No. 20-_____

In The

Supreme Court of the United States

GARY LEWIS, ET AL.,

Petitioners,

v.

UNITED AUTOMOBILE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS CHRISTENSEN, ESQ.

CHRISTENSEN LAW OFFICES
1000 S. Valley View Blvd.
Las Vegas, NV 89107
702-870-1000
courtnotices@injuryhelpnow.com
Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

This Court has recognized three immutables: 1. Appellate courts are limited to reviewing the trial court record for errors of law and do not decide issues of fact; 2. Appellate courts are limited to considering issues raised in the trial court, appealed, and briefed on appeal, based on the stage of the litigation below; and, 3. Federal courts deciding diversity cases must faithfully apply state substantive law, including protecting the right to trial by jury. Here, the Ninth Circuit's unpublished order violates these three principles. It undermines Nevada's insurance regulatory regime and our federalism.

After thirteen years of litigation, the Ninth Circuit dismissed Plaintiffs' appeal for lack of standing citing no injury. Plaintiffs alleged, proved and were awarded partial damages by the trial court. The Defendant did not appeal the damages awarded. Only Plaintiff appealed, claiming: 1. additional damages alleged below flowing from Defendant's breaches; and, 2. the court's summary disposition took Plaintiffs' claims from the jury. Four years into the appeal, and three years after the alleged post-judgment lapse of one item of damage, Defendants raised a substantive factual damage issue, couched as "standing" to avoid waiver.

The question presented is whether a federal appeals court may be divested of jurisdiction by evaluating facts of an alleged post-judgment reduction in the amount of damages and conclude Plaintiffs lacked "standing" on appeal while simultaneously maintaining standing in the trial court.

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiffs Gary Lewis and James Nalder were the Plaintiffs in the Nevada District Court and Appellants in the Ninth Circuit Court of Appeals.

Respondent and Defendant United Automobile Insurance Company was the Defendant in the Nevada District Court and Appellees in the Ninth Circuit Court of Appeals.

RULE 29.6 DISCLOSURE

Gary Lewis is a resident of California and James Nalder is a resident of Nevada. Plaintiffs are not related to any corporate entity.

RELATED CASES

Century Surety Company v. Andrew, Supreme Court of Nevada; Case number 73756; Order answering Certified Question filed December 13, 2018.

Nalder v. Eighth Judicial District Court of Nevada, et al., Supreme Court of Nevada; Case number 78085, consolidated with 78243; Petitions granted in part and denied in part issued April 20, 2020. (Reported at 136 Nev., Advance Opinion 24)

Nalder v. Lewis, Superior Court of California, County of Los Angeles; Case number KS021378; Judgment entered July 24, 2018.

RELATED CASES—Continued

Nalder v. Lewis, District Court, Clark County Nevada, Case number 07A549111; Judgment entered June 3, 2008; Amended Judgment entered March 28, 2018.

Nalder v. Lewis, District Court, Clark County, Nevada, Case number 18-772220; Judgment entered January 23, 2019.

Nalder v. United Automobile Insurance Company; U.S. Court of Appeals, Ninth Circuit, Case number 11-15010 consolidated with 11-15462, Reversed and Remanded in Part, Affirmed in Part, December 17, 2012. (Reported as *Nalder v. United Auto. Ins. Co.*, 500 F. App'x 701 (9th Cir. 2012)).

Nalder v. United Automobile Insurance Company, U.S. Court of Appeals, Ninth Circuit; Case number 13-17441, Order Dismissing Appeal entered June 4, 2020.

Nalder v. United Automobile Insurance Company, 2:09-cv-1348; Judgment entered October 30, 2013.

Nalder v. United Auto. Ins. Co., Supreme Court of Nevada; Case number 70504; Order Answering Certified Questions filed September 20, 2019.

Nalder v. United Auto. Ins. Co., Supreme Court of Nevada; Case number 79487; pending.

Nalder v. United Auto. Ins. Co., Supreme Court of Nevada; Case number 81510 consolidated with 81710; pending.

RELATED CASES—Continued

United Automobile Insurance Company v. Christensen, Arntz & Lewis, U.S. District Court of Nevada; Case number 2:18-cv-2269; pending.

United Automobile Insurance Company v. Christensen, Arntz & Lewis, U.S. Court of Appeals, Ninth Circuit; Case number 20-16729; pending.

United Auto. Ins. Co. v. Eighth Judicial District Court of Nevada, Supreme Court of Nevada; Case number 80965; Order denying Petition for Writ filed April 22, 2020.

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OPINION BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit is unpublished.

BASIS FOR JURISDICTION

The Ninth Circuit Court's unpublished order dismissing the appeal was filed on June 4, 2020. Lewis and Nalder timely filed a petition for rehearing and rehearing en banc, which was denied on July 14, 2020.

This Court has jurisdiction of this petition to review pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

U.S. Constitution, Article III, § 2 provides, in relevant part:

> The judicial Power shall extend to all cases, in law and equity, . . . to controversies . . . between Citizens of different States;

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

28 U.S.C. § 1332(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

Nevada Constitution Article I, § 3. Provides, in relevant part: **Trial by jury; waiver in civil cases**. The right of trial by Jury shall be secured to all and remain inviolate forever; but a Jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law.

NRS 686A.310 Unfair practices in settling claims; liability of insurer for damages.

1. Engaging in any of the following activities is considered to be an unfair practice:

(a) . . . (p) . . .

2. In addition to any rights or remedies available to the Commissioner, an insurer is liable to its insured for any damages sustained by the insured as a result of the commission of any act set forth in subsection 1 as an unfair practice.

(Added to NRS by 1975, 1285; A 1987, 1067; 1991, 2202)

INTRODUCTION

This case presents the important question of whether, despite a legally supported award of partial damages on summary judgment, an alleged reduction in one item of damage occurring post judgment, during appeal, can be raised for the first time late in an appeal and divest just the appellate court of jurisdiction in a diversity case while Plaintiffs still have standing and damages and the district court maintains jurisdiction.

