

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

GIANN BIANCHI, INDIVIDUALLY; AND
DARA DEL PRIOR, INDIVIDUALLY,
Appellants,

vs.

SUSAN CLOKEY, SPECIAL
ADMINISTRATOR FOR THE ESTATE OF
JAMES MCNAMEE,

No. 84064

Electronically Filed
Feb 03 2022 03:50 p.m.

Elizabeth A. Brown

DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Department 23
County Clark Judge Hon. Jasmin Lilly-Spells
District Ct. Case No. A-13-691887-C

2. Attorney filing this docketing statement:

Attorney Ian Samson; Adam Ellis Telephone 310-883-7073
Firm Panish Shea Boyle Ravipudi, LLP
Address 8816 Spanish Ridge Ave., Las Vegas NV 89148

Client(s) Giann Bianchi and Dara Del Priore

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney James P.C. Silvestri; Robert P. Molina Telephone 702-383-6000
Firm Pyatt Silvestri
Address 701 E. Bridger Ave. #600, Las Vegas, NV 89101

Client(s) Susan Clokey, Special Administrator of the Estate of James McNamee

Attorney Alex G. LeVeque; Brian P. Eagan Telephone 702-997-7714
Firm Solomon Dwiggin Freer & Steadman, Ltd
Address 9060 W. Cheyenne Ave., Las Vegas, NV 89129

Client(s) Susan Clokey, Special Administrator of the Estate of James McNamee

(List additional counsel on separate sheet if necessary)

(continued)

1. Judicial District _____ Department _____
County _____ Judge _____
District Ct. Case No. _____

2. Attorney filing this docketing statement:

Attorney _____ Telephone _____
Firm _____
Address _____

Client(s) _____

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Daniel F. Polsenberg Telephone 702-949-8200
Firm Lewis Roca
Address 3993 Howard Hughes Pkwy #600
Las Vegas, NV 89169

Client(s) Susan Clokey, Special Administrator of the Estate of James McNamee

Attorney _____ Telephone _____
Firm _____
Address _____

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|---|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input checked="" type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

McNamee v. Dist. Ct. (Bianchi) - No. 76904

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:
Only the underlying district court case: Bianchi v. Clokey - A-13-691887-C

8. Nature of the action. Briefly describe the nature of the action and the result below:

Plaintiffs suffered personal injury when the vehicle in which they were occupants was rear-ended by the vehicle driven by James McNamee. (James McNamee passed away before trial, and Ms. Clokey, as Special Administrator, substituted in his place). The matter was tried before a jury, which rendered verdicts in favor of Plaintiffs.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

1. Whether the district court erred by applying NRS 140.040(3) to reduce a jury's verdict to match the limits of the liability insurance coverage applicable to the collision, when the decedent's estate maintains a claim for tortious breach of the covenant of good faith and fair dealing (bad faith) against the decedent's insurance carrier.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

Plaintiffs are unaware of any similar proceedings.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

The matter is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(5).

14. Trial. If this action proceeded to trial, how many days did the trial last? 10

Was it a bench or jury trial? Jury

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?
No.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from 12/7/2021

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

The district court's December 7, 2021 Order is arguably ambiguous as to whether it serves as the formal judgment.

17. Date written notice of entry of judgment or order was served 12/7/2021

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ___, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed 01/05/2022

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:
Appellants filed a joint notice of appeal.

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)(1)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|---|---------------------------------------|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input type="checkbox"/> Other (specify) _____ | |

(b) Explain how each authority provides a basis for appeal from the judgment or order:
NRAP 3A(b)(1) allows an appeal to be taken from a final judgment in an action, and the Court's December 7, 2021 Order Granting Defendant's Motion for Judgment Notwithstanding the Verdict (NRCP 50(b))
and/or Motion to Alter or Amend Jury Verdict (NRCP 59(e)) in accordance with NRS 140.040 entered judgment as reduced by the district court pursuant to NRS 140.040.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Plaintiffs: Giann Bianchi and Dara Del Priore

Defendant: Susan Clokey, as Special Administrator of the Estate of James McNamee

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

All parties in the district court are parties to this appeal.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Giann Bianchi: Negligence and Negligence Per Se, resolved via judgment entered December 7, 2021.

Dara Del Priore: Negligence and Negligence Per Se, resolved via judgment entered December 7, 2021.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Giann Bianchi and Dara Del Priore
Name of appellant

Adam Ellis
Name of counsel of record

02/03/2022
Date

/s/ Adam Ellis *Adam Ellis*
Signature of counsel of record

Clark County, Nevada
State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 3rd day of February, 2022, I served a copy of this completed docketing statement upon all counsel of record:

- ☐ By personally serving it upon him/her; or
- ☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Alex G. LeVeque; Brian P. Eagan
Solomon Dwiggin Freer & Steadman, Ltd

James P.C. Silvestri; Robert P. Molina
Pyatt Silvestri

Daniel F. Polsenberg
Lewis Roca

Dated this 3rd day of February, 2022

/s/ Adam Ellis *Adam Ellis*
Signature

CERTIFICATE OF SERVICE (Cont'd.)

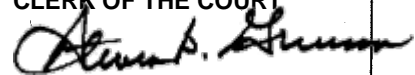
Alex G. LeVeque; Brian P. Eagan
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James P.C. Silvestri; Robert P. Molina
Pyatt Silvestri
701 E. Bridger Ave. #600
Las Vegas, NV 89101

Daniel F. Polsenberg
Lewis Roca
3993 Howard Hughes Pkwy #600
Las Vegas, NV 89169

EXHIBIT 1

EXHIBIT 1



ACOM

Corey M. Eschweiler, Esq.
Nevada Bar No. 6635
Craig A. Henderson, Esq.
Nevada Bar No. 10077
GLEN LERNER INJURY ATTORNEYS
4795 South Durango Drive
Las Vegas, Nevada 89147
Telephone: (702) 877-1500
Facsimile: (702) 933-7043
E-mail: ceschweiler@glenlerner.com
 chenderson@glenlerner.com
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

GIANN BIANCHI, individually,
DARA DELPRIORE, individually,

Plaintiff,

vs.

CASE NO.: A691887
DEPT NO.: VIII

FRED WAID, Special and General
Administrator of the Estate of JAMES
McNAMEE, individually, DOES I - X, and ROE
CORPORATIONS I - X, inclusive,

Defendants.

AMENDED COMPLAINT

Plaintiffs complain as follows:

GENERAL ALLEGATIONS

1. Plaintiffs are, and at all times relevant herein, were, residents of Clark County, Nevada.
2. The actions complained of herein took place in Clark County, Nevada.
3. The true names and capacities of the Defendants designated herein as Doe or Roe Corporations are presently unknown to Plaintiffs at this time, who therefore sues said Defendants by such fictitious names. When the true names and capacities of these defendants are ascertained, Plaintiffs will amend this Complaint accordingly.
4. At all times pertinent herein, Defendants were agents, servants, employees or joint venturers of every other Defendant, and at all times mentioned herein were acting within the scope and course of said agency, employment, or joint venture, with knowledge and permission and consent of all other named Defendants.

1 5. Plaintiff GIANN BIANCHI was at all times mentioned herein the operator of a 2008
2 Nissan Pathfinder.

3 6. Plaintiff DARA DELPRIORE was at all times mentioned herein a passenger in and owner
4 of the vehicle operated by Plaintiff GIANN BIANCHI.

5 7. Decedent JAMES McNAMEE was at all times mentioned herein the owner and operator
6 of a 1989 Ford Econoline Van (hereinafter referred to as the "Vehicle").

7 8. On July 17, 2013, Decedent JAMES McNAMEE negligently operated the Vehicle,
8 causing a collision with the vehicle containing Plaintiffs.

9 9. As a direct and proximate result of the negligence of Decedent, Plaintiffs sustained
10 injuries to their necks, backs, bodily limbs, organs and systems, all or some of which conditions may be
11 permanent and disabling, and all to Plaintiffs' damage in a sum in excess of \$15,000.00.

12 10. As a direct and proximate result of the negligence of Decedent, Plaintiffs received medical
13 and other treatment for the aforementioned injuries, and said services, care, and treatment are continuing
14 and shall continue in the future, all to the damage of Plaintiffs.

15 11. As a direct and proximate result of the negligence of Decedent, Plaintiffs have been
16 required to, and have, limited occupational and recreational activities, which has caused and shall
17 continue to cause Plaintiffs loss of earning capacity, lost wages, physical impairment, mental anguish,
18 and loss of enjoyment of life, in a presently unascertainable amount.

19 12. As a direct and proximate result of the negligence of Decedent, Plaintiff DARA
20 DELPRIORE's vehicle was damaged and she lost the use of that vehicle.

21 13. As a direct and proximate result of the aforementioned negligence of all Decedent,
22 Plaintiffs have been required to engage the services of an attorney, incurring attorney's fees and costs to
23 bring this action.

24 ///

25 ///

26 ///

27 ///

1 **FIRST CAUSE OF ACTION**

2 **(Negligence against Defendant FRED WAID, as Special and General Administrator of the Estate of**
3 **JAMES McNAMEE)**

4 14. Plaintiffs incorporate paragraphs 1 through 13 of the Complaint as though said paragraphs
5 were fully set forth herein.

6 15. Decedent JAMES McNAMEE owed Plaintiffs a duty of care to operate the Vehicle in a
7 reasonable and safe manner. Decedent JAMES McNAMEE breached that duty of care by striking the
8 vehicle containing Plaintiffs on the roadway. As a direct and proximate result of the negligence of
9 Decedent JAMES McNAMEE, Plaintiffs have been damaged in an amount in excess of \$15,000.00.

10 **SECOND CAUSE OF ACTION**

11 **(Negligence Per Se against Defendant FRED WAID, as Special and General Administrator of the**
12 **Estate of JAMES McNAMEE)**

13 16. Plaintiffs incorporate paragraphs 1 through 15 of the Complaint as though said paragraphs
14 were fully set forth herein.

15 17. The acts of Decedent JAMES McNAMEE as described herein violated the traffic laws of
16 the State of Nevada and Clark County, constituting negligence per se, and Plaintiffs have been damaged
17 as a direct and proximate result thereof in an amount in excess of \$15,000.00.

18 WHEREFORE, Plaintiffs expressly reserving the right to amend this complaint prior to or at the
19 time of trial of this action, to insert those items of damage not yet fully ascertainable, pray judgment
20 against all Defendants, and each of them, as follows:

- 21 1. For general damages in an amount in excess of \$15,000.00;
22 2. For special damages in an amount in excess of \$15,000.00;
23 3. For property damages sustained by Plaintiff DARA DELPRIORE;
24 4. For attorney's fees and costs;

25 ///

26 ///

27 ///

- 1 5. For interest at the statutory rate; and
2 6. For such other relief as the Court deems just and proper.
3

4 GLEN LERNER INJURY ATTORNEYS

5 /s/ Craig A. Henderson
6 Corey M. Eschweiler, Esq.
7 Nevada Bar No. 6635
8 Craig A. Henderson, Esq.
9 Nevada Bar No. 10077
10 4795 South Durango Drive
11 Las Vegas, Nevada 89147
12 Attorneys for Plaintiffs
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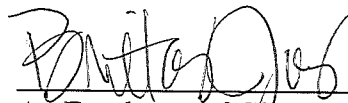
CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(a), E.D.C.R. 7.26(a) and N.E.F.C.R. 9, I hereby certify that I am an employee of GLEN LERNER INJURY ATTORNEYS, and on the 21 day of June, 2018 the foregoing **AMENDED COMPLAINT** was served by electronic copy via the Court's electronic service system, WIZNET, addressed to the following counsel of record:

James P.C. Silvestri, Esq.
Jeffrey Orr, Esq.
PYATT SILVESTRI
701 Bridger Ave., Suite 600
Las Vegas, Nevada 89101
Attorney for Defendant

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

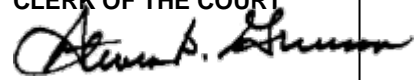
Fred P. Waid, Esq.
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
Special and General Administrator of the
Estate of James Allen McNamee



An Employee of Glen Lerner Injury Attorneys

EXHIBIT 2

EXHIBIT 2



MOT

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Nevada Bar No. 3603

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aleveque@sdfnvlaw.com

Attorneys for Defendant Susan Clokey

Special Administrator for the

Estate of James McNamee

DISTRICT COURT

CLARK COUNTY, NEVADA

GIANN BIANCHI, individually, DARA
DELPRIORE, individually,

Plaintiffs,

vs.

SUSAN CLOKEY, Special Administrator for the
ESTATE OF JAMES MCNAMEE, DOES I-X,
and ROE CORPORATIONS I-X, inclusive,

Defendants.

Case No.: A-13-691887-C

Dept. No.: XXIII

**MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT
(NRCF 50(b)) AND/OR MOTION TO
ALTER OR AMEND JURY VERDICT
(NRCF 59(e)) IN ACCORDANCE WITH
NRS 140.040**

HEARING REQUESTED

SUSAN CLOKEY, Special Administrator for the Estate of James McNamee, by and through
her attorneys, the law firms of PYATT SILVESTRI and SOLOMON DWIGGINS FREER & STEADMAN,
LTD., hereby moves this Honorable Court for an order reducing the verdicts in favor of Plaintiffs
GIANN BIANCHI and DARA DELPRIORE to judgment, each in the amount of THIRTY
THOUSAND DOLLARS (\$30,000.00), pursuant to NRCF 50(b), 59(e) and NRS 140.040.

I.

INTRODUCTION

Under well-settled Nevada law, the estate of a decedent cannot be liable for any claim in a special probate administration except in a situation where a policy of liability insurance exists that can pay a claim without otherwise disturbing the property of the estate. Only a general administrator has the authority to act on claims against a decedent's estate where the estate has assets other than a policy of liability insurance. The Supreme Court of Nevada has made it clear that the judiciary is prohibited from creating exceptions to the limitations set forth in NRS 140.040(3). Plaintiffs in this case are essentially requesting that this Court create two such prohibited judicial exceptions: (1) permitting an estate to be liable for a claim in a special administration where the claim exceeds the limits of a policy of liability insurance; and (2) permitting a judgment against a special administrator on a claim where a creditor alleges the estate has assets other than an insurance policy.¹

The only defendant in this case is Ms. Clokey, the Special Administrator of the Estate of James McNamee. The only verdicts are verdicts against Ms. Clokey in that capacity. Accordingly, if and to the extent that the verdicts are valid, the estate can only be liable to the extent of the GEICO policy limits. In this case, such limits are \$30,000 for each Plaintiff. Therefore, the verdicts in favor of Plaintiffs Giann Bianchi and Dara Del Priore must be reduced, pursuant to NRS 140.040(3), to \$30,000 each.

Ms. Clokey's Motion is ripe for adjudication. This case went to jury trial on the merits and verdicts were entered. No general administration has ever been opened. A non-existent general administrator cannot be held liable for judgments that were entered against the Special Administrator. Plaintiffs were not without a remedy. They had the opportunity to petition the Probate Court to open a general administration for the McNamee estate but apparently made a strategic decision to not seek such relief. For the various reasons set forth herein, they are now barred from doing so.

¹ Plaintiffs have contended since the death of James McNamee that his estate has a potential bad faith claim against GEICO. Although this contention has been disputed by Defendant, assuming *arguendo* that such potential bad faith claim is an "asset" of the estate, the Plaintiffs would be entitled to no relief as the special administrator can only pay a claim with the insurance policy when there are no other assets. NRS 140.040(3).

II.

STATEMENT OF RELEVANT FACTS

1. Plaintiffs filed their Complaint against Defendant James McNamee on November 19, 2013.

2. James McNamee died on August 12, 2017, during the pendency of these proceedings.²

3. On September 20, 2017, counsel for McNamee filed in the Probate Court a *Petition for Special Letters of Administration*, which sought to appoint Ms. Clokey as a special administrator for the “sole” purpose of allowing this lawsuit to proceed “as to the insurance proceeds of the GEICO automobile insurance policy pursuant to Nevada Revised Statutes 140.040(2)(a) and 140.040(3)(b).”³

4. On November 16, 2017, the Probate Court granted the *Petition for Special Letters of Administration*.⁴ Accordingly, the only exposure the Probate Court permitted against the Estate was exposure as to the proceeds of the insurance policy.

5. On December 14, 2017, counsel for McNamee moved to substitute the Special Administrator in the place and stead of McNamee in this case. Plaintiffs opposed the motion on January 3, 2018, primarily arguing that a special administration was not proper because the Estate possessed assets beyond the liability insurance policy:

*In short, because the decedent’s Estate does possess assets beyond the liability insurance policy, the Estate must be generally administered, and the administrator substituted in place of the decedent McNamee under NRCP 25(a)(1).*⁵

6. On January 3, 2018, Plaintiffs filed in the Probate Court their *Petition for Issuance of General Letters of Administration* which sought to convert the special administration into a general

² See Suggestion of Death, filed on September 20, 2017, attached hereto as **Exhibit 1**.

³ See Petition for Special Letters of Administration, filed on September 20, 2017, attached hereto as **Exhibit 2**.

⁴ See Order Granting Petition for Special Letters of Administration, filed on November 16, 2017, attached hereto as **Exhibit 3**.

⁵ See Plaintiff’s 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, filed on January 3, 2018, at 3:12-15, attached hereto without exhibits as **Exhibit 4**.

administration and to appoint a general administrator in the place and stead of Ms. Clokey.⁶ Again, Plaintiffs primarily argued that a special administration is not appropriate because the Estate possessed a potential bad faith claim against GEICO:

[T]he Estate's assets consist not only of decedent's liability insurance policy through GEICO, but the Estate's causes of action against GEICO for breach of contract and tortious breach of the implied covenant of good faith and fair dealing, or insurance "bad faith."

*...
In short, because the decedent's Estate does possess assets beyond the liability insurance policy, the Estate must be generally administered.⁷*

7. Ms. Clokey filed her objection to Plaintiffs' *Petition for General Administration* on January 24, 2018, arguing that (a) a special administration is the only proper probate proceeding that applies to this Estate; and (b) the probate court lacks jurisdiction to generally administer the Estate because McNamee was not a Nevada resident at the time of his death and died without holding any property in the State of Nevada.⁸

8. Despite the Plaintiffs noticing their *Petition for General Administration* to be heard by the Probate Commissioner on March 16, 2018, Plaintiffs chose to vacate the hearing and abandoned their *Petition for General Administration* because of a ruling from Judge Smith in this case where he appointed a general administrator.⁹

9. The ruling referenced by counsel for Plaintiffs was Judge Smith's Order Denying the December 14, 2017, Motion to Substitute the Special Administrator in the Place and Stead of McNamee wherein Judge Smith, *sua sponte*, appointed Fredrick Waid as the general administrator of the Estate in a chambers decision.¹⁰

⁶ See Petition for Issuance of General Letters of Administration and for Appointment of *Cumis* Counsel for the Estate of James Allen McNamee, filed on January 3, 2018, attached hereto without exhibits as **Exhibit 5**.

⁷ *Id.*, at 3:10-13; 3:28-4:1.

⁸ See Objection to Petition for Issuance of General Letters of Administration and for Appointment of *Cumis* Counsel for the Estate of James Allen McNamee, filed on January 24, 2018, attached hereto without exhibits as **Exhibit 6**.

⁹ See March 4, 2018 Email Exchange between Jeff Orr, Esq. and Corey Eschweiler, Esq., attached hereto as **Exhibit 7**.

¹⁰ See Order Denying Defendant James McNamee's Motion to Substitute Special Administrator in Place and Stead of Defendant James Allen McNamee and to Amend Caption, filed on March 27, 2018, attached hereto as **Exhibit 8**.

10. Accordingly, on March 30, 2019, McNamee filed a Motion to Amend Order which sought a reconsideration of the appointment of Mr. Waid as general administrator because no party had requested such relief and Plaintiffs had a petition pending before the Probate Court which sought to convert the special administration into a general administration.¹¹

11. Judge Smith heard the Motion to Amend Order on April 10, 2018, purportedly granted it in part, appointed Fred Waid as both the special administrator *and* the general administrator of McNamee's Estate, and substituted *sua sponte*, Mr. Waid, as a "special/general administrator," as the defendant in this case.¹²

12. Said ruling was reversed by the Supreme Court of Nevada in *McNamee v. Eighth Jud. Dist. Ct.*, 135 Nev. 392, 450 P.3d 906 (2019) as Judge Smith's refusal to substitute in Ms. Clokey, the Special Administrator, was arbitrary and capricious:

The district court thus denied the motion to substitute based on preference alone. We conclude this was an arbitrary and capricious exercise of the district court's discretion.

Id., at 135 Nev. 397, 450 P.3d 910.

13. The Supreme Court of Nevada also vacated Judge Smith's orders substituting Mr. Waid as special and general administrator for the Estate and remanded for this Court to reconsider McNamee's motion to substitution. *Id.*

14. Accordingly, on October 28, 2019, counsel for McNamee refiled the Motion to Substitute Special Administrator. The same was heard on December 3, 2019 and granted.¹³

15. On January 29, 2020, and with full knowledge that the Probate Court had already exercised exclusive *in rem* jurisdiction over the Estate, Plaintiffs filed in this Court a Motion for

¹¹ See Defendant James McNamee's Motion to Amend Order on Order Shortening Time, filed on March 30, 2018, without exhibits, attached hereto as **Exhibit 9**.

¹² See 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, filed on May 14, 2018, attached hereto as **Exhibit 10**.

