

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MCNAMEE,
Petitioner,

Electronically Filed
Nov 28 2018 08:55 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 II of II

J. Colby Williams, Esq.
Philip R. Erwin, Esq.
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, Nevada 89101
Telephone: (702) 382-5222

Corey M. Eschweiler, Esq.
GLEN LERNER
INJURY ATTORNEYS
4795 S. Durango Drive
Las Vegas, Nevada 89147
Telephone: (702) 877-1500

(continued on next page)

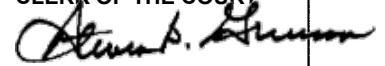
Lee Roberts, Esq.
WHEELER WEINBERG
HUDGINS GUNN & DIAL
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118

Counsel for Real Parties in Interest

INDEX

	Page
Court Minutes Dated April 10, 2018	374
Court Minutes Dated January 22, 2018	73
Defendant James McNamee's Motion to Amend Order on Order Shortening Time	248
Defendant James McNamee's Motion to Dismiss on Order Shortening Time	318
Defendant James McNamee's Motion to Substitute Special Administrator in Place and Stead of Defendant James McNamee and to Amend Caption	3
Defendant James McNamee's Opposition to Motion to Substitute Special Administrator in Place and Stead of Defendant James McNamee and to Amend Caption	56
Errata to Petition for Issuance of General Letters of Administration and for Appointment of <i>Cumis</i> Counsel for the Estate of James McNamee	126
Motion for Appointment of <i>Cumis</i> Counsel for the Estate of James McNamee on Order Shortening Time	128
Objection to Petition for Issuance of General Letters of Administration and for Appointment of <i>Cumis</i> Counsel for the Estate of James McNamee	74
Opposition to Defendant James McNamee's Motion to Substitute Special Administrator in Place and Stead of Defendant James McNamee and to Amend Caption	16
Opposition to Motion for Appointment of <i>Cumis</i> Counsel for the Estate of James McNamee on Order Shortening Time	174
Order Denying Defendant James McNamee's Motion to Dismiss and Granting in Part and Denying in Part Defendant James McNamee's Motion to Amend Order	376

Order Denying Defendant James McNamee’s Motion to Substitute Special Administrator in Place and Stead of Defendant James McNamee and to Amend Caption	246
Order Denying Motion for Appointment of <i>Cumis</i> Counsel for the Estate of James McNamee on Order Shortening Time.....	243
Petition for Issuance of General Letters of Administration and for Appointment of <i>Cumis</i> Counsel for the Estate of James McNamee	40
Plaintiffs’ Response to Special Administrator’s Brief Concerning the Probate Court’s Exclusive Jurisdiction over the Estate of James McNamee.....	236
Reply in Support of Petition for Issuance of General Letters of Administration and for Appointment of <i>Cumis</i> Counsel; and Response to Objection to Petition for Issuance of General Letters of Administration and for Appointment of <i>Cumis</i> Counsel for the Estate of James McNamee	91
Special Administrator’s Brief Concerning the Probate Court’s Exclusive Jurisdiction over the Estate of James McNamee	192
Suggestion of Death on the Record	1
Transcript of Hearing on Motion to Amend Order on Order Shortening Time and Motion to Dismiss on Order Shortening Time.....	346
Transcript of Hearing on Motion for Appointment of <i>Cumis</i> Counsel for the Estate of James McNamee on Order Shortening Time.....	179



1 JEFFREY J. ORR, ESQ.
2 Nevada Bar No. 7854
3 PYATT SILVESTRI
4 701 Bridger Avenue, Suite 600
5 Las Vegas, Nevada 89101
6 T. (702) 383-6000
7 F. (702) 477-0088
8 jorr@pyattsilvestri.com

9 Attorneys for Defendant
10 *JAMES MCNAMEE*

11
12 **DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**
14

15 GIANN BIANCHI, individually, DARA
16 DELPRIORE, individually

17 Plaintiffs

18 v.

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

21 Defendants.
22
23
24
25
26
27
28

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

Hearing Date: April 10, 2018
Hearing Time: 8:00 a.m.

29 **DEFENDANT JAMES MCNAMEE'S MOTION TO AMEND ORDER**
30 **ON ORDER SHORTENING TIME**

31 COMES NOW, Defendant James McNamee, by and through his attorneys of record, Jeffrey
32 J. Orr, Esq. of Pyatt Silvestri and hereby submits his Motion to Amend Order on Order Shortening
33 Time. Because this matter is set for trial on an April 16, 2018 trial stack, Defendant requests that this
34 motion should be heard on a shortened time on or before the date currently set for trial.

35 ///

36 ///


37 ///

PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-8941
PHONE (702) 383-6000 FAX (702) 477-0088

1 This Motion is made and based upon NRCP 60(b), EDCR 2.24(b), the declaration of Jeffrey
2 J. Orr, Esq., the papers and pleadings on file herein, as well as the Memorandum of Points and
3 Authorities and any oral argument at the time of hearing of this matter.
4

5 DATED this 29 day of March, 2018.

6 PYATT SILVESTRI

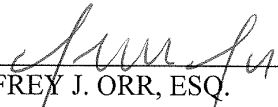
7
8 
9 JEFFREY J. ORR, ESQ.
10 Nevada Bar No. 7854
11 701 Bridger Avenue, Suite 600
12 Las Vegas, Nevada 89101
13 Attorneys for Defendant
14 JAMES MCNAMEE

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

16 Through this motion, Defendant seeks to amend the order filed on March 27, 2018. (See
17 Order Denying Defendant James McNamee's Motion to Substitute Special Administrator in place
18 and stead of Defendant James McNamee and to Amend Caption, attached as Exhibit A). Because
19 trial is set on an April 16, 2018 trial stack, Defendant requests that this motion be heard on a shortened
20 time on or before the date currently set for trial.

21 DATED this 29 day of March, 2018.

22 PYATT SILVESTRI

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

///

///

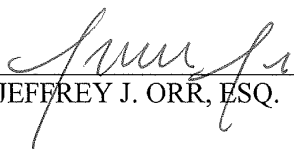
PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-5941
PHONE (702) 383-6000 FAX (702) 477-0088

**AFFIDAVIT OF JEFFREY J. ORR, ESQ. IN SUPPORT OF DEFENDANT JAMES
MCNAMEE'S MOTION TO AMEND ORDER ON ORDER SHORTENING TIME**

I Jeffrey J. Orr, Esq, declare under the penalties of perjury of the laws of the State of Nevada,
the following:

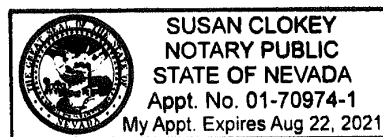
1. I am an attorney at the law firm Pyatt Silvestri and am counsel for Defendant James McNamee.
2. That an order denying Defendant James McNamee's Motion to Substitute Special Administrator in Place and Stead of Defendant James Allen McNamee and to Amend Caption was recently filed on March 27, 2018. (See Exhibit A).
3. That the instant Motion is being brought in a timely fashion as the Motion denying Defendant's Motion to Substitute, Exhibit A, was only recently filed.
4. That Defendant requests that this Motion be heard on a Shortened Time period as trial is set for a trial stack beginning on April 16, 2018.
5. Defendant requests that the instant Motion be heard on or before April 16, 2018.
6. Defendant makes this request in good faith.

FURTHER AFFIANT SAYETH NOT.


JEFFREY J. ORR, ESQ.

SUBSCRIBED AND SWORN TO before
me this 29th day of March, 2018.


NOTARY PUBLIC



///

///

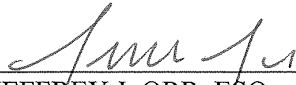
///

ORDER SHORTENING TIME

Based on the declaration of Jeffrey J. Orr, Esq. and Defendant's Application for Order Shortening Time, and good cause appearing, Defendant James McNamee's Motion to Amend Order will be heard before the above-captioned Court on the 10 day of April 2018 at 8:00 am or as soon thereafter as counsel may be heard.


DISTRICT COURT JUDGE

Submitted By:


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

I.

FACTUAL BACKGROUND

This matter is a negligence action by Plaintiffs Giann 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. A Suggestion of Death was filed in this matter on September 20, 2017. On December 14, 2017, Defendant filed a Motion to Substitute the Special Administrator of the Estate of James McNamee in place and stead of Defendant James McNamee and to amend the caption. (See Defendant's Motion to Substitute Special Administrator in Place and Stead of Defendant James McNamee and to Amend Caption, attached as Exhibit B). In that motion, Defendant states that the Probate Court appointed a Special Administrator of the Estate

of James McNamee and found that the Special Administrator was qualified to serve as the Defendant in this matter.

Plaintiff filed a Limited Opposition on January 3, 2018. The Limited Opposition merely requests the Court to defer ruling on that Motion until the Probate Court hears Plaintiffs' Motion in Probate Court. "In light of the foregoing and the arguments set forth in Plaintiff's Petition, Plaintiffs request that this Court defer ruling on the present Motion to Substitute Special Administration until the Probate Court rules on Plaintiff's Petition." (See Page 4 of Plaintiff's Opposition to Defendant's Motion to Substitute Special Administrator in Place and Stead of Defendant James McNamee and to Amend Caption, attached as Exhibit C). Nowhere in Plaintiffs' Opposition do Plaintiffs argue that a general administration should be opened. In fact, by filing that request in Probate Court, Plaintiffs seem to acknowledge that only the Probate Court can open a general administration.

Defendant's Reply points out that pursuant to NRCP 25(a)(1) the ninety (90) day period to move to substitute deceased parties had already passed and as such, any future Motions to Substitute parties were precluded. (See Defendant's Reply to Opposition to Motion to Substitute Special Administrator in Place and Stead of Defendant James McNamee and to Amend Caption, attached as Exhibit D).

There was no oral argument on this Motion. The Minutes state that the Motion is denied and that the Court requested proposed names of candidates to serve as the administrator of the estate. The Minutes never state that the Court opened a general administration. (See Court Minutes regarding Defendant's Motion to Substitute Special Administrator in Place and Stead of Defendant James McNamee and to Amend Caption, attached as Exhibit E).

The Order states that, ..."Fred Wade is hereby named as the general administrator of the Estate of James McNamee. (See Exhibit A). Defendant believes that word "general" is not appropriate because nobody requested that this Court open a general administration of the Estate of James McNamee. Neither the Motion, the Opposition or the Reply ever requested this Court to open

1 a general administration. The Court Minutes do not state that a general administration is to be opened.
2 Because the opening of a general administration was not requested by the parties and was not ordered
3 by the Court in the Court Minutes, the Order (Exhibit A) should not state that anybody is named as a
4 "general administrator".
5

6 **II.**

7 **THE ORDER SHOULD BE AMENDED TO REFLECT THE PLEADINGS**
8 **AND THE COURT MINUTES**

9 NRCP 60(b) states that Orders can be amended pursuant to Motion when there has been
10 mistake or inadvertence. EDCR 2.24(b) states, "A party seeking reconsideration of a ruling of the
11 Court, other than any order which may be addressed by Motion pursuant to NRCP 50b), 52(b), 59 or
12 60, must file a Motion for such relief within ten (10) days after service of written notice of the order
13 or judgment unless the time is shortened or enlarged by order. A Motion for rehearing or
14 reconsideration must be served, noticed, filed and heard as is any other Motion. A Motion for
15 Reconsideration does not toll the 30-day period for filing a Notice of Appeal from a final order or
16 judgment." EDCR 2.24(b).
17

18 In this case Defendant moved the court to substitute the Special Administrator of the Estate
19 of James McNamee in place and stead of James McNamee who is deceased. Although the Court is
20 free to deny that Motion, neither the Motion, the Opposition or the Reply ever requested or even
21 suggested that the Court should appoint a General Administrator. Additionally, the Court Minutes
22 do not state that the Court would appoint a General Administrator. There was no oral argument on
23 this Motion and it was decided in chambers. Therefore, the issue of a General Administration was
24 never before this Court and was not requested by any party.
25

26 ///

27 ///

28 ///

PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-8941
PHONE (702) 383-6000 FAX (702) 477-0088


III.

CONCLUSION

Because neither party requested this court to open a general administration of the estate of James McNamee and because the Court Minutes do not state that a general administration was to be opened, the Order should not state that a general administration should be opened. Defendant requests that the Court issue an Amended Order which makes no reference to a general administration.

DATED this 29 day of March, 2018

PYATT SILVESTRI


JEFFREY J. ORR, ESQ.

