IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

GEICO CASUALTY COMPANY, d/b/a GEICO, Plaintiff, vs. CAROLINE WILLIAMS, personally and as Personal Representative of the ESTATE OF ROBERT SHAPSNIKOFF, and as assignee of ALYA LANDT and INNOCENT DUSHKIN; KIM SHAPSNIKOFF as assignee of ALYA LANDT and INNOCENT DUSHKIN and as parent and legal guardian of JAZZMYNE SHAPSNIKOFF, minor, and MARINA SHAPSNIKOFF, minor, individually and as assignee(s) of ALYA LANDT and INNOCENT DUSHKIN; Defendants.	)
CAROLINE WILLIAMS, personally and as Personal Representative of the ESTATE OF ROBERT SHAPSNIKOFF, and as assignee of ALYA LANDT and INNOCENT DUSHKIN; KIM SHAPSNIKOFF as assignee of ALYA LANDT and INNOCENT DUSHKIN and as parent and legal guardian of JAZZMYNE SHAPSNIKOFF, minor, and MARINA SHAPSNIKOFF, minor, individually and as assignee(s) of ALYA LANDT and INNOCENT DUSHKIN; Counter Plaintiffs, vs. GEICO CASUALTY COMPANY, d/b/a GEICO, Counter Defendant.	)
	) Case No. 3AN-04-9429 CI

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was tried before the Court from March 31, 2010, through April 6, 2010, without a jury. Both parties were represented by counsel, and both parties presented their cases through testimony and exhibits. It will be evident that many of the Court's findings and conclusions are derived from the proposed findings and conclusions submitted by the plaintiff. This is because the Court has determined, after an independent consideration of the evidence and the law, that many of the proposed findings and conclusions of law submitted by the plaintiff are accurate and supported by a preponderance of the evidence. Having reviewed all the evidence, this Court makes the following Findings of Fact and Conclusions of Law:

I. Findings of Fact

1. In the early morning of September 3, 2000, in Unalaska, Alya Landt (hereinafter "Landt") was driving a rental truck while under the influence of a significant amount of alcohol.

2. Ms. Landt was severely impaired by alcohol when she was driving the vehicle, with a blood alcohol level as of that time between .16 and .27 gm%, depending on how much of the

alcohol she had consumed had been metabolized as of that time. [Exhibit 1015 at 16]

3. Innocent "Ty" Dushkin (hereinafter "Dushkin") was a passenger in the rental truck and was also severely intoxicated at that time.

4. At a minimum, Dushkin's blood alcohol level was .17 gm%. [Exhibit 1015 at 18]

5. Robert Shapsnikoff (hereinafter "Shapsnikoff") was passed out from alcohol intoxication and lying in the road in dark clothing. [Exhibit 1012 at 2]

6. Shapsnikoff's blood alcohol level was .248. [Exhibit 1012 at 2]

7. The rental truck ran over Shapsnikoff.

8. Landt pulled the rental truck forward and parked. [Defendants' Exhibit 1, Subsection 5, Dushkin's 4/26/04 deposition at SWPTE 00981 and SWPTE 01017]

9. Dushkin got out of the truck and went to where Shapsnikoff was lying in the road. [*Id.* at SWPTE 00981] It took him approximately five to ten seconds to get from the truck to Shapsnikoff. [*Id.* at SWPTE 01088]

10. Dushkin checked Shapsnikoff for broken bones and obvious injuries. [*Id.* at SWPTE 00981]

11. Landt turned the truck off and went to where Dushkin and Shapsnikoff were. [*Id.* at SWPTE 01015 and SWPTE 01017] It took Landt approximately 10 to 12 seconds to get to them. [*Id.* at SWPTE 01015]

12. Dushkin testified that Shapsnikoff was trying to draw deep labored breaths while he was still in the road. [*Id.* at SWPTE 01001-01002; and Defendants' Exhibit 1, Subsection 2, at SWPTE 00644]

13. Landt testified that Shapsnikoff's chest was making a "noise like no normal person makes." [Exhibit 1068 at 38]

14. Shapsnikoff did not say anything and did not move. [Defendants' Exhibit 1, Subsection 5, Dushkin's 4/26/04 deposition at SWPTE 01087]

15. Shapsnikoff's eyes were open, but there was no recognition and he did not appear to Dushkin to be conscious. [*Id.* at SWPTE 01088]

16. Shapsnikoff did not respond to his name or anything Dushkin or Landt did. [Defendants' Exhibit 1, Subsection 5, Dushkin's 4/26/04 deposition at SWPTE 01088]

17. Landt said she did not want to get in trouble with the cops. [*Id.* at SWPTE 00981-982]

18. Landt returned to the rental truck and backed the truck up to where Dushkin and Shapsnikoff were located. [*Id.* at SWPTE 01017]

19. Landt got out of the rental truck, and Landt and Dushkin placed Shapsnikoff's limp body into the rental truck. [*Id.* at SWPTE 01016-1017]

20. Dushkin did not know if Shapsnikoff was breathing when he and Landt lifted Shapsnikoff to load him into the vehicle. [Defendants' Exhibit 1, Subsection 2, at SWPTE 00647]

21. Landt drove the rental truck back to the Dora Circle parking lot. [Exhibit 1068 at 9, 31]

22. Dushkin tried but could not feel a heartbeat or pulse on Shapsnikoff while they were driving to Dora Circle. [Defendants' Exhibit 1, Subsection 5, Dushkin's 4/26/04 deposition at SWPTE 00982]

23. When they arrived at Dora Circle, Dushkin pulled Shapsnikoff from the rental truck, laid him on the ground, and commenced CPR. [*Id.* at SWPTE 00982-983]

24. Landt called for assistance. [*Id.* at SWPTE 00985-986]

25. Shapsnikoff suffered massive internal injuries as a result of being run over by the motor vehicle, including an almost completely torn aorta and a broken spine. [Exhibit 1012

at 3-4] Given the severity of the injury caused by the running over of Shapsnikoff's body, the movement of Shapsnikoff's body from the ground to the truck in no way increased Shapsnikoff's injuries and did not hastened his inevitable death. [*Id.* at 4]

