must be appointed.**

5 To the contrary, based on GEICO’s failure to settle Giann and Dara’s claims within  
6 decedent’s policy limits, GEICO, admittedly, has exposed the Estate of James Allen McNamee to  
7 liability in excess of decedent’s \$60,000 liability insurance policy. In other words, the Estate of  
8 James Allen McNamee has causes of action against GEICO for, *inter alia*, breach of contract and  
9 tortious breach of the implied covenant of good faith and fair dealing. This was confirmed on July  
10 13, 2015, when GEICO offered to settle each Plaintiff’s claims for amounts in excess of  
11 McNamee’s automobile liability insurance coverage. As important, there exists, and has existed for  
12 some time, an actual conflict of interest between GEICO and the Estate of James Allen McNamee,  
13 both of whom are currently represented by the same law firm, Pyatt Silvestri. This, because:

14 The insured’s remedy to protect himself from an excess judgment is to assign to  
15 the claimant his cause of action for bad faith refusal to settle in exchange for a  
covenant not to enforce the judgment against the insured’s personal assets.

16 *Safeco Ins. Co. of Am. v. Superior Court*, 71 Cal. App. 4th 782, 788-89, 84 Cal. Rptr. 2d 43, 46  
17 (1999). It is a conflict of interest, however, for Pyatt Silverstri – who represents GEICO and, now,  
18 McNamee’s Estate, to advise the Estate of its bad faith rights against Pyatt Silvestri’s other client,  
19 GEICO. *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338 (Sep. 24,  
20 2015) (“Nevada is a dual-representation state, [and] counsel may not represent both the insurer and  
21 the insured when their interests conflict and no special exception applies”).

22 **G. GEICO agreed this Court has jurisdiction to appoint *Cumis* counsel.**

23 The probate court, having not been advised of these facts, granted Pyatt Silvestri’s petition to  
24 appoint Pyatt Silvestri employee Susan Clokey as Special Administrator for the Estate. See Nov.  
25 16, 2017, Order Granting Petition for Special Letters of Administration, on file with this Court. On  
26 January 3, 2018, Plaintiffs filed a Petition with the Probate Court seeking to have a general  
27 administrator appointed for the McNamee Estate, and requesting that independent, *Cumis* counsel  
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1 be appointed to advise the Estate of its rights against GEICO. *See* Jan. 3, 2018, Petition for Issuance  
2 of Letters of General Administration and For Appointment of *Cumis* Counsel for the Estate of James  
3 Allen McNamee, on file with the Probate Court, and on file with this Court as Exhibit 1 to  
4 Plaintiffs' Opposition to Motion to Substitute Special Administrator and Amend Caption.

5 On January 24, 2018, GEICO purported to make a special appearance in the probate court  
6 action to oppose Plaintiffs' motion for appointment of *Cumis* counsel for the Estate. *See* Jan. 24,  
7 2018, Opposition to Petition for Appointment of *Cumis* Counsel for the Estate of James Allen  
8 McNamee, on file with the Probate Court and attached hereto as Ex. 1-A for reference. In the  
9 opposition, GEICO argued that the Probate Court "does not have jurisdiction to appoint *Cumis*  
10 counsel in pending litigation. That authority resides solely within the jurisdiction of the trial court  
11 which as inherent power to govern and control the members of the bar appearing before it." *See*  
12 Opposition to Petition for Appointment of *Cumis* Counsel, at 2:7-9; 5:10-12 (emphasis added),  
13 attached hereto as Ex. 1-A. Consequently, Plaintiffs withdrew the portion of their Probate Court  
14 Petition seeking the appointment of *Cumis* counsel for the Estate of James Allen McNamee  
15 (although the hearing on Plaintiffs' Petition for Issuance of Letters of General Administration is set  
16 for hearing before the Probate Court on February 9, 2018).

17 Plaintiffs, now, come before this Court seeking an order requiring the appointment of *Cumis*  
18 counsel for the Estate of James Allen McNamee, prior to the April 16, 2018, jury trial. This,  
19 because the Estate possesses bad faith claims against GEICO, and GEICO's counsel cannot  
20 ethically advise the Estate of its rights against GEICO.

### 21 III. ARGUMENT

#### 22 A. The Estate of James Allen McNamee possesses claims for insurance bad faith 23 against GEICO.

24 It is well settled that "[t]he implied covenant requires the insurer to settle the case within  
25 policy limits when there is a substantial likelihood of recovery in excess of those limits." *Kelly v.*  
26 *CSE Safeguard Ins., Co.*, No. 2:08-CV-0088-KJD-RJJ, 2011 U.S. Dist. LEXIS 111136, at \*10 (D.  
27  
28

1 Nev. Sep. 27, 2011).<sup>2</sup> “The duty to settle is implied in law to protect the insured from exposure to  
2 liability in excess of coverage as a result of the insurer’s gamble — on which only the insured might  
3 lose. When the insurer breaches its duty to settle, the insured has been allowed to recover excess  
4 award over policy limits and other damages.” *Id.*, quoting *Murphy v. Allstate Ins. Co.*, 17 Cal. 3d  
5 937, 941 (1976). As another court explained:

6       An offer to settle for a sum approaching the monetary limit on liability confronts  
7       the insurer with a conflict of interest, a conflict described in some detail in *Brown*  
8       *v. Guarantee Ins. Co.*, *supra*, 155 Cal.App.2d at pages 682-683. In brief, by  
9       rejecting the settlement, the insurer may subject its policyholder to the risk of  
10      personal liability far exceeding the policy limit; by accepting it, the company may  
11      be paying a sum greater than the minimum possible settlement. Confronted with  
12      such a conflict, the insurer is obligated to give the interests of its policyholder at  
13      least as much consideration as its own.

14      *See Critz v. Farmers Ins. Grp.*, 230 Cal. App. 2d 788, 795-96 (1964), cited with approval in  
15      *Hamilton v. Maryland Casualty Co.*, 27 Cal. 4th 718, 725 (2002).<sup>3</sup> This case is no different. In fact,  
16      there is not merely a substantial likelihood the Estate will be exposed to an excess judgment in this  
17      case – it is imminent. More importantly, GEICO admits this fact when it made offers to resolve the  
18      case above policy limits. In other words, GEICO admits its unreasonable handling of the claim.

19      In the probate proceedings, GEICO claimed “the underlying issue of this litigation is still  
20      whether Mr. McNamee negligently caused the harm for which [Plaintiffs] now seek to recover,” yet  
21      GEICO fails to consider that this court has already entered a pre-trial order in limine “precluding  
22      McNamee from contesting liability at trial.” *See* July 19, 2017, Order Regarding Plaintiff’s Motions  
23      in Limine Numbers 1 through 28, on file with this Court. McNamee is, therefore, liable for the  
24      causing the collision. There is no dispute GEICO refused to settle Plaintiffs’ claims prior to  
25      litigation knowing their medical special damages would exceed McNamee’s \$60,000 liability  
26      insurance coverage, nor does GEICO dispute that on July 13, 2015, it offered to settle each of  
27      Plaintiffs’ claims for more than McNamee’s \$30,000 per person automobile liability insurance limit,  
28      thereby admitting that Plaintiffs’ damages exceeded the available insurance. In other words, it is all

<sup>2</sup> Unpublished federal court dispositions may be cited “for their persuasive, if nonbinding, precedential value.” *Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 440 n.2, 245 P.3d 542, 546 (2010).

<sup>3</sup> “Nevada courts often look to California law, particularly in the bad faith setting.” *Clark Cty. Sch. Dist. v. Travelers Cas. & Sur. Co. of Am.*, No. 2:13-CV-1100 JCM (PAL), 2015 U.S. Dist. LEXIS 46537, at \*13 (D. Nev. Apr. 8, 2015).

1 but undisputed that GEICO failed to compromise Petitioners' claims within McNamee's policy  
2 limits and, as of July 13, 2015, admitted there is excess liability by offering to settle for more than  
3 McNamee's policy. GEICO even admits as much in its Objection to the Probate Court Petition:  
4 "GEICO's primary interest is also to minimize and/or eliminate the Petitioners' claim for damages  
5 because it will have to pay at least a portion of such claim if adjudicated in Petitioners' favor."  
6 See Objection to Petition for Issuance of Letters of General Administration, at 9:9-12 (emphasis  
7 added), attached as Ex. 1-B. Simply put, GEICO intends to gamble with the interests of its insured  
8 at trial by rolling the dice with a jury and paying its \$60,000 of insurance, all while leaving the  
9 insured exposed to the imminent excess liability.

10 **B. There is an actual conflict of interest between GEICO and McNamee's Estate.**

11 This is precisely why *Cumis* counsel is required for the Estate – there is no one advising the  
12 Estate how to protect itself from the excess liability, e.g., by assigning its bad faith claims against  
13 GEICO to Petitioners in exchange for a covenant not to execute, as GEICO acknowledges. See  
14 Objection, at 9 ("The elephant in the room is Petitioners' end-game: to seek assignment of the  
15 purported bad faith claims from the Estate"). The problem for GEICO's three law firms (despite  
16 refusing to hire independent counsel for its insured, the Estate, GEICO retained two, new law firms  
17 to protect its interests in the Probate Court Proceedings), however, is that providing any such advice  
18 to the Estate is directly adverse to GEICO's interests and constitutes a textbook conflict of interest.  
19 See NRPC 1.7; see also *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d  
20 338 (Sep. 24, 2015) ("For independent counsel to be required, the conflict of interest must be  
21 significant, not merely theoretical, actual, not merely potential"). This is why the Nevada Supreme  
22 Court has mandated that independent, *Cumis* counsel be paid for by the insurer in these  
23 circumstances: "Nevada is a dual-representation state, [and] counsel may not represent both the  
24 insurer and the insured when their interests conflict and no special exception applies." *Hansen*, 357  
25 P.3d at 341.

26 Despite that Plaintiffs' counsel advised GEICO and its counsel of the obvious conflict  
27 through written correspondence at the time, GEICO did not retain separate counsel for McNamee,  
28 but hired outside counsel – Pyatt Silvestri – to represent both parties in the MVA Litigation. See

1 Ex. 1-C. Since then, nothing has been done to protect McNamee, and, now, his estate, from excess  
2 liability. This, even after Plaintiffs' counsel sent GEICO a second letter advising it of the conflict of  
3 interest and need for *Cumis* counsel. See Ex. 1-D. Rather than retaining *Cumis* counsel for the  
4 Estate, however, GEICO retained two, additional law firms solely for the purpose of further  
5 protecting GEICO's interests in those proceedings. In short, GEICO's failure to settle within policy  
6 limits and exposing McNamee and his estate to excess liability gave rise to the bad faith claims, and  
7 it is the existence of the bad faith claims that creates the conflict of interest because GEICO's  
8 attorneys cannot ethically advise the Estate of its rights against GEICO.

## 9 VI. CONCLUSION

10 For the reasons set forth above, Plaintiffs request an order from this Court requiring the  
11 appointment of separate counsel for the Estate of James Allen McNamee, to be chosen by the Estate  
12 and at the expense of the decedent's insurer, GEICO. See *State Farm Mut. Auto. Ins. Co. v. Hansen*,  
13 131 Nev. Adv. Rep. 74, 357 P.3d 338, 341 (Sep. 24, 2015).

14 GLEN LERNER INJURY ATTORNEYS

15  
16 By:/s/ Craig A. Henderson  
17 Corey M. Eschweiler, Esq.  
18 Nevada Bar No. 6635  
19 Craig A. Henderson, Esq.  
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24 Attorneys for Plaintiffs  
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1. I am an attorney at Glen J. Lerner & Associates, and counsel of record for Plaintiffs in the above captioned action.

I declare under penalty of perjury of the laws of the State of Nevada that the foregoing is true and correct and that this declaration was executed this 2nd day of February, 2018, in Las Vegas, Nevada.

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1 **CERTIFICATE OF SERVICE**

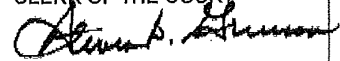
2 Pursuant to N.R.C.P. 5(a), E.D.C.R. 7.26(a) and N.E.F.C.R. 9, I hereby certify that I am an  
3 employee of GLEN LERNER INJURY ATTORNEYS, and on the 9 day of February, 2018, the  
4 foregoing **MOTION FOR APPOINTMENT OF CUMIS COUNSEL FOR THE ESTATE OF**  
5 **JAMES ALLEN McNAMEE ON ORDER SHORTENING TIME** was served by electronic  
6 copy via the Court's electronic service system WIZNET to the following counsel of record:

7 Jeffrey J. Orr, Esq.  
8 Pyatt Silvestri  
9 701 Bridger Ave., Suite 600  
10 Las Vegas, Nevada 89101  
11 *Attorney for Defendant*

12   
13 \_\_\_\_\_  
14 An Employee of Glen Lerner Injury Attorneys  
15  
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EXHIBIT 1-A

EXHIBIT 1-A



Janine C. Prupas, NV Bar No. 9156  
Justin L. Carley, NV Bar No. 9994  
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jcarley@swlaw.com

*Attorneys for GEICO*

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

In the matter of the Estate of JAMES ALLEN  
MCNAMEE, Deceased.

Case No.: P-17-093041-E  
Dept. No.: PC-1

**OPPOSITION TO PETITION FOR  
APPOINTMENT OF CUMIS COUNSEL  
FOR THE ESTATE OF JAMES ALLEN  
McNAMEE**

**Date of Hearing: February 9, 2018**  
**Time of Hearing: 9:30 a.m.**

Non-party GEICO, through its attorneys of record, Snell & Wilmer L.L.P., makes a special appearance in order to file this Opposition to Petitioners' Petition for Appointment of *Cumis* Counsel for the Estate of James Allen McNamee. This Opposition is made and based upon the papers and pleadings on file herein, as well as the Memorandum of Points and Authorities, and any oral argument this Court may hear on this matter.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Petitioners, Giann Bianchi and Dara Del Priore (hereinafter "Petitioners"), attempt to force a change in representation without legal or factual justification for doing so. First, Petitioners failed to have a citation issued by the Clerk, and failed to personally serve GEICO with that citation. *See* NRS 155.050. For this reason alone, Petitioners' request must be denied. Second, Petitioners allege a conflict of interest between GEICO and the Estate of James Allen McNamee (the "Estate and/or decedent") where no actual conflicts exist. The legal requirement for granting a *Cumis* counsel

1 request in Nevada is clear that an actual—and not potential—conflict must exist. The Petition is  
2 misplaced because if there is a bad faith claim, that claim must be brought under NRS 41.100<sup>1</sup>,  
3 assuming such claim accrued prior to the decedent’s death. If the purported claim did not accrue  
4 during the life of the decedent, it does not exist and may not be pursued. Furthermore, GEICO has  
5 not denied coverage. It accepted coverage and is defending the Estate, whose interest is identical to  
6 that of GEICO, which is to avoid and defeat liability.

7 Lastly, this Court does not have jurisdiction to grant a Petition to appoint *Cumis* counsel in  
8 pending litigation. That authority resides solely within the jurisdiction of the trial court which has  
9 inherent power to govern and control the members of the bar appearing before it. *Ryan’s Express*  
10 *Transp. Services, Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 279 P.3d 166 (2012). The  
11 appointment of *Cumis* counsel derives from the authority of the presiding court to examine the facts  
12 and circumstances and determine whether there is a conflict of interest precluding counsel for one of  
13 the parties in an action from representing that party.

## 14 II. FACTUAL BACKGROUND

15 The underlying case is an action for negligence brought by the Petitioners against Defendant  
16 James McNamee (“Mr. McNamee”). On July 17, 2013, the Petitioners’ vehicle and the vehicle  
17 driven by Mr. McNamee collided. Petitioners claimed personal injury damages arising from that  
18 collision. GEICO is Mr. McNamee’s automobile liability insurer. Petitioners filed suit on November  
19 19, 2013 (Case No. A-13-691887-C). During 2014 to 2015, Petitioners and the insured exchanged  
20 offers to settle.

21 After Mr. McNamee passed away on August 12, 2017, this Court granted a petition for  
22 Special Letters of Administration to appoint Susan Clokey as the Special Administrator of Mr.  
23 McNamee’s Estate. Counsel for Mr. McNamee’s Estate then filed a motion to substitute Special  
24 Administrator Susan Clokey as Defendant in this action in place and stead of the now-deceased Mr.  
25 McNamee. Petitioners opposed that motion and filed an accompanying Petition for Issuance of

26 <sup>1</sup> NRS 41.100(1) provides that “no cause of action is lost by reasons of the death of any person, but  
27 may be maintained by or against the person’s executor or administrator.”

28 NRS 41.100(3) provides that “when a person who has a cause of action dies before judgment, the  
damages recoverable by the decedent’s executor or administrator include all losses or damages which the  
decedent incurred or sustained before the decedent’s death...”

1 General Letters of Administration and For Appointment of *Cumis* Counsel for the Estate of James  
2 Allen McNamee. *See* Petitioners' Opposition to Motion to Appoint Special Administrator. GEICO  
3 now makes a special appearance to oppose the Petition.

### 4 III. ARGUMENT

#### 5 A. Petitioners failed to personally serve GEICO with a citation pursuant to NRS 155.050.

6 Petitioners failed to personally serve GEICO with a citation issued by the Clerk pursuant to  
7 NRS 155 *et seq.* NRS 155.060 provides that a citation must be served at least 10 days before the day  
8 of hearing. NRS 155.040 provides that personal notice must be given by citation, issued by the Clerk  
9 and directed to the person to be served, and must command the person to appear before the court at a  
10 time and place to be named in the citation. The nature or character of the proceedings must be briefly  
11 stated in the citation, and a copy of the petition, if any, must be attached. NRS 155.050 mandates  
12 personal service. GEICO was not personally served pursuant to NRS 155. Based on this reason  
13 alone, Petitioners' request for *Cumis* counsel must be denied.

#### 14 B. There is no actual conflict between GEICO and Mr. McNamee/the Estate, and 15 therefore *Cumis* counsel is inappropriate.

16 The Petition to appoint *Cumis* counsel is misconceived and misplaced. If there is a bad faith  
17 claim, that claim must be brought under NRS 41.100 assuming such claim accrued prior to the  
18 decedent's death. If the purported claim did not accrue during the life of the decedent, it does not  
19 exist and may not be pursued. *See Avila v. Century National Ins. Co.*, 473 Fed. Appx. 554 (9th Cir.  
20 2012) (estate retained claim against insurer under Nevada law alleging breach of implied covenant of  
21 good faith and fair dealing regarding insurer's refusal to indemnify, defend, or settle in connection  
22 with underlying suit with insured while he was alive). That is the case here. The insurer did not deny  
23 coverage for the decedent or the Estate. It accepted coverage and is defending the Estate, whose  
24 interest is identical to that of the insurer, which is to avoid and defeat liability. There is no claim for  
25 bad faith that can be asserted by the Estate, but even if there were, it would have to be asserted in  
26 accordance with the probate code by filing and serving an action for bad faith after such cause of  
27 action accrued (which it cannot and never will). *Long v. Century Indemnity Co.*, 163 Cal.App.4th  
28 1460 (2008).

1 In order to grant *Cumis* counsel, a court must find the existence of an “actual conflict.” *State*  
2 *Farm Mutual Auto. Ins. Co. v. Hansen*, 357 P.3d 338, 342 (2015) (“[T]he focus should be on  
3 whether there is actually a conflict.”). Courts must inquire on “a case-by-case basis whether there is  
4 an actual conflict of interest.” *Id.* at 343. The central inquiry for determining whether a Court must  
5 grant a petition for *Cumis* counsel is whether an actual conflict exists under Rule of Professional  
6 Conduct 1.7. *Id.* (“[A]n insurer is obligated to provide independent counsel of the insured’s choosing  
7 only when an actual conflict of interest exists.”). Further, a conflict is not actual if it affects issues  
8 that are “only extrinsic or ancillary to the issues actually litigated in the underlying action.” *Id.* In  
9 order for a Court to permit the insured to select independent counsel, the conflict must also be  
10 “significant, not merely theoretical, actual, not merely potential.” *Id.*

11 There is no actual conflict of interest in this case. Before his death, the insured never brought  
12 an action against GEICO for any reason, including breach of contract or breach of the covenant of  
13 good faith and fair dealing. He did not do so because GEICO never denied coverage. The claims to  
14 which Petitioners refer in the Petition are entirely hypothetical. At this time, without any kind of  
15 action between the Estate and GEICO, current counsel has no conflict of interest. Nothing that  
16 Petitioners allege in the Petition suggests that GEICO and the Estate have conflicting incentives as to  
17 the issues litigated in the underlying action here. On the contrary, both GEICO and the Estate share  
18 an aligned desire to resolve this litigation – avoid and defeat liability. The underlying issue of this  
19 litigation is still whether Mr. McNamee negligently caused the harm for which Petitioners now seek  
20 to recover. Regardless of any potential claims the Petitioners may allege exist between the parties,  
21 both the Estate and GEICO continue to have an interest in showing that Mr. McNamee was not  
22 negligent nor were his actions the proximate or actual cause of Petitioners’ injuries.

23 Finally, Petitioners’ allegation that the Estate’s possible bad faith claim signifies an actual  
24 conflict is unsupported by the law. Petitioners allege that the Estate has not yet settled this action  
25 because GEICO does not wish to spend over the cap of the insurance policy. While the Petitioners  
26 fail to cite to any legal authority demonstrating that, even if this allegation were true, it would  
27 constitute a conflict of interest, courts have found that the opposite proposition is true. *See Sierra*  
28 *Pacific Industries v. American States Ins. Co.*, 883 F.Supp.2d 967, 973 (E.D. Cal. 2012) (“[n]o

1 conflict of interest shall be deemed to exist . . . solely because an insured is sued for an amount in  
2 excess of the insurance policy limits.”).

