IN THE SUPREME COURT OF THE STATE OF NEVADA
CASE NO. 70504

JAMES NALDER, GUARDIAN AD LITEM ON BEHALF OF CHEYANNE NALDER; AND GARY LEWIS, INDIVIDUALLY,
Appellants,

v.

UNITED AUTOMOBILE INSURANCE COMPANY,
Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF ADDRESSING RECENT CASE LAW

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 STATEMENT

The undersigned counsel of record certifies that the following are the persons and entities as described in NRAP 26.1(a)(1), and must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal:

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Dated this 15th day of January, 2019.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

FACTUAL AND PROCEDURAL BACKGROUND[1]

This case arises from UAIC's denial of coverage for a personal injury claim because no valid insurance policy was in effect at the time of the accident.

Specifically, it was alleged that on July 8, 2007, Gary Lewis' vehicle struck Cheyanne Nalder. *In re Nalder*, 824 F. 3d 854 at 855 (9th Cir. 2016). Prior to the accident, Mr. Lewis purchased a month-long automobile liability policy term from United Automobile Insurance Company ("UAIC") for June 2007, which was renewable on a monthly basis. *Id. See also* D.E. 16-17697, 59. Mr. Lewis had previously received a statement instructing him that his renewal payment was due by June 30, 2007, and specifying that "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy." *Id.* The statement listed June 30, 2007, as the policy's effective date and July 31, 2007, as its expiration date. *Id.* Mr.

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[1] In providing the facts and procedural history in this matter, UAIC relies on the federal district court's articulation of that information in its certified question. *See In re Fontainebleau Las Vegas Holdings, L.L.C.*, 127 Nev. 941, 955, 267 P.3d 786, 795 (2011). For the limited purposes of providing context to the issues addressed in its brief on the certified question, however, UAIC also cites to other filings by the parties, which have been provided as part of UAIC's Appendix filed herewith. *See id.* (providing that an appendix that is submitted in a certified-question proceeding may help give context for the issues but should not be relied on "to contradict the certification order"). *See also Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc.*, 333 P.3d 229, 230 n.4 (Nev. 2014). Citations to UAIC's Appendix shall be designated "APPX. [page number]." Citations to the parties' filings in the underlying Ninth Circuit case, which have been provided as part of the record transmitted to this Court, will be to the document number reflected in this Court's docket, and shall be designated "D.E. [document number], [page number]."

Lewis did not pay to renew his policy until July 10, 2007, two days after the accident involving Cheyanne and approximately ten days after his renewal payment was due according to the renewal statement. *Id.*

UAIC therefore denied coverage for the accident because no policy was in effect at the time of the accident due to Mr. Lewis' failure to pay the renewal premium timely. *Id.* at 855-56. James Nalder, Cheyanne's father, thereafter sued Mr. Lewis in Nevada state court and obtained a $3.5 million default judgment. *Id.* at 856. Mr. Nalder and Mr. Lewis then filed suit against UAIC, alleging claims of breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, fraud and breach of section 686A.310 of the Nevada Revised Statutes. *Id.*

During the course of this lawsuit, Mr. Lewis provided answers to requests for admissions that conceded no timely renewal payment was made, and instead, claimed an ambiguity in the renewal statement over two years after entry of the default judgment against him. *(ER p. 492, Response number 8).* UAIC maintained its position that Mr. Lewis had no insurance coverage on the date of the accident and moved for summary judgment on Mr. Nalder and Mr. Lewis' claims. *Id.* Mr. Nalder and Mr. Lewis argued that Mr. Lewis was covered on the date of the accident because the renewal notice was ambiguous as to when payment had to be received to avoid a lapse in coverage, and that this ambiguity had to be construed in favor of the insured. *Id.* The Federal District Court agreed with UAIC and entered summary

judgment on all claims. This was partially reversed by the Ninth Circuit Court of Appeals, which reversed on the question of ambiguity in the renewal language.