¹³ See Order Granting Substitution, filed on December 26, 2019, attached hereto as **Exhibit 11**.

1 Appointment of a General Administrator on an Order Shortening Time.¹⁴ In support of the Motion,
2 counsel for Plaintiffs submitted a sworn declaration wherein he attested:

3 *This motion should be heard on shortened time as hearing it in the normal course*
4 *presents the risk that a general administrator will not be appointed prior to the May*
5 *11, 2020 trial date, around which time the McNamee Estate's unliquidated insurance*
6 *bad faith claim will accrue.*¹⁵

7 16. On March 2, 2020, Ms. Clokey filed an Opposition to Plaintiffs' Motion for
8 Appointment of a General Administrator and Counter-moved to join GEICO as a required party.¹⁶
9 Ms. Clokey argued, *inter alia*, that Plaintiffs' motion was filed in the wrong court because the
10 Probate Court had already exercised *in rem* jurisdiction over the Estate to the exclusion of all other
11 courts.

12 17. Judge Silva agreed that she did not have jurisdiction to appoint a General
13 Administrator. On March 10, 2020, Judge Silva heard the motion and countermotion and denied
14 both. With regard to the Plaintiffs' Motion for Appointment of a General Administrator, Judge Silva
15 made the following findings and conclusions:

16 *Plaintiff requests that the court appoint Fred Waid and the general administrator for*
17 *the Estate of James McNamee's bad faith claim. Although this Court has subject*
18 *matter jurisdiction to appoint a general administrator, this Court's jurisdiction is not*
19 *limitless. This Court agrees with Defendant that, pursuant to the prior-exclusive*
20 *jurisdiction [doctrine], only one court can exercise in rem jurisdiction over the estate*
21 *of a decedent. Accordingly, this Court does not have in rem jurisdiction over the*
22 *estate of James McNamee. **If Plaintiff seeks to convert administration of decedent's***
23 *estate from special to general, it must bring the proper petition to do so before the*
24 *appropriate court, namely the Probate court, i.e., the Honorable Trevor Atkin in*
25 *Department VIII.*¹⁷

26 18. Plaintiffs, however, chose not to avail themselves of Judge Silva's instruction before
27 trial commenced in this case.

28 ¹⁴ See Plaintiffs' Motion for Appointment of a General Administrator on an Order Shortening time,
filed on January 29, 2020, attached hereto without exhibits as **Exhibit 12**.

¹⁵ *Id.*, at 3:18-20.

¹⁶ See Defendant's Opposition to Plaintiff's Motion for Appointment of a General Administrator and
Countermotion to Join GEICO as a Required Party, filed on March 2, 2020, without exhibits,
attached hereto as **Exhibit 13**.

¹⁷ See Order Denying Plaintiff's Motion for Appointment of a General Administrator and
Defendant's Countermotion to Join GEICO as a Required Party, filed on May 27, 2020, attached
hereto as **Exhibit 14**, at 2:2-17 (internal citations omitted) (emphasis added).

19. The operative order regarding Ms. Clokey's appointment is the Probate Court's Amended Order Granting Petition for Special Letters of Administration. Notice of Entry of the Order was filed on November 25, 2019.¹⁸ The order states in relevant part¹⁹:

NOW, THEREFORE, IT IS HEREBY ORDERED that Susan Clokey is appointed as Special Administrator and that Special Letters of Administration be issued, without bond, pursuant to Nevada Revised Statutes 140.040(2)(a) and 140.040(3)(b).

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

The Special Administrator does not have any other authority beyond Nevada Revised Statutes 140.040(2)(a) and 140.040(3)(b) and may not distribute any property other than the GEICO automobile insurance policy with automobile liability insurance coverage of \$30,000 per person and \$60,000 per accident.

20. This case went to jury trial on August 5, 2021. On August 18, 2021, the jury returned verdicts in favor of the Plaintiffs. For Plaintiff Giann Bianchi, the jury awarded \$62,800 (\$37,800 for past medical bills and \$25,000 for past pain and suffering). For Plaintiff Dara Del Priore, the jury awarded \$125,100 (\$41,700 for past medical bills and \$83,400 for past pain and suffering).²⁰

21. At the time of the subject motor vehicle accident, Mr. McNamee was insured through an automobile policy issued by GEICO. This policy provided policy limits for bodily injury claim of \$30,000 per person/\$60,000 per occurrence.²¹

22. Judge Silva's Order Denying Plaintiffs' Motion for Appointment of a General Administrator was entered on May 27, 2020. The Probate Court's Amended Order Granting Petition

¹⁸ See Notice of Entry of Amended Order Granting Petition for Special Letters of Administration, filed on May 27, 2020, attached hereto as **Exhibit 15**.

¹⁹ *Id.*, at 2:11-3:4.

²⁰ See Verdict Forms, filed on August 18, 2020, collectively attached hereto as **Exhibit 16**.

²¹ See Declarations page, Exhibit 17.

for Special Letters of Administration was entered on November 25, 2019. Special appellate rules apply to probate proceedings. Under NRS 155.190(a), orders granting or denying the appointment of administrators and letters of administration are required to be appealed “within 30 days after the notice of entry of an order[.]”²² Plaintiffs had until May 27, 2021, to appeal the Judge Silva’s Order Denying Plaintiffs’ Motion for Appointment of a General Administrator. Plaintiffs did not appeal this order. Moreover, Plaintiffs never sought appellate review of the Probate Court’s Amended Order Granting Petition for Special Letter of Administration before trial commenced. Accordingly, this order is likewise now unreviewable.²³

III.

ARGUMENT

A. CREDITORS HAVE NO RIGHTS AGAINST AN ESTATE ABSENT MAKING A CREDITOR CLAIM AND FOLLOWING STATUTORY PROBATE PROCEDURES SAVE THE LIABILITY INSURANCE EXCEPTION.

“Under the common law, the death of the wrongdoer caused an abatement of any cause of action in tort against him.” *Estes v. Riggins*, 68 Nev. 336, 338, 232 P.2d 843, 844 (1951). Survival of tort claims after the death of the tortfeasor is a creation by statute. Claim survival is, therefore, entirely dependent on survival statutes. Nevada’s survival statute is NRS 41.100. With regard to claims which existed against the decedent before his or her death, NRS 41.100(1) generally provides that “no cause of action is lost by reason of the death of any person, but may be maintained ... against the person’s executor or administrator.” However, to survive abatement vis-à-vis the survival statute, two things need to occur. First, a creditor must avail itself of the Nevada probate claims procedure. Second, a personal representative of the estate of the decedent, with authority to defend

²² See *Estate of Riddle*, 99 Nev. 632, 633-34, 668 P.2d 290, 290-91 (1983) (Appeals taken by virtue of NRS 155.190 “must be taken within thirty days of the date of entry of the order appealed from.”).

²³ NRS 140.020(3)(b) provides that orders appointing a special administrator are not appealable notwithstanding NRS 155.190(a). However, the Supreme Court of Nevada can review appointments of special administrators via original writ proceedings. See *Nevada Paving, Inc. v. Callahan*, 83 Nev. 208, 211, 427 P.2d 383, 385 (1967). Plaintiffs in this case never applied to the Supreme Court for a writ of prohibition or mandamus.

and compromise the claim, must be substituted in as the real party in interest. Both procedures must be timely and properly executed.

1. Plaintiffs failed to avail themselves of the probate claim procedure. This Court is, therefore, without jurisdiction to adjudicate any claim against the McNamee Estate unless an exception applies.

NRS 147.100 provides in no uncertain terms that, except as otherwise ordered by the court for good cause shown, “[n]o recovery may be allowed in an action against property in the estate of a decedent **unless proof** is made of:

- (a) A claim is first filed in whole or in part;
- (b) The claim is rejected in whole or in part; and
- (c) Within 60 days after notice of rejection is given, the claimant who is the plaintiff applies to the court in which the action or proceeding is pending for an order substituting the personal representative in the action nor proceeding.

NRS 147.100(1) and (2) (Emphasis added).²⁴

In this case, Plaintiffs never filed a creditor claim in the McNamee probate proceeding. Furthermore, because Plaintiffs abandoned their *Petition for Issuance of General Letters of Administration*, filed on January 3, 2018 before the Probate Court, Plaintiffs can no longer apply to this Court for an order substituting in a general administrator to prosecute the creditor claim because they never filed a creditor claim and this matter has already concluded to verdict against Ms. Clokey, the Special Administrator. To avoid any uncertainty or doubt as to the applicability and enforceability of NRS 147.100, the Legislature enacted NRS 147.150 which provides that “[n]o holder of a claim against an estate may maintain an action thereon unless the claim is first filed with the clerk and the claim is rejected in whole or in part[.]”²⁵

²⁴ It should be noted that creditor claims are required to be filed with the Clerk of the Court in the probate proceeding and any claims for an amount exceeding \$250 must be supported by an affidavit of the claimant. *See* NRS 147.040 and 147.070.

²⁵ The only actions exempt from NRS 147.150 are actions by the holder of a lien or mortgage to enforce the lien or mortgage against the property of the estate.

**B. THE SPECIAL ADMINISTRATOR’S LIABILITY IS CAPPED AT \$30,000 FOR EACH PLAINTIFF
UNDER NRS 140.040 AND THE APPLICABLE GEICO INSURANCE POLICY.**

There was only one defendant that went to trial in this case: Susan Clokey, the Court-appointed Special Administrator for the McNamee Estate. Pursuant to Court order, Ms. Clokey “does not have any other authority beyond Nevada Revised Statutes 140.040(2)(a) and 140.040(3)(b).”²⁶ The “sole” purpose of the Special Administration “is to allow [this case] to proceed as to the insurance proceeds of the GEICO automobile insurance policy pursuant to Nevada Revised Statutes 140.040(2)(a) and 140.040(3)(b).”²⁷

NRS 140.040 has been reviewed by the Supreme Court of Nevada on three noteworthy occasions, the holdings of which are all relevant to the case at bar: (1) *Bodine v. Stinson*, 85 Nev. 657, 461 P.2d 868 (1969) (“*Bodine*”); (2) *Klosterman v. Cummings*, 86 Nev. 684, 476 P.2d 14 (1970) (“*Klosterman*”); and (3) *Jacobson v. Estate of Clayton*, 121 Nev. 518, 119 P.3d 132 (2005) (“*Jacobson*”). *Bodine* and *Klosterman* were decided before NRS 140.040(3) was amended to permit a claim against a special administrator where the estate contains no other assets other than a policy of liability insurance. *Jacobson* was decided after. All three cases, however, equally support Ms. Clokey’s contention that Plaintiffs cannot recover any more than \$60,000 from the McNamee Estate because Ms. Clokey is a special administrator and the Plaintiffs never availed themselves of opening a general administration and filing a creditor claim for the full amount of their alleged damages.

1. Bodine v. Stinson

In *Bodine*, the trial court dismissed a wrongful death action against the special administrator for the estate of the deceased defendant driver. The action was brought by the heirs of a passenger in the vehicle of the deceased defendant. The trial court dismissed the action because the special administrator could not be liable “to an action by any creditor, on any claim against the estate, nor pay any claim against the deceased” under NRS 140.040(3). *Bodine*, at 85 Nev. 659, 461 P.2d 870. On appeal, the wrongful death claimants argued that because NRS 41.100 [Nevada’s survival statute] provided that “a cause of action for wrongful death shall not abate by reason of the death of

²⁶ See **Ex. 15**, at 3:1-4.

²⁷ *Id.*, at 2:14-18.

the person against whom such cause of action shall have accrued, but shall survive against his legal representative,” the trial court matter should have proceeded because the special administrator was the “legal representative” as contemplated under the statute.

The Supreme Court disagreed. In affirming the dismissal, the Supreme Court held that only a general administrator would have authority to act upon the wrongful death claims because a special administrator is not a general representative of the estate. *Id.*, at 85 Nev. 660, 461 P.2d 871. The Court made some other rulings that are relevant in this case:

- A creditor is not without a remedy if only a special administration is opened. Indeed, a creditor “may seek letters of general administration, or persuade the court to appoint the public administrator or any legally competent person.” *Id.* at 85 Nev. 661, 461 P.2d 871 (citations omitted).
- The claim procedure set forth in NRS 147 “must be followed whenever the estate may be diminished if the creditor is successful.” *Id.*

It should be noted that *Bodine* was overruled only to the extent that NRS 140.040(3) was later amended to create the liability insurance exception.²⁸ Because the exception did not exist in 1969 when *Bodine* was decided, the Supreme Court correctly ruled that a general administration would need to be opened, even if the only asset was a policy of liability insurance.

Applying *Bodine* to the facts of the instant case would results in a limitation of the jury verdicts. Where, prior to 1969, this case would have been dismissed outright, NRS 140.040(3) now necessarily allowed the case to go forward but limits the verdict amount to the policy limits. Here, Plaintiffs’ attempt to circumvent the mandate of the NRS 140.040(3) and the Probate Court’s Order by claiming that a “potential bad faith claim constitutes an asset of the Estate” simply fails. There is no exception in NRS 140.040(3) for estates that have assets, real or potential, in addition to a policy of liability insurance. The Estate’s liability is absolutely limited by statute to the amount of the policy. Any claim in excess of the policy would be subject to NRS 147 procedure, which Plaintiffs have utterly failed to follow. Accordingly, under the clear holding in *Bodine*, which

²⁸ NRS 140.040(3) was amended in 1971 allowing a special administrator to be liable, but only up to “a policy of liability insurance.”

1 interprets NRS 140.040 on its face, Plaintiffs, as creditors, were required to seek the appointment of
2 a general administrator. And, for the reasons articulated by Judge Silva in her May 27, 2020 Order,
3 only the Probate Court has jurisdiction to entertain such a petition.

4 **2. *Klosterman v. Cummings***

5 *Klosterman* was another wrongful death action case brought by the survivors of Klosterman,
6 an air force pilot, who died in a mid-air collision with a plane flown by Sumner. The Klosterman
7 survivors brought a wrongful death claim against Cummings, the court-appointed special
8 administrator of the Sumner estate. The trial court dismissed the wrongful death lawsuit under
9 NRCP 54(b) because Cummings, as a special administrator, could not be liable to an action by a
10 creditor on a claim against the estate pursuant to NRS 140.040(3). The Klosterman estate appealed.
11 The appellants in *Klosterman* essentially requested that the Supreme Court reconsider its *Bodine*
12 decision in holding that a wrongful death action could not be properly brought against a special
13 administrator even though the sole asset of the estate was a liability insurance policy.

14 However, the appellants in *Klosterman* requested some additional relief that the appellants
15 in *Bodine* did not: a request for a remand to permit the appellant to amend her complaint to substitute
16 a general administrator in the place and stead of the special administrator. *Klosterman*, 476 P.2d 16,
17 86 Nev. 687. The Supreme Court **denied** the request. *Id.* In so holding, the Supreme Court aptly
18 observed that NRS 147 applies to probate claims procedure and under such procedure, “a plaintiff
19 who has a pending action against a deceased, at the time of death, must file his claim with the clerk
20 and no recovery shall be allowed in the action unless there is proof of the filing.” *Id.* “[A] plaintiff
21 with a new claim **cannot ignore** the procedural requirements and expect to recover.” *Id.*

22 The Supreme Court affirmed the dismissal and rejected the appellants’ request for leave to
23 amend her pleading to substitute a general administrator because the same cannot be accomplished
24 by an amended pleading. Rather, a creditor claim must be **properly and timely** filed. Moreover, the
25 Supreme Court in *Klosterman* was keen to note that “narrow rules must apply to the filing and
26 prosecution of claims against estates.” *Id.*, at 476 P.2d 18, 86 Nev. 690.

27 The Supreme Court’s opinion in *Klosterman* made one additional ruling that is particularly
28 relevant in this case. The appellants in *Klosterman* urged the Supreme Court to create a judicial

1 exception to NRS 140.040(3), namely, that if an estate's only asset is a policy of liability insurance,
2 a creditor is not required to seek the opening of a general administration and the appointment of a
3 general administrator. The Supreme Court declined do to so holding that:

4 [i]f an exception is to be made in the procedure for processing a claim
5 against an estate where the only asset is a policy of liability insurance, the
6 proper forum to effect such a change is the legislature. It is not for this court
to torture the present statutory scheme to reach the position espoused by the
appellant."

7 *Id.*, at 476 P.2d 15, 86 Nev. 687.

8 In this case, Plaintiffs are essentially requesting two judicial exceptions to NRS 140.040(3)
9 that the Supreme Court has prohibited: (1) permitting the adjudication of a creditor claim where
10 Plaintiffs allege more assets than just a policy of insurance in a special administration; and (2)
11 allowing a special administrator and an estate to be liable for a claim in excess of a policy of liability
12 insurance. No such exceptions exist under NRS 140.040(3) and this Court cannot create them in
13 light of *Klosterman*.

14 **3. *Jacobson v. Estate of Clayton***

15 *Jacobson* was the first case decided after the Legislature amended NRS 140.040(3) to permit
16 liability against an estate in a special administration where the only asset is a policy of liability
17 insurance.

18 *Jacobson* was essentially a "no-brainer" for the Supreme Court because, there, the trial court
19 dismissed a motor vehicle accident lawsuit brought by motorists against the special administrator
20 for Clayton where the order appointing the special administrator stated that the only asset of
21 Clayton's estate was a policy of liability insurance. *Id.*, at 121 Nev. 520, 119 P.3d 133. The estate's
22 special administrator filed a third-party complaint against McDonald's Travel 'N' Fun, the company
23 that owned the trailer that Clayton was towing when the accident occurred. *Id.* McDonald's moved
24 to dismiss both the complaint and the third-party complaint for lack of subject matter jurisdiction,
25 arguing that appellants had failed to follow the probate procedures of NRS 147. *Id.* The trial court
26 dismissed both the pleadings and later amended pleadings.

27 The trial court dismissed the pleadings based on the *Bodine* decision. The Supreme Court
28 reversed and pointed out that both *Bodine* and *Klosterman* were decided before NRS 140.040(3) was

1 amended. The Supreme Court simply stated: “[t]hus, after the 1971 amendment, NRS 140.040(3)
2 permits the special administrator to pay wrongful death, personal injury, and property damage claims
3 when the estate’s only asset is a liability insurance policy.” *Id.*, at 121 Nev. 522, 119 P.3d 134.
4 Accordingly, the Supreme Court reversed.

5 The important takeaway from *Jacobson* is that the Supreme Court did not disturb its long
6 history and rationale for refusing to create judicial exceptions to NRS 140.040(3) and to narrowly
7 interpret rules which apply to the filing and prosecution of claims against estates. *Jacobson* merely
8 recognized that the Legislature carved out a limited exception for liability insurance policies. And
9 with regard to that exception, the Supreme Court stated that the new NRS 140.040(3) “promotes
10 judicial economy and efficient resolution of claims by enabling a plaintiff with such claims to avoid
11 lengthy, costly, formal probate procedures when the sole asset is a liability insurance policy.” *Id.*, at
12 121 Nev. 522, 119 P.3d 134 (Emphasis added). This limited exception provides the only statutorily
13 mandated recovery allowed to Plaintiffs in this case. Without this exception, coupled with Plaintiffs’
14 failure to otherwise open a general administration and make a claim under NRS 147, Plaintiffs would
15 not be able to recover against the Estate at all.

16 IV.

17 CONCLUSION

18 By operation of law, this case can proceed no further than recovery against the GEICO
19 liability policy, i.e., \$30,000 for each Plaintiff. Given that the jury awarded Plaintiff Gianni Bianchi
20 \$62,800 and Plaintiff Dara Del Priore \$125,100, the respective verdict amounts must be reduced to
21 \$30,000, each, under NRS 140.040(3) and the Probate Court’s Order.

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1 Any other result would violate the mandate of the Probate Court and the Legislature's
2 unambiguous and narrow exception to the general rule that Ms. Clokey, as Special Administrator,
3 and the McNamee Estate, are only liable for any of Plaintiffs' claims up to available insurance
4 proceeds.

5 Dated this 13th day of September, 2021.

6 PYATT SILVESTRI

7 /s/ James P.C. Silvestri

8 JAMES P.C. SILVESTRI, ESQ.

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18 9060 West Cheyenne Avenue

19 Las Vegas, Nevada 89129

20 *Attorneys for Defendant Susan Clokey,*
21 *Special Administrator for the Estate of James*
22 *McNamee*
23
24
25
26
27
28

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of Pyatt Silvestri and that on the 13th day of September, 2021, I caused the above and foregoing document **MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (NRCP 50(b) AND/OR MOTION TO ALTER OR AMEND JURY VERDICT (NRCP 59(e) IN ACCORDANCE WITH NRS 140.040**, 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.
ER INJURY ATTORNEYS
4975 S. Durango Drive
Las Vegas, NV 89147
corey@erinjuryattorneys.com

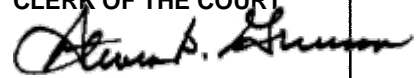
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DARA DELPRIORE

/s/ Barbara Abbott
An Employee of PYATT SILVESTRI

EXHIBIT “1”



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Attorney for Defendant
JAMES MCNAMEE

DISTRICT COURT

CLARK COUNTY, NEVADA

GIANN BIANCHI, individually, DARA)
DELPRIORE, individually)

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

Plaintiffs,

vs.

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

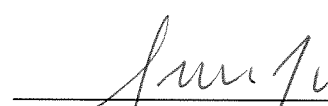
Defendants.