Nevada Bar No. 7854

PYATT SILVESTRI

701 Bridger Ave., Suite 600

Las Vegas, Nevada 89101

Attorney for Defendant

JAMES MCNAMEE

PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-5941
PHONE (702) 383-6000 FAX (702) 477-0088

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Pyatt Silvestri and that on the
3 30th day of March, 2018, I caused the above and foregoing document **DEFENDANT JAMES**
4 **MCNAMEE'S MOTION TO AMEND ORDER ON ORDER SHORTENING TIME**, to be served as follows:

Pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District
6 Court's electronic filing system, with the date and time of the electronic service substituted for the
7 date and place of deposit in the mail; to the attorney(s) listed below:

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


An Employee of PYATT SILVESTRI

Exhibit A



1 **ORDR**

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 J. LERNER & ASSOCIATES
9 4795 South Durango Drive
10 Las Vegas, Nevada 89147
11 Telephone: (702) 877-1500
12 Facsimile: (702) 933-7043
13 ceschweiler@glenlerner.com
14 chenderson@glenlerner.com
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.

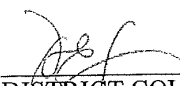
2 Dated this 19 day of March, 2018.

3

4

5

6


DISTRICT COURT JUDGE
DOUGLAS E. SMITH

7

8 Respectfully submitted by:

9 GLEN J. LERNER & ASSOCIATES

10

By: 

11

COREY M. ESCHWEILER, ESQ.

12

CRAIG A. HENDERSON, ESQ,

13

4795 South Durango Drive

14

Las Vegas, Nevada 89147

15

Attorneys for Plaintiffs

16

17

18

19

20

21

22

23

24

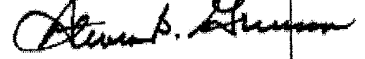
25

26

27

28

Exhibit B



1 JEFFREY J. ORR, ESQ.
2 Nevada Bar No. 7854
3 PYATT SILVESTRI
4 701 Bridger Avenue, Suite 600
5 Las Vegas, Nevada 89101
6 T. (702) 383-6000
7 F. (702) 477-0088
8 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: 1-22-18
Hearing Time: IN CHAMBERS

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

///

///

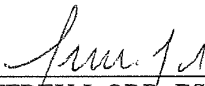
PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-8941
PHONE (702) 383-6000 FAX (702) 477-0088

PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE, SUITE 600
LAS VEGAS, NEVADA 89101-3941
PHONE (702) 363-6000 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**

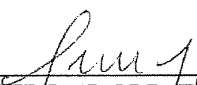
14 TO: PLAINTIFFS GIANN BIANCHI & DARA DELPRIORE

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 In Chambers .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

PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE, SUITE 600
LAS VEGAS, NEVADA 89101-8941
PHONE (702) 383-6000 FAX (702) 477-0088

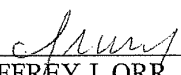
defend this action and allow it to proceed as to the insurance proceeds of the GEICO automobile insurance policy. NRCP 25(a)(1) states that the court may order substitution of the proper parties upon the death of a party. Because Defendant McNamee has passed, the Special Administrator of his estate is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

III. CONCLUSION

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

DATED this 14 day of December, 2017

PYATT SILVESTRI


JEFFREY J. ORR, ESQ.
Nevada Bar No. 7854
PYATT SILVESTRI
701 Bridger Ave., Suite 600
Las Vegas, Nevada 89101
Attorney for Defendant
James McNamee

PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGE AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-8941
PHONE (702) 383-6000 FAX (702) 477-0088

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.
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., Suite 400
Las Vegas, NV 89118
Attorney for Plaintiffs

Robert McNamee
2472 230th Street
Mahnomon, 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**

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

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)
21)
22)
23)
24)
25)
26)
27)
28)

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 12th 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

PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-8941
PHONE (702) 383-6000 FAX (702) 477-0088

PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-8941
PHONE (702) 383-6000 FAX (702) 477-0088

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 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

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 15th day of ^{NOV.} ~~October~~ 2017.

Vincent Ochoa
DISTRICT COURT JUDGE *sa*

9 Submitted by:

10
11
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
21 Attorney for Petitioner,
22 Special Administrator Susan Clokey
23
24
25
26
27
28

PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-8941
PHONE (702) 383-6000 FAX (702) 477-0088

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) 477-0086

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of Pyatt Silvestri and that on the 16th 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 230th Street
Mahnomen, MN 56557-9034


An Employee of PYATT SILVESTRI

Exhibit B

PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-8941
PHONE (702) 383-6000 FAX (702) 477-0088

1 JEFFREY J. ORR, ESQ.
Nevada Bar No. 7854
2 PYATT SILVESTRI
701 Bridger Avenue, Suite 600
3 Las Vegas, Nevada 89101
T. (702) 383-6000
4 F. (702) 477-0088
jorr@pyattsilvestri.com

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

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

10 GIANN BIANCHI, individually, DARA
11 DELPRIORE, individually

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

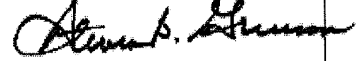
12 Plaintiffs

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.
17
18
19
20
21
22
23
24
25
26
27
28

Exhibit C



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
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
14 chenderson@glenlerner.com

15 Lee D. Roberts, Esq.
16 Nevada Bar No. 8877
17 WEINBERG WHEELER HUDGINS GUNN & DIAL
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 Plaintiffs Giann 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

**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 Giann 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 Giann 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.

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27

28

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
14 Las Vegas, NV 89147
15 (702) 877-1500

16 WEINBERG WHEELER HUDGINS
17 GUNN & DIAL

18 Lee D. Roberts, Esq.,
19 Nevada Bar No. 8877
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 3rd 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 230th 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**
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
14 chenderson@glenlerner.com

15 Lee D. Roberts, Esq.
16 Nevada Bar No. 8877
17 **WEINBERG WHEELER HUDGINS GUNN & DIAL**
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 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:

///

///

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
Corey M. Eschweiler, Esq.
Nevada Bar No. 6635
Craig A. Henderson, Esq.
Nevada Bar No. 10077
4795 South Durango Drive
Las Vegas, NV 89147
(702) 877-1500

WEINBERG WHEELER HUDGINS
GUNN & DIAL

Lee D. Roberts, Esq.,
Nevada Bar No. 8877
6385 South Rainbow Blvd., Suite 400
Las Vegas, NV 89118
*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 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 Giann Bianchi. Petitioner Dara
12 DelPriore occupied the front passenger seat of the Nissan. Both Giann 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 Giann and Dara's claims within decedent's policy limits, despite knowing Giann 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, Giann 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, Giann 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. Giann 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 **C. GEICO admits Petitioners' damages exceed decedent's liability insurance**
17 **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.¹
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 ¹ 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 Gianni 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.
Such conduct gives rise to a breach of the covenant of good faith and fair dealing.
28 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).² 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 ² “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.³

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 ³ 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.

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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
4795 South Durango Drive
Las Vegas, NV 89147
(702) 877-1500
Attorneys for Plaintiffs

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

4
5
6
7
8

9
10
11

12
13
14
15
16
17
18

19
20
21
22
23
24
25
26
27
28

1 Corey M. Eschweiler, Esq.
2 Nevada Bar No. 6635
3 Craig A. Henderson, Esq.
4 Nevada Bar No. 10077
5 Joshua L. Benson, Esq.
6 Nevada Bar No. 10514
7 GLEN LERNER INJURY ATTORNEYS
8 4795 South Durango Drive
9 Las Vegas, Nevada 89147
10 Telephone: (702) 877-1500
11 Facsimile: (702) 933-7043
12 E-mail: ceschweiler@glenlerner.com
13 chenderson@glenlerner.com

9 Lee D. Roberts, Esq.
10 Nevada Bar No. 8877
11 WEINBERG WHEELER HUDGINS GUNN & DIAL
12 6385 South Rainbow Blvd., Suite 400
13 Las Vegas, NV 89118
14 Telephone: (702) 938-3838
15 Facsimile: (702) 938-3864
16 Email: LRoberts@wwhgd.com

17 *Attorneys for Petitioners Gianni Bianchi*
18 *and Dara Del Priore*

15 EIGHTH JUDICIAL DISTRICT COURT

16 CLARK COUNTY, NEVADA

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

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

LISTING OF ALL HEIRS

19
20
21
22
23
24 ///
25 ///
26 ///
27 ///
28 ///

1	Name	Relationship to Decedent	Age	Address
2	Robert McNamee	Father	Unknown	2472 230 th St. Mahnomen, MN 56557-9034
3				
4	Other heirs unknown			
5				

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
 4795 South Durango Drive
 Las Vegas, NV 89147
 (702) 877-1500

WEINBERG WHEELER HUDGINS
 GUNN & DIAL

Lee D. Roberts, Esq.,
 Nevada Bar No. 8877
 6385 South Rainbow Blvd., Suite 400
 Las Vegas, NV 89118
*Attorneys for Petitioners Gianni Bianchi
 and Dara Del Priore*

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
4795 South Durango Drive
5 Las Vegas, Nevada 89147
Telephone: (702) 877-1500
6 Facsimile: (702) 933-7043
E-mail: ceschweiler@glenlerner.com
7 chenderson@glenlerner.com

8
9 Lee D. Roberts, Esq.
Nevada Bar No. 8877
WEINBERG WHEELER HUDGINS GUNN & DIAL
10 6385 South Rainbow Blvd., Suite 400
Las Vegas, NV 89118
11 Telephone: (702) 938-3838
Facsimile: (702) 938-3864
12 Email: LRoberts@wwhgd.com

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

15 EIGHTH JUDICIAL DISTRICT COURT
16 CLARK COUNTY, NEVADA

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

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

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

23 ///

24 ///

25 ///

26 ///

27

28

1 Notice is hereby given that Petitioners Giann 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

14
15 By: /s/ Craig A. Henderson
16 Corey M. Eschweiler, Esq.
17 Nevada Bar No. 6635
18 Craig A. Henderson, Esq.
19 Nevada Bar No. 10077
20 4795 South Durango Drive
21 Las Vegas, NV 89147
22 (702) 877-1500

23 WEINBERG WHEELER HUDGINS
24 GUNN & DIAL

25 Lee D. Roberts, Esq.,
26 Nevada Bar No. 8877
27 6385 South Rainbow Blvd., Suite 400
28 Las Vegas, NV 89118
*Attorneys for Petitioners Giann Bianchi
and Dara Del Priore*

Exhibit D

PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-8941
PHONE (702) 383-6000 FAX (702) 477-0088

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

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.

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).

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.

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

PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-8941
PHONE (702) 383-6000 FAX (702) 477-0088

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).

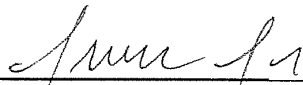
4 In this case, the only asset available to satisfy any judgment is the liability insurance policy.
5 Although Plaintiffs claim that there is a bad faith claim, such a claim is speculative at this time as
6 there has not been any determination as to the amount of Plaintiffs' damages.

7
8 **V.
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

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 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 230th Street
Mahnomen, MN 56557-9034


An Employee of PYATT SILVESTRI

Exhibit A



1 JEFFREY J. ORR, ESQ.
Nevada Bar No. 7854
2 PYATT SILVESTRI
701 Bridger Avenue, Suite 600
3 Las Vegas, Nevada 89101
T. (702) 383-6000
4 F. (702) 477-0088
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

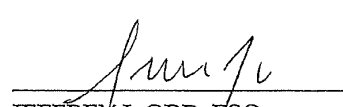
14 Defendants.

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

PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-4941
PHONE (702) 383-6000 FAX (702) 477-0088

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 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



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
14 chenderson@glenlerner.com

15 Lee D. Roberts, Esq.
16 Nevada Bar No. 8877
17 **WEINBERG WHEELER HUDGINS GUNN & DIAL**
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 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:

29 ///

30 ///

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
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 12th 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

PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-4941
PHONE (702) 383-6000 FAX (702) 477-0088

PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-8941
PHONE (702) 383-6000 FAX (702) 477-0088

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.

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-8941
PHONE (702) 383-6000 FAX (702) 477-0088

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 15th day of NOV. 2017.

