IN THE SUPREME COURT OF THE STATE OF NEVADA

NAUTILUS INSURANCE COMPANY, Appellant, v. ACCESS MEDICAL, LLC; ROBERT CLARK WOOD, II; AND FLOURNOY MANAGEMENT LLC, Respondents.	**Supreme Court 79130** United States District Court, for the District of Nevada Case No. 2:15-cv-00321 United States Court of Appeals for the Ninth Circuit: Case Nos. 17-16265 17-16272 17-16273

JOINT APPENDIX VOLUME VI

IN THE SUPREME COURT OF THE STATE OF NEVADA

NAUTILUS INSURANCE COMPANY, Appellant, v. ACCESS MEDICAL, LLC; ROBERT CLARK WOOD, II; AND FLOURNOY MANAGEMENT LLC, Respondents.	**Supreme Court 79130** United States District Court, for the District of Nevada Case No. 2:15-cv-00321 United States Court of Appeals for the Ninth Circuit Case Nos. 17-16265 17-16272 17-16273

JOINT APPENDIX

Citations to the joint appendix will include a page number, which refers to the "NV Sup Ct CQ – Joint Appendix00001" page numbering. This is to prevent any confusion, as many of the documents were previously numbered as exhibits in support of the briefing on this issue before the Ninth Circuit. The volumes of the Joint Appendix are labeled in Roman Numerals to prevent confusion with the volumes of the two underlying sets of exhibits. Tabs are only provided for the volumes of the Joint Appendix, not for the underlying sets of exhibits. Indices of the underlying exhibit volumes can be found at NV Sup CT CQ – JointAppendix00053, 00800.

INDEX BY VOLUME		
VOLUME I		
Tab #	Description	Ninth Circuit Case 17-16265 Docket Entry No.
1	Appellant's Opening Brief	15
2	Nautilus Insurance Company's Excerpts of Record Vol. 1 of 4	16-1

VOLUME II		
Tab #	Description	Ninth Circuit Case 17-16265 Docket Entry No.
3	Nautilus Insurance Company's Excerpts of Record Vol. 2 of 4	16-2

VOLUME III		
Tab #	Description	Ninth Circuit Case 17-16265 Docket Entry No.
4	Nautilus Insurance Company's Excerpts of Record Vol. 3 of 4	16-3

VOLUME IV		
Tab #	Description	Ninth Circuit Case 17-16265 Docket Entry No.
4 (Con't)	Nautilus Insurance Company's Excerpts of Record Vol. 3 of 4 (Con't)	16-3
5	Nautilus Insurance Company's Excerpts of Record Vol. 4 of 4	16-4

VOLUME V		
Tab #	Description	Ninth Circuit Case 17-16265 Docket Entry No.
6	Appellee's Principal and Response Brief	24
7	Access Medical, LLC and Robert Clark Wood, II's Supplemental Excerpts of Record Vol. 1 of 2	25-1
8	Access Medical, LLC and Robert Clark Wood, II's Supplemental Excerpts of Record Vol. 1 of 2	25-2
9	Flournoy Management, LLC's Brief on Cross-Appeal	31

VOLUME VI		
Tab #	Description	Ninth Circuit Case 17-16265 Docket Entry No.
10	Nautilus Reply Brief on Cross-Appeal	36
11	Appellees' Reply Brief	43
12	Flournoy Management, LLC's Reply Brief on Cross-Appeal	44
13	Notice of Supplemental Authority Pursuant to FRAP 28(j) and Circuit Rule 28-6	59
14	Memorandum of Decision	62-1
15	Order Certifying Question to the Nevada Supreme Court	63

ALPHABETICAL INDEX			
Document Title	Tab #	Vol. #	Page #[1]
Access Medical, LLC and Robert Clark Wood, II's Supplemental Excerpts of Records, Vol. 1 of 2	7	V	00799
Access Medical, LLC and Robert Clark Wood, II's Supplemental Excerpts of Records, Vol. 2 of 2	8	V	00814
Appellant's (Nautilus) Opening Brief Before the Ninth Circuit	1	I	00001
Appellee's (Access Medical) Reply Brief Before the Ninth Circuit	11	VI	00993
Appellees' Principal and Response Brief	6	V	00743
Flournoy Management, LLC's Brief on Cross-Appeal	9	V	00910
Flournoy Management, LLC's Reply Brief on Cross-Appeal	12	VI	01021
Memorandum of Decision	14	VI	01046
Nautilus Insurance Company's Excerpts of Record in Support of Brief Before the Ninth Circuit, Vol. 1 of 4	2	I	00052
Nautilus Insurance Company's Excerpts of Record in Support of Brief Before the Ninth Circuit, Vol. 2 of 4	3	II	00079
Nautilus Insurance Company's Excerpts of Record in Support of Brief Before the Ninth Circuit, Vol. 3 of 4	4	III & IV	00311
Nautilus Insurance Company's Excerpts of Record in Support of Brief Before the Ninth Circuit, Vol. 4 of 4	5	IV	00578
Nautilus Reply Brief on Cross-Appeal	10	VI	00965
Notice of Supplemental Authority Pursuant to FRAP 28(j) and Circuit Rule 28-6	13	VI	01035
Order Certifying Question to the Nevada Supreme Court	15	VI	01052

[1] NV Sup CT CQ – JointAppendix Numbering

Joint Appendix

Tab #10

Appeal Nos. 17-16265 (lead), 17-16272, 17-16273

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NAUTILUS INSURANCE COMPANY,

Plaintiff-Appellant-Cross-Appellee,
v.

ACCESS MEDICAL, LLC: ROBERT CLARK WOOD II; FLOURNOY MANAGEMENT, LLC,

Defendants-Appellees-Cross-Appellants.

On Appeal From the United States District Court,
for the District of Nevada
The Honorable Jennifer A. Dorsey, United States District Judge
Case No. 2:15-CV-00321-JAD-GWF

NAUTILUS'S REPLY BRIEF ON CROSS-APPEAL

LINDA WENDELL HSU
SELMAN BREITMAN LLP
33 New Montgomery, Sixth Floor
San Francisco, CA 94105-4537
Telephone: 415.979.0400
Facsimile: 415.979.2099
Attorneys for Plaintiff-Appellant-Cross
Appellee NAUTILUS INSURANCE COMPANY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

Miscellaneous

CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rules of Appellate Procedure, Rule 26.1, Plaintiff/Appellant/Cross-Appellee Nautilus Insurance Company ("Nautilus") by and through its undersigned counsel, certifies the following information with regard to its corporate parents, subsidiaries or affiliates:

Nautilus hereby declares it is a wholly owned subsidiary of Admiral Insurance Company, which is a wholly owned subsidiary of Berkley Insurance Company, and both are subsidiaries of W.R. Berkley Corporation.

A supplemental disclosure statement will be filed upon any change in the information provided herein.

DATED: March 14, 2018 Selman Breitman LLP

By: s/ Linda Wendell Hsu
LINDA WENDELL HSU
Attorneys for Plaintiff-Appellant-Cross-Appellee NAUTILUS INSURANCE COMPANY

I. INTRODUCTION

The United States District Court for the District of Nevada ("District Court") correctly held that Plaintiff/Appellant/Cross-Appellee Nautilus Insurance Company ("Nautilus") never had a duty to defend Access Medical, LLC ("Access Medical"), Robert Clark Wood II ("Wood"), and Flournoy Management, LLC's ("Flournoy") (collectively, the "Insureds"). Nonetheless, the District Court erred by denying Nautilus' request for reimbursement of funds it expended paying for the defense of the insureds in the underlying actions under a reservation of rights. The District Court also erred by refusing to grant Nautilus the relief it sough pursuant to 28 U.S.C. section 2202.

This matter should be remanded to the District Court and reopened for the limited purpose of conducting discovery on the amounts Nautilus expended defending the Insureds in the underlying actions. Nevada Courts hold that when a question arises regarding whether coverage is owed, an insurer can and should elect to defend and seek reimbursement if the insurer is found to not owe a duty of coverage. Nautilus did exactly that, yet has been improperly deprived of its right to collect the amounts the District Court determined it had no duty to expend.

///

///

II. ARGUMENT

A. The Insureds' Arguments That Nautilus Had a Duty to Defend Are Irrelevant To This Appeal.

The District Court correctly ruled that Nautilus did not owe a duty to defend the Insureds. The Insureds' arguments to the contrary are irrelevant to this appeal. Both Access Medical/Wood and Flournoy have respectively filed cross-appeals before this Court that have been briefed and are pending review. The insureds have also filed numerous frivolous motions in the District Court which have been denied. It is wholly improper for the Insureds to now attempt to convolute the reimbursement issue subject to this appeal and distract this Court by submitting further briefing on the duty to defend issue. What is germane is that the District Court erred when it denied Nautilus' request for reimbursement of funds expended defending the Insureds, despite its ruling that Nautilus owed no duty to defend. Accordingly, Nautilus' Reply focuses solely on the issues relevant to this appeal.

B. Nautilus Is Entitled to Reimbursement Under Nevada Law

Under Nevada law, an insurer has a right to reimbursement of defense costs if there is an understanding between the parties that the insured would be required to reimburse the insurer for monies expended in providing a defense. *Capitol Indem. Corp. v. Blazer,* 51 F. Supp. 2d 1080, 1090 (D. Nev. 1999). "[A]cceptance of monies constitutes an implied agreement to the reservation of the insurer's right

to seek reimbursement for claims outside of the policy's coverage." *Probuilders Specialty Ins. Co. v. Double M. Const.*, 116 F. Supp. 3d 1173, 1181 (D. Nev. 2015). The Insureds' Briefs misinterpret applicable law and fail to set forth valid arguments establishing that Nautilus is not entitled to such reimbursement.

In support of its position, Insureds cite this Court's opinion in *Seven Words, LLC v. Network Solutions*, 260 F.3d 1089, 1098 (9th Cir. 2001). *Seven Words* actually supports Nautilus' position because the case cites to Rule 54(c): "Rule 54(c) permits courts to grant relief to which a party is entitled even if not specifically requested in the complaint unless doing so would prejudice the opposing party." *Id.* at 1098. In this case, granting that relief would not be prejudicial to Insureds because on remand, they would have the opportunity to conduct discovery on the reimbursement issue.

In other ways, *Seven Words* is distinguishable from this matter because in *Seven Words*, the Court did not address the moving party's request for damages because the party seeking them did not request them until the late stage of supplemental briefing on appeal. Here, Nautilus immediately requested further relief in the form of reimbursement of money damages after the District Court on its own volition converted Nautilus's Motion for Partial Summary Judgment into a full Motion for Summary Judgment and closed the case. Nautilus was divested of its right to assert monetary damages in this matter. Immediately upon entry of

judgment, Nautilus sought relief from the District Court to assert its claims for monetary reimbursement. Thus, *Seven Words* supports Nautilus's position, and this Court should enter an order reversing the District Court's denial of Nautilus's request for reimbursement monies it expended defending an action in which it owed no duty of coverage.

Insureds' reliance upon *Alliance of Nonprofits for Ins. Risk Retention Group v. Barratt*, 2013 WL 3200083 (D. Nev. 2013) is also flawed. As an initial matter, *Alliance* is an unpublished decision and not binding on this Court. Even if the Court were to consider it, its holding is not applicable herein. In *Barratt*, the Ninth Circuit vacated the district court's award of attorneys' fees on the basis that plaintiffs lacked an enforceable right under 42 U.S.C § 1983, and therefore were not entitled to attorneys' fees as a prevailing party under 42 U.S.C. § 1988. Plaintiff subsequently filed a motion seeking damages, including lost profits, loss of good will/business reputation, lost business opportunities, and attorneys' fees pursuant to 28 U.S.C. § 2202. The district court denied the request based upon its finding that the Commissioner of Insurance did not act in bad faith or with a vexatious intent. In *Barratt*, the plaintiff sought attorney's fees as an exception to the American Rule regarding an entitlement to attorney's fees. Here, Nautilus is not seeking to recover its attorney's fees based upon an exception to the American rule or based upon bad faith. Rather, Nautilus is seeking to recover amounts it

expended defending the insureds in which the District Court determined it owed no duty of coverage. Importantly, Nautilus is not seeking its attorney's fees in the coverage action (i.e. through Selman Breitman, LLP). Rather, Nautilus seeks to recover the amounts it expended defending the Insureds in the underlying action. To hold otherwise would run afoul of the public policy of encouraging insurers to defend and seek reimbursement of attorney's fees should it be found that no duty of coverage is owed.

Insureds also incorrectly rely upon *Horgan v. Felton*, 123 Nev. 577, 584, 170 P.3d 982, 986 (2007). The Insureds' reference to *Horgan* is misplaced and frankly disingenuous. *Horgan* involved a dispute over entitlement to an easement. The Nevada Supreme Court held that in cases concerning title to real property, attorney fees are only allowable as special damages in slander of title actions, not merely when a cloud on the title to real property exists. *Id.* at 579. This case clearly does not involve title to real property. Moreover, Nautilus is not seeking to recover the attorney's fees expended by Selman Breitman in the declaratory relief action. Rather Nautilus is seeking to recover the fees it incurred defending the Insureds in the Underlying Case based upon the District Court's Order that Nautilus had no duty to defend.

Insureds concede that Nevada law is silent on the issue of whether an insurer may seek to recover defense costs expended defending an insured when it turns out

there was never a duty to defend. Nevada law is clear that when it is silent on a particular issue, it routinely turns to and follows California law. *See Allstate Ins. Co. v. Miller*, 125 Nev. 300, 212 P.3d 318, (2009). Under California law, the courts have consistently held that the insurer may seek reimbursement for defense costs after obtaining a judicial determination of no duty to defend. *Buss v. Superior Court*, 16 Cal. 4th 35, 50, 939 P.2d 766, 776 (1997). S*ee also Hogan v. Midland National Ins. Co.,* 3 Cal.3d at pp. 563–564, 91 Cal.Rptr. 153, 476 P.2d 825 (1970); *American Motorists Ins. Co. v. Allied–Sysco Food Services, Inc.,* 19 Cal.App.4th 1342, 1355–1356, 24 Cal.Rptr.2d 106 (1993); *Reliance Ins. Co. v. Alan,* 222 Cal.App.3d 702, 708–710, 272 Cal.Rptr. 65 (1990); *Insurance Co. of the West v. Haralambos Beverage Co.,* 195 Cal.App.3d 1308, 1322–1323, 241 Cal.Rptr. 427 (1987); *Travelers Ins. Co. v. Lesher,* 187 Cal.App.3d 169, 203, 231 Cal.Rptr. 791 (1986).

