**Case No. 14-15975**

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BECKY MCVAY, Plaintiff-Appellant,

vs.

ALLIED WORLD ASSURANCE COMPANY, INC., and
YORK RISK SERVICES GROUP, INC., *et al.,* Defendants-Appellees

On Appeal from the United States District Court for the
District of Nevada

District Court Case No. 3:13-cv-00359-HDM-WGC

# APPELLEE YORK RISK SERVICES GROUP, INC.'S ANSWERING BRIEF

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Defendant/Appellee York Risk Services Group, Inc. ("York") makes the following disclosure:

1) The parent of York Risk Services Group, Inc. is Fox Hill Holdings, Inc. The parent of Fox Hill Holdings, Inc. is York Risk Services Corp. The parent of York Risk Services Corp. is Onex York Mid Corp. The parent of Onex York Mid Corp. is Onex York Holdings Corp.

2) The majority owner of Onex York Holdings Corp. is Onex Partners III, LP. Onex Partners III, LP is a private equity fund whose securities are subject to a Reg. D exemption. Onex Corporation, which is publicly held, is a 10%+ owner of Onex Partners III, LP.

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2. Is McVay a third party beneficiary or an intended beneficiary of the store owner's insurance policy?

3. Can York be liable under any breach of contract theory or third party beneficiary theory for compensating McVay for her injuries?

4. Does the Indian Self-Determination Act require tribes to obtain liability insurance for their business activities, such as the convenience store conducted by the FTDC where McVay slipped and fell, so that McVay would be a third party beneficiary to the insurance policy?

5. Should McVay be allowed to amend her complaint?

## II. STATEMENT OF THE CASE

Accident: The Fallon Tribal Development Corporation ("FTDC") owns and operates the Fox Peak Station, a convenience store and gas station located on the Fallon Paiute Shoshone Indian Reservation in Fallon, Nevada. *See* Excerpts of Record ("ER") 75 (Amended Complaint ¶¶ 7-8). The FTDC is owned by the Fallon Paiute Shoshone Tribe. *Id*. On or about August 6, 2009, McVay alleges

that she entered the Fox Peak Station, slipped, fell and was injured. ER 75-76 (Amended Complaint ¶¶ 7, 9 & 11).

Insurance Coverage: McVay alleges that defendant Allied World Assurance Company (U.S.), Inc. ("Allied") provided a property and casualty insurance policy to the FTDC. ER 76-77 (Amended Complaint ¶ 20). She asserts that York was the third party administrator for Allied and that York participated in administering her claim for Allied. ER 77 (Amended Complaint ¶ 21).

Prior Litigation: McVay initially filed a personal injury action in the State District Court for Churchill County against the FTDC. ER 77 (Amended Complaint ¶ 29). The parties stipulated to dismiss that case. ER 77 (Amended Complaint ¶ 30). McVay then filed an action against the FTDC in the Tribal Court for the Fallon Paiute Shoshone Tribe. ER 77 (Amended Complaint ¶ 31). That case is still pending as McVay is attempting to add Allied and York as defendants to the case, asserting claims similar to those in this federal action. *See* ER 77 (Amended Complaint ¶ 33). The last order entered by the Tribal Court acknowledged that the FTDC was dismissed from the case, but the Tribal Court needed to determine if the case could proceed without the named defendants (FTDC and Fox Peak Station) to the original action. Brief of Becky McVay as Appellant ("McVay Brief") at 5-6.

Claims Against Allied and York in the Amended Complaint Filed in This Case: McVay's amended complaint in the action filed in the Federal District Court for the District of Nevada first asserts she is a third party beneficiary of the insurance contract between Allied and the FTDC. ER 78. Neither McVay nor York was a party to this insurance contract. ER 6. McVay claims that Allied and York breached the contract with the FTDC, thereby causing her to suffer damages for which Allied is liable. ER 78.

McVay's second cause of action against York is for the contractual breach of the covenant of good faith and fair dealing. ER 79. McVay also refers to this cause of action as a claim for fraud and bad faith. ER 78 (Amended Complaint ¶ 36).

Federal Court Proceedings: McVay filed her initial complaint in the District Court on July 3, 2013. ER 84. She filed an amended complaint on August 29, 2013. ER 74. Allied and York both filed motions to dismiss the amended complaint pursuant to FRCP 12(b)(6). ER 85 & 86. On April 18, 2014, the District Court granted the motions to dismiss and denied McVay's request to file yet another amended complaint. ER 89 & 90.

## III. SUMMARY OF THE ARGUMENT

First, York did not issue an insurance policy to cover any party involved in this case.

Second, Nevada does not recognize a direct action by an injured party against an alleged tortfeasor's liability insurance carrier. McVay attempts to get around this restriction by arguing she is an insured under the policy and/or a third party beneficiary to the policy. Neither of these arguments is supported by the facts or the law.

The store where McVay was injured was covered by a liability insurance policy that made the store's owner the insured. The policy was meant to protect the owner from liability (hence the name liability insurance), not insure any random person who entered the store and made a claim against the store. The liability insurance policy's definition of "insured" does not include an injured person who makes a claim.

McVay twists the simple, logical definition of "insured" to attempt to include herself within the parties that may enforce the insurance policy. She asserts that a written contract exists that makes her an insured. She asserts that the Indian Self-Determination Act requires Indian tribes to obtain insurance, which she misconstrues as a "contract." This Act does not apply to businesses operated by tribes, and if it did, the Act's terms still do not make McVay an insured. Also the charter for the Fallon Tribal Development Corporation does not constitute a contract that would make McVay an insured.