Vincent Ochoa
DISTRICT COURT JUDGE *sa*

9 Submitted by:

10
11
12 *Jeffrey J. Orr*
13
14 Jeffrey J. Orr, Esq.
15 Nevada Bar No. 7854
PYATT SILVESTRI
16 701 Bridger Avenue, Suite 600
Las Vegas, NV 89101
17 T. (702) 383-6000
jorr@pyattsilvestri.com
18 Attorney for Petitioner,
Special Administrator Susan Clokey

19 ///

20 ///

21 ///

22 ///

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
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-5541
PHONE (702) 383-6000 FAX (702) 477-0068

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of Pyatt Silvestri and that on the 16th 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 230th Street
Mahnomen, MN 56557-9034


An Employee of PYATT SILVESTRI

Exhibit E

[Skip to Main Content](#) [Logout](#) [My Account](#) [Search Menu](#) [New District Civil/Criminal Search](#) [Refine Search](#) [Close](#)

Location : District Court Civil/Criminal [Help](#)

REGISTER OF ACTIONS

CASE NO. A-13-691887-C

Giann Bianchi, Plaintiff(s) vs. 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
Defendant Estate of James Mcnamee	
Defendant McNamee, James	James P.C. Silvestri Retained 7023836000(W)
Plaintiff Bianchi, Giann	D Lee Roberts, Jr. Retained 702-938-3838(W)
Plaintiff Delpriore, Dara	D Lee Roberts, Jr. Retained 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

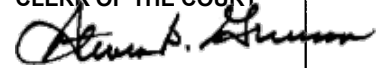
- Defendant James McNamee's Motion to Substitute Special Administrator in Place and Stead of Defendant James McNamee and to Amend Caption came before the Court on the January 22, 2018, Chamber Calendar. Having reviewed the Motion, its Opposition, and Reply thereto, COURT ORDERED, this Motion is DENIED. 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](#)

PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-8941
PHONE (702) 383-6000 Fax (702) 477-0088

ORIGINAL

Electronically Filed
3/30/2018 2:18 PM
Steven D. Grierson
CLERK OF THE COURT



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

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

Hearing Date: April 10, 2018
Hearing Time: 8:00 a.m.

DEFENDANT JAMES MCNAMEE'S MOTION TO DISMISS
ON ORDER SHORTENING TIME

COMES NOW, Defendant James McNamee, by and through his attorneys of record, Jeffrey J. Orr, Esq. of Pyatt Silvestri and hereby submits his Motion to Dismiss Plaintiffs' Complaint on Order Shortening Time. Because this matter is set for trial on an April 16, 2018 trial stack, Defendant requests that this Motion should be heard on a shortened time on or before the date currently set for trial.

///

///

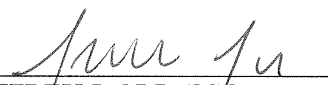
///

PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-9941
PHONE (702) 383-6000 FAX (702) 477-0088

1 This Motion is made and based upon NRCP 25(a)(1), the declaration of Jeffrey J. Orr, Esq.,
2 the papers and pleadings on file herein, as well as the Memorandum of Points and Authorities and
3 any oral argument at the time of hearing of this matter.

4 DATED this 29 day of March, 2018.

6 PYATT SILVESTRI

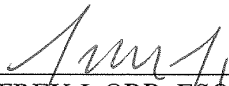
7
8 
9 JEFFREY J. ORR, ESQ.
10 Nevada Bar No. 7854
11 701 Bridger Avenue, Suite 600
12 Las Vegas, Nevada 89101
13 Attorneys for Defendant
14 JAMES MCNAMEE

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

16 Through this Motion, Defendant seeks to dismiss Plaintiffs' lawsuit for failure to comply with
17 NRCP 25(a)(1). Because trial is set on an April 16, 2018 trial stack, Defendant requests that this
18 Motion be heard on a shortened time on or before the date currently set for trial.

19 DATED this 29 day of March, 2018.

20 PYATT SILVESTRI

21 
22 JEFFREY J. ORR, ESQ.
23 Nevada Bar No. 7854
24 701 Bridger Avenue, Suite 600
25 Las Vegas, Nevada 89101
26 Attorneys for Defendant
27 JAMES MCNAMEE

28 ///

///

///

///

PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE, SUITE 600
LAS VEGAS, NEVADA 89101-8941
PHONE (702) 383-6000 FAX (702) 477-0088

**AFFIDAVIT OF JEFFREY J. ORR, ESQ. IN SUPPORT OF DEFENDANT JAMES
MCNAMEE'S MOTION TO DISMISS ON ORDER SHORTENING TIME**

I Jeffrey J. Orr, Esq, declare under the penalties of perjury of the laws of the State of Nevada, the following:

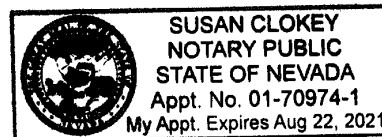
1. I am an attorney at the law firm Pyatt Silvestri and am counsel for Defendant James McNamee.
2. That an order denying Defendant James McNamee's Motion to Substitute Special Administrator in Place and Stead of Defendant James Allen McNamee and to Amend Caption was recently filed on March 27, 2018. (See Exhibit A).
3. That the instant Motion is being brought in a timely fashion as the Motion denying Defendant's Motion to substitute, Exhibit A, was only recently filed.
4. That Defendant requests that this Motion be heard on a Shortened Time period as trial is set for a trial stack beginning on April 16, 2018.
5. Defendant requests that the instant Motion be heard on or before April 16, 2018.
6. Defendant makes this request in good faith.

FURTHER AFFIANT SAYETH NOT.


JEFFREY J. ORR, ESQ.

SUBSCRIBED AND SWORN TO before
me this 29th day of March, 2018.


NOTARY PUBLIC



///

///

///


PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-8941
PHONE (702) 383-6000 FAX (702) 477-0088

ORDER SHORTENING TIME

Based on the declaration of Jeffrey J. Orr, Esq. and Defendant's Application for Order Shortening Time, and good cause appearing, Defendant James McNamee's Motion to Dismiss will be heard before the above-captioned Court on the 10th day of April 2018 at 9:00 am or as soon thereafter as counsel may be heard.


DISTRICT COURT JUDGE

Submitted By:


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

I.

FACTUAL BACKGROUND

This matter is a negligence action by Plaintiffs Giann 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. A Suggestion of Death was filed in this matter on September 20, 2017. Pursuant to NRCP 25(a)(1), the ninety (90) day deadline to file a Motion to substitute the deceased Defendant was December 19, 2017. To date, Plaintiffs have not filed any Motion to substitute the deceased Defendant.

Although Defendant filed a Motion to Substitute the Special Administrator in Place and Stead of Defendant James McNamee, the Court denied that Motion. The minutes state that the Motion was

1 denied and that the Court requested “proposed names to the to the Court for consideration as to who
2 they want to serve as Administrator of the Estate.” (See Court Minutes for Defendant’s Motion to
3 Substitute Special Administrator in Place and Stead of Defendant James McNamee and to Amend
4 Caption, in chambers, attached as Exhibit B). Neither the Court Minutes nor the order state that any
5 new party is substituted in place and stead of deceased Defendant James McNamee. (See Exhibits A
6 and B). To date, there has not been a substitution of the Defendant.

8 II.

9 NRCP 25(A)(1) MANDATES DISMISSAL OF THIS CASE

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

12 “If a party dies and the claim is not thereby extinguished, the Court may order
13 substitution of the proper parties. The Motion for substitution may be made by
14 any party or by the successors or representatives of the deceased party and,
15 together with the notice of hearing, shall be served on the parties as provided
16 in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the
17 service of a summons. **Unless the Motion for substitution is made not later**
18 **than ninety (90) days after the death is suggested upon the record** by service
19 of a statement of the fact of the death as provided herein for the service of the
20 Motion, **the action shall be dismissed as to the deceased party.**” NRCP 25(a)(1)
(emphasis added)

21 This statute mandates dismissal of the action unless a Motion for Substitution is submitted
22 within ninety (90) days of the Suggestion of Death. Plaintiff has not filed any such Motion. Notably,
23 the statute uses the phrase “shall be dismissed” indicating that the statute is not discretionary but
24 mandates dismissal.

25 In *Wharton v. City of Mesquite*, 113 Nev. 796, 942 P.2d 155 (1997) Plaintiff died during the
26 pendency of the litigation. A Suggestion of Death was filed. One hundred and twenty-five (125)
27 days after the Suggestion of Death was filed, Plaintiff’s counsel filed a Motion to Substitute
28 Wharton’s surviving spouse as his personal representative. The Trial Court denied Defendant’s
Motion to Dismiss and granted Plaintiff’s Motion to Substitute.

1 The Nevada Supreme Court reversed and held that it was error to deny Defendant's Motion
2 to Dismiss because NRCP 25(a)(1) mandates dismissal unless the Motion to Substitute is filed within
3 ninety (90) days of the Suggestion of Death. The Court held, "Although a trial on the merits is favored
4 over a mechanical application of a ninety-day rule, this Court has strictly interpreted the language of
5 NRCP 25 (a)(1)." *Wharton v. City of Mesquite*, 113 Nev. 796, 798, 942 P.2d 155 (1997) (citing *Barto*
6 *v. Weishaar*, 101 Nev. 27, 692 P.2d 498 (1985). "The rule is quite clear that unless the Motion for
7 Substitution is made within ninety (90) days after the death is suggested upon the record, the action
8 'shall be dismissed as to the deceased party.' The district judge was required to dismiss the deceased
9 party." *Id.* at 798. "In the instant case, Wharton's counsel failed to comply with NRCP 25(a)(1) by
10 not moving the Court to substitute Wharton's surviving spouse as his personal representative within
11 the 90-day period. Therefore, we conclude that the District Court erred in granting Wharton's
12 counsel's untimely Motion for Substitution of parties and denying the Defendant's Motions to
13 Dismiss the action." *Id.* at 798.

14 The Suggestion of Death of James McNamee was filed on September 20, 2017. (See
15 Suggestion of Death of James McNamee, attached as Exhibit C). As such, any Motions to substitute
16 Defendant James McNamee as Defendant must have been filed on or before December 19, 2017.
17 Because this was not done, pursuant to NRCP 25(a)(1) and *Wharton v. City of Mesquite*, 113 Nev.
18 796, 798, 942 P.2d 155 (1997), the Court does not have discretion and must dismiss this action.

22 III.


23 CONCLUSION

24 *Wharton v. City of Mesquite*, 113 Nev. 796, 798, 942 P.2d 155 (1997) is clear. It states that
25 the Court does not have discretion and must dismiss an action if a Motion to Substitute a deceased
26 party is not filed within ninety (90) days of the Suggestion of Death. In this case, it has been over
27 one hundred eighty (180) days since Defendant James McNamee's Suggestion of Death was filed and
28

1 served upon the parties. Plaintiff has not filed a Motion to Substitute. As such, pursuant to *Wharton*
2 and NRCP 25(a)(1), this Court must dismiss this action.

3 DATED this 29 day of March, 2018

4 **PYATT SILVESTRI**

5 
6 JEFFREY J. ORR, ESQ.

7 Nevada Bar No. 7854

8 PYATT SILVESTRI

9 701 Bridger Ave., Suite 600

10 Las Vegas, Nevada 89101

11 Attorney for Defendant

12 JAMES MCNAMEE

13 PYATT SILVESTRI
14 A PROFESSIONAL LAW CORPORATION
15 701 BRIDGER AVENUE - SUITE 600
16 LAS VEGAS, NEVADA 89101-8941
17 PHONE (702) 383-6000 FAX (702) 477-0088
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Pyatt Silvestri and that on the 30th day of March, 2018, I caused the above and foregoing document **DEFENDANT JAMES MCNAMEE'S MOTION TO DISMISS ON ORDER SHORTENING TIME**, 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.
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


An Employee of PYATT SILVESTRI

PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-8941
PHONE (702) 383-6000 FAX (702) 477-0088

Exhibit A



1 **ORDR**

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 J. LERNER & ASSOCIATES
9 4795 South Durango Drive
10 Las Vegas, Nevada 89147
11 Telephone: (702) 877-1500
12 Facsimile: (702) 933-7043
13 ceschweiler@glenlerner.com
14 chenderson@glenlerner.com
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.

