

DETACHED FROM MOTION AND FILED  
PER 12/12/16 ORDER

Case No. 70504

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IN THE SUPREME COURT OF NEVADA

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JAMES NALDER, Guardian Ad Litem  
on behalf of CHEYANNE NALDER;  
GARY LEWIS, Individually,

Appellants,

v.

UNITED AUTOMOBILE INSURANCE  
COMPANY,

Respondent.

**FILED**

DEC 12 2016

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

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**BRIEF OF AMICUS CURIAE OF THE NEVADA JUSTICE  
ASSOCIATION IN SUPPORT OF APPELLANTS**

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Ninth Circuit Case No. 13-17441  
U.S.D.C. No. 2:09-cv-01348-RCJ-GWF

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## **NRAP 26.1 DISCLOSURE**

The undersigned counsel of record hereby certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

The Nevada Justice Association (“NJA”) is a non-profit organization of independent lawyers who represent consumers and share the common goal of improving the civil justice system. NJA aims to ensure that Nevadans' access to the courts and to justice is not diminished. NJA also works to advance the science of jurisprudence, to promote the administration of justice for the public good, and to uphold the honor and dignity of the legal profession.

NJA did not appear in the underlying action and has submitted to this Court a motion for leave to file this brief. It is represented in the pending appeal, as amicus curiae, by Matthew L. Sharp, Esq., of the firm of Matthew L. Sharp, Ltd.

DATED this 15<sup>th</sup> day of November 2016.

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## **SUMMARY OF THE ARGUMENT**

This Amicus Brief addresses the issue certified by this Court at the request of the Ninth Circuit Court of Appeals:

Whether, under Nevada law, the liability of an insurer that has breached its duty to defend, but has not acted in bad faith, is capped at the policy limit plus any costs incurred, or is the insurer liable for all losses consequential to the insurer's breach?

*In re Nalder*, 824 F.3d 854, 855 (9th Cir. 2016).

This Court should find that if an insurer breaches its contractual duty to defend, the insurer should be liable for all consequential damages caused by the insurer's breach including a default judgment in excess of policy limits. Damages for breach of contract claims are designed to place the non-breaching party into the position he would have been had the contract not been breached. Consequential damages compensate the non-breaching party for damages that arise from the breach and are foreseeable at the time of contracting. When an insurer breaches its duty to defend, it breaches the contract. A default judgment in excess of policy limit can be consequential damages for the breach of contract as: (1) the default judgment in excess of the policy limit arises from the breach of the contract; and (2) the fact that if an insurer breaches its duty to defend, the insured could have default

judgment entered against him that is in excess of policy limits is foreseeable at the time the parties entered into the insurance contract.

In addition, Nevada law recognizes that an insurer owes a fiduciary-like duty to its insured. A rule that allows an insured to recover for judgments entered in excess of policy limits because of the insurer's contractual breach of the duty to defend is consistent with and in furtherance of the insurer's fiduciary-like duty. On a case-by-case basis, a trier of fact or judge is in the best position to determine what consequential damages have been caused by the insurer's breach of the duty to defend.

By contrast, a rule that rigidly prohibits an insurer from obtaining all consequential damages like a judgment in excess of policy limit is inconsistent with the insurer's fiduciary-like duty. Such a rule fails to consider the facts of each case. It will deprive the insured of consequential damages and provides the insurer with a windfall since the insurer will avoid accountability for the damage it caused when it breached its contractual duty to defend.

In order to assure fairness in the civil justice system, this Court should find that when an insurer breached its duty to defend, but has not acted in bad faith, it is liable for all consequential damages caused by the breach including a judgment in excess of policy limits.