As Nautilus previously asserted, a case more properly on point is *Horn & Hardart Co. v. National Rail Passenger Corp*., in which the court held:

> Section 2202…provides for "necessary or *proper* relief" – specifically, "proper relief *based on* the declaratory judgment." 28 U.S.C. § 2202 (emphasis added.) Amtrak's request for further relief in the form of triple rent and attorneys' fees follows absolutely from, and is based on, the district court's decision in *Horn & Hardart I* confirming Amtrak's right to terminate the leasehold. And even though Amtrak's present request may not be "necessary" to effectuate the lease termination ruling, **the plain language of the Declaratory Judgment Act does**

> **not require this degree of stringency. The relief need only be proper.**
>
> *Horn & Hardart Co. v. National Rail Passenger Corp*. 843 F.2d 546 (D.C. Cir. 1988). (emphasis added).

Here, just like in *Horn & Hardart*, Nautilus's request for reimbursement of the defense fees and costs expended to defend its insureds in a case that was ultimately determined not to be covered under the policy is proper relief.

The fact that Nautilus is entitled to such relief was confirmed in the court's decision in *Omaha Indemnity Insurance Co. v. Cardon Oil Co*., 687 F.Supp. 502 (N.D. Cal. 1988); aff'd, 902 F.2d 40 (9th Cir. 1990) ("*Omaha*") (*declined to follow on other grounds by Evanston Ins. Co. v. OEA, Inc.*, 566 F.3d 915, 921, fn. 3 (9th Cir. 2009)). In *Omaha*, the trial court had granted the insurer's request for declaratory relief, holding that the policy did not cover the investment loss claims alleged against the insureds in the underlying case, and that plaintiff had no duty to defend or indemnify. *Id*. at 503. The insurer then brought a motion for summary adjudication under 28 U.S.C. § 2202 seeking an order that the insureds reimburse the insurer for all attorney's fees and costs advanced in the underlying action. *Id*. The insurer pointed out that it had expressly reserved its right to recover attorney's fees and costs advanced on behalf of the insureds in the underlying case and that it was entitled to recovery since the court had ruled that it had no duty to defend. *Id*. The insureds moved to strike on the grounds that there was no action pending

before the court since a judgment was entered in the case. *Id*.

In ruling for the insurer, the *Omaha* court made the following rulings:

- The further relief requested by the insurer was a proper request for relief under section 2202. *Id*. at 503-504.
- The insurer was entitled to reimbursement because the insurer had reserved its right to seek reimbursement in its reservation of rights letter. *Id*. at 504. The silence of the insured in accepting the defense with reservation of rights was sufficient to require reimbursement. *Id*. at 504-505.
- Any allegation that the insurer delayed payment of certain invoices, made only partial payments, and disputed legitimate items in the invoices did not defeat the insurer's right to recover monies that it actually paid on the insured's behalf. *Id*. at 505.

Similarly, in this case, Nautilus is entitled to relief under section 2202, because Nautilus reserved its right to obtain reimbursement and the insured did not object. *See also Progressive Cas. Ins. Co. v. Peerless Ins. Co*., No. CVF06-1113, 2007 WL 1655790, at *2 (E.D. Cal. June 7, 2007); *Columbia Cas. Co. v. Abdou* ,No. 15CV80-LAB (KSC), 2016 WL 4417711 at *1, (S.D. Cal. Aug. 18, 2016) ("*Abdou*"); *Continental Cas. Co. v. Assicurazioni Generali, S.P.A*., 903 F.Supp. 990 (S.D. W.Va. 1995); *Hewlett Packard Co. v. Ace Prop. & Cas. Co*., No. C-99-

20207, 2010 U.S. Dist. LEXIS 145065, *8 (N.D. Cal. Dec. 15, 2010) ("Reimbursement of defense costs pursuant to a motion for reimbursement qualifies as 'proper relief' following a court order that a carrier had no duty to defend."). Therefore, the district court erred by declining to find that the relief Nautilus sought was not the type contemplated under the Declaratory Judgment Act.

Insureds further argue that they were prejudiced from conducting discovery relating to attorneys' fees and the reasonableness of those attorneys' fees. This contention fails for two reasons. First, there is no need to conduct discovery. Nautilus filed the bills with the District Court which were submitted by the Insured's defense counsel and paid by Nautilus. Nautilus seeks reimbursement for the defense costs it actually incurred on the Insured's behalf. Thus, the only relevant evidence is what Nautilus paid. The amounts Nautilus paid are undisputed herein. The total amount of defense costs Nautilus paid on Access Medical and Wood's behalf is $304,482.43. (Vol. 3/494 ¶5). The total amount of defense costs Nautilus paid on Flournoy's behalf is $142,310.52. (Vol. 3/ER 485, ¶6). The Insureds Briefs do not dispute or otherwise allege that Nautilus paid these amounts during their defense in the District Court case. Second, and in the alternative, Nautilus respectfully requests that this Court remand the case to the District Court for the sole limited purpose of conducting discovery on the amounts Nautilus

expended defending the Insureds.

C. Nautilus Met Its Burden to Show It is Entitled to Reimbursement in Its Unopposed Motion Seeking Reimbursement from Flournoy.

The District Court erred by not granting Nautilus's unopposed Motion seeking reimbursement from Flournoy. Flournoy argues that Nautilus sought reimbursement through Declaratory Judgment Act procedure but had no substantive law basis for its requested relief. This contention is false. The cases relied upon by Flournoy are inapplicable herein because they apply only to summary judgment motions. Flournoy cites *Cristobal v. Siegal*, 26 F.3d 1488, 1494-95 (9th Cir. 1994). In *Cristobal*, the Court found that under FRCP 56, the burden is on the moving party to demonstrate the absence of material fact, even when the party against whom the motion is directed has not filed any opposition. *Cristobal* is not applicable here because Nautilus's Motion was not a Motion for Summary Judgment. Accordingly, the heightened summary judgment standard of absence of any material fact is inapplicable. Even if that were the standard, Nautilus easily met its burden of proof.

Insureds also cite *J.I.P., Inc. v. Reliance Ins. Co.*, 173 F.3d 860 (9th Cir. 1999) in support of their flawed arguments. *J.I.P., Inc.* is an unpublished decision and thus not binding or precedent on this Court. Nonetheless, *J.I.P., Inc.* actually supports Nautilus' position that it is entitled to reimbursement. The court in *J.I.P.,*

Inc. expressly stated, "[b]ecause [insurer] accepted the defense under a unilateral reservation of rights, the district court correctly held that 'Insurer might have a right to recover by way of setoff defense costs that are attributable to ... claims for which there was no potential for coverage ....'" (internal citations omitted) (a unilateral reservation of rights is effective because "the insurer can reserve its right of reimbursement for defense costs by itself, without the insured's agreement"). *J.I.P., Inc. v. Reliance Ins. Co.,* 173 F.3d 860 (9th Cir. 1999). *J.I.P., Inc.* thus holds that an insurer may unilaterally reserve its right to reimbursement of defense costs and that the insured's agreement or compliance to the same is not required. Nautilus has shown that it is entitled to seek reimbursement under the appropriate standard.

The appropriate standard to apply is a preponderance of the evidence standard. An insurer seeking reimbursement from its insured is a party desiring relief that must carry the burden of proof by preponderance of the evidence. *See, Aydin Corp. v. First State Ins. Co*., 18 Cal.4th 1183, 1188 (Cal.1998). *See also, Aerojet-General Corp. v. Transport Indem. Co.,* 17 Cal.4th 38, 64 (Cal.1997)).

Here, Nautilus did show that it is entitled to reimbursement by a preponderance of the evidence. On at least four occasions, namely the May 19, 2014, October 2, 2014, October 17, 2014, and April 5, 2016 letters, Nautilus advised its Insureds (including Flournoy) that it reserved all rights, including the

right to seek reimbursement of all defense fees and costs incurred. (Vol. 2/ER 32, 48; Vol. 3/ER 470, 482-483). The Insureds never requested that Nautilus stop paying for defense fees and costs or independent counsel fees and costs on their behalf. (Vol. 3/ER 491, ¶5; 495, ¶10; 486, ¶ 10). Accordingly, Nautilus met the requisite burden of proof in its Motion seeking reimbursement.

It is undisputed that Flournoy failed to oppose the Motion. The District Court erred by not granting the Motion with respect to Flournoy based upon there being no opposition filed.

D. The Insureds' Assertion That They Objected to the Defense is Not Supported By the Record.

The Insureds argue that Nautilus "employed a strategy" of repeatedly changing counsel which unnecessarily increased the defense costs in the underlying action. They further assert that they objected to that strategy. This contention is simply not supported by the record before the Court. The record on appeal clearly establishes that the Insureds only changed counsel once throughout the course of the underlying litigation. Nautilus assigned Wolfe & Wyman, LLP to defend Access Medical and Wood. (Vol.2/ER 32). Gordon Rees Scully Mansukhani, LLP eventually substituted in as defense counsel for Access Medical and Wood. (Vol.3/ER 496, ¶15). Nautilus also paid for Access Medical and Wood to obtain independent counsel. Access Medical and Wood unilaterally selected

Wild Carter & Tipton as independent counsel. (Vol. 3/ER 495 ¶10; 491¶ 5).

Additionally, on October 17, 2014, Nautilus agreed to provide Flournoy, a derivative party, with a "defense" against the Switzer Cross-Complaint, subject to a full and complete reservation of rights including the right to seek reimbursement of defense fees and other litigation related expenses that it paid in connection with the defense and indemnification of Flournoy. (Vol.3/ER 470-471). Nautilus paid for Flournoy's defense counsel, Hall Hieatt & Connely LLP as well as Flournoy's prior counsel McCormick Barstow LLP. (Vol. 3/ER 485-486, ¶¶ 7-8). Nautilus also paid for Flournoy's independent counsel that Flournoy unilaterally selected, the Law Office of Amy R. Lovegren-Tipton. (Vol. 3/ER 486, ¶9).

The Insureds were provided with independent counsel of their choosing to defend the underlying action. The Insureds had the sole ability to confer with their independent counsel and develop or approve litigation strategies. Even assuming *arguendo* that the Insureds did object to the defense strategy, this objection is immaterial to the issues herein. The only issue germane to this appeal is whether the Insureds objected to the payment of defense costs on their behalf, including the costs of independent counsel. The answer to this question is emphatically "no." The Insureds never objected to Nautilus' payment of the defense costs in this matter. The Insureds' Briefs concede that they received each of Nautilus' reservation of rights letters, but never contacted Nautilus to request that it stop

paying the invoices for the defense of the underlying action. The Insureds thus agreed to the terms of the defense including that Nautilus could seek reimbursement should the court find that there was no duty of coverage.

If the Insureds have disputes with the specific defense costs, such as amounts new counsel incurred to get up to speed in the case, these issues can be raised, properly briefed, and decided by the District Court at a hearing on remand. Regardless, it does not affect Nautilus's entitlement to reimbursement in the first place.

E. The District Court Erred By Denying Nautilus' Request for Further Relief Under Section 2202 As There is Precedent from the Ninth Circuit and the District Court of Nevada that Nautilus May Be Granted Such Relief.

The Insureds incorrectly argue that there is no Nevada authority which grants Section 2202 relief in Nevada. In an action under 42 U.S.C. Sec. 2202e, it is within the discretion of the trial court to order reinstatement of a wrongfully discharged employee. *Sias v. City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978) (holding district court erred in concluding that it could not grant reinstatement because plaintiff failed to request such remedy); *see also,. Z Channel v. Home Box Office,* 931 F.2d 1338 (1991) (Ninth Circuit held district court's remedy not limited to relief sought in complaint); *In re USA Commercial*

Mortg. Co. 802 F. Supp.2d 1147 (July 14, 2011) (district court of Nevada granted further relief under 2202); *Penthouse v. Barnes, 792 F.2d 943* (1986) (9th Cir. held the district court could award further relief where a party was "aware of the possibility and had an opportunity to be heard); *Armstrong v. Brown* 768 F.3d 975 (2014) (9th Cir. held oral notice at hearing sufficient). Thus, Nevada and Ninth Circuit case law regarding the application of Section 2202 does exist and is binding herein.

1. Insureds' Argument That In the Absence of An Enforceable Modification, Nautilus is Not Entitled to Reserve Its Rights and Seek Reimbursement, is Erroneous.

The Insureds argue that in the absence of an enforceable written modification of the Policy, Nautilus is not entitled to provide a defense with a reservation of rights and obtain reimbursement because it did not bargain for that benefit. This contention fails. Insureds cite *Probuilders Specialty Ins. Co. v. Double M. Const.*, 116 F. Supp. 3d 1173, 1182 (D. Nev. 2015) in support of their position. This is a misunderstanding and misapplication of *Probuilders* because an express provision is unnecessary.

In *Probuilders*, the district court held that since the underlying action included claims not covered by the policy, Double M had to reimburse Probuilders for its defense costs. *Id.* at 1182. In reaching this conclusion, the district court

noted that Double M was notified of Probuilders' full reservation of rights, including Probuilders' right "to recover monies spent in defense, settlement or satisfaction of judgments, and to file a declaratory relief action to secure a resolution of any coverage issues." *Id*. The district court found that "Double M implicitly agreed to the reservation of rights by accepting Probuilders' defense and passing litigation costs to it for two years." *Id*. Accordingly, the District Court of Nevada granted Probuilders' motion for summary judgment on the issue that Probuilders was entitled to reimbursement. *Id*. at 1183.

Contrary to the Insureds' contention, *Probuilders* does not stand for the proposition that an insurer cannot unilaterally reserve its right to reimbursement. Rather, the district court in *Probuilders* held that the insured implicitly agreed to insurer's reservation of rights to seek reimbursement for money it spent in providing its insured with a defense. *Probuilders*, 116 F. Supp at 1182.

Nevada courts have recognized reservation of rights letters as valid. The United States District Court of Nevada previously held that insurers did not violate Nevada's unfair practices statute by failing to promptly provide to an insured a reasonable explanation of the basis for declination of coverage under commercial general liability insurance policies, where the insurers thoroughly set forth in their reservation of rights letters and denial letter their bases for denying coverage by analyzing facts giving rise to the insured's claim, the applicable policy provisions,

and current law. *See, Gary G. Day Constr. Co. v. Clarendon Am. Ins. Co.,* 459 F. Supp. 2d 1039 (D. Nev. 2006). Additionally, the Nevada Supreme Court held an "[i]nsurer agreed to investigate the validity of the claim while specifically reserving all defenses available to it." *Havas v. Atl. Ins. Co.,* 96 Nev. 586, 588, 614 P.2d 1, 1 (1980).