3

4

5

6



DISTRICT COURT JUDGE
DOUGLAS E. SMITH

7

8 Respectfully submitted by:

9 GLEN J. LERNER & ASSOCIATES

10

By: 
COREY M. ESCHWEILER, ESQ.
CRAIG A. HENDERSON, ESQ,
4795 South Durango Drive
Las Vegas, Nevada 89147
Attorneys for Plaintiffs

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

Exhibit B

[Skip to Main Content](#) [Logout My Account](#) [Search Menu](#) [New District Civil/Criminal](#)
[Search Refine Search Close](#)

Location : District Court Civil/Criminal [Help](#)

REGISTER OF ACTIONS

CASE No. A-13-691887-C

Giann Bianchi, Plaintiff(s) vs. James McNamee, Defendant(s)

§
§
§
§
§
§

Case Type: **Negligence - Auto**

Date Filed: **11/19/2013**

Location: **Department 8**

Cross-Reference Case **A691887**

Number:

PARTY INFORMATION

		Lead Attorneys
Defendant	Estate of James McNamee	
Defendant	McNamee, James	James P.C. Silvestri <i>Retained</i> 7023836000(W)
Plaintiff	Bianchi, Giann	D Lee Roberts, Jr. <i>Retained</i> 702-938-3838(W)
Plaintiff	Delpriore, Dara	D Lee Roberts, Jr. <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](#)

Exhibit C



1 JEFFREY J. ORR, ESQ.
Nevada Bar No. 7854
2 PYATT SILVESTRI
701 Bridger Avenue, Suite 600
3 Las Vegas, Nevada 89101
T. (702) 383-6000
4 F. (702) 477-0088
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.

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

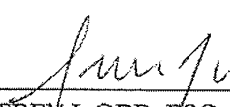
14 Defendants.

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


PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRIDGER AVENUE, SUITE 600
LAS VEGAS, NEVADA 89101-8941
PHONE (702) 383-6000 FAX (702) 477-0088

PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION
701 BRUNGER AVENUE SUITE 600
LAS VEGAS, NEVADA 89101-8941
PHONE (702) 383-6000 FAX (702) 477-0088

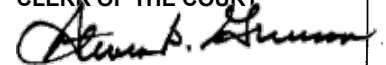
CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of Pyatt Silvestri and that on the 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 **OPPS**

2 Corey M. Eschweiler, Esq.
3 Nevada Bar No. 6635
4 Craig A. Henderson, Esq.
5 Nevada Bar No. 10077
6 GLEN LERNER INJURY ATTORNEYS
7 4795 South Durango Drive
8 Las Vegas, Nevada 89147
9 Telephone: (702) 877-1500
10 Facsimile: (702) 933-7043
11 ceschweiler@glenlerner.com
12 chenderson@glenlerner.com

13 Lee D. Roberts, Esq.
14 Nevada Bar No. 8877
15 WEINBERG WHEELER HUDGINS GUNN & DIAL
16 6385 South Rainbow Blvd., Suite 400
17 Las Vegas, NV 89118
18 Telephone: (702) 938-3838
19 Facsimile: (702) 938-3864
20 Email: LRoberts@wwhgd.com

21 Attorneys for Plaintiffs

22 **DISTRICT COURT**

23 **CLARK COUNTY, NEVADA**

24 GIANN BIANCHI, individually,
25 DARA DELPRIORE, individually,

26 Plaintiff,

27 vs.

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

Defendants.

CASE NO.: A691887
DEPT NO.: VIII

PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS;
AND
PLAINTIFFS' LIMITED OPPOSITION
TO MOTION TO AMEND ORDER

Date of Hearing: April 10, 2018
Time of Hearing: 8:00 a.m.

Plaintiffs Gianni Bianchi and Dara Delpriore files this Opposition to Defendant's separately filed Motion to Dismiss on Order Shortening Time and this limited opposition to Defendant's Motion to Amend Order on Order Shortening Time. Because Defendant's two motions are generally premised on the same legal and factual theories and because the issues and argument in each motion contain significant overlap, Plaintiff submits this consolidated brief in response to both

1 of Defendant's motions.¹ This consolidated Opposition is based on the following memorandum of
2 points and authorities, the papers and pleadings on file with this Court, and the oral argument of the
3 parties.

4 GLEN LERNER INJURY ATTORNEYS

5
6 By: /s/ Craig A. Henderson
Corey M. Eschweiler
7 Nevada Bar No. 6635
Craig A. Henderson, Esq.
8 Nevada Bar No. 10077
4795 South Durango Drive
9 Las Vegas, NV 89147
(702) 877-1500
10 Attorneys for Plaintiff
11

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13
14 **I. INTRODUCTION**

15 Defendant has filed two separate motions based on the contention the court erred when it
16 appointed Fred Waid as the general administrator of McNamee's estate, yet denied Defendant's
17 timely NRCP 25(a)(1) motion to substitute the special administrator as party defendant. Each of the
18 motions is without merit because there was compliance with the relevant rules, or, in the alternative,
19 any delay was caused by Defendant and its appointment of a firm employee as the special
20 administrator: an actual conflict of interest.

21 Defendant first contends there was no compliance with NRCP 25(a)(1), despite that
22 Defendant admits filing a motion to substitute under NRCP25(a)(1) on December 14, 2017. This,
23 85 days after Defendant served a suggestion of Defendant's death on the record and well within the
24 90 day deadline. Even so, Nevada Supreme Court jurisprudence is clear the 90 day deadline is not
25 triggered "when a suggestion of death emanating from the deceased party fails to identify a
26 successor or personal representative." *Moseley v. Dist. Court*, 124 Nev. 654, 660, 188 P.3d 1136,
27

28 ¹ Defendant withdrew its Motion to Continue trial on April 4, 2018.

1 1141 (2008). Defendant's suggestion of death did not identify Defendant's successors or
2 representatives, and the 90 day deadline has not been triggered.

3 Even if the 90 day deadline was implicated, the deadline may be extended for excusable
4 neglect. In this case, Plaintiffs requested on January 3, 2018, that this Court appoint a general
5 administrator for McNamee's estate in response to Defendant's motion to substitute the special
6 administrator. Defendant opposed Plaintiffs' request for a general administrator, and the court did
7 not issue a ruling until signing its order on March 19, 2018, appointing Mr. Waid. Plaintiffs,
8 therefore, could not have sought substitution until there was a representative of the Estate to
9 substitute, and that did not occur until March 19, 2018, at the earliest. This, all because Defendant
10 sought to improperly appoint a Special Administrator with an actual conflict of interest while
11 opposing Plaintiffs' request for a general administrator. In short, any delay in complying with the
12 90 day deadline is not attributable to Plaintiffs and should be excused under NRCP 6(b)(2).

13 Defendant also contends the court's March 27, 2018 order, appointing a general
14 administrator must be amended. As an initial matter, Plaintiffs do not believe the Court's order
15 requires amendment and that the Court's order properly effectuates the appointment of the general
16 administrator. As a matter of judicial efficiency, however, and to avoid further delay by the filing of
17 another motion to substitute, Plaintiffs are amenable to amending the order to reflect that the motion
18 to substitute was granted in part to appoint Fred Waid as administrator and substitute him as the
19 party defendant, and denied in part to substitute the Special Administrator, Susan Clokey. This will
20 permit the action to proceed to trial as scheduled without further delay.

21 **II. RELEVANT FACTUAL BACKGROUND**

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

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

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

2 At the time of the July 17, 2013, collision, Decedent was covered by an automobile liability
3 insurance policy issued by GEICO, policy number 4180457162. *See* Petition for Letters of Special
4 Administration, at 2 ¶ 6, filed with the probate Court on Sep. 20, 2017. The GEICO policy provided
5 Decedent with liability insurance coverage of \$30,000 per person up to \$60,000 per occurrence. *Id.*
6 Since the collision on July, 2013, Decedent's automobile liability insurer, GEICO, has repeatedly
7 refused to settle Giann and Dara's claims within decedent's policy limits, despite knowing Giann
8 and Dara's damages far exceed the \$30,000 per person liability insurance coverage. In fact, by July,
9 2015, Giann's total damages had increased to \$2,850,136.97, including \$356,306 in medical special
10 damages alone. Dara's total damages had increased to \$2,481,097, including \$99,280 in medical
11 special damages. On July 13, 2015, decedent offered to settle Giann and Dara's claims, each for an
12 amount in excess of McNamee's automobile liability insurance policy limit. Plaintiffs rejected
13 these offers that did not even compensate them for their medical special damages. The two offers
14 are critical, however, because through the offers, GEICO admitted the value of Giann and Dara's
15 claims exceed decedent's \$60,000 of insurance coverage. Put differently, GEICO admitted
16 McNamee, and now his Estate, will be exposed to excess liability as a result of GEICO's bad faith
17 refusal to compromise Plaintiffs' claims for the policy limits.

18 **C. Decedent died before Plaintiffs claims were to proceed to trial.**

19 On September 20, 2017, Decedent's counsel, Pyatt Silvestri, served a Suggestion of Death
20 on the Record indicating McNamee had passed on August 12, 2017. *See* Suggestion of Death Upon
21 the Record, on file with this Court. Notably, Defendant's suggestion of death did not identify any of
22 McNamee's successors. *Id.* Defendant's counsel served the suggestion five days before Giann and
23 Dara's negligence claims against decedent were scheduled to proceed to trial on September 25,
24 2017. Thereafter the trial was continued to April 16, 2018, and based on the Court's statements
25 during the April 3, 2018, calendar call, trial is likely to be continued to the Court's next jury trial
26 stack.

27 ///

28 ///

1 **D. GEICO sought appointment of a special administrator.**

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

9 **E. Plaintiffs sought appointment of a general administrator.**

10 To the contrary, based on GEICO's failure to settle Giann and Dara's claims within
11 decedent's policy limits, GEICO, admittedly, has exposed the Estate of James Allen McNamee to
12 liability in excess of decedent's \$60,000 liability insurance policy. In other words, the Estate of
13 James Allen McNamee has causes of action against GEICO for, *inter alia*, breach of contract and
14 tortious breach of the implied covenant of good faith and fair dealing. This was confirmed on July
15 13, 2015, when GEICO offered to settle each Plaintiff's claims for amounts in excess of
16 McNamee's automobile liability insurance coverage. As important, there exists, and has existed for
17 some time, an actual conflict of interest between GEICO and the Estate of James Allen McNamee,
18 both of whom are currently represented by the same law firm, Pyatt Silvestri. This, because:

19 The insured's remedy to protect himself from an excess judgment is to assign to
20 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.

21 *Safeco Ins. Co. of Am. v. Superior Court*, 71 Cal. App. 4th 782, 788-89, 84 Cal. Rptr. 2d 43, 46
22 (1999). It is a conflict of interest, however, for Pyatt Silverstri – who represents GEICO and, now,
23 McNamee's Estate, to advise the Estate of its bad faith rights against Pyatt Silvestri's other client,
24 GEICO. *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d 338 (Sep. 24,
25 2015) ("Nevada is a dual-representation state, [and] counsel may not represent both the insurer and
26 the insured when their interests conflict and no special exception applies").
27
28

1 **F. Defendant filed a motion to substitute within 90 days of the suggestion of death.**

2 The probate court, having not been advised of these facts, granted Pyatt Silvestri's petition to
3 appoint Pyatt Silvestri employee Susan Clokey as Special Administrator for the Estate. *See* Nov.
4 16, 2017, Order Granting Petition for Special Letters of Administration, on file with this Court. On
5 December 14, 2017, Defendant filed a Motion to Substitute Special Administrator in the Place and
6 Stead of Defendant James McNamee. *See* Motion to Substitute Special Administrator in the Place
7 and Stead of Defendant James McNamee, on file with this Court. This, 85 days after Defendant's
8 counsel filed and served a suggestion of Defendant's death upon the record.

9 **G. Plaintiffs sought appointment of a general administrator.**

10 On January 3, 2018, Plaintiffs filed a Petition with the Probate Court seeking to have a
11 general administrator appointed for the McNamee Estate, and requesting that independent, *Cumis*
12 counsel be appointed to advise the Estate of its rights against GEICO. *See* Jan. 3, 2018, Petition for
13 Issuance of Letters of General Administration and For Appointment of *Cumis* Counsel for the Estate
14 of James Allen McNamee, on file with the Probate Court. Also on January 3, 2018, Plaintiffs filed
15 an opposition to Defendant's Motion to substitute the special administrator explaining that a general
16 administrator was required, not a special administrator. *See* Plaintiffs' Opposition to Motion to
17 Substitute Special Administrator in the Place and Stead of Defendant James McNamee, on file with
18 this Court. Although Defendant contends that neither party requested appointment of general
19 administrator as part of the proceedings regarding Defendant's Motion to Substitute Special
20 Administrator and To Amend Caption, this is patently incorrect. To the contrary, Plaintiff's
21 Opposition to the Motion to Substitute Special Administrator in the Place and Stead of Defendant
22 James McNamee and To Amend Caption specifically stated that "because the decedent's Estate
23 does possess assets beyond the liability insurance policy, the Estate must be generally
24 administrated." *See* Opposition to Motion to Substitute Special Administrator in the Place and
25 Stead of Defendant James McNamee, on file with this Court. On January 22, 2018, this Court
26 ordered the parties "to submit three (3) proposed names to the Court for consideration as to who
27 they want to serve as Administrator of the Estate." *See* Jan. 22, 2018, Minute Order, on file with
28 this Court.

