COPY

APPLICATION FOR NOMINATION TO JUDICIAL OFFICE

This original application, 16 double-sided copies and one (1) single-sided copy must be filed with the Human Resources Department, Administrative Office of the Courts, 1501 W. Washington, Suite 221, Phoenix, AZ, 85007, not later than 3:00 p.m. on Wednesday, August 31, 2016. Read the application instructions thoroughly before completing this application form. The fact that you have applied is not confidential, responses to Section I of this application are made available to the public, and the information provided may be verified by Commission members. The names of applicants, interviewees and nominees are made public, and Commission files pertaining to nominees are provided to the Governor for review. This entire application, including the confidential portion (Section II), is forwarded to the Governor upon nomination by the Commission.

SECTION I: PUBLIC INFORMATION (QUESTIONS 1 THROUGH 71)

PERSONAL INFORMATION

1. Full Name: **Keith Randall Nelson**

2. Have you ever used or been known by any other legal name? **No** If so, state name:

3. Office Address: **21321 East Ocotillo, Suite 113, Queen Creek, Arizona 85142**

4. When have you been a resident of Arizona? **From 1975-1994, 1996-2003, and from 2006-present.**

5. What is your county of residence and how long have you resided there? **I have been a resident of Maricopa County from 1975-1994, 1996-2003, and from 2006-present.**

6. Age: **41**

(The Arizona Constitution, Article VI, §§ 22 and 37, requires that judicial nominees be 30 years of age or older before taking office and younger than age 65 at the time the nomination is sent to the Governor.)

7. List your present and former political party registrations and approximate dates of each:

1993-2006	**Registered Independent or No Party**
2006-Present	**Registered Republican**

(The Arizona Constitution, Article VI, § 37, requires that not all nominees sent to the Governor be of the same political affiliation.)

8. Gender: **Male**

Race/Ethnicity:
[**X**] White
[ ] Hispanic or Latino (of any race)
[ ] Black or African American
[ ] American Indian or Alaska Native
[ ] Asian
[ ] Native Hawaiian/Pacific Islander
[ ] Other: _____

(The Arizona Constitution, Article VI, §§ 36 and 41, requires the Commission to consider the diversity of the state's or county's population in making its nominations. However, the primary consideration shall be merit.)

EDUCATIONAL BACKGROUND

9. List names and locations of schools attended (college, advanced degrees and law), dates attended and degrees.

Mesa Community College (Mesa, Arizona)	**1993-1994**
	1996-1998
Arizona State University (Tempe, Arizona)	**1998-2000**
Gonzaga College of Law	**2003-2006**
Howard University (Study abroad in Cape Town, South Africa)	**Summer of 2005**

10. List major and minor fields of study and extracurricular activities.

Arizona State University – Bachelors of Science Degree in Justice Studies

Gonzaga College of Law – Juris Doctorate Degree
Intern at United States Attorney's Office
Moot Court Competition
Tutored new students

11. List scholarships, awards, honors, citations and any other factors (e.g., employment) you consider relevant to your performance during college and law school.

At Arizona State University I made the honor roll several times while working 50-60 hours per week to provide for my family.

At Gonzaga I received the CALI award (highest grade in the class) in several classes; mentored new students; placed second in the Annual Moot Court competition; interned for two years at the United States Attorney's Office; graduated Magna Cum Laude; and graduated third in my class of 240 students.

PROFESSIONAL BACKGROUND AND EXPERIENCE

12. List all courts in which you have been admitted to the practice of law with dates of admission. Give the same information for administrative bodies, which require special admission to practice.

Admitted to Arizona Courts on December 16, 2006.
Admitted to United States District Court of Arizona on February 7, 2007.

13. a. Have you ever been denied admission to the bar of any state due to failure to pass the character and fitness screening? **No** If so, explain.

    b. Have you ever had to take a bar examination more than once in order to be admitted to the bar of any state? **No** If so, explain.

14. Indicate your employment history since completing your formal education. List your current position first. If you have not been employed continuously since completing your formal education, describe what you did during any periods of unemployment or other professional inactivity in excess of three months. Do not attach a resume.

EMPLOYER	DATES	LOCATION
Riggs Ellsworth & Porter	**July 2010-Present**	**Queen Creek, Arizona**
Rowley Chapman Barney Buntrock	**May 2006-July 2010**	**Mesa, Arizona**
The United States Attorney's Office	**May 2004-May 2006**	**Spokane, Washington**
Law Student	**June 2003-May 2006**	**Spokane, Washington**
The Arizona Biltmore	**August 2000-May 2003**	**Phoenix, Arizona**

15. List your current law partners and associates, if any. You may attach a firm letterhead or other printed list. Applicants who are judges should attach a list of judges currently on the bench in the court in which they serve.

Partners:
Matthew L. Riggs
Paul C. Riggs
Gary A. Porter
Michael R. Ellsworth

Associates:
Spencer T. Hale
Wesland J. Wright

16. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

I primarily focus my practice in the fields of criminal defense and personal injury with each area constituting approximately 50% of my practice.

17. List other areas of law in which you have practiced.

I have done pro bono cases in the areas of debt reduction; employment law; debt collection; and contract disputes.

18. Identify all areas of specialization for which you have applied or been granted certification by the State Bar of Arizona. **None**

19. Describe your typical clients.

My typical personal injury client ranges from very poor to very wealthy. These clients have been injured in some manner due to the negligence of others. Frequently they have attempted to resolve the case on their own, but without success. Most explain that they are not litigious by nature but have been wronged legally and need representation to resolve their matter.

My typical criminal defense client also range from poor to wealthy. They have been accused of violating the law and are seeking representation. Some admit to violating the law and seek to mitigate the consequences; some have had their Constitutional Rights violated and seek protection under the United States Constitution; others hire me because they profess innocence of all charges.

My typical pro bono client is usually indigent and does not have the funds to hire a competent attorney. They generally are not eligible to have an attorney appointed to represent them but have legitimate need for legal representation.

20. Have you served regularly in a fiduciary capacity other than as a lawyer representing clients? If so, give details. **No**

21. Describe your experience as it relates to negotiating and drafting important legal documents, statutes and/or rules.

As both a criminal defense attorney and a personal injury attorney, knowing and understanding the law has been crucial. Most cases can be resolved by (1) understanding the law; (2) documentation my position of the law by way of case law, statutes, etc.; and (3) possessing the ability to articulate the law to either the opposing party or my own clients (depending on who is holding to an unreasonable position). A well drafted motion or demand letter can frequently lead to resolution of a case without trial. The same is true regarding a well-reasoned letter to a client. There are other occasions when both parties have reasonable interpretations of the law that contrast one from the other. When that occurs, understanding the law during trial not only benefits my client but also helps keep the trial proceeding in a timely manner.

As an intern/clerk at the United States Attorney's Office, I personally drafted approximately 20 responses to appeals which were filed in the Ninth Circuit. As an attorney I have drafted hundreds of motions, letters, demand letters, and other legal documents. Many of these documents have led to cases being settled.

22. Have you practiced in adversary proceedings before administrative boards or commissions? **No** If so, state:

    a. The agencies and the approximate number of adversary proceedings in which you appeared before each agency.

    b. The approximate number of these matters in which you appeared as:

    Sole Counsel: _____

    Chief Counsel: _____

    Associate Counsel: _____

23. Have you handled any matters that have been arbitrated or mediated? **Yes**
If so, state the approximate number of these matters in which you were involved as:

Sole Counsel:	**50**
Chief Counsel:	**2**
Associate Counsel:	**5**

24. List not more than three contested matters you negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the names, addresses (street and e-mail) and telephone numbers of all counsel involved and the party each represented; (3) a summary of the substance of each case: and (4) a statement of any particular significance of the case. You may reveal nonpublic, personal, identifying information relating to client or litigant names or similar information in the confidential portion of this application.

State v. Blackman CR2011-03128 (Pinal County Superior Court)

1. **Date or Period of proceedings: January 2012 through August 2012**
2. **The names, addresses (street and e-mail) and telephone numbers of all counsel involved and the party each represented;**
   a. **I represented Mr. Blackman**
   b. **Lawrence Wharton represented the State of Arizona as a Deputy County Attorney. Lawrence Wharton is now a Pinal County Superior Court Judge.**
      P.O. Box 747
      Florence, Arizona 85132
      520-866-5454
      Lwharton@courts.az.gov
3. **Summary of substance of each case: Please see Attachment A Confidential.**
4. **Statements of particular significance of the case: Please see Attachment A Confidential.**

Velez v. Barnes CV2013-095949 (Maricopa County Superior Court)

1. **Date or Period of proceedings: November 2013 through May 2016**
2. **The names, addresses (street and e-mail) and telephone numbers of all counsel involved and the party each represented;**
   a. **I represented Mr. Velez**
   b. **Rae Richardson Represented Mr. Barnes**
      Renaud Cook Drury Mesaros, PA
      One North Central, Suite 900
      Phoenix, Arizona 85004-4117
      602-256-3034
      rrichardson@rcdmlaw.com

3. **Summary of substance of each case: Mr. Velez was rear-ended while riding his motorcycle and suffered significant injuries, some of which did not present until sometime after the accident. Although liability was clear, causation regarding his injuries was disputed.**
4. **Statements of particular significance of the case: There were expert witnesses on both sides that had opposing views. One expert claimed the injuries were caused by the accident, the other said they were not. We were able to negotiate a fair settlement that prevented the lengthy trial this case would have precipitated.**

Flatley v. Noland CV2013-091018 (Maricopa County Superior Court)