26. Landt had a motor vehicle policy of insurance with GEICO. [Exhibit 1001]

27. The liability limits of Landt's policy of insurance were $50,000 per person and $100,000 per occurrence. [Exhibit 1001]

28. One $50,000 liability limit is the most one claimant can recover per occurrence under the terms of the policy "regardless of the number of *insureds* involved in the occurrence." [Exhibit 1001 at 4]

29. The uninsured/underinsured coverage limits were for $50,000 per person and $100,000 per occurrence. [Exhibits 1001 and 1002]

30. Landt's attorney, Sam Fortier, reported the incident to GEICO on September 8, 2000. He reported that Landt found Shapsnikoff, picked him up, and drove him home. He also reported that Landt did not know if Shapsnikoff was alive or dead when she found him. [Exhibit 1003 at 103439, and trial testimony of Lina at Tr. 299-300]

31. As of September 14, 2000, Landt's attorney was still representing to GEICO that there was no allegation that Landt had run over Shapsnikoff. [Exhibit 1003 at 103441, and trial testimony of Lina at Tr. 300-301]

32. On October 19, 2000, GEICO learned that Landt had been criminally charged for the death of Shapsnikoff. [Exhibit 1003 at 103447]

33. On October 20, 2000, GEICO Claims Representative Michael Lina requested settlement authority to resolve the Shapsnikoff estate's claim against Landt. He requested settlement authority of $50,000 plus add-ons, which is the maximum amount that one claimant could recover for one occurrence under the terms of the policy. [Exhibit 1003 at 103451, and testimony of Lina at Tr. 295, 303-304]

34. That same day, October 20, 2000, Lina was granted the settlement authority he had requested. [Testimony of Lina at Tr. 303]

35. Also that same day, GEICO learned that the estate was being represented by Phillip Paul Weidner's office (hereinafter "Weidner"). [Testimony of Lina at Tr. 301-302; Exhibit 1001 at 103449]

36. On October 24, 2000, GEICO attempted to contact Weidner, leaving a message that GEICO would like to resolve the case. [Exhibit 1003 at 103453-103454]

37. On November 1, 2000, GEICO recorded in its claims diary that it was able to discuss the claim with Weidner the preceding week, and that GEICO had reiterated that it would like to resolve the claim. [Exhibit 1003 at 103454-103455]

38. On April 10, 2001, GEICO called Weidner and again reiterated that it would like to resolve the claim. Wayne Hawn of Weidner's law firm advised GEICO that he was not prepared to attempt to resolve the case at that point. [Exhibit 1003 at 103458-459]

39. On September 24, 2001, GEICO again called Weidner's office to try to resolve the claim. Weidner's associate stated that he was still gathering information and not ready to settle. [Exhibit 1003 at 103460]

40. On February 5, 2002, GEICO again contacted Weidner. GEICO informed Weidner's associate that it remained "ready and willing to resolve the case." [Exhibit 1001 at 103461] Weidner advised that it may be difficult to release the policyholder at that time because of continuing issues with the rental car agency. Weidner also advised that a Complaint would be filed

because of issues with the rental car company as well as dram shop claims. [Exhibit 1003 at 103461]

41. On August 28, 2002, Defendants/Counter-Plaintiffs (hereinafter "the Shapsnikoffs") filed the underlying suit, Williams et al. v. Carl's Bayview Inn et al., 3AN-02-10434 CI. [Exhibit 1004]

42. In their Complaint, the Shapsnikoffs alleged that either Landt or Dushkin was driving Landt's rental truck at the time of the accident. [Exhibit 1004 at ¶18, 19]

43. In September 2002, GEICO assigned the defense of Landt to Hughes, Thorsness, Powell, Huddleston & Bauman, with Joe Huddleston as her attorney. [Exhibits 1003 at 103464, and Exhibit 1007]

44. On January 8, 2003, Huddleston sent a letter to Weidner advising that Landt was interested in discussing settlement. [Exhibit 1008]

45. On May 7, 2003, Huddleston advised the court in preparation for an upcoming settlement conference in the underlying action, "[t]he intention of Alya Landt in this matter is to appear at the settlement conference and to offer payment of policy limits. ... The amount of the coverage in place was the State minimum $50,000.00." [Exhibit 1009 at 2]

46. On July 9, 2003, Dushkin, through his counsel, Daniel Quinn of Richmond & Quinn, tendered his defense to GEICO through Huddleston. The tender was based on the fact that the Shapsnikoffs had alleged that either Landt or Dushkin was operating the vehicle at the time of the accident. [Exhibit 1010]

47. On August 27, 2003, GEICO agreed to provide Dushkin with a defense under a reservation of rights. The defense was under a reservation of rights because "coverage may be excluded because you may not be an insured under the policy; and if you are an insured under the policy, because of any intentional acts by you or Ms. Landt that led to the injury of Mr. Shapsnikoff." [Exhibit 1011 at 4] GEICO agreed that Dushkin could continue with Quinn as his counsel, at GEICO's expense, if he wished. [*Id.*, and testimony of M. Lina at Tr. 662, 664]

48. Dr. Fallico, the former Chief Medical Examiner for the State of Alaska, testified before the grand jury that indicted Landt. When asked how long Shapsnikoff lived after being struck,[1] Dr. Fallico testified that "with the degree of rupture, the amount of blood I found, and the description of what

[1] Dr. Fallico had been posed a compound question. This Court finds that the more reasonable interpretation of Dr. Fallico's answer to the question, when considered in light of all of his testimony, is that he was responding to how long he believed Mr. Shapsnikoff had lived, not how long he was conscious. *Cf.* Exhibit 1012 at 4.

happened at the scene, it would be a matter of seconds to only a few minutes, at most. More likely than not, seconds." [Exhibit 1013 at 88-89]

49. Dr. Fallico also testified about agonal breathing: "Agonal breathing is that kind of abnormal breathing most of the time that occurs at or about the time of death. … [I]t could be characterized, by gasping, deeper than normal, or even more shallow than normal. At any rate, to a casual observer, it would not be normal breathing." [Exhibit 1013 at 89]

50. On October 2, 2003, Dr. Fallico provided an affidavit to Quinn that set forth his opinions based on his autopsy of Shapsnikoff. Dr. Fallico concluded the following:

> 4. Based on the autopsy, I concluded that Mr. Shapsnikoff was likely lying face down in the roadway when he was run over by a vehicle. The lack of any tire marks on his body suggested that he was not run over by the wheels of the vehicle, but rather by the undercarriage.
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> 5. Mr. Shapsnikoff's blood alcohol level was 0.248 GM/DL, and his urine alcohol level was 0.272 GM/DL. This is a level more than three times the level for which intoxication is presumed in a driver. At this level of intoxication, Mr. Shapsnikoff was severely intoxicated and highly incapacitated, both mentally and physically.
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> 6. The autopsy revealed that Mr. Shapsnikoff suffered numerous blunt force crushing injuries consistent with his having been run over by a motor vehicle. Those injuries included:
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> a. Rib fractures left posterior thorax, laceration of right intercostal soft tissues;

b. Fracture/dislocation thoracic/lumbar spine and pelvis;

c. Laceration/avulsion, thoracic aorta;

d. Hemomediastinum and laceration of left pulmonary hilum;

e. Internal extravasation (left hemothorax 1600 ml);

f. Massive internal contusions, soft tissues of posterior thorax;

g. Laceration, liver;

h. Lacerations, spleen;

i. Abrasions, contusions and lacerations as listed and described;

j. No evidence of classical bumper wounds/fracture(s), legs;

k. No evidence of tread mark abrasions or pattern imprints on body.

7. These were mortal injuries, which would cause death in seconds to minutes (more likely seconds to two to three minutes). In particular, Mr. Shapsnikoff had an avulsion laceration of the aorta at the level of the aortic ligament with almost complete separation. The aorta is the largest blood vessel in the body, and a laceration of this high pressure artery causes massive internal bleeding. Additionally, he bled from other sources which would compound the severity of his injuries. Mr. Shapsnikoff bled to death.

...

9. I understand that Mr. Shapsnikoff's body was placed in a vehicle and moved following the injury. In my opinion, movement of Mr. Shapsnikoff's body in no way increased his injuries nor hastened his inevitable death. Moreover, given his level of intoxication and the severity of his

injuries, I do not believe that Mr. Shapsnikoff consciously experienced anything after he was struck by the vehicle.

[Exhibit 1012 at 2-5]

51. On October 15, 2003, Huddleston sent a letter to Weidner reminding him that $50,000 plus add-ons had been offered and was still being offered. [Exhibit 1016]

52. On October 22, 2003, Wilkerson & Associates sent a letter to Huddleston reminding him that the allegations were that either Landt or Dushkin was driving the vehicle at the time of the accident, that there was only one policy providing coverage, and "it is imperative that a global settlement occur releasing claims against both ... ." [Exhibit 1017]

53. On January 23, 2004, Quinn sent a letter to Weidner reminding him that "[t]here is a $50,000 per person limit on this policy" and offering to settle the claims against Landt and Dushkin for that amount plus applicable add-ons. [Exhibit 1018]

54. Dr. Jacobsen, a medical expert retained by the Shapsnikoffs, prepared an expert report dated March 18, 2004. His conclusions are consistent with Dr. Fallico's: Mr. Shapsnikoff "was struck by the undercarriage of the vehicle and experienced mortal injuries." [Exhibit 1015 at 5] "Physical findings are consistent with Mr. Shapsnikoff experiencing such severe injuries as to have died within no more than a few

minutes of being struck." [*Id.* at 11] Dr. Jacobsen also concluded that no medical intervention would have prevented Shapsnikoff's death. [*Id.*] He finally concluded that "it is not possible" for him to say whether Shapsnikoff was ever conscious after he being run over. [*Id.* at 18]

55. On March 31, 2004, David Carter, Landt's attorney following the retirement of Huddleston, reiterated that the $50,000 plus add-ons was available and requested that "[i]f you believe that there is any other coverage available under Ms. Landt's Geico policy, please let me know." [Exhibit 1019]

56. On June 28, 2004, Carter submitted a mediation brief on behalf of Landt recognizing that "[l]ong ago, Geico extended policy limits settlement authority." [Exhibit 1023 at 4] The brief also notes that the Shapsnikoffs' attorney, Michael Cohn, "has at times wondered if there might be two $50,000 limits" but adds that the Shapsnikoffs "have not articulated any legal basis to indicate that the policy limits is anything other than $50,000 plus interest, Rule 82 attorney fees and costs." [*Id.*] The brief also asserts that "[m]edical evidence indicates that he did not regain consciousness at any point following the accident, and that his injuries were such that he would have died immediately following the accident." [*Id.* at 2]

57. On June 29, 2004, Quinn submitted a mediation brief on behalf of Dushkin admitting that the only the possible coverage for Dushkin under the GEICO policy was because "Dushkin may have been driving the vehicle," despite his adamant argument that he was not the driver of the vehicle. [Exhibit 1024 at 8] But Quinn noted that for any single injury, the GEICO policy "carries the Alaska minimum liability of 50/100, meaning that for any single injury, $50,000 is available" and that this amount (plus add-ons) had been repeatedly offered. [*Id.* at 8] Quinn also asserted that there was no evidence that Shapsnikoff was ever conscious after having been struck. [*Id.* at 7]

58. The mediation occurred on July 1, 2004. The Shapsnikoffs demanded two $50,000 policy limits, plus add-ons, plus an additional $500,000 each from Landt and Dushkin for the release of Landt and Dushkin from the underlying action. [Exhibit 1003 at 103546] A settlement was not reached between Landt, Dushkin and the Shapsnikoffs.