3 Petitioners here attempt to make essentially the same argument: that GEICO has a conflict of  
4 interest because the Estate is being sued for an amount in excess of the insurance policy limits. *Long*  
5 *v. Century Indemnity Co.*, 163 Cal.App.4th 1460 (2008). Even setting aside that in this case no bad  
6 faith claim has been brought and thus no actual conflict exists, Petitioners’ argument depends, just  
7 like in the *Sierra Pacific* case, on the unsupported presumption that because the insured has been  
8 sued for an amount greater than the policy limit, the case creates a conflict of interest.

9 **C. This Court does not have jurisdiction to appoint *Cumis* counsel.**

10 This Court does not have jurisdiction to grant a Petition to appoint *Cumis* counsel in pending  
11 litigation. That authority resides solely within the jurisdiction of the trial court which has inherent  
12 power to govern and control the members of the bar appearing before it. *Ryan’s Express Transp.*  
13 *Services, Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 279 P.3d 166 (2012). The appointment of  
14 *Cumis* counsel derives from the authority of the presiding court to examine the facts and  
15 circumstances and determine whether there is a conflict of interest precluding counsel for one of the  
16 parties in an action from representing that party. In the *Cumis* situation, the conflict of interest  
17 generally arises out of conflicting obligations of insurance defense counsel and the insured in certain  
18 coverage situations where the determination of facts in the case may result in a finding of coverage  
19 or no coverage. In such situations, defense counsel, who is regularly paid by the insurance company  
20 and may derive substantial business from such company, may have an interest in presenting the facts  
21 in a manner favorable to the insurer to avoid coverage, rather than favorable to the insured. The  
22 typical situation arises in cases where an action can be determined to be intentional (which avoids  
23 coverage under the typical policy) or negligent, in which case coverage would obtain. In such cases,  
24 the trial court, on proper motion, or sua sponte, can determine that the attorney has an unwaivable  
25 conflict because in Nevada (which is a dual role state) he has a fiduciary duty to both the insured and  
26 the insurer. Where their interests are aligned, however, there is no conflict of interest, even in  
27 situations where the insurer has reserved rights to deny coverage under the policy. The reason is that  
28 both the insurer and insured are aligned in the effort to defeat or avoid liability. *Long v. Century*

1 *Indemnity Co.*, 163 Cal.App.4th 1460 (2008) (no conflict exists solely because an insured is sued for  
2 an amount in excess of the policy limits).

3 That is the situation here. Regardless of the facts, however, this Court does not have  
4 jurisdiction under NRS 139 to enter an order disqualifying or conditioning representation of counsel  
5 in a case pending in a different court, or entering an order against GEICO to appoint separate  
6 counsel for its insured. The trial court must first enter an order disqualifying counsel from  
7 representing the interests of the insured in connection with the presentation of that part of the case  
8 where a conflict arises, in which case, additional counsel is appointed by the insurer to satisfy its  
9 contractual obligations to defend the interests of the insured under the policy. The duty of the insurer  
10 to its insured to provide a defense is contractual in Nevada, and the duty and obligation to determine  
11 whether the insured's counsel can satisfy that duty arises out of the rules of professional  
12 responsibility enforced by the trial court, not the probate court.

#### 13 IV. CONCLUSION

14 This Court should deny the Petition for Appointment of *Cumis* Counsel because no actual  
15 conflict of interest exists between the Estate and GEICO. Moreover, this Court lacks jurisdiction to  
16 decide this issue. This court has no jurisdiction to disqualify counsel representing the insurer and the  
17 insured in their common goal to avoid liability, and even if it did, *Cumis* counsel is not appropriate  
18 under Nevada law.

19 DATED this 24<sup>th</sup> day of January, 2018.

20 SNELL & WILMER L.L.P.

21 By: 

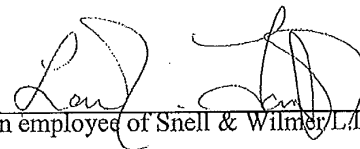
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26 *Attorneys for GEICO*

**CERTIFICATE OF SERVICE**

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **OPPOSITION TO PETITION FOR APPOINTMENT OF CUMIS COUNSEL FOR THE ESTATE OF JAMES ALLEN McNAMEE** by the Court's Electronic Filing System.

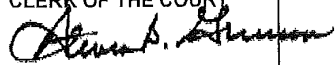
Dated: January 24, 2018

  
An employee of Snell & Wilmer LLP.

4811-1071-6762

EXHIBIT 1-B

EXHIBIT 1-B



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**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

In the Matter of the Estate of

JAMES ALLEN MCNAMEE,

Deceased.

Case No.: P-17-093041-E  
Dept. No.: PC-1

Date of Hearing: February 9, 2018  
Time of Hearing: 9:30 a.m.

**OBJECTION TO PETITION FOR ISSUANCE OF GENERAL LETTERS  
OF ADMINISTRATION AND FOR APPOINTMENT OF CUMIS  
COUNSEL FOR THE ESTATE OF JAMES ALLEN MCNAMEE**

Petitioners, Gianni Bianchi and Dara Del Priore (hereinafter "Petitioners"), requested relief  
— to open a general administration for the purposes of administering a speculative bad faith personal  
injury claim before such cause of action has even accrued — is wholly improper under both legal  
and factual grounds. In so doing, Petitioners misread Nevada law to reach the conclusion that a  
special administrator cannot defend a lawsuit when an estate has assets in the form of future legal  
claims. Petitioners' position is, however, entirely misplaced because: (1) the purpose of a special

1 administrator is to act as the real party in interest in lawsuits involving an estate; and (2) Nevada  
2 does not recognize a hypothetical, contingent and unripe claim for bad faith as an estate asset.  
3 Moreover, Nevada law precludes this Court from initiating a general administration because James  
4 Allen McNamee (hereinafter, "Decedent") died as a resident of Arizona without holding any  
5 property in this State. Thus, this Court properly limited the instant proceeding to a special  
6 administration for the sole purpose of allowing Petitioners to properly adjudicate their pending  
7 claims against Decedent after his death.

8 Petitioners' claim that a removable conflict of interest exists should also be rejected by this  
9 Court. There is no actual conflict of interest between GEICO and the Special Administrator. To the  
10 contrary, GEICO and the Special Administrator are presently aligned and share an interest in  
11 defending the Petitioners' tort claims, the primary duty of a special administrator under Nevada  
12 law. Accordingly, the Petitioners' Petition should be denied and the special administration already  
13 in place should be preserved to allow the Special Administrator to defend the Estate against the  
14 Petitioners' pending lawsuit.

#### 15 MEMORANDUM OF POINTS AND AUTHORITIES

#### 16 I.

#### 17 **FACTUAL BACKGROUND**

18 The instant probate matter stems from an action for negligence brought by Petitioners  
19 against Decedent prior to his death. In July 2013, Decedent's vehicle and the vehicle driven by  
20 Petitioners collided. On November 19, 2013, Petitioners initiated a lawsuit against Decedent for  
21 personal injury damages allegedly caused by such collision. Such action is currently pending before  
22 Department VIII of the Eighth Judicial District Court, Case No. A-13-691887-C (hereinafter, the  
23 "MVA Lawsuit"), and is set on a five-week trial stack commencing April 16, 2018. GEICO is  
24 Decedent's automobile liability insurer. During 2014 and 2015, Petitioners and Decedent  
25 exchanged offers to settle; however, the Parties were ultimately unable to compromise Petitioners'  
26 claims.

27 On August 12, 2017, Decedent died in and as a resident of in Mohave County, Arizona.  
28 Decedent left no property in the State of Nevada. Because of the unresolved MVA Lawsuit, this

1 Court appointed Susan Clokey as the Estate's Special Administrator to substitute the Estate as the  
2 real party in interest.<sup>1</sup> Ms. Clokey is an employee of Pyatt Silversetri, the Decedent's attorney in  
3 the MVA Lawsuit. Counsel for Decedent then filed a motion to substitute the Special Administrator  
4 as Defendant in the MVA Lawsuit in place and stead of Decedent. Petitioners opposed such motion  
5 in the MVA Lawsuit and herein filed the instant Petition for Issuance of General Letters of  
6 Administration and For Appointment of Cumis Counsel for the Estate of James Allen McNamee  
7 (hereinafter, "Petition"). Ms. Cokey and GEICO now jointly oppose the Petition, with GEICO  
8 making a special appearance herein for such purposes.<sup>2</sup>

9 **II.**

10 **ARGUMENT**

11 **A. The Current Special Administration is the Only Proper Probate Proceeding that**  
12 **Applies to the Estate of James Allen McNamee.**

13 1. The Special Administrator's Sole Purpose is to Defend the MVA Lawsuit.

14 This Court properly limited the instant proceeding to a special administration initiated for  
15 the sole purpose of adjudicating Petitioners' claims against Decedent's Estate. This Court has the

16  
17 <sup>1</sup> The Special Administrator's authority is limited to defending the MVA Lawsuit and distributing insurance  
18 proceeds to Petitioners if they prevail at trial. Indeed, in establishing the special administration, on November  
15, 2017, this Court entered the following orders:

19 The sole purpose of this order is to allow Bianchi et al. v. McNamee, Case No.  
20 A-13-691887-C to proceed as to the insurance proceeds of the GEICO  
21 automobile insurance policy pursuant to Nevada Revised Statutes  
140.040(2)(a) and 140.040(3)(b). Petitioner intends to defend that action as the  
real party in interest.

22 The Special Administrator does not have any other authority beyond Nevada  
23 Revised Statutes 140(2)(a) [sic] and 140(3)(b) [sic] and may not distribute any  
24 property other than the GEICO automobile insurance policy with automobile  
liability insurance coverage of \$30,000 per person and \$60,000 per accident.

25 See Order Granting Special Letters of Administration, attached hereto as **Exhibit A**.

26 <sup>2</sup> As a preliminary matter, the Petition is not properly before this Court as Petitioners failed to issue GEICO  
27 a citation as required under NRS 155, *et seq.* Out of an abundance of caution, however, GEICO and the  
28 Special Administrator hereby object to the Petition as it relates to Petitioners' request to initiate a general  
administration and issue letters of administration. Janine C. Prupas, Esq., of the law firm of Snell & Wilmer  
will be opposing Petitioners' request for the appointment of Cumis counsel on GEICO's behalf.

1 authority to appoint a special administrator in any proper case to exercise powers as may be  
2 necessary for the estate's preservation. NRS 140.010. Such appointment may occur where, as here,  
3 no assets are subject to administration, but good cause nevertheless exists for the appointment of a  
4 personal representative of the decedent.<sup>3</sup> NRS 140.010(6) and (7). A special administrator, at her  
5 discretion, may, for all necessary purposes, defend actions and other legal proceedings as a personal  
6 representative of the Estate. NRS 140.040(1)(b).

7 As a general rule, special administrators cannot accept, reject or negotiate creditor claims.  
8 NRS 140.040(3). A general administration is necessary for such a procedure or an order from the  
9 Court granting a special administrator such power. The exception to this rule is when an estate's  
10 sole asset is a policy of liability insurance and a claim is made where such liability insurance would  
11 cover the loss. NRS 140.040(3)(b).

12 Petitioners' argument that the Special Administrator cannot defend the MVA Lawsuit  
13 because the Estate has another asset – namely, a speculative bad faith claim against GEICO – is  
14 entirely misplaced. As an initial matter, defending a lawsuit and satisfying creditors are two separate  
15 and distinct functions a personal representative performs. A special administrator is not divested of  
16 his or her authority under NRS 140.040(1)(b) to defend a civil action as the personal representative  
17 of the Estate if the Estate has more than one asset.<sup>4</sup> That is not the purpose and effect of NRS  
18 140.040(1)(b). Rather, its purpose is to permit a special administrator – who otherwise has no  
19 powers to compromise and pay creditors – to pay a claim when such a claim would be satisfied  
20 with proceeds from a liability insurance policy that covered the loss.<sup>5</sup>

21  
22 <sup>3</sup> "Personal Representative" includes an executor, an administrator, a successor personal representative, a  
23 special administrator and persons who perform substantially the same function under the law governing their  
status. NRS 132.265.

24 <sup>4</sup> Indeed, NRS 140.140(2)(a) expressly authorizes a special administrator to "commence" and "maintain"  
25 legal proceedings as the personal representative of the estate. How could a special administrator pursue an  
asset of the estate through litigation if he or she is divested of power because the asset exists?

26 <sup>5</sup> Ironically, the Petitioners are attacking a statute that was enacted for their benefit. Indeed, as recognized  
27 by the Nevada Supreme Court, NRS 140.040(3) promotes judicial economy and efficient resolutions of  
28 claims by enabling a plaintiff with such claims to avoid lengthy, costly, formal probate procedures when the  
sole asset is a liability insurance policy. *See Jacobsen v. Estate of Clayton*, 121 Nev. 518, 522, 119 P.3d 132,  
134 (2005).

Moreover, the Petitioners' reliance on *Bodine* for the proposition that the Estate must be converted to a general administration is misguided and otherwise misleading as it fails to account for subsequently enacted law. Despite Petitioners' claim to the contrary, the entire *Bodine* decision was superseded by NRS 140.040(3).<sup>6</sup> Moreover, even if *Bodine* were good law, which it is not, it merely stands for the proposition that "[t]he claim procedure specified by Ch. 147 must be followed whenever the estate of the deceased may be diminished if the creditor is successful."<sup>7</sup>

First, the claim procedure is not necessary at this time. Second, even if it were necessary, a special administrator can initiate such a procedure. The claim procedure involving notice to creditors need not be followed under the current circumstances because, unlike in *Bodine*, the Estate has no current assets that can be diminished by a creditor thereby rendering any notice to creditors an exercise in futility. Indeed, the general administration procedure could only potentially be beneficial to the Estate and its creditors if and when (1) the Petitioners successfully obtain a judgment in the underlying MVA Litigation which creates excess liability for the Estate; and (2) the Estate obtains a judgment against GEICO under an insurance bad faith theory.

Moreover, NRS 143.335, a statute enacted in 2011, further belies the Petitioners' argument that a special administrator cannot exist when an estate has assets other than a policy of liability insurance. NRS 143.335 provides: "[a] special administrator may be granted authority to administer the estate pursuant to NRS 143.300 to 143.815, inclusive, if the special administrator is appointed with, or has been granted, the power of a general personal representative." A special administrator can, therefore, initiate a claims process and independently administer an estate if the Court so orders it. Accordingly, this Court should summarily dismiss Petitioners' claims for want of any legal support.

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///

<sup>6</sup> See *Jacobsen*, 121 Nev. at 519, 119 P.3d at 132 (concluding that "*Bodine* is superseded by the Legislature's 1971 amendment of NRS 140.040 to specifically allow suits against a special administrator, in place of probate proceedings, when the estate's sole asset is a liability insurance policy.") (emphasis added).

<sup>7</sup> See *Jacobsen*, 121 Nev. at 521, 119 P.3d at 134.

2. The Alleged Bad Faith Insurance Claim has Not Accrued and, Therefore, Cannot be a Basis to Establish a General Administration Where no Proper Basis Otherwise Exists.

Petitioners' allegation that the Estate has an interest in yet-to-be accrued bad faith claims does not somehow provide this Court with the jurisdiction to generally administer Decedent's Estate where no proper basis otherwise exists. As this Court is well aware, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998). In the case of Petitioners' purported claim for bad faith, such claim only ripens upon a determination that claimants suffered damages in excess of the benefits available under the controlling insurance policy and such determination is affirmed on appeal.<sup>8</sup>

Even if the Petitioners' erroneous interpretation of NRS 140.040(3)(b) were accepted by this Court, the purported bad faith claim is neither a claim nor an asset of the Estate. Petitioners have not even taken the MVA Lawsuit to trial yet. Petitioners still have to win and obtain judgments in excess of the policy limit of \$30,000.00 for even a prima facie "refusal to settle" claim to exist. Such claim would also require a showing that: (1) GEICO has no reasonable basis for disputing coverage; (2) GEICO knew or recklessly disregarded the fact that there was no reasonable basis for disputing coverage.<sup>9</sup> The Court should then need to find that the damages sustained by Petitioners exceeded the limits available under the GEICO policy and the affirmation of such determination on appeal. This fact has been conceded by the Petitioners.<sup>10</sup> Thus, as this matter has yet to even go to trial, absolutely no basis exists to establish a general administration at this time.

<sup>8</sup> See *Branch Baking and Trust Co. v. Nevada Title Co.*, 2011 WL 1399810 (D.Nev.2011) (holding that a claim for insurance bad faith for denying a claim "without any reasonable basis" and with "knowledge that no reasonable basis exists to deny the claim" does not become ripe until after a determination of the underlying claim is final); *Western Nat. Ins. Group v. Halon*, 2017 WL 6614258 (D.Nev.2017) (distinguishing ripeness of an insurance bad faith claim and a legal malpractice claim); *Vest v. Travelers Ins. Co.*, 753 So.2d 1270, 1276 (Fla.2000) ("a cause of action in court for [bad faith] is premature until there is a determination of liability and extent of damages owed on the first-party insurance contract."); *Lausell v. GEICO*, 2017 WL 3720890 (M.D.Fla.2017) ("a claim for bad faith requires: (1) a determination of liability and (2) a judgment awarding damages in excess of the policy limits.").

<sup>9</sup> See *Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 730, 962 P.2d 596, 621 (1998).

<sup>10</sup> See Petition at 11:7-8 ("James Allen McNamee left an estate that consist of...the Estate's potential bad faith claims against GEICO.") (emphasis added).

Moreover, in addition to the extreme unripeness of the alleged bad faith claim, Petitioners seem to forget that they have no standing to complain about the contractual relationship between GEICO and the Decedent. Indeed, Nevada law “does not recognize a right a right of action on the part of a third-party claimant against an insurance company for bad-faith refusal to settle.”<sup>11</sup> Thus, Petitioners – third parties to the relationship between the insurance and the insured – have absolutely no standing to request that this Court open a general administration for the purposes of administering claims that can only be asserted by Decedent against GIECO.

**B. This Court Lacks Jurisdiction to Administer the Estate of James Allen McNamee Because he was not a Nevada Resident at the Time of his Death and Died Without Holding any Property in the State of Nevada.**

The initiation of a general administration is fundamentally improper because, at the time of this death, Decedent was not a Nevada resident and did not own any assets in this State as expressly required under Nevada law. NRS 132.275 defines “probate” as “a legal proceeding in which the court has jurisdiction to administer, pay out and distribute the assets of a decedent to the persons entitled to them, including devisees, heirs, creditors and others.” Nevada’s probate jurisdiction is set forth in NRS 136.010. Under that statute, Nevada district courts sitting in probate may hear and make rulings on cases where: (1) the decedent was a resident of Nevada at the date of death [NRS 136.010(1)]; or (2) the decedent was a non-resident but owns property located within the State of Nevada [NRS 136.010(2)].

The Decedent died on August 12, 2017, in Mohave County, Arizona.<sup>12</sup> At the time of his death, the Decedent was a resident of Arizona.<sup>13</sup> Accordingly, this Court has no jurisdiction to entertain a general probate administration under NRS 136.010(1). Notwithstanding the Decedent being a resident of Arizona at the time of his death, this Court could still open a general probate administration if an interested party establishes that the Decedent died with property located within

<sup>11</sup> *AAA Nevada Ins. Co. v. Chau*, 463 Fed. Appx. 627, 628 (9th Cir. 2011) (unpublished) (citing *Tweet v. Webster*, 610 F.Supp. 104, 105 (D.Nev.1985) and *Hunt v. State Farm Mut. Auto. Ins. Co.*, 655 F.Supp. 284, 286–88 (D.Nev.1987)).

<sup>12</sup> See *Ex. A* at ¶¶ 1-2.

<sup>13</sup> *Id.*

1 the State of Nevada.<sup>14</sup> “Property” in this context is defined as “anything that may be the subject of  
2 ownership, and includes both real and personal property and any interest therein.” NRS 132.285.

3 The Petitioners argue that the Estate’s nonexistent bad faith claim is “property” and,  
4 therefore, a general probate administration is appropriate. For the reasons already explained, a  
5 theoretical, unripe and contingent claim for bad faith is not property. You cannot own something  
6 that does not exist.<sup>15</sup> A general probate administration, therefore, is unavailable.

7 **C. There is no Conflict of Interest Between the Special Administrator and the Estate.**

8 As no conflict of interest presently exists between the Special Administrator and GEICO,  
9 no grounds exist to disqualify Ms. Clokey from so serving. Only an actual conflict of interest can  
10 justify disqualification of the Special Administrator. The suggestion of a potential conflict of  
11 interest is not sufficient.<sup>16</sup> The Estate and the Petitioners are adverse: the Petitioners are suing the  
12 Estate’s personal representative for tort damages. GEICO and the Estate are presently aligned: they  
13 both have an interest in defending the Petitioners’ claim for more than \$5.27 million of damages  
14 allegedly caused by the Decedent in the MVA Litigation. There is no present conflict between  
15 GEICO and its insured.

16  
17  
18 <sup>14</sup> NRS 136.010(2) states that “[t]he estate of a nonresident decedent may be settled by the district court of  
19 any county in which any part of the estate is located.” “‘Estate’ includes the property of the decedent or trust  
20 whose affairs are subject to [Title of the NRS] as it is originally constituted and as it exists from time to time  
during administration.” NRS 132.120.