Insureds cite *Ohio Cas. Ins. Co. v. Biotech Pharmacy Inc.,* 547 F. Supp. 2d 1158, 1159 (D. Nev. 2008) for the proposition that a unilateral reservation of rights letter is inappropriate. This decision is inapplicable herein because it involved a Nevada district court interpreting Texas law. The remaining cases cited in Insureds' Briefs also cite to precedent outside of this jurisdiction that do not interpret Nevada law, thus they are inapplicable.

Here, Nautilus advised its Insureds, on at least four occasions, namely on May 19, 2014, October 2, 2014, October 17, 2014 and April 5, 2016, that it reserved all rights, including the right to seek reimbursement of all defense fees and costs incurred. (Vol. 2/ER 32, 48; Vol. 3/ER 470,482 - 483). Nautilus expressly reserved the right to seek declaratory relief and reimbursement of defense costs it incurred for the Insureds' defense in the Underlying Action. (Vol. 2/ER 32, 48; Vol. 3/ER 470,482 - 483). Nautilus paid defense costs on behalf of its Insureds for well over two years. (Vol. 2/ER 59 – 226; Vol. 3/ER 252 - 445). The Insureds never requested that Nautilus stop paying for defense fees and costs

or independent counsel fees and costs on their behalf. (Vol. 3/ER 491, ¶5; 495, ¶10; 486, ¶ 10). By accepting Nautilus's defense and passing litigation costs to it for over two years, the Insureds' implicitly agreed to the reservation of rights. *Probuilders*, 116 F. Supp.3d at 1182. Accordingly, the district court erred by finding that there existed no agreement between the Insureds and Nautilus. Nautilus is entitled to reimbursement as a matter of law.

III. CONCLUSION

Nautilus respectfully requests that this Court reverse the District Court's Order Denying Nautilus's request for reimbursement of defense costs and either award such costs to Nautilus, or remand this case back to the District Court with instructions to determine the amount of reimbursement owed to Nautilus by the Insureds.

DATED: March 14, 2018 Selman Breitman LLP

By: /s Linda Wendell Hsu
LINDA WENDELL HSU
Attorneys for Plaintiff-Appellant-Cross-Appellee NAUTILUS INSURANCE COMPANY

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28 – 2.6 Nautilus Insurance Company hereby sets forth the following related cases pending before the United States Court of Appeals for the Ninth Circuit:

- *Nautilus Insurance Company v. Access Medical LLC, et al.*, Case No. 17-16272 (cross-appeal by Access Medical LLC and Mr. Wood in this action);
- *Nautilus Insurance Company v. Access Medical, LLC, et al*., Case No. 17-16273 (cross-appeal by Flournoy Management LLC in this action);
- *Nautilus Insurance Company v. Access Medical, LLC, et al*. Case No. 17-16840 (Access Medical LLC and Mr. Wood's appeal from an order denying their second motion for reconsideration, which is separate from this appeal);
- *Nautilus Insurance Company v. Access Medical, LLC et al*, Case No. 17-16273 (Flournoy Management LLC's appeal from an order denying the second motion for reconsideration, which is separate from this appeal);
- *Nautilus Insurance Company v. Access Medical, LLC et al*, Case No. 18-15136 (Access Medical LLC and Mr. Wood appeal from their second application to consider motion for relief from judgment, which

is separate from this appeal);

- *Nautilus Insurance Company v. Access Medical, LLC et al*, Case No. 18-15214 (Flournoy Management LLC's appeal from the second application to consider motion for relief from judgment which is separate from this appeal).

DATED: March 14, 2018 Selman Breitman LLP

By: /s Linda Wendell Hsu
LINDA WENDELL HSU
Attorneys for Plaintiff-Appellant-Cross-Appellee NAUTILUS INSURANCE COMPANY

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,454 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word (Version 2010) Times New Roman 14-point font.

DATED: March 14, 2018 Selman Breitman LLP

By: /s Linda Wendell Hsu
LINDA WENDELL HSU
Attorneys for Plaintiff-Appellant-Cross-Appellee NAUTILUS INSURANCE COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2018, I electronically filed Nautilus's Reply Brief on Cross-Appeal to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED: March 14, 2018 Selman Breitman LLP

By: /s Pamela Smith
Pamela Smith

Joint Appendix

Tab #11

Appeal Nos. 17-16265(lead), 17-16272, 17-16273

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAUTILUS INSURANCE COMPANY,
Plaintiff-Appellant-Cross-Appellee

v.

ACCESS MEDICAL, LLC and ROBERT CLARK WOOD, II, FLOURNOY MANAGEMENT, LLC,
Defendants-Appellees-Cross-Appellants,

On Appeal from the United States District Court,
for the District of Nevada
The Honorable Jennifer A. Dorsey, Untied States District Judge
Case No. 2:15-cv-00321-JAD-GWF

APPELLEES' REPLY BRIEF

MARTIN J. KRAVITZ
L. RENEE GREEN
KRAVITZ, SCHNITZER & JOHNSON, CHTD.
8985 S. Eastern Ave., Suite 200
Las Vegas, NV 89123
Telephone: 702.362.2222
Facsimile: 702.362.2203

JORDAN P. SCHNITZER
THE SCHNITZER LAW FIRM
9205 W. Russel Rd., Suite 240
Las Vegas, NV 89148
Telephone: 702.960.4050
Facsimile: 702.960.4092
Attorneys for Defendants, Appellees ACCESS MEDICAL, LLC and ROBERT CLARK WOOD, II

CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rules of Appellate Procedure, Rule 26.1, Defendant/Appellants Access Medical, LLC and Robert Clark Wood, II ("Access") by and through its undersigned counsel, certifies the following information with regard to its corporate parents, subsidiaries or affiliates:

Access hereby declares that there is no such corporation from which is a parent corporation of Access or that owns 10% or more of stock belonging to Access

A supplemental disclosure statement will be filed upon any change in the information provided herein.

Dated this 4th day of May, 2018

Kravitz, Schnitzer & Johnson, Chtd.

By:/s/ L. Renee Green
MARTIN J. KRAVITZ
L. RENEE GREEN

Attorneys for Defendants, Appellees
ACCESS MEDICAL, LLC and
ROBERT CLARK WOOD, II

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

I. INTRODUCTION

The United States District Court for the District of Nevada ("district court") correctly found that Nautilus Insurance Company ("Nautilus") was not entitled to reimbursement of defense costs from a California action ("Underlying Action") in Nautilus's Motion for Further Relief for multiple reasons. First, Nautilus never indicated a right to attorneys' fees in its commercial general liability policy (hereinafter the "Policy") that it unilaterally drafted and issued to Access Medical, LLC and Robert "Sonny" Wood, II (collectively the "Insureds"). Moreover, Nautilus Insurance Company never sought reimbursement of attorneys' fees in its declaratory relief action until declaratory relief was granted.

Even more surprising, Nautilus fails to explain its multiple failures for failing to indicate a right to reimbursement of defense costs in its Policy. Nautilus also failed to explain its failure to inform the district court and the Insureds in its own declaratory relief action that it was seeking reimbursement of defense costs until after declaratory relief was granted. Due to Nautilus's multiple failures, the district court did not err when it denied Nautilus's request for reimbursement of funds.

In addition, the Supreme Court or Nevada has never held that an insurer is entitled to reimbursement of attorneys' fees when the insurer failed to indicate the same in its insurance policy to its insureds. Nevada also does not have a statute

that provides that an insurer can recoup defense costs from its insured under these circumstances.

In fact, courts have held that an insurer cannot unilaterally modify a contract in a reservation of rights letter to its insured. By attempting to unilaterally modify the contract, an insurer benefits unfairly by requiring an insured to reimburse the insurer for the cost of defense when the insurer invoked its right to defend in order to protect its own interest from a potential bad faith claim. Due to Nautilus's failure to provide a reimbursement provision in its Policy or to even indicate that it sought reimbursement throughout this entire action until declaratory relief was granted, the district court did not err when it declined to award Nautilus reimbursement of defense costs in the Underlying Action.

II. ARGUMENT

A. Whether Nautilus had the duty to defend its Insureds is Relevant to the Insureds' Cross-Appeals, which relate to the district court's order denying the Insureds' Motion for Reconsideration.

The district court's order, which is titled "Order denying request for consideration of motion for relief from judgment" (hereinafter the "Order"), denied Nautilus's Motion for Relief from Judgment. Vol. I/ER 5. The same Order denied the Insureds' Motion Reconsideration. *Ibid.* In this Order, the Court rendered judgments regarding ECF Numbers 73, which was Nautilus's Motion for Further Relief; 80, which was the Insureds' Motion for Reconsideration; 81, which was

Flournoy's Joinder to the Insureds' Motion for Reconsideration; and 83, which was the Insureds' Motion to Stay.

Nautilus appealed from the district court's Order on June 16, 2017 regarding the district court's denial of Nautilus's Motion for Further Relief. Vol. I/ ER 1. The Insureds' appealed the same Order regarding the district court's denial of its Motion for Reconsideration on June 19, 2017. Vol. I/SER 1. These notices of appeal were later numbered by this Court 17-16265, which was Nautilus's appeal, 17-16272, which was the Insureds' appeal, and 17-16273, which was Flournoy's appeal. Due to the fact that the Insureds' appealed the district court's order denying the Insureds' Motion for Reconsideration, which addressed Nautilus's duty to defend the Insureds, this appeal is directly relevant to this appeal.

B. Nautilus failed to cite any binding authority that supports its argument that it is entitled to reimbursement in the Underlying Action when Nautilus failed to provide a reimbursement provision in its Policy.

Nautilus does not dispute the Insureds' assertions that Nevada law applies to whether Nautilus is entitled to reimbursement of defense costs. *See generally*, Dkt. 24; See generally, Dkt. 36. However, Nautilus's contentions are misplaced when it argues that Nevada law allows an insurer to reimbursement of defense costs. Dkt. Entry 36, p. 8. In fact, Nautilus fails to cite any binding authority, including from the Nevada Supreme Court or a Nevada statute, which supports Nautilus's argument that it is entitled to reimbursement of attorneys' fees although Nautilus

never provided a reimbursement provision in its Policy and never indicated that it sought reimbursement in its Complaint or any other filing until a judgment was entered.

Moreover, Nautilus's reliance on *Capitol Indem. Corp.* is misplaced. See *Id.* First, Nautilus cites a district court case, which is not binding authority. Second, even if this Court desires to entertain Nautilus's arguments regarding a district court's interpretation of reimbursement, *Capital Indem* does not support Nautilus's contention that it is entitled to attorneys' fees when it failed to indicate this provision in its Policy or seek such relief in its Complaint. *Capitol Indem. Corp. v. Blazer*, 51 F. Supp. 2d 1080, 1090 (D. Nev. 1999). Rather, the *Capital Indem.* court held that the insured must have "unambiguous notice that it may later be held responsible for costs incurred." *Ibid.* The *Capital Indem.* court found that due to the insurer's failure to provide evidence that there was an unambiguous understanding between the insurer and the insured that the insured may have to reimburse the insurer for defense costs, the insurer was not entitled to reimbursement. *Ibid.*

In this matter, Nautilus failed to show that there was an unambiguous understanding between it and the Insureds regarding reimbursement. Specifically, Nautilus failed to indicate that it may seek reimbursement of defense costs in its Policy although it unilaterally drafted this Policy and could have inserted this

provision if desired. An unambiguous understanding was also never created even when Nautilus attempted to unilaterally modify the Policy in its reservation of rights letters (discussed in further detail below) because the Insureds informed Nautilus that if Nautilus desired to withdraw its defense in the Underlying Action, it may do so. However, the Insureds also indicated that Nautilus may have certain consequences to deal with if it is determined that coverage under the Policy potentially existed. See Vol. II/ SER 55-86. At no time did the parties agree or have an understanding that the Insureds would reimburse Nautilus in the Underlying Action. See *Id.*

Third, unlike the insurer in *Capital Indem.*, who indicated in its complaint that it sought reimbursement of attorney's fees, Nautilus failed to timely inform its Insureds and the district court that it may seek reimbursement for defense costs. Even when the insurer in *Capital Indemn.* timely indicated to the district court that it sought reimbursement of defense costs in its complaint, the district court denied the insurer's claim for reimbursement. *Capital Indemn.*, 51 F. Supp. at 1090. Nautilus did even less than the insurer in *Capital Indem.* because it failed to even indicate that it sought such relief in any complaint, motion, discovery request, or other filing with the district court until after the district granted declaratory relief, and thus Nautilus is not entitled to reimbursement. See *Id*; See Vol. IV/ ER 545-554.

Nautilus provides no explanation for its failures to indicate that it belatedly sought such fees in any of its briefs. For that reason alone, Nautilus should not be entitled to reimbursement just as the insurer in *Capital Indem.* was not entitled to reimbursement. *Ibid.*

C. Nautilus failed to address its failure to inform the Insureds that it sought reimbursement of defense costs in its Policy, its Complaint seeking declaratory relief, or any filing to the district court before an order was entered, which ultimately prejudiced the Insureds from ascertaining Nautilus's claims.

Nautilus should not be rewarded for its failure to follow the law and standard procedure of informing the Insureds and the district court that it sought reimbursement of defense costs until after the district court entered its judgment. In fact, the law has consistently found that a party is not allowed to benefit from failing to inform the opposing party that it seeks additional damages. *Seven Words, LLC v. Network Solutions*, 260 F.3d 1089, 1090 (9th Cir. 2001). Contrary to Nautilus's contentions that the case cited by the Insureds, *Seven Words*, does not hold that a party is prevented from relief when it springs a claim for money damages after judgment is entered, this Court held:

> Rule 8(a)(3) requires a claim to contain "a demand for judgment for the relief the pleader seeks." **Although our decisions go to great lengths to underscore the breadth of notice pleadings** [citations omitted] **the principle is not without limits.** Surely a simple request "for damages" would satisfy the notice requirement without imposing any undue burden on the drafter. Otherwise, notice pleading might allow a plaintiff to file, in any case, a complaint consisting of no more

> than the useless statement, "I was wronged and am entitled to judgment for everything to which I am entitled." Such a result would undermine the intent of the civil rules and prejudice the opposing party. See Sapp v. Renfroe, 511 F.2d 172, 176 n.3 (5th Cir. 1975)[.]
>
> (emphasis added) *Seven Words, LLC*, 260 F.3d at 1098.