59. The day after the mediation, Weidner sent a letter to Carter and Quinn advising that he would be making a settlement offer on behalf of his clients. In that letter, Weidner stated that "it is our position that as Robert Shapsnikoff was occupying an insured vehicle, as noted, and given said

provisions and the law, there should exist $1 million in uninsured/underinsured coverage from the Geico policy." [Exhibit 1025 at 2]

60. On July 15, 2004, Weidner sent a letter to Quinn, GEICO, and Dushkin with a settlement demand. The letter demands "true full policy limit proceeds" and "95% of the uninsured/underinsured benefits" on the policy, which the letter asserts are at least $1,000,000. The letter concludes that if there were any disputes about such sums, such disputes could be resolved either by arbitration or a judge-tried declaratory action filed in Superior Court. By its terms, this offer was to remain open until July 30, 2004. [Exhibit 1028]

61. The next day, July 16, 2004, an identical, but apparently independent offer was made to Landt. [Exhibit 1027]

62. On July 17, 2004, the court in the underlying case ruled that the maximum recovery for non-economic damages was $400,000 and was recoverable only once. [Exhibit 1029]

63. On July 19, 2004, the court in the underlying case dismissed all claims for negligent infliction of emotional distress for Kim Shapsnikoff, Caroline Williams, Jazzmyne Shapsnikoff, and Marina Shapsnikoff. [Exhibit 1030]

64. On July 29, 2004, Wilkerson, Hozubin & Burke sent a letter to Weidner, Quinn, and Carter. The letter first sought clarification as to the terms of the July 15, 2004 and July 16, 2004 offers. The letter next advised that GEICO continued to offer one liability policy limit for $50,000 plus add-ons for dismissal of both Landt and Dushkin. And, in response to Mr. Weidner's letters of July 15 and 16, the letter indicated that to the extent Weidner's letters set out a contrary settlement proposal, "his settlement demand is declined." Finally, the letter advised that GEICO had filed a Declaratory Judgment Action in Superior Court asking that the court rule "on the parties' rights and duties with respect to Mr. Weidner's proposal." The letter enclosed a copy of the Complaint filed in this action. [Exhibit 1031]

65. The Complaint in this matter asked the court to resolve the question of who was driving/operating the vehicle at the time of the accident, Landt or Dushkin.

66. The Complaint also sought that a ruling that if the court found that Dushkin was operating the vehicle, then there is no coverage under the Landt policy.

67. The Complaint further sought rulings on a second policy limit as "[t]he Estate of Shapsnikoff is apparently

alleging that the acts following the running over of Shapsnikoff constitute a second occurrence necessitating a second liability policy limit." [Exhibit 1031 at ¶11]

68. On August 2, 2004, the court in the underlying action dismissed the remainder of Kim Shapsnikoff's claims. [Exhibit 1032]

69. On September 16, 2004, Carter reiterated to Weidner that GEICO remained willing to settle the case on behalf of Landt and Dushkin "for its policy limits." [Exhibit 1033, and testimony of Lina at p. 678]

70. On September 24, 2004, the Shapsnikoff defendants filed their Answer to the First Amended Declaratory Complaint together with a Counterclaim. In their Answer, the Shapsnikoffs stated that the Declaratory Judgment Action "is premature" despite their request for a judge-tried Declaratory Judgment Action in July 2004. [Answer at 3] In their Counterclaim, the Shapsnikoffs alleged that "GEICO is in bad faith in refusing to offer policy limits separately for both Landt and Dushkin, where both allege each other was the driver, to protect them and provide policy limits to the counter plaintiffs." [Answer at 5] The Shapsnikoffs also alleged in their Counterclaim that GEICO

was in bad faith for having filed the Declaratory Judgment Action. [*Id.*]

71. The court in the underlying case granted the Shapsnikoffs' Motion for Apportionment of Fault on September 27, 2004, ruling that any compensatory damages for fault attributable to Landt or Dushkin that resulted from the serving of intoxicating drinks to visibly intoxicated individuals by The Elbow Room would be offset by the settlement monies the Shapsnikoffs had recovered from The Elbow Room. [Exhibit 1034 at 3]

72. On October 25, 2004, Quinn wrote to Dushkin advising him of a settlement conference that had occurred in the underlying matter that day. Quinn relayed that at the time of the settlement conference, Weidner had argued that the GEICO had policy limits "in the range of $1.3 million," based in part on a theory for attorney fees under AS 09.06.070. Weidner offered to settle on behalf of his clients for that amount plus $100,000 each from Dushkin and Landt personally. [Exhibit 1035]

73. Following that settlement conference, on November 5, 2004, GEICO filed its Second Amended Complaint adding a Fourth Claim seeking a ruling as to what coverage, if any, exists under

the policy of insurance and a declaration as to the amount owed. [Second Amended Complaint at 5]

74. Also following the October 25, 2004 settlement conference, GEICO again offered to settle the claims against Landt and Dushkin for a total of $50,000 plus add-ons, while preserving certain of the parties' claims in the Declaratory Judgment Action. [Exhibit 1036]

75. Landt submitted her trial brief on December 13, 2004. It stated, "[t]he primary issue in this case is whether anyone other than Mr. Shapsnikoff is responsible for his death." [Exhibit 1073 at 3]

76. On December 13, 2004, Weidner sent a settlement demand letter to Carter. In that letter, Weidner indicated his clients' willingness to settle with Alya Landt for "full policy limits (i.e. $50,000 plus applicable add-ons to be determined in the declaratory judgment action/arbitration)." [Exhibit 1037] The demand was copied to Quinn, Hozubin, June, and Fortier. [Exhibit 1037]

77. That same day, an identical settlement demand letter was sent to Quinn and copied to Carter, Hozubin, June, and Fortier. [Exhibit 1038]

78. On December 15, 2004, Quinn submitted his trial brief on behalf of Dushkin. Quinn reiterated the lack of any damages from moving Shapsnikoff's body after the accident. He also asserted that Shapsnikoff and possibly The Elbow Room would be found the primary at-fault parties in this matter. [Exhibit 1039]

79. On December 16, 2004, GEICO, through Wilkerson, Hozubin & Burke, requested that Weidner clarify his December 13, 2004 offers, stating, "it is not clear what amount you ask GEICO to tender at this time to resolve this action and only proceed with the declaratory judgment action. Please advise immediately what amount you agree to accept to settle this matter." GEICO then reiterated its offer to tender a total of $50,000 plus add-ons for the release of all claims against both Landt and Dushkin and to allow the remainder of the issues, including additional liability coverage, AS 09.60.070 attorney fees, and underinsured motorist coverage, to be resolved in this Declaratory Judgment Action. [Exhibit 1040, testimony of R. Holmes at Tr. 70, and testimony of M. Lina at Tr. 689]

