

In the Supreme Court of the State of Nevada

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Elizabeth A. Brown
Clerk of Supreme Court

NATIONSBUILDERS INSURANCE SERVICES, INC., a foreign
corporation; NBIS CONSTRUCTION & TRANSPORT INSURANCE
SERVICES, INC., a foreign corporation;

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in
and for the County of Clark; and THE HONORABLE MARK R.

DENTON, District Judge;

Respondents,

DIANE SANCHEZ;

Real Party in Interest

**REAL PARTY IN INTEREST DIANE SANCHEZ'S ANSWER TO
PETITION FOR WRIT OF MANDAMUS, OR ALTERNATIVELY,
PROHIBITION**

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made so that the judges of this Court may evaluate for possible disqualification or recusal.

1. Real Party in Interest Diane Sanchez is an individual.
2. Identify all parent corporations and any publicly held company that owns 10% or more of the parties' stock:

NONE

3. Names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

Dennis M. Prince – PRINCE LAW GROUP

Kevin T. Strong – PRINCE LAW GROUP

4. If any litigant is using a pseudonym, disclose the litigant's true name:

NONE

DATED this 4th day of April, 2022.

/s/ Kevin T. Strong

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I. ISSUE PRESENTED

Whether a liability insurer that: (1) knowingly breached its contractual duty to defend, which caused entry of a substantial default judgment against its insured; (2) is sued for breach of contract and insurance bad faith to enforce the default judgment; and (3) in response, uses its named insured to attempt, on appeal, to set aside the default judgment to preserve its financial interests, is entitled to receive the benefit of a stay of the resulting insurance bad faith enforcement action without posting a supersedeas bond to stay judgment enforcement.

II. STATEMENT OF FACTS

This judgment enforcement/insurance bad faith action arises from Real Party in Interest Diane Sanchez's ("Sanchez") lawsuit for personal injuries against Blas Bon ("Bon"). NBIS000002-000005. Bon was insured under an auto liability policy issued by ATX Premier Insurance Company ("ATX"). RPI.APP.000380. Petitioners NationsBuilders Insurance Services, Inc. ("NBIS") and NBIS Construction & Transport Insurance Services, Inc.'s ("CTIS") (collectively "Petitioners") owned, managed, and controlled ATX at the relevant time period. RPI.APP.000253, RPI.APP.000257. As part of that relationship, Petitioners retained the

contractual obligation to: (1) satisfy the duty to defend Bon; and (2) to control settlement decisions arising from the ATX policy. RPI.APP.000233-000238, RPI.APP.000426. Petitioners' failure to satisfy those duties caused the entry of a financially ruinous default judgment against Bon and this subsequent action.

A. Petitioners Retained Financial Responsibility and Control Over Bodily Injury Claims Arising from ATX Insurance Policies

Arthur Kirkner ("Kirkner"), who was employed as the vice president of claims for CTIS in 2016, described ATX as a "paper company" with no employees.¹ RPI.APP.000683-000684. Kirkner explained any expenses arising from ATX insurance policies were "issued off of NBIS check stock." RPI.APP.000684-000685. On February 22, 2013, the Texas Commissioner of Insurance, as part of his approval allowing ATX to perform insurance business in Texas, recognized NBIS as the parent

¹ Kirkner provided deposition testimony regarding the relationship between NBIS, CTIS, and ATX in a separate Nevada case, *Hayes v. ATX Premier Ins. Co., et al.*, Case No. 2:18-cv-01938-GMN-NJK (the "Hayes" action), that involved some similar conduct Petitioners committed in this action. RPI.APP.000521; RPI.APP.000268-000287.

company of ATX. RPI.APP.000252-000253. Kirkner characterized NBIS as a holding company. RPI.APP.000681-000682.

Kirkner testified CTIS provided underwriting services, claims services, and loss control and risk management services. CTIS retained “responsibility for the runoff claims that were associated with . . . the ATX Premier Insurance paper.” RPI.APP.000687-000690. On April 1, 2015, a contractual relationship existed between CTIS and DMA Claims Management, Inc. (“DMA”), a third-party claims administrator. RPI.APP.000193-000205. DMA was obligated to perform various claims adjusting services for claims arising from policies issued by affiliated companies of CTIS, including ATX. *Id.* RPI.APP.000040.

On April 1, 2015, ATX, CTIS, AutoTex MGA, Inc. (“AutoTex”) and Safe Auto Insurance Company (“Safe Auto”) entered into their Amended and Restated Claims Handling Agreement. RPI.APP.000257. The agreement was amended because NBIS, the parent company of AutoTex, agreed to sell 100 percent of AutoTex’s stock to Safe Auto. *Id.* Before the sale, AutoTex was the claims administrator handling claims arising from ATX insurance policies. RPI.APP.000683-000684. The Amended and Restated Claims Handling Agreement memorializes CTIS’s management

and control over any liability insurance policies issued by ATX before the March 2, 2015 AutoTex sale.² RPI.APP.000257. The relevant ATX policy that insured Bon when the motor vehicle collision occurred became effective on December 16, 2014. RPI.APP.000380. Therefore, Bon's policy qualifies as a "Pre-close Policy" that remains under Petitioners' control.

