No. _____

In The

Supreme Court of the United States

GARY LEWIS,

Petitioner,

v.

UNITED AUTOMOBILE INSURANCE COMPANY, et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The question presented is whether the constitutional right to a jury trial can be usurped by the trial court and appellate court interfering with the jury's fact finding role? Can the rule of law and our federalism survive if the United States Supreme Court neglects its duty to correct the Circuit Courts when they, with impunity, deny the right to a jury trial? Petitioner Gary Lewis ("Insured"), an American consumer, sued his liability insurance carrier, Respondent United Automobile Insurance Company ("Insurer"), in 2009. Since then, the federal courts, though determining he suffered some damages from a breach of the duty to defend, have denied Lewis a jury trial or *even one* evidentiary hearing and disregarded all of the following: an excess of $3,000,000.00 2008 Nevada state court judgment damaging the insured; a similar 2018 Nevada state court judgment damaging the insured; a similar 2018 California state court judgment damaging the insured; clear Nevada precedent in the almost identical case of *Allstate v. Miller* requiring a jury trial on the reasonableness of the Insurer's discharge of its duty of affirmative good faith and fair dealing; clear Nevada precedent arising out of the almost identical federal case of *Andrew v. Century Surety* requiring a jury trial on all damages caused to the insured; and other damages in addition to the judgments alleged in the complaint. Ultimately, the federal courts ruled on contested material facts against the Insured. These improper rulings took the case from the jury on

QUESTIONS PRESENTED—Continued

summary judgment without review. Three separate courts claimed a "lack of jurisdiction" because of alleged no damages to the Insured. The Court decided that the insured was not damaged by two 2018 state court judgments in California and Nevada. If these failures are left unchecked, what will be the effect on our federalism, the rule of law and the constitutionally protected right to a jury trial?

The Insured sued his Insurer in the state court of Nevada. The Insurer removed the case to federal court under diversity of citizenship. Through improper procedural wranglings, the Insurer has, for fifteen years, prevented the Insured's claim from ever reaching a jury trial, or even an evidentiary hearing. This undermines Nevada's insurance regulatory regime, the rule of law and our federalism. The jury trial is not a nifty procedural nicety for the Insured—it is a Nevada state and United States constitutional right. Justice, even in Nevada, should not be a roll of the dice.

After fifteen years of litigation, the Ninth Circuit dismissed Plaintiffs' third Ninth Circuit appeal claiming a lack of jurisdiction because of no damages to the Insured. This final insult ignored two 2018 state court judgments (that are still valid and damaging the Insured) in the record. This action could cut off the Insured's rights under the Nevada and United States Constitution to a jury trial—FOREVER.

QUESTIONS PRESENTED—Continued

Can the federal judicial system disregard the judicial acts of the state courts, the specific findings of state courts in related actions, the general state court decisional law and the state court statutory law governing insurance claims practices? Is efficiency of the dockets more important than justice? If so, our federalism and the rule of law are no more. The federal judiciary cannot make the insured consumer plaintiffs' path so procedurally complicated and prolonged such that the persistent plaintiff, who perseveres against his insurance company, is ultimately punished because the case has been pending for a prolonged period. No court should ever tire of doing justice. The mere passage of time cannot destroy the constitutional right to a jury trial. The delay in getting to a jury trial is an indictment of the justice system, not a reason for refusing to apply state law faithfully.

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff Gary Lewis, the Insured, was the Plaintiff in a Nevada state court case removed on diversity of citizenship to the Federal District Court for the District of Nevada and Appellant in the Ninth Circuit Court of Appeals.

Respondent and Defendant United Automobile Insurance Company, the Insurer, was the Defendant who removed on diversity grounds to the federal court for the District of Nevada and Appellee in the Ninth Circuit Court of Appeals.

Plaintiff James Nadler was also a Plaintiff in the Nevada state court case that was removed to the Federal District Court for the District of Nevada and an Appellant in the Ninth Circuit Court of Appeals.

RULE 29.6 DISCLOSURE

Gary Lewis is a resident of California. Petitioner is 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.

RELATED CASES – Continued

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.

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.

