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Patrick D. Soles

DISTRICT COURT

CLARK COUNTY, NEVADA

EILEEN ANDERSON,

Plaintiff,

vs.

PATRICK D. SOLES, JAY W. NANCE, GARY TOVAR, individuals; DAVID REED and BRANDI REED, Husband and Wife; AMERICAN FAMILY MUTUAL INSURANCE COMPANY; DOES 1 through 10; ROE CORPORATIONS 11 through 20, inclusive,

Defendants.

CASE NO: A-10-626134-C
DEPT. NO: 21

and consolidated cases

CASE NO: A-11-637659-C
DEPT. NO: 21

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Crossclaimant,

vs.

PATRICK D. SOLES; JAY W. NANCE, GARY TOBAR; DAVID REED and BRANDI REED, husband and wife,

Cross-defendants,

And All Related Matters

NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT FOLLOWING BENCH TRIAL ON SEPTEMBER 2, 2014

TO: ALL INTERESTED PARTIES;

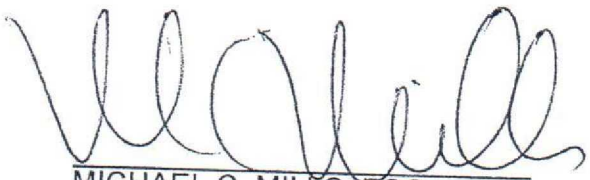
YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that on the 6th day of October 2014, the Court entered an Order on Findings of Fact and Conclusions of Law

Docket 66948 Document 2014-42093

and Judgment Following Bench Trial on September 2, 2014 Regarding American Family Mutual Insurance Company's Counter and Cross Claim for Declaratory Relief. A copy of which is attached hereto.

DATED this 21st day of October 2014.

MILLS & ASSOCIATES



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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2 of the Eighth Judicial District Court, I hereby certify that I am an employee of MILLS & ASSOCIATES, and that on the 21st day of October 2014, I caused a true and correct copy of the foregoing document **FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT FOLLOWING BENCH TRIAL ON SEPTEMBER 2, 2014 REGARDING AMERICAN FAMILY MUTUAL INSURANCE COMPANY'S COUNTER AND CROSS CLAIM FOR DECLARATORY RELIEF** to be served as follows:

☒ VIA U.S. POSTAL MAIL: by placing a true and correct copy thereof enclosed in a sealed envelope with the postage thereon fully prepaid, addressed as indicated on the attached service list in the United States Mail.

☐ VIA FACSIMILE: by causing a true and correct copy thereof to be faxed on this date to the addressee(s) at the attached facsimile numbers set forth in the service list.

☒ VIA E-SERVICE: by causing a true and correct copy thereof to be electronically served in compliance with the Administrative Order 14-2 and Nevada Electronic Filing and Conversion Rules.

SERVICE LIST

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

PATRICK SOLES, an individual, KELLI SOLES, an individual, DANIELE SOLES, a minor, by and through her Guardian Ad Litem, KELLI SOLES, WESLEY WESTLER, a minor by and through his Guardian Ad Litem, KELLI SOLES, KELSEY EDENFIELD, a minor, by and through her Guardian Ad Litem, KELLI SOLES, and ALISHEA GREEN, a minor, by and through her Guardian Ad Litem KELLI SOLES, Plaintiff, vs. BRANDI REED, individually, DAVID REED, individually, JAY W. NANCE, individually; GARY TOVAR, individually; DOES I through X; and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO: A-10-626134-C DEPT NO: XXI Consolidated with: CASE NO: A-11-637659-C DEPT NO: XVI and CASE NO: A-11-639047-C DEPT NO: XXVII
ALL RELATED MATTERS.	

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT FOLLOWING BENCH TRIAL ON SEPTEMBER 2, 2014 REGARDING AMERICAN FAMILY MUTUAL INSURANCE COMPANY'S COUNTER AND CROSS CLAIM FOR DECLARATORY RELIEF

On September 2, 2014, American Family Mutual Insurance Company's ("AFMIC") Counter-claim and Cross-claim for declaratory relief against Patrick D. Soles, Jay W. Nance, and Gary Tovar came on for trial before the Honorable Valerie Adair. Joshua M. Santeramo,

Esq. and Damon A. Schuetze, Esq. appeared on behalf of Counter-claimant AFMIC. Michael C. Mills, Esq. appeared on behalf of Cross-Defendant Soles. Maury Rygg, Esq. appeared on behalf of Plaintiffs Soles. No appearance was made by Defendants Jay W. Nance or Gary Tovar.