80. On December 17, 2004, Weidner sent another settlement demand to Quinn and Hozubin. He indicated he interpreted GEICO's December 16, 2004 letter to constitute bad faith

rejection of Weidner's December 13, 2004 offer to resolve the claims against Dushkin. But he renewed his December 13, 2004 offer. Additionally, he alternatively offers to settle all claims against Dushkin for $112,500 (without any explanation of how he reached that amount) along with an acknowledgement by GEICO that payment of that sum would trigger any applicable UIM coverage. [Exhibit 1041]

81. Also on December 17, 2004, the identical demand was sent by Weidner to Carter for Landt. [Exhibit 1042]

82. On December 19, 2004, Carter sent GEICO a letter that requested GEICO accept either one of the two settlement demands, either December 13, 2004 or December 17, 2004, to resolve the claims against Landt. Carter stated that it is his personal belief that Shapsnikoff caused the accident. He stated he had "no opinion as to whether Dushkin should be deemed covered" under the GEICO policy. [Exhibit 1043 at 3, 4] Carter's job was as defense counsel for Landt; he did not care whether the offers were within the limits of the policy, so long as his client was dismissed from the underlying litigation. [Testimony of D. Carter at Tr. 451]

83. On December 20, 2004, GEICO, through Wilkerson, Hozubin & Burke, again offered to tender one policy limit of

$50,000 plus applicable add-ons for a full release of Landt and Dushkin, with all remaining issues to be resolved in the Declaratory Judgment Action. [Exhibit 1044, testimony of R. Holmes at Tr. 70, and testimony of M. Lina, Tr. 632]

84. On December 24, 2004, Weidner proposed a confession of judgment arrangement to attorney Marc June and Dushkin. The proposal was not copied to Quinn, Dushkin's counsel. [Exhibit 1045]

85. That same day, Weidner made the same proposal to Landt and Sam Fortier without copying or notifying Carter, Landt's counsel. [Exhibit 1046]

86. On December 31, 2004, Weidner proposed that Landt confess judgment in the total amount of $10,853,702.51 plus Rule 79 costs to the Estate of Robert Shapsnikoff, Williams, and Jazzmyne and Marina Shapsnikoff, together with an additional $2,436,000 to be confessed to Kim Shapsnikoff. [Exhibit 1047]

87. An identical offer was made to Dushkin through Mr. Carter on the same date. [Exhibit 1048]

88. On January 10, 2005, the Shapsnikoffs filed their Answer to the Second Amended Complaint and an Amended Counterclaim. In this pleading, the Shapsnikoffs again stated that the Declaratory Judgment Action "is premature" despite

their July 2004 proposal for a judge-tried Declaratory Judgment Action. [*See* Exhibits 1027 and 1028] In their Counterclaim, the Shapsnikoffs again alleged that GEICO is in bad faith due to its "failure to apply the facial amount of policy coverage to each insured." [Answer to Second Amended Complaint at 6]

89. On February 15, 2005, GEICO filed its Second Motion to Amend and its Third Amended Complaint. [*See* record] GEICO sought to amend its Complaint to include a Fifth Claim for relief for a ruling that if Landt and Dushkin confessed judgment, they would breach the contract of insurance such that there would then be no insurance under the Landt policy. [Third Amended Complaint at 4] This was filed based on the Shapsnikoffs' proposed settlement with Landt and Dushkin via the confessions of judgment. The motion to amend was granted on March 11, 2005.

90. On May 2, 2005, the Shapsnikoffs filed their Answer to the Third Amended Complaint and an Amended Counterclaim. Again, in their Answer, the Shapsnikoffs stated that the Declaratory Judgment Action "is premature." In their Counterclaim, the Shapsnikoffs alleged again that GEICO was in bad faith due to its "failure to apply the facial amount of policy coverage to each insured." [Answer to Third Amended Complaint at 7]

91. Throughout this litigation, the Shapsnikoffs have continued to maintain that either Landt or Dushkin was driving the vehicle at the time of the accident, or that one encouraged or allowed the other to drive, thus continuing to create exposure to Dushkin for running over Shapsnikoff. *See, e.g.,* the following:

a. April 15, 2005 - Shapsnikoffs' Cross-Motion for Partial Summary Judgment re AS 09.60.070 Attorney Fees;

b. April 15, 2005 - Shapsnikoffs' Cross-Motion for Partial Summary Judgment re: Occurrence;

c. April 20, 2005 - Shapsnikoffs' Cross-Motion for Partial Summary Judgment Regardless of Whether Landt or Dushkin Was the Driver;

d. April 20, 2005 - Shapsnikoffs' Motion for Partial Summary Judgment that Robert Shapsnikoff is an Insured Under the GEICO Policy;

e. April 28, 2005 - Shapsnikoffs' Motion for Partial Summary Judgment As to Separate Policy Limits Insurance Coverage for Landt and Dushkin Under the GEICO Insurance Policy;

f. May 12, 2005 - Shapsnikoffs' Reply in Support of Cross-Motion for Summary Judgment re AS 09.60.070;

g. June 2, 2005 - Shapsnikoffs' Reply in Support of Motion for Partial Summary Judgment As to Separate Policy Limits Insurance Coverage for Landt and Dushkin;

h. June 2, 2005 - Shapsnikoffs' Reply in Support of Cross-Motion for Partial Summary Judgment Re: No Coverage if Dushkin is the Driver;

i. September 13, 2005 - Shapsnikoffs' Pleading re: Evidence to Defeat GEICO's Motion for Summary Judgment on Declaratory Action Ruling as to Separate Occurrences and Related Issues;

j. September 5, 2006 - Shapsnikoff's Opposition to GEICO's Motion for Rule of Law;

k. February 1, 2007 - Shapsnikoffs' Amended Answer to GEICO's Third Amended Complaint and Amended Counterclaims;

l. June 14, 2007 - Shapsnikoffs' Motion to Compel;

m. August 16, 2007 - Shapsnikoffs' Motion for Partial Summary Judgment; and

n. December 8, 2008 - Shapsnikoffs' Reply to Opposition to Motion for Summary Judgment and Opposition to Cross-Motion.

o. April 23, 2010 - Defendants' Proposed Decision(s)/Finding(s) of Fact/Conclusions of Law/Verdict(s) and Order(s) at 18-19.

