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# Summary of Estate of LoMastro v. American Family Ins., 124 Nev. Adv. Op. No. 89

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# Estate of LoMastro v. American Family Ins., 124 Nev. Adv. Op. No. 89 (Oct. 30, 2008)[1]

## INSURANCE LAW

**Summary**

Appeal from a district court judgment in an insurance matter and from a post-judgment order denying an NRCP 60(b) motion to set aside the judgment.

**Disposition/ Outcome**

Affirmed in part, reversed in part, dismissed in part, and remanded.

**Factual and procedural History**

This matter arose from a single-vehicle rollover accident that claimed Matthew LoMastro's life in April 2005. The vehicle's owner, Chad Leach was a friend of Matthew's, and a passenger in the vehicle. In May 2005, Matthew's parents, the LoMastros, discovered that Leach did not maintain automobile insurance on the vehicle. Thus, to recover insurance proceeds, the LoMastros made a claim with their insurance company, American Family Insurance Group under the uninsured motorist provision of their policy. American Family denied the claim, contending that, under Nevada law, uninsured motorist coverage does not apply to single-vehicle accidents.

Meanwhile, the LoMastros instituted a civil action against Leach claiming that he negligently entrusted his vehicle to Matthew and caused Matthew's death. Leach failed to answer the complaint and the LoMastros eventually had default entered against them. After being informed of default entry, American Family moved to intervene in the action against Leach. The district court granted this motion prior to default judgment being entered. To the motion to intervene, American Family attached an answer in intervention attempting, among other things, to contest Leach's liability. The LoMastros moved to strike the answer in intervention arguing it was untimely. The district court found the motion timely and thus denied the motion to strike, but held that the entry of default precluded American Family from contesting Leach's liability.

The LoMastros then filed an amended complaint and a second amended complaint, which asserted new causes of action against American Family directly, including claims for breach of the implied covenant of good faith and fair dealing and violations of the Nevada Unfair Claims Practices Act.[2] American Family answered the second amended complaint, denying the allegations against Leach and itself, and then moved for summary judgment on all of the causes of action in the complaint. After determining that uninsured motorist coverage does not apply to single-vehicle accidents, the district court granted American Family's motion for summary judgment on all claims against it.[3] Thereafter, the LoMastros moved to amend or set aside the

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[2] These amended complaints did not alter the allegations against Leach.

[3] The district court also entered default judgment against Leach in the amount of $3 million.

summary judgment in favor of American Family under NRCP 59(e) and 60(b). The district court denied that motion, affirming its summary judgment. This appeal followed.

**Discussion**

Entry of default against Leach was sufficient to bind American Family

In Nevada, an insurance company "is bound by the result of an action between its insured and an uninsured motorist when the carrier has notice of the action but elects not to intervene."[4] Additionally, when an intervener intervenes, it "is bound by all prior orders and adjudications of fact and law as though [it] had been a party from the commencement of the suit."[5] In regards the issue of whether an entry if default is sufficient to bind an intervener, the court concluded that when an intervener wishes to assert defenses to liability on behalf of the original defendant, it must intervene before entry of default or move to set aside the default. The Court reasoned that because entry of default acts as an admission by the defending party of all material claims made in the complaint,[6] it generally resolves the issues of liability and causation and leaves open only the extent of damages.[7]

Here, the court concluded that because American Family intervened after the entry of default, despite having notice of the LoMastros' intent to seek default, it was limited, on the claims against Leach, to contesting the amount of damages, or alternatively, it could have moved to set aside the entry of default.

American Family put forth two arguments to contest the conclusion that they were bound by the entry of default. First, American Insurance argued that under Allstate Insurance Co. v. Pietrosh[8] it would have been bound only upon the entry of default judgment. The court rejected this argument. The Court reasoned that nothing in the Court's conclusion in Pietrosh indicates that insurers are only bound by default judgments.[9] In Pietrosh, the court invalidated an exclusion in an uninsured motorist policy that a judgment obtained against an uninsured motorist would not bind the insurer unless the insurer consented to the litigation.[10] The court recognized that the exclusion would be reasonable if the insurance company did not have notice of the litigation or if judgment was obtained by default but held that an insurance company with notice should be bound by a judgment obtained through adversarial proceedings despite contrary rules regarding privity in using a judgment against a party by estoppel.[11,12] Thus, the Court concluded

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[4] State Farm Mut. Auto. Ins. v. Wharton, 88 Nev. 183, 187 n.7, 495 P.2d 359, 362 n.7 (1972) (citing State Farm Mut. Auto. v. Christensen, 88 Nev. 160, 494 P.2d 552 (1972); Pietrosh, 85 Nev. 310, 454 P.2d 106 (1969)).