This holding is consistent with multiple circuits of the United States appellate courts. *Fox v. Bd. of Trs. Of the State Univ.*, 42 F.3 135, 142 (2d Cir. 1994)("[W]e perceive no basis to allow a belated claim for damages "to breathe life into a moribund dispute"); see also *R.S. &V. Co. v. Atlas Van Lines*, 917 F.2d 348, 351 (7th Cir. 1990)(failure to seek actual or nominal damages rendered claim moot); *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999)("[a] request for damages...will not avoid mootness if it was inserted after the complaint was filed in an attempt to breathe life into a moribund dispute"); *Thomas R.W. v. Mass. Dep't of Educ.*, 130 F.3d 477, 480-481 (1st Cir. 1997)(concluding that damages claim was "too little, too late" and that a general prayer for relief does not avoid mootness where plaintiff did not otherwise request damages).

Specifically in *Seven Words*, this Court affirmed the district court's disallowance of a party to amend its complaint when the party's "damages claim was made after two years of litigation, after various representations that it was seeking only declaratory and injunctive relief, and after a motion to dismiss, and at the eleventh hour, only days before oral argument on appeal." *Seven Words, LLC*,

260 F.3d at 1098. Hence, this Court "follow[ed] the lead of our sister circuits and decline[d] to read a damages claim into Seven Words' Complaint. To conclude otherwise would render the pleading requirements of Federal Rule of Civil Procedure 8(a)(3) illusory and certainly prejudice [the opposing party]." *Ibid.*

Just as the party in *Seven Words* who waited nearly two years to make a damages claim, Nautilus waited nearly two years to make a damages claim. *Ibid*; See Vol. IV/ EDR 545. Moreover, just as the party in *Seven Words* failed to inform other parties or the district court that it was seeking money damages until after a motion to dismiss was adjudicated, Nautilus failed to inform the Insureds or the district court that it sought additional damages against the Insureds until after a motion for summary judgment was adjudicated. *Seven Words, LLC*, 260 F.3d at 1098; See Vol II/EDR 24. Moreover, just as this Court found that the opposing party was prejudiced for the party's failure to notify the court and the opposing party that it was seeking additional money damages until nearly two years after litigation, the Insureds are prejudice for Nautilus's failure to inform them of its intention to seek additional damages until nearly two years of litigation. See *Id.* For these multiple failures of timely addressing the fact that they sought such damages, Nautilus is not entitled to seek additional damages at this late hour just as the party in Seven Words was not entitled to seek additional damages at that late hour. *Ibid.*

D. **Nautilus's mischaracterized the holdings in *Barratt* and *Horgan*.**

Nautilus's arguments regarding *Barratt* are misplaced for multiple reasons. First, if Nautilus argues that *Barratt* is not binding on this Court and for this reason should not even consider this case, the same is true for all case law that Nautilus cites for its contention for reimbursement when Nautilus failed to indicate that it sought such relief in a timely manner. Dkt. Entry 36, p. 10.

Second, Nautilus fails to address one of the main reasons the *Barratt* court refused to grant additional money damages after it provided plaintiff the injunctive and declaratory relief the plaintiff requested. *Ibid.* Specifically, the *Barratt* court found that the plaintiff was not entitled to additional money damages because "[f]urther, in its complaint, plaintiff did not seek damages- instead requesting a declaratory judgment and an award of costs and attorneys' fees associated with this action." *Alliance of Nonprofits for Ins. v. Barratt*, 2013 U.S. Dist. LEXIS 88172, at *10-11 (D. Nev. June 24, 2013).

Instead of addressing one of the main reasons why the *Barratt* court refused to award additional relief in the form of money damages, Nautilus contends that the district court in *Barratt* refused to award the plaintiff additional damages because the Commissioner of Insurance found that the defendant did not act in bad faith. Dkt. Entry 36, p. 10. However, Nautilus conflates the issue of plaintiff requesting attorney's fees for prosecuting the declaratory action, which is not at

issue in this matter as no party has requested attorneys' fees for the declaratory action itself, versus the plaintiff requesting additional money damages after the court entered an order regarding the declaratory relief action, which is at issue. Specifically, the latter is at issue because Nautilus is requesting additional money damages, which is guised as reimbursement, in the Underlying Action when Nautilus failed to indicate it would seek such relief in its Policy and failed to indicate such in any filing with the district court before the district court entered its order regarding Nautilus's Motion for Summary Judgment. See Vol. IV/ER 545-554. Due to Nautilus's failure to take the requisite steps to notify the Insureds or the Court that it was seeking such relief, Nautilus is not entitled to additional relief in the form of money damages this late in litigation.

In addition, Nautilus conflates the issue regarding Flournoy Management, LLC's reference to *Horgan*. Dkt. Entry 36, p. 11. Specifically, Nautilus claims that the Insureds reference to *Horgan* is misplaced and disingenuous, but fails to explain why- especially when the only time that Flournoy cited this case was to support the Nevada Supreme Court's holding that "attorney fees are generally "not recoverable absent a statute, rule, or contractual provision to the contrary." *Ibid*; *Horgan v. Felton*, 170 P.3d 982, 986 (Nev. 2007). The citation quoted by Flournoy did not only pertain to seeking attorneys' fees through real estate transactions. Dkt. Entry 31, p. 33. Rather, the Nevada Supreme Court has made it abundantly clear

that a court will not generally award attorney's fees unless authorized by statute, rule, or contract. *Dep't of Human Res., Welfare Div. v. Fowler*, 858 P.2d 375, 376 (Nev. 1993); see also *Nevada Bd. Osteopathic Med. v. Graham*, 643 P.2d 1222, 1223(1982); *State ex rel. List v. Courtesy Motors*, 590 P.2d 163, 166 (Nev. 1979). Real estate transactions have nothing to do with this rule. See *Id.* Nautilus cites nothing to contradict this fact.

E. Nautilus conceded that the Nevada Supreme Court has never held or a Nevada statute has provided that an insurer can recoup defense costs from its insured incurred for claims that a court found were not covered under an insurance policy.

In its Opposition, Nautilus has conceded that there is no statute and the Nevada Supreme Court has never held that an insurer is entitled to recover attorney's fees that it expended on its insured. See Dkt. Entry 36, pp. 6-7. However, Nautilus's contention that Nevada routinely follows California law is misplaced because in fact, Nevada has used case law from multiple jurisdictions in order to determine the legal rights of parties. See *Wood v.* Safeway, 121 P.3d 1026, 1034 (Nev. 2005)(the Nevada Supreme Court followed law in South Carolina as it related to the right of bringing sexual assault claims against an employer); *Edelstein v. Bank of N.Y. Mellon*, 286 P.3d 249, 259 (Nev. 2012)(the Nevada Supreme Court adopting Georgia law in regards to determining the beneficiary in a deed of trust); *May v. Anderson*, 119 P.3d 1254, 1258 (Nev. 2005)(the Nevada Supreme Court adopted the approach used in Florida and

Pennsylvania in regards to contract interpretation of releases in settlement agreements). Most importantly, the California cases cited by Nautilus have no binding authority and should not be considered in this analysis.

Rather, multiple courts have consistently held that an insurer is not entitled to reimbursement of defense costs for non-covered claims because courts have been "unwilling to grant insurers a substantial rebate on their duty to defend." *Perdue Farms, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 448 F.3d 252, 259 (4th Cir. 2006); *National Sur. Corp. v. Immunex Corp.*, 297 P.3d 688, 694 (Wash. 2013)(holding that an insurer may not recoup defense costs incurred under a reservation of rights defense while the insurer's duty to defend is uncertain); see also *Axis Surplus Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 947 F. Supp. 2d 1129, 1136 (W.D. Wash. 2013)(holding that an insurer defending under a reservation of rights may not require reimbursement of defense costs if a court ultimately declares no coverage exists because it creates an impermissible "all reward, no risk" proposition that renders the defense portion of a reservation of rights defense illusory); *Am. & Foreign Ins. Co. v. Jerry's Sport Cit. Inc.*, 2 A.3d 526, 539 (Pa. 2010)(the insurer was not entitled to reimbursement of defense costs due to a unilateral reservation of rights letter, which could not create rights not contained in the policy itself).

The rationale for courts' refusal to allow an insurer from recouping defense costs from its insureds in these instances because:

> **It is the insurer that decides whether to defend (with or without a reservation of rights) *before* any judicial determination of coverage. Providing a defense benefits the insurer by giving it the ability to monitor the defense and better limit its exposure.** When an insurer defends under a reservation of rights, it insulates itself from potential claims of breach and bad faith, which can lead to significant damages, including coverage by estoppel. In turn, the insured receives the benefit of a defense until a court declares none is owed. Conversely when an insurer declines to defend altogether, it saves money on legal fees but assumes the risk it may have breached its duty to defend or committed bad faith.
>
> *Nat'l Sur. Corp. v. Immunex Corp.*, 297 P.3d 688, 693-94 (Wash. 2013) (footnote and citations omitted).

Moreover, if an insurer "were allowed to recover defense costs, its "offer" to defend would serve solely to protect *itself* from claims of breach while placing the full risk of a determination of noncoverage on its insured. **This provides no security to the insured.**" (emphasis added) *Id.* at 886.

F. Nautilus's continued reliance on *Omaha Indemnity* is misplaced.

As provided previously, Nautilus's reliance on *Omaha Indemnity Ins. Co.* is misplaced. "Because a reservation of rights defense if fraught with potential conflicts, it implicates an enhanced duty of good faith toward the insured." *Nat'l Sur. Corp. v. Immunex Corp.*, 297 P.3d 688, 691 (Wash. 2013). However, Nautilus failed to protect its Insureds' interests in the Underlying Action with the multiple defense teams it hired. The Insureds objected to Nautilus's strategy of the

Insureds' defense in the Underlying Action while Nautilus had an enhanced duty to defend after sending reservation of rights letters to its Insureds. See *Id.*; Vol. I/ SER 37-86.

Specifically, the Insureds repeatedly questioned Nautilus's defense strategy in the Underlying Action, which included seeking an explanation for Nautilus's decision to change defense firms in the Underlying Action on at least two occasions to defend the Insureds. See *Id.* Moreover, the defense team that Nautilus hired failed to strike or dismiss the cause of action that Mr. Switzer deficiently alleged and from which is at issue in this matter, which ultimately lead to Mr. Switzer receiving a judgment against the Insureds in the Underlying Action. Due to Nautilus's multiple failures of failing to adequately represent its Insureds in the Underlying Action and its failure to even allege that it was seeking reimbursement in the declaratory action, Nautilus is not entitled to reimbursement of defense costs from the Insureds.

G. The District Court Correctly Denied Nautilus's Request for Further Relief Under Section 2202.

Nautilus incorrectly contends that Section 2202 by itself allows the district court to grant money damages when Nautilus failed to indicate that it was seeking such relief in its Complaint or any other filing before the Court erroneously granted the declaratory relief that Nautilus requested. Dkt. Entry 36, p. 15. Moreover, Nautilus has consistently mischaracterized the Insureds' representations to this

Court regarding what case law holds and also has failed to cite to the record as to when the Insureds supposedly made such representations. For example, the Insureds never claimed that there is no Nevada authority which grants Section 2202 as Nautilus represented in its Opposition. Dkt Entry 36, p. 20.

In reality, the Insureds stated that Section 2202 by itself does not provide an award of attorney's fees that would not otherwise be available under state law in a diversity action. Dkt. Entry 24, p. 47. Nautilus has also failed to rebut the fact that Section 2202 "does not by itself provide authority to award attorney's fees that would not otherwise be available under state law in a diversity action." *See generally*, Dkt. Entry 36; *Mercantile Nat'l Bank v. Bradford Trust Co.*, 850 F.2d 215, 218 (5th Cir. 1988); *Schell v. OXY USA, Inc.*, 814 F.3d 1107, 1127 (10th Cir. 2016)("We have never recognized § 2202 as an independent basis to award attorneys' fees - viz., as an additional ground for such fees beyond the four well-recognized exceptions to the American Rule."); *Jackson v. Mayo*, 975 So. 2d 815, 825 (2nd Cir. 2008)("[I]n the analogous situation of "further relief" under the federal Declaratory Judgment Act, 28 U.S.C. § 2202, attorney fees are disallowed unless provided by contract or substantive statute.")

Nautilus's citations to its contention that the district court can award monetary damages from a separate action after a party only sought declaratory relief are misplaced. Dkt. Entry 36, p. 20. For example, Nautilus cites *Z Channel*

v. Home Box Office for its proposition that the district court's remedy is not limited to relief sought in the complaint. *Ibid.* However, this Court held in *Z Channel* that the party sufficiently alleged in its complaint that it experienced financial damage as a result of the defendant's behavior. *Z Channel Ltd. Partnership v. Home Box Office, Inc.*, 931 F.2d 1338,1341 (9th Cir. 1991). Hence, in contrast to the party in *Z Channel* who sufficiently alleged in its complaint a claim for monetary damages, Nautilus failed to do the same in its Complaint or any other filing until after the district court issued its order granting declaratory relief. *Ibid*; See Vol. IV/ ER 545.

In another example, Nautilus cites *Penthouse v. Barnes* for its misplaced contention that the district court award further relief where a party was aware of the possibility and had an opportunity to be heard. Dkt Entry 36, p. 21. However in *Barnes*, the party that sought additional relief placed the court and the other parties on notice throughout the entire litigation process by raising the appropriate affirmative defenses, raising the nature of the remedy it sought in the trial brief, and discussing these issues during closing argument. *Penthouose Int'l, Ltd. v. Barnes*, 792 F.2d 943, 950 (9th Cir. 1986).

In contrast to the party in *Barnes* who placed the court and opposing parties on notice from its initial pleadings to closing arguments, Nautilus failed to place the district court and the Insureds on notice that it was seeking reimbursement of defense costs in a separate action until the district court already granted declaratory

relief. *Ibid.* Due to Nautilus's failure to notify the district court and the parties of its intentions to seek reimbursement before declaratory relief was granted, the district court correctly declined to award defense costs to Nautilus.

H. Nautilus's argument that it can unilaterally change the terms of the insurance policy that it issued to the Insureds is erroneous.