As of April 1, 2015, NBIS remained the parent company of ATX and retained financial responsibility for claims arising from any insurance policies issued by ATX. CTIS retained control over all claims arising from ATX insurance policies. ATX and NBIS's counsel confirmed this arrangement in the *Hayes* action, which also involved claims arising from an ATX insurance policy issued in 2014:

In the context of this case, NBIS **retained financial responsibility for claims relating to policies that were issued prior to the sale of ATX in 2015** [sic].³

NBIS is a holding company that, as part of the sale of ATX, **agreed to indemnify ATX for losses associated with pre-sale policies, akin to a reinsurer to insurance companies.**

² The Amended and Restated Claims Handling Agreement refers to this category of ATX insurance policies as a "Pre-close Policy." RPI.APP.000257

³ NBIS actually sold ATX in 2016. RPI.APP.000259-000260.

While NBIS-affiliated companies engage in **claim oversight activities** – notably, NBIS Construction and Transport Services (“CTIS”) – it is a completely separate company from NBIS.

RPI.APP.000295, RPI.APP.000303-000304.

Petitioners’ reserved power, management, and control over the handling of bodily injury claims arising from ATX policies, including Sanchez’s bodily injury claim, cannot legitimately be questioned.

B. Sanchez’s Personal Injury Lawsuit

Petitioners mischaracterize facts related to Sanchez’s personal injury lawsuit and their communications to Bon regarding the same.

1. The motor vehicle collision

On April 28, 2015, Bon, a permissive driver of a pickup truck owned by non-party Hipolito Cruz (“Cruz”), negligently collided with the left side of the rear bumper of Sanchez’s car as they traveled northbound on Interstate-15.⁴ RPI.APP.000247-000248. A second vehicle driven by non-party Joseph Acosta then struck the rear bumper of Sanchez’s car. RPI.APP.000069. Sanchez resolved her bodily injury claims against

⁴ Contrary to Petitioners’ assertion, Bon’s liability for causing the collision and Sanchez’s bodily injuries are not alleged. They are facts established by the default judgment. RPI.APP.000247-000248.

Joseph Acosta and Wilfredo Acosta, the owner of the vehicle. RPI.APP.000132. As a result of Bon's collision, Sanchez suffered catastrophic injuries. RPI.APP.000247-000248.

2. Sanchez's bodily injury claim

At the time of the collision, ATX issued a personal auto liability insurance policy to Cruz that covered the pickup truck Bon drove. RPI.APP.000380. The ATX policy was in full force and effect when the collision occurred because the policy term ran from December 16, 2014 through June 16, 2015. *Id.* The applicable coverage limits under the ATX policy were \$15,000.00 per person and \$30,000.00 per collision. *Id.* Bon was insured under the ATX policy when the collision occurred because he was a permissive driver. RPI.APP.000247-000248. Petitioners have never disputed this fact, nor can they because it is established by the default judgment. RPI.APP.000247-000248.

On June 16, 2015, Sanchez made a two-week time limit demand for Bon's policy limits to ATX and DMA, the third-party claims administrator hired by CTIS. RPI.APP.000038. Sanchez's past medical expenses totaled approximately \$8,000.00, which was over half of the \$15,000.00 policy limit. *Id.* By that time, Sanchez was already

recommended to undergo a future cervical fusion surgery. *Id.* Sanchez included a copy of the traffic accident report and her medical records and bills, including the record outlining her future surgical recommendation, with her demand. *Id.*

On July 10, 2015, ten days **after** the demand period expired, DMA's assigned claims representative, DeLawrence Templeton ("Templeton") requested additional time to complete his liability investigation. RPI.APP.000040. On July 17, 2015, Templeton advised that ATX/DMA denied Sanchez's claim because Bon was not negligent. RPI.APP.000042. As this was a completely baseless reason to reject Sanchez's policy limits demand, Sanchez filed her personal injury complaint.

3. Sanchez properly served Bon with the summons and personal injury complaint

On August 7, 2015, Sanchez filed her complaint for personal injuries against Bon. NBIS000001-000005. Petitioners falsely claim Sanchez knew Bon was homeless and split time between a neighborhood community center and Cruz's residence. On October 20, 2015, Sanchez filed her Affidavit of Due Diligence wherein the process server detailed his extensive efforts to personally serve Bon at 3900 Cambridge Street, Suite 106, Las Vegas, Nevada 89119, his address listed in the traffic

accident report. RPI.APP.000050, RPI.APP.000063-000064. On November 2, 2015, after she exercised reasonable diligence to personally serve Bon, the Nevada Department of Motor Vehicles (“DMV”) acknowledged service of the summons and complaint on Bon pursuant to NRS 14.070. RPI.APP.000077. On November 9, 2015, Sanchez’s attorney mailed, via certified mail, copies of the summons, personal injury complaint, traffic accident report and DMV letter confirming proof of service to Bon’s last known address on Cambridge Street. RPI.APP.000079-000087. On November 12, 2015, this package was returned as unclaimed. RPI.APP.000087.

The district court in the personal injury action determined, on three separate occasions, Sanchez properly served Bon as a matter of Nevada law. NBIS000929-000944. Conspicuously absent from Petitioners’ brief is that Sanchez’s attorney, on multiple occasions, provided notice of her personal injury complaint and proof of service to ATX and DMA. Petitioners also received notice of the lawsuit and service pursuant to NRS 14.070.

On January 20, 2016, Sanchez’s attorney notified ATX/DMA, via letter to Templeton, that she served Bon through the DMV.