## ARGUMENT

### **A. An Insurer Who Breaches Its Duty to Defend Should Be Responsible for all Consequential Damages.**

Under a liability insurance policy, an insurer owes two basic contractual duties: (1) a duty to defend; and (2) a duty to indemnify. *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 309, 212 P.3d 318, 324-325 (2009). “The duty to defend is broader than the duty to indemnify.” *United Natl Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 686-687, 99 P.3d 1153, 1158-1159 (2004). The duty to defend exists where there is a potential for coverage. *Id.* “A potential for coverage only exists when there is arguable or possible coverage.” *Id.* An insurer owes “‘a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy.’” *Id.*, quoting *Gray v. Zurich Insurance Company*, 65 Cal. 2d 263, 419 P.2d 168, 177, 54 Cal. Rptr. 104 (Cal. 1966).

In this case, United Auto Insurance Company (“UAIC”) breached its contractual duty to defend its insured, Lewis. The breach of the duty to defend did not rise to the level of the tort of insurance bad faith. The question before this Court is the remedies available for a contractual breach of the duty to defend.

“It is well established that in contracts cases, compensatory damages ‘are awarded to make the aggrieved party whole and . . . should place the



plaintiff in the position he would have been in had the contract not been breached.'" *Rd. & Highway Builders, LLC v. Northern Nev. Rebar, Inc.*, 128 NAO 36, 284 P.3d 377, 382. (2012), quoting *Hornwood v. Smith's Food King No. 1*, 107 Nev. 80, 84, 807 P.2d 208, 211 (1991). Breach of contract damages include consequential damages since those damages are consistent with restoring the party to the position he/she would have been in had the contract not been breached. *Id.* To establish consequential damages, the damage must be foreseeable meaning: (1) the damage or loss must fairly and reasonably be considered as arising naturally from the breach of contract; and (2) the loss must be one that is reasonably in contemplation by both parties, at the time they make the contract. *Clark County Sch. Dist. v. Rolling Plains Const.* 117 Nev. 101, 106, 16 P.3d 1079, 1080 (2001), overruled in part on other grounds in *Sandy Valley Assoc. v. Sky Ranch Estate Ass'n*, 117 Nev. 948, 955, 35 P.3d 964, 969 (2001).

Lewis presented facts to satisfy the first element for consequential damages. The Lewis policy was a minimum statutory \$15,000/\$30,000 policy. UAIC breached the duty to defend Lewis. Since it did not defend him, Lewis was unable to appear and defend the complaint. Nalder obtained a default judgment against Lewis in the amount of \$3,500,000.00. The

judgement that exceeded the \$15,000 policy limit arose naturally from the breach of the contract.

The facts establish that Lewis meets the second element for consequential damages. At the time it sold the insurance to Lewis, UAIC knew it owed a duty to defend. It was foreseeable that if UAIC were to breach its duty to defend, Lewis would be unable to defend the lawsuit, and a default judgment in excess of policy limits could result. Therefore, a default judgment in excess of policy limits is the type of loss reasonably contemplated at the time the insurance policy was sold.

As a default judgment in excess of policy limits falls within both elements for consequential damages, this Court should adopt a rule that consequential damages for a contractual breach of the duty to defend can include a judgment in excess of policy limits, including a default judgment. Whether the consequential damage of judgement in excess of policy limits is awarded should be based upon a trier of fact's determination regarding the individual merits of that case.

**B. A Rule Recognizing an Excess Judgment as a Consequential Damage Is Consistent with an Insurer's Duty to Defend.**

As previously explained in this brief and set forth in more detail in Appellant's Opening Brief, an insurer owes an insured a duty to defend a

lawsuit. This Court must consider the contractual duty in the context of the insurer/insured relationship.

Nevada has a long standing rule of law that the insurer/insured relationship is one of special confidence and akin to that of a fiduciary duty. *Ainsworth v. Combined Ins. Co. of America*, 104 Nev. 587, 592, 763 P.2d 673, 676 (1988), citation omitted; *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1258 n. 3, 969 P.2d 949, 956 n.3 (1998). The insurer, at a minimum, must consider the insured's interest at least equal to its own interest. *Allstate Ins. Co. v. Miller*, at 311, citation omitted. The nature of the insurer/insured special relationship "requires that the insurer adequately protect the insured's interest." *Id.*, citing to *Powers v. United Servs. Auto Ass'n*, 114 Nev. 690, 701-02, 969 P.2d 596, 603 (1998), modified on other grounds, *Powers v. United Servs. Auto Ass'n*, 115 Nev. 38, 979 P.2d 1286 (1999).