SUGGESTION OF DEATH UPON THE RECORD

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

DATED this 20 day of September, 2017.

PYATT SILVESTRI



JEFFREY J. ORR, ESQ.

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

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


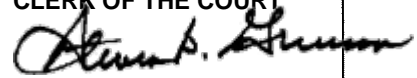

Employee of PYATT SILVESTRI

EXHIBIT “2”



PET
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Attorney for Petitioner,
Special Administrator Susan Clokey

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

P-17-093041-E

| | | |
|--|---|----------------|
| In the Matter of the Estate of James Allen |) | Case No.: PC-1 |
| McNamee, Deceased |) | Dept No.: |
| |) | |
| |) | |
| |) | |
| |) | |
| |) | |

PETITION FOR SPECIAL LETTERS OF ADMINISTRATION

1. Petitioner, Susan Clokey, by and through her attorney, Jeffrey J. Orr, Esq., of the law firm of Pyatt Silvestri, (hereinafter "Petitioner"), alleges and shows as follows:

2. Petitioner files this request pursuant to Nevada Revised Statutes 140(2)(a) and 140(3)(b), and requests this Court enter an Order authorizing the appointment of a Special Administrator over the estate of James Allen McNamee, (hereinafter "Decedent").

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

4. Decedent, James Allen McNamee, died on August 12, 2017. A certified copy of Decedent's death certificate is attached as **Exhibit A**.

5. The Decedent was at the time of death a defendant in a pending civil action, *Bianchi et. al v. James Allen McNamee*, Case No. A-13-691887-C. This case is set for trial beginning September 25, 2017 before the Honorable Judge, Douglas Smith in Dept. VIII.

1 6. Petitioner has conducted a search of assets for James Allen McNamee,
2 decedent. Upon information and belief, the Estate of James Allen McNamee has no assets
3 to satisfy any judgment other than an automobile insurance policy with GEICO. That
4 insurance policy, GEICO policy #4180457162 provides automobile liability insurance
5 coverage of \$30,000 per person and \$60,000 per accident.

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

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


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

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

17 WHEREFORE, Petitioner prays that a Special Administrator of the Estate of James
18 Allen McNamee, be appointed to defend Case No. A-13-691887-C, to be substituted as the
19 real party in interest Case No. A-13-691887-C for the sole purposes noted in
20 NRS140.040(2)(a) and 140.040(3)(b).

21 DATED this 20 day of September, 2017.

22
23 Respectfully submitted,

24 
25 _____
26 Jeffrey J. Orr, Esq.
27 Nevada Bar No. 7854
28 PYATT SILVESTRI
701 Bridger Avenue
Suite 600
Las Vegas, NV 89101
Attorney for Petitioner,
Special Administrator Susan Clokey

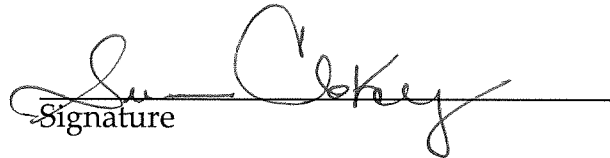
VERIFICATION IN SUPPORT OF
PETITION FOR SPECIAL LETTERS OF ADMINISTRATION

STATE OF NEVADA)
COUNTY OF CLARK)ss

Susan Clokey, being first duly sworn, declares under penalty of perjury under the law of the State of Nevada that the foregoing and following is true and correct:

I am the Petitioner in the above-entitled action. I have read the foregoing Petition for Special Letters of Administration, and know the contents thereof. The Petition is true of my own knowledge except as to those matters that are stated on information and belief, and as to those matters, I believe them to be true.

DATED this 20th day of September, 2017.


Signature

Susan Clokey

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

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EXHIBIT A

(Death Certificate)

STATE OF ARIZONA

CERTIFICATION OF VITAL RECORD

STATE OF ARIZONA DEPARTMENT OF HEALTH SERVICES - OFFICE OF VITAL RECORDS CERTIFICATE OF DEATH

State File NO. 102- 2017-035221

| | | | | | | |
|---|----------------------------|--|--|--|---|-------------------------------|
| 1. DECEDENT'S LEGAL NAME (FIRST, MIDDLE, LAST) JAMES ALLEN MCNAMEE | | | 2. AKA'S (IF ANY) | | 3. DATE OF DEATH 08/12/2017 | |
| 4. SEX MALE | 5. SOCIAL SECURITY NUMBER: | 6. DATE OF BIRTH 06/28/1968 | 7. AGE 49 | 8. MONTHS UNDER 1 YEAR | | 9. DAYS UNDER 1 DAY |
| 12. PLACE OF DEATH - HOSPITAL: <input type="checkbox"/> INPATIENT <input type="checkbox"/> E.R./OUTPATIENT <input type="checkbox"/> DEAD ON ARRIVAL | | | 13. PLACE OF DEATH - OTHER THAN HOSPITAL: <input type="checkbox"/> NURSING HOME OR LONG TERM CARE FACILITY <input checked="" type="checkbox"/> RESIDENCE <input type="checkbox"/> HOSPICE FACILITY <input type="checkbox"/> OTHER | | | |
| 14. FACILITY NAME (OR STREET ADDRESS IF NOT A FACILITY): 3309 N BRYCE RD | | | 15. CITY, TOWN & ZIP CODE OR LOCATION OF DEATH: GOLDEN VALLEY 86413 | | 16. COUNTY OF DEATH: MOHAVE | |
| 17. BIRTHPLACE (CITY AND STATE OR FOREIGN COUNTRY): ADA, MINNESOTA | | | 18. MARITAL STATUS AT TIME OF DEATH: WIDOWED | | 19. NAME OF SURVIVING SPOUSE (MAIDEN NAME IF WIFE): | |
| 20. DECEDENT'S USUAL RESIDENCE STREET ADDRESS: 3309 N BRYCE RD | | | 21. CITY AND COUNTY: GOLDEN VALLEY, MOHAVE | | 22. STATE ARIZONA | |
| 23. ZIP CODE 86413 | | | 24. EVER IN THE ARMED FORCES NO | | | |
| 25. WAS DECEDENT OF HISPANIC ORIGIN? <input checked="" type="checkbox"/> NO, NOT SPANISH, HISPANIC OR LATINO <input type="checkbox"/> YES: MEXICAN, MEXICAN AMERICAN, CHICANO <input type="checkbox"/> YES: PUERTO RICAN <input type="checkbox"/> YES, CUBAN <input type="checkbox"/> YES, OTHER (SPECIFY) <input type="checkbox"/> UNKNOWN | | 26. DECEDENT'S RACE(S): <input checked="" type="checkbox"/> WHITE <input type="checkbox"/> BLACK, AFRICAN AMERICAN <input type="checkbox"/> NATIVE HAWAIIAN <input type="checkbox"/> ASIAN INDIAN <input type="checkbox"/> CHINESE <input type="checkbox"/> FILIPINO <input type="checkbox"/> JAPANESE <input type="checkbox"/> GUAMANIAN OR CHAMORRO <input type="checkbox"/> KOREAN <input type="checkbox"/> VIETNAMESE <input type="checkbox"/> SAMOAN <input type="checkbox"/> AMERICAN INDIAN OR ALASKA NATIVE <input type="checkbox"/> OTHER ASIAN (SPECIFY) <input type="checkbox"/> OTHER PACIFIC ISLANDER (SPECIFY) <input type="checkbox"/> OTHER (SPECIFY) <input type="checkbox"/> UNKNOWN | | 27. IF AMERICAN INDIAN OR ALASKA NATIVE, SPECIFY UP TO 4 TRIBES, PRIMARY OR ENROLLED TRIBE: ADDITIONAL TRIBE: ADDITIONAL TRIBE: ADDITIONAL TRIBE: | | |
| 28. OCCUPATION: DIESEL MECHANIC | | | | | | |
| 29. FATHER'S NAME (FIRST, MIDDLE, LAST) ROBERT GERAY MCNAMEE | | | 30. MOTHER'S NAME (FIRST, MIDDLE, & LAST NAME PRIOR TO FIRST MARRIAGE) KATHLEEN LOUISE ADAMS | | | |
| 31. INFORMANT'S NAME BARBARA KAY MEIERHOFFER | | | 32. RELATIONSHIP SISTER | | | |
| 33. NAME AND ADDRESS OF FUNERAL FACILITY: LIETZ-FRAZE FUNERAL HOME & CREMATORY - KINGMAN 1701 N. STOCKTON HILL RD., KINGMAN, AZ | | | 34. FUNERAL DIRECTOR: KRISTEN L. LIETZ, FUNERAL DIRECTOR | | | |
| 35. LICENSE NUMBER: F0968 | | | 36. METHOD(S) OF DISPOSITION: CREMATION | | | |
| 37. NAME AND LOCATION OF 1st DISPOSITION FACILITY: LAKEVIEW CREMATORY, LAKE HAVASU CITY, ARIZONA | | | 38. NAME AND LOCATION OF 2nd DISPOSITION FACILITY: NONE | | | |
| 39. MEDICAL CERTIFICATION SECTION CAUSE OF DEATH PART I | | | | | | |
| 40. A ARTERIOSCLEROTIC CARDIOVASCULAR DISEASE | | 41. APPROXIMATE INTERVAL: | | 42. APPROXIMATE INTERVAL: | | |
| 43. APPROXIMATE INTERVAL: | | 44. APPROXIMATE INTERVAL: | | 45. APPROXIMATE INTERVAL: | | |
| 46. APPROXIMATE INTERVAL: | | 47. APPROXIMATE INTERVAL: | | 48. APPROXIMATE INTERVAL: | | |
| 49. CAUSE OF DEATH PART II | | | | | | |
| 50. INJURY? | | 51. INJURY AT WORK? | | 52. MANNER OF DEATH | | |
| 53. WAS AN AUTOPSY PERFORMED? | | 54. NATURAL DEATH | | 55. TIME OF DEATH | | |
| 56. DATE CERTIFIED: | | 57. DATE REGISTERED: | | 58. DATE OF DEATH | | |
| 59. NAME OF PERSON COMPLETING CAUSE OF DEATH: ARCHAUS MOSLEY, M.D. | | 60. NAME OF REGISTRAR: PATTY MEAD | | 61. DATE CERTIFIED: 08/14/2017 | | |
| 62. CERTIFIER'S ADDRESS: 1145 AVIATION DRIVE STE. 101 LAKE HAVASU CITY, AZ 86404 | | 63. DATE REGISTERED: 08/17/2017 | | 64. DATE OF DEATH | | |

DATE ISSUED: 09/19/2017



This is a true certification of the facts on file with the Arizona Department of Health Services, Bureau of Vital Records, PHOENIX, ARIZONA.
Revised 07/2016

Krystal Colburn
KRYSTAL COLBURN
ASSISTANT STATE REGISTRAR

ARIZONA DEPARTMENT
OF HEALTH SERVICES

This copy not valid unless prepared on a form displaying the State Seal and Impressed with the raised seal of the issuing agency.

ANY ALTERATION OR ERASURE VOIDS THIS CERTIFICATE

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

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EXHIBIT B

(Nominations and/or Affidavits in Support of Petition)

1
2 AFFIDAVIT OF SUSAN CLOKEY
3 IN SUPPORT OF PETITION FOR SPECIAL LETTERS
4 OF ADMINISTRATION

5 STATE OF NEVADA)
6)ss
7 COUNTY OF CLARK)

8 SUSAN CLOKEY, being first duly sworn, under oath, deposes and says that:

9 1. I am employed with the law firm of Pyatt Silvestri located at 701 Bridger
10 Avenue, Suite 600, Las Vegas, Nevada 89101;

11 2. That I am familiar with Case No. A-13-691887-C entitled *Bianchi et al. v.*
12 *James McNamee* in Department VIII. The matter is set for trial on September 25, 2017.

13 3. Due to the death of James Allen McNamee, I make this request pursuant to
14 NRS 140.040(2)(a) and NRS 140.040(3)(b) to allow the Special Administrator to be
15 substituted as the real party in interest and to defend that action.

16 4. That I have reviewed an asset search for James Allen McNamee and upon
17 information and belief, his estate contains no assets.

18 5. That James McNamee had an automobile insurance policy with GEICO,
19 policy #4180457162 which provides liability coverage in the amount of \$30,000 per person
20 and \$60,000 per accident.

21 6. The sole purpose of the appointment of the Special Administrator is to allow
22 the Special Administrator to defend that action and to be substituted as the real party in
23 interest.


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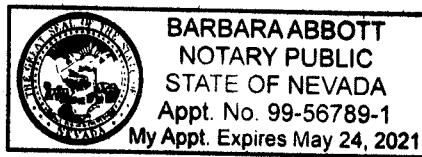
1 7. I declare under penalty of perjury that the foregoing is true and correct and
2 this affidavit is executed this 20th day of September, 2017.

3 **FURTHER AFFIANT SAYETH NAUGHT.**

4
5 
6 SUSAN CLOKEY

7 SUBSCRIBED AND SWORN to before me
8 this 20th day of September, 2017.

9 
10 NOTARY PUBLIC, in and for
11 said County and State.



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, NV 89101
T. (702) 383-6000
jorr@pyattsilvestri.com
Attorney for Petitioner
Special Administrator, Susan Clokey

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

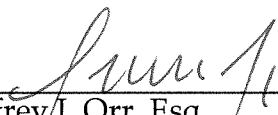
| | | |
|--|---|----------------|
| In the Matter of the Estate of James Allen |) | Case No.: PC-1 |
| McNamee, Deceased |) | Dept No.: |
| |) | |
| |) | |
| |) | |
| |) | |
| |) | |

NOMINATION OF SPECIAL ADMINISTRATOR

I, Jeffrey J. Orr, Esq., whose address is 701 Bridger Avenue, Suite 600, Las Vegas, Nevada 89101 declare under penalty of perjury that I hereby nominate Susan Clokey, who works at Pyatt Silvestri located at 701 Bridger Avenue, Suite 600, Las Vegas, Nevada 89101, to serve as Special Administrator of the Estate of James Allen McNamee.

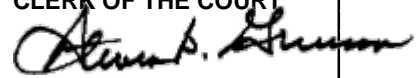
DATED this 20 day of September, 2017.

Respectfully submitted,



Jeffrey J. Orr, Esq.
Nevada Bar No. 7854
PYATT SILVESTRI
701 Bridger Avenue, Suite 600
Las Vegas, NV 89101
T. (702) 383-6000
Attorney for Petitioner
Special Administrator, Susan Clokey

EXHIBIT “3”



ORIGINAL

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

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

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

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

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

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

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

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

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

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

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

8 DATED this 15th day of ^{NOV.} ~~October~~, 2017.

9 

10 DISTRICT COURT JUDGE sa

11 Submitted by:

12 
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
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EXHIBIT A

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

1. A special administrator shall:

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

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

2. A special administrator may:

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

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

NRS 148.170.

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

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

3. A special administrator is not liable:

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

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

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

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


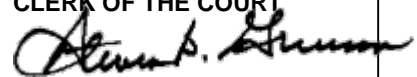

An Employee of PYATT SILVESTRI

EXHIBIT “4”



MOT

Corey M. Eschweiler, Esq.
Nevada Bar No. 6635
Craig A. Henderson, Esq.
Nevada Bar No. 10077
Joshua L. Benson, Esq.
Nevada Bar No. 10514
GLEN LERNER INJURY ATTORNEYS
4795 South Durango Drive
Las Vegas, Nevada 89147
Telephone: (702) 877-1500
Facsimile: (702) 933-7043
E-mail: ceschweiler@glenlerner.com
chenderson@glenlerner.com

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

*Attorneys for Plaintiffs Gianni Bianchi
and Dara Del Priore*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

GIANN BIANCHI, individually,
DARA DELPRIORE, individually,

Plaintiff,

vs.

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

Defendants.

CASE NO.: A691887
DEPT NO.: VIII

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

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

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

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

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

15 Plaintiffs' allegations are detailed in their Petition, but by way of brief background, Plaintiffs
16 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.

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

4
5
6 GLEN LERNER INJURY ATTORNEYS

7
8 By: /s/ Craig A. Henderson
9 Corey M. Eschweiler, Esq.
10 Nevada Bar No. 6635
11 Craig A. Henderson, Esq.
12 Nevada Bar No. 10077
13 4795 South Durango Drive
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
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1 **CERTIFICATE OF SERVICE**

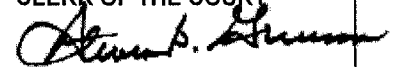
2 Pursuant to NRCP 5(b), I certify that I am an employee of GLEN LERNER INJURY
3 ATTORNEYS and that on the 3rd day of January, 2018, I caused the above **OPPOSITION TO**
4 **DEFENDANT JAMES ALLEN McNAMEE'S MOTION TO SUBSTITUTE SPECIAL**
5 **ADMINISTRATOR IN THE PLACE AND STEAD OF DEFENDANT JAMES McNAMEE**
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
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EXHIBIT “5”



PET

Corey M. Eschweiler, Esq.
Nevada Bar No. 6635
Craig A. Henderson, Esq.
Nevada Bar No. 10077
Joshua L. Benson, Esq.
Nevada Bar No. 10514
GLEN LERNER INJURY ATTORNEYS
4795 South Durango Drive
Las Vegas, Nevada 89147
Telephone: (702) 877-1500
Facsimile: (702) 933-7043
E-mail: ceschweiler@glenlerner.com
chenderson@glenlerner.com

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

*Attorneys for Petitioners Gianni Bianchi
and Dara Del Priore*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

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

Date of Hearing:
Time of Hearing:

///

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

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

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

10 (2) pursuant to *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Rep. 74, 357 P.3d
11 338 (Sep. 24, 2015), order appointment of *Cumis* counsel for the Estate of James Allen McNamee
12 based on the actual conflict of interest that exists between the Estate of James Allen McNamee, and
13 GEICO (Decedent James Allen McNamee's automobile liability insurer).

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

17
18 GLEN LERNER INJURY ATTORNEYS

19
20 By: /s/ Craig A. Henderson
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23 Craig A. Henderson, Esq.
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*Attorneys for Petitioners Gianni Bianchi
and Dara Del Priore*

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 In this probate matter that involves pending personal injury litigation against the decedent,
4 James Allen McNamee, petitioners 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
17 **C. GEICO admits Petitioners' damages exceed decedent's liability insurance
coverage.**

18 By July, 2015, Giann's total damages had increased to \$2,850,136.97, including \$356,306 in
19 medical special damages alone. Dara's total damages had increased to \$2,481,097, including
20 \$99,280 in medical special damages. On July 13, 2015, decedent offered to settle Giann and Dara's
21 claims, each for an amount in excess of McNamee's automobile liability insurance policy limit.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.
This breach or failure to perform constitutes 'bad faith' where the relationship
28 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 Gianni and Dara’s claims exceeded decedent’s insurance
24 coverage:

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

28 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.

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VI. CONCLUSION

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

GLEN LERNER INJURY ATTORNEYS

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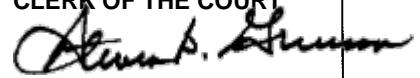
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1. I am an attorney at Glen Lerner Injury Attorneys, and counsel of record for Petitioners Giann Bianchi and Dara DelPriore in the above captioned action. I have read the foregoing Petition and know the contents thereof. The Petition is true of my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

Q 5

COREY M. ESCHWEILER

EXHIBIT “6”



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14
15 **EIGHTH JUDICIAL DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 In the Matter of the Estate of

Case No.: P-17-093041-E

Dept. No.: PC-1

18 JAMES ALLEN MCNAMEE,

Date of Hearing: February 9, 2018

Time of Hearing: 9:30 a.m.

19
20 Deceased.

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

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

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

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

15 MEMORANDUM OF POINTS AND AUTHORITIES

16 I.

17 **FACTUAL BACKGROUND**

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

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

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

9 **II.**

10 **ARGUMENT**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

///

///

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

⁷ See *Jacobsen*, 121 Nev. at 521, 119 P.3d at 134.

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

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

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

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

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

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

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

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

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

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

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

¹² See **Ex. A** at ¶¶ 1-2.

¹³ *Id.*

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

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

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

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

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

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

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

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

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

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

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

27 ///

28 ///

III.

CONCLUSION

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

DATED January 24, 2018.



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-- and --

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*Attorneys for Susan Clokey,
Special Administrator*

CERTIFICATE OF SERVICE

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

Via:

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

Corey M. Eschweiler, Esq. (ceschweiler@glenlerner.com)

Craig A. Henderson, Esq. (chenderson@glenlerner.com)

Counsel for Giann Bianchi and Dara Del Priore

Jeffrey J. Orr, Esq. (jorr@pyattsilvestri.com)

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

Via:

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

Robert McNamee
2472 230th Street
Mahnomen, MN 56557-9034


An employee of SOLOMON DWIGGINS & FREER, LTD.

EXHIBIT “7”

From: Corey M. Eschweiler <ceschweiler@glenlerner.com>
Sent: Wednesday, March 14, 2018 2:20 PM
To: Jeff Orr <Jorr@pyattsilvestri.com>
Cc: Craig A. Henderson <chenderson@glenlerner.com>
Subject: RE: McNamee

Pretty simple: Judge Smith has ruled on each of the issues we raised in our briefing to probate. The hearing is moot. Let me know if any questions.