Plaintiffs appealed from the trial court's judgment entered in their favor on Plaintiffs' motion for partial summary judgment and Defendant's cross motion for summary judgment. The trial court found the full judgment as uncontroverted damages, but limited the

award in its judgment to the insurance policy limit. This finding of damage and award of damages conclusively establishes Plaintiffs' standing. The Defendant did not contest the judgment as damages below, nor did Defendant appeal the damages awarded on partial summary judgment. The parties briefed the issues on appeal, including the issue of the granting of partial summary judgment which cut off Plaintiffs' right under Nevada law to have two material issues of fact decided by a jury: 1. The question of the full consequential damages for breach of the duty to defend; and, 2. Whether the Defendant's actions breached the duty of affirmative good faith and fair dealing or violated the unfair claims settlement practices act in NRS 686A.310 causing further damage to Plaintiffs.

After being fully briefed, these issues were argued orally before the Ninth Circuit panel. Regarding the first issue, the parties then fully briefed a certified question to the Nevada Supreme Court. Following the completed briefing to the Nevada Supreme Court, and perhaps sensing impending loss of the appeal, Defendant raised a new issue, couched as "standing" and not before presented to any court. Four years into the appeal, and three years after the alleged lapse of only one of the items of damage, Defendant raised a substantive fact-dependent damage issue labeled as a "standing" issue. It was presented as "standing" to work around having not raised the issue earlier in the appeal, nor in the trial court. The newly claimed loss of "standing" was not raised in the court below in response to Plaintiffs' motion for partial summary judgment, was

contradicted by the finding that the Nevada state court judgment against the insured damaged him and awarding the policy limits to Plaintiffs (which Defendant failed to appeal), was contradicted by the record on appeal (which the Ninth circuit did not supplement), was not raised in the appellate brief, was not raised at oral argument, and was not raised in the briefing of the first certified question to the Nevada Supreme Court.

The Ninth Circuit's unpublished order invites abusive and wasteful litigation. The Appellate Court must base its review on the trial court record and its rulings must be consistent with the trial court's factual findings. If the Ninth Circuit is not checked, then in every case where a Plaintiff has been awarded a partial summary judgment prior to trial and standing is challenged for the first time on appeal, the Plaintiff will lose. Either a Plaintiff has no additional damages than those found by the trial court, or, even if the Plaintiff has additional damages, they will not be allowed to present them because they were not part of the trial record when the case was summarily decided. By giving the Defendant insurance company a "free pass" after so many years of litigation and only after it lost on appeal, the Ninth Circuit encourages this type of abuse and waste. The Ninth Circuit's unpublished order also undermines Nevada's insurance regulatory regime. To foreclose such abuse in the future, this Court should grant certiorari, or, in the alternative, summarily reverse the Ninth Circuit's unpublished order.

STATEMENT OF THE CASE

A. Legal Framework

1. **Under diversity jurisdiction, a federal court must apply the substantive law of the state.** 28 U.S.C. § 1332 provides diversity jurisdiction in the federal courts over state law claims. In fulfilling the mandate of *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938), a United States district court sitting in diversity must apply the law of the state as it believes the highest court of the state would apply it if the issue were presently before that tribunal. *See Erie*, 304 U.S. at 80, 58 S. Ct. 817; *see also Wichita Royalty Co. v. City Nat'l Bank*, 306 U.S. 103, 107, 59 S. Ct. 420, 83 L.Ed. 515 (1939); *Lexington Ins. Co. v. Rugg Knopp, Inc.*, 165 F.3d 1087, 1090 (7th Cir. 1999). *State Farm Mutual Automobile Insurance v. Pate*, 275 F.3d 666, 669 (7th Cir. 2001). This includes the right to a jury trial of state claims. "[R]uling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), quoting *Adickes v. S. H. Kress & Co., No. 79*, 398 U.S. 158-159 (1970).

2. **The substantive law of the State of Nevada provides an insurance regulatory regime that relies heavily on private enforcement through damage awards to insureds.** This court has recognized that Nevada has a comprehensive statutory and common-law insurance regulatory regime which relies heavily on private causes of action brought by policyholders. "Nevada provides both statutory and common-law remedies to check insurance fraud." *Humana Inc. v. Forsyth*, 525 U.S. 299, 311 (1999) "The Nevada Unfair Insurance Practices Act, Nev. Rev. Stat. § 686A.010 *et seq*. (1996), . . . , is a comprehensive administrative scheme that prohibits various forms of insurance fraud and misrepresentation." *Id.* at 311, 312. In Nevada the insured is typically the enforcement mechanism through a private right of action. "The Unfair Insurance Practices Act authorizes a private right of action for violations of a number of unfair insurance practices." *Id.* at 312. "Moreover, the Act is not hermetically sealed; it does not exclude application of other state laws, statutory or decisional. Specifically, Nevada law provides that an insurer is under a common-law duty "to negotiate with its insureds in good faith and to deal with them fairly." *Ainsworth v. Combined Ins. Co. of Am.*, 104 Nev. 587, 592, 763 P.2d 673, 676 (1988); *see United States Fidelity Guaranty Co. v. Peterson*, 91 Nev. 617, 620, 540 P.2d 1070, 1071 (1975) (recognizing tort action against insurance company for breach of implied covenant of good faith and fair dealing)."

Id. at 617, 619. Damages available to Nevada insureds include that an insurer must pay for independent counsel where there is a conflict of interest. *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.*, 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (Ct. App. 1984) and *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Op. 74 (9/24/2015).

