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9 **SUPERIOR COURT OF CALIFORNIA, COUNTY OF CONTRA COSTA COUNTY**

10 Unlimited Civil Jurisdiction

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12 **CAROL L. STEELE and MICHAEL E. STEELE,**

13
14 **Plaintiffs,**

15 **vs.**

16 **MEASHEL ANN NOLTE, an individual;**
NOLTE ENVIRONMENTAL AND
17 **DEMOLITION, INC., a California**
18 **corporation; BRIAN NOLTE, an individual;**
and **DOES 1-25, inclusive,**

19 **Defendants.**

CASE NO. C09-02787

**NOTICE OF MOTION AND MOTION
FOR JUDGMENT ON THE PLEADINGS;
MEMORANDUM OF POINTS AND
AUTHORITIES; [PROPOSED] ORDER**

Assigned for all purposes to:
Hon. Judith Craddick

Date Action Filed: Oct. 5, 2009

Hearing Date:

Time:

Dept: 9

20 **ALLSTATE INSURANCE COMPANY,**

21 **Intervenor.**
22 _____/

23 **TO INTERVENOR ALLSTATE INSURANCE COMPANY AND TO ITS ATTORNEYS OF**
24 **RECORD:**

25 **PLEASE TAKE NOTICE** that on _____, 2010, at ___:___m., or as soon
26 thereafter as the matter can be heard, Department 9 of this Court, located at 725 Court
27 Street, Martinez, California, Plaintiffs CAROL L. STEELE and MICHAEL E. STEELE will
28 move the Court, pursuant to Code Civ. Proc. § 438, for entry of judgment on the pleadings

1 in favor of Plaintiffs CAROL L. STEELE and MICHAEL E. STEELE and against Intervenor
2 ALLSTATE INSURANCE COMPANY.

3 The motion will be made on the ground that the Verified First Amended Complaint
4 states facts sufficient to constitute a cause of action and Intervenor's Complaint in
5 Intervention does not state facts sufficient to constitute a defense.

6 The motion will be based on this Notice of Motion, the Memorandum of Points and
7 Authorities which accompanies this Notice, the pleadings, documents, records, and files
8 in this action, and such oral and documentary evidence as may be presented at the
9 hearing.

10
11 Dated: November __, 2010.

LAW OFFICE OF SCOTT K. ZIMMERMAN

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13 **SCOTT K. ZIMMERMAN**
14 Attorney for Plaintiffs,
15 CAROL L. STEELE and MICHAEL E. STEELE
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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR**
2 **JUDGMENT ON THE PLEADINGS**

3 **INTRODUCTION**

4 Plaintiffs CAROLL. STEELE and MICHAEL E. STEELE move this Court for an order
5 for judgment on the pleadings. The Complaint in Intervention filed by ALLSTATE
6 INSURANCE COMPANY on behalf of its insured, suspended corporation Defendant
7 NOLTE ENVIRONMENTAL AND DEMOLITION, INC. ("NEDI"), which Complaint in
8 Intervention is regarded as an Answer to Plaintiffs' Verified First Amended Complaint,
9 presents nothing by way of a denial or new matter to bar or defeat the action, and raises
10 no issue on a material allegation of Plaintiff's Verified First Amended Complaint.
11 Accordingly, Plaintiffs are entitled to judgment on the pleadings.

12 Plaintiff CAROL L. STEELE sustained serious physical injuries in the accident and
13 has incurred over \$600,000 in medical bills, yet this litigation has been stalled by an
14 automatic bankruptcy stay that did not involve Defendant NEDI, along with months of
15 barren representations by ALLSTATE INSURANCE COMPANY that the insurer would
16 intervene. ALLSTATE finally filed its Complaint in Intervention in October, 2010, however,
17 the Complaint in Intervention failed to include any denial or raise any issue on a material
18 allegation of Plaintiffs' Verified First Amended Complaint whatsoever. This left Plaintiffs in
19 litigation limbo, unable to propound contention interrogatories or propound any meaningful
20 discovery whatsoever as to ALLSTATE's defenses to the allegations of the Verified First
21 Amended Complaint. As a result, Plaintiffs are compelled to seek judgment on the
22 pleadings.