RPI.APP.000097-000108. Sanchez enclosed a copy of the complaint and affidavit of compliance confirming proof of service through the DMV. *Id.*

The letter stated:

Please file an Answer to Plaintiff's Complaint as soon as possible or I will have no choice but to request the Court to enter a Default against your insured.

RPI.APP.000097.

On February 16, 2016, Sanchez's attorney informed ATX/DMA, through Templeton, that Bon still did not file an answer to Sanchez's personal injury complaint. RPI.APP.000110. Sanchez's attorney advised, for a second time, that if Bon did not answer Sanchez's complaint, he would "request for the Court to enter a Default against your insured." *Id.* Between January 20, 2016 and April 1, 2016, the date the district court entered a default against Bon, Petitioners, ATX, and DMA never: (1) responded to the letters from Sanchez's attorney, (2) communicated with Sanchez's attorney, or (3) filed an answer to Sanchez's personal injury complaint on Bon's behalf. RPI.APP.000179.

4. Petitioners knew Sanchez filed her personal injury lawsuit, explained the lawsuit to Bon, and still failed to provide a legal defense to Bon

On November 19, 2021, Petitioners produced electronic claims file notes related to Sanchez's bodily injury claim. RPI.APP.000629-000634. Cindy Blanco ("Blanco") authored a portion of the claims file notes. RPI.APP.000559. DMA classifies Blanco was Petitioners' direct employee who was involved in the handling of Sanchez's bodily injury claim. RPI.APP.000642. Blanco was the central figure responsible for addressing Sanchez's personal injury lawsuit on behalf of Petitioners and for the benefit of Bon. RPI.APP.000559.

On February 16, 2016, Rebecca Perez, a DMA employee, forwarded a copy of Sanchez's personal injury complaint and Joseph Acosta's cross-claim against Bon to Blanco. *Id.* Perez received a copy of Sanchez's personal injury complaint from Templeton, who previously received the complaint from Sanchez's attorney less than one month earlier. *Id.* On February 18, 2016, Blanco documented that she reviewed Sanchez's personal injury complaint. RPI.APP.000561. Blanco strangely questioned whether a default could be entered against Bon even though she knew or should have known: (1) Sanchez's attorney mailed proof of

service of the summons and complaint to Templeton on January 20, 2016; and (2) Sanchez's attorney requested Templeton on February 16, 2016, to file an answer to Sanchez's complaint to avoid entry of default against Bon. RPI.APP.000561.

On February 19, 2016, Bon called Blanco. *Id.* Blanco confirmed, in writing, that she notified Bon that Sanchez filed a personal injury lawsuit against him. *Id.* Blanco also explained the lawsuit to Bon. *Id.* Nearly two months before the Court entered the default against Bon, Bon knew Sanchez filed a personal injury lawsuit against him and learned about the substance of her allegations against him directly from Petitioners' employee. *Id.*

Bon denied that he was served with the personal injury complaint. RPI.APP.000562. Based on the information she received, Blanco should have known this was false because Sanchez's attorney advised Templeton nearly one month earlier that he properly served Bon through the DMV. RPI.APP.000097. Blanco should have informed Bon of the same, particularly because she acknowledged he faced potential entry of a default. RPI.APP.000561-000562. Blanco never informed Bon that he was served through the DMV. *Id.* Instead, Blanco requested Bon to

provide his address and phone number and gave him the assurance that she would not release this information to anyone. *Id.* Blanco pledged to hide Bon's whereabouts to help him avoid service of process even though she knew entry of a default against him remained. *Id.*

Despite knowing Sanchez's personal injury complaint immediately triggered the duty to provide a legal defense to Bon, Petitioners refused to defend Bon. If Petitioners felt service on Bon was improper, they could have hired counsel to file a motion pursuant to NRCP 12(b)(4). Instead, Petitioners ignored the lawsuit and stuck their proverbial heads in the sand. Unsurprisingly, Petitioners withheld this information from the district court to bolster their feeble arguments to set aside the default judgment entered against Bon.

5. The district court entered a default judgment against Bon

Despite receiving more than three months to file an answer on Bon's behalf or challenge the sufficiency of Sanchez's service of process, Petitioners failed to defend Bon against Sanchez's personal injury complaint. As a result, the district court entered a default against Bon on April 1, 2016. NBIS000006-000009.

On July 19, 2019, the district court entered a default judgment against Bon for \$15,212,655.73. NBIS000251-000254. Petitioners inaccurately imply that Sanchez and the district court never contemplated entry of a default judgment against Bon. During several court hearings between July 24, 2018 and January 29, 2019, the district court continually expressed its intent to enter a default judgment against Bon. RPI.APP.000752-000758.

C. Petitioners are Using Bon to Protect Their Financial Interests

On August 20, 2019, the district court entered its order judicially assigning all of Bon's claims and causes of action against any liability insurer or other entity to Sanchez. RPI.APP.000137-000138. On November 13, 2019, Sanchez filed her judgment enforcement/insurance bad faith action. RPI.APP.000140-000148. This action, unsurprisingly, triggered Petitioners to use Bon to attempt to set aside the default judgment via two separate motions pursuant to NRCP 60(b) since intervention was not a legal option. NBIS000265-000396, RPI.APP.000153-000167. Petitioners retained two sets of attorneys to appeal the orders denying the motions to set aside the default judgment

and the amended judicial assignment order.⁵ NBIS000775-000890. Petitioners are only funding the appeal because their own financial interests are now at stake. When their financial interests were not implicated, Petitioners abandoned Bon, which caused entry of a financially ruinous default judgment.