1 **H. Plaintiffs sought to have *Cumis* counsel appointed for the Estate.**

2 On January 24, 2018, GEICO purported to make a special appearance in the probate court
3 action to oppose Plaintiffs' motion for appointment of *Cumis* counsel for the Estate. *See* Jan. 24,
4 2018, Opposition to Petition for Appointment of *Cumis* Counsel for the Estate of James Allen
5 McNamee, on file with the Probate Court. In the opposition, GEICO argued that the Probate Court
6 "does not have jurisdiction to appoint *Cumis* counsel in pending litigation. That authority resides
7 solely within the jurisdiction of the trial court which as inherent power to govern and control the
8 members of the bar appearing before it." *See* Opposition to Petition for Appointment of *Cumis*
9 Counsel, at 2:7-9; 5:10-12 (emphasis added). Consequently, Plaintiffs withdrew the portion of their
10 Probate Court Petition seeking the appointment of *Cumis* counsel for the Estate of James Allen
11 McNamee and re-filed the request with this Court on February 9, 2018. The Court also took up the
12 issue of appointment of a general administrator. Plaintiffs were prepared with two names to provide
13 to the court. Defendants were not prepared despite the minute order and despite calls from
14 chambers asking for names from each party. Plaintiffs' motion for appointment of *Cumis* counsel
15 was heard by this Court on February 13, 2018. The Court took the motion under advisement and
16 requested the parties submit proposed findings of fact and conclusions of law. On March 12, 2018,
17 the court denied Plaintiffs' motion seeking appointment of *Cumis* counsel and the court adopted
18 Defendant's proposed findings of fact and conclusion of law. *See* Order Denying Motion for
19 Appointment of *Cumis* Counsel for the Estate of James Allen McNamee, on file with this Court.

20 **I. The court appointed a general administrator.**

21 On March 27, 2018, the court issued an order regarding Defendant's Motion to Substitute
22 Special Administrator in the Place and Stead of Defendant James McNamee. *See* Order Denying
23 Defendant James McNamee's Motion to Substitute Special Administrator in Place and Stead of
24 Defendant James Allen McNamee and to Amend Caption, on file with this Court. The court's order
25 states:

26 it is ORDERED, ADJUDGED, and DECREED that Defendant James Allen
27 McNamee's Motion to Substitute Special Administrator in Place and Stead of
28 Defendant James Allen McNamee and to Amend Caption is Denied.

1 The court directed the parties to submit three (3) proposed names to the Court for
2 consideration as to who they want to serve as Administrator of the Estate. The
3 Court has reviewed those submissions and further ORDERS that Fred Wade [sic]
is hereby named as the General Administrator of the Estate of James Allen
McNamee.

4 See Order Denying Defendant James Allen McNamee's Motion to Substitute Special Administrator
5 in Place and Stead of Defendant James Allen McNamee and to Amend Caption, on file with this
6 Court. Defendant now seeks to amend this order and obtain dismissal of the action entirely alleging
7 non-compliance with NRCP 25.

8 III. ARGUMENT

9 A. There was compliance with NRCP 25(a)(1) and there is no basis for dismissal.

10 Defendant contends the entire action should be dismissed under NRCP 25(a)(1) because
11 "Plaintiffs have not filed any motion to substitute the deceased Defendant." Mot. to Dismiss, at 2.
12 To the contrary, Defendant's September 20, 2017, notice of suggestion of death on the record did
13 not identify McNamee's successors. As the Nevada Supreme Court has explained:

14 the 90-day period in which to seek substitution was not triggered because
15 allowing the 90-day period to run when a suggestion of death emanating from the
16 deceased party fails to identify a successor or personal representative would
17 create a "tactical maneuver" that would burden the plaintiff with the duty of
locating a representative for the deceased defendant's estate or have an otherwise
meritorious action dismissed.

18 *Moseley v. Eighth Judicial Dist. Court of Nev.*, 124 Nev. 654, 660, 188 P.3d 1136, 1141 (2008).
19 Because Defendant's suggestion of death did not identify a successor, the 90 day period has never
20 commenced pursuant to *Moseley*. Even if the deadline had begun to run following Defendant's
21 September 20, 2017, suggestion of death, Defendant admits filing a motion to substitute the special
22 administrator on December 14, 2017, only 85 days later. The plain language of NRCP 25(a)(1) does
23 not require the motion be granted or even heard within 90 days, but only that it be "filed" within 90
24 days by "any party." NRCP 25(a)(1) (emphasis added). Defendant's December 14, 2017, motion,
25 therefore, complied with the 90 day deadline, if the deadline was ever triggered.

26 ///

27 ///

1 **B. Any delay was the result of excusable neglect.**

2 Assuming for the sake of argument there is an issue with the 90-day deadline, the Nevada
3 Supreme Court has also held the deadline may be extended for excusable neglect under NRCP 6(b):

4 Under federal Rule 6(b), a party may obtain an extension of time to act under a
5 particular rule when the time to act has expired and the party seeking an extension
6 demonstrates good faith, a reasonable basis for not complying within the specified
7 period, and an absence of prejudice to the nonmoving party. The key factor in the
8 federal decisions is whether the plaintiff asserted a reasonable basis for not
9 complying. Thus, a delay in taking the necessary action, such as moving for
10 substitution within the 90-day period, may be excused if it is shown that the delay
11 was reasonable.

12 *Moseley*, 124 Nev. at 665, 188 P.3d at 1144. Here, Plaintiff sought to have a general administrator
13 appointed because McNamee's estate possesses assets beyond the liability insurance policy, and
14 Defendant's suggestion of death did not identify any of McNamee's successors to serve as the
15 administrator. Most importantly, Plaintiffs sought a general administrator because the Special
16 Administrator was an employee of Defendant's counsel's law firm, giving rise to an actual conflict
17 of interest between the Special Administrator and GEICO. In other words, the Special
18 Administrator is beholden to her employer law firm and her employer law firm's client, GEICO, not
19 the interests of McNamee's Estate. Plaintiffs sought appointment of a general administrator in their
20 January 3, 2018, opposition to Defendant's Motion to Substitute that was filed on December 14,
21 2017. After that, it was not until March 19, 2018, that this Court signed the order appointing a
22 general administrator, and, notice of entry served on March 27, 2018. *See* Notice of Entry of Order,
23 on file with this Court. Plaintiff, therefore, could not have sought to substitute the general
24 administrator in the place and stead of Defendant until the court appointed a general administrator
25 pursuant to its March 19, 2018, order.

26 During this same time, the defense in this case sought to obstruct Plaintiffs' efforts to have a
27 general administrator appointed by opposing Plaintiffs' motion for a general administrator and by
28 claiming McNamee's estate has no assets. This, similar to the action discussed in *Moseley* where
"the decedent's attorney attempted to stall any substitution by alleging that there was no estate and
there was no one to be substituted in the decedent's place." *Moseley*, 124 Nev. at 667, 188 P.3d at

1 1145. Simply put, Plaintiffs could not have moved to substitute the general administrator, Fred
2 Waid, as the party Defendant until Mr. Waid was appointed as the general administrator, or March
3 19, 2018, at the earliest. Now that Mr. Waid has been appointed as the general administrator, this
4 Court may, now, substitute him as the defendant in the place and stead of McNamee, amend the
5 caption, and extend the time for doing so under NRCP 6(a) to the extent necessary.

6 **C. The court's March 27, 2018, order requires amendment.**

7 Defendant further contends that this Court's March 27, 2018, order should be amended
8 because it appoints a general administrator and "nobody requested that this court open a general
9 administration of the Estate of James Allen McNamee." Mot. to Amend, at 5. Plaintiffs agree the
10 March 27, 2018, order should be amended, but not for the reasons Defendant claims.² As noted
11 above, Plaintiffs clearly sought the appointment of a general administrator when they filed their
12 opposition to Defendant's motion to substitute the Special Administrator, and provided legal
13 authority holding that a special administrator is not proper because the Estate possess assets. That
14 issue was, therefore, properly before the court and the court had jurisdiction. The Court, then,
15 requested the parties provide names of possible administrators for appointment, at which point the
16 court appointed Fred Waid and this is properly reflected in the order the court signed. *See* March
17 19, 2018, Order. For convenience and to avoid any further delay, however, Plaintiffs would agree to
18 allow the order to be amended to reflect that the December 14, 2017, Motion to Substitute was (1)
19 granted in part with Fred Waid being appointed the general administrator of McNamee's Estate and
20 substituted as the party defendant with the caption amended accordingly, and (2) denied, in part, to
21 the extent it sought substitution of Susan Clokey, the Special Administrator, because of the conflict
22 of interest involving the Special Administrator, the Special Administrator's employer, the
23 employer's client GEICO, and the McNamee Estate. Even Defendant concedes that an order may be
24 amended under NRCP 60(b) when there has been mistake or inadvertence. Upon issuance of this
25 amended order, the action may proceed to trial without further delay, subject to the court's trial
26 calendar.

27
28 ² Despite Plaintiffs having submitted the order, Plaintiffs now recognize the order should be amended to clear any
confusion of the record and move the case to trial.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. CONCLUSION

For the reasons set forth above, Defendant's Motion to Dismiss and Motion to Continue trial must be denied. Defendant's Motion to Amend Order should be granted in part to reflect the appointment and substitution of Fred Waid, along with the denial of Defendant's request to substitute the special administrator.

GLEN J. LERNER & ASSOCIATES

By: /s/ Craig A. Henderson
Corey M. Eschweiler
Nevada Bar No. 6635
Craig A. Henderson, Esq.
Nevada Bar No. 10077
4795 South Durango Drive
Las Vegas, NV 89147
(702) 877-1500
Attorneys for Plaintiffs

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(a) and EDCR 7.26(a), I hereby certify that I am an employee of GLEN J.
3 LERNER & ASSOCIATES, and on the 10th day of April, 2018, the foregoing **PLAINTIFFS'**
4 **OPPOSITION TO DEFENDANT'S MOTION TO DISMISS; AND PLAINTIFFS' LIMITED**
5 **OPPOSITION TO MOTION TO AMEND ORDER** was served by depositing a true and correct
6 copy of the Notice in the United States Mail, postage prepaid, addressed as follows, to the following
7 counsel of record:

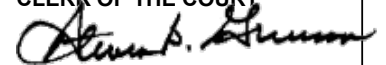
8 James P.C. Silvestri, Esq.
9 Jeffrey J. Orr, Esq.
10 Pyatt Silvestri
11 701 Bridger Ave., Suite 600
12 Las Vegas, Nevada 89101
13 *Attorney for Defendant*

14 The preceding document was served by depositing a true and correct copy in the United
15 States Mail, Postage prepaid, addressed to the General Administrator:

16 Fred P. Waid, Esq.
17 10080 West Alta Drive, Suite 200
18 Las Vegas, NV 89145
19 General Administrator

20
21
22
23
24
25
26
27
28

29 /s/ Brittany Jones
30 An Employee of Glen Lerner Injury Attorneys



TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

GIANN BIANCHI, DARA DELPRIORE,)

Plaintiffs,)

vs.)

JAMES MCNAMEE, ESTATE OF JAMES)

MCNAMEE,)

Defendants.)

CASE NO. A-13-691887

DEPT. NO. VIII

Transcript of Proceedings

BEFORE THE HONORABLE DOUGLAS E. SMITH, DISTRICT COURT JUDGE

ALL PENDING MOTIONS

TUESDAY, APRIL 10, 2018

APPEARANCES:

For the Plaintiffs: D. LEE ROBERTS, JR., ESQ.
COREY M. ESCHWEILER, ESQ.

For the Defendants: JAMES P.C. SILVESTRI, ESQ.
JEFFREY J. ORR, ESQ.
RUSSEL J. GEIST, 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
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

TUESDAY, APRIL 10, 2018 AT 8:06 A.M.

THE COURT: *Bianchi versus McNamee*. It's A691887.
And I have not reviewed -- I got a, Opposition, Mr.
Roberts, where are you there?

THE COURT RECORDER: Can we have --

THE COURT: Yeah. You need to put your appearance
on the record, please.

MR. ESCHWEILER: Good morning, Your Honor. Corey
Eschweiler on behalf of the plaintiffs.

MR. ROBERTS: Good morning, Your Honor. Lee
Roberts on behalf of plaintiffs.

MR. SILVESTRI: Your Honor, Jim Silvestri and Jeff
Orr here on behalf of -- well, presently, defendants.