23 **FACTUAL AND PROCEDURAL BACKGROUND**

24 The following is supported by the record in this action.

25 This case arises from a vehicular accident on May 18, 2009, wherein Plaintiff
26 CAROL L. STEELE was operating her 1999 Cadillac Deville vehicle, lawfully traveling on
27 Discovery Bay Boulevard in Discovery Bay, California, when Defendant MEASHEL ANN
28 NOLTE, operating a 2001 Chevrolet 3500 truck owned by NEDI entered the intersection

1 of Clipper Drive and Discovery Bay Boulevard, and failed to grant the right of way to
2 Plaintiffs' vehicle. As a proximate result of the negligence of Defendants, Plaintiffs were
3 injured and damaged. [Verified FAC ¶¶ 1-18.]

4 Plaintiffs' filed their Verified Complaint on October 5, 2009.

5 On November 5, 2009, Defendants MEASHEL NOLTE and NEDI filed an Answer
6 to Complaint, and on November 17, 2009, Defendants MEASHEL NOLTE and NEDI filed
7 an Amended Answer to the Complaint. At the time Defendant NEDI filed its answers, it was
8 a suspended corporation.

9 On May 3, 2010, Plaintiffs filed a Verified First Amended Complaint. No Defendants
10 have filed an answer to the Verified First Amended Complaint.

11 On May 12, 2010, Defendants MEASHEL and BRIAN NOLTE and their various
12 fdba's and dba's, filed a Chapter 7 Bankruptcy Action, and the liability in the within matter
13 against these Defendants was discharged in Bankruptcy on October 19, 2010.

14 With the liability of Defendants MEASHEL and BRIAN NOLTE and their various
15 fdba's and dba's discharged in Bankruptcy, the only remaining defendant is NOLTE
16 ENVIRONMENTAL AND DEMOLITION, INC., a suspended California corporation.

17 On October 12, 2010, ALLSTATE INSURANCE COMPANY, the insurer of
18 Defendant NEDI, filed a Complaint in Intervention. The Complaint in Intervention does not
19 allege any denial of liability for Plaintiffs' injuries and damages on behalf of NEDI and does
20 not contain any allegations that constitute affirmative defenses.

21 On October 21, 2010, Plaintiffs filed their Answer to Complaint in Intervention.

22 **THE OPERATIVE ALLEGATIONS OF PLAINTIFFS' VERIFIED**
23 **FIRST AMENDED COMPLAINT**

24 Plaintiffs' Verified First Amended Complaint alleges that on May 18, 2009, Plaintiff
25 CAROL L. STEELE was operating her 1999 Cadillac Deville vehicle, lawfully traveling on
26 Discovery Bay Boulevard in Discovery Bay, California, when Defendant MEASHEL ANN
27 NOLTE, operating a 2001 Chevrolet 3500 truck owned by NEDI entered the intersection of
28 Clipper Drive and Discovery Bay Boulevard, and failed to grant the right of way to Plaintiffs'

1 vehicle, that Defendants negligently entrusted, managed, maintained, operated, and drove
2 their motor vehicle so as to proximately cause it to collide with Plaintiffs' Cadillac Deville
3 vehicle. The 2001 Chevrolet 3500 truck being operated by Defendant MEASHEL ANN
4 NOLTE was owned by and being driven with the permission of Defendant NEDI, and
5 Plaintiff CAROL L. STEELE was injured and damaged as a result of Defendants'
6 negligence. [Verified FAC ¶¶ 1-17.] Additionally, Plaintiff MICHAEL D. STEELE alleges
7 a claim for damages due to loss of consortium. [Verified FAC ¶ 18.] Plaintiffs' Complaint
8 alleges that Defendant NEDI is a suspended California corporation. [Verified FAC ¶ 2.]

9
10 **THE OPERATIVE ALLEGATIONS OF THE VERIFIED COMPLAINT IN
INTERVENTION BY ALLSTATE INSURANCE COMPANY**

11 The verified Complaint in Intervention ("CII") alleges that ALLSTATE was the insurer
12 for NOLTE ENVIRONMENTAL AND DEMOLITION, INC., under a policy of commercial
13 auto insurance affording liability coverage to operations of certain owned vehicles (CII ¶ 2),
14 that Plaintiffs claim some right, title or interest in some or all of the policy afforded to NEDI
15 (CII ¶ 3), that NEDI is and was suspended as of the date of the filing of the Complaint and
16 has forfeited its rights and privileges to defend itself in this action (CII ¶ 4), that ALLSTATE
17 intervenes on the ground that it has a substantial interest in the litigation in that it is the
18 insurer for NEDI and which coverage may include the obligation of said insurer both to
19 indemnify and to defend Defendant NEDI in connection with this action (CII ¶ 5), and that
20 ALLSTATE intervenes so that it may assert any defenses and cross-claims on behalf of its
21 insured, including liability defenses and reserves the right to deny liability in whole or in part
22 to any or all of the claims asserted by Plaintiffs (CII ¶ 7).