III. SUMMARY OF THE ARGUMENT

Petitioners unfairly exposed Bon to an excess judgment by refusing to settle Sanchez's bodily injury claim for his minimum \$15,000.00 policy limits. Despite knowing Sanchez sued Bon and that entry of a default was imminent, Petitioners abandoned Bon by refusing to provide him with a legal defense after suit was filed. Now that Sanchez seeks to enforce her default judgment against by stepping into Bon's shoes, through the judicial assignment, Petitioners expect this Court to stay judgment enforcement against them, not Bon, at no cost. There is no denying Petitioners are using Bon to set aside the default judgment for their own financial benefit under the guise of acting in his defense. This

⁵ On September 16, 2021, the district court amended its judicial assignment order to clarify its intent to judicially assign all of Bon's claims against any and all liability insurers, third-party claims administrators, adjusters, or any other applicable insuring entity. RPI.APP.000545-000547.

explains why Petitioners refuse to post a supersedeas bond in the personal injury action to obtain the stay they so desperately want. Petitioners only want a stay to protect themselves, not Bon. Absent the posting of a bond, Bon remains subject to all collection efforts. Despite Petitioners' material breach of the insurance contract, they believe stay relief should be granted without posting any security. This is not indicative of a true defense for Bon.

Imposing a stay of judgment enforcement proceedings, absent a bond, sends a message that insurers can use the insureds they previously refused to defend to make belated challenges to judgments they are responsible for, without consequence. Allowing insuring entities, like Petitioners, to halt judgment enforcement proceedings without posting any financial security creates an unfair advantage that directly harms the innocent judgment creditor. It also leaves Bon's assets unprotected from collection even though he did nothing to cause entry of the default judgment. This outcome is entirely inconsistent with *Century Sur. Co. v. Andrew*, 134 Nev. 819, 432 P.3d 180 (2018) and *Nautilus Ins. Co. v. Access Med., LLC*, 482 P.3d 683, 689 (Nev. 2021).

Petitioners question the ripeness of Sanchez's insurance bad faith claim under the false premise the default judgment is not final. Motions seeking relief pursuant to NRCP 60(b) do not affect the finality of the judgment in any way. The appeal of orders denying Rule 60(b) relief similarly do not affect the finality of a judgment. Therefore, the default judgment is final, which ends any dispute as to the ripeness of Sanchez's claims.

Petitioners argue they will suffer irreparable harm and prejudice if this action is not stayed based on the unfounded claim that Sanchez abused discovery. This is factually inaccurate and emblematic of Petitioners' continuous efforts to obtain favorable relief by any means necessary. Petitioners produced their claims file to Sanchez. RPI.APP.000629-000634. The claims file notes reveal Petitioners made material factual misrepresentations to unfairly support their arguments to set aside the default judgment. Sanchez properly used the claims file notes to correct the factual record and ensure the pending appeal is litigated on the merits. RPI.APP.000558-000559. The existence of any so-called "procedural quagmire" is solely attributable to Petitioners' blatant attempt to distort the factual record in their quest to avoid responsibility

for a default judgment of their own doing. Under these circumstances, Petitioners should not be rewarded with extraordinary relief.

IV. ARGUMENT

“Writ relief is an extraordinary remedy that is **only available** if a petitioner does **not** have a plain, speedy and adequate remedy in the ordinary course of law.” *In re William J. Raggio Family Trust*, 460 P.3d 969, 972 (Nev. 2020) (internal quotations omitted) (emphasis added). A writ seeking extraordinary relief should not be a “routine litigation practice; mandamus is an **extraordinary remedy, reserved for extraordinary causes.**” *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 819, 407 P.3d 702, 706 (2017) (emphasis added).

Petitioners fail to carry their burden to establish any emergent need for this Court to direct the district court to stay this action pending the outcome of an appeal they are pursuing in the personal injury action. Petitioners already have a plain, speedy, and adequate remedy in the ordinary course of law to stay this judgment enforcement/insurance bad faith action: post a supersedeas bond in the personal injury action pursuant to NRCP 62(d)(1).

A. Petitioners Request a Special Rule to Stay Judgment Enforcement Only Against Insurers that Breached Their Duty to Defend While They Improperly Use Their Insureds to Avoid Liability for the Resulting Judgment

The duty to defend is a “valuable service paid for by the insured and one of the principal benefits of the liability insurance policy.” *Century Sur. Co.*, 134 Nev. at 822, 432 P.3d at 183. Petitioners retained the duty to provide Bon with a legal defense against Sanchez’s personal injury lawsuit that he was entitled to under the ATX insurance policy. RPI.APP.000237. Petitioners refused to defend Bon even though they knew Sanchez filed a personal injury complaint against him and notified him of the same. *Century Sur. Co.*, 134 Nev. at 820, 432 P.3d at 182.

Sanchez obtained a valid judicial assignment of Bon’s claims for relief against Petitioners, which means she has now stepped into Bon’s shoes. RPI.APP.000545-000547. Sanchez is actually enforcing Bon’s rights against Petitioners and DMA. This is a valid method for judgment execution. *Gallegos v. Malco Enters. of Nev.*, 127 Nev. 579, 582, 255 P.3d 1287, 1289 (2011). As a valid judgment creditor, Sanchez is free to utilize other legal means to collect on the default judgment. *See Nev. Rev. Stat.* 21.005, *et seq.* Bon still remains the judgment debtor and, as a result, Sanchez is free to directly collect from him personally to satisfy the

default judgment. Yet, Petitioners ask this Court to only afford them financial protection from judgment enforcement, but to leave Bon's financial assets unprotected from collection. Petitioners shockingly request this relief while undeniably using Bon's party status to set aside the default judgment for their own financial benefit, not his.