21 <sup>15</sup> Moreover, an estate that has no assets cannot be damaged by an insurer that fails to protect the interests  
22 of the estate. See *McDaniel v. GEICO*, 55 F.Supp.3d 1244 (E.D.Cal.2014) (“an insolvent estate that becomes  
23 subject to an excess judgment due to the insurer’s unreasonable refusal to settle has no bad faith claim  
because the estate has no interests to be damaged.”) (reversed in part on unrelated grounds) (citing *Shapero*  
*v. Allstate*, 14 Cal.App.3d 433, 92 Cal.Rptr. 244 (1971)).

24 <sup>16</sup> See e.g. *Frank Settelmeier & Sons, Inc. v. Smith & Harmer, Ltd.*, 124 Nev. 1206, 197 P.3d 1051, n. 33  
25 (2008) (declining to disqualify an attorney because a suggestion of a potential conflict was not sufficient);  
26 *State Farm v. Hansen*, 131 Nev. Adv. Op. 74, 357 P.3d 342-43 (“The *Cumis* rule is not based on insurance  
27 law but on the ethical duty of an attorney to avoid representing conflicting interests. For independent counsel  
to be required, the conflict of interest must be significant, not merely theoretical, actual, not merely  
28 potential.”) (quotations omitted); *In re Shaw*, 186 A.D. 809, 589 N.Y.S.2d 97 (1992) (“A potential conflict  
of interest between a fiduciary and a party interested in the estate does not warrant the denial of letter to, or  
removal of, a fiduciary. Rather, it is the actual misconduct, not a conflict of interest, that justifies the removal  
of a fiduciary.”) (quotations omitted).

1           Petitioners claim that a hypothetical, unripe and contingent bad faith claim that the Estate  
2 may have against GEICO divests the Special Administrator of her ability aggressively defend the  
3 MVA Lawsuit. This is nonsensical. At best, the Special Administrator has a potential conflict of  
4 interest which only becomes actual if and when (1) the Petitioners obtain judgments in excess of  
5 the policy limits in the MVA Litigation which are upheld on appeal; and (2) the Estate has assets  
6 other than the potential bad faith claim, which it does not.

7           Again, the Petitioners are putting the cart before the horse. The Special Administrator has  
8 no actual conflict of interest with the Estate. If anything, under the Petitioners' theory of conflict,  
9 the Estate and GEICO share the goal of defending the Petitioners' claim for damages. The Estate's  
10 primary interest is to minimize and/or eliminate creditor claims for the benefit of beneficiaries;  
11 GEICO's primary interest is also to minimize and or eliminate the Petitioners' claim for damages  
12 because it will have to pay at least a portion of such claim if adjudicated in the Petitioners' favor.

13           The elephant in the room is the Petitioners' end-game: to seek the assignment of the  
14 purported bad faith claim from the Estate because Nevada law prohibits a right of action on the part  
15 of a third-party claimant against an insurance company for bad-faith refusal to settle. Petitioners,  
16 however, have a lot of hurdles to jump over before there is an assignable claim, the highest of which  
17 is convincing this Court that Nevada should not follow *McDaniel and Shapero* which hold that a  
18 "refusal to settle" bad faith claim does not exist when an estate has no assets that are subject to  
19 creditors.

20           The conflicts complained of by the Petitioners are potential and highly speculative.  
21 Accordingly, the Special Administrator should not be removed and replaced by the Public  
22 Administrator. Moreover, the Petitioners are asking this Court for Clark County and its taxpayers  
23 to shoulder the expense of hiring the Public Administrator because there are no assets in the Estate  
24 to pay the Public Administrator. Indeed, the current special administration is being paid for  
25 voluntarily by GEICO in order to properly dispense the Estate's duty to substitute in as the real  
26 party of interest as a result of Decedent's death.

27       ///

28       ///

9060 WEST CHEYENNE AVENUE  
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SOLOMON  
DWIGGINS & FREER  
TRUST AND ESTATE ATTORNEYS




III.

CONCLUSION

WHEREFORE, GEICO and the Special Administrator respectfully request that the Court deny Giann Bianchi and Dara Del Priore's Petition for Issuance of General Letters of Administration and for Appointment of *Cumis* Counsel for the Estate of James Allen McNamee in its entirety.

DATED January 24, 2018.



Brian P. Eagan  
Nevada Bar No. 09395  
Email: beagan@sdfnvlaw.com  
Alexander G. LeVeque  
Nevada Bar No. 11183  
Email: aleveque@sdfnvlaw.com  
SOLOMON DWIGGINS & FREER, LTD.  
9060 West Cheyenne Avenue  
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-- and --

Jeffrey J. Orr  
Nevada Bar No. 07854  
Email: jorr@pyattsilvestri.com  
PYATT SILVESTRI  
701 Bridger Avenue, Suite 600  
Las Vegas, Nevada 89101  
Telephone: (702) 383-6000  
Facsimile: (702) 477-0088

*Attorneys for Susan Clokey,  
Special Administrator*

**CERTIFICATE OF SERVICE**

PURSUANT to NRCP 5(b), I HEREBY CERTIFY that on January 24, 2018, I served a true and correct copy of the OBJECTION TO PETITION FOR ISSUANCE OF GENERAL LETTERS OF ADMINISTRATION AND FOR APPOINTMENT OF *CUMIS* COUNSEL FOR THE ESTATE OF JAMES ALLEN MCNAMEE the following in the manner set forth below:

**Via:**

☐ Hand Delivery  
☐ U.S. Mail, Postage Prepaid  
☐ Certified Mail, Receipt No.: \_\_\_\_\_  
☐ Return Receipt Request  
☒ E-Service through Wiznet as follows:

Corey M. Eschweiler, Esq. ([ceschweiler@glenlerner.com](mailto:ceschweiler@glenlerner.com))

Craig A. Henderson, Esq. ([chenderson@glenlerner.com](mailto:chenderson@glenlerner.com))

*Counsel for Gianni Bianchi and Dara Del Priore*

Jeffrey J. Orr, Esq. ([jorr@pyattsilvestri.com](mailto:jorr@pyattsilvestri.com))

*Counsel for Susan Clokey, Special Administrator of the Estate of James Allen McNamee and GEICO*

**Via:**

☐ Hand Delivery  
☐ U.S. Mail, Postage Prepaid  
☐ Certified Mail, Receipt No.: \_\_\_\_\_  
☐ Return Receipt Request  
☒ E-Service through Wiznet as follows:

Robert McNamee  
2472 230<sup>th</sup> Street  
Mahnomen, MN 56557-9034

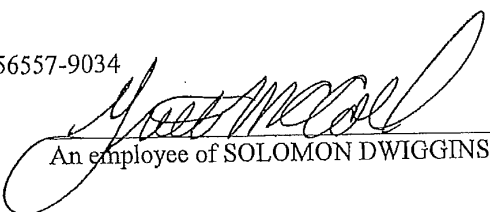
  
An employee of SOLOMON DWIGGINS & FREER, LTD.

EXHIBIT "A"

EXHIBIT "A"

*Steven D. Grier*

1 **ORDR**

2 Jeffrey J. Orr, Esq.  
3 Nevada Bar No. 7854  
4 PYATT SILVESTRI  
5 701 Bridger Avenue  
6 Suite 600  
7 Las Vegas, NV 89101  
8 T. (702) 383-6000  
9 F. (702) 477-0088  
10 [jorr@pyattsilvestri.com](mailto:jorr@pyattsilvestri.com)  
11 Attorney for Petitioner,  
12 Special Administrator Susan Clokey

8 **EIGHTH JUDICIAL DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 In the Matter of the Estate of James Allen ) Case No.: P-17-093041-E  
11 McNamee, Deceased ) Dept No.: S  
12 )  
13 )  
14 )  
15 )

15 **ORDER GRANTING**  
16 **PETITION FOR SPECIAL LETTERS OF ADMINISTRATION**

17 Upon submission of the Petition for Special Letters of Administration, representing  
18 as follows:

- 19 1. That Decedent, James Allen McNamee died on the 12<sup>th</sup> day of August, 2017, in  
20 the County of Mohave, State of Arizona.
- 21 2. That Decedent was a resident of Mohave County, Arizona, at the time of his  
22 death.
- 23 3. That at the time of Decedent's death, Decedent was a Defendant in a personal  
24 injury lawsuit, *Bianchi et. al v. James Allen McNamee*, Eighth Judicial District Court, Clark  
25 County, Nevada Case No. A-13-691887-C.
- 26 4. Petitioner has conducted a search of assets for James Allen McNamee,  
27 decedent. Upon information and belief, the Estate of James Allen McNamee has no assets  
28 to satisfy any judgment other than an automobile insurance policy with GEICO. That

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Pyatt Silvestri  
A PROFESSIONAL LAW CORPORATION  
701 BRIDGER AVENUE, SUITE 600  
LAS VEGAS, NEVADA 89101-8941  
PHONE (702) 389-6000 FAX (702) 477-0088

insurance policy, GEICO policy #4180457162 provides automobile liability insurance coverage of \$30,000 per person and \$60,000 per accident.

5. Petitioner is a resident of the State of Nevada, and is employed at the law firm of Pyatt Silvestri located at 701 Bridger Avenue, Suite, 600, Las Vegas, NV 89101.

6. Special Administration is needed to allow *Bianchi et. al. v. McNamee*, Case No. A-13-691887-C to continue and substitute the real party in interest, the Special Administrator.

7. Petitioner is willing to act as Special Administrator of the estate to defend *Bianchi et. al. v. McNamee*, Case No. A-13-691887-C.

8. Petitioner has never been convicted of a felony. Petitioner is qualified under NRS 139.010 to serve as Special Administrator of the Estate.

NOW, THEREFORE, IT IS HEREBY ORDERED that Susan Clokey is appointed as Special Administrator and that Special Letters of Administration be issued, without bond, pursuant to Nevada Revised Statutes 140(2)(a) and 140(3)(b).

The sole purpose of this order is to allow *Bianchi et. al. v. McNamee*, Case No. A-13-691887-C to proceed as to the insurance proceeds of the GEICO automobile insurance policy pursuant to Nevada Revised Statutes 140.040(2)(a) and 140.040(3)(b). Petitioner intends to defend that action as the real party in interest.

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1 The Special Administrator does not have any other authority beyond Nevada  
2 Revised Statutes 140(2)(a) and 140(3)(b) and may not distribute any property other than the  
3 GEICO automobile insurance policy with automobile liability insurance coverage of \$30,000  
4 per person and \$60,000 per accident.

5 Any funds will be held in a blocked account or attorney trust account.

6 IT IS FURTHER ORDERED that the settlement of the decedent's lawsuit is subject to  
7 this court's approval.

8 DATED this 15<sup>th</sup> day of <sup>NOV.</sup> ~~October~~, 2017.

*Vincent Ochoa*  
DISTRICT COURT JUDGE *sa*

11 Submitted by:

12 *Jeffrey J. Orr*  
13 \_\_\_\_\_  
14 Jeffrey J. Orr, Esq.  
15 Nevada Bar No. 7854  
16 PYATT SILVESTRI  
17 701 Bridger Avenue, Suite 600  
18 Las Vegas, NV 89101  
19 T. (702) 383-6000  
20 [jorr@pyattsilvestri.com](mailto:jorr@pyattsilvestri.com)  
21 Attorney for Petitioner,  
22 Special Administrator Susan Clokey  
23  
24  
25  
26  
27  
28

EXHIBIT A

**NRS 140.040 Powers, duties and immunity from liability for certain claims.**

1. A special administrator shall:

(a) Collect and preserve for the executor or administrator when appointed all the goods, chattels and receivables of the decedent, and all incomes, rents, issues, profits, claims and demands of the estate.

(b) Take charge and management of the real property and enter upon and preserve it from damage, waste and injury.

2. A special administrator may:

(a) For all necessary purposes, commence, maintain or defend actions and other legal proceedings as a personal representative.

(b) Without prior order of the court, sell any perishable property of the estate, as provided in

NRS 148.170.

(c) Exercise such other powers as have been conferred by the order of appointment.

(d) Obtain leave of the court to borrow money or to lease or mortgage real property in the same manner as an executor or administrator.

3. A special administrator is not liable:

(a) To any creditor on any claim against the estate; or

(b) For any claim against the decedent except a claim involving wrongful death, personal injury or property damage if the estate contains no assets other than a policy of liability insurance.

[Part 86:107;1941; 1931 NCL § 9882.86] – (NRS A 1971, 647; 1983, 668; 1999, 2276)

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of Pyatt Silvestri and that on the 16<sup>th</sup> day of November, 2017, I caused the above **ORDER GRANTING PETITION FOR SPECIAL LETTERS OF ADMINISTRATION**, to be served pursuant to NRCP 5(b) to be electronically served through the *Eighth Judicial District Court's electronic filing system* and via *U.S. Mail* to the following party listed below:

Robert McNamee  
2472 230<sup>th</sup> Street  
Mahnomon, MN 56557-9034

  
An Employee of PYATT SILVESTRI

EXHIBIT 1-C

EXHIBIT 1-C

Glen J. Lerner, Esq.  
Porter C. Allred, Esq.  
Corey M. Eschweiler, Esq.  
Scott R. Guido, Esq. ††  
Craig A. Henderson, Esq.\*  
Michael A. Kristof, Esq.  
Benjamin R. Lund, Esq.\*\*  
Justin G. Randall, Esq.\*\*\*

## GLEN LERNER INJURY ATTORNEYS

James Rolhouse, Esq.\*\*\*†  
Joseph R. Schmitt, Esq.  
Adam D. Smith, Esq.

\*Also Admitted in CA  
\*\*Also Admitted in ID  
\*\*\*Also Admitted in AZ  
†Also Admitted in MN  
††Also Admitted in IL

April 11, 2014

VIA FACSIMILE: (702) 233-9343

Robert Eaton, Esq.  
LAW OFFICE OF KATHERINE M. BARKER  
823 South Las Vegas Boulevard, Suite 300  
Las Vegas, Nevada 89101

Re: **Bianchi v. McNamee**

Dear Mr. Eaton:

As you know, Plaintiffs attempted to settle this matter with Geico in 2013 for policy limits of \$30,000. Geico instead offered ██████ for Plaintiff Dara DelPriore and ██████ for Plaintiff Gianni Bianchi. In fact, Geico made no attempt at a resolution as both Plaintiffs' medical bills were more than \$22,000 each, including future estimates. Now, Defendant has offered ██████ to settle Dara's case. This, while knowing both Plaintiffs' medical bills have greatly increased with additional treatment. The timing of Defendant's recent offer is anything but reasonable. Based on Plaintiffs' medical bills, this case is worth far more than the policy limits.


Geico's business gamble in failing to tender limits before the filing of litigation creates conflict for you as defense counsel. You were hired by Geico. Ultimately, you must provide Defendant with advice that is potentially detrimental to Geico. To alleviate this conflict, we would suggest that Defendant consult with independent bad faith counsel. We can suggest several competent bad faith attorneys who can advise Defendant of potential rights at no cost.

Do not take this responsibility lightly. As you are aware, a failure by counsel to protect Defendant with independent bad faith counsel could result in malpractice liability exposure at the conclusion of this case.

Plaintiffs extended the olive branch to settle this case and it was rejected. Plaintiffs are again willing to extend the olive branch to resolve the claim, although their situation has changed. If you desire to discuss the possibilities, please contact me immediately.

Sincerely,

GLEN LERNER INJURY ATTORNEYS

  
Adam D. Smith

4795 S. Durango Dr. | Las Vegas, NV 89147 | Tel: (702) 877-1500 | Fax: (702) 877-0110 | T-Free: (877) 453-7637 | Email: info@glenlerner.com

EXHIBIT 1-D

EXHIBIT 1-D

ELECTRONICALLY SERVED  
11/8/2017 2:02 PM

Glen J. Lerner, Esq.  
Porter C. Allred, Esq. \*  
Joshua L. Benson, Esq.  
Jeffrey D. Cahill, Esq. †††  
Corey M. Eschweiler, Esq.  
Scott P. Guido, Esq. ††  
Craig A. Henderson, Esq. †  
Justin G. Randall, Esq. †\*\*  
Joseph F. Schmitt, Esq.

Randolph L. Westbrook, Esq. \*\*\*

## GLEN LERNER INJURY ATTORNEYS

\*\* Also Admitted in Arizona  
† Also Admitted in California  
†† Also Admitted in Illinois  
\*\*\* Also Admitted in Michigan  
††† Only Admitted in Minnesota & Florida  
\* Also Admitted in Utah

November 8, 2017

Via First Class mail and  
Email (jorr@pyattsilvestri.com)

James P.C. Silvestri, Esq.  
Jeffrey J. Orr, Esq.  
PYATT SILVESTRI  
701 Bridger Avenue, Suite 600  
Las Vegas, Nevada 89101

**Re: Bianchi v. McNamee**

Dear counsel and all insurance company decision makers:

Please allow this letter to follow up on our April 11, 2014, letter to prior counsel, Katherine Barker and Robert Eaton, regarding GEICO's repeated failure to settle Plaintiffs' claims within policy limits, thereby exposing Mr. McNamee (and now his estate) to significant excess damages. As detailed below, GEICO's bad faith continues to this day.

In our prior letter, we provided a detailed history of the pre-litigation settlement negotiations in this case, including GEICO's repeated refusal to settle Plaintiffs' claims within Mr. McNamee's policy limits, despite that Mr. McNamee's liability clearly exceeds those insurance limits. In that letter, we also urged Defendant's counsel to retain separate *Cumis* counsel for Mr. McNamee to advise of his potential bad faith claims against GEICO. This, because Ms. Barker and Mr. Eaton – who were employed by GEICO, retained by GEICO, and paid by GEICO – were under an obligation to advise their client, Mr. McNamee, of his rights against their other client, GEICO, for rejecting Plaintiffs' reasonable settlement demands and exposing Mr. McNamee to significant excess liability. In other words, Ms. Barker and Mr. Eaton had a conflict of interest because they were obligated to provide advice to the insured that was detrimental to their other client, the insurer.

Less than three months later, Mr. McNamee filed a substitution of attorney replacing GEICO's inside counsel with new outside counsel, i.e., your office. This change of counsel, however, was superficial and did not ameliorate GEICO's bad faith refusal to settle Plaintiffs' claims or resolve the conflict of interest, as GEICO has

James P.C. Silvestri, Esq.  
Jeffrey J. Orr, Esq.  
November 8, 2017  
Page 2 of 4

continued to operate in bad faith, the conflict of interest still exists, and the insurer and the insured are still represented by the same law firm.

**A. GEICO admits the policy limits are no longer a cap on Plaintiffs' recovery.**

In particular, by spring of 2015, after the substitution of Mr. McNamee's counsel, Giann's medical bills had increased to \$329,494, including the cost of the surgery Dr. Kabins recommended. This, in addition to \$348,948 for Giann's future care needs; \$277,832 for Giann's loss of household services; and \$1,867,000 for Giann's loss of enjoyment of life, or a total of more than \$2,800,000 in damages. Consequently, on April 21, 2015, Giann served Defendant with an offer [REDACTED]. Defendant did not accept Giann's offer.

At the same time, Dara's medical bills had increased to \$93,980. This, in addition to \$296,537 in lost wages; \$384,361 in loss of household services; and \$1,700,000 in loss of enjoyment of life, or a total of more than \$2,470,000 in damages. On April 21, 2015, Dara served Defendant with an offer [REDACTED]. Defendant did not accept Dara's offer.

In July, 2015, Giann's total damages had increased to \$2,850,136.97, including \$356,306 in medical special damages alone. Dara's total damages had increased to \$2,481,097, including \$99,280 in medical special damages. Despite these damage amounts, on July 13, 2015, Defendant served Giann and Dara, each, with a [REDACTED] offer. Plaintiffs rejected these offers, but these offers are telling because Defendant now admits, by its offers, that policy limits are not a cap on recovery. Stated differently, by offering to settle each Plaintiff's claims in excess of Mr. McNamee's liability insurance policy limits, GEICO admits its prior refusal to settle Plaintiffs' claims within policy limits was unreasonable, and its subsequent failure to accept Plaintiffs' April 21, 2015, offers [REDACTED] was unreasonable. This, because in both cases, GEICO was well aware the value of Plaintiffs' claims far exceeded the amounts for which Plaintiffs were offering to compromise their claims.

**B. GEICO continues to gamble with its insured's interests.**

GEICO, now, seeks to further gamble with the interests of Mr. McNamee's estate by taking Plaintiffs' claims to trial on April 16, 2018, after already having admitted the value of Plaintiffs' claims exceeds Mr. McNamee's liability insurance policy limits. In other words, the only remaining question for trial is the amount by which Plaintiffs' damages exceed Mr. McNamee's insurance. Despite this, GEICO is, once again, willing to roll the dice by risking an excess judgment at trial in lieu of resolving Plaintiffs' claims for a reasonable amount and mitigating its own bad faith damages. This is a particularly interesting strategy considering there is no dispute regarding Mr. McNamee's liability for the collision and the defense is precluded from challenging Mr. McNamee's liability

James P.C. Silvestri, Esq.  
Jeffrey J. Orr, Esq.  
November 8, 2017  
Page 3 of 4

during trial by order of the court. Even more critical, Defendant's surgeon, Dr. Hugh Selznick, is precluded from offering medical causation opinions regarding either Plaintiff's spine surgery. The reason: Dr. Selznick failed to supplement his expert opinions for nearly three years and Dr. Selznick's untimely supplemental expert reports were stricken by order of the court. Similarly, Defendant has no expert billing testimony to challenge the cost of Gianni's lumbar fusion or Dara's cervical fusion because Defendant's billing expert, Dr. Edson Parker, also failed to timely supplement his expert opinions. Along the same lines, Defendant's economist, Mark Erwin, has been precluded by order of the court from offering any opinions at trial regarding Dara's lost wages or loss of future earning capacity, or any testimony rebutting the opinions of Plaintiffs' economist, Dr. Stan Smith. The reason is the same: Mr. Erwin did not timely supplement his expert opinions during discovery.