Nautilus incorrectly argues that Nevada allows a party to unilaterally change the terms of an insurance policy when the insurer sends reservation of rights letters to its insureds regarding reimbursement of defense costs even though this provision is not located in the Policy. See Dkt Entry 36, pp. 21-23. First, Nautilus fails to cite any binding case law or statute to support this contention. See *Id.* Moreover and in contrast to Nautilus's contentions, many courts have cited the Nevada district court case *Blazer* for the standing that "reimbursement of defense costs is allowed only if an agreement between the parties provides for reimbursement". *Nat'l Sur. Cor. v. Immunex Corp.*, 297 P.3d at 693 (citing *Capitol Indem. Corp. v. Blazer*, 51 F. Supp. 2d 1080, 1090 (D. Nev. 1999)(the *Immunex* court ultimately found that the insurer was not entitled to reimbursement of defense costs when the insurer sent reservation of rights letters to the insured because the reimbursement provision was not located in the insurance policy).

In contrast to Nautilus's contentions, courts have found that an insurer cannot unilaterally change the terms to the insurance policy in reservation of rights letters due to the fact that the rules of contract interpretation provide that the

mutual intention of parties at the time they formed the contract governs its interpretation. *Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.*, 2 A.3d 526, 544 (Pa. 2010)("Where the insurance contract is silent about the insurer's right to reimbursement of defense costs, permitting reimbursement for costs the insurer spent exercising its right and duty to defend potentially covered claims prior to a court's determination of coverage would be inconsistent...It would amount to a retroactive erosion of the broad duty to defend...by making the right and duty to defend contingent upon a court's determination that a complaint alleged covered claims[.]"); See *Shoshone FirstBank v. Pacific Emplrs. Ins. Co.*, 2 P.3d 510, 510 (Wyo. 2000)("In light of the failure of the policy language to provide for allocation, we will not permit the contract to be amended or altered by a reservation of rights letter."); *Gen. Agents Ins. Co. of Am., Inc. v. Midwest Sporting Goods Co.*, 828 N.E.2d 1092, 1102 (Ill. 2005)("As a matter of public policy, we cannot condone an arrangement where an insurer can unilaterally modify it contract, through a reservation of rights, to allow for reimbursement of defense costs in the event a court later finds that the insurer owes no duty to defend.").

Insurers are in the business of making the decision about whether to defend its insureds. Hence, it is up for the insurer to ascertain whether it decided to defend its Insureds. *Immunex Corp.*, 297 P.3d at 693. Moreover, courts have rationalized that the insurers benefit from providing a defense to its insured in

uncertain circumstances because "[p]roviding a defense benefits the insurer by giving it the ability to monitor the defense and better limit its exposure." *Ibid.*

Courts have further found that an insurer cannot unilaterally modify the contract after the insured purchased the insurance policy by rationalizing:

> **We reject [the insurer's] view that an insurer can have the best of both options: protection from claims of bad faith or breach without any responsibility for the costs of defense if a court later determines there is no duty to defend.** This "all reward, no risk" proposition renders the *defense* portion of a reservation of rights defense illusory. The insured receives no greater benefit than if its insurer had refused to defend outright.
> (emphasis added) *Ibid.*

Although Nautilus unilaterally drafted the Policy and failed to include a reimbursement provision in the Policy to the Insureds, Nautilus inappropriately attempts to create a "win-win" situation for itself by unilaterally modifying the contract in a reservation of rights letter while inadequately controlling the reigns of the Insureds' defense in the Underlying action. See *Id.* Although Nautilus claims that it sent reservation of rights letters to the Insureds, "a reservation of rights letter [only] asserts defenses and exclusion **that are already set forth in the policy."** (emphasis added) Black's Law Dictionary (8th ed. 2004) (defining a reservation of rights letter as "notice of an insurer's intention not to waive its contractual rights to contest coverage or to apply an exclusion that negates an insured's claim). Due to Nautilus's failure to provide for a right to reimbursement of defense costs in its Policy, Nautilus is not entitled to unilaterally modify the Policy and inform the

district court that it seeks such reimbursement after the district court granted declaratory relief.

III. CONCLUSION

The Insureds respectfully request that Court reverse the district court's Order denying the Insureds' Motion for Reconsideration and affirm the district court's Order denying Nautilus's Motion for Further Relief.

Dated this 4th day of May, 2018

Kravitz, Schnitzer & Johnson, Chtd.

By:/s/ L. Renee Green
MARTIN J. KRAVITZ
L. RENEE GREEN

Attorneys for Defendants, Appellants
ACCESS MEDICAL, LLC and
ROBERT CLARK WOOD, II

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2018, I electronically filed Access Medical, LLC and Robert Clark Wood, II's Reply Brief to the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated this 4th day of May, 2018

Kravitz, Schnitzer & Johnson, Chtd.

By: /s/ Walter M. R. Knapp

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-16265,17-162

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is 4853 words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: /s/L. Renee Green

Date: May 4, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

(Rev.12/1/16)

Joint Appendix

Tab #12

Nos. 17-16265, 17-16272, 17-16273

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAUTILUS INSURANCE COMPANY, Plaintiff -- Appellant/ Cross-Appellee, v. ACCESS MEDICAL, LLC, ROBERT CLARK WOOD, II; FLOURNOY MANAGEMENT, LLC; Defendants -- Appellees/ Cross-Appellants.	

Appeal from the U. S. District Court for the District of Nevada
Case No. 2:15-cv-00321-JAD-GWF
Hon. Jennifer A. Dorsey

FLOURNOY MANAGEMENT, LLC's REPLY BRIEF ON CROSS-APPEAL

JAMES E. HARPER
TAYLOR G. SELIM
HARPER | SELIM
1707 Village Center Circle, Suite 140
Las Vegas, Nevada 89134
(702) 948-9240
Counsel for Flournoy Management, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

INTRODUCTION

The district court's order denying coverage should be reversed. The district court's order denying Nautilus' request for reimbursement should be affirmed. No matter the evidentiary burden of proof that is applied by the Court, Nautilus' request for reimbursement fails as a matter of law. The Court need not consult California law to reach this conclusion. All of the authority needed is supplied by Nevada case law and the actual contract at issue. Finally, if the Court concludes that Nautilus is entitled to any reimbursement, the amount of fees and costs to be reimbursed should be litigated according to Rule 54(d)'s usual adversarial process upon remand.

ISSUES PRESENTED

I. WHETHER NAUTILUS HAS DEMONSTRATED ANY ENTITLEMENT TO REIMBURSEMENT AS A MATTER OF LAW, EVEN ASSUMING THAT THE DISTRICT COURT SOMEHOW ERRED BY CONSTRUING NAUTILUS' MOTION FOR REIMBURSEMENT AS A MOTION FOR SUMMARY JUDGMENT

II. WHETHER THE COURT SHOULD FOLLOW CALIFORNIA LAW WITH RESPECT TO REIMBURSEMENT OF DEFENSE COSTS WHERE NEVADA LAW PROVIDES ADEQUATE GROUNDS TO AFFIRM THE DISTRICT COURT'S DENIAL OF NAUTILUS' REIMBURSEMENT REQUEST

III. WHETHER NAUTILUS' CLAIM FOR REIMBURSEMENT OF FEES AND COSTS WAS COGNIZABLE BEFORE THE DISTRICT COURT WHEN IT WAS NOT CONTEMPLATED BY THE INSURANCE CONTRACT AND THE INSURANCE CONTRACT WAS NEVER MODIFIED TO PERMIT IT

IV. WHETHER THE FEES AND COSTS FOR WHICH NAUTILUS SEEKS REIMBURSEMENT MUST HAVE BEEN REASONABLY INCURRED

ARGUMENT

I. NAUTILUS HAS NOT DEMONSTRATED ANY ENTITLEMENT TO REIMBURSEMENT AS A MATTER OF LAW, EVEN ASSUMING THAT THE DISTRICT COURT SOMEHOW ERRED BY CONSTRUING NAUTILUS' MOTION FOR REIMBURSEMENT AS A MOTION FOR SUMMARY JUDGMENT

Without citation to any legal authority, Nautilus asserts that it, not the district court, controls whether or not the district court may construe its motion for reimbursement as a motion for summary judgment. Nautilus further argues that it may change the district court's decision to construe its motion as a summary judgment motion if it does not like the result. *See* Nautilus' Reply Brief on Cross-Appeal at 11-12. This argument must fail.

Here, the district court construed Nautilus' motion for reimbursement as a motion for summary judgment and denied it. Therefore, the fact that Flournoy did not oppose the motion does not mean that the motion should be granted as uunopposed. *See Cristobal v. Siegel*, 26 F.3d at 1494-95. Nautilus had the burden to show the district court that it was entitled to reimbursement, and it failed to do so as a matter of law. Flournoy's choice to not file a formal opposition does not cure that defect.

Moreover, Nautilus' argument that it "only" needed to prove it was entitled to reimbursement by a preponderance of the evidence (see Nautilus' Reply Brief on Cross-Appeal at 11-12) still does not save Nautilus' claim for reimbursement.

As previously briefed, Nautilus was not entitled to reimbursement as a matter of law, under any possible burden of proof.

II. THE COURT SHOULD NOT LOOK TO CALIFORNIA LAW WITH RESPECT TO REIMBURSEMENT OF DEFENSE COSTS WHERE NEVADA LAW PROVIDES ADEQUATE GROUNDS TO AFFIRM THE DISTRICT COURT'S DENIAL OF NAUTILUS' REQUEST FOR REIMBURSEMENT

Nautilus' argument that the Court should apply California law to its request for reimbursement is self-serving and incorrect. *See* Nautilus' Reply Brief on Cross-Appeal at 7-8 (arguing that California law should be followed and citing to numerous California cases. While Nevada courts do indeed look to rulings from their sister state California for guidance, as well as other sister states, *see Allstate Ins. Co. v. Miller*, 212 P.3d 318, 327 (Nev. 2009), Nevada law provides all the answers needed to affirm the denial of Nautilus' request for reimbursement.

///

///

///

///

///

///

///

III. NAUTILUS' CLAIM FOR REIMBURSEMENT OF FEES AND COSTS WAS NOT COGNIZABL BEFORE THE DISTRICT COURT WHEN IT WAS NOT CONTEMPLATED BY THE INSURANCE CONTRACT AND THE INSURANCE CONTRACT WAS NEVER MODIFED TO PERMIT IT

Nautilus tries to stretch its arguments that the Court should apply California law to the extent that it seems to argue that California case law supersedes even the contractual provisions of the insurance contract. *See* Nautilus' Brief on Cross-Appeal at 7-10. However, as previously briefed, the provisions of the actual contract underlying the parties' disputes govern here.

IV. FEES AND COSTS FOR WHICH NAUTILUS SEEKS TO BE REIMBURSED MUST HAVE BEEN REASONABLY INCURRED

Nautilus contends that the amount of fees and costs for which it seeks reimbursement need not be assessed for reasonableness by any federal court. *See* Nautilus' Reply Brief on Cross-Appeal at 10 (arguing that "the only relevant evidence is what Nautilus paid"). As a general rule, however, federal courts will always make a determination of whether requested attorneys' fees and costs are reasonable in the view of opposing counsel, absent unusual circumstances not present here. *See* Fed. R. Civ. P. 54(d)(2) (court must give opposing party chance to make adversary submissions and must make findings of fact and conclusions of law); *see also Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 301 (2006) (district court may not tax costs that are not authorized by statute or

court rule). If the Court of Appeals reverses the district court's order denying reimbursement, then adversary submissions by the parties and adjudication by the district court of the reasonableness of the requested fees and costs should take place on remand.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed as to its denial of coverage and affirmed as to the denial of Nautilus' request for reimbursement.

Dated: May 4, 2018.

HARPER | SELIM

/s/ James E. Harper

Attorneys for Flournoy Management, LLC

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 900 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(iii).

Dated: May 4, 2018.

/s/ James E. Harper

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Dated: May 4, 2018.

/s/ James E. Harper

Pamela J. Smith

From: ca9_ecfnoticing@ca9.uscourts.gov
Sent: Wednesday, May 9, 2018 8:35 AM
To: Pamela J. Smith
Subject: Re-send: 17-16265 Nautilus Insurance Company v. Access Medical, LLC, et al "Brief on the Merits (Opening, Answering, Reply, Supplemental, etc)"

United States Court of Appeals for the Ninth Circuit

Amended 05/09/2018 08:35:03: Notice of Docket Activity

The following transaction was entered on 05/04/2018 at 11:54:12 PM PDT and filed on 05/04/2018

Case Name: Nautilus Insurance Company v. Access Medical, LLC, et al
Case Number: 17-16265
Document(s): Document(s)

Docket Text:
Submitted (ECF) Cross-Appeal Reply Brief for review. Submitted by Appellee Flournoy Management, LLC in 17-16265, Appellant Flournoy Management, LLC in 17-16273. Date of service: 05/04/2018. [10862863] [17-16265, 17-16272, 17-16273]--[COURT UPDATE: Attached corrected brief. 05/09/2018 by SLM]--[Edited 05/09/2018 by SLM] (Harper, James)

Notice will be electronically mailed to:

Ms. L. Renee Green
Mr. James E. Harper, Attorney
Martin J. Kravitz
Mr. Jordan P. Schnitzer
Jennifer Naomi Wahlgren
Ms. Linda Sharon Wendell Hsu

The following document(s) are associated with this transaction:
Document Description: Main Document
Original Filename: C:\Users\stacym\Desktop\CM ECF Documents\17-16265 B 44.pdf
Electronic Document Stamp:
[STAMP acecfStamp_ID=1106763461 [Date=05/04/2018] [FileNumber=10862863-0]

[68353e904585ca36a46d4697a1f4b10bba8e4a171b1d0602abef87a50a6c3a2a83ef581ecd3733a0fa82bacae413d
f928cc41ba275712ab589b0c88bbf80ee6c]]

Joint Appendix

Tab #13

Law Offices
KRAVITZ, SCHNITZER & JOHNSON, CHTD.
A Professional Corporation

Martin J. Kravitz
Gary E. Schnitzer
M. Bradley Johnson *
Gina M. Mushmeche ‡
Tyler J. Watson
Kristopher T. Zeppenfeld

8985 S. Eastern Avenue, Suite 200
Las Vegas, Nevada 89123

Telephone
(702) 362-6666

Facsimile
(702) 362-2203

¤ Christopher J. Halcrow
Wade J. Van Sickle
L. Renee Green
Adam J. Wax
Kimberley A. Hyson
Bianca V. Gonzalez

*Also Admitted in Texas
‡ Also Admitted in Louisiana & Mississippi
¤ Also Admitted in New York

DIRECT DIAL
(702) 222-4170

EMAIL ADDRESS
rgreen@ksjattorneys.com

June 4, 2019

Sent via Regular U.S. Mail
Molly C. Dwyer
Clerk of Court
United States Court of Appeals
Ninth Circuit
The James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103

Re: ***Nautilus Insurance Company v. Access Medical, LLC and Robert Clark Wood, II, Flournoy Management , LLC***
U. S. Court of Appeals for the Ninth Circuit Case Nos. 17-16265, 17-16272, 17-16273
Notice of Supplemental Authority Pursuant to FRAP 28(j) and Circuit Rule 28-6

Dear Ms. Dwyer:

On December 13, 2018, the Supreme Court of Nevada issued a decision in *Century Sur. Co. v. Andrew*, 432 P.3d 180, 182 (Nev. 2018), which is attached hereto as **Exhibit A**. The decision, which was issued after the parties finished briefing this matter, answered the certified question from the United States District Court for the District of Nevada as to whether the liability of an insurer that breached its duty to defend, but has not acted in bad faith, is generally capped at the policy limits plus costs. *Ibid.*

In addressing the issue, the Supreme Court of Nevada further solidified the duty to defend in Nevada, holding:

> The duty to defend is a valuable service paid for by the insured and one of the principal benefits of the liability insurance policy. The insured pays a premium for the expectation that the insurer will abide by its duty to defend when such a duty arises. In Nevada, that duty arises if facts in a lawsuit are alleged which if proved would give rise to the duty to indemnify, which then the insurer must defend.
>
> *Andrew*, 432 P.3d at 183–184 (citations and quotations omitted).