RELATED CASES – Continued

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; Order Dismissing Appeal entered April 8, 2021.

Nalder v. United Auto. Ins. Co., Supreme Court of Nevada; Case number 81510 consolidated with 81710; Order affirming filed March 17, 2022.

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.

Nalder v. Lewis v. United Auto. Ins. Co., Supreme Court of Nevada; Case number 83881, Order Dismissing Appeal January 19, 2022.

Nalder v. Lewis v. United Auto. Ins. Co., Supreme Court of Nevada; Case number 83392, pending.

RELATED CASES – Continued

Christensen, Arntz & Lewis v. United Auto Ins. Co., District Court, Clark County, Nevada, Case number A-20-825502, removed to U.S. District Court of Nevada *as case number 2:21-cv-01274, and then remanded; removed again as Christensen, Arntz & Lewis v. United Auto Ins. Co.*, case number 2:22-c-02125, pending.

Lewis v. United Auto Ins. Co., Petition for a Writ of Certiorari, case 20-814, Petition denied February 22, 2021.

Nalder v. United Automobile Insurance Company, U.S. Court of Appeals, Ninth Circuit; Case number 22-16073, consolidated with 22-16105, pending.

Nalder v. United Automobile Insurance Company, U.S. Court of Appeals, Ninth Circuit; Case number 21-16283, subject of this Petition for Writ of Certiorari.

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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 order denying relief from judgment pursuant to FRCP 60 to Petitioner

Lewis was filed on December 9, 2022. Lewis timely filed a petition for rehearing and rehearing *en banc*, which was denied on January 19, 2023. This Court has jurisdiction of this petition to review pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

US 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;

US Constitution, Amendment VII states:

> 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 reexamined 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.

Nevada Revised Statute 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

Does the federal court's flagrant disregard of state insurance law manifest a bias? Is it possible that some federal court judges are biased in favor of insurance companies who remove cases to the federal system? Does an overreaching grant of summary judgment by the federal court deprive state residents of their constitutional right to a jury trial? Does a cloak of "lack of jurisdiction" to avoid review by the federal court deprive state residents of their constitutional right to a jury trial? Can the District Court rest on the clear

error of the Ninth Circuit and refuse to evaluate its own standing? Does this type of free-wheeling handling of cases in the federal court insulate insurers, destroy the state's regulation of insurance conduct and eviscerate the duty of affirmative good faith and fair dealing? That is the claim of this petition and this case has the receipts. This case uniquely brings into sharp focus the important question of whether the federal courts, sitting in diversity jurisdiction, can: disregard judgments from the state courts of Nevada and California; refuse to follow the specific findings of state courts in related actions, nullify the general state court decisional law and the state statutory law requiring that insurers deal with affirmative good faith and fair dealing towards their insureds (and the insured public in general). Failure by the federal judiciary to act within the bounds of due process denies the Insured a right to jury trial as guaranteed in the United States Constitution and the Nevada State Constitution. If the Ninth Circuit's actions are not reviewed, our federalism and the rule of law for Nevada insureds is no more.

This case is a unique opportunity because of the clear record, across 15 years of litigation, where no jury trial or *even one evidentiary hearing* has occurred. All decisions denying relief to the Insured were made by the court on motions for summary judgment. These decisions and the refusal to review them nullify the clear Nevada court and statutory precedent requiring jury trial of the issues presented in the case. The two Nevada Supreme Court decisions requiring jury trial are cases that are factually indistinguishable from the

claims of the Insured here. This provides a clear record for review of the legal principles applicable to our federalism and jury trial guarantees.

The Ninth Circuit's order affirming the District Court denial of FRCP 60 relief rewards, rather than punishes, the Insurer's abusive and wasteful litigation. The Appellate Court must base its review on the trial court record and its rulings must be consistent with the record in the trial court. The trial court does not have discretion to ignore or disregard evidence in the record. If the Ninth Circuit is not checked in this circumstance, then all insureds will be subject to the whims of the particular judge or panel assigned the case. This is the opposite of the rule of law. The Ninth Circuit's 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 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 Ninth Circuit destroyed Nevada's insurance regulatory regime.** 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 "If an insurer violates its duty of good faith and fair dealing by failing to adequately inform the insured of a reasonable settlement opportunity, the insurer's actions can be a proximate cause of the insured's damages arising from a foreseeable settlement or excess judgment." *Allstate Ins. Co. v. Miller*, 212 P.3d 318 (Nev. 2009) Nevada law holds "whether Allstate could have settled with Hopkins within the policy limits in conjunction with Miller is a disputed issue of material fact that the trier of fact must resolve." *Allstate Ins. Co. v. Miller*, 212 P.3d 318 (Nev. 2009).