3. **Nevada's insurance regulatory regime requires that issues of breach and damages are questions of fact and must be submitted to the jury.** Nevada's insurance regulatory regime establishes that the questions of breach of the duty of affirmative good faith and fair dealing or violation of the Nev. Rev. Stat. § 686A.010 *et seq*. (1996), particularly regarding breach of the duty to defend including adequately communicating settlement offers, is **a question of fact for the jury to decide** and is therefore not properly disposed of by summary judgment. In *Allstate Insurance v. Miller*, 125 Nev. Adv. Op. No. 28, 49760 (2009), 212 P.3d 318, 13 (Nev. 2009), the Nevada Supreme Court has made it clear that the reasonableness of an insurer's actions are for jury determination. "Allstate never told Miller about the details of Hopkins' settlement offer. Therefore, there is a factual dispute as to whether Allstate complied with its duty to adequately inform Miller of the offer and to protect Miller's interests." *Id*. The substantive law of Nevada requires that the failure to inform an insured of a settlement opportunity is a genuine material issue of fact that must be submitted to the jury. "We now

join these jurisdictions and conclude that an insurer's failure to adequately inform an insured of a settlement offer is a factor for the trier of fact to consider when evaluating a bad-faith claim." *Id.* at 318, 325. This Court has recognised that the individual insured may recover consequential and punitive damages for violations of the unfair claims practices act and breach of the duty of affirmative good faith and fair dealing. "In addition, . . . an insurer is liable to its insured for any damages sustained by the insured as a result of the commission of any act set forth in subsection 1 as an unfair practice. . . . Furthermore, aggrieved insured parties may be awarded punitive damages if a jury finds clear and convincing evidence that the insurer is guilty of 'oppression, fraud or malice.' Nev. Rev. Stat. § 42.005(1) (1995)." *Humana* at 313 (1999).

Nevada has also decided in *Century Sur. Co. v. Andrew*, 432 P.3d 180, 186 (Nev. 2018), that the consequential damages, specifically from a breach of the duty to defend, are for the jury to decide. "The determination of the insurer's liability depends on the unique facts of each case and is one that is left to the jury's determination. *See Khan v. Landmark Am. Ins. Co.*, 326 Ga.App. 539, 757 S.E.2d 151, 155 (2014) ('[W]hether the full amount of the judgment was recoverable was a jury question that depended upon what damages were found to flow from the breach of the contractual duty to defend.')." *Century Sur. Co. v. Andrew*, 432 P.3d 180, 186 (Nev. 2018).

This general rule that the consequential damages presents a jury question, as expressed in *Century Sur. Co.* was applied directly to these parties by the Nevada Supreme Court in answering the certified questions. "UAIC's argument—essentially that UAIC's refusal to defend in this case was more reasonable than the insurer's refusal to defend in *Century Surety*—is undermined by *Century Surety*'s holding 'that good-faith determinations are irrelevant for determining damages upon a breach of [the duty to defend].'" *Nalder v. United Auto. Ins. Co.*, No. 70504, at *2 (Nev. Sep. 20, 2019).

It goes without saying that these type of economic damages are appropriate damages upon which to base standing, as this Court and both the Fifth and Tenth Circuits have found. "Economic injury" of this sort is "a quintessential injury upon which to base standing." *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006); *see also Vt. Agency of Nat. Res. v. United States*, 529 U.S. 765, 772-77 (1998) (finding Article III injury from financial harm); *Clinton v. New York*, 524 U.S. 417, 432 (1998) (same); *Sierra Club v. Morton*, 405 U.S. 727, 733-34 (1972). "The Utah Supreme Court has explained that insurance is purchased to 'provide peace of mind.' *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 802 (Utah 1985). And a breach of the implied covenant of good faith for a contract that is "specifically directed toward matters of mental concern and solicitude" is likely to result in damages for emotional distress and

mental anguish. *Cabaness v. Thomas*, 232 P.3d 486, 508 (Utah 2010)." *Blakely v. USAA Cas. Ins. Co.*, No. 15-4059, at *42-43 (10th Cir. June 27, 2017).

4. **The trial court finding damages and reducing a portion to judgment, when not appealed, establishes Article III standing.** In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), this Court held that a statutory violation alone does not confer Article III standing. Instead, standing requires the Plaintiff to allege and prove a "concrete injury" caused by the statutory violation. *Id*. at 1549. In this case, the trial court found and awarded damages to Plaintiffs. In order to faithfully apply Nevada substantive law and "[i]n order to preserve the integrity of the appellate structure, [the appellate courts] should not be considered a 'second-shot' forum . . . where secondary, back-up theories may be mounted for the first time. Parties must be encouraged to give it everything they've got at the trial level. Thus, an issue must be presented to, considered and decided by the trial court before it can be raised on appeal." *Torres de la Cruz v. Maurer*, 483 F.3d 1013, 1023 (10th Cir. 2007). *Wall v. Astrue*, 561 F.3d 1048, 1067 n.25 (10th Cir. 2009). The appellate court decides issues based on the record as it presented to the trial court, especially regarding factual issues like the damages awarded in a judgment. "Reliance does not dispute the jury's well-supported conclusion that it breached the covenant of good faith and fair dealing when it wrongfully withdrew the developers' defense."

Pershing Park Villas v. United Pacific, 219 F.3d 895, 902 "The jury found that Reliance's withdrawal of the developers' defense in the construction-defect suit resulted in entry of a default judgment . . . There can be no question that these injuries are concrete, traceable to Reliance's conduct, and remediable by money damages." *Id.* at 895, 900 (9th Cir. 2000). Failure of only one item of damage does not destroy jurisdiction. *Village of Elk Grove Village v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993) "Accordingly, the district court expressly found that Hurley and Nantz bought health insurance because they are obligated to, and we must defer to that factual finding." *Texas v. United States*, No. 19-10011, at *20 (5th Cir. Dec. 18, 2019). "The intervenor-defendant states fail to point to any evidence contradicting these declarations, and they did not challenge this evidence in the district court." *Texas v. United States*, No. 19-10011, at 20 (5th Cir. Dec. 18, 2019).