On remand, the district court ultimately granted partial summary judgment to each party, finding in favor of Mr. Nalder and Mr. Lewis on the issue of coverage and finding in favor of UAIC on the issues of bad faith and extra-contractual claims and remedies. *Id.* Specifically, the district court found the renewal statements were ambiguous and construed the ambiguity against UAIC by finding that Mr. Lewis was covered on the date of the accident. *Id.* The district court further found UAIC did not act in bad faith because it had a reasonable basis to dispute coverage. *Id.* Finally, the district court ruled UAIC breached its duty to defend Mr. Lewis, but awarded no damages because Mr. Lewis did not incur any fees or costs in defending the underlying action as he took a default judgment. The district court ordered UAIC "to pay Cheyanne Nalder the policy limits on Gary Lewis' implied insurance policy at the time of the accident," which UAIC promptly paid.

ARGUMENT

I. *Century Surety* is Factually and Legally Distinguishable from the Present Matter and, Therefore, the Rule of Law Set Forth Therein Should Not Be Held to Apply to this Matter.

On December 13, 2018, this Court released its decision in *Century Surety Company v. Andrew*, 134 Nev., Advance Opinion 100, which addressed the issue of whether "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 by the insured in mounting a defense, or whether the insurer is liable for all losses consequential to the insurer's breach." Opinion at p. 2. In that case, the insurer denied coverage based on a policy exclusion after it reviewed the accident report and conducted an investigation, concluding that the insured's employee driver was not in the course and scope of employment at the time of the accident.

This Court ultimately held that

> Damages from a breach of the duty to defend are not automatically limited to the amount of the policy; instead, the damages awarded depend on the facts of each case. The objective is to have the insurer pay damages necessary to put the insured in the same position he would have been in had the insurance company fulfilled the insurance contract. Thus, a party aggrieved by an insurer's breach of its duty to defend is entitled to recover all damages naturally flowing from the breach.

Opinion at p. 9 (internal quotation marks and citations omitted). In reaching this conclusion, this Court reasoned that an "insured pays a premium for the expectation that the insurer will abide by its duty to defend when such a duty arises[,]" and clarified that in Nevada the duty to defend arises "if facts in a lawsuit are alleged which if proved would give rise to the duty to indemnify[.]" Opinion at 7 (internal quotation marks omitted). This distinction is crucial, as the *Century Surety* lawsuit on its face alleged facts which would trigger coverage if proven.

Importantly, the four corners of the pleadings in the *Century Surety* matter triggered a duty to defend. The *Century Surety* plaintiffs alleged in their complaint that the insured's employee driver was acting in the course and scope of his employment with the insured at the time of the accident. The insurer, however, independently concluded based on its own investigation of the loss that the accident was excluded from coverage under an exclusion in its insurance policy despite what was specifically pled in a complaint. The *Century Surety* insurer thus made a conscious decision not to defend, despite the language of the complaint clearly triggering coverage. The face of the complaint in *Century Surety* showed a clear potential for coverage under the policy, and the insurer nevertheless refused to defend its insured based upon facts outside of the complaint.

This Court's prior case law does hold, however, that the duty to defend is not absolute. *See United Natl Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 687, 99 P.3d 1153, 1158 (2004); *Aetna Cas. & Sur. Co. v. Centennial Ins. Co.*, 838 F.2d 346, 350 (9th Cir. 1988). This Court reaffirmed this holding in *Century Surety*, stating that "there is no duty to defend where there is no *potential* for coverage[,]" and explaining that a potential for coverage is determined by "comparing the allegations of the complaint with the terms of the policy." Opinion at p. 7 fn. 4. This Court further clarified that "[i]n this instance, as a general rule, facts outside of the complaint cannot justify an insurer's refusal to defend its insured." *Id.*