As stated below, the District Court correctly ruled that McVay does not have a cognizable cause of action against York or Allied, and properly dismissed the case with prejudice.

## IV. ARGUMENT

### A. STANDARD OF REVIEW

This Court reviews de novo a district court's order granting a motion to dismiss under Rule 12(b)(6). *Cook v. Brewer,* 637 F.3d 1002, 1004 (9th Cir. 2011).

A court may dismiss a complaint for failure to state a claim upon which relief may be granted if the complaint does not contain sufficient factual matters to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). In *Iqbal*, the United States Supreme Court clarified the two-step approach courts are to apply when considering motions to dismiss. First, a court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 679. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.* at 678. Second, a court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id*. at 679. A claim is facially plausible when the plaintiff's complaint alleges facts that allow a court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 678. Where the complaint does not permit the court to infer

more than the mere possibility of misconduct, the complaint has "alleged-but has not shown-that the pleader is entitled to relief." *Id.* at 679 (internal quotation marks omitted). When the claims in a complaint have not crossed the line from conceivable to plausible, the complaint must be dismissed. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Moreover, a complaint must contain either direct or inferential allegations concerning "all the material elements necessary to sustain recovery under some viable legal theory." *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co*., 745 F.2d 1101, 1106 (7th Cir. 1984).

Finally a district court's denial of a request to file and amended complaint is reviewed using an abuse of discretion standard. *Graham-Sult v. Clainos,* 756 F.3d 724, 748 (9th Cir. 2014). A district court does not abuse its discretion by dismissing a complaint without leave to amend if an amendment would be futile. *Duckett v. Schamehorn*, 564 Fed. Appx. 290 (9th Cir. 2014).

**B. APPLICABLE LAW**

In diversity cases, a federal court must conform to state law to the extent mandated by the principles set forth in the seminal case of *Erie*, which requires federal courts sitting in diversity to apply state substantive law and federal procedural law. *Feldman v. Allstate Inc. Co.*, 322 F.3d 660, 666 (9th Cir. 2003); *see also Mirch v. Frank,* 295 F. Supp. 2d 1180, 1183 (D. Nev. 2003); *Hoag v. Sweetwater Intl.*, 857 F. Supp. 1420, 1423 (D. Nev. 1994). In interpreting state

law, federal courts are bound by pronouncements of the forum state's highest court. *Mirch,* 295 F. Supp. 2d at 1183.

This case was filed in the District Court on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332. Accordingly, in determining the instant motion to dismiss, the District Court applied the substantive law of Nevada with respect to McVay's claims.

### C. IN NEVADA, A CLAIMANT WHO HAS NOT SUCCESSFULLY OBTAINED A JUDGMENT AGAINST A TORTFEASOR HAS NO DIRECT CLAIM AGAINST AN INSURANCE COMPANY PROVIDING LIABILITY COVERAGE

McVay's first cause of action is for breach of contract under which she asserts she is a third party beneficiary of the insurance policy issued by Allied to the FTDC. ER 78. York was the "third party administrator" for Allied, which means that York did not provide any insurance policy to the FTDC that could have provided coverage for McVay's slip and fall accident. However even if York had provided an applicable insurance policy, the District Court would still have dismissed York because McVay never obtained a judgment against the FTDC.

McVay's claims against the FTDC in the Tribal Court were dismissed, so she cannot obtain a judgment against the FTDC. McVay Brief at 2-3 & 5. Based on this, Allied has no duty to pay any liability incurred by the FTDC. If Allied has no duty to pay, then York could not have any liability, even under McVay's theories. Also, McVay simply overlooks the fact that York would never have a

duty to pay on a judgment incurred against the FTDC since York never agreed in an insurance policy to pay for the FTDC's liabilities.

Under Nevada law, a tort claimant who has not obtained a judgment against a tortfeasor has no cognizable claim against the alleged tortfeasor's liability carrier. *Knittle v. Progressive Cas. Ins. Co*., 908 P.2d 724, 726, 112 Nev. 8, 11 (1996). In *Knittle,* the plaintiff filed an action against an alleged tortfeasor and an insurance company. The insurance company filed a motion to dismiss the claim against it arguing that the plaintiff's claim against it was not ripe for adjudication and was an impermissible direct action against an insurer. *Id.,* 908 P.2d at 725, 112 Nev. at 9. The Nevada Supreme Court relied upon a prior case by the Colorado Supreme Court holding that no claim against an insurance company exists until a plaintiff obtains a judgment against the tortfeasor. The Nevada Supreme Court noted:

> The Colorado Supreme Court held that a plaintiff does not have standing to sue for declaratory relief against a defendant's insurer before obtaining a judgment against the defendant. *Farmers Ins. Exchange v. District Court*, 862 P.2d 944 (Colo.1993). The court concluded that the plaintiff had
>
> > no legally protected right or cognizable interest at stake unless and until she has established [the defendant's] liability. Her rights are contingent on her successful litigation of the personal injury suit. When the rights of the plaintiff are contingent on the happening of some event which cannot be forecast and which may never take place, a court cannot provide declaratory relief.
> >
> > *Id*. at 948.

*Knittle*, 908 P.2d at 725-26, 112 Nev. at 10-11.

The Nevada Supreme Court followed the reasoning of the Colorado Court. The Court ruled that any claim against the insurance company was contingent on a successful litigation in the related tort case. "[S]ince [plaintiff's] rights against [the insurance company] are contingent on her successful litigation of a pending tort suit, [plaintiff] can assert no legally protectable interest creating a justiciable controversy ripe for declaratory relief." *Id.,* 908 P.2d at 726, 112 Nev. at 11. Here, McVay admits she cannot successfully litigate a tort suit, so her rights against any insurance company can never arise. McVay has no legally protectable interest necessary to have a justiciable controversy ripe for adjudication.