5. **An appellate court must base its actions on the appellate record.** Fact finding is the "basic responsibility" of trial courts "rather than appellate courts." *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982). "Papers not filed with the district court or admitted into evidence in that court are not part of the clerk's record and cannot be part of the record on appeal." *See United States v. Walker*, 601 F.2d 1051, 1054-55 (9th Cir. 1979) (affidavits that "were not part of the evidence presented to the district court" would not be considered on appeal); *Panaview Door Window Co. v.*

Reynolds Metals Co., 255 F.2d 920, 922 (9th Cir. 1958) (striking from record an exhibit that had been attached to appellant's trial court memorandum of points and authorities and a document that had been marked for identification, neither of which had been received in evidence); *Watson v. Rhode Island Ins. Co.*, 196 F.2d 254, 255-56 (5th Cir. 1952) (granting motion to strike documents that were tendered as exhibits to brief on appeal but that had not been offered in evidence below). *Kirshner v. Uniden Corp. of America*, 842 F.2d 1074, 1077 (9th Cir. 1988). *See Walker*, 601 F.2d at 1055 ("We are here concerned only with the record before the trial judge *when his decision was made*."); *Health v. Helmick*, 173 F.2d 156, 156-57 (9th Cir. 1949) (striking from record on appeal papers that were filed in district court *after* judgment from which appeal was taken) ("The cause must be tried here upon the record made at the original trial.")." *Id.* at 1074, 1077-78.

6. **Even issues raised in the trial court and appealed are waived if not also raised in the first brief filed on appeal.** Not only must a party raise an issue in the trial court and appeal the issue, a party must also raise the issue in its first brief on appeal. Raise it or waive it is the rule on appeal. *United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015) ("Generally, an appellee waives any argument it fails to raise in its answering brief."); *In re Cellular 101, Inc.*, 539 F.3d 1150, 1155 (9th Cir. 2008); cf. *Parmalat Capital Finance Ltd. v. Bank of Am. Corp.*, 671 F.3d 261, 270-71 (2d

Cir. 2012) (parties waived argument by failing to raise it in the first round of appeal). Supplemental briefs are not the place for new substantive arguments. *Pakootas v. Teck Cominco Metals, Ltd*., 830 F.3d 975, 986 n. 12 (9th Cir. 2016) (citing *United States v. McEnry*, 659 F.3d 893, 902 (9th Cir. 2011)); *Kreisner v. City of San Diego*, 1 F.3d 775, 778 n.2 (9th Cir. 1993). "We, therefore, refuse to address Claimant's argument for the first time on appeal. *See United States v. Porter*, 405 F.3d 1136, 1141-42 (10th Cir. 2005) ("We do not consider issues not presented to the district court, and they are deemed waived.")." *Wall v. Astrue*, 561 F.3d 1048, 1067 (10th Cir. 2009) "We will review an issue that has been raised for the first time on appeal under certain narrow circumstances . . . [:](1) to prevent a miscarriage of justice; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law." *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996) (internal citations omitted). "The decision to consider an issue not raised below is discretionary, and such an issue should not be decided if it would prejudice the other party." *Id.* "Needless to say, we do not consider issues raised for the first time in a reply brief. *See Stephens v. C.I.T. Group/Equipment Financing, Inc.*, 955 F.2d 1023, 1026 (5th Cir. 1992)." *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1053 (9th Cir. 2006). Moreover, the failure to provide any legal or factual analysis of an issue results in waiver of that issue. *See United States v. Green*, 964 F.2d 365, 371 (5th

Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 984, 122 L.Ed.2d 137 (1993); Fed.R.App.P. 28(a)(6)." "Supplementing the appellate record is possible only "in extraordinary cases" and only to support substantive arguments properly before the Court. *Lowry v. Barnhart*, 329 F.3d 1019, 1024-25 (9th Cir. 2003)." *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 260 n.9 (5th Cir. 1995).

7. **Prior to trial below, allegations of damage must be accepted as true, even on appeal.** The test for standing and the level of proof required changes as a case proceeds. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). To satisfy the standing requirement throughout the Plaintiff's case, "each element must be supported in the same way as any other matter on which the Plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* Thus, at the pleading stage, factual allegations of injury suffice; at summary judgment, the Plaintiff must offer facts; and at trial, "those facts (if controverted) must be 'supported adequately by the evidence adduced at trial." *Id*. (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n. 31 (1979)).

8. **Prudential standing improperly raised is subject to waiver.** At the most general level, "[the standing] inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498

(1975). Constitutional standing concerns whether the Plaintiff's personal stake in the lawsuit is sufficient to make out a concrete "case" or "controversy" to which the federal judicial power may extend under Article III, § 2. *See United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996); *Lujan*, 504 U.S. at 555, 559. Beyond this constitutional core, "the prudential doctrine of standing has come to encompass 'several judicially self-imposed limits on the exercise of federal jurisdiction.' " *Brown Group*, 517 U.S. at 551 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). To satisfy the standing requirement throughout the Plaintiff's case, "each element must be supported in the same way as any other matter on which the Plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. *Lujan*, 504 U.S. at 555, 561. Principles of prudential standing are not "ordained by the Constitution, but constitute rather 'rule(s) of practice,' albeit weighty ones; hence some exceptions to them where there are weighty countervailing policies have been and are recognized." *United States v. Raines*, 362 U.S. 17, 22 (1960) (alteration in original) (citation omitted) (quoting *Barrows v. Jackson*, 346 U.S. 249, 257 (1953)). "Because issues of constitutional standing are jurisdictional, they must be addressed whenever raised. *See Ripplinger v. Collins*, 868 F.2d 1043, 1046-47 (9th Cir. 1989) (*citing Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-42 (1986)).

By contrast, a party waives objections to non-constitutional standing not properly raised before the district court. *See Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 538 (9th Cir. 1995) (as amended)." *Pershing Park Villas v. United Pacific*, 219 F.3d 895, 899-900 (9th Cir. 2000).