Corey M. Eschweiler | Attorney at Law

[GLEN LERNER INJURY ATTORNEYS](#)

4795 S. Durango Dr. Las Vegas, NV 89147 | Main: 702-877-1500 | Fax: 702-933-7043

ceschweiler@glenlerner.com#



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From: Jeff Orr [<mailto:Jorr@pyattsilvestri.com>]
Sent: Wednesday, March 14, 2018 2:19 PM
To: Corey M. Eschweiler
Subject: McNamee

Corey,

I understand that you requested that Friday's probate hearing be vacated. Can you tell me why you did that?

Thanks,

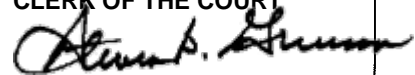
Jeff
Jeffrey J. Orr



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EXHIBIT “8”



ORDR

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chenderson@glenlerner.com
Attorneys for Plaintiffs

DISTRICT COURT
CLARK COUNTY, NEVADA

GIANN BIANCHI, individually,
DARA DELPRIORE, individually,

Plaintiff,

vs.

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

Defendants.

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

**ORDER DENYING 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**

Defendant James Allen McNamee's Motion to Substitute Special Administrator In Place and Stead of Defendant James Allen McNamee and To Amend Caption came before this Court on January 22, 2018. The Court having considered the motion, opposition, and reply, and good cause appearing, it is hereby

ORDERED, ADJUDGED, and DECREED that Defendant James Allen McNamee's Motion to Substitute Special Administrator in Place and Stead of Defendant James Allen McNamee and To Amend Caption is DENIED.

The 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. The Court has reviewed 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 Def
DISTRICT COURT JUDGE
DOUGLAS E. SMITH
6
7 ndp

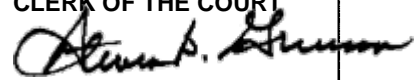
8 Respectfully submitted by:

9 GLEN J. LERNER & ASSOCIATES

10
11 By: 

12 COREY M. ESCHWEILER, ESQ.
13 CRAIG A. HENDERSON, ESQ,
4795 South Durango Drive
Las Vegas, Nevada 89147
14 *Attorneys for Plaintiffs*
15
16
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22
23
24
25
26
27
28

EXHIBIT “9”



JEFFREY J. ORR, ESQ.
Nevada Bar No. 7854
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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 AMEND ORDER
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 Amend Order 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.

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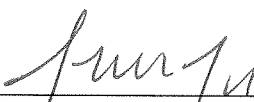
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1 This Motion is made and based upon NRCP 60(b), EDCR 2.24(b), the declaration of Jeffrey
2 J. Orr, Esq., the papers and pleadings on file herein, as well as the Memorandum of Points and
3 Authorities and any oral argument at the time of hearing of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

///

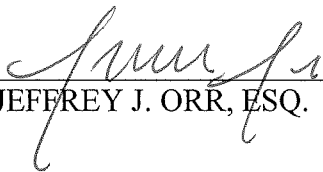
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AFFIDAVIT OF JEFFREY J. ORR, ESQ. IN SUPPORT OF DEFENDANT JAMES MCNAMEE'S MOTION TO AMEND ORDER ON ORDER SHORTENING TIME

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

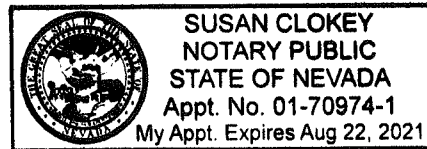
1. I am an attorney at the law firm Pyatt Silvestri and am counsel for Defendant James McNamee.
2. That an order denying Defendant James McNamee's Motion to Substitute Special Administrator in Place and Stead of Defendant James Allen McNamee and to Amend Caption was recently filed on March 27, 2018. (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



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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 nap

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

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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

CERTIFICATE OF SERVICE

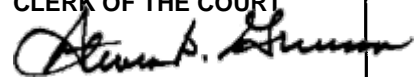
Pursuant to NRCP 5(b), I certify that I am an employee of Pyatt Silvestri and that on the 30th day of March, 2018, I caused the above and foregoing document **DEFENDANT JAMES MCNAMEE'S MOTION TO AMEND ORDER ON ORDER SHORTENING TIME**, to be served as follows:
Pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District 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

EXHIBIT “10”



ORDR

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.

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

Defendants.

CASE NO: A-13-691887-C

DEPT NO: VIII

**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

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.

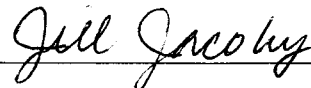
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10 **DOUGLAS E. SMITH**
11 **DISTRICT COURT JUDGE**
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CERTIFICATE OF SERVICE

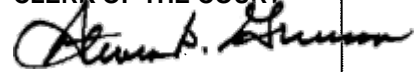
I hereby certify that on the 14th day of May 2018, a copy of this Order was electronically served to all registered parties in the Eighth Judicial District Court Electronic Filing Program and/or placed in the attorney's folder maintained by the Clerk of the Court and/or transmitted via facsimile and/or 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
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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

EXHIBIT “11”



ORDR

JAMES P. C. SILVESTRI, ESQ.
Nevada Bar No. 3603
PYATT SILVESTRI
701 Bridger Avenue, Suite 600
Las Vegas, Nevada 89101
Tel: (702) 383-6000
Fax: (702) 477-0088
jsilvestri@pyattsilvestri.com

Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

GIANN BIANCHI, individually, DARA
DELPRIORE, individually

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

Plaintiffs

v.

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

Defendants.

**ORDER GRANTING DEFENDANT JAMES MCNAMEE'S MOTION
TO SUBSTITUTE SPECIAL ADMINISTRATOR IN PLACE AND STEAD
OF DEFENDANT JAMES MCNAMEE, PURSUANT TO WRIT**

This matter having come for hearing in Department IX, before the Honorable Judge Cristina Silva presiding on the 3rd day of December, 2019, Ian Samson, Esq., of Panish Shea & Boyle LLP appearing on behalf of Plaintiffs; and James P. C. Silvestri Esq., of Pyatt Silvestri and Alex G. LeVeque of Solomon Dwiggin & Freer, Ltd. appearing on behalf of the Defendant, and the Court being fully advised in the premises, the Court finds:

1. Defendant, James McNamee, died in Arizona on August 12, 2017.
2. On November 16, 2017, the District Court appointed Susan Clokey as Special Administrator of the Estate of James McNamee and ordered that the Special Administrator defend this case, *Bianchi, et. al. v. McNamee*, Case No. A-13-691887, as the real party in interest.
3. Ms. Clokely was the only administrator proposed.

1 4. The Court makes no findings of fact or conclusions of law concerning a future motion
2 by any party to substitute the administrator.

3 THEREFORE, pursuant to these findings, and pursuant to NRCP 25, and good cause
4 appearing,

5 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion to
6 Substitute Special Administrator in Place and Stead of Defendant James McNamee, deceased, and
7 to amend caption to reflect this substitution, is GRANTED.

8 Dated this 26th day of December, 2019.


9
10 
11 DISTRICT COURT JUDGE
12 


13 DATED this 23 day of December, 2019.

DATED this 23 day of December, 2019.

14 Respectfully Submitted by:
15 PYATT SILVESTRI

Approved as to Form and Content by:
PANISH SHEA & BOYLE LLP

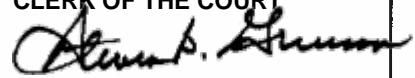
16 
17 JAMES P. C. SILVESTRI, ESQ.
18 Nevada Bar No. 3603
19 701 Bridger Avenue, Suite 600
20 Las Vegas, Nevada 89101
21 Attorneys for Defendant

22 
23 RAHUL RAVIPUDI, ESQ.
24 Nevada Bar No. 14750
25 ADAM R. ELLIS, ESQ.
26 Nevada Bar No. 14514
27 IAN SAMSON, ESQ.
28 Nevada Bar No. 15089
8816 Spanish Ridge Avenue
Las Vegas, NV 89148
Attorneys for Plaintiffs

Bianchi, et al. v. McNamee
Case No. A-13-691887-C

Order Granting Defendant's Motion to Substitute Special Administrator
in Place and Stead of Defendant James McNamee, Deceased Pursuant to Writ

EXHIBIT “12”



MOT

COREY M. ESCHWEILER

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LERNER & ROWE

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PANISH SHEA & BOYLE LLP

8816 Spanish Ridge Avenue

Las Vegas, Nevada 89148

Telephone: 702.560.5520

Facsimile: 702.975.2515

Attorneys for Plaintiffs

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.: IX (9)

**PLAINTIFFS' MOTION FOR
APPOINTMENT OF A GENERAL
ADMINISTRATOR ON AN ORDER
SHORTENING TIME**

(Hearing Requested on Shortened Time)

Plaintiffs, GIANN BIANCHI and DARA DELPRIORE, by and through their attorneys of record, the law firm of PANISH SHEA & BOYLE, LLP and LERNER & ROWE, hereby move the Court to appoint a general administrator in addition to the current special administrator to administer the Estate of James McNamee's potential bad faith claim against its insurer, GEICO, arising from this action. This Motion is made and based upon the following memorandum of points and authorities, the papers and pleadings on file herein, and any argument that may be made at the hearing on this matter.

ORDER SHORTENING TIME

IT IS HEREBY ORDERED that counsel for Plaintiffs will bring their MOTION FOR APPOINTMENT OF A GENERAL ADMINISTRATOR on shortened time on for hearing before this Court on the 4th day of February, 2020, at the hour of 8:30 a.m./p.m., at the above entitled Court in Department 9. Defendant's Opposition, if any, is due by the 29th day of January, 2020.

Dated this 21th day of January, 2020.



DISTRICT COURT JUDGE

DECLARATION OF ADAM ELLIS
IN SUPPORT OF APPLICATION FOR ORDER SHORTENING TIME

1. I am an attorney in the law firm of PANISH SHEA & BOYLE, LLP, am licensed to practice before all the courts of the State of Nevada, and I am one of the counsel of record for Plaintiffs GIANN BIANCHI and DARA DELPRIORE. The following facts are within my personal knowledge, and if called as a witness, I am competent to testify thereto.

2. This Declaration is submitted in support of Plaintiffs' Motion for Appointment of a General Administrator on an Order Shortening Time ("Motion").

3. On December 26, 2019, the Court entered an Order Granting Defendant James McNamee's Motion to Substitute Special Administrator in Place and Stead of Defendant James McNamee, Pursuant to Writ.

4. The Court's December 26, 2019 Order only appointed a special administrator, and did not preclude the appointment of a general administrator.

5. On January 14, 2020, the Court entered an Amended Order Setting Civil Jury Trial and Calendar Call, setting a firm trial date for this action on May 11, 2020.

6. This Motion should be heard on shortened time as hearing it in the normal course presents the risk that a general administrator will not be appointed prior to the May 11, 2020 trial date, around which time the McNamee Estate's unliquidated insurance bad faith claim will accrue.

7. Additionally, this Motion should be heard on shortened time to ensure all issues relating to the administration of the McNamee Estate are resolved prior to the May 11, 2020 trial.

8. Plaintiffs request this Motion be heard at the Court's earliest possible setting.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 21, 2020.



Adam Ellis

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 As the Court is aware, this action arises from a June 17, 2013 car collision that upended the
4 lives of Plaintiffs Gianni Bianchi and Dara Delpriore. There is no doubt that James McNamee, the
5 driver who hit Plaintiffs' vehicle with his own, was responsible for the rear-end collision. There is
6 also no doubt that Plaintiffs' damages exceeded the limits of Mr. McNamee's GEICO insurance policy.
7 So, when Plaintiffs demanded that GEICO tender his policy limits in exchange for a complete release
8 of their claims against Mr. McNamee, GEICO should have acted in good faith and protected its
9 insured (Mr. McNamee) by tendering those limits. It didn't. Instead, it refused to pay, thereby
10 exposing Mr. McNamee to a judgment far in excess of his limits. When Mr. McNamee passed away,
11 his Estate was likewise exposed to an excess judgment.

12 In short, GEICO's actions have given rise to an unliquidated insurance bad faith claim held by
13 the Estate. Such a claim would work as follows: Suppose that Plaintiffs proceed to trial and are
14 awarded \$1,000,000. The Estate's GEICO policy would cover only \$60,000 of that judgment, leaving
15 the Estate holding the bag for the remaining \$940,000. The Estate could then pursue a bad faith claim
16 against GEICO for the balance of the judgment, but even if it were successful, Plaintiffs would have a
17 judgment entered against it. Alternatively, and importantly for this motion, the Estate could decide to
18 assign its bad faith claim to Plaintiffs in exchange for a covenant not to execute; in essence, rather
19 than fight GEICO itself with a judgment recorded against it, the Estate could protect itself from
20 GEICO's conduct by giving its bad faith rights to Plaintiffs.

21 A general administrator is necessary to preserve the Estate's ability to use its bad faith claim to
22 protect its own interests and ensure that the conduct of this lawsuit is not pursued solely for GEICO's
23 benefit. This Court has already appointed a special administrator to administer the Estate's GEICO
24 policy. This motion does not seek to disturb that ruling. Instead, Plaintiffs request that a general
25 administrator be appointed for the sole purpose of administering the Estate's potential bad faith claim.
26 It is well within this Court's power to do so, and there is no prejudice in appointing an additional
27 administrator to ensure that the Estate's interests are considered separate and apart from GEICO's
28 interests. Instead, such an appointment ensures that the Estate will not be prejudiced.

1 Appointment of a general administrator is also consistent with the Supreme Court's recent
2 ruling in this case. Although the Court reversed the district court's preference-based selection of
3 administrator, nothing in its ruling indicated that this Court lacks the power to appoint a general
4 administrator under proper circumstances. Such circumstances are present here as a result of GEICO's
5 conduct, Mr. McNamee's passing, and the unliquidated insurance bad faith claim held by the Estate
6 but unable to be administered by the current special administrator. A general administrator is
7 appropriate and consistent with the Supreme Court's ruling.

8 Accordingly, Plaintiffs respectfully submit that the Court should appoint Fred Waid as the
9 general administrator of the Estate. Alternatively, the Court should reconsider its previous decision
10 and grant the special administrator the authority to dispose of the bad faith claim, in addition to the
11 GEICO policy.

12 **II. FACTUAL AND PROCEDURAL BACKGROUND**

13 **A. Background of Litigation**

14 On July 17, 2013, decedent James Allen McNamee was driving a Ford van on East Sahara
15 Avenue approaching a red light at the intersection with McLeod. Decedent failed to slow the van in
16 time, violently slamming into the rear of a Nissan Pathfinder that was stopped at the red traffic signal.
17 Plaintiff Giann Bianchi was behind the wheel of the Pathfinder, and Plaintiff Dara Del Priore was in
18 the front passenger seat. Plaintiffs suffered severe injuries in the collision.

19 **B. GEICO Exposes McNamee and His Estate to Excess Liability**

20 At the time of the July 17, 2013, collision, decedent was covered by an automobile liability
21 insurance policy issued by GEICO, policy number 4180457162. The GEICO policy provided
22 decedent with liability insurance coverage of \$30,000 per person up to \$60,000 per occurrence. *Id.*
23 Since the July 17 collision GEICO has repeatedly refused to settle Plaintiffs' claims within decedent's
24 policy limits, despite knowing that their damages far exceed the \$30,000 per person liability insurance
25 coverage.

26 GEICO's course of conduct indicates that decedent (and his estate) have potential bad faith
27 claims arising from GEICO's decision to expose decedent and his estate to an excess judgment. By
28 way of brief background:

- 1 • On October 25, 2013, Giann and Dara each served GEICO with a demand requesting
2 decedent's \$30,000 per person policy limit in exchange for a release of all claims against
3 decedent. At the time, Giann had incurred \$10,707.78 in medical bills and was
4 recommended for pain management medical treatment at an estimated cost of \$12,050.
5 Dara had incurred \$10,797.25 in medical bills and had also been recommended for pain
6 management treatment at an estimated cost of \$12,050. GEICO did not tender decedent's
7 policy limits, despite the fact that the past and future medical care alone nearly reached the
8 per person limit for both Giann and Dara. Giann and Dara then proceeded with the
9 recommended injections.
- 10 • On November 19, 2013, Giann and Dara filed this action, suing decedent for damages
11 arising out of the July 17, 2013, crash.
- 12 • On April 3, 2014, decedent served Dara, only, with an offer to settle in the amount of
13 \$30,000—the same amount Dara had demanded and GEICO refused to pay just months
14 before. Dara rejected this offer, as her medical bills, alone, totaled \$36,214.35. Shortly
15 thereafter, Giann and Dara's counsel advised GEICO to appoint separate counsel to advise
16 decedent of his potential bad faith claim against GEICO. Less than three months later,
17 decedent filed a substitution of attorney retaining new, outside counsel (the Pyatt Silvestri
18 law firm, Defendant's current counsel of record).
- 19 • By the spring of 2015, Giann's medical bills had increased to \$329,494—over ten times
20 decedent's per person policy limit—including the cost of the spinal surgery Giann's doctor
21 recommended. This, in addition to \$348,948 for Giann's future medical care; \$277,832 for
22 Giann's loss of household services; and \$1,867,000 for Giann's loss of enjoyment of life—
23 a total of more than \$2,800,000 in damages. Those total damages are more than ninety-
24 three times the per person limit GEICO refused to pay despite the obvious risk of exposing
25 decedent to an excess judgment. Consequently, on April 21, 2015, Giann served
26 McNamee with an offer to settle for \$435,000. Decedent did not accept Giann's offer.
- 27 • Also by Spring, 2015, Dara's medical bills had increased to \$93,980. This, in addition to
28 \$296,537 in lost wages; \$384,361 in loss of household services; and \$1,700,000 in loss of

1 enjoyment of life—a total of more than \$2,470,000 in damages, or about 82 times the per
2 person policy limit. On April 21, 2015, Dara served decedent with an offer to settle in the
3 amount of \$345,000. Decedent did not accept the offer.

4 In other words, despite knowing Giann and Dara's medical special damages were going to
5 exceed decedent's policy limits, GEICO refused to pay the policy to petitioners. That has exposed
6 decedent and his estate to the risk of a significant excess judgment.

7 **C. GEICO Admits Plaintiffs' Damages Exceed the Policy Limits**

8 By July, 2015, Giann's total damages had increased to \$2,850,136.97, including \$356,306 in
9 medical special damages alone. Dara's total damages had increased to \$2,481,097, including \$99,280
10 in medical special damages. On July 13, 2015, decedent offered to settle Giann and Dara's claims
11 *each* in excess per person limit and occurrence limit of decedent's insurance policy. Plaintiffs rejected
12 these offers that did not even compensate them for their medical special damages.

13 Those offers, however, are critical for a different reason: By offering to settle the claims over
14 the available insurance, GEICO admitted that the value of Plaintiffs' claims is more than decedent's
15 policy limits. Consequently, GEICO admits that decedent's estate is exposed to an excess judgment.

16
17 **D. Decedent Dies Prior to Trial and GEICO-Appointed Counsel Seek Appointment**
18 **of a Special Administrator**

19 On September 20, 2017, *five days before the trial was to proceed on September 25*, decedent's
20 counsel served a Suggestion of Death indicating decedent had passed on August 12, 2017. On that
21 same day, Pyatt Silvestri filed a Petition for Special Letters of Administration. The Petition sought to
22 have Susan Clokey, an employee of Pyatt Silvestri, appointed as the Special Administrator of the
23 Estate of James Allen McNamee based on Pyatt Silvestri's representations to the probate court that
24 "the Estate of James Allen McNamee has no assets to satisfy any judgment other than an automobile
25 policy with GEICO [providing] automobile liability insurance coverage of \$30,000 per person and
26 \$60,000 per accident." (See Petition for Letters of Special Administration, at 2-6, attached to Motion.)

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1 **E. The District Court Refuses to Appoint Ms. Clokey, Leading to Supreme Court**
2 **Review and Remand to This Court**

3 As set forth in the Supreme Court's opinion, the district court refused the request to appoint
4 Ms. Clokey, explaining that, in its view, it "just felt it would be better to have a third party come in."
5 *McNamee v. Eighth Judicial District*, 135 Nev. Adv. Op. 52, at *9 (Oct. 17, 2019). The court
6 therefore appointed Fred Waid as general administrator. Upon review, the Supreme Court vacated the
7 appointment, finding that the district court had abused its discretion. In the Supreme Court's opinion,
8 the district court based its opinion on "prejudice or preference rather than on reason." *Id.*
9 Consequently, it remanded to this Court to consider appointment in light of its opinion.

10 **F. This Court Appoints a Special Administrator**

11 On December 3, 2019, this Court granted Defendant James McNamee's Motion to Substitute
12 Special Administrator in Place and Stead of Defendant James McNamee, Pursuant to Writ. In
13 granting the motion, this Court indicated it relied heavily on the Supreme Court's Opinion, which
14 appeared to direct this Court's decision upon remand. However, this Court indicated another
15 important factor leading to its decision was only one special administrator had been proposed (Ms.
16 Clokey). The Court specifically did not foreclose a further request for appointment or other action to
17 address the bad faith claim.