The United States District Court for the District of Nevada has followed this reasoning and granted a motion to dismiss based on a plaintiff's failure to first obtain a judgment.

> Plaintiffs' Complaint fails to allege they have obtained a tort judgment against [the alleged tortfeasor]. Prior to obtaining a tort judgment against [the alleged tortfeasor], Plaintiffs' rights are speculative as to the liability of [the alleged tortfeasor's insurance carrier] to indemnify [the alleged tortfeasor] for any judgment obtained against him by Plaintiffs.

*Vignola v. Gilman*, 804 F.Supp.2d 1072, 1078 (D. Nev. 2011). *See also Probuilders Specialty Ins. Co. v. Thompson*, Case No. 3:12-CV-00332-LRH-WGC, Order dated Jan. 30, 2013 (D. Nev. 2013)("[I]n Nevada, the rights of a third

party against an insurer do not mature until the third party obtains a judgment against the insured, an insurer's rights against a third-party claimant are "speculative and not ripe for declaratory relief.").

Since McVay did not successfully litigate her personal injury case, Nevada law dictates that McVay's claims against the alleged tortfeasor's insurance carrier do not present a justiciable controversy ripe for adjudication.

## D. MCVAY CANNOT ENFORCE AN INSURANCE POLICY UNDER WHICH SHE IS NOT AN "INSURED"

### 1. McVay Is Not An "Insured" Under the Insurance Policy

McVay's asserted breach of contract under a third-party beneficiary theory for the insurance contract between Allied and the FTDC fails because she is not an intended beneficiary under the insurance contract. Legitimate third-party beneficiary claims require a court to review the terms of the contract to determine if the third-party was an intended beneficiary of the contract. "Whether an individual is an intended third-party beneficiary, however, depends on the parties' intent, 'gleaned from reading the contract as a whole in light of the circumstances under which it was entered.'" *Canfora v. Coast Hotels & Casinos, Inc.*, 121 P.3d 599, 605, 121 Nev. 771 (Nev. 2005)(quoting *Jones v. Aetna Cas. and Sur. Co.*, 26 Cal.App.4th 1717, 33 Cal.Rptr.2d 291, 296 (1994)).

Here, however, York is not a party to the contract that McVay is seeking to enforce, so could not have any liability to any intended beneficiaries of the

contract. McVay's assertion of a third-party beneficiary claim against a "fourth party" must fail as a matter of simple logic.

McVay asserts that she is an "insured" under the insurance policy, so can enforce it. However she completely misconstrues the insurance policy's definition of "insured," which includes, in relevant part:

> … any person, [or] organization … to whom the Named Insured is *obligated by virtue of a* ***written contract or oral agreement*** to provide insurance such as is afforded by this policy…

ER 10 (Policy, Coverage Part 1, Section 1(A))(emphasis added). McVay believes the Tribe or the FTDC was obligated by virtue of a written contract or oral agreement to provide her insurance coverage. She appears to concede that there was no actual written contract or oral agreement between her and either the Tribe or the FTDC. This is reasonable as she never had any dealings with the Tribe or the FTDC prior to the alleged accident that could have resulted in any type of agreement with her. She was simply a store customer.

The only "written contract or oral agreement" that existed relevant to this case was an agreement between the Tribe and the FTDC to allow the Tribe's insurance policy to cover the FTDC as an insured. The FTDC was the insured, not McVay or any other person who might have been injured in the FTDC's store. There is thus no basis under which McVay qualifies as a "Named Insured" – or an insured of any kind – under the Policy.

### 2. The Indian Self-Determination Act Requirements Do Not Make McVay An "Insured" And Simply Do Not Apply To This Case

The definition of "insured" in the insurance policy does not refer to any obligations the Named Insured might have pursuant to a statute, as McVay alleges, and especially not to a statute that does not apply to these circumstances. McVay asserts that she is a specific intended beneficiary because the "Indian Self-Determination and Education Assistance Act of 1975," 25 U.S.C. §§ 450 *et seq.* ("Indian Self-Determination Act" or "the Act") requires tribes to provide insurance coverage for tort claims by third parties for all tribal activities. This is completely wrong. No law exists that requires tribes to have insurance coverage for all of its activities. The Indian Self-Determination Act does not make this a requirement.

As outlined in Cohen's Handbook of Federal Indian Law,[1] § 22.02[1] (ER 59-69), the Indian Self-Determination Act allows tribes to take over some of the federal government's trust duties to tribes. The United States has a trust duty to provide certain governmental services to tribes, such as law enforcement, health services and schooling. *Id.* The Indian Self-Determination Act provides that tribes can enter into contracts with the United States that require the United States

[1] Federal courts often cite to Cohen's Handbook of Federal Indian Law as the foremost treatise on this subject. *See, e.g., Winnemucca Indian Colony v. United States,* 837 F.Supp.2d 1186, 1192 (D.Nev. 2011).

to provide funds directly to the tribe that the United States would have expended on providing the services, so that the tribe can provide the service itself.[2] *Id.* For example, if the United States was going to spend $500,000 to provide law enforcement services on the Fallon reservation, the Fallon Paiute Shoshone Tribe would enter into a 638 contract whereby the United States would pay the $500,000 to the Tribe, and the Tribe would use the funds to provide law enforcement services on its Reservation.