92. On September 1, 2005, Weidner advised Carter, Quinn, Fortier, and June that (1) the punitive damages would be dropped from the confessions because the State of Alaska would not participate in the confession process and (2) the confession documents were going to be finalized and sent to them for review and final approval. [Exhibit 1050]

93. On October 20, 2005, this Court ruled that there could be a second occurrence caused by the act of loading Mr. Shapsnikoff into the vehicle if it caused him incremental additional harm (including perhaps additional pre-death pain). The Order was distributed by mail on October 26, 2005.

94. On October 20, 2005, this Court also ruled that any award of full reasonable attorneys fees under AS 09.60.070 is not recoverable from GEICO. The Order was distributed by mail on October 26, 2005.

95. Finally, on October 20, 2005, this Court ruled that if Dushkin was the driver of the rental truck then there was no coverage under the GEICO policy for the initial accident. The Order was distributed by mail on October 26, 2005.

96. On October 27, 2005, Weidner filed a Notice to Court with this Court indicating that the proposed confession documents in the underlying action were nearing finalization.

97. In November 2005, Weidner, Carter, and Quinn filed Proposed Confession documents with the court in the underlying action. [Exhibit 1056]

98. The court in the underlying action, on May 2, 2006, had declined to enter the proposed Findings of Fact and Conclusions of Law and proposed Final Judgment against Landt and Dushkin. [Exhibit 1055]

99. On October 3, 2006, Weidner, Carter, and Quinn filed a Stipulation for Entry of Judgment in the underlying action which incorporated the agreements and stipulations filed with the court. Landt and Dushkin confessed judgment for a total of $4,678,177.42 for each defendant.

100. Pursuant to that stipulation, Final Judgments were signed by the court in the underlying action on October 9, 2006. [Exhibit 1057]

101. The Assignment of Rights was signed by the parties on October 13, 2006. The assignments stated that either Landt or Dushkin was driving the rental truck when it ran over Shapsnikoff. [Exhibit 1058, *see*, e.g., p. 13]

II. Conclusions of Law

A. Declaratory Judgment Action

1. GEICO filed this Declaratory Judgment Action seeking a ruling as to what was owed under the terms of the contract of insurance.

2. The Court has already resolved several questions of law in this case, leaving the question of whether there was a second occurrence that could have been covered under the terms of the policy. *See* Order re Motion for Partial Summary Judgment re Occurrences, dated October 20, 2005.[2]

3. This question of whether there was a second occurrence is a question of fact and has two parts:

a. Was Shapsnikoff alive when he was loaded into the vehicle after the accident?

b. Did Shapsnikoff experience any additional conscious pain as a result of being moved?

[2] Also pending are GEICO's objections to portions of the deposition of Haig Neville. All of those objections are overruled, although this Court has accorded very little weight to Mr. Neville's testimony, since considerable portions of it are substantially at odds with the applicable law in the state of Alaska.

4. Under Alaska law, an insurer's obligations are generally determined by the terms of the insurance policy. West v. Umialik Ins. Co., 8 P.3d 1135, 1138 (Alaska 2000)(citations omitted).

5. The insurance policy is generally to be interpreted in light of the purpose of the policy. Tenopir v. State Farm Mut. Co., 403 F.2d 533, 536 (9th Cir. 1968).

6. The court should not torture or twist the policy to find in favor of the insured. Allstate Ins. Co. v. Ellison, 757 F.2d 1042, 1044 (9th Cir. 1985); Whispering Creek Condo. Owner Ass'n v. Alaska Nat'l Ins. Co., 774 P.2d 176, 178 (Alaska 1989).

7. In order for the estate to recover under the terms of the policy for the second occurrence, Shapsnikoff must have sustained "bodily injury" as a result of that second occurrence.

8. "Bodily injury" is defined in the policy as "bodily injury to a person, including resulting sickness, disease or death." [Exhibit 1001]

9. "Recovery can be had only for pain consciously experienced, and events subsequent to unconsciousness are not compensable." Northern Lights Motel, Inc., Inc. v. Sweaney, 561 P.2d 1176, 1190 (Alaska 1977) (*quoting* Burrous v. Knotts, 482 S.W.2d 358, 363 (Tex. Civ. App. 1972)).

10. The preponderance of the evidence is that Shapsnikoff was mortally wounded when he was run over by the truck, and was deceased when he was loaded into the rental truck. The uncontroverted expert evidence is that Shapsnikoff more likely than not died within seconds of being run over, and Shapsnikoff's body was not loaded into the rental truck within seconds.

11. Further, the preponderance of the evidence in this case is that even if Shapsnikoff was not yet deceased when he was loaded into the vehicle, he suffered no additional conscious pain as a result of being loaded into the rental truck.

12. The preponderance of the evidence is that Shapsnikoff was not conscious at any time after he was struck by the vehicle. [Exhibit 1012]

13. The Shapsnikoffs objected, at certain times, to the introduction of Dr. Fallico's affidavit and grand jury testimony based on hearsay objections. This Court finds that the Shapsnikoffs waived this objection with their reliance on the testimony and Affidavit of Dr. Fallico. *See e.g.*, Trial Transcript at p. 240, line 22 -- p. 244, line 6; p. 543, line 22 -- p. 544, line 22; p. 546, lines 9-18; and p. 556, line 12 -- p. 560, line 12. Additionally, this Court finds that Dr.

Fallico's affidavit, Exhibit 1012; Grand Jury Testimony, Exhibit 1013; and Criminal Trial Transcript, Exhibit 1014, are not hearsay pursuant to Evidence Rule 804(a)(4) and (b)(5).

14. Based upon the evidence presented, and under the law and the terms of the policy, this Court concludes that there was no second occurrence.

B. Tort of Bad Faith

15. The Shapsnikoffs, as assignees for Landt and Dushkin, filed a counterclaim seeking damages for the tort of bad faith.

16. This Court previously ruled that in order to show bad faith, the Shapsnikoffs must demonstrate that GEICO did not have a reasonable basis in concluding that Shapsnikoff was deceased when he was moved and that GEICO did not have a reasonable basis in concluding that Shapsnikoff did not experience any additional conscious pain when he was moved. *See* Hillman v. Nationwide Mut. Fire Ins. Co., 855 P.2d 1321, 1324 (Alaska 1993) and Ruling on the Record at the February 19, 2010 hearing.