23 The CII is devoid of any factual allegations constituting a denial of liability or
24 affirmative defenses.

25 **POINTS AND AUTHORITIES**

26 Plaintiffs CAROL L. STEELE and MICHAEL E. STEELE respectfully submit the
27 following points and authorities in support of their Motion for Judgment on the Pleadings
28 against Intervenor ALLSTATE INSURANCE COMPANY.

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2 1.

3 **PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD BE**
4 **GRANTED BECAUSE THE FIRST AMENDED COMPLAINT STATES FACTS**
5 **SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR NEGLIGENCE AND THE**
6 **COMPLAINT IN INTERVENTION FAILS TO RAISE A MATERIAL ISSUE OR TO SET**
7 **UP AN AFFIRMATIVE DEFENSE**

8 **A. Plaintiffs are Entitled to a Judgment on the Pleadings:**

9 A plaintiff's motion for judgment on the pleadings is proper when the plaintiff claims
10 that the complaint states facts sufficient to constitute a cause or causes of action against
11 the defendant and the answer does not state facts sufficient to constitute a defense to the
12 complaint. (*Code Civ. Proc.* § 438(c)(1)(A).) A plaintiff's motion for judgment on the
13 pleadings should be granted when the complaint is sufficient and the answer presents
14 nothing, either by way of denial or new matter, to bar or defeat the action. (*Hemme v.*
15 *Hayes* (1880) 55 Cal. 337, 339; *Allstate Ins. Co. v. Kim W.* (1984) 160 Cal. App. 3d 326,
16 334–335.) A plaintiff is entitled to a judgment on the pleadings when the defendant's
17 answer is evasive and raises no issue on a material allegation of the complaint.
18 (*Adjustment Corp. v. Hollywood Hardware & Paint Co.* (1939) 35 Cal. App. 2d 566, 569.)

19 In the present action, ALLSTATE INSURANCE COMPANY has intervened by its
20 Complaint in Intervention and stands in the shoes of its insured, the suspended corporation
21 NEDI. (*Truck Ins. Exchange v. Superior Court* (1997) 60 Cal.App.4th 342.) An intervening
22 party is accordingly “to be regarded as a plaintiff or as a defendant in the action ...
23 [depending upon] the party for whose success he seeks to intervene, ...” (*Boskowitz v.*
24 *Thompson* (1904) 144 Cal. 724, 729.) An intervener becomes either a plaintiff or a
25 defendant, depending upon for whose success it seeks to intervene. For a
26 defendant-in-intervention, such as ALLSTATE, its Complaint in Intervention is regarded as
27 an answer, despite its misleading name. (*Timberidge Enterprises, Inc. v. City of Santa*
28 *Rosa* (1978) 86 Cal.App.3d 873, 879.)

Therefore, ALLSTATE INSURANCE COMPANY is to be regarded as Defendant in
Plaintiffs' action and its Complaint in Intervention as it's answer to Plaintiffs' Verified v First

1 Amended Complaint. However, ALLSTATE's Complaint in Intervention, treated as its
2 answer to Plaintiffs' Verified First Amended Complaint, fails to state a defense to any of the
3 allegations in the Complaint.

4 As shown herein below, Plaintiffs' Verified First Amended Complaint states facts
5 sufficient to constitute a cause of action for negligence against the suspended corporation
6 Defendant NEDI, and therefore, its insurer, Intervenor ALLSTATE INSURANCE
7 COMPANY. ALLSTATE's Complaint in Intervention presents nothing by way of a denial
8 or any new matter to bar or defeat the action, and raises no issue on any material
9 allegation of Plaintiffs' Verified First Amended Complaint. Accordingly, Plaintiffs are entitled
10 to a judgment on the pleadings.

