IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYMOND BROOKS; AND BRADY LINEN SERVICES, LLC, Appellants, v. JERREL TURNER; AND KESHA FRYER, Respondents.	No.: 82881

PETITION FOR JUDICIAL REVIEW

DAVID J. CHURCHILL, ESQ. (SBN: 7308)
JARED B. ANDERSON, ESQ. (SBN: 9747)
INJURY LAWYERS OF NEVADA
4001 Meadows Lane
Las Vegas, Nevada 89107
Telephone: 702-868-8888
Facsimile: 702-868-8889
david@injurylawyersnv.com
jared@injurylawyersnv.com
Attorneys for Plaintiffs

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities described in NRAP 2.1(a) and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly held companies owning 10 percent or more of the party's stock: *None.*
2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceeding in the district court or before an administrative agency) or are expected to appear in this court: Injury Lawyers of Nevada.
3. If litigant is using a pseudonym, the litigant's true name: *None.*

Dated this 29th day of August, 2022.

INJURY LAWYERS OF NEVADA

DAVID J. CHURCHILL, ESQ. (SBN: 7308)
JARED B. ANDERSON, ESQ. (SBN: 9747)
4001 Meadows Lane
Las Vegas, Nevada 89107
Telephone: 702-868-8888
Facsimile: 702-868-8889
david@injurylawyersnv.com
jared@injurylawyersnv.com
Attorneys for Plaintiffs

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2. Whether the District Court judge Abused her Discretion in Making a Factual Finding that the Insurance Company's Routine Pre-Litigation Claims Handling Activities, Absent Extensive Settlement Interactions, Did Not Constitute a Clear Intent to Appear and Defend the Case.
3. Whether the Nevada Supreme Court should Follow the Defendants' Arguments and Extend the Holdings of *Christy* and *Lindblom* and Rule that Any Pre-litigation Communications Between an Insurance Company and the Plaintiff Constitute a Clear Intent to Defend.

IV.

RELEVANT FACTS AND PROCEDURAL HISTORY

Following the motor vehicle crash that is the subject of the underlying action the adjuster for Travelers Insurance Company communicated with plaintiffs and their counsel during the two-week period between September 20, 2016 and October 6, 2016. The Travelers insurance adjuster performed a few routine information gathering activities, asking for the names of the individuals in plaintiffs' car, requesting a letter of representation from plaintiff's counsel and coordinating an inspection of the plaintiffs' vehicle. Subsequently the insurance adjuster denied the claim, noting that she had not received a letter of representation from counsel. As of October 6, 2016 all communication between the insurance adjuster and counsel for plaintiffs ceased.

The complaint was filed on September 10, 2018. AA01-AA06. Plaintiffs served the summons and complaint on defendant Brady Linen Services, LLC on October 4, 2018 and on defendant Raymond Brooks on October 21, 2018. AA07-AA08. No answer or other appearance was ever filed by defendants Brady Linen Services, LLC and Raymond Brooks and on March 5, 2019 default was entered against these defendants. AA09-AA014.

The defendants still took no action and on April 8, 2019 the plaintiffs served a three-day notice of intent to take default judgment on each of the defendants. AA015-AA018. Even after being served with the three-day notice of intent to take default judgment the defendants still took no action to respond to the plaintiffs' complaint.

The plaintiffs waited an entire year after sending the notice of intent to take a default judgment for the defendants to respond. On April 30, 2020, after there had been no response from the defendants whatsoever, the plaintiffs filed their motion for default judgment. AA019-AA028. On May 20, 2020 the defendants filed their motion to set aside the default. AA029-AA052.

On June 2, 2020 the district court considered the defendants' motion to set aside the default. AA053-AA0103. After considering the applicable evidence, the arguments and the authorities, the district court denied the motion to set aside the default, explaining the decision as follows. AA0121-AA0125.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

. . .

The Court hereby FINDS that after being properly served with the summons and complaint and having actual notice of the subject lawsuit Raymond Brooks and Brady Linen Services, LLC failed to file an answer or

responsive pleading within the time allotted under the Nevada Rules of Civil Procedure.