1. **Date or Period of proceedings: October 2013 to January 2016**
2. **The names, addresses (street and e-mail) and telephone numbers of all counsel involved and the party each represented;**
   a. **I represented Ms. Flatley**
   b. **Nathan P. Bordegaray represented Mr. Noland**
      20860 North Tatum Boulevard, Suite 175
      Phoenix, Arizona 85050
      480-968-6951, extension 18
      NBordegaray@Geico.com
3. **Summary of substance of each case: Ms. Flatley rear-ended in her automobile suffered significant injuries, some of which did not present until sometime after the accident. Ms. Flatley is in the military and had previously suffered similar injuries while in the Armed Forces. Again, liability was clear; however, causation of her injuries was disputed.**
4. **Statements of particular significance of the case: Like in the Velez case, there were "expert" witnesses on both sides that had opposing views. One expert claimed the injuries were caused by the accident, the other said they were not. This was a particularly difficult case to work and settle because Ms. Flatley was re-stationed to the east coast, making deposition and independent medical exams difficult to schedule and complete. We were able to negotiate a fair settlement that prevented the lengthy trial this case would have occasioned.**

25. Have you represented clients in litigation in Federal or Arizona trial courts? **Yes**
If so, state:

The approximate number of cases in which you appeared before:

Federal Courts: **1**

State Courts of Record: **150**

Municipal/Justice Courts: **500**

The approximate percentage of those cases which have been:

Civil: **15%**

Criminal: **85%**

The approximate number of those cases in which you were:

Sole Counsel: **640**

Chief Counsel: ___

Associate Counsel: **10**

The approximate percentage of those cases in which:

You conducted extensive discovery[1]:	**20%**
You wrote and filed a motion for summary judgment:	**1%**
You wrote and filed a motion to dismiss:	**1%**
You argued a wholly or partially dispositive pre-trial, trial or post-trial motion (e.g., motion for summary judgment, motion for a directed verdict, motion for judgment notwithstanding the verdict):	**3%**
You made a contested court appearance (other than as set forth in above response)	**0%**
You negotiated a settlement:	**85%**
The court rendered judgment after trial:	**14%**
A jury rendered verdict:	**1%**
Disposition occurred prior to any verdict:	**0%**

The approximate number of cases you have taken to trial:

Court **80-90**

Note: If you approximate the number of cases taken to trial, explain why an exact count is not possible.

Jury **5**

[1]Extensive discovery is defined as discovery beyond standard interrogatories and depositions of the opposing party.

I have tried dozens of bench trials to municipal and justice courts. I have not kept track of the exact number.

26. Have you practiced in the Federal or Arizona appellate courts? **No** If so, state:

The approximate number of your appeals which have been:

Civil: _____

Criminal: _____

The approximate number of matters in which you appeared:

As counsel of record on the brief: AZ _____ U.S. _____

Personally in oral argument: AZ _____ U.S. _____

27. Have you served as a judicial law clerk or staff attorney to a court? **No** If so, state the name of the court and dates of service, and describe your experience.

I interned at the United States Attorney's Office in the Eastern District of Washington from 2004-2006. As part of my responsibilities, I prosecuted petty offenses; however, the majority of my internship focused on researching and drafting responses to criminal, civil, and immigration appeals which were presented to the Ninth Circuit Court of Appeals.

28. List not more than five cases you litigated or participated in as an attorney before mediators, arbitrators, administrative agencies, trial courts or appellate courts. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency and the name of the presiding judge or officer before whom the case was heard; (3) the names, addresses (street and e-mail) and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case. You may reveal nonpublic, personal, identifying information relating to client or litigant names or similar information in the confidential portion of this application.

State v. Delange CR2015-001563

1. **Date or period of the proceedings; March 2015 and is Ongoing**
2. **Name of the court or agency and the name of the presiding judge or officer before whom the case was heard;**
   a. **City of Mesa Municipal Court**
   b. **The Honorable Valerye Boyer-Wells**
3. **Names, addresses (street and e-mail) and telephone numbers of all counsel involved and the party each represented;**
   a. **I represent Ms. Delange**

b. Samantha Rivera and John Gaylord represented the State of Arizona as Assistant City of Mesa Prosecutors

City of Mesa Prosecutor's Office
50 East 1st Ave
Mesa, Arizona 85210
480-644-2210
john.gaylord@mesaaz.gov
samantha.rivera@mesaaz.gov

4. Summary of the substance of each case: This case involves the Arizona Medical Marijuana Act (AMMA) defense to a driving under the influence of marijuana charge.
5. Statement of any particular significance of the case: A jury trial was held in April 2016. This was one of the first (if not the first) cases to be tried under the AMMA defense and resulted in a hung jury. A retrial is scheduled for October 2016.

State v. Romney CR2014-132330-001

1. Date or period of the proceedings; July 2014 through April 2016
2. Name of the court or agency and the name of the presiding judge or officer before whom the case was heard;
   a. Maricopa County Superior Court
   b. The Honorable Michael W. Kemp
3. Names, addresses (street and e-mail) and telephone numbers of all counsel involved and the party each represented;
   a. Todd Baker represented Ms. Romney

      Maricopa County Public Defender's Office
      620 West Jackson Street Suite 4015
      Phoenix, Arizona 85003
      602-506-7711
      bakerm002@mail.maricopa.gov

   b. I served as Knapp Counsel for Ms. Romney
   c. Tiffany Leigh Brady represented the State of Arizona as a Deputy County Attorney

      Maricopa County Attorney's Office
      301 West Jefferson Street, Suite 800
      Phoenix, Arizona 85003
      602-506-3411
      bradyt@mcao.maricopa.gov

4. Summary of the substance of each case: This case involved a single car fatal automobile accident where driving under the influence of alcohol was alleged. Ms. Romney and the deceased were both in the vehicle at the time of the accident.
5. Statement of any particular significance of the case: This case had several pretrial issues regarding statements the deceased made prior to passing as well as other evidentiary issues. Eventually this case was tried to a jury. I was hired as Knapp counsel months prior to trial.

Holderbach v. The Estate of Gale Baker and Rummel Construction, Inc. CV2012-093217

1. **Date or period of the proceedings; May 2012 through October 2013**
2. **Name of the court or agency and the name of the presiding judge or officer before whom the case was heard;**
   a. **Maricopa County Superior Court**
   b. **Michael Herzog served as mediator**
3. **Names, addresses (street and e-mail) and telephone numbers of all counsel involved and the party each represented;**
   a. **I represent Mr. Holderbach**
   b. **Patrick Flynn represented The Estate of Gale Baker. Mr. Flynn has since retired. Below is the information for his former firm**
      American Family Insurance
      225 North 45th Street
      Phoenix, Arizona 85034
      (602) 22-3779
   c. **Clint Sorenson represented Rummel Construction, Inc.**
      Law Office of Amy Hamilton
      8800 N. Gainey Center Drive, Suite 277
      Scottsdale, Arizona 85258
      480-294-2898
      sorensc1@nationwide.com
4. **Summary of the substance of each case: Liability was questioned regarding whether Mr. Holderbach shared any contributory negligence to his injuries.**
5. **Statement of any particular significance of the case: Mr. Baker passed away shortly after the accident (nonrelated causes). This led to pretrial issues regarding statements he made about the accident. The case was settled at mediation.**

State v. James Furhmann CR2011-01109

1. **Date or period of the proceedings; June 2011 through November 2012**
2. **Name of the court or agency and the name of the presiding judge or officer before whom the case was heard;**
   a. **Pinal County Superior Court**
   b. **The Honorable Gilberto V. Figueroa**
3. **Names, addresses (street and e-mail) and telephone numbers of all counsel involved and the party each represented;**
   a. **I represented Mr. Furhmann.**
   b. **Sylvia Lafferty represented the State of Arizona as a Deputy County Attorney. Ms. Lafferty currently serves as a pro tem judge in Pinal County.**
      Building A, 971 Jason Lopez Circle
      Florence, Arizona 85132
      520-866-5400
      slafferty@courts.az.gov

4. **Summary of the substance of each case: Mr. Furhmann was charged with Felony Criminal Damage.**
5. **Statement of any particular significance of the case: This case was tried to a jury after significant work was done on pretrial discovery and motions.**

Carter v. Fisher CV2011-098942

6. **Date or period of the proceedings; September 2011 through May 2012**
7. **Name of the court or agency and the name of the presiding judge or officer before whom the case was heard;**
   c. **Maricopa County Superior Court**
   d. **Stephen Scott served as mediator**
8. **Names, addresses (street and e-mail) and telephone numbers of all counsel involved and the party each represented;**
   d. **I represent Mr. Carter**
   e. **Michael J. Childers represented Ms. Fisher**
      Perry Childers Hanlon & Hudson, PLC
      722 East Osborn, Suite 100
      Phoenix, Arizona
      602-254-1444
      mchilders@pchhlaw.com
9. **Summary of the substance of each case: Liability was disputed regarding weather or not Ms. Fisher was responsible for causing Mr. Carter's injuries.**
10. **Statement of any particular significance of the case: After significant discovery, this case was settled through mediation.**

29. If you now serve or have previously served as a mediator, arbitrator, part-time or full-time judicial officer, or quasi-judicial officer (e.g., administrative law judge, hearing officer, member of state agency tribunal, member of State Bar professionalism tribunal, member military tribunal, etc.), give dates and details, including the courts or agencies involved of, whether elected or appointed, periods of service and a thorough description of your assignments at each court or agency. Include information about the number and kinds of cases or duties you handled at each court or agency (e.g., jury or court trials, settlement conferences, contested hearings, administrative duties, etc.).

I have served as a Justice of the Peace pro tem in Maricopa County continuously since June of 2010 (approximately 80 hours per year). I was appointed to the position of pro tem and have been reappointed each year since.

I have served as a pro tem in the following Courts:

San Tan Justice Court
San Marcos Justice Court
East Mesa Justice Court
North Mesa Justice Court

I have heard cases in the following areas of law:

Evictions/Forcible Detainers – Over the last six years I have heard hundreds of Evictions/Forcible Detainer cases. Usually these cases are undisputed; however, I have had the opportunity to preside over dozens of trials regarding this area of law. Usually the defendant in the case is appearing pro se. I work very hard to make sure that the pro se defendants not only receive a fair trial but also *feel* like they received a fair trial even though they are not trained legally. I strive to explain the trial and ruling in a manner that is fair to both sides yet is firmly grounded in the law.