In other words, rather than having appointed separate counsel to advise Mr. McNamee of his rights against GEICO as soon their interests diverged, GEICO simply hired an outside law firm to continue representing both the insurer and the insured. See *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338 (Sep. 24, 2015). Notwithstanding all of that, the firm and the insurer seek to plow headlong into a jury trial, regardless of the evidence supporting their defenses and regardless of the exposure to Mr. McNamee's estate. All of these risks were at the expense of its insured and, now, his estate.

GEICO now has a new problem. It has apparently allowed an employee of Pyatt Silvestri to act as Mr. McNamee's special administrator. The "primary duty [of a special administrator] is to take possession of and preserve the decedent's property." *Bodine v. Stinson*, 85 Nev. 657, 661, 461 P.2d 868, 871 (1969) (superseded by statute on other grounds). Once again, GEICO and its hired counsel are putting the interests of GEICO ahead of Mr. McNamee's estate by having an employee of the same law firm that is already in conflict with Mr. McNamee's estate make decisions regarding the litigation and oversee the estate. This is a law firm being paid by GEICO to defend its insured, while exposing the insured and now his estate to a judgment in the millions of dollars. As the Nevada Supreme Court held in *State Farm v. Hansen*, when there is a conflict of interest between the insurer and the insured, the "insurer is obligated to provide independent counsel of the insured's choosing." *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338, 343 (Sep. 24, 2015). In other words, unlike when our initial letter was mailed in 2014, separate counsel for the insured is no longer a recommendation in Nevada. It is the law. The conflict of interest in this case is obvious and has been obvious for some time. The conflict can only be alleviated by retaining separate, independent counsel to advise Mr. McNamee's estate, and appointing an independent administrator.

As a creditor of the estate, the Plaintiffs hereby OBJECTS to the appointment of a special administrator of the estate with a conflict of interest (i.e., who is being paid by the

James P.C. Silvestri, Esq.  
Jeffrey J. Orr, Esq.  
November 8, 2017  
Page 4 of 4

largest debtor to the estate and has a financial interest in not zealously pursuing that debtor).

GEICO's bad faith in this case has continued for years. GEICO has continually put its interests above those of Mr. McNamee, and, now, his estate. The failure to hire separate counsel for Mr. McNamee and his estate is but one piece of that bad faith, and it continues with the other improper actions by GEICO and its outside counsel. Once again, we encourage you to notify the true representative of Mr. McNamee's estate of its right to independent counsel of its choosing, at GEICO's expense. We also ask that you forward our correspondence to your contact at GEICO and any coverage counsel representing GEICO for their review. Please let us know if and when separate counsel is hired.

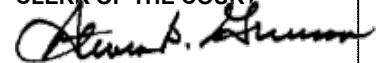
Please also be advised we reserve our rights to seek costs for any unreimbursed expert payments that may be outstanding following the recent trial continuance that you requested. As a courtesy to your firm we withdrew the motion prior to the last status check. We will, however, include any unreimbursed amounts in our post-trial motions following the conclusion of the upcoming trial.

Very truly yours,

GLEN DERNER INJURY ATTORNEYS



Corey M. Eschweiler



1 Janine C. Prupas, NV Bar No. 9156  
2 Justin L. Carley, NV Bar No. 9994  
3 SNELL & WILMER L.L.P.  
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8 Email: [jprupas@swlaw.com](mailto:jprupas@swlaw.com)  
9 [icarley@swlaw.com](mailto:icarley@swlaw.com)

10 *Attorneys for GEICO*

11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

13 GIANN BIANCHI, individually,  
14 DARA DELPRIORE, individually,

15 Plaintiff,

16 vs.

17 JAMES McNAMEE, individually, DOES I-X,  
18 and ROE CORPORATIONS I-X, inclusive,

19 Defendants.

Case No.: A-13-691887-C  
Dept. No.: VIII

**OPPOSITION TO MOTION FOR  
APPOINTMENT OF *CUMIS* COUNSEL  
FOR THE ESTATE OF JAMES ALLEN  
McNAMEE**

**Date of Hearing: February 13, 2018  
Time of Hearing: 8:00 a.m.**

20 Non-party GEICO, through its attorneys of record, Snell & Wilmer L.L.P., makes a special  
21 appearance in order to file this Opposition to Plaintiff's Motion for Appointment of *Cumis* Counsel  
22 for the Estate of James Allen McNamee. This Opposition is made and based upon the papers and  
23 pleadings on file herein, as well as the Memorandum of Points and Authorities, and any oral  
24 argument this Court may hear on this matter.

25 **MEMORANDUM OF POINTS AND AUTHORITIES**

26 **I. INTRODUCTION**

27 Plaintiffs Gianni Bianchi and Dara Del Priore (hereinafter "Plaintiffs") attempt to force a  
28 change in representation without legal or factual justification for doing so. Plaintiffs allege a conflict  
of interest between GEICO and the Estate of James Allen McNamee (the "Estate and/or decedent")  
where no actual conflicts exist. The legal requirement for granting a *Cumis* counsel request in  
Nevada is clear that an actual—and not potential—conflict must exist. The Motion is misplaced

1 because if there is a bad faith claim, that claim must be brought under NRS 41.100<sup>1</sup>, assuming such  
2 claim accrued prior to the decedent's death. If the purported claim did not accrue during the life of  
3 the decedent, it does not exist and may not be pursued. Furthermore, GEICO has not denied  
4 coverage. It accepted coverage and is defending the Estate, whose interest is identical to that of  
5 GEICO, which is to avoid and defeat liability and damages.

## 6 II. FACTUAL BACKGROUND

7 The underlying case is an action for negligence brought by the Plaintiffs against Defendant  
8 James McNamee ("Mr. McNamee"). On July 17, 2013, the Plaintiff's vehicle and the vehicle driven  
9 by Mr. McNamee collided. Plaintiffs claimed personal injury damages arising from that collision.  
10 GEICO is Mr. McNamee's automobile liability insurer. Plaintiffs filed suit on November 19, 2013  
11 (Case No. A-13-691887-C). During 2014 to 2015, Plaintiffs and the insured exchanged offers to  
12 settle.

13 After Mr. McNamee passed away on August 12, 2017, this Court granted a petition for  
14 Special Letters of Administration to appoint Susan Clokey as the Special Administrator of Mr.  
15 McNamee's Estate. Counsel for Mr. McNamee's Estate then filed a motion to substitute Special  
16 Administrator Susan Clokey as Defendant in this action in place and stead of the now-deceased Mr.  
17 McNamee. Plaintiffs opposed that motion and filed an accompanying Petition for Issuance of  
18 General Letters of Administration and For Appointment of *Cumis* Counsel for the Estate of James  
19 Allen McNamee. *See* Petitioners' Opposition to Motion to Appoint Special Administrator. GEICO  
20 made a special appearance to oppose that Petition. Plaintiffs then withdrew their *Cumis* counsel  
21 request in the probate court and renewed the request in this Motion.

## 22 III. ARGUMENT

### 23 A. There is no actual conflict between GEICO and Mr. McNamee/the Estate, and 24 therefore *Cumis* counsel is inappropriate.

25 The Motion to appoint *Cumis* counsel is misconceived and misplaced. If there is a bad faith

26 <sup>1</sup> NRS 41.100(1) provides that "no cause of action is lost by reasons of the death of any person, but  
27 may be maintained by or against the person's executor or administrator."

28 NRS 41.100(3) provides that "when a person who has a cause of action dies before judgment, the  
damages recoverable by the decedent's executor or administrator include all losses or damages which the  
decedent incurred or sustained before the decedent's death..."

1 claim, that claim must be brought under NRS 41.100 assuming such claim accrued prior to the  
2 decedent's death. If the purported claim did not accrue during the life of the decedent, it does not  
3 exist and may not be pursued. *See Avila v. Century National Ins. Co.*, 473 Fed. Appx. 554 (9th Cir.  
4 2012) (estate retained claim against insurer under Nevada law alleging breach of implied covenant of  
5 good faith and fair dealing regarding insurer's refusal to indemnify, defend, or settle in connection  
6 with underlying suit with insured while he was alive). That is the case here. The insurer did not deny  
7 coverage for the decedent or the Estate. It accepted coverage and is defending the Estate, whose  
8 interest is identical to that of the insurer, which is to avoid and defeat liability and damages. There is  
9 no claim for bad faith that can be asserted by the Estate, but even if there were, it would have to be  
10 asserted in accordance with the probate code by filing and serving an action for bad faith after such  
11 cause of action accrued (which it cannot and never will). *Long v. Century Indemnity Co.*, 163  
12 Cal.App.4th 1460 (2008).

13 In order to grant *Cumis* counsel, a court must find the existence of an "actual conflict." *State*  
14 *Farm Mutual Auto. Ins. Co. v. Hansen*, 357 P.3d 338, 342 (2015) ("[T]he focus should be on  
15 whether there is actually a conflict."). Courts must inquire on "a case-by-case basis whether there is  
16 an actual conflict of interest." *Id.* at 343. The central inquiry for determining whether a Court must  
17 grant a petition for *Cumis* counsel is whether an actual conflict exists under Rule of Professional  
18 Conduct 1.7. *Id.* ("[A]n insurer is obligated to provide independent counsel of the insured's choosing  
19 only when an actual conflict of interest exists."). Further, a conflict is not actual if it affects issues  
20 that are "only extrinsic or ancillary to the issues actually litigated in the underlying action." *Id.* In  
21 order for a Court to permit the insured to select independent counsel, the conflict must also be  
22 "significant, not merely theoretical, actual, not merely potential." *Id.*

23 There is no actual conflict of interest in this case. Before his death, the insured never brought  
24 an action against GEICO for any reason, including breach of contract or breach of the covenant of  
25 good faith and fair dealing. He did not do so because GEICO never denied coverage. The claims to  
26 which Plaintiffs refer in the Motion are entirely hypothetical. At this time, without any kind of action  
27 between the Estate and GEICO, current counsel has no conflict of interest. Nothing that Plaintiffs  
28 allege in the Motion suggests that GEICO and the Estate have conflicting incentives as to the issues

1 litigated in the underlying action here. On the contrary, both GEICO and the Estate share an aligned  
2 desire to resolve this litigation – avoid and defeat liability and damages. The underlying issue of this  
3 litigation is still whether Mr. McNamee negligently caused the harm for which Plaintiffs now seek to  
4 recover. Regardless of any potential claims the Plaintiffs may allege exist between the parties, both  
5 the Estate and GEICO continue to have an interest in showing that Mr. McNamee was not negligent  
6 nor were his actions the proximate or actual cause of Plaintiffs’ injuries.

7 Finally, Plaintiffs’ allegation that the Estate’s possible bad faith claim signifies an actual  
8 conflict is unsupported by the law. Plaintiffs allege that the Estate has not yet settled this action  
9 because GEICO does not wish to spend over the cap of the insurance policy. While the Plaintiffs fail  
10 to cite to any legal authority demonstrating that, even if this allegation were true, it would constitute  
11 a conflict of interest, courts have found that the opposite proposition is true. *See Sierra Pacific*  
12 *Industries v. American States Ins. Co.*, 883 F.Supp.2d 967, 973 (E.D. Cal. 2012) (“[n]o conflict of  
13 interest shall be deemed to exist . . . solely because an insured is sued for an amount in excess of the  
14 insurance policy limits.”).

15 Plaintiffs here attempt to make essentially the same argument: that GEICO has a conflict of  
16 interest because the Estate is being sued for an amount in excess of the insurance policy limits. *Long*  
17 *v. Century Indemnity Co.*, 163 Cal.App.4th 1460 (2008). Even setting aside that in this case no bad  
18 faith claim has been brought and thus no actual conflict exists, Plaintiffs’ argument depends, just like  
19 in the *Sierra Pacific* case, on the unsupported presumption that because the insured has been sued  
20 for an amount greater than the policy limit, the case creates a conflict of interest.

#### 21 IV. CONCLUSION

22 This Court should deny the Motion for Appointment of *Cumis* Counsel because no actual  
23 conflict of interest exists between the Estate and GEICO.

24 DATED this \_\_\_\_ February, 2018.

SNELL & WILMER L.L.P.

25 By: 

26 Janine C. Prupas (NV Bar No. 9156)

27 Justin Carley (NV Bar No. 9994)

28 50 W. Liberty Street, Suite 510

Reno, Nevada 89501-1961

Attorneys for GEICO

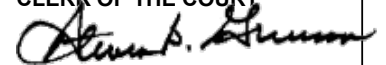
CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **OPPOSITION TO MOTION FOR APPOINTMENT OF CUMIS COUNSEL FOR THE ESTATE OF JAMES ALLEN McNAMEE** by the Court's Electronic Filing System.

Dated: February 9, 2018

  
An employee of Snell & Wilmer L.L.P.

4844-2304-1373



TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

\* \* \* \* \*

GIANN BIANCHI, DARA DELPRIORE, )

Plaintiffs, )

vs. )

JAMES MCNAMEE )

Defendant. )

CASE NO. A-13-691887

DEPT. NO. VIII

**Transcript of Proceedings**

BEFORE THE HONORABLE DOUGLAS E. SMITH, DISTRICT COURT JUDGE  
**MOTION FOR APPOINTMENT OF CUMIS COUNSEL FOR THE ESTATE OF  
JAMES ALLEN MCNAMEE ON ORDER SHORTENING TIME**

TUESDAY, FEBRUARY 13, 2018

APPEARANCES:

For the Plaintiffs: D. LEE ROBERTS, JR., ESQ.  
COREY M. ESCHWEILER, ESQ.

For James McNamee: JAMES P.C. SILVESTRI, ESQ.  
JEFFREY J. ORR, ESQ.

For Geico: JUSTIN L. CARLEY, ESQ.  
ALEXANDER G. LEVEQUE, ESQ.

RECORDED BY: GINA VILLANI, DISTRICT COURT  
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording, transcript  
produced by transcription service.

1 TUESDAY, FEBRUARY 13, 2018 AT 8:01 A.M.

2

3 THE COURT: *Bianchi versus McNamee*. This is a  
4 Motion to Appoint a *Cumis* Counsel for the Estate.

5 THE CLERK: Can we have appearances for the  
6 record?

7 THE COURT: Oh, sorry.

8 MR. ROBERTS: Lee Roberts for plaintiffs, Your  
9 Honor.

10 MR. ESCHWEILER: Corey Eschweiler for plaintiffs,  
11 Your Honor.

12 MR. SILVESTRI: Your Honor, Jim Silvestri and Jeff  
13 Orr here on behalf of defendant McNamee.

14 MR. LEVEQUE: Good morning, Your Honor. Alex  
15 LeVeque, probate counsel for Geico and special  
16 administrator.

17 MR. CARLEY: Good morning, Your Honor. Justin  
18 Carley for Geico.

19 THE COURT: All right. The way I read the  
20 Pleadings, your guys already had a -- it's not *Cumis*  
21 counsel necessarily, like a guardian, and that doesn't --  
22 isn't how it works. You give me three names and I'll  
23 choose. If I'm not happy with the names, I'll give you  
24 three names. So, --

25 MR. SILVESTRI: Your Honor, Jim Silvestri. Just

1 for clarification, we did receive the minute order. It  
2 spoke about denying our Motion to Appoint a Special  
3 Administrator. And then --

4 THE COURT: Well, it's somebody in your office.

5 MR. SILVESTRI: Correct. And I've had that, Your  
6 Honor. There's no particular --

7 THE COURT: I understand.

8 MR. SILVESTRI: -- reason for that. It was --  
9 been done like that in the past. We needed to get a  
10 substitution. But today's Motion is about appointing *Cumis*  
11 counsel and, so, I just want to make sure if we're tracking  
12 the same discussion.

13 THE COURT: Well, that's my understanding. So, --

14 MR. ESCHWEILER: Your Honor, and we got a call  
15 from chambers asking us to confer with the other side --

16 THE COURT: Right.

17 MR. ESCHWEILER: -- on names for a new  
18 administrator and, so, we have conferred. We have our  
19 names ready today if you --

20 THE COURT: Supply me your names.

21 MR. ESCHWEILER: Fred Waid from Hutchison Steffen  
22 and Robert Morris from Morris, Grant, and Dodds.

23 MR. SILVESTRI: We don't have names, Your Honor.

24 THE COURT: Okay.

25 MR. SILVESTRI: We would request -- this issue,

1 we're requesting briefing on this. It's our understanding,  
2 maybe Mr. --

3 THE COURT: That's what it's on for. If you're  
4 not ready, then I'll make the appointment.

5 MR. SILVESTRI: No. Today's hearing is on for  
6 appointment of *Cumis* counsel.

7 THE COURT: No. We've notified your office.

8 MR. SILVESTRI: Right. But that was --

9 THE COURT: They got notified, you got notified; -  
10 -

11 MR. SILVESTRI: Correct, Your Honor. But the --

12 THE COURT: -- if you're not prepared, you're not  
13 prepared.

14 MR. SILVESTRI: Our position is is that only the  
15 Probate Court has jurisdiction to appoint an administrator  
16 to substitute in --

17 THE COURT: No. That's not true.

18 MR. SILVESTRI: Okay. We would request to be able  
19 to brief that issue, then, Your Honor.

20 THE COURT: How long is it going to take you to  
21 brief it?

22 MR. SILVESTRI: Ten days.

23 THE COURT: Ten days. Now, what do you want to  
24 argue today?

25 MR. CARLEY: Your Honor, I'm counsel for Geico and

1 I'm here for the limited purpose of addressing plaintiffs'  
2 *Cumis* counsel motion.

3 THE COURT: All right.

4 MR. CARLEY: I assume they want to go first  
5 though.

6 MR. ROBERTS: Your Honor, as you know, Nevada has  
7 adopted the *Cumis* case out of California with the caution  
8 that *Cumis* counsel is only required to the extent there is  
9 an actual conflict. We would submit that the briefings in  
10 the case demonstrate clearly that there is an actual  
11 conflict in existence in this case when the insurance  
12 company failed to settle for a policy limits demand and,  
13 then, later offered in excess of policy limits. They've  
14 created a situation where they have exposed, first, their  
15 insured and now their estate to an excess judgment. And  
16 the case law that we've cited demonstrates that that cause  
17 of action arose prior to the decedent's death upon their  
18 refusal to settle within policy limits.

19 And, now, we're in a situation where I'm sure  
20 they're not going to stand up and tell you: We will pay  
21 whatever judgment is entered against the estate of the  
22 insured. If they are willing to tell you that, we will  
23 cover and pay any judgment against the estate. That's all  
24 they need to do. There's no conflict of interest.  
25 Assuming they're unwilling to do that, then there's an

1 actual conflict.

2           As their briefings before the Probate Commissioner  
3 state: What's the end game here? They accuse plaintiffs  
4 of having an end game. What is the end game they accuse us  
5 of? Taking an assignment of the bad faith action. Well,  
6 let's assume that is our end game. Because, certainly,  
7 where someone acts in bad faith, refuses to settle for  
8 policy limits, and exposes their insured for an excess  
9 judgment, that's one way to resolve it. We'll take an  
10 assignment of their bad faith claim. Who do we negotiate  
11 that with? The attorneys that have been hired by the  
12 insurance companies who, under our case law, have a dual  
13 obligation both to the insurance company and the insured?  
14 There's no one we could negotiate that deal with because  
15 they would be negotiating to assign us rights against  
16 someone paying their bills. That's why we need independent  
17 counsel to advise the estate and that's why, Your Honor,  
18 we're -- the estate is entitled to *Cumis* counsel. We're  
19 the ones asking for it because there's no one free of a  
20 conflict of interest representing the estate who would be  
21 able to ask for that on the other side.

22           And I would point out that although they have  
23 steadfastly refused to get independent counsel for their  
24 insured throughout these proceedings, now that the Geico's  
25 interest is involved, we -- all of the sudden three firms

1 are okay. But, yet, all three firms are here with an  
2 obligation to the insurance company and representing the  
3 insurance company, no one's here for the estate, no one's  
4 independent and free of that conflict, and that's why we  
5 believe this Court needs to appoint *Cumis* counsel under  
6 Nevada law. Thank you, Your Honor.

7 MR. CARLEY: May I?

8 THE COURT: Yeah.

9 MR. CARLEY: Again, I'm Justin Carley and I  
10 represent Geico only on the *Cumis* counsel request. And I'm  
11 here solely to address that request and there are at least  
12 three problems with it. The first one is an obvious  
13 standing problem. It would be one thing if the deceased or  
14 his estate was requesting independent counsel, claiming  
15 that either Geico didn't provide a defense or Geico should  
16 have paid the claim, but that's not what's happening here.  
17 This is plaintiffs' counsel making a request, saying that  
18 Geico should hire its insured an additional attorney. The  
19 case is --

20 THE COURT: Who do you owe your attorney-client  
21 privilege to?

22 MR. CARLEY: Geico.

23 THE COURT: Okay.

24 MR. CARLEY: But it's not the plaintiffs' estate  
25 requesting separate counsel, it's the plaintiffs' counsel

1 trying to drive a wedge between the insured and the insurer  
2 and not a single case that they cite in their brief allows  
3 that. Essentially, their position is: Geico, you should  
4 have paid the policy limits at the outset before you did  
5 any investigation and even when the amount we demanded was  
6 less than the policy limits, but since you didn't, we sued.  
7 So, now, if the judgment is bigger than that, there is a  
8 mandatory conflict of interest, but that's just not the  
9 law.