. . .

The Court hereby FINDS that after defendants Raymond Brooks and Brady Linen Services, LLC were served with three day notice of intent to take default judgment they did not take any steps to make an appearance in the case until May 19, 2020 when they filed a motion to set aside the default, after the plaintiffs had moved for default judgment and that this is a situation where the adversary process has been halted because of the defendants' unresponsiveness.

The Court hereby FINDS that Travelers Insurance Company did not clearly evidence an intention to defend the defendants in the subject case. The sole argument raised by the defendants in support of the motion to set aside the default was the argument that the default should be set aside because a copy of the summons and complaint was not served on Travelers Insurance Company. The defendants rely on *Christy v. Carlisle*, 94 Nev. 651, 584 P.2d 687 (1978) in arguing that the default should be set aside. However, the *Christy* case is distinguishable from the subject case. In the subject case the only communications that took place between Travelers Insurance Company and counsel for the plaintiff involved simple, routine claims handling

activities. These communications ended on October 6, 2016 nearly two years before the filing of the complaint.

In the *Christy* case, unlike the subject case, the insurance company had communicated with the plaintiff about the suit and had received an open extension to respond to the complaint. In this case Travelers did not communicate with plaintiffs or their counsel about the lawsuit in any way. Further, in the *Christy* case, unlike the subject case, the attorney for the plaintiff had promised to notify the insurance company that a responsive pleading needed to be filed when the open extension was over. In this case, because no extension to answer the complaint had been requested or given, plaintiffs' counsel did not promise Travelers that he would notify them when a responsive pleading was due.

The defendants argue that the communications that took place between the Travelers adjuster and counsel for plaintiffs evidence a clear intention to defend the lawsuit and required plaintiffs to serve a copy of the summons and complaint on Travelers Insurance Company. The Court cannot agree with the defendants' position. While it is true that pre-litigation communications between an insurance company and a party can demonstrate the type of clear intention to defend the lawsuit that is set forth in *Christy*, that does not mean that every type of communication between an insurance company and a party

necessarily demonstrates the clear intent to defend a lawsuit that is described in *Christy*. The defendants' argument seeks to stretch the holding in the *Christy* case beyond what the Nevada Supreme Court intended.

The Nevada Supreme Court did not hold that simple, routine claims handling activities carried out by an insurance adjuster constitute the clear evidence of intention to defend the lawsuit that is described in *Christy*. The Court FINDS that the communications that took place between Travelers Insurance Company and counsel for plaintiff in this case were insufficient to evidence the type of clear evidence of intent to defend the defendants that were referenced in the *Christy v. Carlisle*, 94 Nev. 651, 584 P.2d 687 (1978) case.

The *Christy* case is also distinguishable from the subject case for a number of other reasons. In the *Christy* case, unlike the subject case, the defendant Carlisle was not personally served and never received actual notice of the filing of the complaint. In this case it is undisputed that both Raymond Brooks and Brady Linen Services, LLC were personally served with the summons and complaint.

In the *Christy* case, unlike the subject case, the plaintiff obtained the default judgment only six days after the filing of the default. In this case the plaintiff waited for an entire year before moving to take the default judgment.

In the *Christy* case, unlike the subject case, the plaintiff did not serve the defendants with a three-day notice of intent to take default judgment. In this case the plaintiff personally served the defendants with the summons and complaint and also served the defendants with a three-day notice of intent to take default judgment.

In this case, unlike in the *Christy* case, one of the defendants, Brady Linen Services, LLC, is a corporation which certainly has the sophistication to understand the importance and necessity of filing an answer to a complaint after having been properly served with the summons and complaint. For all of the reasons set forth above, it is hereby

ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Set Aside Default is hereby DENIED.

AA0121-AA0125.

Subsequently the defendants filed their appeal. The Nevada Court of Appeals issued a decision on August 10, 2022, reversing the decision of the District Court and ordering that the case be remanded.

V.