In addition to liability being a question of fact for the jury, damages for an insurer's breach of the duty to defend under Nevada law requires a jury trial. "[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 (Nev. 2018) quoting *Khan v. Landmark Am. Ins. Co.*, 326 Ga.App. 539, 757 S.E.2d 151, 155 (2014).

3. **The Ninth Circuit callously cutoff the Insured's jury trial right.** 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 recognized 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." *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). The Ninth Circuit twice declined to follow the Nevada Supreme Court's mandate binding the Insurer and Insured in this case.

4. **The Ninth Circuit hides its destruction of jury trial with improper standing rulings.** It goes without saying that these type of economic damages, flowing from and including a 2018 Nevada judgment and 2018 California judgment against the insured, 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 affirmative 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). These damages were alleged in the complaint, not contested by affidavit and ultimately ignored by the federal trial and appellate courts.

5. **Summary Judgment on liability where damages are not contested requires the damage allegations of the complaint be accepted as true for jurisdiction, 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)).

6. **The Ninth Circuit's actions are an affront to the Constitutional right to a jury trial provided by both the United States 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). Settled law requires this writ issue. Else the law is not settled, if the circuit courts may violate the law with impunity and the Insured have no recourse.

Justice Thomas has stated that "there is some dispute whether the guarantee of a jury trial protects an individual right, a structural right or both." He reiterated that the jury is a "fundamental reservation of power in our constitutional structure." *Wellness International Network, Ltd. v. Sharif*, 135 S.Ct. 1932, 1961 n.1 (2015)

B. Factual and Procedural History[1]

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).

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 within the policy limits.

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 § 686A.310. The complaint included claims for general, special, statutory and punitive damages.

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

Lewis and Nalder entered into an agreement in lieu of immediate execution on the judgment, which damaged Lewis in an amount in excess of the judgment as he transferred valuable rights to Nalder as partial 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 sought to deny Lewis a jury trial and 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 settled black letter law. The district court agreed with UAIC and refused to allow the case to go to a jury 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 again granted partial summary judgment to each party denying the Insured's right to a jury trial. (App. 15) 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 as a matter of law 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 on the admitted failure to defend the Insured, failure to settle within policy limits and failure to adequately inform the Insured of settlement opportunities. The court also wrenched the case from the jury when it construed disputed facts regarding the reasonableness of UAIC's actions in favor of the movant UAIC. UAIC made three payments (that Lewis then 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, which was 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 questions of the reasonableness of UAIC's denial of coverage, refusal to defend, failure to communicate settlement offers and violations of Nevada's claims handling regulatory code NRS 686A.310. UAIC did not appeal the finding of breach of the duty to defend or 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 jury in the trial court on remand.

10. Through different counsel Nalder took action against Lewis in Nevada and in California. These actions by Nalder were a direct result of UAIC's suggestion that she must maintain her continued ability to collect her judgment from Lewis. The

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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 sua sponte 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.

resulting 2018 Nevada and California state court judgments and the attorney fees associated with those actions are additional damages to 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 E. 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 state court, UAIC has further damaged its insured Lewis, and his attorneys by filing a Federal SLAPP lawsuit alleging medieval barratry. The barratry claims have since been dismissed.

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. 70).