10           To get there, they present you with some  
11 settlement offers and say: Hey, look, they made these  
12 settlement offers subsequent to our initial demand and  
13 that's greater than the policy limits so you've conceded  
14 that you owe that many. And that's not quite how that  
15 works. It's a settlement offer and we know under the  
16 statute in Nevada, a settlement offer wouldn't be  
17 admissible to prove liability. It's certainly not good  
18 enough to get you to presume there would be liability and  
19 therefore there's a bad faith claim. And that's when --

20           THE COURT: What's the offer today?

21           MR. CARLEY: I don't have authority to make an  
22 offer today. The offer -- the last offer in writing in  
23 their brief would have been the last offer that we've made.  
24 I don't know that off the top of my head.

25           But the point is, on the merits, this *Cumis*

1 counsel request fails because --

2 THE COURT: Who did the negotiate the offer with?

3 MR. CARLEY: That would have been insured's  
4 counsel before I was involved.

5 THE COURT: Who was that?

6 MR. CARLEY: I believe it's Jeff Orr. But I'm not  
7 certain.

8 MR. SILVESTRI: Yeah. That was our firm, Your  
9 Honor.

10 MR. CARLEY: But the *Cumis* counsel cases isn't as  
11 broad as you're being told today. That doesn't say: If  
12 you refuse to settle within policy limits, there's  
13 automatically a conflict of interest. What that says is:  
14 If you provide a defense for your insured but you reserve  
15 the right to later say that claim was not covered, then  
16 you've created a conflict. It's not merely the: You  
17 didn't offer to settle within the policy limits. The *Cumis*  
18 counsel case doesn't say that and none of the cases they  
19 cite say that. In fact, not a single case in their brief  
20 had a holding that said: *Cumis* counsel should be  
21 appointed. Not one of the six cases they cite.

22 They -- one of the primary cases they relied on  
23 was *State Farm versus Hansen* and that's the Nevada Supreme  
24 Court case that said: *Cumis* counsel, that doctrine is  
25 adopted here. And if there is a conflict of interest, then

1 that counsel must be appointed. However, that court went  
2 on to say:

3           The conflict of interest must be significant and  
4           not theoretical, actual not merely potential. Joint  
5           representation is permissible so long as that conflict  
6           remains speculative.

7           And that's all we have here. We have a  
8 plaintiffs' attorney speculating that there's a conflict  
9 with no evidence of that. The insured, and now the  
10 insured's estate since he's deceased, has never demanded  
11 its own independent counsel. So, besides the standing  
12 problem, they don't satisfy the *Cumis* counsel case and the  
13 Nevada case that adopted that in order to have you appoint  
14 a new attorney for the insured. This is simply the  
15 plaintiffs' effort to drive a wedge between that  
16 relationship when there is no basis to do so. Do you have  
17 any questions for me, Your Honor?

18           THE COURT: You've answered my questions.

19           MR. CARLEY: Thank you.

20           MR. ROBERTS: Your Honor, as to the power of this  
21 Court to enter an Order, we've also filed motions over with  
22 the Probate Commissioner and in their response to our  
23 motion over before the Probate Commissioner on *Cumis*  
24 counsel, they represented to the Probate Commissioner that  
25 you were the only one with the power to appoint *Cumis*

1 counsel. So, that's before you.

2 THE COURT: I'm a general jurisdiction judge. I -

3 -

4 MR. ROBERTS: Yes.

5 THE COURT: I don't listen to attorneys --

6 MR. ROBERTS: If we have --

7 THE COURT: -- telling me I can't do something.

8 MR. ROBERTS: So, the *State Farm* case, which  
9 adopted *Cumis*, wasn't limited to reservation of rights and,  
10 in fact, even pointed out that in some cases where there's  
11 a reservation of rights, there may not be an actual  
12 conflict. Rather, they said, because the *Cumis* counsel is  
13 based on the ethical rules, the question as to whether  
14 there should be a *cumis* counsel is whether there is an  
15 actual conflict of interest.

16 And, in this case, as we pointed out, when the  
17 cause of action for bad faith arose during the lifetime of  
18 the defendant, there, at that point, became a conflict of  
19 interest. And it was apparent in the scenario that I put  
20 forward before the Court. Who do we negotiate with to take  
21 an assignment of the bad faith claim against Geico? There  
22 is no one who doesn't owe an obligation to Geico. So,  
23 that's why we need *Cumis* counsel and, for the same reason,  
24 that's why there needs to be an independent administrator  
25 of this estate.

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THE COURT: Well, here's what we'll do.

MR. ROBERTS: That's all I have, Your Honor.

Thank you.

THE COURT: Both of you file a findings of fact and conclusions of law consistent with your arguments. Do it on Word. You got 10 days to get it done. I'll follow one, both, or combine them. Thank you.

MR. CARLEY: Okay. Thank you.

MR. ROBERTS: Thank you, Your Honor.

PROCEEDING CONCLUDED AT 8:14 A.M.

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**CERTIFICATION**

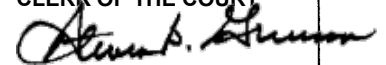
I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

**AFFIRMATION**

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.



KRISTEN LUNKWITZ  
INDEPENDENT TRANSCRIBER



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*Attorneys for Susan Clokey,  
Special Administrator for the Estate  
of James Allen McNamee*

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

GIANN BIANCHI, individually, DARA  
DELPRIORE, individually,

Plaintiffs,

vs.

JAMES MCNAMEE, individually, DOES I-X, and  
ROE CORPORATIONS, I-X, inclusive,

Defendants.

Case No.: A-13-691887-C  
Dept. No.: VIII

**SPECIAL ADMINISTRATOR'S  
BRIEF CONCERNING THE  
PROBATE COURT'S EXCLUSIVE  
JURISDICTION OVER THE ESTATE  
OF JAMES MCNAMEE**

On February 13, 2018, during the hearing on Plaintiffs' *Motion for Appointment of Cumis Counsel for the Estate of James Allen McNamee*, this Department requested that Plaintiffs and Defendant each provide the Court with the names of persons to serve as the Special Administrator of the Estate of James Allen McNamee. In response, counsel for the Defendant requested leave, which the Court granted, to brief the issue of whether it is appropriate for this Department to intervene in the probate proceedings already pending before Department S and modify or otherwise amend orders already entered by Judge Ochoa. As set forth in detail herein, the answer

1 is respectfully no. The Eighth Judicial District Court Rules prevent this Department from entering  
2 any orders which relate to the probate proceeding, including any order removing and/or replacing  
3 the duly authorized Special Administrator. Accordingly, this Department should defer all such  
4 issues to the Probate Court.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I.**

7 **STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY**

8 Defendant James Allen McNamee ("Decedent") died on August 12, 2017. On September  
9 20, 2017, Decedent's counsel filed a Petition for Special Letters of Administration in the probate  
10 court (the "Probate Petition") which sought the appointment of Susan Clokey, his paralegal, to  
11 carry on the defense of the Decedent's Estate in the instant tort proceeding.<sup>1</sup> The Probate Petition  
12 was granted by the Probate Commissioner and signed by Judge Ochoa in Department S, a  
13 department designated by the Chief Judge of the Eighth Judicial District Court as a probate court.<sup>2</sup>  
14 Accordingly, Susan Clokey is the duly authorized Special Administrator of the Decedent's Estate  
15 and is charged with the duty of defending the Estate in the instant proceeding.<sup>3</sup>

16 On January 3, 2018, Plaintiffs filed their *Petition for Issuance of General Letters of*  
17 *Administration* (the "Plaintiff's Petition") in the probate proceeding before Department S which  
18 seeks to convert the special administration into a general administration and to appoint a general  
19  
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25 <sup>1</sup> See Probate Petition, a true and correct copy being attached hereto as **Exhibit A**.

26 <sup>2</sup> See Order Granting Probate Petition, a true and correct copy being attached hereto as **Exhibit B**.

27 <sup>3</sup> *Id.*, see also Letters of Special Administration, a true and correct copy being attached hereto as  
28 **Exhibit C**.

1 administrator in the place and stead of the current Special Administrator.<sup>4</sup> That petition is  
2 scheduled to be heard by the Probate Commissioner on March 16, 2018.<sup>5</sup>

3  
4 **II.**

5 **GIVEN THAT (1) THE PROBATE COURT HAS ALREADY APPOINTED A SPECIAL**  
6 **ADMINISTRATOR FOR THE DECEDENT'S ESTATE; AND (2) THE PLAINTIFFS'**  
7 **PETITION FOR ISSUANCE OF GENERAL LETTERS OF ADMINISTRATION IS**  
8 **CURRENTLY PENDING BEFORE DEPARTMENT S AND THE PROBATE**  
9 **COMMISSIONER, EDCR 7.10 PRECLUDES THIS DEPARTMENT FROM**  
10 **INTERVENING IN THOSE PROCEEDINGS**

11 The Eighth Judicial District Court Rules, which are approved by the Supreme Court of  
12 Nevada, "govern the procedure and administration of the Eighth Judicial District Court and all  
13 actions or proceedings cognizable therein." EDCR 1.10. Accordingly, all parties, hearing masters  
14 and district court judges are bound by the same.<sup>6</sup>

15 EDCR 7.10 provides in relevant part:

16 (a) Except as provided in these rules or in an emergency, **no judge**  
17 **except the judge having charge of the cause or proceeding may**  
18 **enter any order therein.** If the matter is of an emergency nature  
19 and both the judge to whom the case is assigned and the judge's  
20 designee are absent or otherwise unavailable, applications must be

21 <sup>4</sup> See Petition for Issuance of General Letters of Administration, a true and correct copy being  
22 attached hereto as **Exhibit D**.

23 <sup>5</sup> The Plaintiffs' Petition was originally scheduled to be heard on February 9, 2018. However,  
24 Plaintiffs failed to publish notice of the Petition as required under NRS 155.020(1)(b), which  
25 caused the delay and continuance of the hearing.

26 <sup>6</sup> See also NRS 3.020, which states:

27 **Judicial districts with more than one judge; Concurrent jurisdiction of judges.** In  
28 judicial districts where more than one judge has been provided for, the judges have  
concurrent and coextensive jurisdiction within the district, **under such rules as may be**  
**prescribed by law, and the district judges therein may make additional rules, not**  
**inconsistent with law, which will enable them to transact judicial business in a**  
**convenient and lawful manner.** (Emphasis added).

See also *Halverson v. Hardcastle*, 123 Nev. 245, 163 P.3d 428, at n. 93 (2007) (where Supreme  
Court of Nevada found unavailing Judge Halverson's argument that the removal of her criminal  
cases pursuant to EDCR 1.33 violated her "equal coextensive and concurrent jurisdiction and  
power" because NRS 3.020 permits judicial districts creating divisions to transact judicial  
business in a convenient and lawful manner).

made to the chief judge, or in a case assigned to the family division, the presiding judge.

(b) When any district judge has begun a trial or hearing of any cause, proceeding or motion, or made any ruling, order or decision therein, no other judge may do any act or thing in or about such cause, proceeding or motion, unless upon the request of the judge who has begun the trial or hearing of such cause, proceeding or motion. (Emphasis added).

In this case, Judge Ochoa in Department S and the Probate Commissioner preside over the probate proceedings concerning the Decedent's Estate. Judge Ochoa has already entered an order appointing Ms. Clokey as the Special Administrator. Moreover, the Clerk of the Court, pursuant to that order, has issued Letters of Special Administration. Accordingly, EDCR 7.10(a) and (b) prohibit this Department from entering any orders and doing any acts in the probate proceeding which would include an order or act removing and replacing the current Special Administrator.

Similarly, the Plaintiffs are seeking relief in the probate proceeding which has not yet been heard; namely, an order converting the special administration into a general administration and the appointment of a different general administrator. Thus EDCR 7.10(a) and (b) also prohibit this Court from taking any action on that petition as well.

Accordingly, this Department cannot and should not intervene in the probate proceedings.

## II.

### **EVEN IF THERE WERE NO PENDING PROBATE PROCEEDINGS, ONLY THE PROBATE COMMISSIONER OR A PROBATE JUDGE CAN HEAR AN ADJUDICATE PROBATE MATTERS IN THE EIGHTH JUDICIAL DISTRICT COURT**

"Part IV [of the EDCR] governs the practice and procedure of all proceedings under Title 12 and Chapters 162 through 167 of Title 13 of the NRS." <sup>7</sup>

"The chief judge for the Eighth Judicial District Court of Nevada shall be designated as the probate judge."<sup>8</sup> "The chief judge may, however, in the chief judge's discretion, appoint one district court judge to serve as the probate judge in the chief judge's stead."<sup>9</sup> "The chief judge

<sup>7</sup> See EDCR 4.01.

<sup>8</sup> See EDCR 4.02.

<sup>9</sup> *Id.*

1 shall also have the discretion to designate one or more district court judges as alternate probate  
2 judge(s) to hear probate matters in the event that the probate judge is disqualified from hearing a  
3 matter or if the probate judge is unable to accommodate a matter for any good cause in the  
4 discretion of the probate judge.”<sup>10</sup>

5 “All probate and trust proceedings under Title 12 and Chapters 162 through 167 of Title  
6 13 of the NRS are automatically referred to the probate commissioner, subject to Rule 4.08.”<sup>11</sup> “In  
7 any matters referred to the probate commissioner, each party is entitled, as a matter of right, to  
8 have any contested matter heard before the probate judge provided that the probate commissioner  
9 has not made any ruling on such contested matter or commenced hearing on any contested  
10 matter.”<sup>12</sup> “The probate judge may, upon resolution of the contested matter, return the case to the  
11 probate commissioner’s calendar or retain the case at the discretion of the probate judge.”<sup>13</sup>

12 The foregoing Rules require all probate proceedings to be heard either by the Probate  
13 Commissioner, the Chief Judge, or a district court judge appointed by the Chief Judge to hear  
14 probate matters. This Department has not been appointed to hear probate matters. Accordingly, it  
15 cannot and should not hear and adjudicate any matters relating to the Decedent’s Estate.

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24  
25 <sup>10</sup> *Id.*

26 <sup>11</sup> *See* EDCR 4.03(a) (emphasis added).

27 <sup>12</sup> *See* EDCR 4.08.

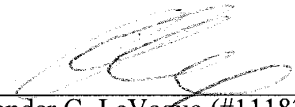
28 <sup>13</sup> *Id.*

III.

CONCLUSION

Judge Ochoa has already taken jurisdiction of the probate proceedings and has entered orders in the same. Moreover, this Department has not been appointed by the Chief Judge to handle probate cases. Accordingly, this Department should defer all matters relating to the Estate of James Allen McNamee to Judge Ochoa and the Probate Commissioner.

Dated this 16<sup>th</sup> day of February, 2018.



Alexander G. LeVaque (#11183)  
Brian P. Eagan (#9395)  
SOLOMON DWIGGINS & FREER, LTD.  
9060 West Cheyenne Avenue  
Las Vegas, Nevada 89129

-and-

James P.C. Silvestri (#3603)  
Jeffrey J. Orr (#7854)  
PYATT SILVESTRI  
701 Bridger Avenue, Suite 600  
Las Vegas, Nevada 89101

*Attorneys for the Special Administrator for  
the Estate of James Allen McNamee*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 23rd day of February, 2018, a true and correct copy of the foregoing **SPECIAL ADMINISTRATOR'S BRIEF CONCERNING THE PROBATE COURT'S EXCLUSIVE JURISDICTION OVER THE ESTATE OF JAMES MCNAMEE** was served by the following method(s):

☒ **Electronic:** by submitting electronically for filing and/or service with the Eighth Judicial District Court's Odyssey eFileNV Electronic Filing system and serving all parties with an email address on record, as indicated below, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R. That date and time of the electronic proof of service in place of the date and place of deposit in the U.S. Mail.

Corey M. Eschweiler, Esq.  
Craig A. Henderson, Esq.  
Joshua Benson, Esq.  
GLEN LERNER INJURY ATTORNEYS  
4795 South Durango Drive  
Las Vegas, Nevada 89147  
Email: [ceschweiler@glenlerner.com](mailto:ceschweiler@glenlerner.com)  
[chenderson@glenlerner.com](mailto:chenderson@glenlerner.com)  
[jbenson@glenlerner.com](mailto:jbenson@glenlerner.com)

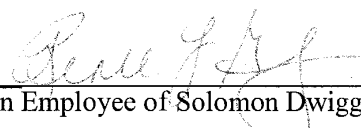
-and-

Lee D. Roberts, Esq.  
WEINBERG WHEELER HUDGINS GUNN & DIAL  
6385 South Rainbow Boulevard, Suite 400  
Las Vegas, Nevada 89118  
Email: [lroberts@wwhgd.com](mailto:lroberts@wwhgd.com)

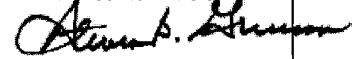
*Attorneys for Plaintiffs*

Janine C. Prupas, Esq.  
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Email: [jprupas@swlaw.com](mailto:jprupas@swlaw.com)  
[jcarley@swlaw.com](mailto:jcarley@swlaw.com)

*Attorneys for GEICO*

  
An Employee of Solomon Diggins & Freer, Ltd.

# **EXHIBIT “A”**



1 PET  
2 Jeffrey J. Orr, Esq.  
3 Nevada Bar No. 7854  
4 PYATT SILVESTRI  
5 701 Bridger Avenue  
6 Suite 600  
7 Las Vegas, NV 89101  
8 T. (702) 383-6000  
9 F. (702) 477-0088  
10 [jorr@pyattsilvestri.com](mailto:jorr@pyattsilvestri.com)  
11 Attorney for Petitioner,  
12 Special Administrator Susan Clokey

8 EIGHTH JUDICIAL DISTRICT COURT

9 CLARK COUNTY, NEVADA

P-17-093041-E

10 In the Matter of the Estate of James Allen ) Case No.: PC-1  
11 McNamee, Deceased ) Dept No.:  
12 )  
13 )  
14 )  
15 )

16 PETITION FOR SPECIAL LETTERS OF ADMINISTRATION

17 1. Petitioner, Susan Clokey, by and through her attorney, Jeffrey J. Orr, Esq., of  
18 the law firm of Pyatt Silvestri, (hereinafter "Petitioner"), alleges and shows as follows:

19 2. Petitioner files this request pursuant to Nevada Revised Statutes 140(2)(a) and  
20 140(3)(b), and requests this Court enter an Order authorizing the appointment of a Special  
21 Administrator over the estate of James Allen McNamee, (hereinafter "Decedent").

22 3. Petitioner is a resident of the State of Nevada, and is employed at the law firm of  
23 Pyatt Silvestri located at 701 Bridger Avenue, Suite, 600, Las Vegas, NV 89101.

24 4. Decedent, James Allen McNamee, died on August 12, 2017. A certified copy of  
25 Decedent's death certificate is attached as **Exhibit A**.

26 5. The Decedent was at the time of death a defendant in a pending civil action,  
27 *Bianchi et. al v. James Allen McNamee*, Case No. A-13-691887-C. This case is set for trial  
28 beginning September 25, 2017 before the Honorable Judge, Douglas Smith in Dept. VIII.

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6. Petitioner has conducted a search of assets for James Allen McNamee, decedent. Upon information and belief, the Estate of James Allen McNamee has no assets to satisfy any judgment other than an automobile insurance policy with GEICO. That insurance policy, GEICO policy #4180457162 provides automobile liability insurance coverage of \$30,000 per person and \$60,000 per accident.

7. Special Administration is needed to allow *Bianchi et. al. v. McNamee*, Case No. A-13-691887-C to continue and substitute the real party in interest, the Special Administrator.

8. Petitioner is willing to act as Special Administrator of the estate to defend *Bianchi et. al. v. McNamee*, Case No. A-13-691887-C.

9. Petitioner has never been convicted of a felony. Petitioner is qualified under NRS 139.010 to serve as Special Administrator of the Estate.

10. The sole purpose of this petition is to allow *Bianchi et. al. v. McNamee*, Case No. A-13-691887-C to proceed as to the insurance proceeds of the GEICO automobile insurance policy pursuant to Nevada Revised Statutes 140.040(2)(a) and 140.040(3)(b). Petitioner intends to defend that action as the real party in interest.

WHEREFORE, Petitioner prays that a Special Administrator of the Estate of James Allen McNamee, be appointed to defend Case No. A-13-691887-C, to be substituted as the real party in interest Case No. A-13-691887-C for the sole purposes noted in NRS140.040(2)(a) and 140.040(3)(b).

DATED this 20 day of September, 2017.