18 **III. ARGUMENT**

19 **A. This Court Has Discretion to Appoint an Administrator, Including a General**
20 **Administrator, and to Define the Scope of an Administrator's Power**

21 As a court of general jurisdiction, this Court has the power to enter orders regarding the estate,
22 appoint a general administrator, and to define the scope of an administrator's power. *Cf. Klabacka v.*
23 *Nelson*, 394 P.3d 940, 945-46 (Nev. 2017) (finding that family court had subject matter jurisdiction
24 over trust-related claims brought during divorce despite existence of statute conferring exclusive
25 jurisdiction of trust-related affairs to probate court). In prior pleadings, Defendant has argued that this
26 Court lacks jurisdiction because the local rules purportedly divest it of probate jurisdiction. That
27 misreads the rules.
28

1 Although EDCR 4.03(a) provides that "the Probate Commissioner enjoys exclusive
2 jurisdiction over all matters pertaining to the administration of estates under Title 12 of the NRS,"
3 that portion of the rule must be read in conjunction with EDCR 4.03(c), which provides that "[i]n any
4 civil action in which the capacity or standing of a party to represent a decedent or an estate is in
5 question, any district court judge *may* refer the matter to the probate commissioner for determination
6 of standing or capacity." This is a civil action. "May," unlike "must" or "shall," indicates discretion.
7 *See In re Nevada State Engineer Ruling No. 5823*, 128 Nev. 232, 239 (2012) ("Must' is mandatory, as
8 distinguished from the permissive 'may.'"); *Fourchier v. McNeil Constr. Co.*, 68 Nev. 109, 122 (1951)
9 ("There is no occasion for us to construe the discretionary 'may' as having the meaning of the
10 mandatory 'must' or 'shall.'"). Read together, EDCR 4.03 makes clear that although the probate court
11 may enjoy probate jurisdiction, this Court retains its discretion concerning "the capacity or standing of
12 a party to represent a decedent or an estate." Thus, this Court has jurisdiction to both appoint a
13 general administrator and to define the scope of the administrator's powers.

14 **B. The Estate Has an Assignable, Potential Bad Faith Claim Against GEICO as a**
15 **Result of GEICO's Failure to Pay Its Insurance Policy Limits**

16 **1. Insurance Bad Faith Claims Arise Where an Insurer Exposes Its Insured**
17 **to an Excess Judgment by Failing to Properly Tender the Insured's**
18 **Bargained-For Policy Limits**

18 It is well settled that:

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

23 *See Pemberton v. Farmers Ins. Exch.*, 109 Nev. 789, 792-93 (1993) (internal citations omitted).

24 As the Supreme Court has further explained, "[t]he law, not the insurance contract, imposes
25 this covenant on insurers. A violation of the covenant gives rise to a bad-faith tort claim. This court
26 has defined bad faith as an actual or implied awareness of the absence of a reasonable basis for
27 denying benefits of the [insurance] policy." *See Allstate Ins. Co. v. Miller*, 125 Nev. 300, 308 (2009)
28 (internal citations omitted); *see also United States Fid. & Guar. Co. v. Peterson*, 91 Nev. 617, 619-20

1 (1975) ("We approve and adopt the rule that allows recovery of consequential damages where there
2 has been a showing of bad faith by the insurer. Where an insurer fails to deal fairly and in good faith
3 with its insured by refusing without proper cause to compensate its insured for a loss covered by the
4 policy such conduct may give rise to a cause of action in tort for breach of an implied covenant of
5 good faith and fair dealing. The duty violated arises not from the terms of the insurance contract but is
6 a duty imposed by law, the violation of which is a tort"). An insurer who fails to settle a claim in good
7 faith and exposes its insurer to excess liability is liable for the full amount of the judgment: "since the
8 insurer has reserved control over the litigation and settlement it is liable for the entire amount of a
9 judgment against the insured, including any portion in excess of the policy limits, if in the exercise of
10 such control it is guilty of bad faith in refusing a settlement." *See Comunale v. Traders & Gen. Ins.*
11 *Co.*, 50 Cal. 2d 654, 660 (1958).¹

12 The facts support a potential bad faith action for decedent and his estate. Plaintiffs provided
13 GEICO with opportunities to compromise their negligence claims against decedent for the \$60,000
14 liability insurance policy limits. GEICO refused, even though it was well aware the value of
15 Plaintiffs' claims exceeded decedent's insurance coverage. That, as courts have noted, is the essence
16 of the bad faith claims decedent's estate now possesses:

17 Obviously, it will always be in the insured's interest to settle within the policy limits
18 when there is any danger, however slight, of a judgment in excess of those limits.
19 Accordingly the rejection of a settlement within the limits where there is any danger
20 of a judgment in excess of the limits can be justified, if at all, only on the basis of
21 interests of the insurer, and, in light of the common knowledge that settlement is one
22 of the usual methods by which an insured receives protection under a liability policy,
23 it may not be unreasonable for an insured who purchases a policy with limits to
24 believe that a sum of money equal to the limits is available and will be used so as to
25 avoid liability on his part with regard to any covered accident. In view of such
26 expectation an insurer should not be permitted to further its own interests by
27 rejecting opportunities to settle within the policy limits unless it is also willing to
28 absorb losses which may result from its failure to settle.

Crisci v. Sec. Ins. Co., 66 Cal. 2d 425, 430-31 (1967).

¹ "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 Since then, GEICO has confirmed the estate's excess exposure by extending settlement offers
2 to both Giann and Dara, each, in amounts that exceed the available insurance coverage, thereby
3 admitting that their damages exceed decedent's insurance coverage. As another court has recognized:

4 [W]henver it is likely that the judgment against the insured will exceed policy limits
5 so that the most reasonable manner of disposing of the claim is a settlement which
6 can be made within those limits, a consideration in good faith of the insured's interest
7 requires the insurer to settle the claim Moreover, in deciding whether or not to
8 compromise the claim, the insurer must conduct itself as though it alone were liable
9 for the entire amount of the judgment. Thus, the only permissible consideration in
evaluating the reasonableness of the settlement offer becomes whether, in light of the
victim's injuries and the probable liability of the insured, the ultimate judgment is
likely to exceed the amount of the settlement offer.

10 *Johansen v. Cal. State Auto. Ass'n Inter-Ins. Bureau*, 15 Cal. 3d 9, 16 (1975). In this case, GEICO
11 refused to tender decedent's insurance limits when Giann and Dara's damages clearly exceeded
12 \$60,000. Once Giann and Dara's medical bills exceeded \$60,000, GEICO made a series of low-ball
13 offers, concluding with individual offers to each Plaintiff in excess of the total insurance policy.
14 These facts indicate that, although GEICO has known Plaintiffs' claims have always exceeded the
15 policy, it hoped to settle them for less than policy limits for its own financial interests. Forgotten in
16 that calculus was the interest decedent (and, after his death, his estate) had in being protected from
17 excess claims when a policy limits opportunity to settle was presented. *See Avila v. Century Nat'l Ins.*
18 *Co.*, 473 Fed. Appx 554, 556 (9th Cir. 2012) ("If [an insurer] breached its implied covenant with [the
19 insured] while he was alive, then, under Nevada law, the Estate would retain any such claims as if [the
20 insured] were still alive.").

21 **2. By Definition, All Pre-Trial Bad Faith Claims Are Potential, But Are**
22 **Nevertheless Assignable Assets a Defendant Can Use to Protect Itself from**
Its Insurer's Bad Faith Conduct

23 The estate's potential bad faith claim is an important asset appointment of a special
24 administrator lacking specific authority to administrate that claim would impair. When an insurer
25 exposes its insured by breaching the duty to settle, "the insured has been allowed to recover [an]
26 excess award over policy limits and other damages." *Kelly v. CSE Safeguard Ins., Co.*, 2011 WL
27 4526769, at *4 (D. Nev. Sept. 27, 2011). In this scenario, "[t]he insured's remedy to protect himself
28 from an excess judgment is to assign to the claimant his cause of action for bad faith refusal to settle

1 in exchange for a covenant not to enforce the judgment against the insured's personal assets." *Safeco*
2 *Ins. Co. of Am. v. Superior Court*, 71 Cal. App. 4th 782, 788 (1999). "**Such an assignment may be**
3 **made before trial**, but the assignment does not become operative, and the claimant's action against the
4 insurer does not mature, until a judgment in excess of the policy limits has been entered against the
5 insured." *Hamilton v. Maryland Cas. Co.*, 27 Cal. 4th 718, 725 (2002) (emphasis added).

6 That the bad faith claim has not yet accrued because trial has not commenced is of no
7 moment—as indicated above, an unaccrued claim may be assigned **before trial** as a means to protect
8 the Although there is no case law squarely addressing inclusion of a bad faith claim in a decedent's
9 estate, bankruptcy proceedings provide a helpful analogy. In such cases, potential claims (including
10 those for insurance bad faith) are considered as "assets" even before they are proven. *See, e.g.,*
11 *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9th Cir. 2001) (debtor judicially
12 estopped from pursuing insurance bad faith claim he failed to list on his bankruptcy schedule). By the
13 same token, the Estate's potential bad faith claim is an asset that it can use to protect itself from the
14 excess judgment GEICO's conduct created.

15 As such, the potential claim falls squarely within Nevada's broad definition of "property"
16 applicable here. Indeed, the Legislature defines "property" under Title 12 of the Nevada Revised
17 Statutes as "**anything** that may be the subject of ownership, and includes both real and personal
18 property and any interest therein." NRS 132.285 (emphasis added). Because a potential cause of
19 action for bad faith is capable of being assigned prior to accrual, it falls squarely within the all-
20 encompassing umbrella of "anything that may be the subject of ownership." Moreover, although Title
21 12 does not contain a specific definition for "personal property," NRS 10.045 defines that term to
22 include "things in action"—*i.e.* causes of action. That definition is clearly met here.

23 In sum, it is plain that decedent's estate does not merely possess the liability policy, but also a
24 potential bad faith claim arising from GEICO's failure to protect it from an excess judgment. A
25 general administrator should make decisions about how that potential claim should be used.

26 ///

27 ///

28 ///

1 **C. A General Administrator is Necessary to Administer the Estate's Bad Faith**
2 **Claim**

3 Pursuant to NRS 140.040(3)(b), a special administrator is not liable "[f]or any claim against
4 the decedent except a claim involving wrongful death, personal injury or property damage *if the estate*
5 *contains no assets other than a policy of liability insurance.*" NRS 140.040(3)(b) (emphasis added).
6 A special administrator is provided this authority because there is no risk that other assets of the estate
7 will be diminished by a successful creditor, *because no other assets exist. Jacobson v. Estate of*
8 *Clayton*, 121 Nev. 518, 522 (2005). When other assets exist, and therefore the estate contains other
9 property which may be diminished, the Estate must be administered by a *general administrator.*
10 *Bodine v. Stinson*, 85 Nev. 657, 661, (1969) (superseded by statute on other grounds as explained in
11 *Jacobson v. Estate of Clayton*, 121 Nev. 518, 522 (2005)).

12 GEICO's insurance counsel has readily admitted that the current special administrator, Ms.
13 Clokey, would lack the ability to administer the bad faith claim. Even if she could legally do so,
14 handing her the reins would create an impermissible conflict between GEICO and the Estate. That's
15 because, as explained above, the Estate currently possesses an unliquidated bad faith claim against
16 GEICO that it could assign to protect itself against an excess judgment to which it was exposed by
17 GEICO's refusal to pay the insurance policy limits. No one knows whether that claim will have any
18 merit, *but that is true of all bad faith claims before trial*, and, as demonstrated above, such claims are
19 routinely assigned before trial for just that reason. As an employee of a law firm paid by GEICO, Ms.
20 Clokey's attempt to administer the bad faith claim would be irrevocably at odds with her employer's
21 relationship with GEICO.

22 No such problem exists for a general administrator, especially where, as here, Mr. Clokey will
23 handle administration of the insurance limits. Instead, a general administrator's only focus would be
24 protection of the Estate via the bad faith claim. Perhaps it would conclude that the Estate is best
25 protected by assignment. Perhaps not. In either case, the Estate is only benefitted by the presence of a
26 general administrator, and no one is prejudiced. Instead, the appointment of an administrator is the
27 best way to ensure that, at every stage of this litigation, someone is considering the Estate's best
28 interests, not the best interests of GEICO.

1 **D. Plaintiffs Nominate Fred Waid to be Appointed as General Administrator**

2 Plaintiffs have standing to nominate an administrator. NRS 139.050 ("Administration may be
3 granted upon petition to one or more qualified persons, although not otherwise entitled to serve, at the
4 written request of the person entitled, filed in the court."). The best candidate to serve as general
5 administrator of the McNamee is an independent third-party. Fred Waid is a neutral, experienced
6 administrator in Las Vegas.² In fact, the Court previously selected and appointed Mr. Waid as Special
7 Administrator prior to the appellate proceedings in this case. Thus, it is clear Mr. Waid is a neutral
8 administrator of the McNamee Estate, without any conflicts of interest in relation to the parties to this
9 case, or their counsel. As a result, the Court should appoint Fred Waid as the general administrator of
10 the McNamee Estate.

11 **IV. CONCLUSION**

12 For the foregoing reasons, Plaintiffs respectfully request that the Court appoint Fred Waid as
13 the general administrator for the Estate of James McNamee's bad faith claim.

14 DATED this 21st day of January 2020.

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By



IAN SAMSON (NV Bar #15089)

ADAM ELLIS (NV Bar #14514)

8816 Spanish Ridge Avenue

Las Vegas, NV 89148

Tel. 702-560-5520

Attorneys for Plaintiffs

² The only known heir of the Estate of James McNamee is his father, Robert McNamee, who resides at 2472 230th St., Mahanomen, MN, 56557-9034. Notice of this Motion will be provided to Mr. McNamee.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of PANISH SHEA & BOYLE, LLP and on this
29 day of January 2020, I caused a true and correct copy of the foregoing **PLAINTIFFS'**
MOTION FOR APPOINTMENT OF A GENERAL ADMINISTRATOR ON AN ORDER
SHORTENING TIME

to be served as follows:

☒ pursuant to N.E.F.C.R. 9 by serving it via electronic service

☐ by placing a true and correct copy of the same to be deposited for mailing in the U.S.
Mail at Las Vegas, Nevada, enclosed in a sealed envelope upon which first class
postage was fully prepaid; and/or

☐ pursuant to EDCR 7.26, by sending it via facsimile; and/or

☐ by hand delivery

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By ~~/s/ Isolde Parr~~ 
an Employee of PANISH SHEA & BOYLE LLP

135 Nev., Advance Opinion 52

IN THE SUPREME COURT OF THE STATE OF NEVADA

1691887

No. 76904

JAMES MCNAMEE,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
DOUGLAS SMITH, DISTRICT JUDGE,
Respondents,

and

GIANN BIANCHI; AND DARA
DELPRIORE,
Real Parties in Interest.

FILED

OCT 17 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

Original petition for writ of mandamus challenging an order denying a motion to dismiss based on the failure to timely substitute the representative of a deceased party under NRCP 25.

Petition granted in part.

Pyatt Silvestri and Jeffrey J. Orr, Las Vegas; Solomon Dwiggins & Freer, Ltd., and Alexander G. LeVeque and Tess E. Johnson, Las Vegas, for Petitioner.

Campbell & Williams and J. Colby Williams and Philip R. Erwin, Las Vegas; Glen Lerner Injury Attorneys and Corey M. Eschweiler, Las Vegas; Weinberg Wheeler Hudgins Gunn & Dial and Lee Roberts, Las Vegas, for Real Parties in Interest.

A-13-691887-C
LSASCO
Appeals -- Supreme Court Order
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OF
NEVADA

(D) 1947A

19-42784

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BEFORE HARDESTY, STIGLICH and SILVER, JJ.

OPINION

By the Court, SILVER, J.:

The procedure for substituting a successor or representative in place of a deceased party to a civil action is governed by NRCP 25(a)(1). Under that rule, the filing and service of a suggestion of death triggers a deadline to file a motion to substitute a successor or representative in place of the deceased party. Once the deadline is triggered, the court must dismiss the action if a motion to substitute is not filed before the deadline expires.

In this original proceeding, we reconsider *Barto v. Weishaar*, 101 Nev. 27, 692 P.2d 498 (1985), and its conclusion that a suggestion of death emanating from the deceased party must identify the deceased party's successor or representative in order to trigger the deadline in NRCP 25(a)(1) to file a motion to substitute. Although we acknowledge the importance of precedent, we are convinced that *Barto* expanded NRCP 25(a)(1) beyond its plain language. Therefore, we overrule *Barto* and hold that a suggestion of death that is properly served triggers the deadline for filing a motion to substitute regardless of which party files it and whether it identifies the deceased party's successor or representative.¹

¹This opinion has been circulated among all justices of this court, any two of whom, under IOP 13(b), may request en banc review of a case. The two votes needed to require en banc review in the first instance of the question of overruling *Barto* were not cast.

Here, counsel for petitioner James McNamee filed and served a suggestion of death after McNamee died. Under the controlling authority at that time, the suggestion of death did not trigger the deadline for filing a motion to substitute because it did not identify McNamee's successor or representative. The district court therefore was not required by law to dismiss the action as to McNamee. Accordingly, we deny the petition to the extent it challenges the district court's order denying the motion to dismiss based on NRCP 25(a)(1). But we conclude the district court arbitrarily or capriciously exercised its discretion when it denied McNamee's motion to substitute based solely on the court's preference that someone other than the special administrator appointed by the probate court be appointed as administrator of McNamee's estate. Thus, we grant relief in part.

FACTS AND PROCEDURAL HISTORY

James McNamee rear-ended another vehicle at a red light. Giann Bianchi was driving the other vehicle, and Dara Delpriore² was in the front passenger seat; both suffered injuries as a result of the collision. Bianchi sued McNamee for damages caused by the collision, alleging negligence and negligence per se.

During the pending litigation, McNamee died. McNamee's attorney filed and served Bianchi with a suggestion of death on September 20, 2017. The suggestion of death did not name a successor or representative. On the same day, McNamee's attorney filed a petition for special letters in the probate court, naming Susan Clokey, an employee of the law firm representing McNamee, as petitioner. The probate court granted the petition and appointed Clokey as special administrator for the

²Hereinafter, we refer to Bianchi and Delpriore collectively as "Bianchi."

limited purpose of defending Bianchi's negligence suit and distributing any insurance policy proceeds therein.

McNamee's attorney then filed a motion to substitute the special administrator for McNamee as the party defendant in the negligence suit on December 14, 2017, just shy of 90 days after he filed the suggestion of death. The district court orally denied the motion and directed the parties to submit three names for the court to consider as administrators for McNamee's estate. The district court subsequently entered a written order denying the motion to substitute Clokey and naming Fred Waid as general administrator of McNamee's estate. McNamee's attorney then moved to dismiss the personal injury case, asserting that his motion to substitute had been denied and no other motion to substitute had been filed within the 90-day deadline under NRCP 25(a)(1).³ The district court denied McNamee's motion to dismiss and granted his related motion to amend its prior order, appointing Fred Waid as special and general administrator of McNamee's estate and substituting Waid in that capacity as the defendant in place of McNamee. This petition for a writ of mandamus followed.

DISCUSSION

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist.*

³The Nevada Rules of Civil Procedure were amended on March 1, 2019. *In re Creating a Comm. to Update and Revise the Nev. Rules of Civil Procedure*, ADKT 522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018). The amended NRCP 25(a)(1) imposes a 180-day deadline. Because the events in this case occurred before the rule's amendment, we reference the prior version of NRCP 25(a)(1) and its 90-day deadline.

Court, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Whether a writ of mandamus will be issued is within the appellate court's sole discretion. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Generally, this court does not entertain mandamus petitions challenging orders denying motions to dismiss. *State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 362, 662 P.2d 1338, 1340 (1983). However, we allow "very few exceptions where considerations of sound judicial economy and administration militate[] in favor of granting such petitions." *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997). And writ relief may be warranted if the record reflects clear legal error or manifest abuse of discretion by the district court, or when an important issue of law requires clarification. *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 819-20, 407 P.3d 702, 706-07 (2017). We elect to review McNamee's petition to clarify NRCP 25(a)(1)'s requirements and correct the district court's manifest abuse of discretion in denying McNamee's motion to substitute.

McNamee argues that the district court should have dismissed the underlying action because his motion to substitute was denied and no other motion was filed within NRCP 25(a)(1)'s 90-day deadline. Bianchi responds that the district court properly denied McNamee's motion to dismiss because the suggestion of death did not identify McNamee's successor or representative, failing to trigger the 90-day deadline under *Barto v. Weishaar*, 101 Nev. 27, 692 P.2d 498 (1985). McNamee urges this court to reconsider *Barto*, arguing that the case is based on bad law and bad policy. Although we agree with Bianchi that the suggestion of death in this case did not trigger the 90-day deadline based on *Barto*, which was controlling at the time, we take this opportunity to clarify that NRCP

25(a)(1) does not require that a suggestion of death emanating from the deceased party must include the name of the deceased party's successor or representative to trigger the 90-day deadline.

"Because the rules of statutory interpretation apply to Nevada's Rules of Civil Procedure," we apply the rule as written when the plain meaning of the rule's language is unambiguous. *Logan v. Abe*, 131 Nev. 260, 264, 350 P.3d 1139, 1141-42 (2015) (internal quotation marks omitted). 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)'s plain, unambiguous language does not require that the suggestion of death identify the deceased party's successor or representative to trigger the 90-day deadline. However, in *Barto*, we concluded the opposite based on *Rende v. Kay*, 415 F.2d 983 (D.C. Cir. 1969), a federal case interpreting FRCP 25(a)(1), the Nevada rule's federal counterpart.

In *Rende*, the federal court stated that because the federal rule allowed a party, successor, or representative to file the suggestion of death, the advisory committee "plainly contemplated" that a suggestion of death filed by the deceased party's counsel would identify a successor or representative. 415 F.2d at 985. We disagree because neither the federal

rule, nor the advisory committee notes, mention such a requirement. Moreover, Nevada's rule and corresponding drafter's note do not mention such a requirement either.