[5] Galbreath v. Metro. Trust Co., 134 F.2d 569, 570 (10th Cir. 1943). See also Arizona v. California, 460 U.S. 605, 615 (1983) ("[P]ermission to intervene does not carry with it the right to relitigate matters already determined in the case, unless those matters would otherwise be subject to reconsideration.").

[6] See Ewing v. Jennings, 15 Nev. 379, 382 (1880) (holding that defaulting is an admission of all averments in the complaint); Nev. Civ. Prac. Manual § 10.04[5] (Matthew Bender & Company, Inc. ed., 5th ed. 2007) ("If the defendant is in default, then all well-pleaded facts will be deemed admitted, except as to items of damages. Thus, liability will be assumed and the inquiry generally will focus on proof of the amount of damages.").

[7] Nev. Civ. Prac. Manual, supra note 6, at § 10.04[5].

[8] 85 Nev. 310, 454 P.2d 106.

[9] Id. at 316, 454 P.2d at 111.

[10] Id. at 316-17, 454 P.2d at 110-11.

[11] Id.

[12] The Court noted that they expanded on the Pietrosh analysis in State Farm Mut. Auto. v. Christensen, by ultimately determining that a default judgment bound an insurer that chose not to intervene in the action against the uninsured motorist. 88 Nev. at 162-63, 494 P.2d at 553.

that their reasoning in Pietrosh, which was expanded in Christensen, supports their conclusion that the entry of default bound American Family in this case.

Second, American Family asserted that the district court improperly applied Eckerson v. Rudy.[13] The Court agreed that the Eckerson analysis was inapplicable to this case. In Eckerson, the Nevada Supreme Court affirmed a district court order denying a motion to intervene because not only was a default judgment entered against the defendant, but the judgment had been satisfied.[14,15] The Court concluded that Eckerson was inapposite because it addressed the timeliness of motions to intervene, whereas in this case the issue addressed was the effect of the entry of default against the uninsured motorist on an intervener. Here, since neither the LoMastros nor American Family challenged the district court's order granting the motion to intervene in this appeal, the Court concluded that although the district court improperly applied the Eckerson analysis, it correctly determined that American Family was bound by the entry of default.

The district court erred when it held that Nevada law requires a collision between two vehicles for recovery of uninsured motorist benefits

American Family argued that the court should interpret the LoMastros' policy and Nevada law to require physical contact between an insured or an insured's vehicle and an uninsured vehicle before coverage is invoked. First, American Family argued that the Legislature's use of the phrase "other vehicle" in NRS 687B.145(2) indicates it contemplated the involvement of two cars in accidents giving rise to claims for uninsured or underinsured motorist benefits.[16] But the Court points out that "other vehicle" could refer to a vehicle other than the one for which a policy is being issued, without requiring a collision between the insured car and the uninsured. When a statute "is capable of being understood in two or more senses by reasonably informed persons, the statute is ambiguous."[17] Because NRS 687B.145(2) has two reasonable interpretations, it must be interpreted according to the Legislature's intent.[18]

The Court has previously stated that the clear intent of the Legislature in requiring insurance companies to offer uninsured motorist coverage was to compensate an injured insured for injuries caused by the negligence of the owner or operator of an uninsured or underinsured motor vehicle.[19] In light of that legislative intent, the Court has also stated that they "construe

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[13] 72 Nev. 97, 295 P.2d 399 (1956).

[14] Id. at 98-99, 295 P.2d at 399.