THE COURT: All right. This is --

MR. SILVESTRI: We also have Alex LeVeque.

THE COURT: I'm sorry.

MR. LEVEQUE: Sorry. Alex LeVeque on behalf of
the special administrator.

THE COURT: Okay.

MR. GEIST: Russel Geist on behalf of Fred Waid,
who is also present today.

THE COURT: All right. Thank you. All right.
This is --

MR. ROBERTS: Your Honor, I'm confused. We've got

1 an appearance for a special administrator. I didn't think
2 we had one. We have a general administrator.

3 MR. SILVESTRI: Well, there is a special
4 administrator named.

5 THE COURT: Well, there is a special
6 administrator, Mr. --

7 MR. SILVESTRI: Named by the Probate Court.

8 THE COURT: -- Roberts. So, let me tell you where
9 I am in this. This -- I just have Motions in Limine and a
10 status check. There's some other -- some defense motions
11 as well.

12 MR. SILVESTRI: Correct, Your Honor.

13 THE COURT: All right. The two Motions in Limine,
14 let me start with those. And I have not read your
15 Oppositions, Mr. Roberts. I got it just before I came on
16 the bench.

17 MR. ROBERTS: Thank you, Your Honor. And I -- I
18 think I can cover things. And I assume you mean our Reply
19 briefs in support of our Motions.

20 THE COURT: On Plaintiffs' Motion in Limine To
21 Preclude Accident Reconstruction.

22 MR. ROBERTS: Okay. I thought you wanted us to
23 start the Motions in Limine.

24 THE COURT: No.

25 MR. ROBERTS: Is that correct?

1 THE COURT: Well, that's sort of --

2 MR. ROBERTS: Or --

3 THE COURT: That's the next one.

4 MR. ROBERTS: Okay.

5 THE COURT: This is the Reconstruction
6 Biomechanical Opinions from Defendants' Medical Experts.
7 Can they lay a foundation? If they can lay a foundation
8 where they -- were they disclosed in discovery?

9 MR. ROBERTS: The opinions were properly disclosed
10 in discovery, Your Honor.

11 THE COURT: Okay.

12 MR. ROBERTS: The point of our Motions is that
13 they cannot lay a foundation and we know right now they
14 cannot lay a foundation because what they want to do is
15 offer opinions on the forces involved in the collision.
16 There is no accident reconstruction which determines delta-
17 V's. There is no biomechanic who has laid a proper
18 foundation. And the key to this is drawn from one of their
19 expert reports. One of their doctors notes that it would
20 be very helpful to have a biomechanical opinion but the
21 defendants could not obtain one because there's no evidence
22 of what the damage was to the defendants' vehicle.

23 Now, there are repair estimates for the
24 plaintiffs' vehicle, there are pictures of damage to the
25 plaintiff vehicle, which we disclosed. However, in

1 response to both the voluntarily disclosures and to our
2 direct discovery requests, the defendants produced zero
3 evidence of damage to the defense vehicle, the one that
4 rammed into the back of the plaintiff. So, we have no
5 pictures of the vehicle and we've got no repair estimates
6 to the vehicle.

7 And, Your Honor, the point of *Hallmark* was that
8 the biomechanic could not lay an adequate foundation
9 because he had not seen sufficient evidence. Now, in *Rish*
10 in 2016, the Nevada Supreme Court declined to extend that
11 ruling. And they said medical doctors can render low
12 impact decisions. And the jury's entitled to hear them as
13 long as there's an adequate foundation. And, in *Rish*, the
14 doctor saw the evidence of damage to both vehicles.

15 So, here's the problem that they have in this
16 case. Because of their own failure to either preserve
17 evidence or properly respond to discovery, there is now
18 zero evidence of what the damage was to the defense
19 vehicle. And, without that evidence, no one has the
20 foundation to render an opinion about the forces involved
21 in the collision. It's a big vehicle, there are 30 feet if
22 skid marks, it rammed into the plaintiffs' vehicle. We
23 know what damage was caused to the plaintiff vehicle but as
24 Your Honor knows, damage to two different vehicles can
25 differentiate in a collision based on where the impact

1 occurs, the crumple zones, how they function. I've got a
2 truck with a big trailer hitch and someone rammed it into
3 the back of me, hit right on the trailer hitch, you
4 couldn't even tell I been in an accident. The front end of
5 their car was crushed. We don't know how badly the van was
6 crushed. And, without that evidence, they cannot lay a
7 foundation for the forces that were involved in the
8 collision. So, even though a medical doctor is allowed to
9 give a causation opinion, he can only do it under *Rish* with
10 adequate foundation.

11 They tried to get a biomechanic. The biomechanic
12 said: Hey, without the damage to one of the vehicles, I
13 can't render an opinion on forces of impact. So, now,
14 they've got a doctor who still has no idea what the forces
15 of impact are but he wants to opine: This is a low to
16 moderate impact and it wasn't sufficient to cause injuries
17 to the spine. And our opinion, Your Honor, is that that's
18 clearly should be excluded under both *Rish* and *Hallmark*.
19 Thank you, Your Honor.

20 MR. ORR: Your Honor, this issue should be
21 reserved for trial. Your Honor should hear from the
22 doctors first before Your Honor limits any portion of their
23 testimony. The simple fact is defendant never did try and
24 retain a biomechanical expert. *Rish* came out a couple
25 years ago and it simply says, quote:

1 A medical doctor may offer an opinion regarding
2 causation so long as there's sufficient foundation for
3 the conclusion.

4 Both of our medical experts reviewed the traffic
5 accident report, they both reviewed the depositions of the
6 plaintiffs, they reviewed the photographs of the vehicles,
7 they reviewed the damage estimate of plaintiffs' vehicle,
8 and they reviewed multiple medical expert -- medical
9 records. For this reason, there's sufficient foundation to
10 offer the basic facts of the accident and that it's a rear-
11 end accident and whether or not a rear-end accident is
12 consistent with the injuries alleged. Thank you.

13 MR. ROBERTS: The *Rish* case, Your Honor, headnotes
14 5 and 6, states:

15 In this case, Dr. Fish examined the medical
16 records, the MRI images, and photographs of the damage
17 to both parties' vehicles, and therefore had a
18 sufficient basis to offer an opinion.

19 In this case, we're missing one fundamental piece
20 of that evidence and we're missing it because the
21 defendants failed to preserve it.

22 THE COURT: I would think -- and I haven't --
23 again, I can't make a final decision until I read your --
24 the documents that you filed to the Motions you filed
25 today. But it would seem to me that they can't give a

1 biomedical opinion anyway because you didn't -- they're not
2 experts in that area. I mean, are you trying to get him in
3 as biomedical engineers of some sort?

4 MR. ORR: No. It's a --

5 THE COURT: Or just to say: It doesn't appear to
6 me -- I mean, I examined, I looked at the police reports,
7 and I've looked at the MRIs, and I've looked at the
8 accident, and it doesn't seem to me that that, as a doctor,
9 that they -- they could have had this type of injury? Is
10 that kind of the gist of what the doctor's going to say?

11 MR. ORR: It's much more limited than what
12 plaintiffs' implying, Your Honor. They're just going to
13 say it's a it's a rear-end accident.

14 THE COURT: All right. I'll have a decision -- I
15 try not to, in trials, is take away your case, either
16 plaintiffs' or defense. So, I'm -- at this point, without
17 having read these other documents, I'm probably going to
18 allow it. But they have to lay the proper foundation.
19 They can't give accident reconstruction evidence, they
20 can't give biomedical evidence, but likely they're going to
21 be able to say: It doesn't appear to me that they could --
22 these injuries are consistent with that accident. But I'll
23 have read -- I'll have to get you a minute order on that.

24 MR. ROBERTS: Thank you, Your Honor. And we would
25 request that they attempt to lay that foundation outside

1 the presence once we're in trial just to prevent
2 prejudicing the jury if the opinions ultimately do not come
3 in.

4 THE COURT: Right. All right.

5 Plaintiffs' Motion in Limine to Preclude
6 Photographs and Repair Estimate Regarding Plaintiffs'
7 Vehicle.

8 MR. ROBERTS: Yes, Your Honor. And this is a
9 closely related Motion. They're really tied together,
10 which is why they're being heard at the same time. As I
11 explained, the defendants failed to produce any repair
12 estimate or photographs of the damage to their vehicle,
13 even though that information was specifically requested in
14 discovery. The plaintiffs have produced a repair estimate
15 and photographs.

16 THE COURT: On plaintiffs' vehicle or --

17 MR. ROBERTS: I'm sorry. I'm at the wrong table.
18 I'm in the different table upstairs, Your Honor.

19 THE COURT: Okay.

20 MR. ROBERTS: So, the defendants' vehicle, the
21 plaintiffs propounded discovery.

22 THE COURT: This doesn't have anything to do with
23 defense vehicle. It says plaintiffs' vehicle.

24 MR. ROBERTS: Correct. So, what we have is we
25 have evidence that the plaintiffs preserved, which shows

1 the damage to the vehicle and which has a cost of repair to
2 the vehicle. We have no such evidence from the defendants.
3 They didn't preserve it. As I explained --

4 THE COURT: Now, wait, wait. Back this bus up a
5 bit.

6 MR. ROBERTS: Okay. All right.

7 THE COURT: Are you telling me that they're going
8 to say, well, -- if you're going to say it costs \$10,000 to
9 fix the car and they're going to say, well, it only costs -
10 - here, we have an estimate of 2,000 to fix your car, you
11 would lay the foundation on repairing your car, I would
12 think.

13 MR. ROBERTS: Well, this is --

14 THE COURT: And, then, they present --

15 MR. ROBERTS: There's a much bigger issue here.
16 This is not about us recovering the cost of repair. This
17 is about the defense using the cost of repair and the
18 pictures to our vehicle to argue that it's a low impact
19 collision. And look at the damage, there wasn't much force
20 involved. But, as I've said in the last Motion, we don't
21 know how much force is involved without pictures and damage
22 to the defendants' vehicle, which they didn't preserve.
23 So, it's more prejudicial --

24 THE COURT: It doesn't have anything to do with
25 the defense vehicle. This is plaintiffs' vehicle.

1 MR. ROBERTS: It is plaintiffs' vehicle, which we
2 want to exclude it because damage -- these get in the
3 collision.

4 THE COURT: I am -- I assume there was some paint
5 transfer somewhere.

6 MR. SILVESTRI: No.

7 MR. ROBERTS: We got a collision. Right?

8 THE COURT: Uh-huh.

9 MR. ROBERTS: Okay. This is the plaintiff
10 vehicle. This is the defendants' van. Right? That --
11 now, they're going to say: Look at that, no damage, low
12 impact. But this is what they're not showing the jury.
13 The jury doesn't know how much force is involved.

14 THE COURT: Do we have no photographs of the
15 defense vehicle?

16 MR. ROBERTS: No. They failed to preserve it and
17 they didn't respond to discovery. So, now --

18 THE COURT: I thought you would have preserved it.
19 I would have thought you would have gone out and got
20 photographs, your experts go out, and your investigators go
21 out and take pictures. Wouldn't they?

22 MR. ROBERTS: No. No. They exfoliated the
23 evidence. They sold the vehicle before we requested to see
24 it. They didn't preserve either pictures or repair
25 estimates before they got rid of the vehicle. So, we've

1 got no way of knowing how much damage there was to the
2 defendants' vehicle. And, without that, it's misleading
3 and prejudicial for them to show the jury half the picture
4 because they failed to preserve the whole picture and,
5 then, argue from that half that the forces of the collision
6 were low.

7 THE COURT: All right.

8 MR. ROBERTS: Thank you, Your Honor.

9 THE COURT: Let me hear from defense.

10 MR. ORR: Your Honor, *Krause versus Little* is
11 right on point. It says:

12 To merit exclusion, the evidence must unfairly
13 prejudice an opponent, typically by appealing to the
14 emotional and sympathetic tendencies of a jury, rather
15 than the jury's intellectual ability to evaluate the
16 evidence.

17 What Mr. Roberts is saying is that: This photo of
18 plaintiffs' vehicle hurts me and the jury will improperly
19 speculate. That -- we don't know -- he's speculating about
20 what the jury might speculate about. Again --

21 THE COURT: Where is the defense vehicle?

22 MR. ORR: What's that?

23 THE COURT: It got sold at whatever -- either B&E
24 Auto or the other place?

25 MR. ORR: We did our best to obtain defendants'

1 vehicle and we were unable to do so during the course of
2 discovery. That's true. No photos were ever taken of
3 defense vehicle. But --

4 THE COURT: I assume it was totaled.

5 MR. ORR: I don't believe it was totaled but we
6 were unable to locate it.

7 But, again, Your Honor, *Rish versus Simao* is right
8 on point. Typically, photographs are excluded when they're
9 inflammatory. Autopsy photos. This is not the case.
10 There's nothing that elicits passion or prejudice about
11 photos of a car. The case law that precludes photographs
12 typically deals with those types of issues: Passion or
13 prejudice. The jury should be allowed to evaluate the
14 photographs of one of the vehicles in this lawsuit.