The *Rende* court also expressed concern that not requiring the deceased defendant's counsel to identify that party's successor or representative in a suggestion of death "would open the door to a tactical maneuver to place upon the plaintiff the burden of locating the representative of the estate within 90 days." 415 F.2d at 986. Although we echoed that concern in *Barto*, 101 Nev. at 29, 692 P.2d at 499, we now recognize that such a tactical maneuver is not an issue because a party may request more time to file the motion to substitute under NRCP 6(b). *Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 662-64, 188 P.3d 1136, 1142-43 (2008). Although courts disagree on this topic, some have reached the same conclusion as we do here. See, e.g., *Unicorn Tales, Inc. v. Banerjee*, 138 F.3d 467, 470 (2d Cir. 1998) (concluding "[FRCP 25(a)(1)] does not require that the statement identify the successor or legal representative," and that FRCP 6(b) eliminates the potential tactical maneuver anticipated by the *Rende* court); *In re MGM Mirage Sec. Litig.*, 282 F.R.D. 600, 602-03 (D. Nev. 2012) (acknowledging split of authority); *Ray v. Koester*, 215 F.R.D. 533, 534-35 (W.D. Tex. 2003) (agreeing with the Second Circuit's decision in *Unicorn Tales*); *Stoddard v. Smith*, 27 P.3d 546, 548-49 (Utah 2001) (noting that Utah's Rule 25(a)(1)'s plain language does not limit who may file a suggestion of death, declining to follow *Rende*, and observing that the tactical maneuver discussed in *Rende* would violate an attorney's ethical obligations).

While we acknowledge the importance of stare decisis, we cannot ignore that *Barto* broadened the scope of NRCP 25(a)(1) by expanding its reach beyond its precise words. *Cf. Egan v. Chambers*, 129 Nev. 239, 299 P.3d 364 (2013) (overruling prior decision that interpreted a statute to reach beyond its plain language). Accordingly, we overrule *Barto* to the extent that it concludes that a suggestion of death emanating from the deceased party must identify the deceased party's successor or representative to trigger the 90-day deadline for filing a motion to substitute. We hold that once the suggestion of death is filed on the record and served upon the appropriate parties, the deadline in NRCP 25(a)(1) for filing a motion to substitute is triggered, regardless of whether the deceased party's successor or representative has been identified in the suggestion of death.

McNamee, however, cannot rely on our new construction of the rule to assert that the suggestion of death filed by his counsel triggered the 90-day period. *See Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 132 Nev. 784, 791 n.5, 383 P.3d 246, 251 n.5 (2016) (observing that factors in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), for determining whether a court's holding applies retroactively, "still apply . . . when 'a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct'" (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534 (1991))). Applying our prior decisions that controlled at the time, the suggestion of death filed by McNamee's counsel did not trigger the 90-day deadline. NRCP 25(a)(1) therefore did not require the district court to dismiss the action against McNamee. Accordingly, we deny the petition to

the extent that it seeks a writ directing the district court to dismiss the action against McNamee.

The only remaining issue involves the district court's decision to deny McNamee's motion to substitute the special administrator appointed by the probate court and instead appoint and substitute a different representative for McNamee's estate. The district court has discretion in ruling on a motion to substitute. NRCP 25(a)(1) ("[T]he court may order substitution of the proper parties." (emphasis added)); see also *Lummis v. Eighth Judicial Dist. Court*, 94 Nev. 114, 116, 576 P.2d 272, 273 (1978) (indicating that district court's decision on motion to substitute under NRCP 25(a) is discretionary). A district court's exercise of discretion may be controlled through a writ of mandamus only if there was a manifest abuse or arbitrary or capricious exercise of that discretion, *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981), such as a decision based on "prejudice or preference rather than on reason," *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 780 (2011) (internal quotation marks omitted).


The district court denied McNamee's motion to substitute because it was "bothered" that McNamee's counsel sought to substitute his law firm's employee, whom the probate court had appointed as a special administrator, as the party defendant. The district court further explained that it did not think the choice was "improper" but that it "just felt it would be better to have a third party come in." The district court thus denied the motion to substitute based on preference alone. We conclude this was an arbitrary or capricious exercise of the district court's discretion.⁴

⁴In light of our decision, we decline to consider McNamee's arguments concerning the district court's authority to create a general administration.

Accordingly, we grant the petition in part and direct the clerk of this court to issue a writ of mandamus directing the district court to vacate its orders entered on March 27, 2018, and May 14, 2018, to the extent they substituted Fred Waid as special and general administrator for the deceased defendant's estate and to reconsider the motion to substitute in light of this opinion.

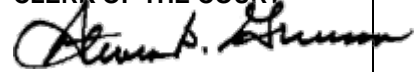
 J.
Silver

We concur:

 J.
Hardesty

 J.
Stiglich

EXHIBIT “13”



OPPC

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Special Administrator for the
Estate of 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.: IX

**DEFENDANT'S OPPOSITION TO
PLAINTIFFS' MOTION FOR
APPOINTMENT OF A GENERAL
ADMINISTRATOR**

-AND-

**COUNTERMOTION TO JOIN GEICO AS
A REQUIRED PARTY**

HEARING REQUESTED

Defendant Susan Clokey, in her capacity as Special Administrator for the Estate of James McNamee, deceased ("Defendant"), by and through her attorneys, the law firms of Solomon Dwiggins & Freer, Ltd. and Pyatt Silvestri, hereby opposes Plaintiffs' Motion for Appointment of a General Administrator (the "Opposition"). Defendant counter-moves, pursuant to EDCR 2.20(f) and NRCP 19(a), to join GEICO as a required party because a decision on the Plaintiffs' Motion without it being a party could impair or impede its ability to protect its interests (the "Counter-Motion").

This Opposition and Counter-Motion are made and based upon the following Memorandum of Points and Authorities, the papers and pleadings on file herein, and any argument that may be permitted at the hearing on this matter.

DATED this 2nd day of March, 2020.

/s/ Alexander G. LeVeque
Alexander G. LeVeque (#11183)
SOLOMON DWIGGINS & FREER, LTD.

James P.C. Silvestri (#3603)
PYATT SILVESTRI

*Attorneys for Susan Clokey, Special
Administrator for the Estate of James
McNamee*

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The Plaintiffs' Motion must be denied outright or, alternatively, transferred to Department 8, for the following reasons:

- The Motion is procedurally improper. The D.C.R. and EDCR mandate that only Judge Atkin can hear and decide matters relating to the Estate.
- The Motion is patently deficient as it ignores all of the procedural and due process requirements for (a) revoking letters of administration; and (b) petitioning the court for a general administration.
- A general administration would be improper as the decedent died in Arizona and there are presently no assets in Nevada other than the policy of motor vehicle insurance.
- An unaccrued, "potential" bad faith claim cannot constitute an asset of the Estate. Even if it did, its value would be zero under Nevada's survival statute.

Should the Court entertain the Motion on its merits, it should require the joinder of GEICO as a necessary party. Accordingly, Defendant counter-moves to join GEICO as a party pursuant to EDCR 2.20(f) and NRCp 19(a).

II.

STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

1. Plaintiffs filed their Complaint against James McNamee (“Decedent”) on November 19, 2013.

2. Decedent died in Arizona on August 12, 2017.

3. The undersigned learned of Decedent’s death on or about September 14, 2017, and requested a certified copy of Decedent’s death certificate.

4. To the undersigned’s knowledge, Decedent died with no assets save a policy of motor vehicle liability insurance.

5. On September 20, 2017, defense counsel served a suggestion of death pursuant to NRCP 25. That same day, the undersigned filed a petition in the Probate Court for the appointment of Susan Clokey as a Special Administrator for the purpose of substituting the Decedent’s Estate as the real party in interest.

6. On November 16, 2017, the Probate Court granted the petition and appointed Susan Clokey as the Special Administrator (the “Special Administrator”) and issued special letters of administration.

7. On December 14, 2017, the Special Administrator filed her motion in this proceeding to substitute in the place and stead of Decedent. Plaintiffs opposed the motion.

8. On January 3, 2018, Plaintiffs filed a petition in Probate Court for the issuance of letters of general administration and for the appointment of a general administrator.

9. On January 22, 2018, this Department orally denied the Special Administrator’s motion to substitute party.

10. On March 16, 2018, the Plaintiffs vacated their petition pending in Probate Court.

11. On March 27, 2018, this Department entered its written order denying the Special Administrator’s motion and appointed Fredrick Waid as the general administrator.

12. On March 30, 2018, the Special Administrator filed a motion to dismiss Plaintiffs’ underlying personal injury case due to no substitution being made within 90 days as required under NRCP 25.

13. On May 14, 2018, this Department denied the motion to dismiss and *sua sponte* appointed a “general and special” administrator..

14. On September 11, 2019, the Special Administrator filed a petition for writ of mandamus or prohibition in the Supreme Court of Nevada.

15. On October 17, 2019, the Supreme Court of Nevada issued a writ of mandamus directing this Department to vacate the March 27, 2018 and May 18, 2018, orders, ruling that this Department acted arbitrarily or capriciously in exercising its discretion when it denied the Special Administrator’s motion to substitute.

16. On October 28, 2019, the Special Administrator filed her motion to substitute in the place and stead of Decedent, which was granted by this Department on December 26, 2019.

17. On January 29, 2020, Plaintiffs filed the instant Motion, which seeks to remove the Special Administrator, revoke the letters of special administration, open a general probate administration, and appoint Fredrick Waid as the general administrator of the Estate.

III.

THE PLAINTIFFS’ “MOTION” IS PROCEDURALLY IMPROPER

A. ONLY JUDGE ATKIN CAN HEAR AND DECIDE MATTERS RELATING TO THE ESTATE.

Given the current state of the proceedings, there is only one way to open a general probate administration for the Decedent’s Estate: to file a petition (not a motion) in Department 8 to convert the current special administration into a general probate administration. Under the well-settled *Prior Exclusive Jurisdiction* doctrine, only one court may exercise *in rem* jurisdiction over the estate of a decedent.¹ While it is true that both this Department and Department 8 are both part

¹ See NRS 155.0967(1)(“In a proceeding involving the estate of a decedent or a testamentary trust, the court has jurisdiction over the assets of the estate or trust as a proceeding in rem”); *Chapman v. Deutsche Bank Nat’l Trust Co.*, 129 Nev. 314, 317, 302 P.3d 1103, 1105 (2013) (“The prior-exclusive-jurisdiction holds that, when one court is exercising *in rem* jurisdiction of a *res*, a second court will not assume *in rem* jurisdiction over the same *res*.”) (citations omitted); *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 466 (1939) (“We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect

of the Eighth Judicial District Court, the Rules of the District Courts of the State of Nevada and the Eighth Judicial District Court Rules prohibit this Department from entering orders in the probate proceedings before Department 8 unless (a) Department 8 makes a request to this Department for such an order; or (b) an emergency situation exists thus warranting such an order.² Neither exception applies. Accordingly, this Court should either deny the Motion or transfer the same to Department 8.³

The Plaintiffs rely on *Klabacka v. Nelson*, 133, Nev. 164, 394 P.3d 940 (2017) for the proposition that this Department may “enter orders regarding the estate, appoint a general administrator, and to define the scope of an administrator’s power.”⁴ Such reliance is misplaced and underscores the Plaintiffs’ fundamental misunderstanding of their procedural problem. The issue isn’t whether this Department has subject matter jurisdiction over the Estate. There is no dispute that it does because this Department is part of the Eighth Judicial District Court. The issue is whether this Department can and should be entering orders in an *in rem* estate proceeding that is pending in Department 8. It should not. Ironically, the *Klabacka*⁵ decision actually supports the

to its jurisdiction, the court must control the property. The doctrine is necessary to the harmonious cooperation of federal and state tribunals.”); *Marshall v. Marshall*, 547 U.S. 293, 296 (2006) (“[W]hen one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*.”)

² See D.C.R. 18(1) (“When any district judge shall have entered upon the trial or hearing of any cause, proceeding or motion, or made any ruling, order or decision therein, no other judge shall do any act or thing in or about such cause, proceeding or motion, unless upon the written request of the judge who shall have first entered upon the trial or hearing of such cause, proceeding or motion.”); EDCR 7.10(a) (“Except as provided in these rules or in an emergency, no judge except the judge having charge of the cause or proceeding may enter any order therein.”); and EDCR 7.10(b) (“When any district judge has begun a trial or hearing of any cause, proceeding or motion, or made any ruling, order or decision therein, no other judge may do any act or thing in about such cause, proceeding or motion, unless upon the request of the judge who has begun the trial or hearing of such cause, proceeding or motion.”).

³ See *Rohlfing v. Second Jud. Dist. Ct.*, 106 Nev. 902, 907, 803 P.2d. 659, 663 (1990), *distinguished on other grounds by Maiola v. State*, 120 Nev. 671, 99 P.3d 227 (2004) (observing that a district court judge lacks jurisdiction to review the acts of another district court judge); *State v. Babayan*, 106 Nev. 155, 162, 787 P.2d 805, 812 (1990), *distinguished on other grounds by Mayo v. Eighth Jud. Dist. Ct.*, 132 Nev. Adv. Op. 79, 384 P.3d 486 (2016) (finding error where a judge reconsidered an issue by a different judge in the course of the same case).

⁴ See Motion, at p. 8.

⁵ It should be noted that the undersigned’s firm represented Klabacka in that appellate proceeding.

Defendant in this regard. In *Klabacka*, the Supreme Court of Nevada determined that the statutory scheme and court rules which would otherwise require the Probate Commissioner to hear trust and estate matters did not apply because the trust dispute at issue was raised in a divorce proceeding already pending before Judge Sullivan in Family Court:

We conclude that this case was not initiated for the purpose of enforcing or determining a spendthrift beneficiary's rights under NRS 164.120(2) or determining the internal affairs of a nontestamentary trust under NRS 164.015(1). Rather, the case was initiated as a divorce proceeding under NRS Chapter 125.⁶

In the case at bar, the Estate proceedings were initiated in Department 8; not this Department. Absent an emergency or permission from Judge Atkin, this Department is prohibited by D.C.R. 18 and EDCR 7.20 from deciding any issue related to the Decedent's estate, which would include revoking and issuing letters testamentary and appointing administrators.

B. PLAINTIFFS' MOTION IS PATENTLY DEFICIENT AS IT IGNORES ALL OF THE PROCEDURAL AND DUE PROCESS REQUIREMENTS FOR A PROBATE PETITION.

1. Removing Clokey Requires the Initiation of Revocation Proceedings.

Before Letters can be granted to a General Administrator, Ms. Clokey's Letters of Special Administration would have to be revoked. There is a mandatory statutory procedure for seeking such a revocation. First, a petition for revocation must be filed Department 8.⁷ Second, the petitioners (in this case Plaintiffs) are required to serve a citation on Ms. Clokey, the special administrator, to appear and answer the petition at the time appointed for hearing.⁸ Third, the citation must be served on the administrator in accordance with NRS 155.050⁹ at least 10 days before the date of the hearing.¹⁰ Fourth, the court is required to take evidence at the revocation hearing "and if the right of the petitioner is established, and the petitioner is qualified, letters of

⁶ *Klabacka*, at 133 Nev. 170, 394 P.3d 946.

⁷ NRS 139.150(1).

⁸ *Id.*

⁹ A citation must be served by (a) certified mail, return receipt requested; (b) personal service; or (c) publication. NRS 155.050.

¹⁰ NRS 139.150(1).

administration must be granted to him or her and the letters of the former administrator revoked.”¹¹

The Plaintiffs followed zero of the procedural requirements for revocation of letters.

2. Converting a Special Administration to a General Administration Requires a New Petition.

Like a petition to revoke letters of administration, there are several procedural steps that are required by statute for the issuance of letters of administration. First, a petitioner must file a petition in Department 8 that must state: (a) the jurisdictional facts; (b) the names and addresses of the heirs of the decedent and their relationship to the decedent; (c) the character and estimated value of the property of the estate; and (d) whether the person to be appointment as administrator has been convicted as a felony.¹² Second, notice of hearing of the petition is required to be given to the heirs of the decedent and the Director of Health and Human Services.¹³ Third, notice of the petition and hearing must be published “on three dates of publication before the hearing, and if the newspaper is published more than once each week, there must be at least 10 days from the first to last dates of publication, including both the first and last days.”¹⁴ Fourth, the petition is required to be verified under oath.¹⁵

The Plaintiffs followed zero of the procedural requirements for appointment of a general administrator and the issuance of letters of general administration.

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¹¹ NRS 139.150(2).

¹² NRS 139.090.

¹³ NRS 139.100.

¹⁴ See NRS 155.020(1)(b).

¹⁵ NRS 132.270 (“‘Petition’ means a verified written request to the court for an order.”); NRS 139.090.

IV.

**A GENERAL ADMINISTRATION WOULD BE IMPROPER AS THE DECEDENT DIED
IN ARIZONA AND THERE ARE PRESENTLY NO ASSETS OTHER THAN THE
POLICY OF MOTOR VEHICLE INSURANCE**

Even assuming arguendo that (a) this Department can hear probate petitions relating to the Decedent's estate, and (b) the "Motion" comports with the statutory procedural requirements, the Motion should nevertheless be denied because a general administration is improper as there are no probate assets other than the policy of liability insurance.

Under Nevada law, in instances where a decedent did not reside in Nevada, "[t]he estate of a nonresident decedent may be settled by the district court of any county in which any part of the estate is located."¹⁶ Decedent was an Arizona resident who died in Arizona. Accordingly, in order to satisfy the most basic jurisdictional requirement for the opening of a general administration, Plaintiffs are required to show that there is a probate asset here in Clark County, Nevada. Here, Plaintiffs contend that the "potential" bad faith claim is such an asset. In reality, there is no such asset at this time because such a claim, if any, is not ripe unless and until a judgment is in excess of the policy limits. Moreover, Nevada's survival statute limits recovery on any cause of action surviving the decedent to only those damages suffered while alive.

A. THERE IS NO PRESENT CAUSE OF ACTION FOR BAD FAITH.

At McNamee's death, there was no cause of action for bad faith. Plaintiffs admit this, continuously arguing that this claim is only "potential."¹⁷ This can be more readily seen in the Supreme Court of Nevada's decision in *Gallegos v. Malco Enters. of Nevada*, 127 Nev. 579, 255 P.3d 1287 (2011). In that case, the Court took note that under NRS 10.045, "'Personal property' includes money, goods, chattels, things in action and evidences of debt."¹⁸ The Court stated that "A 'thing in action,' alternatively referred to as a 'chose in action,' is defined as a '*right* to bring

¹⁶ NRS 136.010(2).

¹⁷ See e.g. Motion, at pp. 4, 9.

¹⁸ *Gallegos*, at 127 Nev. 582, 255 P.3d 1289.

an action to recover a debt, money, or thing.”¹⁹ In *Gallegos*, Gallegos took a default judgment against a tort defendant, Gonzalez. The insurer for Gonzalez was First American Property and Casualty Insurance Company. Gallegos then sought and obtained a judicial assignment of Gonzalez’s unasserted claims for breach of contract, breach of fiduciary duties and breach of the duty of good faith and fair dealing against First American. Gallegos then sued First American directly. In allowing the assignment to stand, the Court first had to determine whether a judgment was “property” and, therefore, assignable under NRS 21.320. The Court stated, “[W]e conclude that *rights* of action held by a judgment debtor (Gonzalez) are personal property subject to execution in satisfaction of a judgment.”²⁰ In the present case, Plaintiffs do not have any type of judgment against McNamee. Therefore, they have no “property” upon which an action can be alleged. Likewise, the Defendant has no “right of action” for bad faith as there is no judgment against the Defendant. The cases relied upon by Plaintiffs explain Plaintiffs’ problem.

In *Kelly v. CSE Safeguard Ins., Co.*, 2011 U.S. Dist. Lexis 111136 (D. Nev. 2011), the court granted summary judgment to the insurance carrier. Kelly was the tort plaintiff who sued the tort defendant, Flores. Kelly and Flores stipulated to a judgment in excess of Flores’s insurance coverage provided by CSE Safeguard Insurance Company. Flores then assigned his “bad faith rights” against his insurance carrier to Kelly. Kelly then attempted to bring a bad faith cause of action against CSE Safeguard for the insurance carrier’s alleged failure to settle the case.

The court held that:

“the agreed judgment cannot be fairly attributed to the insurer’s conduct even if the insurer’s refusal to settle with the policy limits was unreasonable.” *Hamilton v. Maryland Casualty Co.*, 27 Cal. 4th 718, 117 Cal. Rptr. 2d 318, 41 P.3d 128, 137 (2002). A “litigated” excess judgment must be obtained, before it can be used as a presumptive measure of insured’s damages. *Id.* at 133. (“the judgment provides no reliable basis to establish damages resulting from a refusal to settle, an essential element of plaintiffs’ cause of action”).²¹

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¹⁹ *Id.* at 582, 255 P.3d at 1289.

²⁰ *Id.*

²¹ *Id.* at *17.

1 In the present case, Plaintiffs do not have *any* judgment, let alone a stipulated one. As
2 such, there is no value to the alleged “bad faith” claim, and, thus, no asset.