Criminal (Driving under the influence, domestic violence, disorderly conduct, assault, shoplifting). I have also heard hundreds of criminal cases. Most criminal cases resolve in a plea agreement. As a judge, I strive to efficiently accept pleas while making sure that the defendants understand the full consequences of entering a plea. On many occasions I have presided over criminal bench and jury trials. As with other trials, I endeavor to conduct these trials in a manner in which both parties feel that the court was fair in its rulings and decisions. Both parties may not always agree with my rulings, but they do feel as if they were fully heard and that a well-reasoned decision was rendered.

Civil Disputes under $10,000.00 – As a pro tem, I have worked on hundreds of civil files. I have ruled on dozens of Motions for Summary Judgement, Default Judgments, and Judgements on the Pleadings. I have also presided over many bench trials. As with Eviction/Forcible Detainers, many civil defendants appear pro se at trial. Although they are held to the same standards as if they had an attorney representing them, I ensure that they have been heard fully and have a good understanding of the legal reasoning for decisions and rulings.

Orders of Protections/Injunctions Prohibiting Harassment – On more than fifty occasions I have had applications for Orders of Protections or Injunctions Prohibiting Harassment brought before me while on the bench. With each application, I listen to the applicant fully and completely. I explain to the applicant the legal burden they bear and then rule on the application. There are times when the evidence was strong enough that I have granted the Order or Injunction. Other times, there was no prima facie facts to support the application, so the application was denied. And there were times when I was not convinced that there was sufficient evidence to grant the ex parte request and instead set the matter for a hearing. I have also presided over dozens of contested hearing for Orders of Protection and Injunctions Prohibiting Harassment. With each ruling I render a judgment that is clear in explaining the law, applying the facts, and granting or denying the Order. I treat all litigants with dignity and respect as participants in the legal process.

30. List not more than five cases you presided over or heard as a judicial or quasi-judicial officer, mediator or arbitrator. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) the names, addresses (street and e-mail) and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case. You may reveal

nonpublic, personal, identifying information relating to client or litigant names or similar information in the confidential portion of this application.

State v. Nardelli JC2015-130391

1. **Date or Period of Proceedings: May 20, 2016**
2. **Name of the court or agency: San Tan Justice Court**
3. **Names, addresses (street and e-mail) and telephone numbers of all counsel involved and the party each represented**
   i. **Jenna Derango, Deputy County Attorney represented the State**
      Maricopa County Attorney's Office
      301 West Jefferson Street, Suite 800
      Phoenix, AZ 85003
      602-506-3411
      derangoj@mcao.maricopa.gov
   ii. **Sander Dawson, Attorney for Defendant**
      Dawson & Rosenthal
      25 Schnebly Hill Road
      Sedona, Arizona 86336
      928-282-3111
      sander@dawsonandrosenthal.com
4. **Summary of the substance of each case; Ms. Nardelli was charged with Shoplifting and was entitled to a jury trial.**
5. **Statement of any particular significance of the case: There were several rulings on evidentiary matters at trial.**

CC2015-215967 Espinosa v. Gilchrest

1. **Date or Period of Proceedings: December 3, 2015**
2. **Name of the court or agency: San Tan Justice Court**
3. **Names, addresses (street and e-mail) and telephone numbers of all counsel involved and the party each represented: All litigants were pro se. Their personal information is not available to me.**
4. **Summary of the substance of each case: The Espinosas petitioned to have the Gilchrests' dog declared a "vicious dog" and to be put down.**
5. **Statement of any particular significance of the case: Request was denied. According to Superior Court rulings, an individual may not file a petition for vicious dog, rather, it must be done by law enforcement officials.**

CC2015-199989 Readfield v. Randall; CC2015-200787 Moore v. Randall; CC2015-200956 Robin v. Randall; CC2015-200950 Clark v. Randall

1. **Date or Period of Proceedings: October 27, 2015**
2. **Name of the court or agency: San Tan Justice Court**
3. **Names, addresses (street and e-mail) and telephone numbers of all counsel involved and the party each represented: All litigants were pro se. Their personal information is not available to me.**

4. **Summary of the substance of each case: All the named litigants were seeking an Injunction Prohibiting Harassment for the same matter involving the use of motor vehicles on the Randall's property.**
5. **Statement of any particular significance of the case: In closing, petitioners asked the court to issue an injunction prohibiting the Randall's use the motor vehicles on the Randall's property. Request was denied as the Justice Court did not have authority to issue such an order.**

TR2014-160634 State v. Tripp

1. **Date or Period of Proceedings: May 15, 2015**
2. **Name of the court or agency: San Tan Justice Court**
3. **Names, addresses (street and e-mail) and telephone numbers of all counsel involved and the party each represented:**
   i. **Ari Rittman, Deputy County Attorney represented the State**
      Maricopa County Attorney's Office
      301 West Jefferson Street, Suite 800
      Phoenix, Arizona 85003
      602-506-3411
      rittmana@mcao.maricopa.gov
   ii. **Todd Nolan, Attorney for Defendant**
      1744 South Val Vista Drive #210,
      Mesa, Arizona 85204
      480-568-6275
      todd@thenolanlawfirm.com
4. **Summary of the substance of each case: This case was a jury trial regarding charges that Ms. Trip was driving under the influence of alcohol.**
5. **Statement of any particular significance of the case: There were evidentiary issues that needed to be ruled on by the court both before and during trial.**

31. Describe any additional professional experience you would like to bring to the Commission's attention.

While taking a full class schedule at Arizona State University, I worked 50-60 hours a week at Phoenix Tent Rentals. I worked my way into a management position wherein I was responsible for several different departments and employees. I learned how to manage and dispatch a dozen different routes while keeping up with the demands of clientele and ownership.

After I graduated with a Bachelor's Degree but prior to attending Law School, I worked at the Arizona Biltmore as a manager in the Banquet Department. I had between 20-40 employees depending on the season of the year. Although not part of the official job description, my biggest responsibility was appeasing ownership, clients, and my employees. I was required to perform this task daily, frequently when the interests of the three groups were in direct opposition.

BUSINESS AND FINANCIAL INFORMATION

32. Have you ever been engaged in any occupation, business or profession other than the practice of law or holding judicial or other public office, other than as described at question 14? **Yes** If so, give details, including dates.

See Question 31 for additional details.

33. Are you now an officer, director or majority stockholder, or otherwise engaged in the management, of any business enterprise? **No** If so, give details, including the name of the enterprise, the nature of the business, the title or other description of your position, the nature of your duties and the term of your service.

    Is it your intention to resign such positions and withdraw from any participation in the management of any such enterprises if you are nominated and appointed? **Not Applicable** If not, give reasons.

34. Have you filed your state or federal income tax returns for all years you were legally required to file them? **Yes** If not, explain.

35. Have you paid all state, federal and local taxes when due? **Yes** If not, explain.

36. Are there currently any judgments or tax liens outstanding against you? **No** If so, explain.

37. Have you ever violated a court order, including but not limited to an order for payment of child or spousal support? **No** If so, explain.

38. Have you ever been a party to a lawsuit, including bankruptcy but excluding divorce? **Yes** If so, identify the nature of the case, your role, the court, and the ultimate disposition.

In 2005 I sued US Airways in small claims court in Spokane, Washington. The airlines charged extra and unauthorized fees to my credit card. A hearing was held and the court found in my favor and awarded me the full amount of the complaint plus costs.

39. Do you have any financial interests, investments or retainers that might conflict with the performance of your judicial duties? **No** If so, explain.

CONDUCT AND ETHICS

40. Have you ever been terminated, expelled, or suspended from employment or any school or course of learning on account of dishonesty, plagiarism, cheating, or any other "cause" that might reflect in any way on your integrity? **No** If so, give details.

41. a. Have you ever been charged with, arrested for, or convicted of any felony, misdemeanor, or violation of the Uniform Code of Military Justice? **Yes** If so, identify the nature of the offense, the court, and the ultimate disposition.

In 1993 I was out with a group of friends and we were using illegal "Black Cat" firecrackers. When we were confronted by Chandler Police regarding the firecrackers and with a misguided sense of responsibility, I untruthfully told police that I was the only person using fireworks. I entered a misdemeanor plea in the City of Chandler Municipal Court for Illegal use of Fireworks and paid a fine of $50.00.

b. Have you, within the last 5 years, been charged with or cited for any traffic-related violations, criminal or civil, that are not identified in response to question 41(a)? If so, identify the nature of the violation, the court, and the ultimate disposition. **No**

42. If you performed military service, please indicate the date and type of discharge. If other than honorable discharge, explain. **Not Applicable**

43. List and describe any litigation (including mediation, arbitration, negotiated settlement and/or malpractice claim you referred to your insurance carrier) concerning your practice of law. **Not Applicable**

44. List and describe any litigation involving an allegation of fraud in which you were or are a defendant. **Not Applicable**

45. List and describe any sanctions imposed upon you by any court for violation of any rule or procedure, or for any other professional impropriety. **Not Applicable**

46. To your knowledge, has any formal charge of professional misconduct ever been filed against you by the State Bar or any other official attorney disciplinary body in any jurisdiction? **No** If so, when? How was it resolved?

47. Have you received a notice of formal charges, cautionary letter, private admonition or other conditional sanction from the Commission on Judicial Conduct or any other official judicial disciplinary body in any jurisdiction? **No** If so, in each case, state in detail the circumstances and the outcome.

48. During the last 10 years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by Federal and State laws? **No** If your answer is "Yes," explain in detail. (Unlawful use includes the use of one or more drugs and/or the unlawful possession or distribution of drugs. It does not include the use of drugs taken under supervision of a licensed health care professional or other uses authorized by Federal law provisions.)

49. In the past year, have you ever been reprimanded, demoted, disciplined, placed on probation, suspended, cautioned or terminated by an employer as a result of your alleged consumption of alcohol, prescription drugs or illegal use of drugs? **No** If so, state the circumstances under which such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

50. Within the last five years, have you ever been formally reprimanded, demoted, disciplined, cautioned, placed on probation, suspended or terminated by an employer? **No** If so, state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) of any persons who took such action, and the back ground and resolution of such action.

51. Have any of your current or former co-workers, subordinates, supervisors, customers or clients ever filed a complaint or accusation of misconduct against you with any regulatory or investigatory agency, or with your employer? **No** If so, state the date(s) of such accusation(s), the specific accusation(s) made, and the background and resolution of such action(s).

52. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? **No** If so, state the date you were requested to submit to such a test, type of test requested, the name of the entity requesting that you submit to the test, the outcome of your refusal and the reason why you refused to submit to such a test.

53. Within the last five years, have you failed to meet any deadline imposed by a court order or received notice that you have not complied with the substantive requirements of any business or contractual arrangement? **No** If so, explain in full.

54. Have you ever been a party to litigation alleging that you failed to comply with the substantive requirements of any business or contractual arrangement, including but not limited to bankruptcy proceedings? **No** If so, explain in full.

PROFESSIONAL AND PUBLIC SERVICE

55. Have you published any legal or non-legal books or articles? **No** If so, list with the citations and dates.

56. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge? **Yes** If not, explain.

57. Have you taught any courses on law or lectured at bar associations, conferences, law school forums or continuing legal education seminars? **No** If so, describe.

58. List memberships and activities in professional organizations, including offices held and dates.

    Have you served on any committees of any bar association (local, state or national) or have you performed any other significant service to the bar?

I perform dozens of hours of pro bono legal services each year for those that cannot afford representation but are in need of legal representation.

List offices held in bar associations or on bar committees. Provide information about any activities in connection with pro bono legal services (defined as services to the indigent for no fee), legal related volunteer community activities or the like.

Pro bono services provided over the last several years include:

- **Represented multiple employees whose employer refused to pay wages.**
- **Represented client whose wife was dying of cancer to help reduce medical**

bills and other debt.

- **Represented indigent client against debt collectors.**
- **Represented indigent family against a car warranty company that refused to pay under warranty.**
- **Represented multiple indigent clients on criminal charges.**
- **Represented multiple indigent clients against car insurance companies.**

Although many of these cases were outside of the areas in which I practice, I accepted these cases because my clients could not afford legal representation but needed legal assistance. I studied the law until I became proficient in these areas and provided valuable services to those that could not afford representation.

59. Describe the nature and dates of any community or public service you have performed that you consider relevant.

Gilbert Chamber of Commerce 2006-Present – I joined the Gilbert Chamber of Commerce in 2007 and have been a continuous member since. I was asked to serve as a member of the Board of Directors in 2010. I served on the board for three years, promoting business and commerce in the Town of Gilbert. As a member of the Gilbert Chamber, I have been involved in many committees whose aim is to help others. Earlier this year, I worked with a student at Arizona State University as part of the chamber Mentoring Program. He and I spent 30-40 hours together as I mentored him on becoming an attorney. With the permission of my clients, he attended several court dates and other legal events. He now has a better understanding of the process of applying to and attending law school, taking and passing the bar exam, and applying for legal jobs upon completion.

Copper Basin YMCA Board of Directors 2013-Present. In 2013, I joined the Board of Directors. Shortly thereafter I was asked to serve as a Co-Chairman of Board and have served faithfully in that position since. As a member of the board, I encourage others to donate their time, talents and treasures to help the youth in Valley of the Sun. I have headed fundraisers and participated on the committees of many other fundraisers. As a direct result of our efforts there are hundreds of children that are now able to have swim lessons, participate in other physical activities, and have memberships with the YMCA. These youth have gained alternative events to help keep them engaged in positive activities.

Boy Scouts of America – As a teen-aged young man, I earned the highest rank in scouts, the Eagle Scout Award. The men that were my adult leaders during that time were very influential on my life. Once I turned 18, I continued to stay involved in the scouting organization. Over the last 23 years I have served as an adult volunteer in the following capacities: Scout Master, Varsity Coach, Venturing Advisor, Committee Member, Chartered Organization Representative, and Unit Commissioner. I am currently the Scout Master of Troop 581 in Gilbert. On five different occasions I have taken young men ages 14-18 on a two week backpacking excursion at the

Philmont Scout Ranch in New Mexico. During those two weeks, we backpack between 50-120 miles and teach the youth skills that relate not only to the outdoors, but to life as well. Although my volunteer work with the scouts is time consuming and frequently requires the use of my family's personal resources, it has been rewarding to watch young men grow and develop through their teenage years and into adulthood.

Presenter at Town of Gilbert Constitution Week – In each of the last two years, I have been a presenter at Constitution Week. I have donated multiple evenings to ensure that the youth in Gilbert have been able to take classes and learn about the United States Constitution.

Missionary in Cape Town, South Africa 2004-2006 – At age 18 I applied to be a full time Missionary for the Church of Jesus Christ of Latter-day Saints. I entered South Africa shortly after my 19th birthday and shortly after Nelson Mandela was elected president in the first free election held in South Africa. During the two years I spent in South Africa, I spent many hours each week working at charitable organizations that benefited the community. While living in eight different cities, I was able to volunteer as a High School Basketball Coach, spend one on one time with senior citizens at assisted living facilities, work with abused and abandoned animals at the Society for Prevention of Cruelty to Animals, work at the local soup kitchen, and engage with toddlers at preschools as well as perform general maintenance.

Beyond the missionary and volunteer work I was engaged with in South Africa, I watched the growth and development of a country that narrowly avoided a violent civil war. I watched as The Truth and Reconciliation Commission was instituted and applied. My appreciation increased for the governmental structure of the United States and our judicial system. I was able to return later and study the law under Zak Yacoob, a Supreme Court Justice of South Africa. See Question 64 for further details.

60. List any professional or civic honors, prizes, awards or other forms of recognition you have received.

61. List any elected or appointed offices you have held and/or for which you have been a candidate, and the dates.

Have you been registered to vote for the last 10 years? **Yes**

Have you voted in all general elections held during those years? **Yes** If not, explain.

I have absolutely voted in each election during the last 10 years, usually by means of "early voter." However, I recently received a letter in the mail indicating that I have missed voting in at least one election. Although I disagree that I have missed voting in any election, I wanted to disclose to this information to the Commission.

62. Describe any interests outside the practice of law that you would like to bring to the Commission's attention.

I enjoy developing and promoting commerce in local communities as well as promoting youth activities through the local YMCA branches and other youth groups. I am fortunate to have daughters who enjoy accompanying me on backpacking and hiking excursions. I am also privileged to have a wife that enjoys being engaged in outdoor activities with our daughters.

HEALTH

63. Are you physically and mentally able to perform the essential duties of a judge in the court for which you are applying? **Yes**

ADDITIONAL INFORMATION

64. The Arizona Constitution requires that the Commission consider the diversity of the state's or county's population in making its nominations. Provide any information about yourself (your heritage, background, experience, etc.) that may be relevant to this requirement.

Although I was raised in middle class Arizona, I did not have many luxuries associated with the middle class. I learned responsibility at a young age. I began working as a paperboy at age 12. During the summer of my junior year of high school, I worked at a warehouse in Phoenix Monday through Saturday from 4 am – 4:30 pm (or later) each day. I worked full time through undergrad and part time during my second and third years of Law School. Additionally, though it did not feel like an opportunity at the time, I was raised in a home with a severely disabled mother who required round-the-clock assistance. As a high school student and into my college years, I juggled my class schedule and my work calendar with my father's work schedule to ensure that all of my mother's needs were met. Dealing with that life experience taught me compassion and empathy for others.

In 2005 I was accepted to a study abroad program through Howard University. Along with 55 students from Howard and 5 students from other various universities, I spent six weeks in Cape Town, South Africa studying International Dispute Resolution and

International Constitutional Law. We studied under Zak Yacoob, a Supreme Court Justice for South Africa's highest court. I learned how and why South Africa's new constitution was constructed. We discussed several constitutional issues that vary from country to country around the world. Because I was one of only five Caucasian students in the class, I was "volunteered" almost daily by Justice Yacoob to discuss topics. He frequently grilled me on my perspective and asked me to relate my views to both the United States Constitution and the South African Constitution. During this time, I gained a greater insight to the Constitution of the Unites States and the importance it has played in the development of laws around the world. I was able to visit Robben Island where Nelson Mandela spent 18 of the 27 years of his imprisonment. I visited the rock quarries where he was forced to do hard labor as a political prisoner. These events deepened my understanding and appreciation for the rights which Mr. Mandela was denied, but are afforded to all in the United States.

65. Provide any additional information relative to your application or qualifications you would like to bring to the Commission's attention at this time.

Given many of my life experiences, I have a unique understating of people who may appear before me in court. Having lived and worked in third world conditions has given me an exceptional socio-economic perspective while also reaffirming the importance of a healthy economy. I know what it means to come from and overcome less than ideal circumstances and to have challenges that can impede progress. My life experiences have developed a healthy understanding and great appreciation for the laws that have built Arizona and the United States.

66. If you were selected by this Commission and appointed by the Governor to serve, are you aware of any reason why you would be unable or unwilling to serve a full term? **No** If so, explain.

67. If selected for this position, do you intend to serve fully, including acceptance of rotation to areas outside your areas of practice or interest? **Yes** If not, explain.

68. Attach a brief statement explaining why you are seeking this position.

Generally speaking, when individuals find themselves in the Superior Court, they are dealing with stressful life events. The anxiety caused by facing felony charges, divorce proceedings, civil disputes, or juvenile delinquency/dependencies leave most people feeling vulnerable and scared. The Judiciary of Arizona is essential to resolving these types of matters and I want to be part of helping individuals through the court process. I have shown the ability to be compassionate and empathetic while maintaining a fair and impartial demeanor as a judge. I recognize that my role as a judge is to enforce and apply the law as written. I understand that while I may

thrive at helping others resolve and settle their legal differences, sometimes those conflicts cannot be settled without trial. When that occurs I want to provide sound legal decisions that further the interest of justice.

69. Attach three professional writing samples, which you personally drafted (e.g., brief or motion). The samples should be no more than a few pages in length.

    You may excerpt a portion of a larger document to provide the writing samples. Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website.

See Attachment B.

70. If you have ever served as a judicial or quasi-judicial officer, mediator or arbitrator, attach sample copies of not more than two written orders, findings or opinions (whether reported or not) which you personally drafted. The writing sample(s) should be no more than a few pages in length. You may excerpt a portion of a larger document to provide the writing sample(s). Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website.