9. **Just framing an issue as "standing" does not allow its consideration at any time.** This Court has dispelled the notion that a "'standing' argument [that] simply presents a straightforward issue of contract interpretation" can serve as a legally cognizable "standing" argument. *Perry v. Thomas*, 482 U.S. 483, 492, 107 S. Ct. 2520, 96 L.Ed.2d 426 (1987). "*Perry* . . . makes clear that *Cornhusker's* purported standing argument does not implicate our subject-matter jurisdiction. In other words, it is not a true standing argument, in the conventional sense, at all." *Cornhusker Cas. Co. v. Skaj*, 786 F.3d 842, 851 (10th Cir. 2015). Consistent with those decisions, this Court has refused to adopt a strict rule requiring that if a litigant claims an issue is a standing issue, the court can consider it without regard to its proper development below. "We likewise decline to reach Thomas' contention that Perry and Johnston lack "standing" to enforce the agreement to arbitrate any of these claims, since the courts below did not address this alternative argument for refusing to compel arbitration." *Perry*, 482 U.S. at 483, 492. It has therefore rejected an approach that would require dismissal of contrived "standing" arguments. Such an approach defies "the

common sense policy—the conservation of judicial energy and the avoidance of multiplicity of litigation" *Rosado v. Wyman*, 397 U.S. 397, 405 (1970) "the well-settled rule that a federal court does not lose jurisdiction over a diversity action which was well founded at the outset even though one of the parties may later change domicile or the amount recovered falls short of $10,000. *See Smith v. Sperling*, 354 U.S. 91, 93 n. 1 (1957); *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289-290 (1938); *Smithers v. Smith*, 204 U.S. 632 (1907); *see generally* C. Wright, Federal Courts § 33, pp. 93-94 (1963)." *Rosado*, 397 U.S. at 397, 405 .

10. **Jury trial is a constitutional right provided to civil litigants by both the U.S. and Nevada constitutions.** "We are inclined to the view that General's petition for Writ of Mandamus is properly before us for consideration since the question presented pertains to a denial of the constitutional right to trial by jury."); *see also Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511, 79 S. Ct. 948, 3 L.Ed.2d 988 (1959) ("[T]he right to grant mandamus to require jury trial where it has been improperly denied is settled."). *In re Lockheed Martin Corp.*, 503 F.3d 351, 353 (4th Cir. 2007).

B. Factual and Procedural History

1. UAIC is a non-standard insurer that issues policies on a deceptive "monthly" basis to skirt certain requirements of Nevada and other states insurance regulatory regimes.

2. On July 8, 2007, Gary Lewis, insured by UAIC, negligently caused severe injuries to nine-year-old Cheyanne Nalder (born April 4, 1998).[1]

3. James Nalder ("Nalder"), Cheyanne's father, made an offer to UAIC to settle Cheyanne's claim for $15,000, the insurance policy limit. UAIC rejected the offer, never informing its insured, Lewis, that Nalder was willing to settle.

4. Nalder sued Lewis in Nevada state court (Case No.07A549111). UAIC was notified of the lawsuit but declined to defend Lewis or file a declaratory relief action regarding coverage. Nalder obtained a judgment against Lewis for $3,500,000.00. Notice of entry of judgment was filed on August 26, 2008.

5. After judgment was entered, Lewis and Nalder filed suit against UAIC in state court (State Court Case No. A-09-590967-C) to establish coverage and alleged general, special and punitive damages consequential to breach of contract, breach of the covenant of affirmative good faith and fair dealing, fraud, and violation of Nevada Revised Statute

[1] The statement of facts herein is based on *Nalder v. United Auto Ins. Co.*, 878 F.3d 754 (9th Cir. 2017).

§ 686A.310. Lewis and Nalder entered into a settlement agreement in lieu of execution on the judgment, which immediately damaged Lewis in an amount in excess of the judgment as he transferred valuable rights to Nalder as payment on the judgment. The case was removed by UAIC to Federal Court based on diversity jurisdiction (Case No. 2:09-cv-01348-ECR-GWF).

6. UAIC moved for summary judgment on the basis that Lewis had no insurance coverage on the date of the accident. Lewis opposed the motion arguing that Lewis was covered on the date of the accident because the renewal notice was ambiguous as to when payment had to be received to avoid a lapse in coverage, and that this ambiguity had to be construed in favor of the insured as a matter of law. The district court agreed with UAIC but was later reversed by the Ninth Circuit Court of Appeals. *Nalder v. United Auto. Ins. Co.*, 500 F. App'x 701, 702 (9th Cir. 2012).

7. On remand, on October 30, 2013, the district court granted partial summary judgment to each party. (App. 6-24) First, the court found the renewal statement ambiguous, so it construed this ambiguity against UAIC as required by Nevada's insurance regulatory regime by finding that Lewis was covered on the date of the accident. Second, the court found that UAIC breached its duty to defend Lewis and that Lewis was damaged in the amount of the state court judgment entered against him but sua sponte capped the award

of damages in the amount of the policy limits. Third, the court took the issue of the reasonableness of UAIC's breach of the duty to defend, breach of the duty of affirmative good faith and fair dealing and violation of NRS 686A.310 away from the jury and construed disputed facts regarding the reasonableness of UAIC's actions in favor of the movant UAIC. UAIC made three payments that Lewis paid to Nalder on the judgment pursuant to the assignment agreement: on June 23, 2014; on June 25, 2014; and on March 5, 2015, but made no effort to defend Lewis or relieve him of the full amount of the judgment against him.

8. Lewis appealed (Case No 13-17441 Federal Court, Appeal No. 2) both the limitation of the award of damages to the policy limits in the October 30, 2013 judgment and the taking from the jury the question of the reasonableness of UAIC's denial of coverage, refusal to defend and failure to communicate settlement offers. UAIC did not appeal the damages found or awarded. The parties filed appellate briefs and argued the issues to the Ninth Circuit. In *Nalder v. UAIC*, 824 F.3d 854 (9th Cir. 2016), the following question was then certified to the Nevada Supreme Court:

> Whether, under Nevada law, the liability of an insurer that has breached its duty to defend, but has not acted in bad faith, is capped at the policy limit plus any costs incurred by the insured in mounting a defense, or is

the insurer liable for all losses consequential to the insurer's breach? *Id.* at 855.[2]

9. The first certified question was fully briefed when UAIC, for the first time, moved to dismiss the appeal for lack of standing because the ability of Nalder to execute further on the judgment against Lewis had allegedly expired. Lewis opposed the motion on the grounds that regardless of the claimed expiration, Lewis had already been awarded damages, had suffered damage by the assignment agreement, had alleged other damages, had alleged punitive damages, and had appealed the district court's refusal to submit the question of reasonableness of UAIC's actions to the jury. Lewis also objected that the framing as a lack of standing was improper and that the question of proof of damages which necessarily involves factual issues should be submitted to the trial court on remand.