17. Based on the information in GEICO's possession, including the Affidavit of Franc Fallico, Dr. Fallico's testimony, and Dr. Jacobsen's report, among other evidence, GEICO had a reasonable basis to conclude that Shapsnikoff was deceased when he was moved. Moreover, based on this same

evidence, GEICO had a reasonable basis to conclude that Shapsnikoff did not experience any additional conscious pain when he was moved into the truck.

18. Because GEICO had a reasonable basis to conclude there was no second occurrence, this Court finds in favor of GEICO on the tort claim of bad faith.

C. Breach of the Covenant of Good Faith and Fair Dealing

19. Finally, the Shapsnikoffs, as assignees for Landt and Dushkin, asserted a contractual claim for breach of the covenant of good faith and fair dealing.

20. In this case, Landt and Dushkin breached their duty to cooperate under the terms of the policy by confessing judgment. Grace v. Ins. Co. of N. Am., 944 P.2d 460, 464 (Alaska 1997).

21. "'Ordinarily, an insured's breach of [a] cooperation clause relieves a prejudiced insurer of liability under the policy.'" Grace, 944 P.2d at 464 (*quoting* Ariz. Prop. & Cas. Ins. Guar. Fund v. Helme, 735 P.2d 451, 458-59 (Ariz. 1987)).

22. However, an insured may confess judgment if there was a prior material breach (*i.e.*, a breach of the duty to defend, indemnify, or settle) by the insurer. Great Divide Ins. Co. v. Carpenter, 79 P.3d 599, 608 (Alaska 2003).

23. This Court has previously ruled that the determination of whether there was a prior excusing breach by GEICO required resolution of the following questions: (1) Did GEICO face a substantial likelihood that a fact-finder would conclude that Shapsnikoff was alive when he was loaded into the vehicle?; (2) Did GEICO face a substantial likelihood that a fact-finder would conclude that Shapsnikoff experienced any additional conscious pain and suffering when he was loaded?; and (3) Did GEICO face a substantial likelihood that the damages to Shapsnikoff from loading him into the truck would have exceeded $50,000? Absent affirmative answers to all three questions, there would be no prior excusing breach by GEICO that would permit Landt and Dushkin to confess judgment. *See* Order on the Record from the February 19, 2010 hearing.

24. While "substantial likelihood" is not specifically defined by statute or case law, this Court finds that the standard obviously is higher than the evidentiary threshold sufficient to defeat summary judgment. This Court finds that while "substantial likelihood" is not certainty, it is more than the requirements for preponderance of the evidence. For example, "substantial likelihood of success" equates to a finding of "'probable success on the merits.'" City of Kenai v.

Friends of Recreation Ctr., Inc., 129 P.3d 452, 457 (Alaska 2006). "'Likelihood' is defined as 'probability' and 'appearance of probable success.'" Id. at 457 n. 17 (*citing* Webster's Third New International Dictionary 1310 (1966)). When one combines the term "substantial" with the term "likelihood," the phrase must mean something more than a likelihood. Indeed, it must mean something substantially more than a likelihood. By contrast, a "preponderance of the evidence" requires only a finding that there is a greater than 50 percent chance that the disputed fact is true; 51 percent probability is enough. 51 percent probability is not a substantial likelihood. Alaska Civil Pattern Jury Instruction § 02.04; *see also* State v. Zeciri, 43 P.3d 169, 170 n. 4 (Alaska Ct. App. 2002). This Court finds that a "substantial likelihood" means more than preponderance of the evidence, but less than a certainty.

25. This Court concludes that, based on the evidence available to GEICO at the time, including the uncontroverted testimony and Affidavit of Dr. Fallico, the report of Dr. Jacobsen, and all of the additional evidence: (1) GEICO did not face a substantial likelihood that a fact-finder would determine that Shapsnikoff was alive when loaded into the truck; (2) GEICO did not face a substantial likelihood that a fact-finder would

determine that Shapsnikoff suffered additional pain and suffering as a result of being loaded into the truck; and (3) GEICO did not face the substantial likelihood that the damages to Shapsnikoff from being loaded into the truck would have exceeded $50,000.

26. In light of the foregoing, this Court finds that there was no prior material breach by GEICO that would permit Landt and Dushkin to confess judgment.

27. This Court also allowed the Shapsnikoffs to put on evidence in support of their argument that GEICO never offered to resolve the claims against Landt solely for one policy limit, based on the Shapsnikoffs' Motion for Reconsideration of the Court's February 19, 2010 rulings.

28. This argument is not well taken. First, there is evidence before this Court that not only did GEICO attempt to resolve the claims against Landt, individually, from 2000 until 2002, but GEICO continued to make offers to settle for one policy limit into October 2003. [Exhibits 1016-1017]

29. Second, an insurer cannot be compelled to pay its policy limits to protect one insured while leaving the other insured without coverage. Lehto v. Allstate Ins. Co., 36 Cal. Rptr. 2d 814, 820-823 (Cal. App. 1994). "An insurer owes the

duty of good faith and fair dealing to each of its insureds, and cannot favor the interests of one insured over the other." Id. at 821. An insurer should not accept a settlement offer without obtaining the release of its insured. Id. An insurer's acceptance of a policy limits offer that would release fewer than all the insureds could itself be an act of bad faith. Strauss v. Farmers Ins. Exch, 31 Cal. Rptr. 2d 811, 814 (Cal. App. 1994). The Court finds the California cases addressing this issue to be particularly persuasive, as the Alaska Supreme Court has often looked to California law for guidance in adjudicating bad faith and coverage disputes. *See* Jackson v. Am. Equity Ins. Co., 90 P.3d 136, 142 (Alaska 2004); Grace, 944 P.2d at 465-466; Hillman, 855 P.2d at 1323-24.

30. In this case, beginning on August 28, 2002, the date when the Shapsnikoffs filed the underlying Complaint, competing claims were being made against Landt and Dushkin for the damages flowing from the accident. Throughout the underlying litigation, the Shapsnikoffs argued that one or the other was driving the vehicle at the time of the accident and that the other remained liable for the accident as well under various theories. *See* paragraph 91 of the Findings of Fact.