71. If you are currently serving as a judicial officer in any court and are subject to a system of judicial performance review, please attach the public data reports and commission vote reports from your last two performance reviews.

-- INSERT PAGE BREAK HERE TO START SECTION II (CONFIDENTIAL INFORMATION) ON NEW PAGE --

ATTACHMENT

B

Sample

1

2008 WL 5530787 (D.Ariz.) (Trial Motion, Memorandum and Affidavit)
United States District Court, D. Arizona.

Patrice BJORNSTAD As Trustee of the Thomas and Isis Davidson Family Trust, On Behalf of Isis Davidson, Plaintiff,
v.
SENIOR AMERICAN LIFE INSURANCE COMPANY, a Foreign Corporation; Black Corporations I-X; White Partnerships I-X; John Does I-X; and Jane Does I-X, Defendants.

No. 208CV00248.
November 3, 2008.

Plaintiff's Motion for Partial Summary Judgment

Rowley Chapman Barney & Buntrock, Ltd., 63 East Main Street, Suite 501, Mesa, Arizona 85201, Telephone (480) 833-1113, Facsimile (480) 833-1114, Email buntrock@azlega.com, Attorneys for Plaintiff, Shane D. Buntrock - SBN #019693, Keith R. Nelson - SBN #024952.

Pursuant to Rule 56, Federal Rules of Civil Procedure, Plaintiff Patrice Bjornstad, as trustee of the Thomas and Isis Davidson Family Trust, for and on behalf of Isis Davidson, moves for partial summary judgment on her complaint. This motion is supported by the entire pleadings on file in this matter together with the following Memorandum of Points and Authorities, the accompanying Statement of Facts, Exhibits and Declaration attached hereto.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case concerns the Isis Davidson's ("Ms. Davidson") claim for benefits from her Health Care Insurance Policy issued by Senior American Life Insurance Company ("Senior American"). On or about March 20, 2002, Isis Davidson) purchased a Senior American Home Health Care insurance policy ("the Policy"). Since April 2006, Ms. Davidson's daughter, Patrice Bjornstad ("Bjornstad"), has made many requests for benefits on Ms. Davidson's behalf. Senior American had denied each and every claim from Bjornstad citing to different theories of why Ms. Davidson is not entitled to benefits under the Policy. Plaintiff is entitled to benefits under the express terms of the policy.

II. UNDISPUTED FACTS

A. Procurement of the Policy.

On March 20, 2002, Ms. Davidson purchased her Senior American insurance policy at issue. (SOF 1). The Policy was a home health care insurance policy designed to provide benefits for home health care, should a need arise. (SOF 2). Ms. Davidson faithfully made all of her premium payments from the time she acquired the policy until the present day. (SOF 3).

B. Ms. Davidson meets the conditions which trigger benefits under the Policy.

According to the Policy, Ms. Davidson is entitled to Home Health Care Benefits and Homemaker/Companion Care Benefits if either (1) she is unable to perform two or more of the Activities of Daily Living without human assistance or continual supervision, or (2) she is afflicted with Cognitive Impairment. (SOF 4)(emphasis added). Ms. Davidson meets both of the

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Policy's terms.

The Policy states Eating, Bathing, Dressing, Ambulating, Transferring, Toileting, and Continence as the Activities of Daily Living. (SOF 5). These terms are defined as follows: (1) Eating is Your ability to get food from Your plate into Your mouth; (2) Bathing is Your ability to get into or out of a tub or shower, and/or wash parts of Your body with a sponge or wash cloth; (3) Dressing is Your ability to dress appropriately for personal health and safety; (4) Ambulating is Your ability to move from place to place; (5)Transferring is Your ability to get into and out of a bed or chair; (6)Toileting is Your ability to transfer to a toilet and complete hygienic measures such that Your health is not compromised; and (7) Continence is Your ability to control urination and defecation or, if not able to control urination or defecation, Your ability to complete hygienic measures such that Your health is not compromised. (SOF 6).

The Policy specifically describes Alzheimer's as a form of Cognitive Impairment which is defined as "confusion or disorientation resulting from a deterioration or loss of intellectual capacity that is not related to or a result of mental illness, but which can result from Alzheimer's disease or similar forms of senility or irreversible dementia." (SOF 7). The Policy also states that "Cognitive Impairment must result in your requiring twenty-four (24) hour a day supervision to maintain Your safety." (SOF 8).

On April 18, 2006, Dr. Copeland diagnosed Ms. Davidson with Alzheimer's disease. (SOF 9). On the same day, Ms. Davidson moved into her new home at Encore Senior Village ("Legacy Village") in Mesa, which is where she currently resides.[1] (SOF 10). When she was admitted to Legacy Village, the Physician's History and Physical Report noted that Ms. Davidson had a medical history of dementia. (SOF 12). When Ms. Davidson was admitted to Legacy Village, she was unable to perform two or more of the activities of daily living without assistance and she suffered from Alzheimer's disease. (SOF 13).

At Legacy Village, Ms. Davidson has her own private bedroom and bathroom. (SOF 14). She is permitted to make most decisions regarding her daily activities. (SOF 15). She is permitted to go for walks on her own, take bus trips to various activities, garden on her own, assist with household activities such as cooking and laundry, and participate in other activities such as exercise programs and arts and crafts. (SOF 16). She is also able to decline to participate in any of the above activities. (SOF 17).

C. The multiple denials of coverage by Senior American.

On or about April 13, 2006, Bjornstad called Senior American to determine what procedures she needed to follow in order to receive covered benefits for Ms. Davidson. (SOF 18). At that time, Bjornstad was incorrectly advised by a representative of Senior American that Ms. Davidson was only eligible for benefits under the Policy if she lived in a home that she owned. (SOF 19). In late April and early May 2006, Bjornstad had three separate telephone conversations with Senior American's Customer Service Manager, Richard Danese, regarding Ms. Davidson's policy. (SOF 20). Due to Senior American's misrepresentation of Ms. Davidson's eligibility for benefits, the Policy was cancelled in May 2006. (SOF 21). The cancellation was back dated to April 14, 2006. (SOF 22).

When Senior American was made aware of its misrepresentations, The Policy was reinstated in October 2006. (SOF 23). However, On November 27, 2006, Senior American again denied coverage because it claimed that it was unable to determine what percentage of Ms. Davison's costs was for Home Health Care and what percentage was for room and board. (SOF 24). On December 27, 2006 Senior American again denied coverage because part of Ms. Davidson's costs were related to her residence rather than health care. (SOF 25). Senior American also implied that the claim was being denied because Ms. Davidson's costs did not rise as her level of care increased, and she therefore was not actually incurring costs for her care. (SOF 26).

On January 15, 2007, Senior American again denied coverage claiming that Ms. Davidson's costs were related to residence rather than health care. (SOF 27).

On May 4, 2007, Senior American was provided a Tenant Ledge from Legacy Village, which separated Ms. Davidson's health care costs from her rent. (SOF 28).

On May 11, 2007, Senior American again denied coverage. (SOF 29). This time the denial was based on Senior American's claim that Ms. Davidson was not capable of independent living. (SOF 29). Senior American stated that because Ms. Davidson was unable to perform at least three of the activities of daily living that she was not capable of independent living in her own personal residence and because she was not capable of independent living, home health care coverage was not applicable. (SOF 30). In the same letter, Senior American also tried to deny coverage because Ms. Davidson's condition occurred before the Policy was reinstated (but after it was originally entered into), and as such was a pre-existing condition to the reinstated policy. (SOF 31).

On July 31, 2007, Senior American again denied coverage, claiming that Legacy Village was a "Nursing Facility" and cited to 42 U.S.C.A. § 1396r(a) as a statutory example of defining the term "Nursing Facility." (SOF 32).

D. Ms. Davidson pays for rent and for health care under the Policy.

On August 20, 2008, Theresa M. Berrigan, the Executive Director of Legacy Village signed an affidavit wherein she stated that Ms. Davidson pays $3,695.00 per month for rent and health care she receives at Legacy Village. (SOF 33). Ms. Berrigan also stated that seventy percent (70%) or $2,586.50 of Ms. Davidson's care is for assistance with eating, bathing, dressing, grooming, toileting, assistance from Certified Care Givers and Licensed Nurses, her nutritional management and her therapeutic sessions with weights. (SOF 33). The remaining thirty percent of her costs is for rent, cost of food, laundry services, activities and other services provided. (SOF 34).

E. Senior American claims that had Ms. Davidson remained at Merrill Gardens, she would have been eligible for benefits.

In Senior American's Response #10 to Plaintiffs Non-Uniform Interrogatories, Senior American sated that "[h]ad Ms. Davidson Remained Living in Merrill Gardens, a home health care agency could have provided services for her at Merrill Gardens" and that "[t]his would have been a coverd benefit." (SOF 35). On November 3, 2008, Peter L. Heck, the Executive Director of Merrill Gardens signed an affidavit wherein he stated that he is certified as an Assisted Living Facility Manager and that Merrill Gardens at Apache Junction is licensed to operate as an Assisted Living Center. (SOF 36). On November 3, 2008, Enedina D. Acosta, the Director of Wellness at Merrill Gardens signed an affidavit wherein she stated that Isis Davidson received Assisted Living Services while living at Merrill Gardens. (SOF 37).

From May 8, 2006 until the current date, Senior American has failed to pay the monthly benefits due, for a running total of $62,073.92.[2] (SOF 38). According to the express terms of the Policy, from August 5, 2006 until the current date, Senior American should have waived all premiums which total, to date, $6,423.90. (SOF 39).

Recently, Senior American disclosed another Senior American policy which specifically defines and distinguishes Assisted Living Facilities from Nursing Facilities. (SOF 40). The other policy states that Assisted Living Facilities provide "... 24 hour per day care and service sufficient to support needs resulting from the Inability To Perform Activities of Daily Living or Cognitive Impairment..." (SOF 40). Under the other policy, a Nursing Home must be "licensed by the state as a convalescent nursing facility, a skilled nursing facility ..." (SOF 40). Senior American stated in Response #6 to Plaintiff's Request for Admissions that "the term 'nursing facility' as used in the Policy encompasses both nursing care institutions and assisted living facilities." (SOF 41).