As there is no duty to defend only when there is "no potential for coverage," the legally deficient Cross-Complaint from the Underlying Action, coupled with the additional evidence the Insureds provided to Nautilus, evidence

that the claims against the Insureds were always potentially covered under the Policy.

Access Medical, LLC and Robert Clark Wood, II hereby supplement pages 16 and 28 of its Opening Brief; Pages 6, 19, 26 in Appellees' Principal and Response Brief and pages 21, 23 and 27 of their Answering Brief for the proposition that the duty to defend exists whenever there is the potential for the duty to indemnify.

Sincerely,

L. Renee Green, Esq.

LRG/wk

EXHIBIT "A"

Century Sur. Co. v. Andrew

EXHIBIT "A"

Neutral
As of: June 4, 2019 5:24 PM Z

Century Sur. Co. v. Andrew

Supreme Court of Nevada

December 13, 2018, Filed

No. 73756

Reporter
432 P.3d 180 *; 2018 Nev. LEXIS 112 **; 134 Nev. Adv. Rep. 100

CENTURY SURETY COMPANY, Appellant, vs. DANA ANDREW, AS LEGAL GUARDIAN ON BEHALF OF RYAN T. PRETNER; AND RYAN T. PRETNER, Respondents.

Prior History: Certified question pursuant to NRAP 5 **[**1]** concerning insurer's liability for breach of its duty to defend. United States District Court for the District of Nevada; Andrew P. Gordon, Judge.

Andrew v. Century Sur. Co., 2017 U.S. Dist. LEXIS 128685 (D. Nev., Aug. 14, 2017)

Disposition: Question answered.

Core Terms

insurer, duty to defend, damages, policy limit, insurer's breach, insurance policy, default, refuse to defend, quotation, marks, breaches, costs, bad faith, defending, coverage, consequential damages, duty to indemnify, contractual duty, district court, federal court, excess of the policy limits, insurer's liability, consequential, settlement, capped, rule rule rule, Contracts, naturally, mounting, arises

Case Summary

Overview
HOLDINGS: [1]-The insurer's liability after it breached its contractual duty to defend was not capped at the policy limits plus the insured's defense costs, and instead, could be liable for any consequential damages caused by its breach. Good-faith determinations were irrelevant for determining damages upon a breach of that duty.

Outcome
Question answered.

LexisNexis® Headnotes

Insurance Law > Remedies > Damages

HN1[] In Nevada, insurance policies are treated like other contracts, and thus, legal principles applicable to contracts generally are applicable to insurance policies. The general rule in a breach of contract case is that the injured party may be awarded expectancy damages.

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Duty to Defend

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Indemnification

HN2[] **Duty to Defend**

An insurance policy creates two contractual duties between the insurer and the insured: the duty to indemnify and the duty to defend. The duty to indemnify arises when an insured becomes legally obligated to pay damages in the underlying action that gives rise to a claim under the policy. On the other hand, the insurer bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy.

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Duty to Defend

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Indemnification

HN3[] **Duty to Defend**

Courts have uniformly held the duty to defend to be separate from and broader than the duty to indemnify. The duty to indemnify provides those insured financial protection against judgments, while the duty to defend protects those insured from the action itself, the duty to defend is a valuable service paid for by the insured and one of the principal benefits of the liability insurance policy. The insured pays a premium for the expectation that the insurer will abide by its duty to defend when such a duty arises. In Nevada, that duty arises if facts in a lawsuit are alleged which if proved would give rise to the duty to indemnify, which then the insurer must defend.

Insurance Law > Remedies > Damages

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Duty to Defend

HN4[] **Damages**

In a case where the duty to defend does in fact arise, and the insurer breaches that duty, the insurer is at least liable for the insured's reasonable costs in mounting a defense in the underlying action.

Insurance Law > Remedies > Damages > Consequential Damages

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Duty to Defend

HN5[] **Consequential Damages**

Damages for 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. Damages that may naturally flow from an insurer's breach include: (1) the amount of the judgment or settlement against the insured plus interest even in excess of the policy limits; (2) costs and attorney fees incurred by the insured in defending the suit; and (3) any additional costs that the insured can show naturally resulted from the breach.

Insurance Law > Remedies > Damages

HN6[] **Damages**

There is an important difference between the liability of an insurer who performs its obligations and that of an insurer who breaches its contract. Indeed, the insurance policy limits only the amount the insurer may have to pay in the performance of the contract as compensation to a third person for personal injuries caused by the insured; they do not restrict the damages recoverable by the insured for a breach of contract by the insurer.

Insurance Law > Remedies > Damages > Consequential Damages

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Duty to Defend

HN7[] **Consequential Damages**

The obligation of the insurer to defend its insured is purely contractual and a refusal to defend is considered a breach of contract. Consistent with general contract principles, the insured may be entitled to consequential damages resulting from the insurer's breach of its contractual duty to defend. Consequential damages should be such as may fairly and reasonably be considered as arising naturally, or were reasonably contemplated by both parties at the time they made the contract. The determination of the insurer's liability depends on the unique facts of each case and is one that is left to the jury's determination.

Insurance Law > Remedies > Damages > Consequential Damages

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Duty to Defend

HN8[] **Consequential Damages**

The right to recover consequential damages sustained as a result of an insurer's breach of the duty to defend does not require proof of bad faith.

Insurance Law > Remedies > Damages > Consequential Damages

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Duty to Defend

HN9[] **Consequential Damages**

An insurer's breach of its duty to defend can be determined objectively by comparing the facts alleged in the complaint with the insurance policy. Thus, even in the absence of bad faith, the insurer may be liable for a judgment that exceeds the policy limits if the judgment is consequential to the insurer's breach. An insurer that refuses to tender a defense for its insured takes the risk not only that it may eventually be forced to pay the insured's legal expenses but also that it may end up having to pay for a loss that it did not insure against. Accordingly, the insurer refuses to defend at its own peril. However, an entire judgment is not automatically a consequence of an insurer's breach of its duty to defend; rather, the insured is tasked with showing that the breach caused the excess judgment and is obligated to take all reasonable means to protect himself and mitigate his damages.

Counsel: Gass Weber Mullins, LLC, and James Ric Gass and Michael S. Yellin, Milwaukee, Wisconsin; Christian, Kravitz, Dichter, Johnson & Sluga and Martin J. Kravitz, Las Vegas; Cozen O'Connor and Maria L. Cousineau, Los Angeles, California, for Appellant.

Eglet Prince and Dennis M. Prince, Las Vegas, for Respondents.

Lewis Roca Rothgerber Christie LLP and J. Christopher Jorgensen and Daniel F. Polsenberg, Las Vegas, for Amicus Curiae Federation of Defense & Corporate Counsel.

Lewis Roca Rothgerber Christie LLP and Joel D. Henriod and Daniel F. Polsenberg, Las Vegas; Crowell & Moring LLP and Laura Anne Foggan, Washington, D.C., for Amici Curiae Complex Insurance Claims Litigation Association, American Insurance Association, and Property Casualty Insurers Association of America.

Matthew L. Sharp, Ltd., and Matthew L. Sharp, Reno, for Amicus Curiae Nevada Justice Association.

Judges: Douglas, C.J. We concur: Cherry, J., Gibbons, J., Pickering, J., Hardesty, J., Stiglich, J.

Opinion by: DOUGLAS

Opinion

[*182] BEFORE THE COURT EN BANC.[1]

By the Court, **[**2]** DOUGLAS, C.J.:

An insurance policy generally contains an insurer's contractual duty to defend its insured in any lawsuits that involve claims covered under the umbrella of the insurance policy. In response to a certified question submitted by the United States District Court for the District of Nevada, we consider "[w]hether, 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 by the insured in mounting a defense, or [whether] the insurer [is] liable for all losses consequential to the insurer's breach." We conclude that an insurer's liability where it breaches its contractual duty to defend is not capped at the policy limits plus the insured's defense costs, and instead, an insurer may be liable for any consequential damages caused by its breach. We further conclude that good-faith determinations are irrelevant for determining damages upon a breach of this duty.

FACTS AND PROCEDURAL HISTORY

Respondents Ryan T. Pretner and Dana Andrew (as legal guardian of Pretner) initiated a personal injury action in state court after a truck owned and driven by Michael Vasquez struck **[**3]** Pretner, causing significant brain injuries. Vasquez used the truck for personal use, as well as for his mobile auto detailing business, Blue Streak Auto Detailing, LLC (Blue Streak).

[1] The Honorable Ron D. Parraguirre, Justice, is disqualified from participation in the decision of this matter.

At the time of the accident, Vasquez was covered under a personal auto liability insurance policy issued by Progressive Casualty Insurance Company (Progressive), and Blue Streak was insured under a commercial liability policy issued by appellant Century Surety Company. The Progressive policy had a $100,000 policy limit, whereas appellant's policy had a policy limit of $1 million.

Upon receiving the accident report, appellant conducted an investigation and concluded that Vasquez was not driving in the course and scope of his employment with Blue Streak at the time of the accident, and that the accident was not covered under its insurance policy. Appellant rejected respondents' demand to settle the claim within the policy limit. Subsequently, respondents sued Vasquez and Blue Streak in state district court, alleging that Vasquez was driving in the course and scope of his employment with Blue Streak at the time of the accident. Respondents notified appellant of the suit, but appellant refused to defend Blue **[**4]** Streak. Vasquez and Blue Streak defaulted in the state court action and the notice of the default was forwarded to appellant. Appellant maintained that the claim was not covered under its insurance policy.

Respondents, Vasquez, and Blue Streak entered into a settlement agreement whereby respondents agreed not to execute on any judgment against Vasquez and Blue Streak, and Blue Streak assigned its rights against appellant to respondents. In addition, Progressive agreed to tender Vasquez's $100,000 policy limit. Respondents then filed an unchallenged application for entry of default judgment in state district court. Following a hearing, the district court entered a default judgment against Vasquez and Blue Streak for $18,050,183. The default judgment's factual findings, deemed admitted by default, stated that "Vasquez negligently injured Pretner, that Vasquez was working in the course and scope of his employment with Blue Streak at the time, and that consequently Blue Streak was also liable." As an assignee of Blue Streak, respondents filed suit in state district court against appellant for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair claims **[**5]** practices, and appellant removed the case to the federal district court.

The federal court found that appellant did not act in bad faith, but it did breach its duty to defend Blue Streak. Initially, the federal court concluded that appellant's liability for a breach of the duty to defend was capped at the policy limit plus any cost incurred by Blue Streak in mounting a defense because appellant did not act in bad faith. The federal court stated that it was undisputed that Blue Streak did not incur any defense cost because **[*183]** it defaulted in the underlying negligence suit. However, after respondents filed a motion for reconsideration, the federal court concluded that Blue Streak was entitled to recover consequential damages that exceeded the policy limit for appellant's breach of the duty to defend, and that the default judgment was a reasonably foreseeable result of the breach of the duty to defend. Additionally, the federal court concluded that bad faith was not required to impose liability on the insurer in excess of the policy limit. Nevertheless, the federal court entered an order staying the proceedings until resolution of the aforementioned certified question by this court.

DISCUSSION ***[**6]***

Appellant argues that the liability of an insurer that breaches its contractual duty to defend, but has not acted in bad faith, is generally capped at the policy limits and any cost incurred in mounting a defense.[2] Conversely, respondents argue that an insurer that breaches its duty to defend should be liable for all consequential damages, which may include a judgment against the insured that is in excess of the policy limits.[3]

HN1[↑] In Nevada, insurance policies are treated like other contracts, and thus, legal principles applicable to contracts generally are applicable to insurance policies. *See Century Sur. Co. v. Casino West, Inc., 130 Nev. 395, 398, 329 P.3d 614, 616 (2014)*; *United Natl Ins. Co. v. Frontier Ins. Co., 120 Nev. 678, 684, 99 P.3d 1153, 1156-57 (2004)*; *Farmers Ins. Exch. v. Neal, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003)*. The general rule in a breach of contract case is that the injured party may be awarded expectancy damages, which are determined by the method set forth in the *Restatement (Second) of Contracts § 347* (Am. Law Inst. 1981). *Rd. & Highway Builders, LLC v. N. Nev. Rebar, Inc., 128 Nev. 384, 392, 284 P.3d 377, 382 (2012)*. The *Restatement (Second) of Contracts § 347* provides, in pertinent part, as follows:

---

[2] The Federation of Defense & Corporate Counsel, Complex Insurance Claims Litigation Association, American Insurance Association, and Property Casualty Insurers Association of America were allowed to file amicus briefs in support of appellant.

[3] The Nevada Justice Association was allowed to file an amicus brief in support of respondents.