31. At all times, the Shapsnikoffs were claiming that both Landt and Dushkin were liable for striking Shapsnikoff, the first occurrence.

32. On October 26, 2005, this Court distributed an order that held that if Dushkin was the driver, there was no coverage.

33. The Shapsnikoffs have argued on occasion that, after that point, GEICO should have tendered the liability limits for the first occurrence for Landt alone because, they argue, only Landt faced any exposure for the striking of Shapsnikoff.

34. However, this argument ignores the fact that after that order was issued, the Shapsnikoffs continued to assert alternative theories of liability for the first occurrence, including that Dushkin allowed Landt to operate the rental truck in her inebriated state, that Landt and Dushkin were acting in concert as co-conspirators, and that Dushkin aided and abetted Landt in driving.

35. Under the terms of the policy, "[t]he limits of liability stated in the declarations are our maximum obligations regardless of the number of *insureds* involved in the occurrence." Thus, since the Shapsnikoffs continued to maintain that both Dushkin and Landt had some responsibility for the first occurrence, regardless of who was the driver, GEICO was

still obligated to defend Dushkin. And yet only one per person limit was available to resolve the claim for the first occurrence. In these circumstances, it was appropriate for GEICO to seek a release for both Landt and Dushkin for the first occurrence. The Court finds that GEICO had an equal duty to defend Landt, the named insured, and Dushkin, who GEICO was defending pursuant to a reservation of rights. A defense under a reservation of rights "does not … relieve the insurer of providing a full defense of similar vigor as would be required in the absence of any coverage defenses". Couch on Insurance 3d § 202:51 at 202-123. *See* Mut. of Enumclaw Ins. Co. v. Dan Paulson Const., Inc., 169 P.3d 1, 8 (Wash. 2007) (when defending under reservation of rights, the insurer must refrain from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk); Tank v. State Farm Fire & Cas. Co., 715 P.2d 1133, 1137 (Wash. 1986) ("A reservation of rights agreement is not a license for an insurer to conduct the defense of an action in a manner other than the manner in which it would normally be required to defend. The basic obligations of the insurer to the insured remain in effect.") (citation omitted). Thus, GEICO

acted properly in seeking to obtain a settlement that released both Landt and Dushkin.

36. Finally, the Shapsnikoffs also argued that the filing of this Declaratory Judgment Action was a violation of GEICO's duties and obligations under the terms of the policy. This argument is also not well taken.

37. The Alaska Supreme Court has not squarely addressed whether an insurer may properly seek relief through a Declaratory Judgment Action when confronted with a settlement demand the insurer reasonably concludes is in excess of policy limits. But in Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin, 828 P.2d 745 (Alaska 1992), superseded by statute on other grounds, the Supreme Court indicated in *dicta* that a Declaratory Judgment Action is a proper mechanism for resolution of the situation. Specifically, in a footnote in the decision, the Supreme Court explained: "If Allstate was genuinely confused as to the value of policy limits, it should have filed a declaratory action rather than exposing Bohna to personal liability." *Id.* at 768 n.58.

38. This conclusion follows the general principle that "where language in the insurance contract is thought to need clarification in order to determine the legal position of the

parties, declaratory action is appropriate." Couch on Insurance 3d § 232:47 at 66 (citations omitted). "An insurer does not act in bad faith merely by instituting a declaratory judgment action to determine a legitimate coverage dispute rather than accepting a policy limits demand." Couch on Insurance 3d § 203:27 at 46 (citing Narvaez v. State Farm Mut. Auto. Ins. Co., 989 P.2d 1051, 1053 (Okla. Civ. App. 1999) (holding that "[t]he general rule is that it is not bad faith for an insurer to resort to a judicial forum to settle legitimate disputes as to the validity or amount of an insurance claim")).

39. GEICO made efforts to first resolve the claims against Landt alone for $50,000 plus add-ons - the per person, per occurrence policy limit -- before suit was filed, but the Shapsnikoffs refused to resolve them.

40. Once suit was filed, and allegations in the Complaint made Dushkin an insured, GEICO continued to attempt to resolve the claims against both Landt and Dushkin for a total of $50,000 plus add-ons. In 2004, when GEICO discovered that the Shapsnikoffs were seeking more than one per person policy limit, GEICO tendered the undisputed per person policy limit and also followed the Shapsnikoffs' suggestion by filing this Declaratory

Judgment Action asking the Court to determine what, if anything, more was owed under the policy.

41. GEICO amended its Complaint several times to take into account the Shapsnikoffs' evolving theories of coverage and recovery.

42. This Court concludes that GEICO appropriately offered its undisputed per person policy limit for the first occurrence in exchange for a release of both its insureds. This Court also concludes that the filing of this Declaratory Judgment Action to resolve the remainder of the coverage disputes was appropriate.

In summary, this Court concludes as follows:

(1) GEICO's request for a declaration that there was no second occurrence is GRANTED.

(2) GEICO had a reasonable basis to believe there was no second occurrence based on the evidence available to GEICO at the time it so concluded. Accordingly, GEICO did not commit the tort of bad faith when it sought a declaratory judgment on this issue.

(3) GEICO did not face the substantial likelihood that a fact-finder would conclude that Shapsnikoff was alive when loaded, conscious of any pain when loaded, or that any damages suffered when being loaded would exceed

$50,000. Therefore, GEICO did not commit a material breach of the insurance contract that would excuse Landt and Dushkin's breach of the insurance contract by confessing judgment. Because Landt and Dushkin breached the insurance contract, and their breach was not excused, GEICO's coverage obligations under the insurance policy are discharged. *See* Grace, 944 P.2d at 464.

GEICO is the prevailing party in this matter and shall file a proposed Judgment consistent with Civil Rules 52(a) and 58 within 10 days of the date of distribution of these Findings of Fact and Conclusions of Law.

DATED this 19th day of October, 2010.

Sharon L. Gleason
Superior Court Judge

I certify that on 10-20-10 a copy of the above was mailed to each of the following at their address of record (list name if not an agency)
☐ CSED ☐ AG ☐ PD ☐ DA
Deputy Clerk / Secretary
Hozubin ✓ Weidner ✓