THE COURT OF APPEALS IMPERMISSIBLY SUBSTITUTED ITS OWN JUDGMENT FOR THE JUDGMENT OF THE DISTRICT COURT REGARDING WHETHER TRAVELERS SHOWED A CLEAR INTENT TO DEFEND THE CASE OR WHETHER THEY SIMPLY ENGAGED IN ROUTINE CLAIMS HANDLING ACTIVITIES

In this case all parties agree that the district court applied the proper standard set forth by the Nevada Supreme Court. The defendants simply argue that the district court abused its discretion in making a factual finding that the routine claims handling activities undertaken by Travelers were insufficient to demonstrate a clear intention to defend the case under the specific factual circumstances of this case. This was a purely factual finding that is within the purview of the district court and not within the purview of a court of review. In reversing the decision, the Nevada Court of Appeals impermissibly substituted its own judgment for the judgment of the district court and impermissibly made factual findings that are beyond its purview as a court of review. For these reasons, the plaintiff seeks judicial review of the decision reversing the district court's decision.

VI.

PURSUANT TO THE STANDARD SET FORTH BY THE NEVADA SUPREME COURT, THE DISTRICT COURT'S DECISION NOT TO SET ASIDE THE DEFAULT WAS PROPER

A. The District Court Applied the Proper Standard in Denying the Defendants' Motion to Set Aside the Default and Did Not Abuse her Discretion.

A District Court's determination as to whether or not to set aside a default judgment is reviewed under the abuse of discretion standard. "The district court has wide discretion in deciding whether to set aside a default pursuant to NRCP 60(b)(1), and its determination will not be disturbed absent a showing of an abuse of discretion." *Gazan v. Hoy*, 102 Nev. 621, 730 P.2d 436 (1986). See also *Union Petrochemical Corp. v. Scott*, 96 Nev. 337, 607 P.2d 323 (1980)("The district court has wide discretion in such matters and, barring an abuse of discretion, its determination will not be disturbed.").

Abuse of discretion is a deferential standard of review. "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006); *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001); see also Abuse of discretion, Black's Law Dictionary (10th ed. 2014) ("2. An appellate court's standard

for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence."). Accordingly, this standard requires the appellate court to uphold a decision that falls within a broad range of permissible conclusions. See *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014) ("An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances."). A decision may be an abuse of discretion when: "[A] court fails to give due consideration to the issues at hand." *Patterson v. State*, 129 Nev. 168, 176, 298 P.3d 433, 439 (2013). Therefore the question is not whether another judge considering the same question might have reached a different result. The question is whether the decision is so manifestly unreasonable and wrong that no reasonable judge could have reached that decision.

The record in this case reflects the fact that the district court carefully considered the evidence in the case, the arguments made by each of the parties and the applicable rule of law. After considering the evidence presented to her, the district court made a specific finding that the minimal contacts between Travelers Insurance Company and plaintiff's counsel within the month following the subject crash constituted routine claims handling activities but did not rise to the level of indicating a clear intention to defend the case as was described in *Christy* and *Lindblom*. *Christy v.*

Carlisle, 94 Nev. 651, 584 P.2d 687 (1978); *Lindblom v. Prime Hospitality Corp.*, 90 P. 3d 1283 (2004). AA0122. During the hearing the district court explained the reasoning behind the decision to deny the defendants' motion to set aside default, as follows:

> Coming in here this morning, I had thought about it from both sides. I think we tend as a Court to lean towards letting things go forward on the merits because it is less, if you want to call it that, risky for the Court in terms of appellate review.
>
> But at the end of the day, I think that we are obligated to make whatever the correct call is we perceive from the facts and circumstances in total. And in this particular circumstance, I am going to respectfully deny the motion to set aside the default, and I will explain why.
>
> I really believe, under these facts and circumstances, I really can't quibble with the case law that has been referenced by Mr. Hall, but I think when you look at it in its totality, what we would be doing here, if I am on the side of the argument that says, in this particular circumstance, that activity by the insurance company that far in advance of litigation, and what the nature of that activity was, somehow constitutes an appearance for litigation purposes, so that the insurance company itself needed to be noticed with the 3-day notice, I just can't go there. It is just too much of a stretch.
> . . . .
>
> The only issue here really, when it all boils down, is were those activities by the insurance company back when these claims first started, sufficient to require at some future date that the insurance company be notified, and I don't believe that they were. I think the basic claims processing, and I think the ultimate tipping point over to the Plaintiff's side on this argument was that it was clear that it did not appear that Travelers intended to defend these claims.