10. Nalder took action against Lewis, as UAIC suggested she should do, in Nevada and in California, to assure and confirm the continued ability to collect her judgment from Lewis. The resulting Nevada and California state

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[2] The first certified question arose in light of conflicting opinions within the Nevada District Court. Unlike Judge Jones' decision to cap damages in the underlying *Nalder* case, the Hon. Andrew P. Gordon issued a directly opposite decision in *Andrew v. Century Sur. Co.*, 134 F. Supp. 3d 1249 (D. Nev. 2015), whereby Judge Gordon ruled "[t]here is no special rule for insurers that caps their liability at policy limits for a breach of the duty to defend." *Id.* at 1249.

court judgments are further harming Lewis. These judgments arose as a consequence of UAIC's attempts to escape responsibility by making misrepresentations to the Federal and State Courts and putting its interests ahead of its insured's interests—further violations of Nevada's insurance regulatory regime. UAIC has also failed to recognize and pay Breen Arntz who Lewis hired as independent *Cumis/Hansen* counsel defending the ongoing state court action brought by Nalder.

11. The Ninth Circuit Court of Appeals certified a second question to the Nevada Supreme Court, which the Nevada Supreme Court restated as follows:

> In an action against an insurer for breach of the duty to defend its insured, can the Plaintiff continue to seek consequential damages in the amount of a default judgment against the insured when the judgment against the insured was not renewed and the time for doing so expired while the action against the insurer was pending?

12. Rather than letting the ongoing litigation process unfold in the Ninth Circuit Court of Appeals and Nevada District Court, UAIC has further damaged its insured Lewis, and his attorneys by filing a SLAPP lawsuit alleging medieval barratry.

13. The first and second certified questions were answered by the Nevada Supreme Court on

December 13, 2018, in a related case wherein the Nevada Supreme Court held:

> In answering the certified question, we conclude that an insured may recover any damages consequential to the insurer's beach of its duty to defend. As a result, an insurer's liability for the breach of the duty to defend is not capped at the policy limits, even in the absence of bad faith. *Century Sur. Co. v. Andrew*, 432 P.3d 180, 186, 134 Nev. Adv. Op. 100 (Nev. 2018). (App. 28-43).

14. Thirteen years into the litigation the Ninth Circuit disregarded the law expressed by the Nevada Supreme Court in *Andrew* and *Nalder*, the record finding and awarding damages in the court below, the Fed.R.App.P. 28(j) letter, and dismissed the appeal for lack of standing based on no damages.

15. Lewis petitioned for rehearing and rehearing en banc. (App. 68-89) That petition was denied on July 14, 2020. (App. 25)

REASONS FOR GRANTING THE WRIT

The Court should grant the writ to decide important questions regarding the Appellate Court's ability to decline jurisdiction, to make factual findings contrary to the factual findings of the trial court (about post-judgment events not contained in the record) and to disregard Nevada's insurance regulatory regime.

I. THE NINTH CIRCUIT'S UNPUBLISHED ORDER CONFLICTS WITH THIS COURT'S PRECEDENT AND CREATES A DIVIDE OVER WHEN AND ON WHAT GROUNDS JURISDICTION MAY BE TERMINATED, DENYING PLAINTIFFS THE RIGHT TO TRIAL BY JURY AND UNDERMINING NEVADA'S INSURANCE REGULATORY REGIME.

A. The Ninth Circuit's Unpublished Order Creates Inconsistency Over Whether Appellate Courts May Take Evidence And Find Facts Contrary To The Trial Court Record.

1. Trial courts issue findings of fact and conclusions of law. Under Federal Rule of Civil Procedure 52(a)(6), "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Stability and judicial economy is promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts. To permit courts of appeals to share more actively in the fact-finding function undermines the legitimacy of the district courts in the eyes of litigants, multiplies appeals by encouraging appellate retrial of factual issues, and needlessly reallocates judicial authority. In this case, the Ninth Circuit received and evaluated facts alleged by the Defendant, all occurring post-judgment, and

used unsubstantiated evidence, not contained in the record, to support its dismissal of the appeal. This was in direct conflict with the trial court's finding and award of damages in favor of Plaintiffs. A finding not appealed by Defendant.

Fact finding is the "basic responsibility" of trial courts "rather than appellate courts." *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982) (quoting *DeMarco v. United States*, 415 U.S. 449, 450 n.22 (1974)); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) ("appellate courts must constantly have in mind that their function is not to decide factual issues"). This limitation is fundamental because appellate courts lack the means to authenticate documents and must rely on the district court's designation of submitted documents as part of the record. *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003). The California Supreme Court's formulation of this "essential distinction between the trial and the appellate court" is that it is "the province of the trial court to decide questions of fact and of the appellate court to decide questions of law." *In re Zeth S.*, 31 Cal. 4th 396, 405 (2003), quoting *Tupman v. Haberkern*, 208 Cal. 256, 262-63 (1929). A consequence of this division of responsibilities is that an appellate court's review is cabined by the universe of facts that were "before the trial court for its consideration." *Zeth S.*, 31 Cal. 4th at 405.

The Ninth Circuit here has dispelled that notion and made factual determinations dispositive of the underlying case and contrary to the trial court's favorable ruling of damages awarded to Plaintiffs, and not appealed by Defendant. The Appellate court couched its factual evaluation as relevant to "standing," but that approach misses the mark. The Defendant offered "standing" as a distraction, but this case does not present an Article III standing issue. Plaintiffs prevailed below. Damages were found and awarded. Plaintiff's have alleged ongoing damage and have concrete injury, in addition to the judgment Defendants claim "expired" while the case was on appeal. The universe of facts that were before the trial court for its consideration at the summary judgment proceeding that resulted in the appeal included only a valid and enforceable judgment against an insured as a result of his insurance company's breach of the duty to defend.

B. The Ninth Circuit's Unpublished Order Conflicts With This Courts Published Opinions, The Published Opinions Of Other Circuit Courts And Even The Published Opinions Of The Ninth Circuit, Which Hold That Federal Appellate Courts Are Limited To Legal Issues Raised In The Trial Court, Appealed, Briefed On Appeal And Decided Based On The Stage Of The Litigation Below.