As McVay points out, the Indian Self-Determination Act requires tribes to obtain liability insurance for activities conducted under 638 contracts. ER 63-65 at § 22.02[4][a]; 25 U.S.C. § 450f(c).[3] Since the Fallon Tribe has a number of 638 contracts with the Federal government, the Fallon Tribe needed to obtain an insurance policy to cover the services the Tribe provides under the 638 contracts. However, that is not the only reason the Tribe obtained the policy. The Tribe also

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[2] These contracts are commonly referred to as "638 contracts" because the Indian Self-Determination Act was enacted pursuant to Public Law 93-638.

[3] McVay quotes a portion of the Indian Tribal Tort Claims and Risk Management Act of 1998 to support her argument that Congress required tribes to obtain tort insurance to cover all tribal operations. *See* McVay Brief at 15-16. All this Act does is require a study into insurance coverage available to tribes. The purpose of this Act is: "PURPOSE.—The purpose of this title is to provide for a study to facilitate relief for a person who is injured as a result of an official action of a tribal government." Pub. L. 105-277, Title VII, Sec. 702(b). The Act does not require tribes to obtain insurance, so does not support McVay's argument.

needed insurance to cover its other activities, so the Policy at issue covers more than just the Tribe's activities under 638 contracts. It covers *all* aspects of the Tribe's operations, many of which – including the operations of the Fallon Tribal Development Corporation ("FTDC") – are not funded by 638 contracts. This is a very important distinction because the federal government pays tribes through the 638 contracts to purchase the shares of liability insurance covering activities conducted pursuant to the 638 contracts. *See* ER 64-65. However the federal government does not pay for shares covering non-638 contract activities, such as operating businesses.

The FTDC operates Tribal businesses that are not governmental services funded by 638 contracts. The Federal government has no trust duty to operate or fund Tribal business operations. Therefore the Indian Self-Determination Act does not apply to the FTDC's operations, which means the Indian Self-Determination Act's insurance requirements do not apply to the FTDC. The insurance obtained by the Tribe for the FTDC's Fox Peak Station, where McVay fell, is not subject to any requirements of the Indian Self-Determination Act.

Other entities have sought to expand the insurance requirements stated in 25 U.S.C. § 450f(c), but this Court has recognized that the insurance requirement is limited to tribal operations conducted pursuant to a 638 contract. See, e.g., *Demontiney v. United States*, 255 F.3d 801, 813 (9th Cir. 2001) ("Any effect of §

450f(c) is limited by the section to 'contracts . . . pursuant to this subchapter.' § 450f(c)(1). Because [plaintiff] did not enter into a self-determination contract with the Tribe, § 450f(c) is not applicable."); *Snyder v. Navajo Nation*, 382 F.3d 892, 897 (9th Cir. 2004) ("Congress therefore provided that the United States would subject itself to suit under the [FTCA] for torts of tribal employees hired and acting pursuant to such self-determination contracts under the ISDEAA."). *See also Walton v. Tesuque Pueblo*, 443 F.3d 1274, 1279-1280 (10th Cir. 2006) ("Section 450f(c)(1) requires the government to obtain liability insurance for tribes carrying out self-determination contracts entered into under the ISDEAA. In exchange for insurance coverage, the tribe agrees to waive its sovereign immunity with respect to suits arising out of the tribe's performance of its contractual duties. 25 U.S.C. § 450f(c)(3).").

The FTDC operates tribal businesses that are not governmental services funded by self-determination contracts. The Federal government has no trust duty to fund tribal business operations. Therefore, the ISDEAA does not apply to the FTDC's operations, which means the Act's insurance requirements do not apply to the FTDC here. The insurance obtained by the Tribe for the FTDC's Fox Peak Station, where Ms. McVay fell, is thus not subject to any requirements of the ISDEAA.

Furthermore, there is no federal law that requires tribes to obtain liability

insurance for their business operations, only their governmental operations funded through a 638 contract. But even if the FTDC's operations were considered governmental services the Tribe contracted for under the Indian Self-Determination Act, the FTDC would be considered a federal entity against which any tort action would have to be processed through the Federal Tort Claims Act. 25 U.S.C. § 450f, Notes re: Indian Appropriations Act, P.L. 101-512, §314, 104 Stat. 1915 (1990). Tribal actors providing services under a 638 Contract are considered Federal employees for tort purposes, since they are providing services required by the Federal government's trust duties to tribes. McVay did not file a Federal Tort Claim against the FTDC, which is correct since the FTDC was not acting under a 638 contract to operate its store.

### 3. Even If The Indian Self-Determination Act Applied Here, York Would Still Not Be Liable For McVay's Injuries.

Even if the Indian Self-Determination Act applied as argued by McVay, the Act requires tribes to obtain liability insurance to cover their activities while performing governmental functions. Liability insurance protects the tribe and the United States (the insureds) from any liabilities they may incur. It is not purchased to be a blanket coverage to any random person (McVay) that may be injured by the tribe's activities. It is not some type of health insurance for someone who may be injured. Therefore even if the Indian Self-Determination Act applied here, it still would not require the FTDC to purchase insurance for McVay as an insured under

the policy. At the most, she may be some incidental beneficiary of the policy.

Also even if the Indian Self-Determination Act applied as argued by McVay, the policy obtained by the FTDC has a definition for "insured" that does not cover McVay. The insurance policy defines an "insured" to include a person or organization "to whom the Named Insured is obligated by virtue of a written contract or oral agreement to provide insurance such as is afforded by this policy." ER 10 (applicable insurance policy definition of "insured"). There is no written contract or oral agreement that required the FTDC to make McVay an insured. The Indian Self-Determination Act is not a contract or oral agreement. There is no 638 contract under the Act for the FTDC's business activities related to operating the convenience store.