11 **B. Plaintiffs' First Amended Complaint Alleges Facts to State a Cause of**
12 **Action for Negligence:**

13 Plaintiffs' Verified First Amended Complaint alleges facts to state a cause of action
14 for Negligence. The essential elements of actionable negligence include (1) a defendant's
15 legal duty to use due care, (2) a breach of that duty, (3) the breach as the proximate or
16 legal cause of a resulting injury, and (4) actual loss or damage resulting from that injury.
17 (*United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal. 3d 586, 59; *Koepke v.*
18 *Loo* (1993) 18 Cal. App. 4th 1444, 1448–1449.) The injury required as an element of
19 actionable negligence means an act causing harm in the sense of detrimental physical
20 changes to the body. A detrimental physical change is an actionable injury whether or not
21 it causes emotional distress. (*Duarte v. Zachariah* (1994) 22 Cal. App. 4th 1652,
22 1661–1664.) For a complaint in negligence to succeed, there must be a duty requiring a
23 certain standard of conduct, a failure to conform to that standard, a close causal connection
24 between the conduct and the resulting injury, and actual damages. (*Bojorquez v. House*
25 *of Toys, Inc.* (1976) 62 Cal. App. 3d 930, 933.)

26 The driver is most often the owner of the vehicle as well, but if the owner was not
27 driving, the owner may also be a potential defendant if the owner may be held liable under
28 some theory of vicarious liability, i.e., if the owner gave express or implied permission for

1 the driver to operate the vehicle. (*Vehicle Code* § 17150.)

2 In this action, the verified First Amended Complaint of Plaintiffs STEELE contains
3 allegations that state a cause of action for negligence: that Defendants negligently
4 entrusted, managed, maintained, operated, and drove their motor vehicle so as to
5 proximately cause the motor vehicle to collide with Plaintiff's Cadillac Deville vehicle, that
6 the 2001 Chevrolet 3500 truck vehicle being operated by defendant MEASHEL ANN
7 NOLTE was owned by and being driven with the permission of Defendant NEDI, and that
8 Plaintiffs were injured and damaged as a result of Defendants' negligence [Verified FAC
9 ¶¶ 1-18.]

10 Plaintiffs are entitled to a judgment on the pleadings. As shown herein, ALLSTATE's
11 Complaint in Intervention presents nothing by way of denial or new matter to bar or defeat
12 the action, and raises no issue on a material allegation of Plaintiffs' Verified First Amended
13 Complaint.

14 **C. ALLSTATE's Complaint in Intervention does not deny the material facts**
15 **alleged in the Verified Complaint:**

16 Plaintiffs' Verified First Amended Complaint alleges, and ALLSTATE's Complaint in
17 Intervention does not deny, that MEASHEL ANN NOLTE was driving the 2001 Chevrolet
18 3500 truck, that the truck was owned by NEDI, and that MEASHEL ANN NOLTE was
19 driving the truck with the permission of NEDI, and that Defendants negligently entrusted,
20 managed, maintained, operated, and drove their motor vehicle so as to proximately cause
21 the motor vehicle to collide with Plaintiffs' vehicle, and that as a result of the negligence,
22 Plaintiffs were injured and damaged.

23 ALLSTATE's Verified Complaint in Intervention fails to provide any denial or defense
24 whatsoever in response to the allegations contained in Plaintiff's Verified First Amended
25 Complaint. The effect of a general denial is to "put in issue the material allegations of the
26 complaint." (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 385.) The
27 allegations of a complaint are admitted by simple failure to controvert them. (*Code Civ.*
28 *Proc.* §§ 431.20(a), 431.30(f); *see also Fuentes v. Tucker* (1947) 31 Cal. 2d 1, 5; *Amusing*

1 *Sandwich, Inc. v. City of Palm Springs* (1985) 165 Cal.App.3d 1116, 1130.) Material
2 allegations of the complaint, if not controverted by the answer, are for the purposes of the
3 action taken as true. (*Code Civ. Proc.* § 431.20(a).) Consequently, in the instant case,
4 ALLSTATE's failure to controvert the allegations of the First Amended Complaint
5 constitutes an admission of those allegations.

6 Moreover, Plaintiffs' First Amended Complaint is verified and the denial of the
7 allegations shall be made positively or according to the information and belief of the
8 defendant. (*Code Civ. Proc.* § 431.30(d).)

9 Because the objection that the answer fails to state facts sufficient to constitute a
10 defense is not waived by failure to raise it by demurrer (*see Code Civ. Proc.* § 430.80(b)),
11 plaintiff may move for a judgment on the pleadings if such a defect exists. (*See MacIsaac*
12 *v. Pozzo* (1945) 26 Cal. 2d 809, 812–813.)