An insurer's contractual duty to defend is essential to the peace of mind an insurer provides when it sells the insurance policy. A rule that recognizes an excess judgment may be recovered as a consequential damage when the insurer breaches its duty to defend is consistent with the insurer's fiduciary-like relationship with its insured.

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In *Andrew v. Century Surety Co.*, 134 F. Supp. 3d 1249, 1259 (D. Nev. 2015), Judge Gordon found the insurer, Century, was liable for a default judgment that exceeded the policy limit. Like this case, Century did not commit insurance bad faith. Judge Gordon found that the full amount of the default judgment was recoverable as consequential damages. *Id.* at 1257-58.

In support of his conclusion, Judge Gordon distinguished between the duty to indemnify and the duty to defend. The duty to indemnify obligates the insurer to pay a specific amount. “The duty to defend is not based on the contractual promise to pay a certain amount of money to an injured person.” *Id.* at 1256. “Instead, it is a promise to provide a defense, the breach of which may result in consequential damages to the insured beyond the policy limits.” *Id.* Since the duty to defend is not limited to a specific amount, it logically follows that a breach of the duty to defend should not be arbitrarily limited to the amount of the policy limit. *Id.*

Judge Gordon noted:

In sum, Nevada law allows for recovery of all reasonably foreseeable consequential damages for a breach of contract, regardless of the good or bad faith of the breaching party. There is no special rule for insurers that caps their liability at the policy limits for a breach of the duty to defend.

*Id.* at 1259, emphasis in original.<sup>1</sup>

This Court should follow Judge Gordon's analysis.<sup>2</sup> Clearly, the breach of the duty to defend will result in consequential damage like a judgment in excess of policy limits. In *Andrew*, the breach of the duty to defend did result in a default judgment in excess of policy limits. By allowing an insured to recover consequential damages including a judgment in excess of policy limits, Judge Gordon acted consistent with Nevada's rule on consequential damages and furthered a Nevada's insurer's fiduciary-like duty to its insured.

By comparison, the Federal District Court, in this case, arbitrarily capped UIAC's contractual liability to the policy limit even though the

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<sup>1</sup> As Judge Gordon discussed, there is a split of authority regarding whether an insurer is liable for judgment in excess of policy limits when there is a contractual breach of the duty to defend. This Court should follow the cases finding that consequential damages for breach of the duty to defend may include a judgment in excess of the policy limit including a default judgment. *E.g.*, *Khan v. Landmark Am. Ins. Co.*, 326 Ga. App. 539, 757 S.E.2d 151, 156 (2014); *Maxwell v. Hartford Union High Sch. Dist.*, 341 Wis.2d 238, 262, 814 N.W.2d 484, 496 (2012); *McGrath v. Everest Nat'l Ins. Co.*, 668 F. Supp.2d 1085, 1107 (N.D. Ind. 2010); *Liberty Mutual Fire Insurance Co. v. Canal Insurance Co.*, 177 F.3d 326, 337 (5<sup>th</sup> Cir. 1999). Those cases are consistent with Nevada's law for consequential damages.

<sup>2</sup> In *Andrew*, Judge Gordon was asked to certify a similar question to this Court. While he denied to do that, Judge Gordon did stay the case pending resolution of this appeal. *See Andrew v. Century Surety Company*, 12-CV-00978-APG-PAL. Doc. No. 227 and 241.

default judgement occurred as a consequence of UIAC's contractual breach of its duty to defend. The Federal District Court failed to consider the fiduciary-like nature of the insurer's relationship with insurer. When it chose to limit the insurer's liability for consequential damages, the Federal District Court gave the insurer a form of specialized treatment that no other litigant would receive.