III. STANDARD OF REVIEW

The granting of summary judgment is appropriate if there are "no material facts and [the] moving party is entitled to a judgment as a matter of law." Ariz.R.Civ.P. 56(c). Furthermore, the interpretation of a contract is a matter of law and not a question of fact. *Divizio v. Kewin Enterprises, Inc.,* 136 Ariz. 476, 481, 666 P.2d 1085, 1090; *Polk v. Koerner,* 111 Ariz. 493, 533 P.2d 660 (1975).

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Here, there are no material issues of disputed fact. The only issue is whether Davison is entitled to benefits under the terms of the policy. This issue is dispositive of Count One (Declaratory Judgment) and Count Two (Breach of Contract) of the Complaint.

IV. ARGUMENT AND AUTHORITIES

Arizona law clearly states that "[c]ontracts are to be read in light of the parties' intentions as reflected by their language and in view of all circumstances; if the intention of the parties is clear from such a reading, there is no ambiguity. *Harris v. Harris,* 195 Ariz. 559, 562, 991 P.2d 262, 265 (App. 1999) (citing to *Smith v. Melson, Inc.,* 135 Ariz. 119, 121, 659 P.2d 1264, 1266 (1983)). When the meaning remains uncertain after application of primary standards of construction "a secondary rule of construction provides that ambiguity **is to be strictly construed against the drafting party.**" *Id.* 195 Ariz. at 562, 991 P.2d at 265 (emphasis added).

It is undisputed that Ms. Davidson paid all premiums of her policy. (SOF 3). It is undisputed that Ms. Davison maintains her personal residence at Legacy Village. (SOF 10). It is undisputed that Ms. Davidson had a Cognitive Impairment and was unable to perform two or more of the Activities of Daily Living when she moved to Legacy Village. (SOF 13). It is undisputed that seventy percent (70%) or two thousand five hundred eight-six dollars and fifty cents of Ms. Davidson's care is for assistance with eating, bathing, dressing, grooming, toileting, assistance from Certified Care Givers and Licensed Nurses, her nutritional management and her therapeutic sessions with weights. (SOF 33).

It is also undisputed that Legacy Village is not licensed as a Nursing Care Institution in Arizona and cannot legally operate as such.

B. Under the express terms of the Policy, Ms. Davidson is entitled to benefits because she is unable to perform two or more of the activities of daily living and also because she has a cognitive impairment.

The Policy states that Davison is eligible to receive the Homemaker Companion Benefits if "**You are unable to perform two (2) or more of the Activities of Daily Living without human assistance or continual supervision**" or if "**You are afflicted with a Cognitive Impairment.**" (See EXHIBIT A of Plaintiff's SOF, pg. 5). According to the Policy, Human assistance includes hands-on physical aid or support as well as reminders and verbal cueing. (See EXHIBIT A of Plaintiff's SOF, pg. 5).

When Ms. Davidson moved to Legacy Village, she was unable to perform two or more of the Activities of Daily Living. (SOF 13). The Policy also allows for Home Health Care benefits when the policy holder is unable to perform two (2) or more of the activities of daily living or is afflicted with a Cognitive Impairment such as Alzheimer's disease. (*See* EXHIBIT A of Plaintiff's SOF, pg. 6).

C. Ms. Davidson is entitled to Home Health Care Benefits and Homemaker/Companion Care Benefits.

Ms. Davidson is unable to perform two or more of the Activities of Daily Living without human assistance and she has Alzheimer's. Therefore, per the policy she is eligible for Home Health Care Benefits and Homemaker/Companion Care. Ms. Davidson is entitled to receive benefits for the help she receives with the activities of daily living in her home under Homemaker/Companion Care benefits.

Ms. Davidson is also entitled to receive skilled nursing services performed by licensed registered nurses, licensed practical nurses, licensed vocation nurses, total parental nutrition specialists, physical therapists and assistance with the activities of daily living provided by home health aides or certified nurse's assistance under the Home Health Care benefits. (*See* EXHIBIT A of Plaintiff's SOF, pg. 6).

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Ms. Davidson pays $2,586.50 for the home health care and homemaker/companion care she receives from Legacy Village. (SOF 33). She receives assistance with eating, bathing, dressing, grooming, toileting, assistance from Certified Care Givers and Licensed Nurses, her nutritional management and her therapeutic sessions with weights. (SOF 33).

D.The express terms of the Policy entitle Ms. Davidson to receive these benefits in her home.

Home is defined in the Policy as "Your personal residence, whether it be in a private dwelling, or a home for the retired or aged. (See EXHIBIT A of Plaintiff's SOF, pg. 5). It does not include a hospital, sanitarium or Nursing Facility." (See EXHIBIT A of Plaintiffs SOF, pg. 5). Although the Policy states that any word in bold will be defined, the term "Nursing Facility" is in bold, but is not defined within the Policy. Although the Policy specifically excludes hospitals, sanitariums and nursing facilities, it does not exclude Assisted Living Facilities.

Ms. Davidson lives at Legacy Village as her personal residence. (SOF 10). At Legacy Village, Ms. Davidson has her own private bedroom and bathroom. (SOF 14). She is permitted to make most decisions regarding her daily activities. (SOF 15). She is permitted to go for walks on her own, take bus trips to various activities, garden on her own, assist with household activities such as cooking and laundry, and participate in other activities such as exercise programs and arts and crafts. (SOF 16). She is also able to decline to participate in any of the above activities. (SOF 17).

E.Senior American's denials of coverage are contrary to the Policy.

Senior American has denied coverage for several different reasons. Those reasons include: (1) claiming that Ms. Davidson's costs were related to residence rather than health care (SOF 27); (2) claiming that that because Ms. Davidson was not capable of independent living home health care coverage was not applicable (SOF 29, 30); and (3) claiming that Legacy Village was a "Nursing Facility." (SOF 32).

1. Ms. Davidson accrues actual costs for the care she receives which is separate from the rent she pays.

Senior American has denied coverage to Ms. Davidson claiming that she does not accrue costs for the services she receives. (SOF 26). In order to reside at Legacy Village, Davison pays $3,695.00 per month. (SOF 33). Of that amount, seventy percent (70%) or $2,586.50 is for the assistance she receives with eating, bathing, dressing, grooming, toileting and also the assistance she receives from Certified Care Givers and Licensed Nurses, her nutritional management and her therapeutic sessions with weights. (SOF 33). The remaining thirty percent (30%) goes to pay for other services provided, such as rent, cost of food, laundry services, and activities. (SOF 34).

2. Whether or not Ms. Davidson is incapable of independent living is irrelevant and is not contemplated in the Policy.

Nowhere in the Policy is there any language requiring that Ms. Davidson be capable of independent living in order to be eligible for benefits. Senior American's denial for that reason is completely without merit.

3. Legacy Village is an Assisted Living Facility and not a Nursing Facility, thus according to the express language of the Policy, it is not excluded.

Senior American's does not exclude Assisted Living Facilities from coverage. "Ambiguous terms in a contract of insurance are to be strictly construed in favor of the insured and coverage and against the insurer." *Roberts v. State Farm Fire and Casualty, 146 Ariz.* 284, 285, 286, 705 P.2d 1335, 1336, 1337 (1985). "If an insurer wishes to limit its liability, it must employ the language in the policy which clearly and distinctly communicates to the insured the nature of*the limitation." *Id.*

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146 Ariz. at, 286, 705 P.2d at 1337. "The principle of strict construction applies, however, only after the contested language of the policy has been determined to be ambiguous." *Id.* "It applies, however, with even greater force where the ambiguity appears in an exclusionary clause. *Id.*

The Policy lists only *hospitals, sanitariums and Nursing Facilities* as three facilities that will not be considered Ms. Davidson's home. (See EXHIBIT A of Plaintiffs SOF, pg. 5). Although there is no dispute that Legacy Village is not a hospital or sanitarium, Senior American continues to deny coverage claiming that Legacy Village is a Nursing Facility. (SOF 32).

There is no doubt that at the time the Policy was drafted, Senior American was aware of Assisted Living Facilities in general and could have excluded them along with the other three facilities. In fact, Senior American has other policies which specifically define Assisted Living Facilities as being separate and distinct from Nursing Facilities.[3]

Senior American had the opportunity to limit its liability with the Policy and could have excluded Assisted Living Facilities, but it chose not to do so. Especially since this relates to an exclusionary clause, the principle of strict construction applies and the Policy must be construed in favor of Ms. Davidson and coverage on her claim.

i. Arizona requires that nursing care institutions be licensed by the state, which Legacy Village is not.

Alternatively, Legacy Village cannot legally be considered a Nursing Facility because if it was, Legacy Village would lose it license to operate. In Arizona, "Nursing care institutions" are statutorily defined under A.R.S. § 36–446 as "an institution or other place, however named which is advertised, offered, maintained or operated for the express or implied purpose of providing care to persons who need nursing services on a continuing basis but do not require hospital care or care under the daily direction of a physician."

Arizona law requires that "[a] nursing care institution shall not operate in this state except under the supervision of an administrator licensed pursuant to this article." A.R.S. § 36-446.01. The qualifications required to be a licensed nursing care administrator are delineated in A.R.S. § 36-446.04.

Conversely, under Arizona law, an "Assisted living facility" is defined as "a residential care institution, including adult foster care, that provides or contracts to provide supervisory care services, personal care services or directed care services on a continuing basis." A.R.S. § 36-446(2); A.R.S. § 36-401.

Legacy Village is not licensed as a nursing care institution, and as such is not a Nursing Facility. Theresa M. Berrigan, the director of Legacy Village is certified as an Assisted Living Facility Manager. She is not certified as a nursing care institution manager. By Arizona statutes, Legacy Village is a residential care institution that provides supervisory care, personal care, or directed care services on a continual basis. The Policy allows for human assistance to be provided to assist with the Activities of Daily Living, including hands-on physical aid or support, reminders, and verbal cueing. The services provided by Legacy Village to Ms. Davidson are **precisely** the services allowed by the Policy.

ii. Senior American cites to statutes which prohibit Legacy Village from being defined as a Nursing Facility.