1. Even if this court was to allow the Ninth Circuit to disregard Plaintiffs' standing conclusively established in the trial court, Defendant's attempt to undermine that finding deviates from this court's and other circuit courts' opinions. The Ninth Circuit allowed Defendant to raise a substantive factual issue related to damages, couched as "standing," in a Motion to Dismiss filed four years into the pending appeal, after briefing and oral argument. This conflicts with the principle that fact finding is the "basic responsibility" of trial courts "rather than appellate courts." *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982). This requires federal courts to refuse to consider issues not raised in the trial court, not appealed, not supported in the appellate record, not raised in the initial appellate brief and not raised at oral argument. The Ninth Circuit's actions also conflict with the Tenth and Fifth Circuits, which have established the rule on appeal to be: raise it or waive it. In the Tenth Circuit: "We, therefore, refuse to address Claimant's argument for the first time

on appeal. *See United States v. Porter*, 405 F.3d 1136, 1141-42 (10th Cir. 2005); and, the Fifth Circuit: "Needless to say, we do not consider issues raised for the first time in a reply brief." *See Stephens v. C.I.T. Group/Equipment Financing, Inc.*, 955 F.2d 1023, 1026 (5th Cir. 1992). In the case at hand, the Ninth Circuit entertained facts alleged for the first time in a Motion filed **after** the initial briefing and oral argument in Plaintiffs' appeal and even after the complete briefing of a certified question to the Nevada Supreme Court.

2. Even if conclusive standing below is disregarded and belatedly bringing up the issue is condoned, this Court has long held that a review of standing must be based on the record before the trial court and the stage of the proceeding below. The Ninth Circuit justified its dismissal of this appeal by reasoning that the new damages (that weren't in existence when the trial court awarded damages) cannot be damages proving standing. App. 28. That ignores the standards this Court has established for pleading and proving standing. "At the pleading stage, general factual allegations of injury resulting from the Defendant's conduct may suffice . . . " *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992), 504 U.S. 555, 561. "At summary judgment, there must be some evidence and at trial the injury must be proven." *Id.* Here, the Ninth Circuit has held that a party who appealed from a summary judgment awarding partial damages must allege and prove additional damages (on appeal) to maintain jurisdiction; but that same party is

not allowed to present new evidence to provide the requested proof. Plaintiffs satisfied the standing requirement at the pleading stage. Plaintiffs satisfied the standing requirement on the motion for partial summary judgment. And, Plaintiffs satisfied the standing requirement on appeal. Because the case had not yet gone to trial below, the proper standard on appeal is that allegations of damages must be accepted as true. Trial has not occurred and the summary judgment grant was not based on a failure of damages. The Ninth Circuit did not allow any supplements to the record. However, the Ninth Circuit did consider an affidavit of defense counsel on issues of fact. It did not consider competing affidavits from Plaintiffs or consider evidence of judgments submitted pursuant to Fed.R.App.P. 28(j) contradicting defense counsel's affidavit and conclusively proving Plaintiffs' continuing damages.(App. 26-67).

3. In addition, the Ninth Circuit's unpublished order divides from the universally accepted principle, even in the Ninth Circuit, that failure of only one item of damage does not destroy jurisdiction. *Village of Elk Grove Village v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993). ("[E]ven a small probability of injury is sufficient to create a case or controversy—to take a suit out of the category of the hypothetical—provided of course that the relief sought would, if granted, reduce the probability.") *Pisciotta v. Old National Bancorp*, 499 F.3d 629, 634 n.4 (7th Cir. 2007). "Reliance is therefore liable to the developers for the amount of

the judgment, and all other damages consequential to it." *Pershing Park Villas v. United Pacific*, 219 F.3d 895, 902 (9th Cir. 2000).

4. The Ninth Circuit's unpublished order conflicts with this Court's and the Tenth Circuit's holding that issues framed as "standing," that do not actually implicate constitutional standing, do not impact the jurisdiction of the court. Citing to *Perry v. Thomas*, 482 U.S. 483, 487, 107 S. Ct. 2520, 96 L.Ed.2d 426 (1987), the Tenth Circuit in *Cornhusker Cas. Co. v. Skaj*, 786 F.3d 842, 851 (10th Cir. 2015) concluded, "the *Perry* Court did not countenance a litigant's argument[,] . . . characterize[d] as one of 'standing,' when the contention was merely that [his opponents] were 'not parties' to [an] agreement." *Perry* applies with equal force to this appeal—that is, it makes clear that UAIC's purported standing argument does not implicate the subject-matter jurisdiction of the appellate court. In other words, it is not a true standing argument, in the conventional sense, at all. The issue raised is actually a substantive question of fact to be considered in fixing what damages were actually suffered and should be awarded. This is a factual determination for the jury under Nevada law. *Century Sur. Co. v. Andrew*, 432 P.3d 180, 186 (Nev. 2018). This damage issue is not one for the trial court to decide and certainly not for the appellate court to decide.

5. **The Ninth Circuit's order also conflicts with the "[T]he well-settled rule that a federal court does not lose jurisdiction**

over a diversity action which was well founded at the outset even though one of the parties may later change domicile or the amount recovered falls short of $10,000. *See Smith v. Sperling*, 354 U.S. 91, 93 n. 1 (1957); *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289-290 (1938); *Smithers v. Smith*, 204 U.S. 632 (1907); *see generally* C. Wright, Federal Courts § 33, pp. 93-94 (1963)." *Rosado v. Wyman*, 397 U.S. 397, 405 n.6 (1970). The Ninth Circuit applies this same general rule in its published opinions to non-constitutional standing. "A party waives objections to non-constitutional standing not properly raised before the district court. *See Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 538 (9th Cir. 1995) (as amended)." *Pershing Park Villas v. United Pacific*, 219 F.3d 895, 899-900 (9th Cir. 2000).