> [T]he injured party has a right to damages based on his expectation interest as measured by
> (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
>
> (b) *any other loss, including incidental or consequential loss, caused by the breach, less*
> (c) any cost or other loss that he has avoided by not having to perform.

(Emphasis **[**7]** added.)

HN2[↑] An insurance policy creates two contractual duties between the insurer and the insured: the duty to indemnify and the duty to defend. *Allstate Ins. Co. v. Miller, 125 Nev. 300, 309, 212 P.3d 318, 324 (2009)*. "The duty to indemnify arises when an insured becomes legally obligated to pay damages in the underlying action that gives rise to a claim under the policy." *United Nat'l, 120 Nev. at 686, 99 P.3d at 1157* (internal quotation marks omitted). On the other hand, "Lain insurer . bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy." *Id. at 687, 99 P.3d at 1158* (alteration in original) (internal quotation marks omitted).

HN3[↑] Courts have uniformly held the duty to defend to be "separate from," 1 Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* §5.02[a], at 327 (17th ed. 2015) (internal quotation marks omitted), and "broader than the duty to indemnify," *Pension Tr. Fund for Operating Eng'rs v. Fed. Ins. Co., 307 F.3d 944, 949 (9th Cir. 2002)*. The duty to indemnify provides those insured financial protection against judgments, while the duty to defend protects those insured from the action itself, "The duty to defend is a valuable service paid for by the insured and one of the principal benefits of the liability insurance policy." **[*184]** *Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 164 P.3d 454, 459-60 (Wash. 2007)*. The insured pays a premium for the expectation that the insurer will abide by its duty to **[**8]** defend when such a duty arises. In Nevada, that duty arises "if facts [in a lawsuit] are alleged which if proved would give rise to the duty to indemnify," which then "the insurer *must* defend." *Rockwood Ins. Co. v. Federated Capital Corp., 694 F. Supp. 772, 776 (D. Nev. 1988)* (emphasis added); *see also United Nat'l, 120 Nev. at 687, 99 P.3d at 1158* ("Determining whether an insurer owes a duty to defend is achieved by comparing the allegations of the complaint with the terms of the policy,").[4]

HN4[↑] In a case where the duty to defend does in fact arise, and the insurer breaches that duty, the insurer is at least liable for the insured's reasonable costs in mounting a defense in the underlying action. *See Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc., 127 Nev. 331, 345, 255 P.3d 268, 278 (2011)* (providing that a breach of the duty to defend "may give rise to damages in the form of reimbursement of the defense costs the indemnitee was thereby forced to incur in defending against claims encompassed by the indemnity provision" (internal quotation marks omitted)). Several other states have considered an insurer's liability for a breach of its duty to defend, and while no court would disagree that the insurer is liable for the insured's defense cost, courts have taken two different views when considering whether the insurer may be liable for an entire judgment that exceeds the policy **[**9]** limits in the underlying action.

---

[4] Appellant correctly notes that we have previously held that this duty is not absolute. In the case appellant cites, *United National, we* held that "Where is no duty to defend [w]here there is no *potential* for coverage." *120 Nev. at 686, 99 P.3d at 1158* (second alteration in original) (internal quotation marks omitted). We take this opportunity to clarify that where there is potential for coverage based on "comparing the allegations of the complaint with the terms of the policy," an insurer does have a duty to defend. *Id. at 687, 99 P.3d at 1158*. In this instance, as a general rule, facts outside of the complaint cannot justify an insurer's refusal to defend its insured. Restatement of Liability Insurance *§ 13 cmt. c* (Am. Law Inst., Proposed Final Draft No. 2, 2018) ("The general rule is that insurers may not use facts outside the complaint as the basis for refusing to defend. . . ."), Nonetheless, the insurer can always agree to defend the insured with the limiting condition that it does not waive any right to later deny coverage based on the terms of the insurance policy under a reservation of rights. *See Woo, 164 P.3d at 460* ("Although the insurer must bear the expense of defending the insured, by doing so under a reservation of rights . . . the insurer avoids breaching its duty to defend and incurring the potentially greater expense of defending itself from a claim of breach."). Accordingly, facts outside the complaint may be used in an action brought by the insurer seeking to terminate its duty to defend its insured in an action whereby the insurer is defending under a reservation of rights. Restatement of Liability Insurance *§ 13 cmt. c* (Am. Law Inst., Proposed Final Draft No. 2, 2018) ("Only in a declaratory-judgment action filed while the insurer is defending, or in a coverage action that takes place after the insurer fulfilled the duty to defend, may the insurer use facts outside the complaint as the basis for avoiding coverage.").

The majority view is that "[w]here there is no opportunity to compromise the claim and the only wrongful act of the insurer is the refusal to defend, the liability of the insurer is ordinarily limited to the amount of the policy plus attorneys' fees and costs." *Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198, 201 (Cal. 1958)*; *see also Employers Nat'l Ins. Corp. v. Zurich American Ins. Co., 792 F.2d 517, 520 (5th Cir. 1986)* (providing that imposing excess liability upon the insurer arose as a result of the insurer's refusal to entertain a settlement offer within the policy limit and not solely because the insurer refused to defend); *George R. Winchell, Inc. v. Norris, 6 Kan. App. 2d 725, 633 P.2d 1174, 1177 (Kan. Ct. App. 1981)* ("Absent a settlement offer, the plain refusal to defend has no causal connection with the amount of the judgment in excess of the policy limits."). In *Winchell*, the court explained the theory behind the majority view, reasoning that when an insurer refuses a settlement offer, unlike a refusal to defend, "the insurer is causing a discernible injury to the insured" and "the injury to the insured is traceable to the insurer's breach." *633 P.2d at 1177*. "A refusal to defend, in itself, can be compensated for by paying the costs incurred in the insured's defense." *Id.* In sum, "[a]n [insurer] is liable to the limits of its policy plus attorney fees, expenses and other damages where it refuses **[**10]** **[*185]** to defend an insured who is in fact covered," and "[t] his is true even though the [insurer] acts in good faith and has reasonable ground[s] to believe there is no coverage under the policy." *Allen v. Bryers, 512 S.W.3d 17, 38-39 (Mo. 2016)* (first and fifth alteration in original) (internal quotation marks omitted), *cert. denied by Atain Specialty Ins. Co. v. Allen, __ U.S. __, 138 S. Ct. 212, 199 L. Ed. 2d 118 (2017)*.

The minority view is that *HN5*[↑] damages for 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. *See Burgraff v. Menard, Inc., 2016 WI 11, 367 Wis. 2d 50, 875 N.W.2d 596, 608 (Wis. 2016)*. 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." *Id.* (internal quotation marks omitted). 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." *Id.* (internal quotation marks omitted). Damages that may naturally flow from an insurer's breach include:

> (1) the amount of the judgment or settlement against the insured plus interest [even in excess of the policy limits]; (2) costs and attorney fees incurred by the insured in defending the suit; and (3) any additional costs that the insured can show **[**11]** naturally resulted from the breach.

Newhouse v. Citizens Sec. Mut. Ins. Co., 176 Wis. 2d 824, 501 N.W.2d 1, 6 (Wis. 1993).

For instance, in *Delatorre v. Safeway Insurance Co.*, the insurer breached its duty to defend by failing to ensure that retained counsel continued defending the insured after answering the complaint, which ultimately led to a default judgment against the insured exceeding the policy limits. *2013 IL App (1st) 120852, 989 N.E.2d 268, 274, 370 Ill. Dec. 880 (Ill. App. Ct. 2013)*. The court found that the entry of default judgment directly flowed from the insurer's breach, and thus, the insurer was liable for the portion that exceeded the policy limit. *Id. at 276*. The court reasoned that a default judgment "could have been averted altogether had [the insurer] seen to it that its insured was actually defended as contractually required." *Id.*

On the other hand, in *Hamlin Inc. v. Hartford Accident & Indemnity Co.*, the court considered whether the insured had as good of a defense as it would have had had the insurer provided counsel. *86 F.3d 93, 95 (7th Cir. 1996)*. The court observed that although the "insurer did not pay the entire bill for [the insured's] defense," the insured is not "some hapless individual who could not afford a good defense unless his insurer or insurers picked up the full tab." *Id.* Moreover, the court noted that the insured could not have expected to do better **[**12]** with the firm it hired, which "was in fact its own choice, and not a coerced choice, that is, not a choice to which it turned only because the obstinacy of the [insurers] made it unable to 'afford' an even better firm (if there is one)." *Id.* Therefore, because the entire judgment was not consequential to the insurer's breach of its duty to defend, the insured was not entitled to the entire amount of the judgment awarded against it in the underlying lawsuit. *Id.*

We conclude that the minority view is the better approach. Unlike the minority view, the majority view places an artificial limit to the insurer's liability within the policy limits for a breach of its duty to defend. That limit is based on the insurer's duty to indemnify but "[a] duty to defend limited to and coextensive with the duty to indemnify would be essentially meaningless; insureds pay a premium for what is partly litigation insurance designed to protect . . . the insured from the expense of

defending suits brought against him." Capitol Envtl. Servs. v. N. River Ins. Co., 536 F. Supp. 2d 633, 640 (E.D. Va. 2008) (internal quotation marks omitted). Even the *Comunale* court recognized that HN6[↑] "[t]here is an important **[**13]** difference between the liability of an insurer who performs its obligations and that of an insurer who breaches its contract." 328 P.2d at 201. Indeed, the insurance policy limits "only the amount the insurer may have to pay in the performance of the contract as compensation to a third person for personal injuries caused by the insured; they do not restrict the damages recoverable by the insured for a breach of contract by the insurer." *Id.*

[*186] HN7[↑] The obligation of the insurer to defend its insured is purely contractual and a refusal to defend is considered a breach of contract. Consistent with general contract principles, the minority view provides that the insured may be entitled to consequential damages resulting from the insurer's breach of its contractual duty to defend. *See* Restatement of Liability Insurance § 48 (Am. Law Inst., Proposed Final Draft No. 2, 2018). Consequential damages "should be such as may fairly and reasonably be considered as arising naturally, or were reasonably contemplated by both parties at the time they made the contract." Hornwood v. Smith's Food King No. 1, 105 Nev. 188, 190, 772 P.2d 1284, 1286 (1989) (internal quotation marks omitted). The determination of the insurer's liability depends on the unique facts of each case and is one that is left to the jury's **[**14]** determination. *See* Khan v. Landmark Am. Ins. Co., 326 Ga. App. 539, 757 S.E.2d 151, 155 (Ga. Ct. App. 2014) ("[W]hether the full amount of the judgment was recoverable was a jury question that depended upon what damages were found to flow from the breach of the contractual duty to defend.").[5]

HN8[↑] The right to recover consequential damages sustained as a result of an insurer's breach of the duty to defend does not require proof of bad faith. As the Supreme Court of Michigan explained:

> The duty to defend . . . arises solely from the language of the insurance contract. A breach of that duty can be determined objectively, without reference to the good or bad faith of the insurer. If the insurer had an obligation to defend and failed to fulfill that obligation, then, like any other party who fails to perform its contractual obligations, it becomes liable for all foreseeable damages flowing from the breach.

Stockdale v. Jamison, 416 Mich. 217, 330 N.W.2d 389, 392 (Mich. 1982). In other words, HN9[↑] an insurer's breach of its duty to defend can be determined objectively by comparing the facts alleged in the complaint with the insurance policy. Thus, even in the absence of bad faith, the insurer may be liable for a judgment that exceeds the policy limits if the judgment is consequential to the insurer's breach. An insurer that refuses to tender a defense for **[**15]** "its insured takes the risk not only that it may eventually be forced to pay the insured's legal expenses but also that it may end up having to pay for a loss that it did not insure against." Hamlin, 86 F.3d at 94. Accordingly, the insurer refuses to defend at its own peril. However, we are not saying that an entire judgment is automatically a consequence of an insurer's breach of its duty to defend; rather, the insured is tasked with showing that the breach caused the excess judgment and "is obligated to take all reasonable means to protect himself and mitigate his damages." Thomas v. W. World Ins. Co., 343 So. 2d 1298, 1303 (Fla. Dist. Ct. App. 1977); *see also* Conner v. S. Nev. Paving, Inc., 103 Nev. 353, 355, 741 P.2d 800, 801 (1987) ("As a general rule, a party cannot recover damages for loss that he could have avoided by reasonable efforts.").

CONCLUSION

In answering the certified question, we conclude that an insured may recover any damages consequential to the insurer's breach of its duty to defend. As a result, an insurer's liability for the breach of the duty to defend is not capped at the policy limits, even in the absence of bad faith.

/s/ Douglas, C.J.

Douglas

We concur:

/s/ Cherry, J.

Cherry

/s/ Gibbons, J.

Gibbons

/s/ Pickering, J.

[5] Consequently, we reject appellant's argument that, as a matter of law, damages in excess of the policy limits can never be recovered as a consequence to an insurer's breach of its duty to defend.

Pickering

/s/ Hardesty, J.

Hardesty

/s/ Stiglich, J.

Stiglich

End of Document

Joint Appendix

Tab #14

NOT FOR PUBLICATION

FILED

JUL 2 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NAUTILUS INSURANCE COMPANY, Plaintiff-Appellant, v. ACCESS MEDICAL, LLC; et al., Defendants-Appellees.	No. 17-16265 D.C. No. 2:15-cv-00321-JAD-GWF MEMORANDUM*

NAUTILUS INSURANCE COMPANY, Plaintiff-Appellee, v. ACCESS MEDICAL, LLC; ROBERT CLARK WOOD II, Defendants-Appellants, and FLOURNOY MANAGEMENT, LLC, Defendant.	No. 17-16272 D.C. No. 2:15-cv-00321-JAD-GWF

NAUTILUS INSURANCE COMPANY,	No. 17-16273

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Plaintiff-Appellee, v. ACCESS MEDICAL, LLC; ROBERT CLARK WOOD II, Defendants, and FLOURNOY MANAGEMENT, LLC, Defendant-Appellant.	D.C. No. 2:15-cv-00321-JAD-GWF

Appeal from the United States District Court
for the District of Nevada
Jennifer A. Dorsey, District Judge, Presiding

Argued and Submitted June 10, 2019
San Francisco, California

Before: GOULD, IKUTA, and R. NELSON, Circuit Judges.

Nautilus appeals the district court's denial of a motion for further relief under 28 U.S.C. § 2202 following a declaratory judgment that Nautilus owed no duty to defend Access Medical, Flournoy Management, and Robert Clark Wood II (collectively "Insureds") in the underlying cross-complaint brought by Ted Switzer for claims relating to a breach of a partnership agreement. The Insureds cross-appeal, arguing that the district court erred in granting summary judgment in favor of Nautilus and denying its motion for reconsideration on the duty to defend issue.