3 This is also seen in another case previously referred to by Plaintiffs, *Safeco Ins. Co. of Am.*
4 *v. Superior Court*, 71 Cal. App. 4th 782, 788 (1999). In a prior personal injury/wrongful death
5 action, McKinney and the tort defendants entered into a stipulated judgment. The tort defendants
6 then made an assignment of their bad faith rights against their insurer, Safeco Insurance
7 Company, to McKinney. McKinney then brought a direct action against Safeco, alleging bad
8 faith. The bad faith claim, as here, was based upon Safeco’s alleged failure to settle the case with
9 McKinney. In the underlying bodily injury/wrongful death case, as here, Safeco continued to
10 provide a defense to the tort defendants. In the bad faith case brought by McKinney against
11 Safeco, the California Court of Appeals ordered that summary judgment be entered in favor of
12 Safeco. The court was quite clear in its holding:

13 When, as here, the insurer is providing a defense but merely refuses to settle, the
14 insured has no immediate remedy. A ***cause of action for bad faith refusal to
settle arises only after a judgment has been rendered in excess of the policy
limits.***²²

15 In making its decision, the court specifically appreciated that at trial a verdict could be entered
16 that was less than the policy limits, or that a complete defense verdict could be entered.²³ These
17 ultimate results made the alleged bad faith claim speculative, i.e. “potential,” only.

18 A similar result was reached in another case cited to by Plaintiffs. In *Hamilton v.*
19 *Maryland Cas. Co.*, 27 Cal. 4th 718 (Cal. 2002), the California Supreme Court held:

20 If the insurer declines to settle and decides to go to trial and then obtains a
21 judgment below the settlement offer or obtains a complete defense verdict, then
22 the insured would have no cause to complain, and the insurer would have no
23 liability. Until judgment is actually entered, the mere ***possibility or probability*** of
an excess judgment does not render the refusal to settle actionable.²⁴

24 ///

25 ///

26 ²² *Id.* at 788 (Emphasis added).

27 ²³ *Id.*

28 ²⁴ *Id.* at 727 (Emphasis added).

1 In the present case, there is no judgment of any type. There is only speculation as to the value of the
2 Plaintiffs' claims against McNamee. Without a judgment, nothing is "actionable" and, therefore, not
3 property. *See Gallegos, supra*.

4 Plaintiffs also cite to *Avila v. Century Nat'l Ins. Co.*, 473 Fed.Appx. 554, 556 (9th Cir.
5 2012) for the proposition that a claim arose as soon as Decedent's insurer rejected a settlement
6 offer. *Avila*, however, is distinguishable from the instant action because the bad faith claim arose
7 prior to the decedent's death. In *Avila*, the Ninth Circuit stated that "because [decedent defendant]
8 was alive when Century refused to indemnify, defend, and settle, whether or not he had any assets
9 at the time would be irrelevant to Century's duties." Closer examination of *Avila*, however,
10 reveals that the bad faith conduct and the judgment against the decedent in excess of the policy
11 limits occurred prior to the decedent's death. The *Avila* court found that, under Nevada law,
12 *Avila's* estate retained the bad faith claim against his insurer, as if *Avila* were still alive.

13 Here, there was no judgment at the time of Decedent's death, GEICO has continued to
14 defend the claim on behalf of the Estate, and the Supreme Court of Nevada has not yet squarely
15 addressed the issue of whether an unaccrued potential bad faith claim can be an asset of a
16 decedent's estate.

17 **B. NEVADA'S SURVIVAL STATUTE LIMITS RECOVERY TO DAMAGES SUFFERED PRIOR TO**
18 **DEATH.**

19 Under the common law, all causes of action by and against a decedent abate at death.²⁵
20 Nevada, however, has a survival statute which generally provides that "no cause of action is lost
21 by reason of the death of any person, but may be maintained by or against the person's executor
22 or administrator."²⁶ However, Nevada's survival statute expressly limits recoverable damages to
23 only those damages suffered before the decedent's death:

24 _____
25 ²⁵ See *Forrester v. Southern Pac. Co.*, 36 Nev. 247 (1913); *Walker v. Burkham*, 68 Nev. 250
26 (1951) ("At common law, in an action at law before the trial court, death of a party resulted in
27 absolute abatement without right of substitution of the decedent's representative."); *Estes v.*
Riggins, 68 Nev. 336 ("Under the common law the death of the wrongdoer caused an abatement
28 of any cause of action against him.").

²⁶ NRS 41.100(1).

NRS 41.100 Cause of action not lost by reason of death; damages; recovery for loss arising out of unfair practice regarding policy of life insurance; subrogation.

3. Except as otherwise provided in this subsection, **when a person who has a cause of action dies before judgment, the damages recoverable by the decedent's executor or administrator include all losses or damages which the decedent incurred or sustained before the decedent's death**, including any penalties or punitive and exemplary damages which the decedent would have recovered if the decedent had lived, and damages for pain, suffering or disfigurement and loss of probable support, companionship, society, comfort and consortium. This subsection does not apply to the cause of action of a decedent brought by the decedent's personal representatives for the decedent's wrongful death.

Here, the Plaintiffs implicitly admit that the Decedent did not incur or sustain any damages before his death because the alleged bad faith claim was only a "potential" bad faith claim at the time of his death. There was no judgment at the time of death in Plaintiffs' favor, let alone a judgment that would have subjected the Decedent to an excess of insurance policy limits. Accordingly, even if the potential and unaccrued bad faith claim survived death, it's value would be zero as Decedent suffered no damages during his lifetime caused by the purported tortious conduct.

V.

COUNTERMOTION TO JOIN GEICO AS A REQUIRED PARTY

Under NRCP 19(a), GEICO is probably a required party to the probate proceeding because the opening of a general administration requires a predicate determination of whether the alleged potential bad faith claim is a probate asset under Nevada law. NRCP 19(a)(1)(B) provides that "[a] person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if ... that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest..."

Here, the Plaintiffs seek the appointment of a general administrator so that he or she can attempt to assign the unaccrued and potential bad faith claim to the Plaintiffs. Clearly, GEICO has a vested interest in the undecided legal issues and would likely be prejudiced if it is not afforded the opportunity to make its own arguments in response to the Plaintiffs requests for the

1 appointment of a general administrator and then later a potential attempt to assign the bad faith
2 claim. Accordingly, the Court should order a required joinder of GEICO should this Department
3 entertain the Motion on its merits.

4 **VI.**

5 **CONCLUSION**

6 The Motion should be denied without prejudice as the same should come in the form of a
7 properly noticed and served petition that is filed in Department 8. Alternatively, this Court could
8 transfer the Motion to be heard by Department 8. Should the Court entertain the Motion on its
9 merits, GEICO should first be joined and afforded an opportunity to respond before it decides the
10 same. If decided on the merits, the Motion should be denied for all of the reasons set forth herein.

11 DATED this 2nd day of March, 2020.

12 /s/ Alexander G. LeVeque

Alexander G. LeVeque (#11183)

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14 *Attorneys for Susan Clokey, Special*
15 *Administrator for the Estate of James*
16 *McNamee*

1 **CERTIFICATE OF SERVICE**

2 PURSUANT to NRCP 5(b), I HEREBY CERTIFY that on March 2, 2020, I served a true
3 and correct copy of the **DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR**
4 **APPOINTMENT OF A GENERAL ADMINISTRATOR -AND- COUNTERMOTION TO**
5 **JOIN GEICO AS A REQUIRED PARTY** to the following in the manner set forth below:

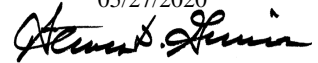
6 **Via:**

- 7 ☐ Hand Delivery
8 ☐ U.S. Mail, Postage Prepaid
9 ☐ Certified Mail, Receipt No.: _____
10 ☐ Return Receipt Request
11 ☒ E-Service through the Odyssey eFileNV/Nevada E-File and Serve System,
12 as follows:
13
14

15 /s/ Barbara Abbott
16 An Employee of Pyatt Silvestri
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20
21
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24
25
26
27
28



EXHIBIT “14”



CLERK OF THE COURT

ORDR

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DISTRICT COURT

CLARK COUNTY, NEVADA

GIANN BIANCHI, individually, DARA
DELPRIORE, individually,

Plaintiffs,

vs.

SUSAN CLOKEY, Special Administrator for the
ESTATE OF JAMES MCNAMEE, DOES I-X,
and ROE CORPORATIONS I-X, inclusive,

Defendants.

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

**ORDER DENYING PLAINTIFFS' MOTION FOR APPOINTMENT
OF A GENERAL ADMINISTRATOR AND DEFENDANT'S
COUNTERMOTION TO JOIN GEICO AS A REQUIRED PARTY**

Plaintiffs' Motion for Appointment of a General Administrator and Defendant's
Counter-motion to Join GEICO as a Required Party having come on for hearing on the 10th day of
March, 2020 in Department IX, the Honorable Cristina D. Silva presiding, Defendant Susan
Clokey, Special Administrator for the Estate of James McNamee, being represented by James
P.C. Silvestri, Esq. of Pyatt Silvestri, non-party GEICO, being represented by Jonathan W.
Carlson, Esq. of McCormick Barstow, and Plaintiffs Giann Bianchi and Dara Del Priori , being
represented by Corey M. Eschweiler, Esq. of Lerner & Rowe and Ian Samson, Esq. of Panish
Shea & Boyle, having considered the same and the papers and pleadings on file herein as well as
the oral argument from counsel, having deferred its decision, the Court now rules as follows:

///

ORDER

1. Plaintiff requests “that the Court appoint ‘Fred Waid’ as the general administrator for the Estate of James McNamee’s bad faith claim.” Although this Court has subject matter jurisdiction to appoint a general administrator, this Court's jurisdiction is not limitless. The Court agrees with Defendant that, pursuant to the prior-exclusive jurisdiction, only one court can exercise *in rem* jurisdiction over the estate of a decedent. *See* NRS 155.0967(1) (“In a proceeding involving the estate of a decedent or a testamentary trust, the court has jurisdiction over the assets of the estate or trust as a proceeding *in rem*”) and *Chapman v. Deutsche Bank Nat’l Trust Co.*, 129 Nev. 314, 317, 302 P.3d 1103, 1105 (2013) (“The prior-exclusive-jurisdiction holds that, when one court is exercising *in rem* jurisdiction of a *res*, a second court will not assume *in rem* jurisdiction over the same *res*.”) (citations omitted). Accordingly, this Court does not have *in rem* jurisdiction over the estate of James McNamee. If Plaintiff seeks to convert administration of decedent's estate from special to general, it must bring the proper petition to do so before the appropriate court, namely the Probate court, i.e. the Honorable Trevor Atkin in Department VIII. Plaintiffs’ Motion is hereby DENIED WITHOUT PREJUDICE.
2. Defendant alternatively requests that the Court join insurer GEICO as an Indispensable Party to the present Motion. Given the Court’s denial of Plaintiffs’ Motion, Defendant’s Counter-Motion is hereby DENIED as premature.
3. In making this Order, the Court recognizes, based upon the Plaintiffs’ Motion, and contrary to the Defendant’s position, that the decedent, McNamee had a potential bad faith claim against non-party GEICO at the time of his death which survives his death. *See* NRS 41.100 and *Avila v. Century Nat’l Ins. Co.*, 473 Fed. Appx. 554 (9th Cir. 2012). Attached to this order as **Exhibit A**, and incorporated by reference, is the Court's April 15, 2020 decision concerning this motion.

///

///

Dated this 27th day of May, 2020

DATED this ____ day of _____, 2020.


DISTRICT COURT JUDGE

MK
17A E8D 77AC 25E6
Cristina D. Silva

Submitted by:

PANISH SHEA & BOYLE LLP

/S/ Ian Samson

IAN P. SAMSON

Nevada Bar No. 15089

8816 Spanish Ridge Avenue

Las Vegas, Nevada 89148

Attorneys for Plaintiffs

Approved as to form and content:

PYATT SILVESTRI

Not Signed

ROBERT MOLINA, ESQ.

Nevada Bar No. 6422

701 Bridger Avenue, Suite 600

Las Vegas, Nevada 89101

Attorneys for Defendant Susan Clokey

Special Administrator for the

Estate of James McNamee

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EXHIBIT A

1 DECN
Judge Cristina D. Silva
2 Eighth Judicial District Court
Department IX
3 Regional Justice Center
200 Lewis Avenue
4 Las Vegas, Nevada 89155

5
6 EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

7 GIANN BIANCHI, individually,
8 DARA DELPRIORE, individually,

9 Plaintiffs,

10 vs.

11 SUSAN CLOKEY, as Special Administrator
for the Estate of JAMES McNAMEE,
12 deceased, DOES I - X, and ROE
CORPORATIONS I - X, inclusive,

13 Defendants.

Case No.: A-13-691887-C

Dept. No.: IX

14 DECISION

15 The Court has reviewed and considered Plaintiffs' Motion for Appointment of a
16 General Administrator on Order Shortening Time, Defendant's Opposition to Plaintiffs'
17 Motion for Appointment of a General Administrator -and- Countermotion to Join GEICO as a
18 Required Party, Plaintiffs' Reply in support of their motion, and the arguments of counsel
19 during the March 10, 2020 hearing. The Court deferred its decision and now rules as follows:

20 1. Plaintiffs Have A Cognizable Bad Faith Action Against Defendant

21 "An insurer fails to act in good faith when it refuses 'without proper cause' to
22 compensate the insured for a loss covered by the policy. Such conduct gives rise to a breach of
23 the covenant of good faith and fair dealing. This breach or failure to perform constitutes 'bad
24 faith' where the relationship between the parties is that of insurer and insured." *Pemberton v.*

1 *Farmers Ins. Exch.*, 109 Nev. 789, 793, 858 P.2d 380, 382 (1993). Thus, to establish a prima facie
2 case of bad-faith refusal to pay an insurance claim, the plaintiff must establish that the insurer
3 had no reasonable basis for disputing coverage, and that the insurer knew or recklessly
4 disregarded the fact that there was no reasonable basis for disputing coverage. *Powers v. United*
5 *Servs. Auto. Ass'n*, 114 Nev. 690, 702–03, 962 P.2d 596, 604 (1998), opinion modified on denial of
6 reh'g, 115 Nev. 38, 979 P.2d 1286 (1999), citing *Falline v. GNLV Corp.*, 107 Nev. 1004, 823 P.2d 888
7 (1991).

8 Although there is no state case law in Nevada squarely addressing the inclusion of a
9 potential bad faith claim in a decedent's estate, federal law is exceptionally persuasive. "If [an
10 insurer] breached its contract while [an insured-decedent] was alive, then, under Nevada law,
11 the [insured-decedent's] Estate would retain any such claims as if [the insured-decedent] were
12 still alive." *Avila v. Century Nat'l Ins. Co.*, 473 Fed. Appx 554, 556 (9th Cir. 2012).¹ "While an
13 insurer's conduct need not rise to the level 'of actual dishonesty, fraud, or concealment' to
14 constitute bad faith, an insurer's conduct must nevertheless be 'prompted not by an honest
15 mistake, bad judgment or negligence but rather by a conscious and deliberate act.'" *McDaniel v.*
16 *Gov't Employees Ins. Co.*, 681 Fed. Appx 614, 615–16 (9th Cir. 2017) (internal citations omitted).

17 Plaintiff argues that GEICO's refusal to settle resulted in a potential bad faith claim
18 held by the decedent's Estate that is assignable prior to trial. Defendant argues that Nevada's
19 Survival Statue limits Plaintiff's recovery to damages suffered prior to the decedent's death.
20 Specifically, Defendant contends that because GEICO's conduct in initially refusing to settle
21 with Plaintiffs for an amount within policy limits and subsequent conduct in extending
22

23 ¹ The Court recognizes that the procedural history of the *Avila* decision is distinguishable as the
24 judgment had been entered at the time the decedent passed. See *Avila v. Century Nat'l Ins. Co.*, No.
209CV00682RCJGWF, 2009 WL 10693546, at 2 (D. Nev. Sept. 18, 2009). This Court still finds the
holding that an insured-decedent's claim survives is persuasive.

1 settlement offers to Plaintiffs in excess of policy limits did not result in a litigated judgment in
2 excess of the policy limits, the potential bad faith claim does not exist. This Court disagrees.

3 As relevant to the pending motion, NRS 41.100 provides “[e]xcept as otherwise
4 provided in this subsection, when a person who has a cause of action dies before judgment, the
5 damages recoverable by the decedent’s executor or administrator include all losses or damages
6 which the decedent incurred or sustained before the decedent’s death, including any penalties
7 or punitive and exemplary damages which the decedent would have recovered if the decedent
8 had lived, and damages for pain, suffering or disfigurement and loss of probable support,
9 companionship, society, comfort and consortium.” NRS 41.100(3).

10 NRS 41.00 is indivisible; it must be read in conjunction with the remainder of its
11 sections, which provide that an estate may recover losses or damages incurred or sustained
12 before the decedent’s death. Here, prior to his death, Mr. McNamee would have had a bad
13 faith claim if GEICO had an opportunity to pay the limits to resolve Plaintiffs’ claims but
14 failed to do so, which is what happened in this case. In 2013, following the incident in this
15 case, Plaintiffs each provided GEICO with opportunities to compromise their negligence
16 claims against the decedent for the \$60,000 liability insurance policy limit and GEICO
17 refused. *See* Plaintiffs’ Motion at 6. In 2014, GEICO offered to settle with Plaintiff Dara in the
18 amount of \$30,000, but she refused on the basis that her medical bills alone exceeded
19 \$36,214.35. *Id.* On April 21, 2015, both Plaintiffs served the decedent with offers to settle in the
20 amounts of \$435,000 and \$345,000 respectively, and both offers were denied. *Id.* at 6-7.
21 Thereafter in July 2015, with knowledge that both Plaintiffs’ claims for damages exceeded the
22 \$60,000 policy limit, GEICO offered to settle Plaintiffs’ claims each in excess of the policy
23 limit.
24

1 GEICO's last attempt to settle with Plaintiffs in 2015, two years following its first
2 refusal and after it had obtained knowledge that Plaintiffs' respective medical bills had
3 substantially increased to six-figure amounts, suggests that GEICO consciously and
4 deliberately exposed the decedent to an excess judgment by failing to properly tender the
5 decedent's bargained-for policy limits when first requested, and may have also breached its
6 covenant of good faith and fair dealing. GEICO's conduct in refusing to settle with Plaintiffs
7 within policy limits was a conscious and deliberate act. Stated otherwise, GEICO's decision to
8 deny coverage resulted in McNamee himself incurring or sustaining any excess damages for his
9 insurance policy's failure to tender. McNamee's death did not terminate his exposure. His
10 estate still likely remains exposed as well. This of course would not be determined until a
11 finder of fact resolves the question of liability.

12 Defendant's argument that the potential bad faith claim was not a loss which the
13 decedent incurred or sustained before the decedent's death because liability had not yet been
14 litigated to its conclusion is of no consequence. The decedent did not die until 2017. But, the
15 acts constituting the bad faith cause of action occurred long before McNamee's untimely
16 passing. Because NRS 41.100 as a whole allows the executor or administrator of a decedent
17 who died before judgment to maintain the decedent's causes of action and recover damages
18 therefrom, the potential bad faith claim at issue continues to exist within the decedent's
19 Estate until a final judgment is rendered. The Court notes that reaching another conclusion
20 regarding the survival of the bad faith claim could potentially result in poor public policy.

21 ...

22 ...

23 ...

24 ...

1 II. Granting Plaintiff's Motion for Appointment of a General Administrator
2 Would Be a Violation of Prior-Exclusive Jurisdiction

3 The parties agree that this Court has subject matter jurisdiction to appoint a general
4 administrator. But, this Court's jurisdiction is not limitless. The Court agrees with Defendant
5 that pursuant to the prior-exclusive jurisdiction, only one court can exercise *in rem* jurisdiction
6 over the estate of decedent. See NRS 155.0967(1) ("In a proceeding involving the estate of a
7 decedent or a testamentary trust, the court has jurisdiction over the assets of the estate or
8 trust as a proceeding in rem"); *Chapman v. Deutsche Bank Nat'l Trust Co.*, 129 Nev. 314, 317, 302 P.3d
9 1103, 1105 (2013) ("The prior-exclusive-jurisdiction holds that, when one court is exercising *in*
10 *rem* jurisdiction of a *res*, a second court will not assume *in rem* jurisdiction over the same *res*."
11 (citations omitted).

12 Accordingly, Plaintiff's Motion for Appointment of a General Administrator is DENIED
13 without prejudice. If Plaintiff seeks to convert administration of decedent's estate from special
14 to general,² it must bring the proper petition to do so before the Honorable Trevor Atkin in
15 Department VIII.

16 III. Defendant McNamee's Counter-Motion to Join GEICO as an Indispensable
17 Party

18 In light of the denial of Plaintiff's motion for appointment of a general administrator,
19 Defendant's countermotion to join GEICO as an indispensable party is DENIED as premature.
20 If Defendant's estate is exposed to an excess judgment post-verdict, the Court is willing to
21 reconsider this motion.

22 ...

23 ...


24 ² Based on this ruling invoking the prior-exclusive jurisdiction rule, the Court makes no
determination on Defendant's other argument that Arizona would have jurisdiction over the decedent's
estate.

1 IV. Conclusion

2 For the reasons set forth above, Plaintiff's Motion for Appointment of a General
3 Administrator is DENIED without Prejudice. Further, Defendant's Counter Motion to Join
4 GEICO as an Indispensable Party is DENIED as premature.

5 The parties shall meet and confer to prepare a draft Order consistent with this decision
6 for the Court's review. The proposed Order should include e-signatures and be electronically
7 submitted to Dept09LC@clarkcountycourts.us in Microsoft Word format on or before May 15,
8 2020.