Additionally, under federal law, Legacy Village cannot be considered a Nursing Facility. Senior American relied on 42 U.S.C.A. § 1396r(a) as an statutory example of the definition of "Nursing Facility." Sections (2) and (3) of the definition state that the term "nursing facility" means an institution or distinct part of an institution which "meets the requirements for a nursing facility described in subsections (b), (c), and (d) of this section." 42 U.S.C.A. § 1396r(a). Section (b) requirements relate to provision of services, section (c) requirements relate to residents' rights and section (d) requirements relate to administration and other matters. Legacy village does not qualify as a Nursing Facility under either of these sections.

Furthermore, 42 U.S.C.A. § 1396r section (d)(2)(A) requires that "**A nursing facility must be licensed under applicable State and local law.**" (Emphasis added). As above, Senior American is not licensed in Arizona as a nursing facility and as

such can not legally operate as one in the State of Arizona.

4. By Senior American's own admissions, Ms. Davidson is entitled to benefits under the Policy.

Senior American even admits that residents of Assisted Living Facilities are entitled to benefits. Although not supported by the Policy, it is Senior American's position that "the term 'nursing facility' as used in the Policy encompasses both nursing care institutions and assisted living facilities." (See EXHIBIT R of Plaintiff's SOF, response #6). Ms. Davidson has lived at two different Assisted Living Facilities since purchasing the Policy: Merrill Gardens at Apache Junction and Legacy Village at East Mesa. (SOF 10, 37). Ms. Davidson has also received Assisted Living Services while at both facilities. (SOF 33, 37).

Senior American states that had "Ms. Davidson remained living at Merrill Gardens, a home health agency could have provided services for her at Merrill Gardens," and that "this would have been a covered benefit." (See EXHIBIT Q of Plaintiff's SOF, response #10). Although Senior American claims that it would have provided home health care benefits had Ms. Davidson remained at the Assisted Living Facility Merrill Gardens, it is now denying coverage because she is living at Legacy Village, another Assisted Living Facility.

By Senior American's own admissions, living in an Assisted Living Facility does not preclude Ms. Davidson from being entitled to home health care benefits, and as such, Assisted Living Facilities are not Nursing Facilities under the Policy. See EXHIBIT Q of Plaintiff's SOF, response #10).

IV. DAMAGES

A. Ms. Davidson is entitled to past due benefits of $62,073.59.

On April 18, 2006, Isis Davison moved into Legacy Village. She pays a monthly sum of $3,695.00 for rent and for the services that she receives at Legacy Village. Since that time, through November 2008, Ms. Davidson has been eligible for benefits in the amount of $62,073.92. This amount is calculated as follows:

Dividing the monthly sum by the number of days in a given month renders the daily cost of living at Legacy Village of $119.19 per day in months with thirty-one days, $123.16 per day in months with thirty days, $127.41 per day in months with twenty-nine days, and $131.96 per day in months with twenty-eight days.

Multiplying the daily cost of living at Legacy Village by 70%, the actual cost accrued for home health care, renders an actual daily cost accrued of $83.43 per day in months with thirty-one days, $86.21 per day in months with thirty days, $89.19 per day in months with twenty-nine days, and $92.37 per day in months with twenty-eight days.

Multiplying the daily actual cost accrued by 80%, the daily benefit amount under the Policy renders daily benefits due in the amount of $66.75 per day in months with thirty-one days, $68.97 per day in months with thirty days, $71.35 per day in months with twenty-nine days, and $73.90 per day in months with twenty-eight days.

Multiplying the daily benefits due by the number of days in the month renders monthly benefits due in the amount of $2,069.14 per month in months with thirty-one days, $2,069.09 per month in months with thirty days, $2,069.14 per month in months with twenty-nine days, and $2,069.13 per month in months with twenty-eight days.

Thus, because the Elimination Period prior to benefits is twenty (20) days, Ms. Davidson became eligible for benefits starting on May 8, 2006. From May 8, 2006 until the end of November 2008, Senior American has failed to pay the monthly benefits due, for a running total of $62,073.92.

B. Ms. Davidson is entitled paid in the amount of $6,423.90.

The Policy also includes a waiver of all premiums after Ms. Davidson receives benefits for ninety continuous (90) days. Her eligibility for benefits began on May 8, 2006; therefore, Senior American should have waived all premiums that came due after August 5, 2006, for a running total of $6,423.90.

C. Ms. Davidson should be awarded her attorney's fees

As a matter arising out of contract and pursuant to A.R.S. § 12-341.01, the Court should award Bjornstad her reasonable attorney's fees in this matter. Moreover, the Court should award prejudgment interest, which is a mater of right on a liquidated claim. *Fleming v. Pima County,* 141 Ariz. 149, 658 P.2d 1301 (1984); *Lennar Corp. v. Auto-Owners Ins. Co.,* 214 Ariz. 255, 151 P.3d 538 (App. 2007) (noting that Court has discretion to award reasonable attorneys' fees to a prevailing party in an insurance contract dispute).

V. CONCLUSION

For all the foregoing reasons, Bjornstad respectively requests the Court to grant partial summary judgment regarding the Declaratory Judgment and Breach of Contract claims in her favor in the amount of $62,073.59 for past due benefits owed and $6,423.60 for premiums that should have been waived. Bjornstad also respectively requests the Court to order Senior American life begin distributing monthly benefits as it is required to do under the policy. Bjornstad also request pre-judgment and post judgment interest together with its attorney's fees pursuant to A.R.S. § 12-341.01.

DATED this 3rd day of November, 2008.

Footnotes

1 Legacy Village purchased Encore Senior Village shortly after Ms. Davidson became a resident. (SOF 11).

2 This amount is through November 2008. Each month will increase the amount owed by Senior American in past due benefits.

3 Under Senior American's other policy, an Assisted Living Facility is defined as providing "... 24 hour per day care and service sufficient to support needs resulting from the Inability To Perform Activities of Daily Living or Cognitive Impairment ... The same policy requires that a Nursing Home be "licensed by the state as a convalescent nursing facility, a skilled nursing facility ..." Not only are the definitions completely distinct from each other, but the care provided at the "Assisted Living Facility" under the other Senior American Policy is exactly the type of care required by someone who is eligible for benefits under Ms. Bjornstad's Policy. (See EXHIBIT Q of Plaintiffs SOF, pg. 5, 7).

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MEMORANDUM OF POINTS AND AUTHORITIES

Rule 16.2(b) of the Arizona Rules of Criminal Procedure establishes the procedure on pretrial motions to suppress evidence and provides that the prosecution bears "the burden of proving, by a preponderance of the evidence, the lawfulness in all respects of the acquisition of all evidence which the prosecutor will use at trial." 16A A.R.S. Rules Crim.Proc., Rule 16.2. This Motion contains specific circumstances which establish a *prima facie* case that the blood drawn in this case should be suppressed.

The Fourth Amendment to the United States Constitution reads as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV. Applying the newly published United States Supreme Court case Missouri v. McNeely, 133 S.Ct. 1552 (2013), clearly indicated that when Pinal County Sheriff's Office obtained Mr. [redacted]'s blood, it was done so in an illegal manner.

I. Factual Background.

On August 18, 2012, Deputy Benedict and Deputy Holloway of the Pinal County Sherriff's Department responded to a private property vehicle collision at the Fry's Food Store located at 155 W. Combs Rd. in San Tan Valley. One of the parties of that collision was Mr. [redacted]. During the investigation an incident occurred wherein Mr. [redacted] ended up injured and on the ground. According to Mr. [redacted], Deputy Holloway threw Mr. [redacted] to the ground, causing significant injuries. According to Deputy Benedict, Mr. [redacted] just "dropped his body weight to the ground."

Deputies contacted medical personnel for evaluation. Mr. [redacted] was transported to Banner Ironwood for the injuries he sustained. After Mr. [redacted] was transported to the hospital, Deputy Benedict had time to receive a copy of the surveillance video and asked loss prevention to "attempt to gain footage of [redacted] from the time he exited his vehicle until he was approached by Ronnie." Deputy Benedict then drove around the corner to Banner Ironwood where he requested that Nurse Kerry provide him with two

grey top vials of blood. Deputy Benedict supplied his own "Grey Top" vials from an evidentiary blood kit. He reports that he put the blood in a storage locker and requested scientific testing be conducted on the blood.

Deputy Benedict did not obtain a search warrant for the blood nor did he request that Mr. [redacted] submit to a blood test pursuant to Implied Consent Law (A.R.S. §28-1321). However, several months later, Deputy Benedict went to Mr. [redacted]'s home and asked him to sign the implied consent affidavit, which Mr. [redacted] refused to sign. (See Attached Informed Consent Form).

II. Law.

Officers rely upon current statute A.R.S. 28-1388(E) and its predecessor, A.R.S. 28-692(M) to justify their refusal to obtain warrants prior to seizing blood taken by medical professional. As defined by the current statute:

> Notwithstanding any other law, if a law enforcement officer has probable cause to believe that a person has violated § 28-1381 and a sample of blood, urine or other bodily substance is taken from that person for any reason, a portion of that sample sufficient for analysis shall be provided to a law enforcement officer if requested for law enforcement purposes. A person who fails to comply with this subsection is guilty of a class 1 misdemeanor.

A.R.S. 28-1388(E).

According the Arizona Supreme Court, before utilizing this statue any officer has three prerequisites: (1) probable causes exists to believe the person has violated A.R.S. 28-1381, **(2) exigent circumstances are present**, and (3) The blood is drawn for medical purposes by medical personnel. State v. Cocio, 147 Ariz. 277, 284, 709 P.2d 1336, 1345 (1985) (emphasis added). In Cocio, the Arizona Supreme Court created *per se* exigency on DUI cases by stating "The highly evanescent nature of alcohol in the defendant's blood stream guaranteed that the alcohol would dissipate over a relatively short period of time." *Id.*

In the past, law enforcement officers have assumed a *per se* exigency (as discussed in Cocio) and declined to obtain a search warrants when blood was drawn by a medical personnel for medical purposes.