15 THE COURT: All right.

16 MR. ORR: And the repair estimate. And there's no
17 competing repair estimates, there's just one. That's not
18 at issue.

19 THE COURT: All right. I'll have a decision with
20 the other one. All right. And the order shortening times
21 issues were here. So, the only thing I need to talk about
22 now is Motion to Dismiss.

23 MR. SILVESTRI: Thank you, Your Honor. Your
24 Honor, I believe there's a Motion to Dismiss and a Motion
25 to Amend Order but they're akin to one another.

1 THE COURT: I'm sorry. There is.

2 MR. SILVESTRI: Yeah. And I can argue both of
3 them at the same time if you want.

4 THE COURT: Same time please.

5 MR. SILVESTRI: Your Honor, just by way of
6 history, because I think some of the dates are important,
7 James McNamee died on or about August 12, 2017. We filed
8 the Suggestion of Death once we learned about the death.
9 He was no longer living in Las Vegas. He lived in Arizona.
10 We filed the Suggestion of Death on September 20, 2017. As
11 of today, there is no party substituted in for James
12 McNamee. The Rule 25 requires a 90 -- and it requires it,
13 it's a shall rule not a must -- a should rule or maybe
14 rule, but it's a shall rule that requires -- it has a 90-
15 day deadline to substitute in a party once Suggestion of
16 Death is provided. That day ran on or about December 19,
17 2017. The only motion that was be filed -- that was filed
18 before that date was the defense motion to name a special
19 administrator. We did our due diligence. We requested to
20 have a special administrator named because we could find no
21 assets that Mr. McNamee had. He lived in a -- what
22 appeared to be a rented trailer, somewhat dilapidated, in
23 Arizona. We searched. We could find no assets.

24 So, pursuant to Nevada law, we moved to have a
25 special administrator named because that statute says that

1 if the only asset available is an insurance policy, a
2 special administrator should be named. We filed that
3 motion in probate, we went back for a couple of hearings, a
4 special administrator was appointed. We, then, moved this
5 Court to name the special administrator as the substituted
6 party for James McNamee.

7 Now, in opposition to that motion, plaintiffs
8 simply said: We need more time, deny the motion at this
9 time so we can go -- we, plaintiffs, can go into probate
10 and have a general administrator appointed. They went into
11 court, into probate, filed that motion, and then withdrew
12 that motion. So, there has never, at least until the Order
13 of this Court, had a general administrator appointed.

14 Your Honor, we were then before you. You denied
15 our motion.

16 THE COURT: Okay. There were two that day and,
17 so, I'm --

18 MR. SILVESTRI: Yeah. And I'm just trying to --
19 and I'll just try to --

20 THE COURT: I'm trying to remember.

21 MR. SILVESTRI: Okay. Well, let me -- and I'll
22 tell you exactly what happened. We named, as a special
23 administrator, one of our legal assistants, because we have
24 no relative here in Nevada.

25 THE COURT: That bothered me that --

1 MR. SILVESTRI: Understood.

2 THE COURT: -- that one of your assistants.

3 MR. SILVESTRI: And I -- you mentioned that in
4 open court and I had said: Your Honor, there was nothing
5 nefarious about that. I've been in cases where I've had
6 plaintiffs' legal assistants --

7 THE COURT: I didn't -- I didn't mean to
8 editorialize it and thought there was something improper.

9 MR. SILVESTRI: No. I didn't take it that way
10 either.

11 THE COURT: I just felt it would be better to have
12 a third party come in.

13 MR. SILVESTRI: Correct. And, at that time, Your
14 Honor had asked --

15 THE COURT: For three names.

16 MR. SILVESTRI: From both sides.

17 THE COURT: Yeah.

18 MR. SILVESTRI: We elected not to produce names
19 because we did not want to waive the issue of whether it
20 should be a special administrator or a general
21 administrator. And that's a substantive difference. So,
22 plaintiffs did suggest three names.

23 In the Order that Your Honor finally signed, this
24 was the Order entered on March 27th, it simply reads: The
25 Court -- and this was an Order submitted by plaintiffs'

1 counsel. It said:

2 Order to Judge and Decree Defendant James
3 McNamee's Motion to Substitute Special Administrator in
4 Place Instead of James Allen McNamee and to Amend
5 Caption is denied.

6 And, then, the next part of the Order says: The
7 Court directed the parties to submit three proposed
8 names to the Court for consideration as to who they
9 want to serve as administrator of the estate. The
10 Court has reviewed those submissions and further orders
11 that -- and handwritten in is Fred Waid, is hereby
12 named as the general administrator of the estate of
13 James Allen McNamee.

14 That's the end of the Order. So, as of today,
15 there is no defendant. Since --

16 THE COURT: Is there an insurance policy?

17 MR. SILVESTRI: There is an insurance policy.

18 THE COURT: Okay.

19 MR. SILVESTRI: But we have now, since December
20 19th, the day -- the last day when the 90-day period ran,
21 more than 110 days of running, and plaintiffs have done
22 nothing to substitute in a party as the defendant in this
23 case. The only party that's taken that effort has been the
24 defense and that motion was denied. So, --

25 THE COURT: Well, on a technicality it was denied.

1 MR. SILVESTRI: Well, we never had a chance --
2 first of all, there was never a motion for it.

3 MR. ORR: A hearing.

4 MR. SILVESTRI: We never had a hearing for it to
5 substitute in a party other than who we proposed. So,
6 today, we sit without a defendant. And the special
7 administrator/general administrator issues are important.
8 They're important to my client. They're important to the
9 estate because how the case -- how this case proceeds will
10 be substantively different depending on if we've got a
11 special administrator or general administrator. And as I
12 said, we did our due diligence, I couldn't find any assets.

13 THE COURT: What if I appoint Fred as general and
14 special?

15 MR. SILVESTRI: Well --

16 THE COURT: Then we got it covered.

17 MR. SILVESTRI: Well, I'll tell you, what was sort
18 of strange is that Mr. Waid has never contacted me and he's
19 supposed to be my client.

20 THE COURT: Well --

21 MR. SILVESTRI: Well, I think --

22 THE COURT: -- I haven't contacted him to let him
23 know he was appointed.

24 MR. SILVESTRI: Well, he knew it because he was
25 here last week --

1 THE COURT: He was here.

2 MR. SILVESTRI: -- at the calendar call and he
3 huddled with plaintiffs' counsel. So, I have concerns
4 about that as to whether or not he's looking out for the
5 interest of the defense in this case or the interest of the
6 plaintiffs in this case. That's another issue on another
7 day.

8 THE COURT: Well --

9 MR. SILVESTRI: He and I will have to deal with
10 that.

11 THE COURT: -- you'll have to deal with that --

12 MR. SILVESTRI: Yeah.

13 THE COURT: -- because I am appointing him both
14 general and special. And that is my intent. Now, you can
15 file any motion that you want that tells me I can't do that
16 --

17 MR. SILVESTRI: Okay.

18 THE COURT: -- and give me the law. I don't have
19 a problem with that.

20 MR. SILVESTRI: Okay. Well, that --

21 THE COURT: But I want the case to go forward and
22 be decided on the facts and not on a procedural issue.
23 And, so, that truly is my intent. But -- and that's what I
24 intend to do today is appoint Mr. Waid. Then -- and if you
25 guys have motions that you want to file and law that says

1 you can't do that --

2 MR. SILVESTRI: Okay.

3 THE COURT: -- I -- please file it. I'm not

4 trying to stop that. I just think it needs to go forward

5 on the facts of the case.

6 MR. SILVESTRI: And we don't have an objection to

7 the case going forward on the facts of the case. I believe

8 that one of the reasons that the special administrator

9 statute is drafted the way it is is because some estates

10 have nothing in them except an insurance policy.

11 THE COURT: Educate me on it, then --

12 MR. SILVESTRI: Yeah.

13 THE COURT: -- through motions. Because I --

14 MR. SILVESTRI: Okay.

15 THE COURT: I've -- I really haven't had that

16 issue --

17 MR. SILVESTRI: Okay.

18 THE COURT: -- come before me before.

19 MR. SILVESTRI: And I think that the trial has

20 been continued so we have time. We do have --

21 THE COURT: Yeah. We need to reset -- that's

22 another issue is to reset the trial date.

23 MR. SILVESTRI: And we have a Five-Year problem.

24 MR. ROBERTS: November.

25 THE COURT: November is the Five-Year? Okay.

1 MR. SILVESTRI: And I would take up with my
2 carrier, Your Honor, to stipulate to extend that. Because
3 I don't know if we can get it tried before then. And I'm
4 just making that as an accommodation so that counsel does
5 not have -- plaintiffs' counsel does not have that concern.

6 THE COURT: Can we do that in writing? Would you
7 do that?

8 MR. SILVESTRI: I would -- I will let them know
9 today.

10 THE COURT: All right.

11 MR. ROBERTS: It would be our preference to get it
12 tried before then, Your Honor. But if we can't, --

13 THE COURT: I'm not sure we can. But --

14 MR. ROBERTS: -- due to the Court's calendar, then
15 we'll stipulate.

16 THE COURT: I don't want to force it and have
17 anybody that is not prepared. And if you force things,
18 then no one is -- somebody could be not prepared and I
19 don't want to do that either.

20 MR. SILVESTRI: I think I'm done arguing. I just
21 wanted clarification. Would you like us to prepare an
22 Order, then, that identifies Mr. Waid --

23 THE COURT: Yes.

24 MR. SILVESTRI: -- as both general and special
25 administrator? And, then, I hate to do this to myself, but

1 do you want me, then, to substitute Mr. Waid in as the
2 defense?

3 THE COURT: For McNamee.

4 MR. SILVESTRI: Very good. And I will run that
5 Order by counsel if there's no objection.

6 THE COURT: Please.

7 MR. SILVESTRI: And --

8 THE COURT: And probably include that at the -- a
9 stipulation if we can't get it tried by November, then
10 let's continue it. It won't be a long continuance but just
11 so that both parties are prepared.

12 MR. SILVESTRI: If I can put that in the Order, I
13 -- well, I will contact my carrier.

14 THE COURT: Or do two Orders. I don't care.

15 MR. SILVESTRI: Okay. Very good. If Your Honor
16 is willing to consider it as one Order, I'd just assume get
17 it all in one.

18 THE COURT: That's fine. That's fine.

19 MR. SILVESTRI: Okay. Very good. I think that's
20 it for today. Is that right? You guys have anything else?

21 MR. ROBERTS: No. That's all we have, Your Honor.

22 THE COURT: Okay.

23 MR. ROBERTS: Would you like me to address
24 anything or it sounds like we've got it resolved?

25 THE COURT: I think we got it resolved.

1 MR. ROBERTS: Very good. The -- we would ask that
2 the Proposed Order note that their Motion was granted in
3 part and denied in part. I think the current Order that we
4 proposed just says denied. But since the Court is
5 appointing --

6 THE COURT: Silvestri is going to prepare the
7 Order and you guys review it.

8 MR. ROBERTS: Very good.

9 THE COURT: If you can't come up with it, just
10 submit two Orders and I'll do my own Order.

11 MR. ROBERTS: Okay.

12 MR. SILVESTRI: And I take it, then -- and, then,
13 no Order yet on --

14 THE COURT: You probably don't want me to do that
15 but go ahead.

16 MR. SILVESTRI: No Order yet on the Motions in
17 Limine. We're waiting for Your Honor's decision. Very
18 good. Thank you, Your Honor.

19 [Colloquy at the bench]

20 THE COURT: Should we try and set a trial date
21 before November?

22 MR. SILVESTRI: Yes.

23 MR. ROBERTS: Yes. That would be our request,
24 Your Honor.

25 THE COURT: Let's see if we can be prepared. I

1 don't want to force you.

2 MR. SILVESTRI: I have -- and I'll talk to counsel

3 about -- I've got some firm dates --

4 THE COURT: Let me give you a proposed date.

5 MR. SILVESTRI: Okay.

6 THE CLERK: September, probably?

7 THE COURT: September -- can we do it in October

8 or is that criminal?