Following the presentation of evidence, stipulated facts, and argument of counsel, the Court makes the following findings of fact and conclusions of law, and thereupon finds in favor of AFMIC regarding the Declaratory Relief Action as follows:

I. FINDINGS OF FACT:

1. On or about October 15, 2006, Brandi and David Reed ("Reeds") acquired a 1999 Four Winns Boat from Jay Nance ("Nance") bearing Hull Number FWNCG203B999. The acquisition was memorialized by an executed contract titled, "Memorandum of Understanding," identifying Nance as the "Seller," and the Reeds as the "Buyers." Joint Exhibit (Hereinafter referenced as JE) 5.

2. As part of the written contract, the Reeds, as "Buyers," agreed to "maintain adequate full-coverage insurance on the boat and trailer" for the term of the agreement. The Memorandum of Understanding states in pertinent as follows:

> The following agreement is between Jay W. Nance hereinafter referred to as "Seller" and David & Brandi Reed hereinafter referred to as "Buyers."
>
> Whereas Seller is desirous of selling the above described boat and Buyers are desirous of buying the same described boat. Seller agrees to leave the current loan on the boat in place and as is for the next 48 months, as long as the monthly payments of $275.22 remain paid and current. **Buyer agrees to pay off this loan completely on or before this same 48 month period is over or will risk returning the boat to the Seller.** Buyer also agrees to maintain adequate full-coverage insurance on the boat and trailer for this same 48 month term. Buyer agrees to maintain the boat in good operational condition during this same term and is financially responsible for any damage and repairs. Buyers are purchasing this boat today in "as is" condition and Seller makes no guarantees as to condition and is not responsible for any future repairs after today."

Id.

3. From approximately October of 2006 through March of 2009, the Reeds had insurance on the boat through First Beacon Insurance. Ms. Reed testified that she changed insurance from First Beacon to AFMIC in an attempt to save money. JE 14, p.30 ll. 23-25.

4. On March 29, 2009, AFMIC issued a Boatowners Policy to Brandi and David Reed covering the 1999 Four Winns 24 Foot Cruiser bearing hull number FWNCG203B999. AFMIC assigned the Boatowners Policy number 27-N03447-01-74-PBTO-NV. The policy provided Watercraft and Boating Equipment Liability coverage in the amount of $300,000.00. Neither Jay Nance nor Gary Tovar were added as named insureds. JE 6.

5. Mrs. Reed testified that prior to the accident, she could no longer make payments on the boat and fulfill her obligations as stated in the Memorandum of Understanding. JE 6 pp. 37-38. Mrs. Reed contacted Mr. Nance by email on April 27, 2009, and asked him if he wanted the boat back because the Reeds could no longer make payments. Mr. Nance responded that he would take the boat back provided it was in good condition. JE 13A. Mrs. Reed cleaned the boat and arranged to meet with Mr. Nance in Pahrump, Nevada to return the boat to him. The Reeds delivered the boat to Jay Nance on or before May 4, 2009 along with all paperwork for the boat, and the Reeds never used the boat again nor made any further payments. JE 14 pp. 38-43

6. On May 4, 2009, Mr. Nance wrote Mrs. Reed thanking her for the return of the boat and keeping it in great condition. JE 13D.

7. Mrs. Reed testified that she believed that the return of the boat relinquished the Reeds of any obligations under the Memorandum of Understanding. JE 14 p. 39-40. Mrs. Reed also testified that she believed her ownership interest ended after returning the boat to Jay Nance and that she had no authority to control what Mr. Nance did with the boat from that point forward. JE 14 pp. 40-41.

8. At the time Mr. Nance took possession of the boat, he also agreed that the Reeds did not have a right to control what he did with the boat from that point forward, and he did not require permission from the Reeds to use the boat. JE 16 p. 51 ll 6-16.

9. There is also no evidence that the Reeds ever agreed to take the boat back again at a later date, nor evidence that the Reeds ever became the titled owners.

10. On May 10, 2009, the subject accident took place. Mr. Nance was the driver of the subject boat, and the Reeds were not present and had no knowledge Mr. Nance was using

the boat that day. JE 16 p. 55 ll 3-21.

11. As this Court determined in its Order granting Plaintiff Soles Motion for Partial Summary Judgment entered on September 12, 2013, the AFMIC Boatowners Policy had not been canceled and was open on or about May 10, 2009 when the subject boat was involved in the accident that this the subject of this litigation. Mrs. Reed testified that she had paid the premium for April and May 2009. JE 14 p. 76 ll 3-8.