**4. The FTDC's Charter Does Not Constitute A Contract That Could Make McVay An Insured.**

McVay also asserts that the FTDC's Charter constitutes a written contract that obligated the Tribe to make McVay an insured under the policy. Section 9.6 of the FTDC's Charter states:

> Fire and casualty insurance on property owned by the Corporation and on property in which the Corporation has an insurable interest, general liability insurance, Directors and Officers liability insurance, and other appropriate insurance, shall be maintained in such reasonable amounts and with such reasonable deductibles as the Board may determine.

The Charter requires the FTDC to purchase liability insurance, which insures the FTDC against any liability that it may incur. The clause does not say make any person who enters the FTDC's properties an "insured" under this liability policy. Also this clause cannot constitute a written contract.

**5. Even If A Written Contract Existed Making McVay An Insured Under The Terms Of The Policy, She Would Be Insured Against Any Liabilities She Incurred - Not Insured To Cover Her Own Injuries.**

The definition of insured in the applicable insurance policy states:

> … any person, [or] organization … to whom the Named Insured is obligated by virtue of a written contract or oral agreement to provide insurance such as is afforded by this policy . . . .

The insurance provided by the policy is for liabilities the insured may incur. If McVay was covered by this policy, it would insure her against any injuries she caused to others – not to herself. The policy covers:

> The Carrier agrees, subject to the limitations, terms and conditions hereunder mentioned, to indemnify the "Insured" for all sums which the "Insured" shall be legally obligated to pay by reason of liability imposed upon the "Insured" by law or assumed by the Named Insured under contract or agreement, for damages, direct or consequential, and expenses, all as more fully defined by the term "ultimate net loss", on account of "personal injuries" and/or "property damage" arising out of any "occurrence" happening during the period of this policy.

ER 11 (Insuring Agreement A – General Liability).

Under the policy, Allied agreed to indemnify the insureds for all sums they are legally obligated to pay by reason of liability for damages on account of

personal injuries arising out of any occurrence during the period of the policy. This is completely different than what McVay argues – she wants to be an insured and apparently seeks the ability to make a claim against herself for injuries she suffered. This is simply illogical.

### E. MCVAY HAS NO CONTRACTUAL RELATIONSHIP WITH ALLIED OR YORK TO SUPPORT A CLAIM FOR A CONTRACTUAL BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

McVay's second cause of action is for the contractual breach of the covenant of good faith and fair dealing. The Nevada Supreme Court first recognized the duty of good faith and fair dealing owed by an insurer towards its insured in *U.S. Fidelity & Guaranty Co. v. Peterson,* 91 Nev. 617, 620, 540 P.2d 1070, 1071 (1975). This duty is imposed by law, not from the terms of the insurance contract between the parties. *Id.*

The relationship between an insured and insurer has been described by the Nevada Supreme Court as one of "special confidence." *See Ainsworth v. Combined Ins. Co. of Am.,* 104 Nev. 587, 592, 763 P.2d 673, 676 (1988). The claim for breach of the covenant of good faith and fair dealing, also referred to as a claim for bad faith, requires an element of special reliance, which is present in an insurer-insured relationship. *See Great Am. Ins. Co. v. Gen. Builders, Inc.,* 113 Nev. 346, 353, 934 P.2d 257, 263 (1997). In *Ainsworth*, the Nevada Supreme Court held that "[a] consumer buys insurance for security, protection and peace of

mind." *Ainsworth,* 104 Nev. at 592, 763 P.2d at 676. The duty of good faith and fair dealing owed to the insured by the insurer is based upon this relationship of special confidence and the desire for security, protection and peace of mind. *Id.* As such, when a consumer purchases insurance there is a reasonable expectation that the insurer will deal fairly and in good faith. *Id.; see also Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 808 P.2d 919 (1991).

This relationship of special confidence and the expectations of good faith and fair dealing arising from it are based upon an express contractual relationship, i.e., privity of contract. *Nevada Ins. Guar. Assoc. v. Sierra Auto Center,* 108 Nev. 1123, 1127, 844 P.2d 126, 128 (1992). A third party to a contract who has paid no premiums to buy "peace of mind, security or protection" cannot be said to have a relationship of special confidence, which is the source of the duty of good faith and fair dealing. Stated differently, a person who did not select the insurer, did not enter into an insurance contract, and did not pay premiums for the protection afforded by the policy is not owed the same duty as the insured, who is a party to the insurance contract.

Accordingly, the Nevada Supreme Court has refused to extend the duty of good faith and fair dealing to parties in the absence of an express contractual relationship. *United Fire Ins. Co. v. McClelland*, 780 P.2d 193, 197, 105 Nev. 504, 511 (1989); *Gunny v. Allstate Ins. Co.,* 108 Nev. 344, 345, 830 P.2d 1335,

1335-36 (1992). In refusing to extend the duty of good faith and fair dealing to the wife of an insured under a health insurance policy, the Nevada Supreme Court emphasized that privity of contract must exist before a plaintiff has standing to bring a bad faith claim.

> Liability for bad faith is strictly tied to the implied-in-law covenant of good faith and fair dealing arising out of an underlying contractual relationship. *K Mart Corp. v. Ponsock*, 103 Nev. 39, 48, 732 P.2d 1364, 1370 (1987). When no contractual relationship exists, no recovery for bad faith is allowed. *Austero v. Nat. Cas. Co. of Detroit, Mich*., 62 Cal.App.3d 511, 133 Cal.Rptr. 107, 110 (1976); *see also Lowe v. American Medical Intern*., 494 So.2d 413 (Ala.1986) (holding that the cause of action for the tort of bad faith refusal to pay was created to protect only the person for whose benefit insurance payments were made).