Respectfully submitted,

  
\_\_\_\_\_  
Jeffrey J. Orr, Esq.  
Nevada Bar No. 7854  
PYATT SILVESTRI  
701 Bridger Avenue  
Suite 600  
Las Vegas, NV 89101  
Attorney for Petitioner,  
Special Administrator Susan Clokey

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Pyatt Silvestri  
A PROFESSIONAL LAW CORPORATION  
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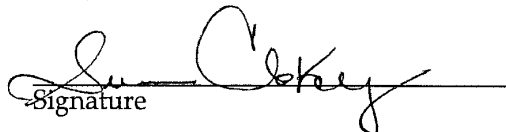
VERIFICATION IN SUPPORT OF  
PETITION FOR SPECIAL LETTERS OF ADMINISTRATION

STATE OF NEVADA }  
COUNTY OF CLARK } ss

Susan Clokey, being first duly sworn, declares under penalty of perjury under the law of the State of Nevada that the foregoing and following is true and correct:

I am the Petitioner in the above-entitled action. I have read the foregoing Petition for Special Letters of Administration, and know the contents thereof. The Petition is true of my own knowledge except as to those matters that are stated on information and belief, and as to those matters, I believe them to be true.

DATED this 20th day of September, 2017.

  
Signature

Susan Clokey

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A PROFESSIONAL LAW CORPORATION  
701 BRIDGER AVENUE SUITE 600  
LAS VEGAS, NEVADA 89101-8941  
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**EXHIBIT A**

**(Death Certificate)**

# STATE OF ARIZONA

## CERTIFICATION OF VITAL RECORD

### STATE OF ARIZONA DEPARTMENT OF HEALTH SERVICES - OFFICE OF VITAL RECORDS CERTIFICATE OF DEATH

State File NO. 102- 2017-035221

1. DECEDENT'S LEGAL NAME (FIRST, MIDDLE, LAST) <b>JAMES ALLEN MCNAMEE</b>				2. AKA'S (IF ANY)		3. DATE OF DEATH <b>08/12/2017</b>	
4. SEX <b>MALE</b>	5. SOCIAL SECURITY NUMBER	6. DATE OF BIRTH <b>06/28/1968</b>	7. AGE <b>49</b>	8. MONTHS <b>UNDER 1 YEAR</b>		9. DAYS <b>UNDER 1 DAY</b>	
12. PLACE OF DEATH - HOSPITAL: <input type="checkbox"/> INPATIENT <input type="checkbox"/> E.R./OUTPATIENT <input type="checkbox"/> DEAD ON ARRIVAL				13. PLACE OF DEATH - OTHER THAN HOSPITAL: <input type="checkbox"/> NURSING HOME OR LONG TERM CARE FACILITY <input checked="" type="checkbox"/> RESIDENCE <input type="checkbox"/> HOME CARE FACILITY <input type="checkbox"/> OTHER			
14. FACILITY NAME (OR STREET ADDRESS IF NOT A FACILITY) <b>3309 N BRYCE RD</b>				15. CITY, TOWN & ZIP CODE OR LOCATION OF DEATH <b>GOLDEN VALLEY 86413</b>		16. COUNTY OF DEATH <b>MOHAVE</b>	
17. BIRTHPLACE (CITY AND STATE OR FOREIGN COUNTRY) <b>ADA, MINNESOTA</b>				18. MARITAL STATUS AT TIME OF DEATH <b>WIDOWED</b>		19. NAME OF SURVIVING SPOUSE (MAIDEN NAME IF WIFE)	
20. DECEDENT'S USUAL RESIDENCE STREET ADDRESS <b>3309 N BRYCE RD</b>				21. CITY AND COUNTY <b>GOLDEN VALLEY, MOHAVE</b>		22. STATE <b>ARIZONA</b>	
23. ZIP CODE <b>86413</b>				24. EVER IN THE ARMED FORCES <b>NO</b>		25. WAS DECEDENT OF HISPANIC ORIGIN? <input checked="" type="checkbox"/> NO, NOT SPANISH, HISPANIC OR LATINO	
26. DECEDENT'S RACE(S) <input type="checkbox"/> WHITE <input type="checkbox"/> BLACK <input type="checkbox"/> AFRICAN AMERICAN <input type="checkbox"/> NATIVE HAWAIIAN <input type="checkbox"/> ASIAN INDIAN <input type="checkbox"/> CHINESE <input type="checkbox"/> FILIPINO <input type="checkbox"/> JAPANESE <input type="checkbox"/> GUAMANIAN OR CHAMORRO <input type="checkbox"/> KOREAN <input type="checkbox"/> VIETNAMESE <input type="checkbox"/> SAMOAN <input type="checkbox"/> AMERICAN INDIAN OR ALASKA NATIVE				27. IF AMERICAN INDIAN OR ALASKA NATIVE, SPECIFY UP TO 4 TRIBES: PRIMARY OR ENROLLED TRIBE: ADDITIONAL TRIBE: ADDITIONAL TRIBE:			
28. OCCUPATION: <b>DIESEL MECHANIC</b>				29. FATHER'S NAME (FIRST, MIDDLE, LAST) <b>ROBERT GERAY MCNAMEE</b>			
30. MOTHER'S NAME (FIRST, MIDDLE, & LAST NAME PRIOR TO FIRST MARRIAGE) <b>KATHLEEN LOUISE ADAMS</b>				31. INFORMANT'S NAME <b>BARBARA KAY MEIERHOFER</b>			
32. RELATIONSHIP <b>SISTER</b>				33. INFORMANT'S MAILING ADDRESS <b>620C N MAIN ST #201, HEBER CITY, UTAH 84032</b>			
34. NAME AND ADDRESS OF FUNERAL FACILITY: <b>LIETZ-FRAZE FUNERAL HOME &amp; CREMATORY - KINGMAN 1701 N. STOCKTON HILL RD., KINGMAN, AZ</b>				35. FUNERAL DIRECTOR <b>KRISTEN L. LIETZ, FUNERAL DIRECTOR</b>		36. LICENSE NUMBER: <b>F0968</b>	
37. METHOD(S) OF DISPOSITION: <input checked="" type="checkbox"/> CREMATION				38. NAME AND LOCATION OF 1st DISPOSITION FACILITY: <b>LAKEVIEW CREMATORY, LAKE HAVASU CITY, ARIZONA</b>			
39. NAME AND LOCATION OF 2nd DISPOSITION FACILITY: <b>NONE</b>				40. A <b>ARTERIOSCLEROTIC CARDIOVASCULAR DISEASE</b>			
41. APPROXIMATE INTERVAL				42. B <b>43. APPROXIMATE INTERVAL</b>			
44. APPROXIMATE INTERVAL				45. APPROXIMATE INTERVAL			
46. APPROXIMATE INTERVAL				47. APPROXIMATE INTERVAL			
48. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RESULTING IN THE UNDERLYING CAUSES GIVEN ABOVE:							
49. INJURY? <b>NO</b> 50. INJURY AT WORK? <b>NO</b> 51. MANNER OF DEATH: <b>NATURAL DEATH</b> 52. TIME OF DEATH: <b>1916</b>							
53. WAS AN AUTOPSY PERFORMED? <b>NO</b> 54. WERE AUTOPSY FINDINGS AVAILABLE TO COMPLETE THE CAUSE OF DEATH?							
CAUSE AND MANNER OF DEATH CERTIFICATION							
55. NAME OF PERSON COMPLETING CAUSE OF DEATH: <b>ARCHAUS MOSLEY, M.D.</b>				56. DATE CERTIFIED: <b>08/14/2017</b>			
57. CERTIFIER'S ADDRESS: <b>1145 AVIATION DRIVE STE 101 LAKE HAVASU CITY, AZ 86404</b>				58. NAME OF REGISTRAR: <b>PATTY MEAD</b>			
				59. DATE REGISTERED: <b>08/17/2017</b>			

DATE ISSUED: 09/19/2017



This is a true certification of the facts on file with the Arizona Department of Health Services, Bureau of Vital Records, PHOENIX, ARIZONA.  
Revised 07/2016

**KRYSTAL COLBURN**  
ASSISTANT STATE REGISTRAR



ARIZONA DEPARTMENT OF HEALTH SERVICES

This copy not valid unless prepared on a form displaying the State Seal and Impressed with the raised seal of the issuing agency.

ANY ALTERATION OR ERASURE VOIDS THIS CERTIFICATE

PYATT SILVESTRI  
A PROFESSIONAL LAW CORPORATION  
701 BRIDGER AVENUE SUITE 600  
LAS VEGAS, NEVADA 89101-8941  
PHONE (702) 383-6000 FAX (702) 477-0088

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**EXHIBIT B**

**(Nominations and/or Affidavits in Support of Petition)**

**AFFIDAVIT OF SUSAN CLOKEY**  
**IN SUPPORT OF PETITION FOR SPECIAL LETTERS**  
**OF ADMINISTRATION**

STATE OF NEVADA     )  
  )ss  
COUNTY OF CLARK     )

SUSAN CLOKEY, being first duly sworn, under oath, deposes and says that:

1. I am employed with the law firm of Pyatt Silvestri located at 701 Bridger Avenue, Suite 600, Las Vegas, Nevada 89101;

2. That I am familiar with Case No. A-13-691887-C entitled *Bianchi et al. v. James McNamee* in Department VIII. The matter is set for trial on September 25, 2017.

3. Due to the death of James Allen McNamee, I make this request pursuant to NRS 140.040(2)(a) and NRS 140.040(3)(b) to allow the Special Administrator to be substituted as the real party in interest and to defend that action.

4. That I have reviewed an asset search for James Allen McNamee and upon information and belief, his estate contains no assets.

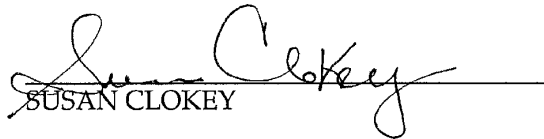
5. That James McNamee had an automobile insurance policy with GEICO, policy #4180457162 which provides liability coverage in the amount of \$30,000 per person and \$60,000 per accident.

6. The sole purpose of the appointment of the Special Administrator is to allow the Special Administrator to defend that action and to be substituted as the real party in interest.


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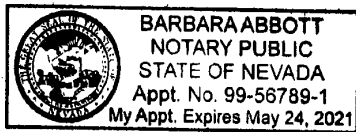
1 7. I declare under penalty of perjury that the foregoing is true and correct and  
2 this affidavit is executed this 20th day of September, 2017.

3 **FURTHER AFFIANT SAYETH NAUGHT.**

4  
5   
6 SUSAN CLOKEY

7 SUBSCRIBED AND SWORN to before me  
8 this 20th day of September, 2017.

9   
10 NOTARY PUBLIC, in and for  
11 said County and State.



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1 Jeffrey J. Orr, Esq.  
2 Nevada Bar No. 7854  
3 PYATT SILVESTRI  
4 701 Bridger Avenue  
5 Suite 600  
6 Las Vegas, NV 89101  
7 T. (702) 383-6000  
8 [jorr@pyattsilvestri.com](mailto:jorr@pyattsilvestri.com)  
9 Attorney for Petitioner  
10 Special Administrator, Susan Clokey

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**EIGHTH JUDICIAL DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

10 In the Matter of the Estate of James Allen ) Case No.: PC-1  
11 McNamee, Deceased ) Dept No.:  
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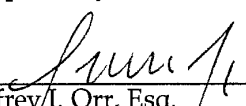
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**NOMINATION OF SPECIAL ADMINISTRATOR**

16 I, Jeffrey J. Orr, Esq., whose address is 701 Bridger Avenue, Suite 600, Las Vegas,  
17 Nevada 89101 declare under penalty of perjury that I hereby nominate Susan Clokey, who  
18 works at Pyatt Silvestri located at 701 Bridger Avenue, Suite 600, Las Vegas, Nevada 89101,  
19 to serve as Special Administrator of the Estate of James Allen McNamee.

20 DATED this 20 day of September, 2017.

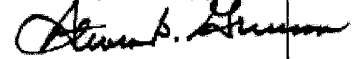
21 Respectfully submitted,

22  
23   
24 Jeffrey J. Orr, Esq.  
25 Nevada Bar No. 7854  
26 PYATT SILVESTRI  
27 701 Bridger Avenue, Suite 600  
28 Las Vegas, NV 89101  
T. (702) 383-6000  
Attorney for Petitioner  
Special Administrator, Susan Clokey

# **EXHIBIT “B”**

ORIGINAL

Electronically Filed  
11/16/2017 4:41 PM  
Steven D. Grierson  
CLERK OF THE COURT



1 **ORDR**

2 Jeffrey J. Orr, Esq.  
3 Nevada Bar No. 7854  
4 PYATT SILVESTRI  
5 701 Bridger Avenue  
6 Suite 600  
7 Las Vegas, NV 89101  
8 T. (702) 383-6000  
9 F. (702) 477-0088  
10 [jorr@pyattsilvestri.com](mailto:jorr@pyattsilvestri.com)  
11 Attorney for Petitioner,  
12 Special Administrator Susan Clokey

8 **EIGHTH JUDICIAL DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 In the Matter of the Estate of James Allen ) Case No.: P-17-093041-E  
11 McNamee, Deceased ) Dept No.: S  
12 )  
13 )  
14 )  
15 )

16 **ORDER GRANTING**  
**PETITION FOR SPECIAL LETTERS OF ADMINISTRATION**

17 Upon submission of the Petition for Special Letters of Administration, representing  
18 as follows:

19 1. That Decedent, James Allen McNamee died on the 12<sup>th</sup> day of August, 2017, in  
20 the County of Mohave, State of Arizona.

21 2. That Decedent was a resident of Mohave County, Arizona, at the time of his  
22 death.

23 3. That at the time of Decedent's death, Decedent was a Defendant in a personal  
24 injury lawsuit, *Bianchi et. al v. James Allen McNamee*, Eighth Judicial District Court, Clark  
25 County, Nevada Case No. A-13-691887-C.

26 4. Petitioner has conducted a search of assets for James Allen McNamee,  
27 decedent. Upon information and belief, the Estate of James Allen McNamee has no assets  
28 to satisfy any judgment other than an automobile insurance policy with GEICO. That

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1 insurance policy, GEICO policy #4180457162 provides automobile liability insurance  
2 coverage of \$30,000 per person and \$60,000 per accident.

3 5. Petitioner is a resident of the State of Nevada, and is employed at the law firm of  
4 Pyatt Silvestri located at 701 Bridger Avenue, Suite, 600, Las Vegas, NV 89101.

5 6. Special Administration is needed to allow *Bianchi et. al. v. McNamee*, Case No.  
6 A-13-691887-C to continue and substitute the real party in interest, the Special  
7 Administrator.

8 7. Petitioner is willing to act as Special Administrator of the estate to defend  
9 *Bianchi et. al. v. McNamee*, Case No. A-13-691887-C.

10 8. Petitioner has never been convicted of a felony. Petitioner is qualified under  
11 NRS 139.010 to serve as Special Administrator of the Estate.

12 **NOW, THEREFORE, IT IS HEREBY ORDERED** that Susan Clokey is appointed as  
13 Special Administrator and that Special Letters of Administration be issued, without bond,  
14 pursuant to Nevada Revised Statutes 140(2)(a) and 140(3)(b).

15 The sole purpose of this order is to allow *Bianchi et. al. v. McNamee*, Case No.  
16 A-13-691887-C to proceed as to the insurance proceeds of the GEICO automobile insurance  
17 policy pursuant to Nevada Revised Statutes 140.040(2)(a) and 140.040(3)(b). Petitioner  
18 intends to defend that action as the real party in interest.

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1 The Special Administrator does not have any other authority beyond Nevada  
2 Revised Statutes 140(2)(a) and 140(3)(b) and may not distribute any property other than the  
3 GEICO automobile insurance policy with automobile liability insurance coverage of \$30,000  
4 per person and \$60,000 per accident.

5 Any funds will be held in a blocked account or attorney trust account.

6 IT IS FURTHER ORDERED that the settlement of the decedent's lawsuit is subject to  
7 this court's approval.

8 DATED this 15<sup>th</sup> day of <sup>NOV.</sup> ~~October~~, 2017.

*Vincent Ochoa*

DISTRICT COURT JUDGE *sa*

11 Submitted by:

*Jeffrey J. Orr*

14 Jeffrey J. Orr, Esq.  
15 Nevada Bar No. 7854  
16 PYATT SILVESTRI  
17 701 Bridger Avenue, Suite 600  
18 Las Vegas, NV 89101  
19 T. (702) 383-6000  
20 [jorr@pyattsilvestri.com](mailto:jorr@pyattsilvestri.com)  
21 Attorney for Petitioner,  
22 Special Administrator Susan Clokey  
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**EXHIBIT A**

**NRS 140.040 Powers, duties and immunity from liability for certain claims.**

1. A special administrator shall:

(a) Collect and preserve for the executor or administrator when appointed all the goods, chattels and receivables of the decedent, and all incomes, rents, issues, profits, claims and demands of the estate.

(b) Take charge and management of the real property and enter upon and preserve it from damage, waste and injury.

2. A special administrator may:

(a) For all necessary purposes, commence, maintain or defend actions and other legal proceedings as a personal representative.

(b) Without prior order of the court, sell any perishable property of the estate, as provided in

**NRS 148.170.**

(c) Exercise such other powers as have been conferred by the order of appointment.

(d) Obtain leave of the court to borrow money or to lease or mortgage real property in the same manner as an executor or administrator.

3. A special administrator is not liable:

(a) To any creditor on any claim against the estate; or

(b) For any claim against the decedent except a claim involving wrongful death, personal injury or property damage if the estate contains no assets other than a policy of liability insurance.

[Part 86:107:1941; 1931 NCL § 9882.86] – (NRS A 1971, 647; 1983, 668; 1999, 2276)

PYATT SILVESTRI  
A PROFESSIONAL LAW CORPORATION  
701 BRIDGER AVENUE SUITE 600  
LAS VEGAS, NEVADA 89101-8941  
PHONE (702) 383-6000 FAX (702) 477-0088

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of Pyatt Silvestri and that on the 16<sup>th</sup> day of November, 2017, I caused the above **ORDER GRANTING PETITION FOR SPECIAL LETTERS OF ADMINISTRATION**, to be served pursuant to NRCP 5(b) to be electronically served through the *Eighth Judicial District Court's electronic filing system* and via *U.S. Mail* to the following party listed below:

Robert McNamee  
2472 230<sup>th</sup> Street  
Mahnomen, MN 56557-9034

  
An Employee of PYATT SILVESTRI

# EXHIBIT “C”

ORIGINAL

Electronically Filed  
2/7/2018 4:26 PM  
Steven D. Grierson  
CLERK OF THE COURT

*Steven D. Grierson*

Jeffrey J. Orr, Esq.  
Nevada Bar No. 7854  
PYATT SILVESTRI  
701 Bridger Avenue, Suite 600  
Las Vegas, Nevada 89101  
T. (702) 383-6000  
F. (702) 477-0088  
[jorr@pyattsilvestri.com](mailto:jorr@pyattsilvestri.com)

*Attorney for Susan Clokey,  
Special Administrator*

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

In the Matter of the Estate of  
JAMES ALLEN MCNAMEE,

Deceased.

Case No.: P-17-093041-E  
Dept. No.: S

**LETTERS OF SPECIAL ADMINISTRATION**

On the 16<sup>th</sup> day of November, 2016, the Court entered an ORDER GRANTING PETITION FOR SPECIAL LETTERS OF ADMINISTRATION ("Order"). The Order appoints Susan Clokey as Special Administrator and legal representative of the Estate of JAMES ALLEN MCNAMEE, Decedent. The Order includes:

- A directive for no bond;
- A directive that all liquid assets be held in the Solomon Dwiggins & Freer, Ltd. Attorney Client Trust Account;
- A directive for the posting of a bond in the sum of \$\_\_\_\_\_; or
- A directive for the establishment of a blocked account.

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1 The Special Administrator, having duly qualified, may act and have the authority and duties of  
2 Special Administrator as set forth in such Order.

3 In testimony of which, I have this date signed these Letters and affixed the seal of the Court.

4 STEVEN D. GRIERSON, CLERK OF COURT

5 By:  

6 Deputy Clerk

7 Date

VIVIAN A. CANELA

8 Respectfully Submitted by:

9 PYATT SILVESTRI

10 By: 

11 Jeffrey J. Orr, Esq.  
12 Nevada Bar No. 7854  
13 701 Bridger Avenue, Suite 600  
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15 T. (702) 383-6000  
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17 [jorr@pyattsilvestri.com](mailto:jorr@pyattsilvestri.com)  
18 Attorney for Susan Clokey,  
19 Special Administrator  
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OATH


I, SUSAN CLOKEY, mailing address of 701 Bridger Avenue, Ste. 600, LV NV 89101, solemnly affirm that I will faithfully perform according to law the duties of Special Administrator, and that all matters stated in any petition or paper filed with the Court by me are true of my own knowledge or, if any matters are stated on information and belief, I believe them to be true.

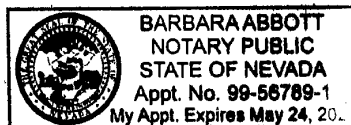
Executed this 7th day of February, 2018.

  
SUSAN CLOKEY

STATE OF NEVADA     )  
                                  )  
COUNTY OF CLARK    )     ss.

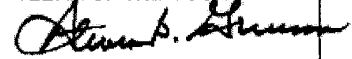
SUBSCRIBED and AFFIRMED before me on the 7th day of February, 2018, by SUSAN CLOKEY.