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 FRAP 28(j) letter which contained the 2018 state court judgments of California and Nevada and dismissed the appeal for lack of standing based on no damages to the Insured. (App. 10)

15. Lewis petitioned for rehearing and rehearing en banc. That petition was denied on July 14, 2020.

16. Lewis petitioned this Court for a writ of Certiorari. The petition was denied. (Docket 20-814)

17. Back in the district court, Lewis brought a motion under FRCP 60 to have the federal court apply the ruling of the Nevada Supreme Court by amending the judgment to provide damages based on the record, including the two 2018 judgments from California and Nevada, and allow a jury trial on additional liability and damages. (App. 51)

18. The district court, in its discretion, ruled on the motion, thus confirming the clear jurisdiction and appropriate timing of the motion, but then denied relief to the Insured based on the appellate court's finding of lack of appellate jurisdiction. (App. 4)

19. This ruling disregarded the Nevada Supreme Court ruling on certified questions, the two valid 2018 state court judgments, the Nevada insurance regulatory scheme and the Insured's right to a jury trial.

20. The Insured appealed and the Ninth Circuit again disregarded the damages to the Insured and the Nevada Supreme Court's legal precedent. (App. 4 and 90)

21. The Ninth Circuit denied relief to the Insured and denied rehearing en banc. (App. 1 and 49)

REASONS FOR GRANTING THE WRIT

The Court should grant the writ to decide important questions regarding the Appellate Court's ability to deny a jury trial to the Insured. The Ninth Circuit's improper decline of jurisdiction destroys the jury trial right of the Insured. The Ninth Circuit's factual findings are contrary to the record and destroy, rather than preserve, the right to a jury trial. The District Court's blind adoption of this jurisdictional decision improperly ignores the merits and the District Court record and results in injustice. Civil jury trial rights are just as important as criminal jury trial rights.

Sir William Blackstone, in his influential treatise on English common law titled *Commentaries on the Laws of England*, called the right "the glory of the English law" and necessary for "[t]he impartial

administration of justice," which, if "entirely entrusted to the magistracy, a select body of men," would be subject "frequently [to] an involuntary bias towards those of their own rank and dignity." The trial court's factual findings substitutes the federal judiciary for the right to a jury trial. Nevada's insurance regulatory regime is destroyed by the federal courts' abusive denial of the right to a jury trial.

I. THE NINTH CIRCUIT'S ORDER CONFLICTS WITH THIS COURT'S PRECEDENT AND CREATES A CLOAK OF "LACK OF JURISDICTION" TO HIDE USURPING FACT FINDING BY THE JURY

A. The Ninth Circuit's Order Substitutes Appellate Fact Finding For The Jury's Fact Finding Role

1. Neither the Ninth Circuit nor the federal trial court can decide factual issues that are required to be tried to a jury. Stability and judicial economy is promoted by recognizing that the jury, not the trial court judge, and certainly 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. It also 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 Insured's right to have those facts submitted to a jury. It also conflicted with the trial court's finding and award of limited damages in favor of the Insured. That finding was not appealed by the Insurer. The Ninth Circuit should have been restrained to the summary judgment record made in the trial court. ("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. The Ninth Circuit however did not base its decision of no appellate jurisdiction on the trial court record. This was later compounded by the trial court, on remand, relying on the erroneous finding (on a limited appellate record) of no appellate jurisdiction. The Ninth Circuit, on subsequent appeal, then ignored the additional damages that were placed on the record in the trial court, and again refused jurisdiction based on the Ninth Circuit's limited prior appellate jurisdictional finding.

The Insured was denied his right to have a jury determine the issues of the Insurer's liability and the extent of damages. This is clear law from two almost identical cases that have been decided by the Nevada Supreme Court and which all federal courts sitting in diversity must follow. It does not matter if it is the

federal trial court or the appellate court. As in *Allstate v. Miller*, the Insured here was not informed by his insurer of an opportunity to settle within the policy limits. Unlike *Miller*, the insured did not get to have a jury evaluate whether that failure on the part of the Insurer was a breach of the duty of affirmative good faith and fair dealing. This right was denied by the federal trial and appellate courts.