*United Fire Ins. Co. v. McClelland*, 780 P.2d at 197-98, 105 Nev. at 511-12. The wife, although a dependent and covered under her husband's health insurance policy, did not have standing to enforce her husband's contract rights for bad faith denial of health care benefits because she was not a party to the contract. *Id.*

In *Gunny,* the Nevada Supreme Court affirmed an order granting summary judgment in favor of an insurance company on the issue of bad faith when no contractual relationship existed between the insured's son and the insurance company. In affirming the order granting summary judgment on the issue of bad faith, the Court concluded that the insured's son "lacks standing to sue because he had no contractual relationship with [the insurance company]." *Gunny v. Allstate Ins. Co.,* 108 Nev. 344, 345, 830 P.2d 1335, 1335-36 (1992). Furthermore, the

Court found that the insured's son had presented no evidence that he relied upon the insurance company's representations, or that he was a specific intended beneficiary. *Id.*

Here, this reasoning applies to Allied, which provided a liability policy to the FTDC. It also applies to York under McVay's theory of joint liability. Neither Allied nor York entered into a contractual relationship with McVay. McVay did not contract for any insurance policy, did not pay any premiums for a policy, and was unknown to Allied and the FTDC when they negotiated the policy so McVay could not have been a named insured on any policy.

As the Nevada Supreme Court emphasized in both *United Fire Insurance* and in *Gunny,* when no contractual relationship exists between the parties, no recovery for bad faith is allowed. As a matter of law, therefore, McVay simply cannot recover on a claim for bad faith. Moreover, McVay lacks standing to bring a bad faith claim against Allied, let alone York, because there is no privity of contract between McVay and York or Allied. Accordingly the District Court properly granted York's motion to dismiss McVay's claim for contractual breach of the covenant of good faith and fair dealing.

McVay relied below on *Wohlers v. Bartgis,* 969 P.2d 949, 114 Nev. 1249 (1998) to support her claims against Defendants Allied and York. ER 87 (Doc. 30). *Wohlers* does hold that a third party administrator may be liable under a "joint

venture" theory to an insured. However *Wohlers* does not apply here because the plaintiff in *Wohlers* was the insured who purchased the applicable insurance policy. This point was critical to the holding in *Wohlers*. Here McVay did not purchase any applicable insurance policy and was not an insured under any policy.

> It is well settled in Nevada that "every contract imposes upon the contracting parties the duty of good faith and fair dealing." *Hilton Hotels Corp. v. Butch Lewis Productions, Inc*., 109 Nev. 1043, 1046, 862 P.2d 1207, 1209 (1993). As we explained in *Ainsworth v. Combined Insurance Co*., 104 Nev. 587, 592, 763 P.2d 673, 676 (1988), "[t]he relationship of an insured to an insurer is one of special confidence. A consumer buys insurance for security, protection, and peace of mind." While an insured assumes various duties under an insurance contract--such as the timely payment of premiums--the insurer assumes the concomitant duty "to negotiate with its insureds in good faith and to deal with them fairly." *Id.*

*Wohlers v. Bartgis,* 969 P.2d at 956. McVay did not purchase the applicable insurance policy. Therefore she cannot argue that she purchased it for security, protection and peace of mind. Therefore McVay cannot rely upon *Wohlers* to support her claims.

To get around the fact that under Nevada law a contractual relationship is required to assert a claim for bad faith, McVay asserts that a third party can make a bad faith claim if the plaintiff is a specific intended beneficiary to the insurance contract, or perhaps that the plaintiff relied to her detriment on representations made by the insurer. McVay relies upon *Vignola v. Gilman,* 804 F.Supp.2d 1072, 1078 (D. Nev. 2011) for this contention. McVay Brief at 19. However *Vignola*

specifically states that in Nevada an insurer does not have a duty to negotiate in good faith with a third party.

> In Nevada, liability for bad faith is strictly tied to the implied covenant of good faith and fair dealing created by the contractual relationship between the insured and the insurer. *United Fire Ins. Co. v. McClelland,* 105 Nev. 504, 780 P.2d 193, 197 (1989). An insurer's duty to negotiate settlements in good faith arises directly from the insurance contract. *Allstate Ins. Co. v. Miller,* 212 P.3d 318, 330 (Nev.2009). Therefore, a party who lacks a contractual relationship with an insurer does not have standing to bring a claim of bad faith. *Gunny v. Allstate Ins. Co.,* 108 Nev. 344, 830 P.2d 1335, 1335–36 (1992). In Nevada, "[w]here no contract relationship exists, no recovery for bad faith is allowed." *McClelland,* 780 P.2d at 197. Other states may recognize a duty to negotiate in good faith between insurers and third parties, however, Nevada does not recognize such a duty.

*Vignola v. Gilman,* 804 F.Supp.2d at 1076. Under Nevada law, neither Allied nor York had a duty to McVay since she had no contractual relationship with either defendant.

McVay argues that *Vignola* support her third party claim for bad faith because the case recognizes that a person has a valid claim if they are a specific intended beneficiary under the policy, or she may argue that she relied to her detriment on actions or representations made by the insurer. However McVay does not meet either of these requirements, and she does not make any such assertion in her amended complaint. This is not surprising considering that McVay was unknown to the FTDC and Allied when they negotiated the insurance policy.

They could not have named McVay as a "specific intended beneficiary" since they did not know she existed.