Here, the four corners of the *Nalder v. Lewis* complaint showed no potential for coverage at all. In fact, the complaint alleged a loss date outside the coverage period. Importantly, the alleged duty to defend was not based upon any potential for coverage known by the insurer at the time of the lawsuit, but rather the district court's conclusion that an implied insurance policy had been formed due to an ambiguity in the renewal statements sent by UAIC, which it construed in favor of the insured, Mr. Lewis. This is a crucial distinction. UAIC had never been told by its insured, or the claimant, that the renewal language was "ambiguous" or confusing until over two years after the loss. Contrary to the facts of *Century Surety*, UAIC was only presented the "ambiguity" rationale years after the loss, and after the judgment had been entered. Furthermore, there was no evidence ever presented that UAIC knew or had reason to know of the alleged ambiguity in the renewal statement until it was raised for the first time in the underlying action in 2010, approximately two years after the default judgment Appellants claim constitute consequential damages was entered.

Such facts and circumstances are wholly distinct from those presented in *Century Surety*. This is not a case in which an insurer consciously elected to ignore a complaint which specifically alleged a covered loss, but rather a case in which an obligation to defend was imputed to an insurer years after the fact based upon an

ambiguity in a renewal statement of which the insurer had no prior notice.[2] Under such circumstances, an insurer's good faith basis for declining to defend its insured should be deemed relevant and should bar liability of an insurer for damages in excess of the policy limits. To hold otherwise would impose upon all insurers in the State of Nevada a duty to defend even in circumstances where there is no potential for coverage based on comparing the allegations of the complaint with the terms of the policy, in direct contravention of this Court's prior holdings in cases such as *United National*. *See United Nat'l Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 687, 99 P.3d 1153, 1158 (2004).

The language of *Century Surety* made clear that consequential damages are not an absolute windfall entitlement following any alleged breach. "Damages from a breach of the duty to defend are not *automatically* limited to the amount of the policy; *instead, the damages awarded depend on the facts of each case.*" Opinion at p. 9 (emphasis added). To impose such a burden on UAIC and other Nevada insurers, with a clearly distinguishable legal and factual predicate, would frustrate the public policy announced by the court in *United National*. This cannot be the law. Insurers in Nevada must be allowed to assess risks intelligently and reasonably,

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[2] The first notice presented to UAIC that the renewal language might be "ambiguous" was more than two years after the judgment. As argued to the Ninth Circuit Court of Appeals, this is the first time any UAIC insured had made any such allegation, and UAIC had no notice of such until years after the judgment.

without fear of catastrophic damage even for reasonable assessments called into question only years later. Were every insurer required to hire counsel to defend every loss that occurred after a lapse in coverage, and separately hire counsel to file declaratory actions while defending those lawsuits, such a ruling would foster needless, expensive and duplicative litigation.

UAIC therefore urges this Court to hold that these factual and legal distinctions render the rule of law set forth in *Century Surety* inapplicable in cases where no potential for coverage was pleaded and an insurer's breach of a duty to defend is based on a reasonable, good faith determination that the insurance policy at issue was not in effect at the time of the loss.

CONCLUSION

For the reasons set forth above, UAIC respectfully requests that this Honorable Court find that its recent decision in *Century Surety Company v. Andrew*, 134 Nev. , Advance Opinion 100 (Dec. 13, 2018), is factually and legally distinguishable from the present matter and that the rule of law set forth therein does not apply in cases where the complaint did not allege a loss within the policy period and an insurer's breach of a duty to defend is based on a reasonable, good faith determination that the insurance policy at issue was not in effect at the time of the loss.

Additionally, UAIC respectfully suggests that the decisional process will be aided through oral argument, and hereby requests that this Honorable Court grant oral argument in this cause.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this 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). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point, double-spaced Times New Roman font.
2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 6,975 words.
3. Finally, I hereby certify that I have read this appellate 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 subjected to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

Dated this 15th day of January, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of January, 2019, I served the foregoing **Respondent's Supplemental Brief Addressing Recent Case Law** by electronically filing and serving the document listed above with the Nevada Supreme Court.

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