C. The Ninth Circuit Acted Beyond Its Appellate Authority, Damaging The Federal System Of Respect For And Faithful Application Of State Law, By Denying The Right To Trial By Jury.

1. The Ninth Circuit's unpublished order conflicts with this Court's pronouncement that Nevada law provides for expansive damages over and above the state court judgment amount, including punitive damages, for breach of the duty of affirmative good faith and fair dealing and violation of the unfair claims practices act—NRS 686A.310. *See*

Humana, Century Sur. Co. and Allstate Insurance v. Miller.

2. Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In assessing a motion for summary judgment, the evidence, together with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A "material fact" is a fact "that might affect the outcome of the suit under the governing law . . . " *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).") The governing law in this case is the law of Nevada that requires these two issues be submitted to a jury. Finding lack of standing and dismissing the appeal frustrates the Nevada insurance regulatory regime, by cutting of review of the trial court's summary resolution contrary to Nevada law.

3. Appellate Courts are restricted from overturning a jury verdict because it constitutes interference with an important constitutional right. Dismissals with impunity, using the wrong standard on Summary Judgment and the wrong standard to evaluate standing, in a more egregious way, also interferes with that right. "In evaluating the sufficiency of the evidence, the district court failed to consider

it as a whole and to resolve all inferences in favor of the jury's verdict. *See Continental Ore Co. v. Union Carbide Carbon Corp.*, 370 U.S. 690, 699 (1962) ("In cases such as this, Plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.") Viewing the evidence in the light most favorable to the nonmoving party, we cannot say the evidence does not reasonably support an award of punitive damages." *Ace v. Aetna Life Insurance*, 139 F.3d 1241, 1247 (9th Cir. 1998). The lower court in this case determined the reasonableness of UAIC's failure to defend in granting a counter-motion for summary judgment. This flies directly in the face of Nevada's insurance regulatory regime and Nevada case law that requires the reasonableness of the insurance company's actions to be determined by a jury. *Allstate v. Miller*, 125 Nev. Adv. Op. No. 28, 49760 (2009), 212 P.3d 318 (Nev. 2009).

4. "[I]n *Adickes v. S. H. Kress Co.*, 398 U.S. 144 (1970), the Court emphasized that the availability of summary judgment turned on whether a proper jury question was presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "Our holding . . . does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.

> The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In the instant case, the Ninth Circuit's unpublished order has the ultimate effect of denying Plaintiff's right to have a jury decide factual issues, resulting in an usurping of Nevada's insurance regulatory regime.

II. THE FAITHFUL APPLICATION OF STATE STATUTORY AND DECISIONAL LAW REGULATING INSURANCE COMPANIES IN DIVERSITY CASES PRESENTS AN IMPORTANT AND RECURRING QUESTION.

This court has recognized that Nevada has a comprehensive statutory and common-law insurance regulatory regime which relies heavily on private causes of action brought by policyholders. "Nevada provides both statutory and common-law remedies to check insurance fraud." *Humana Inc. v. Forsyth*, 525 U.S. 299, 311 (1999). "The Nevada Unfair Insurance Practices Act, Nev. Rev. Stat. § 686A.010 *et seq*. (1996), . . . , is a comprehensive administrative scheme that prohibits various forms of insurance fraud and misrepresentation." *Id.* at 311, 312. In Nevada, the insured is typically the enforcement mechanism through a private right of action. "The Unfair Insurance Practices Act authorizes a private right of action for violations of a number of unfair insurance practices." *Id.* at 312. "Moreover, the Act is not hermetically sealed; it does not exclude application of other state laws, statutory

or decisional. Specifically, Nevada law provides that an insurer is under a common-law duty 'to negotiate with its insureds in good faith and to deal with them fairly.' *Ainsworth v. Combined Ins. Co. of Am.*, 104 Nev. 587, 592, 763 P. 2d 673, 676 (1988); *see United States Fidelity & Guaranty Co. v. Peterson*, 91 Nev. 617, 620, 540 P. 2d 1070, 1071 (1975) (recognizing tort action against insurance company for breach of implied covenant of good faith and fair dealing)." *Id.* at 312.

This federalist concept of the federal courts enforcing the various state regimes of insurance regulation is undermined by unpublished and unrestrained exercises of judicial power. Insureds expend enormous effort to hold insurers responsible to follow the law. Here, the Ninth Circuit ruled directly contrary to the decisional law of the Nevada Supreme Court in dismissing the appeal for a lack of standing. This deprived the litigants at the eleventh hour of their due process rights to have the remaining disputed facts of this case (most importantly, damages) tried by a jury, consistent with Nevada's insurance regulatory regime.

III. SUMMARY REVERSAL IN THIS CASE IS APPROPRIATE.

Where the Court of Appeals' opinion reflects that it misapprehends this Court's precedent, summary reversal is appropriate. *Rhodes v. Stewart*, 488 U.S. 1, 3 (1988); *Brosseau v. Haugen*, 543 U.S. 194, 198 n. 3 (2004) (exercise summary reversal procedure "to correct a clear misapprehension of the controlling legal

standard); *see also Overton v. Ohio*, 534 U.S. 982, 983, 122 S. Ct. 389, 389 (2001) (summary reversal is warranted when lower court fails to apply "well-established Supreme Court case law") (Breyer, J., dissenting from denial of petition for certiorari). As discussed above, the Ninth Circuit's unpublished opinion is inconsistent with a long line of this Court's appellate review precedent and is predicated on two fundamental errors: (1) Disregarding standing conclusively established in the trial court and not appealed; and (2) ignoring the fact that Plaintiffs also pleaded and appealed additional damages and causes of action for which they plainly had standing. Because the decision below is so clearly wrong, as an alternative to granting a writ of certiorari, this Court should summarily reverse the Ninth Circuit's unpublished order.

CONCLUSION

The petition for a writ of certiorari should be granted or summary reversal should be ordered.

Respectfully submitted,

THOMAS CHRISTENSEN, ESQ.

CHRISTENSEN LAW OFFICES
1000 S. Valley View Blvd.
Las Vegas, NV 89107
courtnotices@injuryhelpnow.com

Counsel for Petitioners