[15] The court discussed a similar case, Lopez v. Merit Ins. Co., in which the Court stated that Eckerson was consistent with other cases preventing intervention after the entry of a final judgment and reversed a district court order allowing an insurance company to intervene in a case against an underinsured driver. 109 Nev. 553, 557, 853 P.2d 1266, 1268 (1993). In Lopez, the Court specifically declined to address whether the default judgment against the underinsured driver would bind the insurance company in a later proceeding. Id. at 558, 853 P.2d at 1269.

[16] NRS 687B.145(2) requires that insurance policies "contain a provision which enables the insured to recover up to the limits of his own coverage any amount of damages for bodily injury from his insurer which he is legally entitled to recover from the owner or operator of the *other vehicle*. . . " (emphasis added).

[17] McKay v. Bd. of Supervisors, 102 Nev. 644, 649, 730 P.2d 438, 442 (1986).

[18] State, Div. of Ins. v. State Farm, 116 Nev. 290, 294, 995 P.2d 482, 485 (2000).

[19] Allstate Ins. Co. v. Pilosof, 110 Nev. 311, 314, 871 P.2d 351, 353-54 (1994) ("Uninsured motorist coverage is first-party coverage that fills the void left by uninsured parties who are liable for injuries resulting from vehicular accidents."); State Farm Mut. Auto. Ins. v. Hinkel, 87 Nev. 478, 482, 488 P.2d 1151, 1153 (1971) ("It is [the] clear intent of the legislature that NRS 693.115(1) requires protection against the peril of injury caused by an uninsured motorist to a 'person insured.' The legislative purpose in creating compulsory uninsured motorist coverage was to give needed relief to injured parties through insurance paid for by the insured.").

our [uninsured and underinsured motorist] statutes in favor of recovery by the insured."[20][40] Thus, the Court concluded that because the plain language of NRS 687B.145(2) does not limit recovery of uninsured motorist benefits to accidents involving more than one vehicle and since such a limitation would unnecessarily limit an insured's ability to recover for his or her injuries in contravention of the legislative intent, NRS 687B.145(2) should not be read as prohibiting recovery of uninsured motorist benefits for single-vehicle accidents.

American Family next argued that the "physical contact" requirement in NRS 690B.020(3)(f) applies to all accidents for which recovery of uninsured motorist benefits are sought.[21] However, the Court reasoned that because NRS 690B.020(3) has several alternate definitions of "uninsured motorist" separated by the word "or," and requires physical contact to satisfy only one of those definitions, the plain language of NRS 690B.020(3) indicates that the "physical contact" requirement applies only to accidents involving unidentified or hit-and-run motorists. Thus, the Court concluded NRS 690B.020 does not require physical contact between two vehicles for recovery of uninsured motorist benefits.

American Family next argued that Kern v. Nevada Insurance Guaranty precludes recovery. In Kern, the Court specifically addressed NRS 690B.020(3)(f)(1).[22,23] In Kern, the Court stated, "[m]ost jurisdictions recognize that the purpose behind the 'physical contact' requirement is to prevent fraudulent claims where the insured loses control of his or her car and claims a 'phantom driver' forced him or her off the road."[24] However, the Court stated here that the purpose clarified in Kern only applies in situations where the party at fault is unknown or unidentifiable. Thus, the court concluded that in a case like this one, where the identity of the alleged tortfeasor is known, the physical contact requirement serves no purpose and is thus inapplicable.

Finally, American Family urged the Nevada Supreme Court to adopt the view taken by the federal district court applying Texas law. In Burton v. State Farm Mutual Automobile Insurance Co., the federal court held physical contact was required in order to recover uninsured motorist benefits.[25] The Court concluded that the federal court's analysis of physical contact was only dicta and that the analysis does not suggest that the court intended to state a "physical contact" requirement for all uninsured motorist claims. The Court further stated, that even if the federal court did want to make a general "physical contact" requirement, that court's dicta does not persuade this Court that Nevada should adopt such a requirement.

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[20] Allstate Ins. Co. v. Maglish, 94 Nev. 699, 702, 586 P.2d 313, 314 (1978).

[21] NRS 690B.020(1) requires insurance companies to offer coverage "for the protection of persons insured thereunder who are legally entitled to recover damages, from owners or operators of uninsured or hit-and-run motor vehicles, for bodily injury, sickness or disease, including death, resulting from the ownership, maintenance or use of the uninsured or hit-and-run motor vehicle."