Also businesses purchase premises liability policies to protect themselves against potential liability, not to protect a specific individual who may be injured on the premises. This is a huge distinction that McVay completely overlooks in all of her arguments and in the way she addresses who is an "insured." McVay simply misconstrues the simple definition of an "insured" and the basis for an insured to obtain liability insurance. McVay could have been an insured under her own health insurance policy, but she is not an insured under any liability policy covering the FTDC.

At the most, McVay may have been an incidental beneficiary of the insurance policy, but incidental beneficiaries cannot enforce the policy under any theory of liability. In *United Fire Ins. Co. v. McClelland*, 780 P.2d 193, 105 Nev. 504 (1989), the Nevada Supreme Court recognized that a wife, who was a dependent under her husband's health insurance policy, could not enforce her husband's contractual rights against the insurance company.

> The [Plaintiffs] respond that even though [wife] was not a named insured under the certificate, she became an insured as a dependent. However, a wife's coverage as a dependent under her husband's health insurance policy does not give her standing to enforce her husband's contract rights for bad faith denial of health care benefits. *Hatchwell v. Blue Shield of California*, 198 Cal.App.3d 1027, 244 Cal.Rptr. 249, 253 (1988). In *Hatchwell*, the court reasoned that even though the wife is an insured person and an express beneficiary regarding her

> own health care benefits, she is merely an incidental beneficiary in regard to her husband's benefits. *Id.* We adopt the reasoning of *Hatchwell*.

*United Fire Ins. Co. v. McClelland*, 780 P.2d at 197-98, 105 Nev. at 511-12. *See Gunny v. Allstate Ins. Co.*, 108 Nev. 344, 355-56, 830 P.2d 1335, 1335-36 (1992)(summarizing *United Fire Ins. Co. v. McClelland* as "even though the wife was an insured person and express beneficiary regarding her own health care benefits, she was merely an incidental beneficiary with regard to her husband's benefits"). Even if McVay was an incidental beneficiary of the insurance policy, she would have no right to enforce the terms of the policy.

Additionally, McVay does not allege in her amended complaint that she relied to her detriment on actions or representations made by Allied. Again this is reasonable since she did not know Allied provided an insurance policy to cover the Fox Peak Station until after the accident occurred. *See* ER 76-77 (McVay's Amended Complaint ¶ 20). Based on this, McVay could not allege that she relied to her detriment on any actions or representations by Allied. If McVay cannot state a claim against Allied, McVay cannot state a claim against York (Allied's third party administrator).

## F. THE FTDC IS COMPLETELY SATISFIED WITH THE ASSERTION OF THE SOVEREIGN IMMUNITY DEFENSE.

McVay asserts that Allied improperly advanced a sovereign immunity defense in the Tribal Court action. However York and Allied were not parties to

that case. The FTDC, which was the owner of the store where the alleged slip and fall occurred, raised the sovereign immunity defense in the Tribal Court case. That defense was successful as the Tribal Court granted the FTDC's motion to dismiss. McVay confuses who was a party to the Tribal Court case, and who raised the defense that was successful. If McVay had any legal basis to assert that the sovereign immunity defense did not apply to her tort action, she had the opportunity to raise those arguments in the Tribal Court proceeding. Just because McVay's arguments were not successful, or were not properly raised, does not create a cause of action against Allied or York in any court.

Furthermore McVay cannot expect to require strict enforcement of every term of a contract to which she was not a party. McVay is seeking to enforce an insurance contact between the FTDC and Allied. If one of the provisions of the contract requires a certain procedure to be followed prior to asserting the defense of sovereign immunity, then the parties can agree to amend that provision, or they can simply waive it.

> Waiver is usually defined as "the voluntary and intentional relinquishment of a known right" and may be either express or implied. 5 Williston On Contracts § 678 (3d ed. 1961). Waiver can be implied from conduct such as making payments for or accepting performance which does not meet contract requirements; waiver can also be expressed verbally or in writing. 17 Am.Jur.2d Contracts §§ 393, 396 (1964). Express waiver, when supported by reliance thereon, excuses nonperformance of the waived condition. 5 Williston On Contracts § 679 (3d ed. 1961); 17 Am.Jur.2d Contracts § 392 (1964); Restatement (Second) of Contracts § 84(1) (1981).

*Udevco, Inc. v. Wagner*, 100 Nev. 185, 189, 678 P.2d 679, 682 (Nev. 1984).

If any conditions existed that were not met related to asserting the sovereign immunity defense, the FTDC either expressly or impliedly waived any such conditions. At no time has the FTDC asserted that the sovereign immunity defense was improperly raised. McVay cannot come in as a third party and require strict enforcement of every term of the contract when the parties to the contract are satisfied that each has performed as agreed.

There is no dispute between the FTDC and any insurance company that the sovereign immunity defense should not have applied to the Tribal Court case or and that it was improperly raised in the FTDC's motion to dismiss. Jon Pishion (Tribal Council member and Chairman of the Board of Directors for the FTDC) submitted an affidavit in the Tribal Court action filed by McVay against the FTDC that expressly states that the FTDC did not take any action to waive its immunity from suit. ER 71-73. The affidavit filed with the Tribal Court states in part:

> 9. The FTDC is endowed with all immunities from suit that are possessed by the Tribe. *See* FTDC Corporate Charter § 2.6. The FTDC's Board of Directors can waive the FTDC's immunities, but has not taken any action to waive such immunities to allow any personal injury action to proceed in any court against the FTDC.
>
> 10. The FTDC Board of Directors, at a duly called meeting, authorized and ordered its attorney to assert the sovereign immunity defense in the McVay v. FTDC case pending in the Fallon Tribal Court as Case No.: CV-FT-11-038 (the "McVay case"). This authorization is reflected in the Board's written meeting minutes.