In essence, Petitioners ask this Court to create a special rule for insurers that breached their duty to defend by halting judgment enforcement against them without requiring the posting of a bond to protect the insured they are now allegedly defending. In doing so, Petitioners are willing to cause further harm to Bon, the insured they abandoned by refusing to defend him against Sanchez's personal injury complaint. This Court already refused to create a special rule that caps damages at the policy limit for an insurer that breaches its contractual duty to defend. *Century Sur. Co.*, 134 Nev. at 826, 432 P.3d at 186. Creating a special rule protecting insurers that breached their duty to defend from judgment enforcement indefinitely while they make belated challenges to set aside the judgments actually rewards insurers for breaching one of their most important duties. Insurers should not be incentivized to ignore their contractual duty to defend in this manner,

especially as this Court has clarified insurers should be encouraged to satisfy this duty. *See Nautilus Ins. Co. v. Access Med., LLC*, 482 P.3d 683, 689 (Nev. 2021) (Liability for consequential damages resulting from a breach of the duty to defend “creates a significant disincentive for the insurer to deny a defense outright when there is *any* possibility – even a relatively remote one – that the claim may turn out to be covered”). A stay here will actually discourage liability insurers from fulfilling their contractual duties.

Sophisticated insurance companies “are undoubtedly aware of the potential consequences when [they make] an affirmative decision not to defend.” *Hi-Mill Mfg. Co. v. Aetna Casualty & Sur. Co.*, 884 F. Supp. 1109, 1114 (E.D. Mich. 1995). Petitioners wish to control the timeframe in which they may be pursued for causing damages as a direct result of their contractual duty to defend. Not only is this outcome unfair to both Bon as the innocent insured, but it also unfairly deprives Sanchez, the judgment creditor, from obtaining the financial security she is entitled to receive as a condition to stay her judgment enforcement efforts.

B. Petitioners Manipulate the Purpose of Extraordinary Writ Relief to Stay this Judgment Enforcement Proceeding Solely to Avoid Posting Financial Security

NRCP 62(d)(1) articulates the method to obtain a stay pending appeal:

(1) By Supersedeas Bond. If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described by Rule 62(a)(2). The bond may be given upon or after the filing of a notice of appeal or after obtaining the order allowing the appeal. **The stay is effective when the supersedeas bond is filed** (emphasis added).

“The purpose of a supersedeas bond is to stay the **enforcement** of a judgment.” *Sherman Gardens Co. v. Longley*, 87 Nev. 558, 563, 491 P.2d 48, 52 (1971). A bond posted under NRCP 62(d)(1) “should usually be set in an amount that will permit full satisfaction of the judgment” amount. *Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005).

Sanchez demonstrates in her Statement of Facts, *supra*, that Petitioners are not truly representing Bon in the personal injury litigation since they bear financial responsibility for the excess default judgment. “Bon” conveniently first appeared in the personal injury action **after** Sanchez filed her judgment enforcement/insurance bad faith action against Petitioners. RPI.APP.000140-000148, NBIS000265-000396. Only

then did Petitioners seek to set aside the default judgment entered in the personal injury action. RPI.APP.000153-000167. The crux of Petitioners' arguments to set aside the default judgment is that Sanchez failed to exercise reasonable diligence to personally serve Bon at other locations before eventually serving him pursuant to NRS 14.070. NBIS000265-000396, RPI.APP.000153-000167. Yet, none of the motions filed to set aside the default judgment provided an affidavit from Bon or any other evidence confirming he was unaware of the personal injury lawsuit. *Id.* None of the motions provided any evidence Petitioners attempted to inform Bon that counsel is now "represents" him in the personal injury action. *Id.* These facts demonstrate that Petitioners seek to set aside the default judgment entered against Bon to safeguard their financial interests only.

Petitioners concede they cannot legally intervene to defend themselves in the personal injury action. *Nalder v. Eighth Judicial Dist. Court*, 462 P.3d 677, 682 (Nev. 2020). This argument ignores the real motivation behind "Bon's" miraculous appearance in the personal injury action. Petitioners are not trying to set aside the default judgment to benefit Bon because they already would have posted a bond to protect his

personal assets from execution. This is especially true given Petitioners breached the duty to defend thereby unfairly exposing Bon to this excess judgment. Instead, Petitioners request a narrow stay on Sanchez's judgment enforcement proceedings only against them because they are potentially liable for the default judgment. This further demonstrates that Petitioners are blatantly using Bon to safeguard their own financial interests and, therefore, should not be awarded an indefinite stay that only applies to them.