[22] NRS 690B.020(3)(f)(1) requires physical contact between a motorist and an unidentified vehicle for that vehicle to meet one of the statutory definitions of "uninsured motor vehicle."

[23] 109 Nev. 752, 754, 856 P.2d 1390, 1392 (1993).

[24] Id. at 755, 856 P.2d at 1392.

[25] In Burton, the court considered an accident in which two family members were injured in a single-car accident caused by a third family member's negligent driving. 869 F. Supp. 480, 483 (1994). After determining that no liability or uninsured motorist coverage was available because of various policy exclusions, the court then addressed the lack of physical contact with an uninsured vehicle. Id. at 488. By addressing the physical contact issue, the federal court apparently meant to preclude any other claim for uninsured motorist benefits based on a phantom driver not previously alleged.

On appeal, the LoMastros also asserted that summary judgment was improper on the claims they made against American Family for bad faith denial of their insurance claim and violations of the Unfair Claims Practices Act. In regards to the bad faith claim, the Court concluded that because they reversed summary judgment on the physical contact issue, a genuine issue of material fact remains as to whether American Family had a reasonable basis to deny the LoMastros' claim, and thus reversed summary judgment on the bad faith claim as well.[26]

The Court further concluded that the district court erred by granting summary judgment to American Family on the LoMastros' claim for violations of the Unfair Claims Practices Act.[27] The Court stated that based on the facts the LoMastros alleged[28] there is a genuine issue of material fact as to whether American Family violated the Act, and summary judgment was improper.

**Conclusion**

The Court affirmed the district court's order that American Family was bound by the entry of default against Leach because entry of default binds an insurance company intervener as to the liability of an uninsured motorist defendant if the insurance company had notice of the litigation and the plaintiff's intent to seek entry of default, but failed to intervene. The Court stated that on remand, American Family may contest only the amount of damages in the claims against Leach or, in the alternative, American Family can move to have the default set aside.

In regards to summary judgment, the Court concluded that the district court erred when it granted summary judgment to American Family. The Court reasoned that the law does not, in all cases, require physical contact between at least two cars for recovery of uninsured motorist benefits. Therefore, the district court's grant of summary judgment was reversed as a matter of law. Additionally, because reversal of summary judgment on that matter creates a genuine issue of material fact regarding the LoMastros' allegation that American Family denied their claim in bad faith the district court's grant of summary judgment on that claim was reversed. And finally, the Court concluded that the district court further erred when it granted summary judgment for American Family on the LoMastros' claims of violation of the Unfair Claims Practices Act because genuine issues of material fact exist as to the reasonableness of American Family's investigation and the manner in which it denied the LoMastros' claim. Therefore, the Court reversed the district court's grant of summary judgment to American Family on all grounds and remanded the matter for further proceedings.[29]

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[26] The LoMastros can recover for bad faith if they can prove that American Family refused their claim "'without proper cause'" and that the claim was "for a loss covered by the policy." Pemberton v. Farmers Ins. Exch., 109 Nev. 789, 793, 858 P.2d 380, 382 (1993) (quoting United States Fid. v. Peterson, 91 Nev. 617, 620, 540 P.2d 1070, 1071 (1975)).

[27] NRS 686A.310(1) identifies prohibitions as unfair practice

[28] The Court listed the following facts as being pertinent: that American Family did not promptly respond to the LoMastros' communications, that the ten-month period in which it investigated the claim without affirming or denying coverage was unreasonable, and that it did not provide sufficient explanation for denying the claim

[29] The LoMastros have appealed the district court's order denying their motion to amend the judgment under NRCP 59(e) or to set aside the judgments under NRCP 60(b). To the extent that the district court's order denied their NRCP 59(e) motion to alter or amend the judgment, it is not an appealable order. See Edwards v. Emperor's Garden Rest., 122 Nev. 317, 323 n.4, 130 P.3d 1280, 1284 n.4 (2006). And in light of this opinion, the LoMastros' appeal from the district court's order denying their NRCP 60(b) motion to set aside the judgments is dismissed as moot.