  
NOTARY PUBLIC, in and for said  
State and County



# EXHIBIT “D”

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Steven D. Grierson  
CLERK OF THE COURT



1 **PET**  
2 Corey M. Eschweiler, Esq.  
3 Nevada Bar No. 6635  
4 Craig A. Henderson, Esq.  
5 Nevada Bar No. 10077  
6 Joshua L. Benson, Esq.  
7 Nevada Bar No. 10514  
8 GLEN LERNER INJURY ATTORNEYS  
9 4795 South Durango Drive  
10 Las Vegas, Nevada 89147  
11 Telephone: (702) 877-1500  
12 Facsimile: (702) 933-7043  
13 E-mail: ceschweiler@glenlerner.com  
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15 Lee D. Roberts, Esq.  
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19 Las Vegas, NV 89118  
20 Telephone: (702) 938-3838  
21 Facsimile: (702) 938-3864  
22 Email: LRoberts@wwhgd.com

23 *Attorneys for Petitioners Gianni Bianchi*  
24 *and Dara Del Priore*

25 EIGHTH JUDICIAL DISTRICT COURT

26 CLARK COUNTY, NEVADA

27 In the matter of the Estate of JAMES ALLEN  
28 MCNAMEE, Deceased.

CASE NO.: P-17-093041-E  
DEPT NO.: PC-1

**PETITION FOR ISSUANCE OF  
GENERAL LETTERS OF  
ADMINISTRATION AND FOR  
APPOINTMENT OF CUMIS COUNSEL  
FOR THE ESTATE OF JAMES ALLEN  
MCNAMEE**

**Date of Hearing:**  
**Time of Hearing:**

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1           Petitioners Gianni Bianchi and Dara Del Priore, through their attorneys of record, Corey M.  
2 Eschweiler, Esq., Craig A. Henderson, Esq., and Joshua L. Benson, Esq., of GLEN LERNER  
3 INJURY ATTORNEYS, and Lee D. Roberts, Esq., of WEINBERG WHEELER HUDGINS GUNN  
4 & DIAL, petition this court:

5           (1) pursuant to NRS 139.040 (g)-(h), NRS 139.050, and NRS 139.090, issue letters of  
6 general administration to John J. Cahill, the Clark County Public Administrator, for the Estate of  
7 James Allen McNamee;

8           (2) pursuant to NRCP 25(a) order substitution of the proper parties in place of the decedent,  
9 James Allen McNamee and

10           (2) pursuant to *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d  
11 338 (Sep. 24, 2015), order appointment of *Cumis* counsel for the Estate of James Allen McNamee  
12 based on the actual conflict of interest that exists between the Estate of James Allen McNamee, and  
13 GEICO (Decedent James Allen McNamee's automobile liability insurer).

14           This Petition is based upon the following memorandum of points and authorities, the  
15 Declaration of Corey M. Eschweiler, Esq., the papers and Pleadings on file with the court, and the  
16 oral argument of the parties.

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GLEN LERNER INJURY ATTORNEYS

By: /s/ Craig A. Henderson  
Corey M. Eschweiler, Esq.  
Nevada Bar No. 6635  
Craig A. Henderson, Esq.  
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4795 South Durango Drive  
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GUNN & DIAL

Lee D. Roberts, Esq.,  
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6385 South Rainbow Blvd., Suite 400  
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*Attorneys for Petitioners Gianni Bianchi  
and Dara Del Priore*

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1 policy, the Estate must be generally administrated. Further, because of the actual conflict of interest  
2 that exists between the Estate of James Allen McNamee and GEICO, the Estate is entitled to *Cumis*  
3 counsel at GEICO's expense, to advise the Estate of its rights against GEICO. *See State Farm v.*  
4 *Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338, 341 (Sep. 24, 2015). Otherwise, the interests of the  
5 Estate will continue to be placed behind the financial interests of GEICO.

## 6 II. FACTS

### 7 A. Background of the underlying negligence litigation.

8 On July 17, 2013, decedent James Allen McNamee, was driving a Ford van on East Sahara  
9 Avenue approaching a red light at the intersection of Sahara and McLeod. Decedent failed to slow  
10 the van in time and the van crashed into the rear of a Nissan Pathfinder that was stopped at the red  
11 traffic signal. The Nissan Pathfinder was driven by Petitioner Gianni Bianchi. Petitioner Dara  
12 DelPriore occupied the front passenger seat of the Nissan. Both Gianni and Dara suffered severe  
13 injuries in the collision.

### 14 B. GEICO has exposed decedent's estate to excess liability.

15 At the time of the July 17, 2013, collision, decedent was covered by an automobile liability  
16 insurance policy issued by GEICO, policy number 4180457162. *See* Petition for Letters of Special  
17 Administration, at 2 ¶ 6, filed with this Court Sep. 20, 2017. The GEICO policy provided decedent  
18 with liability insurance coverage of \$30,000 per person up to \$60,000 per occurrence. *Id.* Since the  
19 collision on July, 2013, decedent's automobile liability insurer, GEICO, has repeatedly refused to  
20 settle Gianni and Dara's claims within decedent's policy limits, despite knowing Gianni and Dara's  
21 damages far exceed the \$30,000 per person liability insurance coverage. By way of brief  
22 background:

- 23 • On October 25, 2013, Gianni and Dara each served GEICO with a demand requesting  
24 decedent's \$30,000 per person policy limit in exchange for a release of all claims against  
25 decedent. At the time, Gianni had incurred \$10,707.78 in medical bills and was  
26 recommended for pain management medical treatment at an estimated cost of \$12,050. Dara  
27 had incurred \$10,797.25 in medical bills and had also been recommended for pain  
28 management treatment at an estimated cost of \$12,050. GEICO did not tender decedent's  
policy limits. Gianni and Dara, then, proceeded with the recommended injections.

1 • On November 19, 2013, Giann and Dara sued decedent for damages arising out of the July  
2 17, 2013, crash. *See Bianchi and Del Priore v. James McNamee*, Case Number A-13-  
691887-C, Eighth Judicial District Court, Clark County, Nevada.

3 • On April 3, 2014, decedent served Dara, only, with an offer to settle in the amount of  
4 \$30,000. Dara rejected this offer, as her medical bills, alone, totaled \$36,214.35. Shortly  
5 thereafter, Giann and Dara's counsel advised GEICO to appoint separate counsel to advise  
6 decedent of his potential bad faith claim against GEICO. Less than three months later,  
decedent filed a substitution of attorney retaining new, outside counsel (the Pyatt Silvestri  
law firm).

7 • By spring of 2015, Giann's medical bills had increased to \$329,494, including the cost of  
8 the spinal surgery Giann's doctor recommended. This, in addition to \$348,948 for Giann's  
9 future medical care; \$277,832 for Giann's loss of household services; and \$1,867,000 for  
10 Giann's loss of enjoyment of life -- a total of more than \$2,800,000 in damages.  
Consequently, on April 21, 2015, Giann served McNamee with an offer to settle for  
\$435,000. Decedent did not accept Giann's offer.

11 • Also by Spring, 2015, Dara's medical bills had increased to \$93,980. This, in addition to  
12 \$296,537 in lost wages; \$384,361 in loss of household services; and \$1,700,000 in loss of  
13 enjoyment of life -- a total of more than \$2,470,000 in damages. On April 21, 2015, Dara  
served decedent with an offer to settle in the amount of \$345,000. Decedent did not accept  
the offer.

14 In other words, despite knowing Giann and Dara's medical special damages were going to exceed  
15 decedent's policy limits, GEICO refused to pay the policy to petitioners.

16  
17 **C. GEICO admits Petitioners' damages exceed decedent's liability insurance  
coverage.**

18 By July, 2015, Giann's total damages had increased to \$2,850,136.97, including \$356,306 in  
19 medical special damages alone. Dara's total damages had increased to \$2,481,097, including  
20 \$99,280 in medical special damages. On July 13, 2015, decedent offered to settle Giann and Dara's  
21 claims, each for an amount in excess of McNamee's automobile liability insurance policy limit.<sup>1</sup>  
22 Petitioners rejected these offers that did not even compensate them for their medical special  
23 damages. The two offers are critical, however, because through the offers, GEICO admitted  
24 the value of Giann and Dara's claims exceed decedent's \$60,000 of insurance coverage. Put  
25 differently, GEICO has already admitted the Estate of James Allen McNamee will be exposed  
26

27  
28 <sup>1</sup> Defendant's written offers to Plaintiffs and Plaintiffs' written correspondence to Defendant's counsel's insurer will be  
provided to the court for in camera review upon request.

1 to excess liability as a result of GEICO's bad faith refusal to compromise Petitioners' claims  
2 for the policy limits.

3 **D. Decedent died before Petitioners' claims went to trial in the Eighth Judicial**  
4 **District Court.**

5 On September 20, 2017, decedent's counsel in the *Bianchi v. McNamee* litigation, Pyatt  
6 Silvestri, served a Suggestion of Death on the Record indicating decedent had passed on August 12,  
7 2017. *See* Suggestion of Death Upon the Record, attached as Ex. 1-A; *see also* Death Certificate,  
8 attached as Ex. 1-B. This, five days before Giann and Dara's negligence claims against decedent  
9 were scheduled to proceed to trial on September 25, 2017, in the Eighth Judicial District Court. The  
10 District Court trial in *Bianchi v. McNamee* has since been continued to April 16, 2018.

11 **E. GEICO sought appointment of a special administrator.**

12 Also on September 20, 2017, Pyatt Silvestri filed a Petition for Special Letters of  
13 Administration. The Petition sought to have Susan Clokey, an employee of Pyatt Silvestri,  
14 appointed as the Special Administrator of the Estate of James Allen McNamee based on Pyatt  
15 Silvestri's representations to this Court that "the Estate of James Allen McNamee has no assets to  
16 satisfy any judgment other than an automobile policy with GEICO [providing] automobile liability  
17 insurance coverage of \$30,000 per person and \$60,000 per accident." *See* Petition for Letters of  
18 Special Administration, at 2 ¶ 6, filed with this Court Sep. 20, 2017.

19 **F. A general administrator must be appointed.**

20 To the contrary, based on GEICO's failure to settle Giann and Dara's claims within  
21 decedent's policy limits, GEICO, admittedly, has exposed the Estate of James Allen McNamee to  
22 liability in excess of decedent's \$60,000 liability insurance policy. In other words, the Estate of  
23 James Allen McNamee has causes of action against GEICO for, *inter alia*, breach of contract and  
24 tortious breach of the implied covenant of good faith and fair dealing. As important, there exists,  
25 and has existed for some time, an actual conflict of interest between GEICO and the Estate of James  
26 Allen McNamee, both of whom are currently represented by the same law firm, Pyatt Silvestri. *See*  
27 *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338, 340 (Sep. 24,

28

1 2015) (“Nevada, in contrast, is a dual-representation state: Insurer-appointed counsel represents both  
2 the insurer and the insured.”)

3 It is patently obvious that Pyatt Silvestri is not representing the interests of the Estate of  
4 James Allen McNamee, including failing to advise the Estate of its excess liability and failing to  
5 advise the Estate or even this Court, regarding the Estate’s bad faith rights against GEICO. *See*  
6 Petition for Letters of Special Administration, at 2 ¶ 6, filed with this Court Sep. 20, 2017 (“the  
7 Estate of James Allen McNamee has no assets to satisfy any judgment other than an automobile  
8 policy with GEICO [providing] automobile liability insurance coverage of \$30,000 per person and  
9 \$60,000 per accident”). Consequently, Petitioners’ counsel sent Pyatt Silvestri a second letter on  
10 November 8, 2017, advising them of these developments and that the Estate of James Allen  
11 McNamee is entitled to separate counsel. Petitioners’ counsel has received no response to the letter.

12 **G. The special administrator must be removed and separate *Cumis* counsel**  
13 **appointed for the Estate of James Allen McNamee.**

14 This Court, having not been fully apprised of the facts and circumstances surrounding the  
15 Estate’s liability to Giann and Dara, or the true nature of the Estate’s assets, granted the petition and  
16 issued an Order Granting Petition for Special Letters of Administration to Susan Clokey. *See* Nov.  
17 16, 2017, Order Granting Petition for Special Letters of Administration, on file with this Court. The  
18 purpose of this petition, therefore, is (1) appoint the Clark County Public Administrator John J.  
19 Cahill, as the general administrator of the Estate of James Allen McNamee, and (2) order the  
20 retention by GEICO of *Cumis* counsel for the Estate of James Allen McNamee pursuant to the  
21 Nevada Supreme Court’s holding in *State Farm v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338,  
22 341 (Sep. 24, 2015).

23 **III. ARGUMENT**

24 **A. A general administrator must be appointed to administer decedent’s estate.**

25 Pursuant to NRS 140.040(3)(b), a special administrator is not liable “[f]or any claim against  
26 the decedent except a claim involving wrongful death, personal injury or property damage if the  
27 estate contains no assets other than a policy of liability insurance.” NRS 140.040(3)(b) (emphasis  
28

1 added). As the Nevada Supreme Court has made clear, however, this statute is applicable only  
2 when the estate's sole asset is a liability insurance policy:

3 [A]fter the 1971 amendment, NRS 140.040(3) permits the special administrator to  
4 pay wrongful death, personal injury, and property damage claims when the  
5 estate's only asset is a liability insurance policy. NRS 140.040(3) promotes  
6 judicial economy and efficient resolution of claims by enabling a plaintiff with  
7 such claims to avoid lengthy, costly, formal probate procedures when the sole  
8 asset is a liability insurance policy.

9 *Jacobson v. Estate of Clayton*, 121 Nev. 518, 522, 119 P.3d 132, 134 (2005). If, however, the estate  
10 has other assets, or the claim exceeds the insurance coverage and will diminish the estate, the estate  
11 must be administered by a general administrator:

12 The claim procedure specified by ch. 147 must be followed whenever the estate of  
13 the deceased may be diminished if the creditor is successful. This, of course,  
14 might happen in a wrongful death action against the estate of a deceased  
15 tortfeasor. The loss for which damages are claimed may not be covered by  
16 liability insurance. If covered, the insurance limits might prove to be inadequate.  
17 In either instance the estate is diminished if the claimant is successful.

18 *Bodine v. Stinson*, 85 Nev. 657, 661, 461 P.2d 868, 871 (1969) (superseded by statute on other  
19 grounds as explained in *Jacobson v. Estate of Clayton*, 121 Nev. 518, 522, 119 P.3d 132, 134  
20 (2005)). Here, Giann and Dara's negligence claims against decedent exceed the available liability  
21 insurance and will diminish the Estate. Furthermore, the Estate of James Allen McNamee has assets  
22 above and beyond the \$60,000 liability insurance policy issued by GEICO, i.e., claims for breach of  
23 contract and tortious breach of the implied covenant of good faith and fair dealing against GEICO.  
24 Consequently, special administration of the McNamee Estate is not authorized by the special  
25 administrator statutes. *Id.*

26 **B. The Estate of James Allen McNamee possesses claims for insurance bad faith  
27 against GEICO.**

28 It is well settled that:

Nevada law recognizes the existence of an implied covenant of good faith and fair  
dealing in every contract. An insurer fails to act in good faith when it refuses  
'without proper cause' to compensate the insured for a loss covered by the policy.  
Such conduct gives rise to a breach of the covenant of good faith and fair dealing.  
This breach or failure to perform constitutes 'bad faith' where the relationship  
between the parties is that of insurer and insured.

1 See *Pemberton v. Farmers Ins. Exch.*, 109 Nev. 789, 792-93, 858 P.2d 380, 382 (1993) (internal  
2 citations omitted). As the court has further explained, “[t]he law, not the insurance contract,  
3 imposes this covenant on insurers. A violation of the covenant gives rise to a bad-faith tort claim.  
4 This court has defined bad faith as an actual or implied awareness of the absence of a reasonable  
5 basis for denying benefits of the [insurance] policy.” See *Allstate Ins. Co. v. Miller*, 125 Nev. 300,  
6 308, 212 P.3d 318, 324 (2009) (internal citations omitted); see also *United States Fid. & Guar. Co.*  
7 *v. Peterson*, 91 Nev. 617, 619-20, 540 P.2d 1070, 1071 (1975) (“We approve and adopt the rule that  
8 allows recovery of consequential damages where there has been a showing of bad faith by the  
9 insurer. Where an insurer fails to deal fairly and in good faith with its insured by refusing without  
10 proper cause to compensate its insured for a loss covered by the policy such conduct may give rise  
11 to a cause of action in tort for breach of an implied covenant of good faith and fair dealing. The  
12 duty violated arises not from the terms of the insurance contract but is a duty imposed by law, the  
13 violation of which is a tort”). An insurer who fails to settle a claim in good faith and exposes its  
14 insurer to excess liability is liable for the full amount of the judgment: “since the insurer has  
15 reserved control over the litigation and settlement it is liable for the entire amount of a judgment  
16 against the insured, including any portion in excess of the policy limits, if in the exercise of such  
17 control it is guilty of bad faith in refusing a settlement.” See *Comunale v. Traders & Gen. Ins. Co.*,  
18 50 Cal. 2d 654, 660, 328 P.2d 198, 201 (1958) (emphasis added).<sup>2</sup> This case is no different.

19 **C. GEICO acted in bad faith when it exposed decedent and his estate to excess**  
20 **liability.**

21 Petitioners provided GEICO with opportunities to compromise their negligence claims  
22 against decedent for the \$60,000 liability insurance policy. GEICO refused. This, even when  
23 GEICO was well aware the value of Giann and Dara’s claims exceeded decedent’s insurance  
24 coverage:

25 Obviously, it will always be in the insured’s interest to settle within the policy  
26 limits when there is any danger, however slight, of a judgment in excess of those  
27 limits. Accordingly the rejection of a settlement within the limits where there is  
any danger of a judgment in excess of the limits can be justified, if at all, only on

28 <sup>2</sup> “Nevada looked to California law when it established the implied covenant of good faith and fair dealing in the insurance context.” See *Landow v. Medical Ins. Exch.*, 892 F. Supp. 239, 240 (D. Nev. 1995).

1 the basis of interests of the insurer, and, in light of the common knowledge that  
2 settlement is one of the usual methods by which an insured receives protection  
3 under a liability policy, it may not be unreasonable for an insured who purchases  
4 a policy with limits to believe that a sum of money equal to the limits is available  
5 and will be used so as to avoid liability on his part with regard to any covered  
6 accident. In view of such expectation an insurer should not be permitted to further  
7 its own interests by rejecting opportunities to settle within the policy limits unless  
8 it is also willing to absorb losses which may result from its failure to settle.

9 *Crisci v. Sec. Ins. Co.*, 66 Cal. 2d 425, 430-31, 58 Cal. Rptr. 13, 17, 426 P.2d 173, 177 (1967).

10 Since then, GEICO has admitted Gianna and Dara's damages exceed decedent's insurance coverage  
11 by extending settlement offers to both Giann and Dara, each, in amounts that exceed the available  
12 insurance coverage. This confirms GEICO's bad faith:

13 whenever it is likely that the judgment against the insured will exceed policy  
14 limits so that the most reasonable manner of disposing of the claim is a settlement  
15 which can be made within those limits, a consideration in good faith of the  
16 insured's interest requires the insurer to settle the claim.... Moreover, in deciding  
17 whether or not to compromise the claim, the insurer must conduct itself as though  
18 it alone were liable for the entire amount of the judgment. Thus, the only  
19 permissible consideration in evaluating the reasonableness of the settlement offer  
20 becomes whether, in light of the victim's injuries and the probable liability of the  
21 insured, the ultimate judgment is likely to exceed the amount of the settlement  
22 offer.

23 *Johansen v. Cal. State Auto. Ass'n Inter-Ins. Bureau*, 15 Cal. 3d 9, 16, 123 Cal. Rptr. 288, 292, 538  
24 P.2d 744, 748 (1975). In this case, GEICO refused to tender decedent's insurance limits when  
25 Giann and Dara's damages clearly exceeded \$60,000. Once Giann and Dara's medical bills did  
26 exceed \$60,000, GEICO made a series of low ball offers concluding with offers to Giann, and Dara,  
27 each in amounts that exceed the \$30,000 per-person insurance coverage available to decedent.  
28 GEICO has always known the value of Giann and Dara's claims exceed decedent's policy limits,  
and GEICO has always known the value of Giann and Dara's claims exceeded every settlement  
offer GEICO has extended to Giann and Dara.

**D. Petitioners nominate the Clark County Public Administrator for appointment  
as the general administrator of McNamee's Estate.**

Based on the foregoing, and pursuant to NRS 139.050 and NRS 139.040(g), Petitioners  
nominate the Clark County Public Administrator John J. Cahill for appointment as general  
administrator of the Estate of James Allen McNamee. See NRS 139.040(h) (authorizing "Creditors

1 who have become such during the lifetime of the decedent” to seek letters of general  
2 administration); *see also* NRS 139.050 (“Administration may be granted upon petition to one or  
3 more qualified persons, although not otherwise entitled to serve, at the written request of the person  
4 entitled, filed in the court.”). Mr. Cahill has not been convicted of a felony, is over the age of  
5 majority, is a resident of the State of Nevada, and is otherwise qualified. *See* NRS 139.010(1)-(4).