This Court acknowledged the importance for insurers to satisfy the duty to defend and that failing to do so may subject them to “unbounded liability” that “vastly exceeds the policy limits.” *Nautilus Ins. Co.*, 482 P.3d at 689. Insurers or insuring entities should not enjoy a stay of judgment enforcement actions against them, at no cost, while they use their insureds to challenge the validity of default judgments that were only entered because they breached the duty to defend those same insureds. This outcome unfairly rewards insurers that fail to satisfy their duty to defend by absolving them of any financial obligation to stay judgment enforcement pending an appeal. Conversely, judgment creditors who have obtained valid assignments of the insureds' claims

against those culpable insurers will be forced to halt their judgment enforcement proceedings without the benefit of any financial security to safeguard their enforcement efforts. “The purpose of security for a stay pending appeal is to protect the judgment creditor’s ability to collect the judgment if it is affirmed by preserving the status quo and preventing prejudice to the creditor arising from the stay.” *Nelson*, 121 Nev. at 836, 122 P.3d at 1254. Petitioners only decided to assert legal challenges to the default judgment because Sanchez sued them to enforce the default judgment. Sanchez deserves the financial protection she would otherwise receive when a party seeks stay relief pending the result of an appeal.

Petitioners are clearly able to post the requisite supersedeas bond in the personal injury action to stay Sanchez’s judgment enforcement/insurance bad faith action. Because Petitioners have a legal remedy available to obtain their requested stay relief, denying the writ petition is appropriate.

C. The Writ Petition Does Not Raise an Important Legal Question Because the Default Judgment Remains Final

Petitioners’ belief that the writ petition raises an important legal issue is based on the false premise that Sanchez’s insurance bad faith claim is not ripe. By making this argument, Petitioners directly ignore

the interplay between the Nevada Rules of Appellate Procedure and Nevada Rules of Civil Procedure.

1. The pending appeal does not compromise the finality of the default judgment

On July 19, 2019, the district court entered a default judgment against Bon. NBIS000251-000254. Similar to their failure to defend Bon, which caused entry of the default judgment in the first place, Petitioners did not appeal the default judgment within 30 days of its entry. Nev. R. App. P. 4(a)(1). On January 17, 2020, nearly 180 days after entry of the default judgment, Petitioners used Bon to file a motion to set aside the default judgment pursuant to NRCP 60(b). NBIS000265-000396. NRCP 60(c) specifically addresses the finality of a judgment when a Rule 60(b) motion is filed:

(c) Timing and Effect of that Motion

...

(2) Effect on Finality. The motion ***does not affect the judgment's finality or suspend its operation*** (emphasis added).

NRCP 60(c) confirms that motions pursuant to NRCP 60(b) do not erase the finality of the judgment. It follows that the appeal of an order denying a Rule 60(b) motion also does not affect the judgment's finality.

On September 19, 2020, the district court entered its order denying the motion to set aside the default judgment. RPI.APP.000403-000406. The deadline to appeal the default judgment expired on August 19, 2019, more than one year earlier. Because Petitioners failed to defend Bon in the first instance, they were unaware that the district court entered a default judgment. The only available legal option to alleviate Petitioners' financial exposure was to use Bon to file a Rule 60(b) motion. After entry of judgment, intervention was no longer a legally viable option. *Lopez v. Merit Ins. Co.*, 109 Nev. 553, 557, 853 P.2d 1266, 1268 (1993).

A district court order denying a motion seeking relief pursuant to NRCP 60(b) is independently appealable. *See Holiday Inn Downtown v. Barnett*, 103 Nev. 60, 63 (1987). The independent appealability of an order denying a Rule 60(b) motion is consistent with the unambiguous language of NRCP 60(c), that a judgment does not lose its validity or finality when challenged pursuant to Rule 60(b). Petitioners' self-serving appeal of the order denying the motion to set aside does not alter the finality of the default judgment.

Petitioners' appeal of the order denying "Bon's" Motion for Rehearing does not change the result. Petitioners moved for rehearing

pursuant to NRCP 60(b)(4) and NRCP 59(e). RPLAPP.000153. NRCP 59(e) allows a party to move to alter or amend a judgment provided that motion is filed “no later than 28 days after service of written notice of entry of judgment.” Petitioners filed their Motion for Rehearing on October 19, 2020, over one year after entry of the July 19, 2019 default judgment. Because Petitioners did not timely move to alter or amend the default judgment pursuant to NRCP 59(e), their appeal, through Bon, of the order denying their motion for rehearing does not undermine the finality of the default judgment.⁶ Petitioners used Bon to move for rehearing to amend the **order** denying their previously failed motion to set aside the default judgment. Therefore, Petitioners appealed two orders denying their request for Rule 60(b) relief, which does not erase the default judgment’s finality.

2. The federal cases Petitioners cite are inapposite

Petitioners pose a legal question premised on the falsehood they used Bon to appeal the default judgment. By presenting this question,

⁶ Similarly, Petitioners did not toll the 30-day time period to appeal the default judgment because their NRCP 59(e) motion was untimely. *See Nev. R. App. P. 4(a)(1)*

Petitioners conveniently disregard that they appealed the orders denying their Rule 60(b) motions and, most recently, the amended order judicially assigning Bon's claims for relief to Sanchez. This directly negates the comparison between this case and the federal cases Petitioners use to argue Sanchez's claims are unripe.