III. A NEW UNITED STATE SUPREME COURT CASE MUST BE APPLIED

In April of 2013, the United States Supreme Court issued a ruling changing DUI law across the county put an end to *per se* exigency of alcohol in DUI cases by stating "We hold that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." Missouri v. McNeely, 133 S.Ct. 1552, 1568 (2013).

In McNeely, law enforcement officers suspected that McNeely was driving under the influence and never attempted to obtain a search warrant for blood that was taken from McNeely at a nearby hospital. Id. at 1557. As a result of the outcome from the testing of the blood that was seized without a warrant, McNeely was charged with DUI. Id. McNeely moved to suppress the results of the blood test, arguing that "taking his blood for chemical testing without first obtaining a search warrant violated his rights under the Fourth Amendment." Id. The Court noted that the *per se* rule of exigency on DUI cases is inappropriate since over the years "more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple." Id. at 1561. As noted, in 1977, the Rules of Criminal Procedure were amended to permit judges to issue telephonic search warrants. Id. at 1562. The Court concluded that the natural dissipation of alcohol in the blood does not support a categorical finding of exigency. Id. at 1563.

Thus, in this case, the State must prove that an actual exigent circumstance exited when Deputy Benedict seized Mr. [redacted]'s blood without a search warrant.

IV. APPLICATION.

For purposes of this Motion only, Defense is not disputing that law enforcement had probable causes to believe Mr. [redacted] had violated A.R.S. 28-1381 or that the blood was drawn for medical purposes by medical personnel. What Defense does dispute is whether there were exigent circumstances present to justify a warrantless seizure.

a. There was No Valid Consent to Search Obtained.

Without a search warrant, blood can still be "reasonably" obtained if in compliance with a specifically established and well-delineated exception to the search warrant requirement. See Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507'1967. One of those specifically established and well-delineated exceptions to the warrant requirement is consent. See Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041 (1973)(consent to search constitutes exception to warrant requirement). Although the consent need be freely and voluntarily given and more than just "acquiescence to a claim of lawful authority," (see Bumper v. North Carolina, 391 U.S. 543, 548-49, 88 S.Ct. 1788 (1968)), the consent can be express or implied. Based on any review of the facts of this case there was no attempt to obtain consent to search in this matter on the date of the alleged offense. Deputy Benedict did later attempt to obtain Mr. [redacted]'s signature on implied consent affidavit some four months later, which Mr. [redacted] refused to sign.

b. There were no exigent circumstances.

Neither the police report, nor undersigned's interview of Deputy Benedict reveals any exigency in this case. After Mr. [redacted] was transported to Banner Ironwood (which is less than a mile from the scene), Deputy Benedict was in no rush. He had plenty of time to obtain video surveillance. He then went to the hospital and simply asked for the blood. Mr. [redacted] was admitted to the hospital and his blood was drawn by Nurse Kelly. Deputy Benedict supplied his own law enforcement evidence vials and instructed Nurse Kelly to fill up his vials, for law enforcement purposes.

As this Court is aware, Officers are able obtain telephonic search warrants extremely quickly when occasions requires. Deputy Benedict had plenty of time to obtain a search warrant for Mr. [redacted]'s blood, but chose not to do so. Thus, the seizure of Mr. [redacted]'s blood was unconstitutional and must be suppressed.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS

On January 1, 2014, [redacted] was traveling westbound on Southern Avenue near the 800 block in Mesa, Arizona, when she was pulled over by Officer T. Rowland, #17914. Officer Rowland is a DUI Task Force Officer. He initiated the stop solely because he saw that Ms. [redacted] had a temporary registration taped in the lower driver's side corner of the rear window. During his interview of May 19, 2015, Officer Rowland admitted that he was able to read the temporary plate when she was under street lights, after he started following her. He is not sure if he could read the temporary plate before or after he activated his lights to pull her over. Officer Rowland admits that the stop was based solely on the fact that there was no light illuminating the temporary plate that was placed in the rear windshield and there was no actual driving violation. *See Exhibit "A" Rowland Interview attached hereto.*

Officer Rowland also admitted that clearly displayed on the temporary plates is the instruction for the vehicle owner to place the temporary registration in the rear window of the car and that [redacted] had it correctly placed as prescribed by DMV. When asked, he agreed that people are following the law if they put the plate where DMV has instructed, but only if they are driving during the day and not driving at night. When Officer Rowland was asked if he had any legal backing for requiring a temporary registration in the back window be illuminated, his response was "that my interpretation…"

II. LAW AND APPLICATION

"Under the Fourth Amendment, government officials may conduct an investigatory stop of a vehicle only if they possess 'reasonable suspicion: a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *United States v. Twilley,* 222 F.3d 1092,1095 (9th Cir. 2000) (citing *United States v. Thomas,* 211 F.3d 1186, 1189 (9th Cir. 2000) (quotation omitted)) *See Exhibit "B" attached hereto.* Such reasonable suspicion "requires specific, articulable facts which, together with objective and reasonable inferences, for a basis for suspecting that a particular person is engaged in criminal conduct." *Id.* (quoting *Thomas*, 211 F.3d at 1189). To determine whether an officer has the

requisite basis to conduct a traffic stop, the courts evaluate the totality of the circumstance from the standpoint of "an objectively reasonable police officer." *See Ornelas v. United States,* 517 U.S. 690, 696 (1996).

a. Mistake of Law Cannot Justify a Legal Traffic Stop

In *Twilley*, a California Highway Patrol Narcotics Task Force officer was on duty and observed a vehicle with only one Michigan license plate travel past him. *Twilley,* 222 F.3d at 1092. In California the law requires that cars display "every license plate issued by this State or any other jurisdiction within...the United States." *Id.* citing Cal.Veh.Code § 5202. The officer "believed that Michigan issued two plates, which would make it a violation of California Law to have only a rear license plate." *Id.* quotations omitted. The officer was mistaken as Michigan only issues one license plate. *Id.* The district court concluded that the officer's mistaken belief of law that a license plate violation occurred was reasonable and thus the officer had had "probable cause to believe that the car was in violation of the traffic code, and the stop itself was reasonable." *Id. at 1096.* The Ninth Circuit Court of Appeals reversed the district court and held that "in this circuit, a belief based on a mistaken understating of the law cannot constitute the reasonable suspicion required for a constitutional traffic stop." *Id.*

In explaining its ruling, the Court went on to explain its previous ruling of *United States v. Lopez-Soto*, 205 F.3d 1101, 1105 (9th Cir. 2000):

> [A] police officer stopped a defendant's car because he could not see a registration sticker on the rear of the vehicle. Although the officer believed that such a visible registration sticker was required by law-and had been so instructed at the police academy- the law actually required the sticker to be affix to the windshield. The officer, like Officer Weeks in this case, stopped the car "because he held a mistaken view of the law."

The Court further declared that "[i]n other words, if an officer makes a traffic stop based on a mistake of law, the stop violates the Fourth Amendment." In both *Twilley* and *Lopez-Soto* the Court found that the officers had based their stops on a "mistake of law" and found the stops to be unconstitutional and suppressed that which followed the illegal stops.

b. Officer Rowland Stopped Ms. [redacted] Based on a Mistake of Law

In this case, to legally initiate a traffic stop and conduct an investigatory detention, the Court must determine if an objectively reasonable officer would have had specific and articulable facts that Ms. [redacted] had engaged in criminal conduct such as violating a traffic statue. There are only two statutes that relate to this case. A.R.S. § 28-2156(D) relates to temporary general use registrations and states that: "The department shall prescribe the content and form of the **temporary general use registration** application. The owner or operator of the vehicle shall display the temporary general use registration so that it is clearly visible from the outside of the vehicle." (Emphasis added). *See Exhibit "C" attached hereto.*

A.R.S. § 28-925(C) related to actual license plates and requires that "[e]ither a tail lamp or a separate lamp shall be constructed and placed in a manner that illuminates with a white light the rear **license plate** and renders it clearly legible from a distance of fifty feet to the rear." (Emphasis added). *See Exhibit "D" attached hereto.*

In this case, Officer Rowland admits that the Arizona Department of Motor Vehicles instructs owner/operators of vehicles to place the **temporary registration** in the rear windshield of the vehicle. He also admits that Ms. DeLange had complied with DMV's instructions on placement of the **temporary registration**. Furthermore, Officer Rowland admits that the **temporary registration** was clearly visible from the outside of the vehicle. In fact in his report, he noted that he observed that Ms. DeLange's vehicle "had a temporary registration taped in the lower driver's side corner of the rear window with no illumination." The only specific and articulable fact Officer Rowland can give for conducting a stop was that a "**license plate** must be illuminated at night." (Rowland interview page 6).

In this case, Ms. [redacted] vehicle did not have a **license plate** at all, nor was she required to do so under law. She had a **temporary registration** and it was affixed in its proper location pursuant to DMV and A.R.S. § 28-2156(D). Neither the temporary registration itself nor the statute requires that a

temporary registration be illuminated in the rear window. Because there was no license plate, then A.R.S. § 28-925(C) does not apply.

Because there were no legal grounds to stop Ms. [redacted], Officer Rowlands stop was a direct violation of the Fourth Amendment.

IV. CONCLUSION

Officer Rowland conducted a traffic stop based on his own personal mistake of law. There is no law in Arizona that requires a temporary registration to be illuminated when it is placed in the back window of a car. He had no legal cause to conduct a traffic stop on Ms. [redacted] since she was fully compliant with the law. Because Officer Rowland had no legal grounds to make a traffic stop, the stop itself violated the Fourth Amendment and all evidence obtained thereafter must be suppressed.

RESPECTFULLY SUBMITTED this **18th** day of **August, 2015**.

RIGGS ELLSWORTH & PORTER, PLC

By: _____
Keith R. Nelson
Attorney for Defendant

ORIGINAL filed with the Court
and a copy mailed this
18th day of **August, 2015** to:

MESA CITY PROSECUTOR'S OFFICE
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