6 This court has jurisdiction because James Allen McNamee left an estate that consists of, at a  
7 minimum, the liability insurance policy issued by GEICO, and the Estate’s potential bad faith  
8 claims against GEICO. *See Bodine v. Stinson*, 85 Nev. 657, 659, 461 P.2d 868, 870 (1969) (“It is  
9 well established that a deceased insured’s potential right of exoneration under an insurance policy is  
10 a sufficient estate to justify a grant of administration, and we think, satisfies the requirement of *In*  
11 *re Dickerson’s Estate*, 51 Nev. 69, 268 P. 769 (1928), that an estate exist before administration is  
12 justified.”). A listing of all of James Allen McNamee’s known heirs is attached to this petition.<sup>3</sup>

13 **E. The Estate of James Allen McNamee has not been advised of its rights against**  
14 **GEICO.**

15 The Nevada Supreme Court recently confirmed the applicability in Nevada of the California  
16 Supreme Court’s seminal decision in *San Diego Navy Federal Credit Union v. Cumis Insurance*  
17 *Society, Inc.*, 162 Cal. App. 3d 358, 208 Cal. Rptr. 494, 506 (Ct. App. 1984). In *State Farm v.*  
18 *Hansen*, the Nevada Supreme Court confirmed that “[b]ecause Nevada is a dual-representation  
19 state, counsel may not represent both the insurer and the insured when their interests conflict and no  
20 special exception applies. RPC 1.7. This suggests that the *Cumis* rule, where the insurer must  
21 satisfy its contractual duty to provide counsel by paying for counsel of the insured’s choosing, is  
22 appropriate for Nevada.” *See State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74,  
23 357 P.3d 338, 341 (Sep. 24, 2015). As the court further explained:

24 In sum, Nevada, like California, recognizes that the insurer and the insured are  
25 dual clients of insurer-appointed counsel. Where the clients’ interests conflict, the  
26 rules of professional conduct prevent the same lawyer from representing both  
clients. California’s *Cumis* rule is well-adapted to this scenario. It requires

27 <sup>3</sup> The Division of Health Care Financing and Policy for the Department of Health and Human Services of the State of  
28 Nevada filed a Waiver of Notice required by NRS 155.020 on October 18, 2017. *See* Waiver of Notice, on file with this  
Court.

1 insurers to fulfill their duty to defend by allowing insureds to select their own  
2 counsel and paying the reasonable costs for the independent counsel's  
representation.

3 *Id.* Under NRPC 1.7(a)(1), “[a] concurrent conflict of interest exists if: The representation of one  
4 client will be directly adverse to another client.” Here, GEICO is obviously adverse to decedent’s  
5 Estate. While GEICO has admittedly exposed decedent’s estate to excess liability giving rise to  
6 causes of action for bad faith against GEICO, GEICO’s counsel, Pyatt Silvestri, did not disclose  
7 any of these critical facts to this Court when seeking appointment of a special administrator.  
8 Instead, GEICO, in collusion with Pyatt Silvestri, represented to this Court that the “the Estate of  
9 James Allen McNamee has no assets to satisfy any judgment other than an automobile policy with  
10 GEICO,” something that is clearly inaccurate. In reality, Pyatt Silvestri is only looking out for  
11 GEICO’s interests, and is clearly taking action to benefit GEICO in total disregard of the rights of  
12 decedent’s estate. Indeed, the Estate has not even been advised of its potential excess liability, its  
13 potential bad faith claims against GEICO as a result of that excess liability, or the actual conflict of  
14 interest between GEICO and the Estate. Because neither GEICO nor Pyatt Silvestri is properly  
15 advising the Estate of James Allen McNamee of its rights against GEICO, and because there is an  
16 actual conflict of interest between the insurer and the insured, the Estate is entitled to *Cumis*  
17 counsel of its choosing at GEICO’s expense.

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**VI. CONCLUSION**

For the reasons set forth above, Petitioners request that the Clark County Public Administrator John J. Cahill be issued letters of general administration over the Estate of James Allen McNamee. Petitioners further request an order from this Court requiring the appointment of separate counsel for the Estate of James Allen McNamee, to be chosen by the Estate and at the expense of the decedent's insurer, GEICO. *See State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338, 341 (Sep. 24, 2015).

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24 *Attorneys for Petitioners Gianni Bianchi*  
25 *and Dara Del Priore*

26 EIGHTH JUDICIAL DISTRICT COURT

27 CLARK COUNTY, NEVADA

28 In the matter of the Estate of JAMES ALLEN  
MCNAMEE, Deceased.

CASE NO.: P-17-093041-E  
DEPT NO.: PC-1

**LISTING OF ALL HEIRS**

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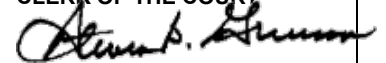
Name	Relationship to Decedent	Age	Address
Robert McNamee	Father	Unknown	2472 230 <sup>th</sup> St. Mahnomen, MN 56557-9034
Other heirs unknown			

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*Attorneys for Petitioners Gianni Bianchi  
and Dara Del Priore*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

GIANN BIANCHI, individually,  
DARA DELPRIORE, individually,

Plaintiff,

vs.

JAMES McNAMEE, individually, DOES I - X,  
and ROE CORPORATIONS I - X, inclusive,

Defendants.

CASE NO.: A-13-691887-C  
DEPT NO.: VIII

**PLAINTIFFS' RESPONSE TO SPECIAL  
ADMINISTRATOR'S BRIEF  
CONCERNING THE PROBATE  
COURT'S EXCLUSIVE JURISDICTION  
OVER THE ESTATE OF JAMES  
McNAMEE**

**Date of Hearing:**  
**Time of Hearing:**

Plaintiffs Gianni Bianchi and Dara Del Priore, through their attorneys of record, Corey M. Eschweiler, Esq., Craig A. Henderson, Esq., and Joshua L. Benson, Esq., of GLEN LERNER INJURY ATTORNEYS, and Lee D. Roberts, Esq., of WEINBERG WHEELER HUDGINS GUNN

1 & DIAL, submit this Response to Special Administrator's Brief Concerning the Probate Court's  
2 Exclusive Jurisdiction over the Estate of James McNamee.

3  
4 GLEN LERNER INJURY ATTORNEYS

5  
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22 *and Dara Del Priore*

23  
24 **MEMORANDUM OF POINTS AND AUTHORITIES**

25 **I. INTRODUCTION**

26 In this personal injury action, the Special Administrator submitted an unsolicited brief  
27 merely seeking to convince this court it cannot appoint a special administrator. On this point, the  
28 Special Administrator claims the court requested additional briefing. It did not. Instead, the Special  
Administrator claims the court requested additional briefing. It did not. Instead, the Special  
Administrator filed a rogue brief that should be stricken. This is especially true after the attorney for  
GEICO and the Special Administrator already admitted this Court has jurisdiction in prior  
pleadings.

Notably, the Special Administrator does not contend the Eighth Judicial District Court lacks  
jurisdiction, but only that this department of the Eighth Judicial District Court has not been  
appointed to hear probate matters. To the contrary, this court is a court of general jurisdiction, a fact

1 already acknowledged by the insurer, GEICO, in its prior briefing to this Court. In other words, the  
2 Special Administrator does not explain why the Court cannot issue the requested relief and only  
3 seeks to improperly remain in control of the Estate. This court should, therefore, appoint a general  
4 administrator to oversee the interests of McNamee's estate.

## 5 **II. FACTS**

### 6 **A. Background of the underlying negligence litigation.**

7 On July 17, 2013, James Allen McNamee (deceased as of August 12, 2017, and, hereinafter  
8 the "Decedent"), was driving a Ford van on East Sahara Avenue approaching a red light at the  
9 intersection of Sahara and McLeod. Decedent failed to slow the van in time and the van crashed  
10 into the rear of a Nissan Pathfinder that was stopped at the red traffic signal. The Nissan Pathfinder  
11 was driven by Plaintiff Giann Bianchi. Plaintiff Dara DelPriore occupied the front passenger seat of  
12 the Nissan. Both Giann and Dara suffered severe injuries in the collision.

### 13 **B. GEICO has exposed decedent's estate to excess liability.**

14 At the time of the July 17, 2013, collision, Decedent was covered by an automobile liability  
15 insurance policy issued by GEICO, policy number 4180457162. *See* Petition for Letters of Special  
16 Administration, at 2 ¶ 6, filed with the probate Court on Sep. 20, 2017. The GEICO policy provided  
17 Decedent with liability insurance coverage of \$30,000 per person up to \$60,000 per occurrence. *Id.*  
18 Since the collision on July, 2013, Decedent's automobile liability insurer, GEICO, has repeatedly  
19 refused to settle Giann and Dara's claims within decedent's policy limits, despite knowing Giann  
20 and Dara's damages far exceed the \$30,000 per person liability insurance coverage.

21 By July, 2015, Giann's total damages had increased to \$2,850,136.97, including \$356,306 in  
22 medical special damages alone. Dara's total damages had increased to \$2,481,097, including  
23 \$99,280 in medical special damages. On July 13, 2015, decedent offered to settle Giann and Dara's  
24 claims, **each** for an amount in excess of McNamee's automobile liability insurance policy limit.  
25 Plaintiffs rejected these offers that did not even compensate them for their medical special damages.  
26 The two offers are critical, however, because through the offers, GEICO admitted the value of  
27 Giann and Dara's claims exceed decedent's \$60,000 of insurance coverage. Put differently, GEICO  
28

1 admitted McNamee, and now his Estate, will be exposed to excess liability as a result of GEICO's  
2 bad faith refusal to compromise Plaintiffs' claims for the policy limits.

3 **C. Decedent died before Plaintiffs claims were to proceed to trial.**

4 On September 20, 2017, Decedent's counsel, Pyatt Silvestri, served a Suggestion of Death  
5 on the Record indicating McNamee had passed on August 12, 2017. *See* Suggestion of Death Upon  
6 the Record, on file with this Court. Also on September 20, 2017, Pyatt Silvestri filed a Petition for  
7 Special Letters of Administration. The Petition sought to have Susan Clokey, an employee of Pyatt  
8 Silvestri, appointed as the Special Administrator of the Estate of James Allen McNamee based on  
9 Pyatt Silvestri's representations to this Court that "the Estate of James Allen McNamee has no  
10 assets to satisfy any judgment other than an automobile policy with GEICO [providing] automobile  
11 liability insurance coverage of \$30,000 per person and \$60,000 per accident." *See* Petition for  
12 Letters of Special Administration, at 2 ¶ 6, filed with the Probate Court on Sep. 20, 2017.

13 **D. GEICO did not dispute the Court's jurisdiction.**

14 The probate court, having not been advised of these facts, granted Pyatt Silvestri's petition to  
15 appoint Pyatt Silvestri employee Susan Clokey as Special Administrator for the Estate. *See* Nov.  
16 16, 2017, Order Granting Petition for Special Letters of Administration, on file with this Court. On  
17 January 3, 2018, Plaintiffs filed a Petition with the Probate Court seeking to have a general  
18 administrator appointed for the McNamee Estate, and requesting that independent, *Cumis* counsel  
19 be appointed to advise the Estate of its rights against GEICO. *See* Jan. 3, 2018, Petition for Issuance  
20 of Letters of General Administration and For Appointment of *Cumis* Counsel for the Estate of James  
21 Allen McNamee, on file with the Probate Court.

22 On January 24, 2018, GEICO purported to make a special appearance in the probate court  
23 action to oppose Plaintiffs' motion for appointment of *Cumis* counsel for the Estate. *See* Jan. 24,  
24 2018, Opposition to Petition for Appointment of *Cumis* Counsel for the Estate of James Allen  
25 McNamee, on file with the Probate Court and attached hereto as Ex. 1-A for reference. In the  
26 opposition, GEICO argued that the Probate Court "does not have jurisdiction to appoint *Cumis*  
27 counsel in pending litigation. That authority resides solely within the jurisdiction of the trial court  
28 which has inherent power to govern and control the members of the bar appearing before it." *See*

1 Opposition to Petition for Appointment of *Cumis* Counsel, at 2:7-9; 5:10-12 (emphasis added).  
2 Consequently, Plaintiffs withdrew the portion of their Probate Court Petition seeking the  
3 appointment of *Cumis* counsel for the Estate of James Allen McNamee and re-submitted the request  
4 to this Court. That motion was heard on February 13, 2018, with counsel for Plaintiffs, the Special  
5 Administrator, and GEICO appearing. The court requested the parties submit orders for the Court's  
6 review. On February 23, 2018, the Special Administrator submitted the Special Administrator's  
7 Brief Concerning the Probate Court's Exclusive Jurisdiction over the Estate of James McNamee in  
8 an attempt to persuade this Court to refrain from appointing a general administrator.

### 9 III. ARGUMENT

10 The Special Administrator simply claims that this Court does not have jurisdiction to appoint  
11 a general administrator over the Estate of James Allen McNamee claiming this department has not  
12 been appointed to hear probate matters. To the contrary, Plaintiffs originally sought relief in the  
13 probate court. GEICO objected to that request arguing that jurisdiction over the matter resided with  
14 the district court who "has inherent power to govern and control the members of the bar appearing  
15 before it." See Opposition to Petition for Appointment of *Cumis* Counsel, at 2:7-9; 5:10-12  
16 (emphasis added). Regardless, as this court has already recognized, it is a court of general  
17 jurisdiction and has original jurisdiction over all matters outside the jurisdiction of the justice courts.  
18 Nev. Const. art. 6, § 6(1). Indeed, the Special Administrator does not even claim the district court  
19 lacks jurisdiction to consider a probate matter, but only that this department of the district court has  
20 not been appointed to do so. In short, the arguments in the Special Administrator's self-serving  
21 brief should hold little weight. This court has the authority to grant the requested relief and, based  
22 on the facts, should appoint a general administrator. Otherwise, the Estate's interests will continue  
23 to be placed behind those of GEICO and the Special Administrator, as detailed in Plaintiffs' prior  
24 briefing with this Court regarding the needs for *Cumis* counsel and general administration for the  
25 Estate.

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**VI. CONCLUSION**

For the reasons set forth above, Plaintiffs request an order from this Court appointing a general administrator for the estate of James Allen McNamee.

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1 **CERTIFICATE OF SERVICE**

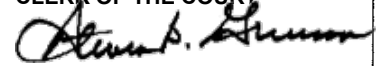
2 Pursuant to N.R.C.P. 5(a), E.D.C.R. 7.26(a) and N.E.F.C.R. 9, I hereby certify that I am an  
3 employee of GLEN LERNER INJURY ATTORNEYS, and on the 12th day of March, 2018, the  
4 foregoing **PLAINTIFFS' RESPONSE TO SPECIAL ADMINISTRATOR'S BRIEF**  
5 **CONCERNING THE PROBATE COURT'S EXCLUSIVE JURISDICTION OVER THE**  
6 **ESTATE OF JAMES McNAMEE** was served by electronic copy via the Court's electronic  
7 service system WIZNET to the following counsel of record:

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17 *Attorneys for GEICO*

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19 /s/ Miriam Alvarez  
20 An Employee of Glen Lerner Injury Attorneys  
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**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

GIANN BIANCHI, individually,  
DARA DELPRIORE, individually,

Plaintiff,

vs.

JAMES McNAMEE, individually, DOES I-X,  
and ROE CORPORATIONS I-X, inclusive,

Defendants.

Case No.: A-13-691887-C  
Dept. No.: VIII

**ORDER DENYING MOTION FOR  
APPOINTMENT OF CUMIS COUNSEL  
FOR THE ESTATE OF JAMES ALLEN  
McNAMEE**

**Date of Hearing: February 13, 2018**  
**Time of Hearing: 8:00 a.m.**

On February 9, 2018, Plaintiffs filed their Motion for Appointment of Cumis Counsel for the Estate of James Allen McNamee on Order Shortening Time. On the same day, Non-party GEICO specially appeared and filed its Opposition. On February 13, 2018, the Court held a hearing on the Motion. Counsel for all parties attended, and the Court heard argument from Plaintiffs' counsel and GEICO's counsel. Having considered the relevant briefing, exhibits, and arguments of counsel, and with good cause appearing, the Court hereby enters the following Order Denying the Motion with Findings of Fact and Conclusions of Law.<sup>1</sup>

**FINDINGS OF FACT**

1. This case is an action for negligence brought by the Plaintiffs against Defendant James McNamee.

<sup>1</sup> Any Finding of Fact or Conclusion of Law that is better characterized as the other, or a combination of both, shall be treated as such.

2. Plaintiffs allege that on July 17, 2013, the Plaintiff's vehicle and the vehicle driven by Mr. McNamee collided. Plaintiffs claim personal injury damages arising from that collision.

3. GEICO was Mr. McNamee's automobile liability insurer.

4. Mr. McNamee passed away on August 12, 2017. The probate court granted a petition for Special Letters of Administration to appoint Susan Clokey as the Special Administrator of Mr. McNamee's Estate. Counsel for Mr. McNamee's Estate then filed a motion to substitute Special Administrator Susan Clokey as Defendant in this action in place and stead of the now-deceased Mr. McNamee. Plaintiffs opposed that motion and filed an accompanying Petition for Issuance of General Letters of Administration and For Appointment of *Cumis* Counsel for the Estate of James Allen McNamee. GEICO made a special appearance in the probate action to oppose that Petition. Plaintiffs then withdrew their *Cumis* counsel request in the probate court and filed it in this court via the current Motion.

### CONCLUSIONS OF LAW

1. Plaintiffs do not have standing to force the insurer to provide the insured with *Cumis* counsel. If the insured or his estate took the position that the insurer failed to provide a defense, provided a defense subject to a reservation of right to later deny coverage, or should have settled within policy limits but did not, then the insured or the estate would have standing to make such a request. But they have not. Thus, absent an assignment or some other mechanism to shift such a hypothetical claim to them, the Plaintiffs lack standing to seek the relief requested in the Motion. *Murphy v. Allstate Ins. Co.* 17 Cal. 3d 937, 941 (1976).

2. For the sake of argument, even assuming that Plaintiffs had such standing, they have not satisfied the Court that *Cumis* counsel is required. In order to grant such a request, a court must find the existence of an "actual conflict" under Rule of Professional Conduct 1.7. *State Farm Mutual Auto. Ins. Co. v. Hansen*, 357 P.3d 338, 342 (2015). A conflict is not actual if it affects issues that are "only extrinsic or ancillary to the issues actually litigated in the underlying action." *Id.* The conflict must be "significant, not merely theoretical, actual, not merely potential." *Id.* "[J]oint representation is permissible as long as any conflict remains speculative." *Id.*

3. Here, there is no actual conflict of interest, merely speculation by Plaintiffs. Before his death, the insured never brought an action against GEICO for any reason. Since his death, neither has his estate. Thus, the claims to which Plaintiffs refer in the Motion are entirely hypothetical. Nothing that Plaintiffs allege in the Motion suggests that GEICO and the estate have conflicting incentives as to the issues litigated in the underlying action. On the contrary, both GEICO and the estate share an aligned desire to resolve this litigation – avoid and defeat liability and damages.

**ORDER**

Based upon the Findings of Fact and Conclusions of Law above, this Court enters the following Order:


**IT IS ORDERED** that Plaintiffs' Motion is **DENIED**.

DATED: <sup>March</sup>February 9, 2018.

  
DISTRICT COURT JUDGE

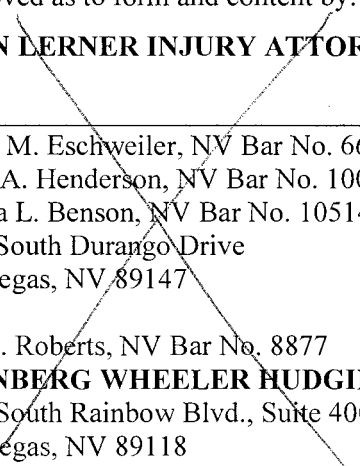
Respectfully submitted by:

**SNELL & WILMER L.L.P.**

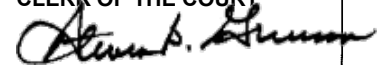
  
Janine C. Prupas, NV Bar No. 9156  
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Approved as to form and content by:

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15 Attorneys for Plaintiffs

9 DISTRICT COURT  
10 CLARK COUNTY, NEVADA

11 GIANN BIANCHI, individually,  
12 DARA DELPRIORE, individually,

13 Plaintiff,  
14 vs.

15 JAMES McNAMEE, individually, DOES I - X,  
16 and ROE CORPORATIONS I - X, inclusive,

17 Defendants.

) CASE NO.: A-13-691887-C

) DEPT NO.: VIII

) **ORDER DENYING DEFENDANT**  
) **JAMES McNAMEE'S MOTION TO**  
) **SUBSTITUTE SPECIAL**  
) **ADMINISTRATOR IN PLACE AND**  
) **STEAD OF DEFENDANT JAMES**  
) **ALLEN McNAMEE AND TO AMEND**  
) **CAPTION**

) **Date of hearing: January 22, 2018**

) **Time of hearing: In chambers**

19 Defendant James Allen McNamee's Motion to Substitute Special Administrator In Place and  
20 Stead of Defendant James Allen McNamee and To Amend Caption came before this Court on  
21 January 22, 2018. The Court having considered the motion, opposition, and reply, and good cause  
22 appearing, it is hereby

23 ORDERED, ADJUDGED, and DECREED that Defendant James Allen McNamee's Motion  
24 to Substitute Special Administrator in Place and Stead of Defendant James Allen McNamee and To  
25 Amend Caption is DENIED.

26 The court directed the parties to submit three (3) proposed names to the Court for  
27 consideration as to who they want to serve as Administrator of the Estate. The Court has reviewed  
28 those submissions and further ORDERS that *Fred Wade* is hereby named as the

1 General Administrator of the Estate of James Allen McNamee.

2 Dated this 19 day of March, 2018.

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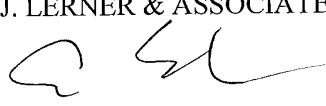
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8 Respectfully submitted by:

9 GLEN J. LERNER & ASSOCIATES

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By: 

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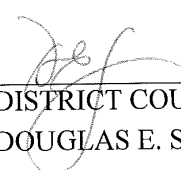
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DISTRICT COURT JUDGE  
DOUGLAS E. SMITH

*ndp*