13 ALLSTATE's verified Complaint in Intervention, serving as its answer to Plaintiffs'
14 First Amended Complaint, fails to deny the truth of the material allegations, thereby
15 establishing them as fact and removing them from the issues to be tried. (*Code Civ. Proc.*
16 § 431.20(a).) Verification is an affidavit verifying the truth of matters covered by it. Its
17 object is to assure good faith in averments or statements of a party to litigation. (*Star*
18 *Motor Imports, Inc. v. Superior Court* (1979) 88 Cal. App. 3d 201, 204; *Hoffman v. City of*
19 *Palm Springs* (1959) 169 Cal. App. 2d 645, 648.) When an allegation is admitted, the
20 plaintiff is relieved of the need to prove that allegation at trial. (*Evid. Code* §§ 210, 350.)

21 Based upon the verified allegations of the First Amended Complaint and
22 ALLSTATE's verified admissions in its Complaint in Intervention, it is undisputed that
23 Defendants negligently entrusted, managed, maintained, operated, and drove their motor
24 vehicle so as to proximately cause the motor vehicle to collide with Plaintiffs' vehicle and,
25 as a proximate result of the negligence, Plaintiffs were injured and damaged. These
26 admitted facts are sufficient to grant Plaintiffs' motion for judgment on the pleadings.

27 **CONCLUSION**

28 The verified pleadings in this action show that it is undisputed that Defendants

1 negligently entrusted, managed, maintained, operated, and drove their motor vehicle so as
2 to proximately cause the motor vehicle to collide with Plaintiffs' vehicle and, as a proximate
3 result of the negligence, Plaintiffs were injured and damaged. As Intervenor for the
4 suspended corporate Defendant NOLTE ENVIRONMENTAL AND DEMOLITION, INC.,
5 ALLSTATE INSURANCE COMPANY has failed to deny or present new matter to bar or
6 defeat the action, and raises no issue on a material allegation of Plaintiff's Verified First
7 Amended Complaint

8 Accordingly, Plaintiffs CAROL L. STEELE and MICHAEL E. STEELE respectfully
9 request that the Court grant their Motion and enter a judgment on the pleadings in their
10 favor and against Intervenor ALLSTATE INSURANCE COMPANY.

11
12 Dated: November __, 2010.

LAW OFFICE OF SCOTT K. ZIMMERMAN

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14 **SCOTT K. ZIMMERMAN**
15 Attorney for Plaintiffs,
16 CAROL L. STEELE and MICHAEL E. STEELE
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4 ATTORNEY FOR PLAINTIFFS,
5 CAROL L. STEELE and MICHAEL E. STEELE

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8 **SUPERIOR COURT OF CALIFORNIA, COUNTY OF CONTRA COSTA COUNTY**

9 Unlimited Civil Jurisdiction

10
11 **CAROL L. STEELE and MICHAEL E. STEELE,** **CASE NO. C09-02787**

12 **Plaintiffs,**

(Proposed)

13
14 **vs.**

**ORDER GRANTING PLAINTIFFS'
MOTION FOR JUDGMENT ON THE
PLEADINGS**

15 **MEASHEL ANN NOLTE, an individual;
NOLTE ENVIRONMENTAL AND
DEMOLITION, INC., a California
16 corporation; BRIAN NOLTE, an individual;
and DOES 1-25, inclusive,**

**Assigned for all purposes to:
Hon. Judith Craddick**

17
18 **Defendants.**

19 **ALLSTATE INSURANCE COMPANY,**

20 **Intervenor.**

21 _____ /
22 The motion of Plaintiffs CAROL L. STEELE and MICHAEL E. STEELE for judgment
23 on the pleadings came on regularly for hearing by the Court on _____,
24 2010. Plaintiff appeared by counsel Scott K. Zimmerman. Intervenor ALLSTATE
25 INSURANCE COMPANY appeared by its counsel _____.

26 The matter having been argued and submitted and it appearing from Plaintiffs'
27 verified First Amended Complaint and ALLSTATE's verified Complaint in Intervention filed
28 herein that the verified First Amended Complaint states facts sufficient to constitute a cause

1 of action and the Complaint in Intervention does not state facts sufficient to constitute a
2 defense.

3 **IT IS ORDERED** that the motion be, and hereby is, granted.

4 **Dated:** _____

5 _____
6 **HONORABLE JUDITH CRADDICK,**
7 **JUDGE OF THE SUPERIOR COURT**

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