12. Per the Boatowners Policy, the term "Insured" applies to the named insured, residents of the named's household, relatives, and persons under 21 or in the care of the resident relatives. Insured also describes "any other person while using the insured watercraft free of charge, provided the actual use of such watercraft is with your permission and is within the scope of such permission." JE 6 p. 00911.

13. If the Reeds wanted to assign the insurance policy to Defendant Nance, the contract specifies the manner in which such could be validly accomplished. Particularly, the "General Conditions" section of the Boatowners Policy states in subsection No. 1, "Assignment of this policy will not be valid unless we [AFMIC] give our written consent." JE 6 p. 00916.

14. Prior to the accident, Mr. Nance never asked the Reeds to name him as an insured on the Boatowners policy, and there was no written agreement to assign the policy to Jay Nance. JE 16 pp. 53-55. Prior to the accident, the parties never notified AFMIC that Mr. Nance had possession of the boat. Neither Mr. Nance nor the Reeds sought, nor did American Family grant written consent to assign the policy of insurance to Mr. Nance. JE 14 pp. 46-47.

15. Mr. Nance also confirmed in an email on May 18, 2009 that he would be assuming premium payments once the AFMIC policy lapsed. JE 13G.

16. In regard to the May 10, 2009 boating accident, AFMIC issued a Reservation of Rights letter to the insureds, Mr. and Mrs. Reed dated on April 15, 2011. JE 9.

17. AFMIC also issued a denial of coverage letter dated April 15, 2011 that stated as follows:

> As you know, American Family issued an insurance policy to Brandi Reed that *potentially afforded coverage* to one of the boats involved in the

subject accident. When Ms. Reed applied for the policy, she implicitly, if not expressly, represented to American Family that she owned the boat in question. But our investigation regarding this matter has revealed that Ms. Reed never owned the boat. Instead, she leased the boat for approximately a year and a half, under an oral contract with Mr. James Nance. When she determined that she could no longer afford the lease payment she returned the boat to Mr. Nance approximately two weeks before the subject accident.

While it is unlikely Ms. Reed ever had any ownership interest in the boat, assuming she did, when she returned possession of the boat to Mr. Nance she relinquished the same.

Nevada 687B.060 provides,

1. No contract of insurance of property or of any interest in property arising from property shall be enforceable as to the insurance except for the benefit of persons having an insurable interest in the things insured at the time of the loss.

2. "Insurable interest" as used in this section means any actual, lawful and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction or pecuniary damage or impairment.

When the subject accident occurred, Ms. Reed did not have an insurable interest in the boat under Nevada law. Furthermore, according to Ms. Reed's sworn testimony, it does not appear that Mr. Nance (the person operating the boat when the accident occurred) had an insurable in the boat. Therefore, under Nevada law, the insurance policy is not enforceable. *See Mann v. Glens Falls Insurance Co.*, 541 F.2d 819 (1976).

JE 10.

II. CONCLUSIONS OF LAW:

1. That pursuant to *Mann v. Glens Falls Insurance Co.*, 541 F.2d 819 (1976), the Reeds relinquished ownership of the boat and their obligations under the Memorandum of Understanding on or before May 4, 2009, and thus, the Reeds had no insurable interest in the subject boat on the date of the accident.

2. That by failing to obtain written permission from AFMIC to assign/transfer the Boatowners policy from the Reeds to Jay Nance, AFMIC is under no contractual obligation to treat Jay Nance as an insured under the policy. Therefore, AFMIC is not obligated under its contract of insurance to indemnify Jay Nance or Gary Tovar for the subject accident, and AFMIC is not responsible for paying policy benefits to the Plaintiffs on their property or bodily injury claims.

///

3. That Jay Nance does not qualify as a permissive user as defined in the Boatowners Policy under the subject facts.

III. JUDGMENT OF THE COURT:

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this Court finds in favor of Cross-claimant AFMIC regarding its counter-claim and cross-claim for declaratory relief against Jay Nance, Gary Tovar, and Patrick Soles. AFMIC is not obligated to indemnify Jay Nance nor Gary Tovar for the subject accident, and AFMIC is not responsible for paying policy benefits to the Plaintiffs on their property or bodily injury claims.

DATED this 6 day of October 2014.

Valerie Adair
DISTRICT COURT JUDGE

Submitted by:

SCHUETZE & McGAHA, P.C.

/s/ William W. McGaha
By_____
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