> And in that sense, I don't think that we get into then Christy. And although Lindblom may stand for the proposition that there could be a party who was active pre-litigation, and should have been noticed, that when you take all of this together, I fear that if I were to be on the insurance company's side in this particular case, under these particular facts, I would basically be opening the door to an argument that as long as an insurance company did something in a claims process at all, that they would always have to be a noticed party in any subsequent litigation, and I just can't take it there.
> . . . .
>
> But at the end of the day, I mean, this is a motion to set aside a default by the defendants, but the defendants themselves are not entitled to have this default set aside by any stretch of any of the evidence I have seen, or any of the argument I have seen in this case.
>
> It really simply boils down to – and if I am oversimplifying, I apologize – but it simply boils down to me to, the insurance company's initial claim activities well in advance of litigation, at which point claims were denied, and no clear intent to defend was seen, can that then stay in place, so to speak, so that at any future date, when there is a future litigation, and the defendants are being contacted, and all of these things are happening, mandate that somebody notify the insurance company.
>
> I don't think the case law stands for that proposition. **I don't think, again, <u>on the specific facts and circumstances of this case</u>, it would be a correct use of my discretion to set aside this particular default,** so I am going to decline to do so.

AA079-AA083.

In this case the district court made a specific factual finding that the pre-litigation communications from Travelers Insurance Company did not clearly evidence an intention to appear and defend the defendants in the subject case. In its order the district court explained:

> **The Court hereby FINDS that Travelers Insurance Company did not clearly evidence an intention to defend the defendants in the subject case.**
>
> . . . .
>
> In the subject case the only communications that took place between Travelers Insurance Company and counsel for the plaintiff involved **simple, routine claims handling activities.** These communications ended on October 6, 2016 nearly two years before the filing of the complaint.

AA0122. (emphasis added)

The district court went on to make specific findings that Travelers Insurance Company merely engaged in simple, routine claims handling activities prior to litigation that did not rise to the level of demonstrating a clear intent to defend the case, as follows:

> The Nevada Supreme Court did not hold that simple, routine claims handling activities carried out by an insurance adjuster constitute the clear evidence of intention to defend the lawsuit that is described in *Christy*. **The Court FINDS that the communications that took place between Travelers Insurance Company and counsel for plaintiff in this case were insufficient to evidence the type of clear evidence of intent to defend the defendants that were referenced in the *Christy v. Carlisle*, 94 Nev. 651, 584 P.2d 687 (1978) case.**

AA0123. (emphasis added)

As is shown above, the district court carefully and properly considered the standard set forth in both *Christy* and *Lindblom*. The district court then properly applied the standard from those cases in determining that based on the facts and circumstances of the subject case, Travelers Insurance

Company had not demonstrated a clear intent to appear and defend the subject case. Her explanation perfectly follows the standard set forth in both of those cases. For these reasons, the district court's decision to deny the motion to set aside the default was not arbitrary or capricious or patently unreasonable and she did not abuse her discretion.

B. The Subject Case is Distinguishable from the Christy Case.

In the subject case, unlike in *Christy*, Travelers insurance company did not indicate a clear purpose to defend the suit. AA0123. The only actions taken by Travelers in this case were simple claims handling activities which ended nearly two years before the filing of the complaint. AA0123. Simple claims handling activities such as communicating with plaintiff's counsel about the claim and denying the plaintiff's claim are insufficient to demonstrate the "clear intention to defend the suit" that was described in the *Christy* case. *Id.* In the Court's decision, the district court very clearly outlined the distinction between the *Christy* case and the subject case, which supported her decision. AA079-AA083. After they had failed to timely respond, the district court was well within its discretion to deny the defendants' motion to set aside the default and that decision should be affirmed.