As in *Century Surety*, the Insured here was abandoned and not defended by his Insurer. Both insureds suffered multimillion dollar judgments against them personally. "An insurer that refuses to tender a defense for 'its insured takes the risk not only that it may eventually be forced to pay the insured's legal expenses but also that it may end up having to pay for a loss that it did not insure against.' *Hamlin*, 86 F.3d at 94. Accordingly, the insurer refuses to defend at its own peril." *Century Sur. Co. v. Andrew*, 432 P.3d 180 (Nev. 2018). Unlike *Century Surety*, the Insured here was refused the opportunity to present the question of the amount of damages that are consequential to the breach of the duty to defend to a jury. This right was replaced by the improper federal trial and appellate court fact finding.

Fact finding by the jury 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. In Nevada, on diversity cases, that fact finding is reserved to the jury. *See Miller* and *Century Sur.*, supra.

The Ninth Circuit here has dispelled that notion and made factual determinations dispositive of the underlying case without submission to a jury and contrary to the trial court record containing the 2018 judgments. The ruling is also contrary to the trial court's favorable ruling of limited damages awarded to the Insured, and not appealed by the Insurer. The Appellate Court couched its factual evaluation as relevant to "standing," but that approach misses the mark. The Insurer offered "standing" as a distraction, but this case does not present an Article III standing issue. The Insured alleged damages in the complaint. At the time of the complaint, and during the entire time the case was pending below, the Insured was suffering

consequential damages from having a Nevada state court judgment against him, including but not limited to, the judgment itself. The Insured prevailed below. The Respondent Insurance Defendant breached its duty to defend. Limited damages were found and awarded as a matter of law. The Insured has alleged ongoing damage and has concrete injury, in addition to the judgment that the Insurer claims "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 a valid and enforceable judgment against an insured as a result of his insurance company's breach of the duty to defend. At the time of the denial of the FRCP 60 relief, consequential damages remain part of the record.

B. The Ninth Circuit's Order, Cloaked In "Lack Of Standing," Denies A Jury Trial To The Insured In Conflict With This Court's Opinions, The Opinions Of Other Circuit Courts And Even The 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. **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 the Insured. 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." *Id.*

2. **The Ninth Circuit's 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 for the jury. It is not one for the trial court to decide. It is certainly not for the appellate court to decide.

3. **The Ninth Circuit's order also conflicts with 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 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 And Shirking Its Responsibility To Consider The Merits Of The Appeal.

1. The Ninth Circuit's order conflicts with the Nevada Supreme Court's mandate that the consequential damages from the breach of the duty to defend must be submitted to the jury. *Century Sur. Co. v. Andrew*, supra. This also brings the order into direct conflict 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. It cuts off review of the trial court's summary resolution which removed the decision from the jury. That is 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, denies 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 specifically surrounding its duty to defend 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 which usurps and perverts Nevada's insurance regulatory regime.

II. WHETHER DAVID STANDING UP TO GOLIATH SHOULD ALSO BE FACED WITH THE ENTIRE PHILISTINE ARMY OF THE FEDERAL JUDICIARY PRESENTS AN IMPORTANT AND RECURRING QUESTION

The Insured pushing back against his insurance company presents a recurring question where the weak individual, the consumer insured, is pitted like David against the far more litigious insurance company which has more funds, more lawyers, more judicial contacts and more legislative contacts—a true legal Goliath. The federal judiciary cannot be allowed to jump on the side of Goliath and wrench from the insured his single stone—the constitutional right to a jury trial. 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 nullifying the constitutional jury right. Insureds expend enormous effort in time, money and emotional capital to hold insurers responsible to follow the law. Often, as here, extending over years and even decades of litigation. 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 a lower court fails to apply "well-established Supreme Court case law") (Breyer, J., dissenting from denial of petition for certiorari). Why is this the law? If not, the lower courts are unfettered from the law. The lower courts must follow the law expressed above because the lower courts are the only courts where the law can be enforced. The trial courts are where the rubber meets the road. Pronouncements by appellate courts not faithfully applied are meaningless pronouncements of the law that never affect the rights of actual litigants. 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 the insured also pleaded and appealed additional damages and causes of action for which they plainly had

standing requiring a jury trial. These improper errors regarding standing mask the greater problem of the violence done to the jury trial right and the rule of law. 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

In order to preserve our federalism, the right to trial by jury and the rule of law in America the petition for a writ of certiorari should be granted or summary reversal should be ordered.

Respectfully submitted,

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