9 THE CLERK: September is civil and November is

10 civil. So --

11 MR. SILVESTRI: September is terrible. I'm in a -

12 -

13 THE COURT: What about the first week of November?

14 THE CLERK: Second week.

15 THE COURT: I meant the second week.

16 MR. SILVESTRI: It's hunting season. But --

17 THE COURT: How long would it take to try this

18 case?

19 MR. SILVESTRI: They think three weeks.

20 THE COURT: Be reasonable.

21 MR. SILVESTRI: Two weeks for you?

22 MR. ROBERTS: Well, all together.

23 THE COURT: For a traffic collision?

24 MR. ESCHWEILER: I think, altogether, two weeks.

25 MR. ROBERTS: We've got a lot of damages,

1 witnesses, Your Honor.

2 MR. SILVESTRI: Well, they have --

3 MR. ROBERTS: Probably two weeks altogether.

4 MR. SILVESTRI: That's -- they have a lot of

5 experts so if they're going to trim their expert list down,

6 that would be fine.

7 THE COURT: All right. You guys work on it.

8 MR. SILVESTRI: Okay.

9 THE COURT: She'll give you the proposed date. If

10 that isn't -- if you guys cannot come to an agreement, then

11 let me know and we'll do it the next stack, which would be

12 when?

13 THE CLERK: The next stack would be February.

14 MR. ROBERTS: Okay.

15 MR. ESCHWEILER: Well, Judge --

16 THE COURT: It'll be a short continuance and a

17 stipulation to continue it.

18 MR. ESCHWEILER: Judge Adair moved us to the July

19 stack last week at the calendar call. If there's going to

20 be motion practice, I'd just ask that maybe we put those on

21 a shortened time and perhaps --

22 THE COURT: She did?

23 MR. SILVESTRI: I just thought she vacated.

24 MR. LEVEQUE: She vacated.

25 THE COURT: She continued the calendar call.

1 MR. SILVESTRI: Yeah. That's all I have.
2 THE CLERK: Reset the trial date.
3 THE COURT: Who -- to reset the trial date.
4 MR. ESCHWEILER: I thought she reset it to the --
5 to July.
6 MR. SILVESTRI: No.
7 THE COURT: She doesn't know what she'd doing
8 anyway. She got me set for trial this morning at 9:30.
9 THE CLERK: So, are we doing the November or
10 February?
11 THE COURT: Well, they're going to come up -- you
12 give them the dates and let them come up with it and send
13 me the -- put an Order or just a requested date.
14 MR. SILVESTRI: Okay.
15 THE COURT: Either February what?
16 THE CLERK: February 11th is the beginning of the
17 stack. Or November 13th.
18 THE COURT: And as long as there's not --
19 MR. ROBERTS: November 15th?
20 THE CLERK: 13th.
21 MR. ROBERTS: 13th.
22 THE COURT: As long as there's not a medical
23 malpractice in November, I'll do that as a firm setting --
24 MR. SILVESTRI: Thank you.
25 THE COURT: -- or February, I mean.

1 MR. ROBERTS: Thank you, Your Honor. That'd be
2 great.

3 MR. SILVESTRI: And I'll talk -- we'll talk to
4 counsel, Your Honor, about that, get it straight.

5 THE COURT: All right. And Mr. Waid will talk to
6 you guys and --

7 MR. SILVESTRI: Oh yeah.

8 THE COURT: You now are opposed to those guys so
9 don't talk to them anymore.

10 MR. SILVESTRI: Thank you, Your Honor.

11

12 PROCEEDING CONCLUDED AT 8:35 A.M.

13 * * * * *

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

Skip to Main Content Logout My Account Search Menu New District Civil/Criminal Search Refine 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
Defendant	Estate of James McNamee Formerly Known As McNamee, James	
Plaintiff	Bianchi, Giann	D Lee Roberts, Jr. Retained 702-938-3838(W)
Plaintiff	Delpriore, Dara	D Lee Roberts, Jr. Retained 702-938-3838(W)

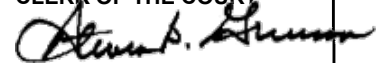
EVENTS & ORDERS OF THE COURT

04/10/2018	<p>All Pending Motions (8:00 AM) (Judicial Officer Smith, Douglas E.)</p> <p><i>Plaintiffs' Motion in Limine to Preclude Accident Reconstruction and Biomechanical Opinions from Defendant's Medical Experts on Order Shortening Time . . . Plaintiffs Motion in Limine to Preclude Photographs and Repair Estimate Regarding Plaintiffs Vehicle . . . Defendant James McNamee's Motion to Amend Order on Order Shortening Time . . . Defendant James McNamee's Motion to Continue Trial on Order Shortening Time . . . Defendant James McNamee's Motion to Dismiss on Order Shortening Time . . . Status Check: Reset Trial Date</i></p> <p>Minutes</p> <p>04/10/2018 8:00 AM</p> <p>- Plaintiffs' Motion in Limine to Preclude Accident Reconstruction and Biomechanical Opinions from Defendants' Medical Experts: Upon Court's inquiry, Mr. Roberts advised that although the opinions were properly disclosed in discovery, a proper foundation cannot be laid. Defendants want to offer opinions on the forces involved in the collision. There is no accident reconstruction or biomechanical expert who has laid a proper foundation. Defendants have a doctor who wants to opine that this is a low to moderate impact and the impact was not sufficient to cause the injuries to the Defendant's spine. Mr. Roberts discussed the Rish and Hallmark cases. Argument by Mr. Orr. It appears to the Court that the medical experts cannot give biomechanical or reconstruction opinions because they are not experts in that area; however, if the medical experts want to testify and say that it does not appear from the evidence that the injuries are consistent with the accident that would be allowed but since the Court has not had an opportunity to review Plaintiff's Reply, COURT ORDERED, decision DEFERRED. Plaintiffs' Motion in Limine to Preclude Photographs and Repair Estimate Regarding Plaintiffs' Vehicle. Mr. Roberts advised that the Defendants failed to produce any repair estimate or photographs of the damage to their vehicle even though that information was specifically requested in discovery. Argument; Plaintiffs have no way of knowing how much damage there was to the Defendant's vehicle and without that, it is misleading and prejudicial for them to show the jury just the pictures of the Plaintiffs' vehicle and, because it appears the damage was minor, argue that the forces of the collision were low and that his was a low impact collision. Argument by Mr. Orr; he discussed the Rish case. COURT ORDERED, decision DEFERRED. Defendant James McNamee's Motion to Dismiss and Motion to Amend Order: Mr. Silvestri advised that Defendant, James McNamee, died on August 12, 2017; thereafter, a Suggestion of Death was filed. As of today, there is no party substituted in for Defendant McNamee; once a Suggestion of Death is provided, there is a ninety (90)-day deadline and the deadline was December 19, 2017. The only motion filed before that date was the Defense Motion to name a Special Administrator; the Statute says that if the only asset available is an insurance policy a Special Administrator should be named. Mr. Silvestri discussed the Special Administrator vs. General Administrator issues. Pursuant to the Order</p>
------------	--

filed March 27, 2018, Fred Waid was named as the General Administrator. Colloquy; the Court is contemplating appointing Fred Waid as the General and Special Administrator as the Court wants the case to go forward and be decided on the merits and not on procedural issues. There being no objection by counsel, COURT ORDERED, the Motion to Amend Order is GRANTED in part and DENIED in part; Fred Waid is APPOINTED as both General and Special Administrator. Additionally, Fred Waid shall be substituted in as a party Defendant for James McNamee. COURT FURTHER ORDERED, the Motion to Dismiss is DENIED. Mr. Silvestri to prepare the Order approved as to form and content by Mr. Roberts. Defendant James McNamee's Motion to Continue Trial: Court noted that it appears this Motion was WITHDRAWN on April 4, 2018; however, this matter is also set for a Status Check to Reset the Trial date. Mr. Silvestri advised that the Five (5)-Year Rule will run in November 19, 2018, but he is working with his carrier on a stipulation because he is not sure this matter will be ready for trial by then. Mr. Roberts advised that it is his preference to try this matter in November but if that is not possible, he will stipulate to an extension of the rule. Colloquy regarding possible trial dates, counsel believe the trial will take two (2) weeks. The November Civil trial stack begins on November 13, 2018, and the next Civil stack begins on February 11, 2019. Court directed counsel to meet and confer and let the Court know whether they intend to set the matter for trial on the November stack, it will be a FIRM setting, or whether they intend to stipulate to an extension of the Five (5)-Year Rule; if so, a Stipulation and Order will need to be prepared.

[Parties Present](#)

[Return to Register of Actions](#)



ORDER

Judge Douglas E. Smith
Eighth Judicial District Court
Department VIII
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155
(702)671-4338

**DISTRICT COURT
CLARK COUNTY, NEVADA**

GIANN BIANCHI, individually,
DARA DELPRIORE, individually,

Plaintiff,

vs.

CASE NO: A-13-691887-C

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

DEPT NO: VIII

Defendants.

**ORDER DENYING DEFENDANT JAMES McNAMEE'S MOTION TO
DISMISS AND GRANTING IN PART AND DENYING IN PART DEFENDANT
JAMES McNAMEE'S MOTION TO AMEND ORDER**

Defendant James Allen McNamee's Motion to Dismiss and Motion to Amend Order came before this Court on April 10, 2018. Plaintiffs were represented by their counsel of record, Corey M. Eschweiler, Esq. of GLEN LERNER INJURY ATTORNEYES, and D. Lee Roberts, Esq., of WEINBERG WHEELER HUDGINS GUNN & DIAL. Defendant James McNamee, deceased, appeared through his counsel of record, James P.C. Silvestri, Esq., and Jeffrey J. Orr, Esq., of PYATT SILVESTRI. Special Administrator Susan Clokey appeared through her counsel Alexander G. LeVeque, Esq., of SOLOMON DWIGGINS & FREER. The Court having considered the motions, Plaintiffs' opposition, and Defendant's reply, the good cause appearing, it is hereby:

ORDERED, ADJUDGED, and DECREED that Defendant's Motion to Dismiss pursuant to NRCP 25(a)(1) is DENIED;

It is further ORDERED, ADJUDGED, and DECREED that Defendant's Motion to

DOUGLAS E. SMITH
DISTRICT JUDGE

DEPARTMENT EIGHT
LAS VEGAS NV 89155

1 Amend Order is GRANTED in part and DENIED in part. The Motion is GRANTED in part
2 to appoint Fred Waid as general and special administrator, and to substitute Mr. Ward in his
3 capacity as special and general administrator of the Estate of James Allen McNamee as party
4 Defendant in the place and stead of the decedent, James Allen McNamee. The Motion is
5 DENIED to the extent it seeks to have Susan Clokey substituted as party Defendant in the
6 place and stead of the decedent James Allen McNamee.

7 It is so ordered this 14th day of May 2018.

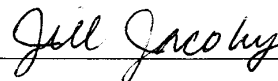
8
9 

10 DOUGLAS E. SMITH
11 DISTRICT COURT JUDGE
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of May 2018, a copy of this Order was electronically served to all registered parties in the Eighth Judicial District Court Electronic Filing Program and/or placed in the attorney's folder maintained by the Clerk of the Court and/or transmitted via facsimile and/or mailed, postage prepaid, by United States mail to the proper parties or per the attached list as follows:

Corey Eschweiler, ceschweiler@glenlerner.com
Brittany Jones, Paralegal, bjones@glenlerner.com
Craig Henderson, chenderson@glenlerner.com
Jeffrey J. Orr, jorr@pyattsilvestri.com
Lisa Titolo, Paralegal, ltitolo@glenlerner.com
Miriam Alvarez, Paralegal, ma@glenlerner.com
Barbara Abbott, babbott@pyattsilvestri.com
James Silvestri, jsilvestri@pyattsilvestri.com
Susan Clokey, sclokey@pyattsilvestri.com
Audra Bonney, abonney@wwhgd.com
Brian P. Eagan, beagan@sdfnvlaw.com
Renee L. Guastaferro, rguastaferro@sdfnvlaw.com
Esther Ibarra, eibarra@wwhgd.com
Alexander G. LeVeque, aleveque@sdfnvlaw.com
Gretta G. McCall, gmccall@sdfnvlaw.com
D. Lee Roberts, lroberts@wwhgd.com
Justin Carley, jcarley@swlaw.com
Docket Docket, docket_las@swlaw.com
Ruby Lengsavath, rlengsavath@swlaw.com
Holly Longe, hlonge@swlaw.com
Janine Prupas, jprupas@swlaw.com



Jill Jacoby, Judicial Executive Assistant