C. <u>The Subject case is Distinguishable from the Lindblom Case</u>.

In *Lindblom* the Nevada Supreme Court noted that its decision to uphold the district court's order setting aside the default was based on the following four factors:

1. "[T]he short time period between the deadline for Prime Hospitality's appearance and the entry of the default judgment";
2. "[T]he extensive settlement interactions between Lindblom and Prime Hospitality before initiation of formal legal proceedings";
3. "Prime Hospitality's referral of the summons to its insurer for defense"; and
4. "Prime Hospitality's promptness in seeking relief after receiving notice that collection proceedings had been commenced."

Lindblom v. Prime Hospitality Corp., 90 P. 3d 1283 (2004).

Based on these four factors set forth above, the Nevada Supreme Court held that: "**[W]e cannot conclude that either Prime Hospitality or its insurer made any attempt to abandon or ignore the proceedings.** We, therefore, hold that Prime Hospitality's participation in pre-suit negotiations constitutes an appearance entitling it to notice under NRCP 55(b)(2)." *Id.* However, the Nevada Supreme Court clearly explained that a

default judgment would be upheld ". . . when the adversary process has been halted because of an essentially unresponsive party." *Id.*

In the subject case, not a single one of these four factors weight in favor of the defendants. First, the time period that passed between the deadline for the defendants' appearance and the date that the defendant moved to set aside the default was more than one full year. AA0124.

Second, unlike in *Lindblom* there were no settlement discussions whatsoever between Travelers Insurance Company and the plaintiff's counsel in this case. AA0121-AA0125. Therefore unlike in the *Lindblom* case there were no ". . . extensive settlement interactions between the plaintiffs and the defendants before initiation of formal legal proceedings." *Id.*

Third, unlike the *Lindblom* defendants who forwarded the summons and complaint to their insurance company, expecting that they would retain counsel who would file a timely response to the complaint, in the subject case the defendants took absolutely no action whatsoever to respond to the summons and complaint after having been personally served with the summons and complaint. AA0121-AA0125.

Fourth, the Nevada Supreme Court found it significant that in the *Lindblom* case the defendant had not abandoned or ignored the action and

had actually taken steps toward defending the action. *Lindblom v. Prime Hospitality Corp.*, 90 P. 3d 1283 (2004). However in this case, based on the defendants' complete lack of activity and their non-responsiveness toward the litigation for a prolonged period of time in the subject case, the district court expressly found that their conduct can only be described as abandoning and ignoring the proceedings which brought the adversarial process to a halt. AA0122. This is the exact type of conduct that the Nevada Supreme Court indicated would support upholding a default against the non-responsive parties. *Id.* For all these reasons, the defendants are unable to meet any of the *Lindblom* factors and the *Lindblom* case fully supports the decision of the district court to deny the defendants' motion to set aside the default.

VIII.

CONCLUSION

For the reasons discussed above, the plaintiff's petition for judicial review should be GRANTED.

Dated this 29th day of August, 2022.

INJURY LAWYERS OF NEVADA

DAVID J. CHURCHILL, ESQ. (SBN: 7308)
JARED B. ANDERSON, ESQ. (SBN: 9747)
Attorneys for Plaintiffs

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) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 4,489 words; or

☐ does not exceed _____ pages.

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 29th day of August, 2022.

INJURY LAWYERS OF NEVADA

DAVID J. CHURCHILL, ESQ. (SBN: 7308)
JARED B. ANDERSON, ESQ. (SBN: 9747)
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Las Vegas, Nevada 89107
Telephone: 702-868-8888
Facsimile: 702-868-8889
david@injurylawyersnv.com
jared@injurylawyersnv.com
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Judicial Review was filed electronically with the Nevada Supreme Court on the 29th day of August, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

MICHAEL R. HALL, ESQ.
NEVADA BAR NO. 5978
HALL JAFFE & CLAYTON, LLP
7425 Peak Drive
Las Vegas, Nevada 89128
Attorneys for Appellants Raymond Brooks and Brady Linen Services, LLC

An employee of Injury Lawyers of Nevada