Furthermore, the Court needs to consider the practical reality of the civil justice system. Most Nevadan's purchasing automobile insurance do not have the financial ability to retain attorneys and incur litigation costs. Many Nevada citizens are like Mr. Lewis and can only afford minimum insurance policies like \$15,000 per person/\$30,000 per accident or \$25,000 per person/\$50,000 per accident. Those insureds simply do not have the resources to hire lawyers and defend the lawsuit the insurer should have defended. It is likely that an insured with a minimum policy limit will be unable to defend the lawsuit and judgment will be entered against the insured. It is foreseeable and likely the judgment exceeds the minimum policy limit. If it adopts a rule limiting the insured's damages to the policy limit and attorney's fees and costs actually incurred, this Court will deprive insureds with minimum insurance policy limits of being able to recover consequential damages claim as they are unlikely to have any out-of-pocket

damages. Insureds with limited means will effectively have no meaningful access to the civil justice system to pursue an insurer who breaches its contractual duty to defend.

By comparison, some sophisticated insureds can afford to hire attorneys and defend lawsuits that should have been defended by their insurer. Since they can afford to incur attorney's fees, those insureds will have consequential damages for the breach of the duty to defend because they can afford to hire attorneys to defend the lawsuit the insurer should have defended. The sophisticated insureds will continue to have access to the court house and have remedies to pursue for breach of contract claim for the breach of the duty defend.

The same logic equally applies to the business community. The practical reality is many small businesses cannot afford to defend a case when an insurer denies the duty to defend. A judgment in excess of policy limits is foreseeable and can be devastating to the future of that business.

Furthermore, in many cases, the insured, even when he/she/it, has the financial resources to hire lawyers, has no defense to liability, and damages exceed policy limits. A rule limiting consequential damages to policy limits and attorney's fees and costs actually incurred places the insured in a dilemma of unnecessarily incurring costs recoverable in a lawsuit or being

hit with a judgment in excess of a policy limit that cannot be recovered as a consequential damage.

Effectively, this Court will create at least two classes of insureds. One class is insureds with limited financial means. Those insureds will have no consequential damages for the breach of the duty to defend. The second class will be sophisticated insureds. Those insureds will have remedies for the consequential damages breach of the duty to defend.

However, the duty to defend is the same whether the policy is a minimal policy or whether the policy limit is \$1,000,000 or more. All insureds, regardless of being poor or rich, should have access to Nevada's civil justice system.

Moreover, the policy in Nevada should be to have a civil justice system that places the wrongdoer in a position of full accountability and the person wronged in the position of being able to obtain full compensation. In Nevada, consequential damages exist to make the non-breaching party whole. A rule of law that an insured may recover judgments in excess of policy limits as consequential damages is consistent with providing full compensation and creating fairness and accountability in our civil justice system.



The breaching party should be responsible for all consequential damages. An element of consequential damages for the breach of the duty to defend can be a judgment, including a default judgment, that exceeds policy limits. Whether the damages are recoverable should be based upon the individual facts of each case.

### **CONCLUSION**

For the foregoing reasons, Amicus Curiae respectfully requests that this Court adopt a rule of law that an insured may recover all consequential damages caused by an insurer's contractual breach of its duty to defend including judgments in excess of policy limits.

DATED this 15<sup>th</sup> day of November 2016.

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## **CERTIFICATE OF COMPLIANCE**

1. I hereby certify that his proposed brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief was prepared in a proportionally-spaced typeface (14-point Times New Roman font) using Microsoft Word.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 3,506 words.

3. I hereby certify that I have read this amicus curiae brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15<sup>th</sup> day of November 2016.

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### **CERTIFICATE OF SERVICE**

Pursuant to NRAP 31, I hereby certify that I am an employee of Matthew L. Sharp, Ltd., and on this date, I electronically filed and served a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE OF THE NEVADA JUSTICE ASSOCIATION IN SUPPORT OF APPELLANTS** via eFlex Program, which will send a notice of electronic filing to the following:

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