9 DATED this 15th day of April, 2020.

10 
11 _____
12 CRISTINA D. SILVA
13 DISTRICT COURT JUDGE
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CERTIFICATE OF SERVICE

I hereby certify that on the date filed, a copy of the foregoing DECISION was electronically served, pursuant to N.E.F.C.R. Rule 9, to all registered parties in the Eighth Judicial District Court Electronic Filing Program and/or emailed to any proper persons or parties not registered for electronic service.

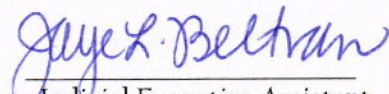
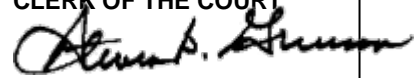

Judicial Executive Assistant

EXHIBIT “15”



1 **NEOJ**
2 JAMES P.C. SILVESTRI, ESQ.
3 Nevada Bar No. 3603
4 PYATT SILVESTRI
5 701 Bridger Avenue, Suite 600
6 Las Vegas, Nevada 89101
7 T. (702) 383-6000
8 F. (702) 477-0088
9 jsilvestri@pyattsilvestri.com

6 Attorneys for Defendant,
7 JAMES MCNAMEE

DISTRICT COURT
CLARK COUNTY, NEVADA

9 In the Matter of the Estate of James Allen
10 McNamee, Deceased

Case No.: P-17-093041-E
Dept. No.: B

**NOTICE OF ENTRY OF AMENDED ORDER GRANTING
PETITION FOR SPECIAL LETTERS OF ADMINISTRATION**

16 NOTICE IS HEREBY GIVEN that the Order Granting Petition for Special Letters of
17 Administration was entered with the Court on November 25, 2019, a copy of which is attached
18 hereto.

19 DATED this 25th day of November, 2019.

20 PYATT SILVESTRI

21 /s/ James P. C. Silvestri
22 JAMES P.C. SILVESTRI, ESQ.
23 Nevada Bar No. 3603
24 701 Bridger Avenue, Suite 600
25 Las Vegas, Nevada 89101
26 Attorneys for Defendant
27 JAMES MCNAMEE
28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Pyatt Silvestri and that on the 25th day of November, 2019, I caused the above and foregoing document **NOTICE OF ENTRY OF AMENDED ORDER GRANTING PETITION FOR SPECIAL LETTERS OF ADMINISTRATION**, 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.
LERNER & ROWE
4795 S. Durango Drive
Las Vegas, NV 89147
ceschweiler@glenlerner.com

Attorney for Plaintiffs
GIANN BIANCHI and
DARA DELPRIORE

Rahul Ravipudi, Esq.
Ian Samson, Esq.
Adam R. Ellis, Esq.
PANISH SHEA & BOYLE LLP
8816 Spanish Ridge Avenue
Las Vegas, NV 89148
ravipudi@psblaw.com
samson@psblaw.com
ellis@psblaw.com

Co-Counsel for Plaintiffs
GIANN BIANCHI and
DARA DELPRIORE

Alexander G. LeVeque, Esq.
Brian P. Eagan, Esq.
SOLOMON DWIGGINS & FREER, LTD.
9060 W. Cheyenne Avenue
Las Vegas, Nevada 89129
aleveque@sdfnvlaw.com
beagan@sdfnvlaw.com

Attorneys for SUSAN CLOKEY
Special Administrator for the
Estate of James McNamee

/s/ *Barbara Abbott*

An Employee of PYATT SILVESTRI

1 **ORDER**

2 JAMES P. C. SILVESTRI, ESQ.
3 Nevada Bar No. 3603
4 PYATT SILVESTRI
5 701 Bridger Ave., Suite 600
6 Las Vegas, NV 89101
7 T. (702) 383-6000 / F. (702) 477-0088
8 jsilvestri@pyattsilvestri.com

9 Attorney for Petitioner,
10 Special Administrator Susan Clokey

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

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

21 **AMENDED ORDER GRANTING PETITION**
22 **FOR SPECIAL LETTERS OF ADMINISTRATION**

23 Upon submission of the Petition for Special Letters of Administration, representing
24 as follows:

25 1. That Decedent, James Allen McNamee died on the 12th day of August, 2017, in
26 the County of Mohave, State of Arizona.

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

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

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

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

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DISTRICT COURT
DEPT B

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 140.040(2)(a) and 140.040(3)(b).

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

19 ///

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1 The Special Administrator does not have any other authority beyond Nevada
2 Revised Statutes 140.040(2)(a) and 140.040(3)(b) and may not distribute any property other
3 than the GEICO automobile insurance policy with automobile liability insurance coverage
4 of \$30,000 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 This is an order nunc pro tunc correcting the previous Order Granting Petition for
9 Special Letters of Administration dated November 15th, 2017.

10 DATED this 22nd day of November, 2019.

11
12 
DISTRICT COURT JUDGE

LINDA MARQUIS

13 Submitted by:

14
15 PYATT SILVESTRI

16  #15036
17  fer

18 James P.C. Silvestri, Esq.
19 Nevada Bar No. 3603
PYATT SILVESTRI
20 701 Bridger Avenue, Suite 600
Las Vegas, NV 89101
21 T. (702) 383-6000
jsilvestri@pyattsilvestri.com
22 Attorney for Petitioner,
Special Administrator Susan Clokey

23 ///

24 ///

25 ///

26 ///

27 ///

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)

EXHIBIT “16”

**DISTRICT COURT
CLARK COUNTY, NEVADA**

GIANN BIANCHI, individually, DARA
DELPRIORE, individually,

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

Plaintiffs,

vs.

SUSAN CLOKEY, Special Administrator for
the ESTATE OF JAMES MCNAMEE, DOES
I-X, and ROE CORPORATIONS I-X,
inclusive,

Defendants.

VERDICT FORM

We, the jury in the above-entitled action, having been instructed by the Court to find in favor of the Plaintiff, DARA DEL PRIORE against Defendant SUSAN CLOKEY, Special Administrator for the ESTATE OF JAMES MCNAMEE.

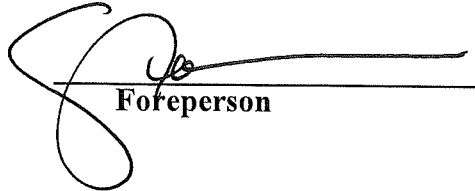
1. Past Medical Bills
2. Past Pain and Suffering

Yes X
Yes X

No _____
No _____

\$ 41,700
\$ 83,400

Dated this 18 day of August, 2021


Foreperson

**DISTRICT COURT
CLARK COUNTY, NEVADA**

GIANN BIANCHI, individually, DARA
DELPRIORE, individually,

Plaintiffs,

vs.

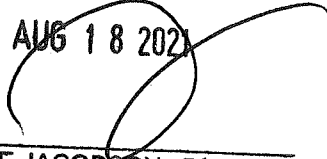
SUSAN CLOKEY, Special Administrator for
the ESTATE OF JAMES MCNAMEE, DOES
I-X, and ROE CORPORATIONS I-X,
inclusive,

Defendants.

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

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

AUG 18 2021

BY, 
ALICE JACOBSON, DEPUTY

VERDICT FORM

We, the jury in the above-entitled action, having been instructed by the Court to find in favor of the Plaintiff, GIANN BIANCHI against Defendant SUSAN CLOKEY, Special Administrator for the ESTATE OF JAMES MCNAMEE

1. Past Medical Bills
2. Past Pain and Suffering

Yes X
Yes X

No _____
No _____

\$ 37,800
\$ 25,000

Dated this 18 day of August, 2021

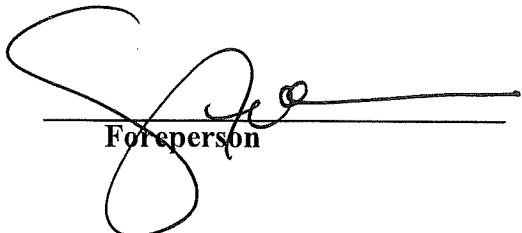

Foreperson

EXHIBIT “17”



Tel: 1-800-841-3000

GEICO GENERAL INSURANCE COMPANY
One GEICO Center
Macon, GA 31295-0001

Date Issued: March 5, 2013

JAMES A MCNAMEE AND LYN
MCNAMEE
2472 230TH ST
MAHNOMEN MN 56557-9034

Email Address: j-mcnamee@hotmail.com

Declarations Page

This is a description of your coverage.
Please retain for your records.

Policy Number: 4180-45-71-62

Coverage Period:

03-05-13 through 09-05-13

12:01 a.m. local time at the address of the named insured.

Endorsement Effective: 03-05-13

Named Insured

James A McNamee
Lyn McNamee

Additional Drivers

None

Vehicle

VIN

Vehicle Location

**Finance Company/
Lienholder**

1 1989 Ford Econo E150 1FDEE14N0KHA19621 Mahnomen MN 56557

Coverages*

Limits and/or Deductibles

Vehicle 1

Bodily Injury Liability

Each Person/Each Occurrence

\$30,000/\$60,000

Property Damage Liability

\$25,000

Uninsured Motorists

Each Person/Each Occurrence

\$25,000/\$50,000

Basic Personal Injury Protection

No Stacking

Non-Ded

Underinsured Motorist

Each Person/Each Occurrence

\$25,000/\$50,000

Total Six Month Premium

*Coverage applies where a premium or \$0.00 is shown for a vehicle.

If you elect to pay your premium in installments, you may be subject to an additional fee for each installment. The fee amount will be shown on your billing statements and is subject to change.

Discounts

The total value of your discounts is

5 Year Good Driving (All Vehicles)

T-Q

DEC_PAGE (11-11) (Page 1 of 2)

Continued on Back
Policy Change Page 5 of 6

MCN00001

DEF000044

Contract Type: A30MN

Contract Amendments: ALL VEHICLES - A30MN A54MN

Class: A -N - -S (VEH 1)

Countersigned by Authorized Representative



Important Policy Information

-Please review the front and/or back of this page for your coverage and discount information.

-Your account balance includes a \$0.50 charge for each vehicle if Comprehensive Coverage is included. This money is sent to the Minnesota Auto Theft Prevention Board.

EXHIBIT 3

EXHIBIT 3

Heather S. Linn

CLERK OF THE COURT

ORDER

JAMES P.C. SILVESTRI, ESQ.

Nevada Bar No. 3603

ROBERT P. MOLINA, ESQ.

Nevada Bar No. 6422

PYATT SILVESTRI

701 Bridger Avenue, Suite 600

Las Vegas, Nevada 89101

(702) 383-6000

(702) 477-0088 (Fax)

jsilvestri@pyattsilvestri.com

rmolina@pyattsilvestri.com

Attorneys for Susan Clokey
Special Administrator for the
Estate of James McNamee

DISTRICT COURT

CLARK COUNTY, NEVADA

GIANN BIANCHI, individually, DARA
DELPRIORE, individually,

Plaintiffs,

vs.

SUSAN CLOKEY, Special Administrator for the
ESTATE OF JAMES MCNAMEE, DOES I-X,
and ROE CORPORATIONS I-X, inclusive,

Defendants.

Case No.: A-13-691887-C

Dept. No.: XXIII

**ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING
THE VERDICT (NRCP 50(b)) AND/OR MOTION TO ALTER OR AMEND JURY
VERDICT (NRCP 59(e)) IN ACCORDANCE WITH NRS 140.040**

Defendant's Motion For Judgment Notwithstanding the Verdict (NRCP 50(b)) and/or
Motion to Alter or Amend Jury Verdict (NRCP 59(c)) in accordance with NRS 140.040, having
come on for hearing on the 16th day of November, 2021, in Department XXIII, the Honorable
Jasmin Lilly Spells presiding, Defendant Susan Clokey, Special Administrator for the Estate of
James McNamee, being represented by James P.C. Silvestri, Esq. of Pyatt Silvestri, Daniel F.
Polsenberg, Esq. and Joel D. Henriod, Esq. of Lewis Roca Rothgerber Christie LLP, and Alex
LeVeque, Esq. of Solomon Dwiggin Freer & Steadman, Ltd., and Plaintiffs Giann Bianchi and
Dara Del Priore, being represented by Ian Samson, Esq. of Panish Shea & Boyle, having
considered the same and the papers and pleadings on file herein as well as the oral argument from

counsel, having deferred its decision, the Court now rules as follows:

ORDER

b

1. Defendants Motion is GRANTED under NRCP 50, subsection ~~6~~. The Court has the authority to the grant the relief requested. The Motion for Judgment as a Matter of Law may be made at any time before the case is submitted to the jury. The Court finds that the Motion was made prior to the case being submitted to the jury. The Court deferred ruling, waiting until after the jury had rendered a verdict, allowing the subject matter to be tried on its merits.
2. NRCP 50(b) states in relevant part:

If the Court does not grant a Motion for Judgment as a matter of law made under Rule 50(a), the Court is considered to have submitted the action to the jury subject to the Court's later deciding the legal questions raised by the Motion. Not later than 28 days after service of written notice of the entry of Judgment, the movant may file a renewed motion.

The 28-day deadline was met in this case.
3. A motion for judgment under NRCP 50(b) presents solely a question of law to be determined by the Court. *Dudley v. Prima*, 84 Nev. 549, 445 P.2d 31 (1968).
4. In ruling on the renewed motion for judgment under NRCP 50(b), the Court may allow the judgment on the verdict, order a new trial, or direct entry of judgment as a matter of law. If the Court grants the renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial under NRCP 50(c).
5. NRS 140.040(3) limits the liability of a special administrator to the limits available under a liability insurance policy. In this case, the Defendant Special Administrator is only liable to Plaintiffs for the amount available under the automobile liability policy issued by GEICO insurance, *i.e.*, \$30,000 for each Plaintiff for a total amount of \$60,000.
6. The Court finds that *Zhang v. Barnes*, 132 Nev. 1049 (2016) (unpublished), and *Las Vegas Metropolitan Police Department v. Yeghiazarian*, 129 Nev. 760 (2013), to be instructive. In both of those cases, the Court reduced jury verdicts and jury judgments based upon statutory

caps. Here, NRS 140.040 caps the Special Administrator's liability to the insurance policy limits. Therefore, it is appropriate to cap the Judgment pursuant to NRS 140.040.

7. Under NRCP 50(c), the Court hereby entertains the possibility of a new trial. The rule likely does not apply to circumstances where a statute or rule requires a particular result as a matter of law, rather than a Rule 50(b) motion premised on an insufficiency of evidence to support a claim. Nevertheless, here, Plaintiffs have not made any conditional motion for new trial and the Court does not find, *sua sponte*, any grounds for a new trial.

8. The Court finds that the judgment reduction is based solely on the statutory liability cap. This case has been fully tried as to all relevant facts with the exception of the legal question posed by NRS 140.040.

9. Judgment may now be entered accordingly based upon the above stated findings of facts and conclusions of law.

DATED this ____ day of _____, 2021.

Dated this 7th day of December, 2021


DISTRICT COURT JUDGE

4A9 16F BB02 C108

Jasmin Lilly Spells

Appellate Court Judge

Submitted by:

PYATT SILVESTRI

PANISH SHEA & BOYLE

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Attorneys for Defendant Susan Clokey
Special Administrator for the
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/s/ Ian Samson
IAN SAMSON, ESQ.
Nevada Bar No. 15089
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Las Vegas, Nevada 89148
Attorneys for Plaintiffs

Barbara Abbott

From: Ian Samson <samson@psblaw.com>
Sent: Wednesday, December 01, 2021 4:28 PM
To: James Silvestri; Adam Ellis; corey@erinjuryattorneys.com
Cc: Robert Molina; Polsenberg, Daniel F.; Henriod, Joel D.; Alexander LeVeque; Barbara Abbott
Subject: RE: 2021.11.29 Order.revised

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To: Ian Samson <samson@psblaw.com>; Adam Ellis <ellis@psblaw.com>; corey@erinjuryattorneys.com
Cc: Robert Molina <rmolina@pyattsilvestri.com>; Polsenberg, Daniel F. <DPolsenberg@lewisroca.com>; Henriod, Joel D. <JHenriod@lewisroca.com>; Alexander LeVeque <aleveque@sdfnlaw.com>; Barbara Abbott <babbott@pyattsilvestri.com>
Subject: RE: 2021.11.29 Order.revised

CAUTION: External Email

Ian
Any word on the proposed Order?

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Gianni Bianchi, Plaintiff(s)

CASE NO: A-13-691887-C

7 vs.

DEPT. NO. Department 23

8 Susan Clokey, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

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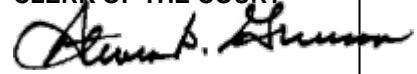
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EXHIBIT 4

EXHIBIT 4



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ROBERT P. MILONA, ESQ.
Nevada Bar No. 6422
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rmolina@pyattsilvestri.com
Attorneys for SUSAN CLOKEY,
Special Administrator for the
ESTATE OF JAMES MCNAMEE

DISTRICT COURT

CLARK COUNTY, NEVADA

GIANN BIANCHI, individually, DARA
DELPRIORE, individually,

Plaintiffs,

vs.

SUSAN CLOKEY, Special Administrator for
the ESTATE OF JAMES MCNAMEE, DOES
I-X, and ROE CORPORATIONS I-X,
inclusive,

Defendants.

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

**NOTICE OF ENTRY OF ORDER
GRANTING DEFENDANT'S MOTION
FOR JUDGMENT NOTWITHSTANDING
THE VERDICT (NRCP 50(b)) AND/OR
MOTION TO ALTER OR AMEND JURY
VERDICT (NRCP 59(e)) IN
ACCORDANCE WITH NRS 140.040**

NOTICE IS HEREBY GIVEN that the Stipulation and Order for Briefing Schedule
Concerning Defendant's Motion for Application of NRS 140.040 was entered with the Court on
September 8, 2021, a copy of which is attached hereto.

DATED this 10th day of December, 2021.

PYATT SILVESTRI

/s/ James P. C. Silvestri
JAMES P.C. SILVESTRI, ESQ.
Nevada Bar No. 3603
701 Bridger Avenue, Suite 600
Las Vegas, Nevada 89101
Attorneys for Defendant
JAMES MCNAMEE

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Pyatt Silvestri and that on the 7th day of December, 2021, I caused the above and foregoing document **NOTICE OF ENTRY OF NOTICE OF ENTRY OF ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (NRCP 50(b)) AND/OR MOTION TO ALTER OR AMEND JURY VERDICT (NRCP 59(e)) IN ACCORDANCE WITH NRS 140.040**, to be served as follows: Pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail to the attorney(s) listed below:

Corey M. Eschweiler, Esq.
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4795 S. Durango Drive
Las Vegas, NV 89147
ceschweiler@glenlerner.com

Attorney for Plaintiffs
GIANN BIANCHI and
DARA DELPRIORE

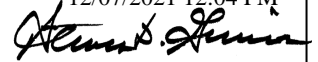
Rahul Ravipudi, Esq.
Ian Samson, Esq.
Adam R. Ellis, Esq.
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Co-Counsel for Plaintiffs
GIANN BIANCHI and
DARA DELPRIORE

Alexander G. LeVeque, Esq.
Brian P. Eagan, Esq.
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Attorneys for SUSAN CLOKEY
Special Administrator for the
Estate of James McNamee

/s/ Barbara Abbott
An Employee of PYATT SILVESTRI


CLERK OF THE COURT

ORDER

JAMES P.C. SILVESTRI, ESQ.

Nevada Bar No. 3603

ROBERT P. MOLINA, ESQ.

Nevada Bar No. 6422

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Attorneys for Susan Clokey
Special Administrator for the
Estate of James McNamee

DISTRICT COURT

CLARK COUNTY, NEVADA

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DELPRIORE, individually,

Plaintiffs,

vs.

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and ROE CORPORATIONS I-X, inclusive,

Defendants.

Case No.: A-13-691887-C

Dept. No.: XXIII

**ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING
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VERDICT (NRCF 59(e)) IN ACCORDANCE WITH NRS 140.040**

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counsel, having deferred its decision, the Court now rules as follows:

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1. Defendants Motion is GRANTED under NRCP 50, subsection ~~6~~. The Court has the authority to the grant the relief requested. The Motion for Judgment as a Matter of Law may be made at any time before the case is submitted to the jury. The Court finds that the Motion was made prior to the case being submitted to the jury. The Court deferred ruling, waiting until after the jury had rendered a verdict, allowing the subject matter to be tried on its merits.

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8. The Court finds that the judgment reduction is based solely on the statutory liability cap. This case has been fully tried as to all relevant facts with the exception of the legal question posed by NRS 140.040.

9. Judgment may now be entered accordingly based upon the above stated findings of facts and conclusions of law.

DATED this ____ day of _____, 2021.

Dated this 7th day of December, 2021


DISTRICT COURT JUDGE

4A9 16F BB02 C108

Jasmin Lilly Spells

Appellate Court Judge

Submitted by:

PYATT SILVESTRI

PANISH SHEA & BOYLE

/s/ James P. C. Silvestri, Esq.
JAMES P. C. SILVESTRI, ESQ.
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Special Administrator for the
Estate of James McNamee

/s/ Ian Samson
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Nevada Bar No. 15089
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Attorneys for Plaintiffs

Barbara Abbott

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Giann Bianchi, Plaintiff(s)

CASE NO: A-13-691887-C

7 vs.

DEPT. NO. Department 23

8 Susan Clokey, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

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