FRCP 60(c)(2) provides the exact same language as its Nevada counterpart, namely that a Rule 60(b) motion does not affect the judgment's finality or suspend its operation. "Rule 60(c)(2) makes clear that a motion under the rule does not affect the judgment's finality. The appeal of such a motion *a fortiori* cannot either." *Retractable Techs., Inc. v. Becton, Dickinson and Co.*, No. 2:08-CV-16-LED-RSP, 2013 U.S. Dist. LEXIS 113091, at *5 (E.D. Tex. Aug. 12, 2013). This is a logical interpretation that is consistent with how Rules 60(b) and (c) function together. There is nothing inherently distinct or different from the appeal of an order denying a Rule 60(b) motion that should have any bearing on the finality of the underlying judgment. By requesting entry of a stay because Petitioners assert their appeal renders Sanchez's insurance bad faith claim unripe, Petitioners want this Court to disregard the plain

language of NRCP 60(b) and (c). There is no legal justification to warrant this relief.

Based on the nature of Petitioners' appeal, their reliance on various federal court decisions to somehow question the ripeness of Sanchez's insurance bad faith claim is not persuasive to this Court's analysis. In each of those decisions, the actual judgments giving rise to the insured's claims for insurance bad faith were appealed. *See e.g., Branch Banking & Trust Co. v. Nev. Title Co.*, No. 2:10-CV-1970 JCM (RCJ), 2011 U.S. Dist. LEXIS 40948, at *4 (D. Nev. Apr. 13, 2011); *Barnes v. Allstate Ins. Co.*, No. 8:10-cv-2434-T-30MAP, 2010 U.S. Dist. LEXIS 138340, at *3 (M.D. Fla. Dec. 28, 2010); *Premcor USA, Inc. v. Am. Home Assur. Co.*, 400 F.3d 523, 525 (7th Cir. 2005). Thus, the federal courts determined the insureds' respective bad faith claims were not ripe because the actual judgments might be overturned. *Branch Banking*, 2011 U.S. Dist. LEXIS 40948, at *10; *Barnes*, 2010 U.S. Dist. LEXIS 138340, at *7-8; *Premcor*, 400 F.3d at 530. Unlike those cases, Petitioners have not appealed the default judgment that gives rise to Sanchez's insurance bad faith claim. NBIS000775-000890. They appealed orders denying motions to set aside the default judgment that do not affect, in any way, the finality of the

default judgment. *Id.*; *see also*, Nev. R. Civ. P. 60(c). The distinction is significant because the Nevada Rules of Civil Procedure, like their federal counterparts, conclude judgments remain final, unless they are timely and directly appealed.

Branch Banking is also distinct because the insurer continued to defend its insured in its pursuit of an appeal to reverse the unfavorable judgment. 2011 U.S. Dist. LEXIS 40948, at *4-5. *Branch Banking* also did not involve a judicial assignment of the insured's claims. *Id.* Here, Petitioners seek to set aside the default judgment for their own financial benefit when no defense was ever previously provided. Otherwise, Petitioners would have already posted the requisite supersedeas bond to stay Sanchez's judgment collection efforts against Bon personally.

An insurance bad faith claim "arises when the insured is legally obligated to pay a judgment that is in excess of his policy limits. *Kelly v. Williams*, 411 So. 2d 902, 904 (Fla. Dist. Ct. App. 1982); *see also*, *Crabb v. National Indem. Co.*, 87 S.D. 222, 231, 205 N.W.2d 633, 638 (S.D. 1973). The default judgment entered against Bon remains final and subject to execution against Bon. In fact, there is no stay in the personal injury case. Although Sanchez secured a valid judicial assignment of

Bon's claims for relief against Petitioners as a means to collect upon her judgment, Bon still remains legally obligated to pay the judgment. By seeking a stay in this action, Petitioners demonstrate their complete indifference to Bon's financial exposure to satisfy the judgment. These facts belie the notion that Sanchez's insurance bad faith claim is based on a contingent outcome that may not occur because the default judgment remains final, which Petitioners caused in the first place.

"A district court's ruling on a Rule 60(b) motion is directly appealable; however, an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review." *Amernational Industries, Inc. v. Action-Tungsum, Inc.*, 925 F.2d 970, 975 (6th Cir. 1991); *see also*, *Branum v. Clark*, 927 F.2d 698, 704 (2d Cir. 1991). As the underlying default judgment is not on appeal, it remains final through the pendency of Petitioners' appeal. Therefore, Sanchez's claims are ripe.

D. Petitioners Fail to Demonstrate the Need for an Indefinite Stay

"It is fundamental that the mere pendency of an appeal does not, in itself, disturb the finality of a judgment." *Wedbush, Noble, Cooke, Inc. v. SEC*, 714 F.2d 923, 924 (9th Cir. 1983). This principle is particularly applicable when the judgment itself has not been appealed. Even when

the ripeness of a claim is raised, the court is still tasked to evaluate “the hardship to the parties of withholding court consideration.” *Skyline Wesleyan Church v. Cal. Dep’t of Managed Health Care*, 968 F.3d 738, 751 (9th Cir. 2020).

Petitioners’ stay request is premised on fabricated facts in the personal injury action. Sanchez never knew Bon was allegedly transient before she tried to personally serve him. Rather, her process server discovered Bon’s whereabouts were unknown when he tried to serve Bon at the residential address listed in the traffic accident report. RPI.APP.000063-000064. The district court also only entered a stipulation and order to dismiss Sanchez’s claims against the Acosta Defendants only. RPI.APP.000719. This is precisely why the district court repeatedly articulated its intent to allow Sanchez to pursue entry of a default judgment against Bon **before** and **after** the order statistically closing the case was erroneously entered. RPI.APP.000752-000758. Contrary to Petitioners’ bald assertion, Sanchez was not obligated to locate Bon to directly obtain an assignment of his claims for relief against Petitioners. Sanchez properly moved the district court to judicially assign Bon’s claims for relief, which is explicitly allowed as a

matter of Nevada law. *Gallegos v. Malco Enters. of Nev.*, 127 Nev. 579, 580, 255 P.3d 1287, 1288 (2011).