> 11. The attorney representing the FTDC is hereby authorized to and ordered to continue to assert the FTDC's sovereign immunity defense in the McVay case.
>
> 12. Any waiver of the FTDC's or the Tribe's sovereign immunity must be express and unequivocal. No express and/or unequivocal waiver of the FTDC's or the Tribe's sovereign immunity exists to provide the Tribal Court with jurisdiction over the FTDC or the Tribe in the McVay case.

ER 71-73.

The FTDC expressly and unequivocally ordered its attorney to assert the sovereign immunity defense. This is the complete opposite of an express and unequivocal waiver of sovereign immunity. As the U.S. Supreme Court has stated numerous times, any waiver of tribal sovereign immunity must be express and unequivocal, and cannot be implied. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Kiowa Tribe v. Mfg. Techs., Inc.,* 523 U.S. 751, 754 (1998). No such waiver exists here.

McVay objects to the Tribal Court dismissing the case against the FTDC based upon the FTDC's sovereign immunity. However, the Tribal Court correctly applied the law when it dismissed the case. The U.S. Supreme Court has noted that some parties may not agree with tribal sovereign immunity, but such immunity nevertheless exists and must be enforced, even where, "[i]n [an] economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice

in the matter, as in the case of tort victims." *Kiowa Tribe of Oklahoma v. Manufacturing Tech.,* 523 U.S. 751, 758 (1998).

### G. THE DISTRICT COURT PROPERLY DENIED MCVAY'S REQUEST TO AMEND HER COMPLAINT AGAIN

The District Court denied McVay's request to amend her complaint a second time. The District Court noted that the Federal Rules of Civil Procedure allow plaintiffs to amend their complaints when justice so requires, but leave to amend it not granted automatically. The District Court noted the following five factors to consider in assessing whether to grant leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether the plaintiff has previously amended her complaint. *See In re W. States Wholesale Nat. Gas Antitrust Litig.,*, 715 F.3d 716, 738 (9th Cir. 2013).

The District Court denied McVay's request to amend her complaint because such an action would be futile. This is correct, as the reasons for granting the motion demonstrated that as a matter of law McVay could not assert a cognizable cause of action against Allied or York. Any amendment would have the exact same problems as the first amended complaint, and would result in District Court granting another motion to dismiss. Therefore it is futile for McVay to amend her complaint.

## V. CONCLUSION

McVay fails to state a claim against York upon which relief may be granted. No party is liable for any damages related to McVay's personal injury claims since McVay has not obtained a judgment against the store where she allegedly fell. Even if McVay had acquired a judgment, York did not provide insurance coverage to the store. While McVay asserts many different theories for why she is an insured under the applicable policy, none of her theories can get past the fact that a liability policy is purchased to protect the business owner, not some person who may enter the store. Since McVay is not a party to the insurance contract, not an insured, and not a third party beneficiary to the policy, she cannot assert a claim against Allied or York for her injuries. Based on the reasons stated herein, York respectfully requests that the Court enter its order affirming the decision of the District Court in its entirety.

RESPECTFULLY SUBMITTED this 27th day of October 2014.

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## STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, York is unaware of any related cases currently pending in this Court.

## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that this brief has been prepared using proportionally double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, the entirety of this brief contains 9591 words.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on October 27, 2014.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October 2014, I electronically filed the foregoing "**APPELLEE YORK RISK SERVICES GROUP, INC.'S ANSWERING BRIEF"** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system, which will send notification of such filing to the email addresses that are registered for this case. All of the participants in this case are registered CM/ECF users so will be served by the appellate CM/ECF system.

/s/ Wes Williams Jr.
Wes Williams Jr.

# STATUTORY ADDENDUM

Except for the following, all applicable statutes are contained in the Statutory Addendum at the end of McVay's Brief:

**25 U.S.C. § 450f; Notes**

. . .

**Claims Resulting From Performance of Contract, Grant Agreement, or Cooperative Agreement; Civil Action Against Tribe, Tribal Organization, Etc., Deemed Action Against United States; Reimbursement of Treasury for Payment of Claims**

Pub. L. 101–512, title III, § 314,Nov. 5, 1990, 104 Stat. 1959, as amended by Pub. L. 103–138, title III, § 308,Nov. 11, 1993, 107 Stat. 1416, provided that: "With respect to claims resulting from the performance of functions during fiscal year 1991 and thereafter, or claims asserted after September 30, 1990, but resulting from the performance of functions prior to fiscal year 1991, under a contract, grant agreement, or any other agreement or compact authorized by the Indian Self-Determination and Education Assistance Act of 1975, as amended (88 Stat. 2203; 25 U.S.C. 450 et seq.) [Pub. L. 93–638, see Short Title note set out under section 450 of this title and Tables] or by title V, part B, Tribally Controlled School Grants of the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988, as amended (102 Stat. 385; 25 U.S.C. 2501 et seq.), an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior or the Indian Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees are deemed employees of the Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement: Provided, That after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act [See Short Title note under section 2671 of Title 28, Judiciary and Judicial Procedure]: Provided further, That beginning with the fiscal year ending September 30, 1991, and thereafter, the appropriate Secretary shall request through annual appropriations funds sufficient to reimburse the Treasury for any claims paid in the prior fiscal year pursuant to the foregoing provisions:

Provided further, That nothing in this section shall in any way affect the provisions of section 102(d) of the Indian Self-Determination and Education Assistance Act of 1975, as amended (88 Stat. 2203; 25 U.S.C. 450 et seq.) [25 U.S.C. 450f (d)]."