“[A party seeking] a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damages to someone else.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S. Ct. 163 (1936)). Petitioners’ stay requests have never been premised on considerations of judicial economy. Instead, Petitioners’ stay request has always been premised on avoiding litigation costs and defending this enforcement case. NBIS000752-000756. Petitioners conveniently abandoned that argument because this Court does not recognize litigation expenses as a type of irreparable harm that warrants a stay. *See Fritz Hansen A/S v. Eight Judicial Dist. Court*, 116 Nev. 650, 658, 6 P.3d 982, 986-87 (2000).

Petitioners now claim Sanchez abused discovery by introducing claims file documents in the personal injury action. Sanchez’s introduction of the claims file notes in the personal injury action was necessary because Petitioners, through Bon, deliberately misrepresented in the personal injury action that Bon had no knowledge of Sanchez’s

personal injury complaint before the default and default judgment were entered. RPI.APP.000558-000559. Petitioners knowingly falsified this fact because they knew their employee, Blanco, informed Bon that Sanchez sued him and explained the lawsuit to him. RPI.APP.000561-000562. Petitioners concealed from the district court in the personal injury action that Blanco was aware of the potential for entry of a default against Bon. Afterall, less than one month earlier, Sanchez's attorney advised Templeton that she served Bon through the DMV. RPI.APP.000097.

Petitioners' appellate challenge to the orders denying their motions to set aside the default judgment are premised on Sanchez's alleged insufficient efforts to personally serve Bon. There is no dispute that Petitioners misrepresented and concealed critical facts that are central to the alleged service issues on appeal. Implying that Sanchez is trying to improperly influence the outcome of the appeal in the personal injury action is baseless. Unlike Petitioners, who wish to fabricate the factual record for their own financial preservation, Sanchez desires to have the pending appeal adjudicated on the merits.

Petitioners incredulously argue Sanchez's efforts to correct the factual record in the personal injury action places them at a disadvantage because they are not parties to the personal injury litigation. This contention defies all logic and commonsense. Petitioners continue to perpetuate the charade that they have not unilaterally orchestrated the failed attempts to set aside the default judgment for their own financial preservation. The timing of "Bon's" sudden appearance in the personal injury action, precisely after Sanchez commenced her judgment enforcement/insurance bad faith action, discredits any suggestion that Petitioners are using Bon to defend themselves in the personal injury action. Petitioners are using Bon, after they abandoned him, to make self-serving arguments all to avoid legal responsibility for a multi-million-dollar default judgment. Simultaneously, Petitioners wish to cause further harm to Bon by requesting a stay of Sanchez's judgment enforcement action only as to them. Allowing such an inequitable outcome will directly undermine the importance for insurers to satisfy their contractual duty to defend, which this Court continues to recognize. *Century Sur. Co. v. Andrew*, 134 Nev. 819, 822, 432 P.3d 180, 184 (2018); *Nautilus Ins. Co. v. Access Med., LLC*, 482 P.3d 683, 689 (Nev. 2021).

Petitioners fail to specify what prejudice they will suffer if this matter is not stayed indefinitely. Petitioners' assertion that they may be forced to pay a premature judgment if this matter is not stayed is not credible. Discovery in the underlying action has barely begun due in large part to Petitioners' dilatory tactics. Petitioners will assuredly appeal any resulting judgment entered against them in this action. It is highly unlikely Petitioners will be forced to satisfy any judgment in this action before their futile appeal in the personal injury action is resolved. Petitioners provide no convincing evidence to prove they will suffer harm if this matter is not stayed.

Conversely, staying this action will unfairly expose Sanchez to a substantial financial risk because no bond will be posted during the pendency of the appeal. If Petitioners are sold or otherwise sustain fiscal losses during that time, this will substantially impede Sanchez ability to recover the full amount of the \$15,212,655.73 default judgment and other damages from Petitioners. Afterall, Sanchez is unaware of Petitioners' financial condition. The likelihood of this outcome is magnified by the uncertainty surrounding the length of time it will take to resolve the appeal in the personal injury action. Generally, stays should not be

indefinite and “should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time.” *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007). Petitioners request this Court to impose an indefinite stay, at no cost, while they use Bon to pursue an appeal for their benefit only. Sanchez is the only party who will suffer hardship while Petitioners enjoy an indefinite stay of her judgment enforcement efforts without posting the requisite security normally required to attain that benefit.

V. CONCLUSION

Based on the foregoing, Sanchez respectfully requests this Court to deny Petitioners’ Writ.

DATED this 4th day of April, 2022.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 Business, in 14-point, double-spaced Century Schoolbook font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(5) and NRAP 21(d) because it is proportionally spaced, has a typeface of 14 points, and contains 6,970 words.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 4th day of April, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed electronically with the Supreme Court of Nevada on the 4th day of April, 2022. Electronic service of the foregoing document entitled **REAL PARTY IN INTEREST DIANE SANCHEZ'S ANSWER TO PETITION FOR WRIT OF MANDAMUS, OR ALTERNATIVELY, PROHIBITION** shall be made in accordance with the Master Service List and the Court's eFlex electronic filing system to the following:

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