We review a grant of summary judgment de novo and a denial of a motion for reconsideration for abuse of discretion. *Pac. Grp. v. First States Ins. Co.*, 70 F.3d 524, 527 (9th Cir. 1995); *Benson v. JPMorgan Chase Bank, N.A.*, 673 F.3d 1207, 1211 (9th Cir. 2012). We conclude that the district court properly entered a declaratory judgment in favor of Nautilus because the underlying proceedings did not trigger Nautilus's duty to defend.

Under Nevada law, an insurer bears a duty to defend whenever there is a potential for liability under the policy. *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 1158 (Nev. 2004). "Once the duty to defend arises, this duty continues throughout the course of the litigation." *Id.* (internal quotation marks omitted). "[A]n insurer's breach of its duty to defend can be determined objectively by comparing the facts alleged in the complaint with the insurance policy." *Century Sur. Co. v. Andrew*, 432 P.3d 180, 186 (Nev. 2018).

In the cross-complaint, Switzer brought claims for interference with prospective economic advantage against Insureds. The policy requires Nautilus to defend Insureds against "any 'suit' seeking damages" because of a "personal and advertising injury . . . arising out of . . . [o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services." Because the allegations in the underlying action stem from an injury that occurred in California, California

law governs the rights and liabilities of the parties as it pertains to Nautilus's duty to defend. *Gen. Motors Corp. v. Eighth Judicial Dist. Court of State of Nev. ex rel. Cty. of Clark*, 134 P.3d 111, 113 (Nev. 2006).

In California, to plead a claim of intentional interference with prospective business advantage, the plaintiff must show that the defendant "engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 902 P.2d 740, 751 (Cal. 1995). Insureds agree Switzer's cross-complaint for intentional interference with prospective economic advantage did not specify wrongful acts that are legally independent from the interference. Nevertheless, Insureds argue that an email from a representative of Flournoy and Access Medical to a third-party hospital, stating that a "Distributor in the California area is now banned from selling" products, created additional evidence that there was a defamation, libel, or business disparagement claim in the cross-complaint. Even if this email could be understood to reference Switzer, it does not contain a false statement that explicitly disparaged him, *see Hartford Cas. Ins. Co. v. Swift Distribution, Inc.*, 59 Cal. 4th 277, 291 (2014); *Blatty v. New York Times Co.*, 728 P.2d 1177, 1182 (Cal. 1986) (in bank), and therefore it did not trigger a duty to defend, *see United Nat'l Ins. Co.*, 99 P.3d at 1158.

There remains a dispute over whether Nautilus is entitled to reimbursement of defense costs where it explicitly reserved the right to seek reimbursement while defending Insureds in the underlying action. The district court denied Nautilus's request for reimbursement for three reasons: (1) Nautilus did not include a claim for reimbursement or damages in its complaint; (2) § 2202 itself does not allow for an award of damages; and (3) Nevada law did not permit Nautilus to recover defense costs under a unilateral reservation of rights.

As to the first two reasons, § 2202's language is broad and does not seem to impose any stringent pleading requirements. Moreover, by its plain language, § 2202 allows the district court to grant "[f]urther necessary or proper relief based on a declaratory judgment . . . after reasonable notice and hearing." We reserve judgment, however, on the proper scope of relief available in this case under § 2202. That is because whether further relief can be granted ultimately depends on whether Nautilus is entitled to reimbursement under Nevada law. Because our review of the district court's legal determination rests entirely on an unaddressed question of Nevada state law, we have certified the question whether Nautilus is entitled to reimbursement under Nevada law in a separate order filed concurrently with this memorandum.

We stay further proceedings in this appeal regarding the availability of further relief under § 2202 pending resolution of our certified question to the

Nevada Supreme Court. For the reasons stated above, however, the district court's grant of declaratory judgment and denial of Insureds' motion for reconsideration is

AFFIRMED.

Joint Appendix

Tab #15

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAUTILUS INSURANCE COMPANY, *Plaintiff-Appellant/ Cross-Appellee,* v. ACCESS MEDICAL, LLC; ROBERT CLARK WOOD II; FLOURNOY MANAGEMENT, LLC, *Defendants-Appellees/ Cross-Appellants.*	Nos. 17-16265 17-16272 17-16273 D.C. No. 2:15-cv-00321-JAD-GWF ORDER CERTIFYING QUESTION TO THE NEVADA SUPREME COURT

Filed July 2, 2019

Before: Ronald M. Gould, Sandra S. Ikuta, and Ryan D. Nelson, Circuit Judges.

SUMMARY*

Certified Question to Nevada Supreme Court

The panel certified the following question of state law to the Nevada Supreme Court:

> Is an insurer entitled to reimbursement of costs already expended in defense of its insureds where a determination has been made that the insurer owed no duty to defend and the insurer expressly reserved its right to seek reimbursement in writing after defense has been tendered but where the insurance policy contains no reservation of rights?

ORDER

Pursuant to Rule 5 of the Nevada Rules of Appellate Procedure, we respectfully certify to the Nevada Supreme Court the question of law set forth in Section III of this order. This question of law will be determinative of a question pending before this court and there is no controlling precedent in the decisions of the Nevada state courts.

I.

We summarize the material facts. After a business partnership went sour, Ted Switzer filed a cross-complaint against Access Medical, Flournoy, and Robert Clark Wood

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

II (collectively "Insureds") in California state court. In the cross-complaint, Switzer brought thirty-one claims, including a purported claim for interference with prospective economic advantage because of the Insureds' alleged interference with relationships with hospitals with which Switzer "enjoyed a long-standing and mutually beneficial relationship." Specifically, Switzer alleged that: (1) Insureds "acted to disrupt the relationship between Switzer" and various hospitals; (2) the wrongful acts "resulted in injury to the personal and business reputation" of Switzer; (3) the wrongful acts caused various vendors to stop using Switzer's business and to use Access Medical's instead; and (4) the wrongful acts were malicious and done with the intent to injure Switzer's professional and business well-being. Although never referenced in the cross-complaint, at some point an email written by Jacqueline Weide, a representative of Access Medical and Flournoy, was uncovered. In the email, Weide advised a third-party hospital that Access Medical wanted to contract to sell spinal implants to them because the hospital's "Distributor in the California area is now banned from selling Alphatec implants." Switzer was the alleged Distributor.

Insureds tendered defense of the cross-claim to their insurance provider, Nautilus. Under the insurance policy, Nautilus is required to defend Insureds against "any suit seeking damages" because of a "personal and advertising injury," "arising out of . . . [o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services." After multiple refusals, Nautilus agreed to defend Insureds under an express reservation of rights.

In a May 19, 2014 letter, Nautilus reserved its right to disclaim coverage, withdraw from defense, and obtain a reimbursement of defense fees following a determination that no potential for coverage existed for Access Medical and Wood's claims. Insureds did not object to payment of defense counsel invoices. On October 2, 2014, Nautilus issued a supplemental reservation of rights letter again reserving the right to reimbursement of all attorneys' fees, expert fees, defense costs, indemnification payments, and other litigation-related expenses paid in connection with its defense of Access Medical and Wood. That same month, Nautilus agreed to provide Flournoy with a defense against the Switzer cross-complaint, subject to a full and complete reservation of rights. Nautilus continued to pay for Insureds' counsel. Finally, in an April 5, 2016 letter, Nautilus again reserved the right to demand defense reimbursement costs. Nautilus continued to pay defense costs after the letter was sent.

On February 24, 2015, Nautilus sought a declaratory judgment in Nevada federal district court that Nautilus never had a duty to defend or indemnify Insureds. Nautilus then filed a motion for partial summary judgment. Nautilus did not address that it was seeking reimbursement of defense costs in either pleading. The Nevada district court found that Nautilus's duty to defend under the policy was not triggered under Nevada law because Switzer's cross-complaint did not allege and the Weide email did not contain a false statement that would support a claim for defamation, libel, or slander under California law. Therefore, the district court construed Nautilus's motion as one for full summary judgment, entered judgment in favor of Nautilus, and closed the case.

Nautilus subsequently brought a motion for further relief under 28 U.S.C. § 2202 seeking reimbursement of defense

costs incurred defending Insureds in the Switzer cross-complaint. Insureds filed a motion for reconsideration arguing that Nautilus had a duty to defend Insureds. The district court denied both motions in the same order. On the reimbursement issue, the district court concluded Nautilus was not entitled to further relief because: (1) Nautilus did not include a claim for reimbursement or damages in its complaint; (2) Nautilus did not show it was entitled to relief as a matter of law under § 2202; and (3) Nautilus did not establish it was entitled to reimbursement under Nevada law.

In a separate memorandum disposition, we affirmed the district court's determination that Nautilus did not owe a duty to defend Insureds and reserved judgment on whether Nautilus could seek further relief under § 2202, depending on whether Nautilus is entitled to reimbursement under Nevada law. Therefore, the only issue remaining is whether Nautilus is entitled to reimbursement under Nevada law.

II.

The district court determined Nautilus is not entitled to reimbursement under Nevada law. Nevada state courts do not appear to have spoken directly on this issue. Insureds argue under *Probuilders Specialty Insurance Co. v. Double M. Construction*, 116 F. Supp. 3d 1173, 1182 & n.4 (D. Nev. 2015), Nevada law only allows reimbursement where the policy explicitly provides insurer's defense is "subject to such reservation of rights" as the insurer deems appropriate. Nautilus argues that *Probuilders* is not so limited.

Our understanding of Nevada law is that a reservation of rights letter can generally be valid. *See Havas v. Atl. Ins. Co.*, 614 P.2d 1, 1 (Nev. 1980) (per curiam) (insurer "agreed to investigate validity of the claim while specifically reserving all defenses available to it"). The federal district

court in Nevada determined that insurers have a right to reimbursement if there is an "understanding" between the parties that the insured would be required to reimburse costs if it is later determined that the insurer had no duty to defend. *Capitol Indem. Corp. v. Blazer*, 51 F. Supp. 2d 1080, 1090 (D. Nev. 1999). This understanding can exist outside the terms of the policy. For example, acceptance of money from the insurer can constitute an implied agreement to the reservation of rights. *Probuilders Specialty Ins. Co.*, 116 F. Supp. 3d at 1182.

Here, Nautilus advised Insureds on at least four occasions that it was reserving all rights, including the right to seek reimbursement. In each of the letters sent to Insureds, Nautilus stated that it "further reserves the right to seek reimbursement for any and all attorney fees, expert fees, defense costs, indemnification payments, and any other litigation-related expenses that it pays in connection with its defense and indemnification."

To be sure, several courts have held that a unilateral reservation of rights letter cannot itself create rights not contained in the policy. *See, e.g.*, *Shoshone First Bank v. Pac. Emp'rs Ins. Co.*, 2 P.3d 510, 515–16 (Wyo. 2000) (opting to follow minority rule that insurer cannot recover defense costs because "insurer is not permitted to unilaterally modify and change policy coverage"). The Illinois Supreme Court explained the difference between the majority and minority rules:

> In general then, the decisions finding that an insurer is entitled to reimbursement of defense costs are based upon a finding that there was a contract implied in fact or law, or a finding that the insured was unjustly enriched when its insurer paid defense costs

> for claims that were not covered by the insured's policy.

Gen. Agents Ins. Co. of Am. v. Midwest Sporting Goods Co., 828 N.E.2d 1092, 1101 (Ill. 2005). In adopting the minority rule, the Illinois Supreme Court explained that in paying defense costs pursuant to a reservation of rights:

> [T]he insurer is protecting itself at least as much as it is protecting its insured. Thus, we cannot say that an insured is unjustly enriched when its insurer tenders a defense in order to protect its own interests, even if it is later determined that the insurer did not owe a defense.

Id. at 1103.

Courts that follow the majority rule, however, state that it is in the best interests of both parties to allow insurers to recoup their defense costs under a reservation of rights. "Without a right of reimbursement, an insurer might be tempted to refuse to defend an action in any part—especially an action with many claims that are not even potentially covered and only a few that are—lest the insurer give, and the insured get, more than they agreed." *Buss v. Superior Court*, 939 P.2d 766, 778 (Cal. 1997).

We understand that "[w]here Nevada law is lacking, its courts have looked to the law of other jurisdictions, particularly California, for guidance." *Eichacker v. Paul Reverse Life Ins. Co.*, 354 F.3d 1142, 1145 (9th Cir. 2004) (internal quotation marks omitted). Under California law, "the insurer can reserve its right of reimbursement for defense costs by itself, without the insured's agreement." *Buss*, 939 P.2d at 784 n.27. "If that conclusion is reached,

the insurer, having reserved its right, may recover from its insured the costs it expended to provide a defense, which, under its contract of insurance, it was never obliged to furnish." *Scottsdale Ins. Co. v. MV Transp.*, 115 P.3d 460, 468 (Cal. 2005).

Because the Nevada Supreme Court has not spoken directly on the issue of an insurer's entitlement to reimbursement of defense costs under a reservation of rights and because such issues involve matters of state law and policy best resolved by the highest court of Nevada, certification of a question to the Nevada Supreme Court is appropriate. We recognize that "[t]he written opinion of the Supreme Court stating the law governing the questions certified . . . shall be res judicata as to the parties." Nev. R. App. P. 5(h).

III.

The question of law we certify is:

> Is an insurer entitled to reimbursement of costs already expended in defense of its insureds where a determination has been made that the insurer owed no duty to defend and the insurer expressly reserved its right to seek reimbursement in writing after defense has been tendered but where the insurance policy contains no reservation of rights?

We do not intend our framing of this question to restrict the Nevada Supreme Court's consideration of any issues it deems relevant. If the Nevada Supreme Court accepts certification, it may in its discretion reformulate the question. *Adamson v. Port of Bellingham*, 899 F.3d 1047, 1052 (9th Cir. 2018).

IV.

Nautilus's appeal presents an issue of Nevada state law which will be determinative of an issue essential to the resolution of claims raised in the present case. For this reason, we respectfully request that the Nevada Supreme Court accept and decide the question herein certified.

The clerk of this court shall forward a copy of this order, under official seal, to the Nevada Supreme Court, along with copies of all briefs and excerpts of record that have been filed with this court.

Further proceedings in our court are stayed pending the Nevada Supreme Court's decision whether it will accept review and, if so, receipt of the answer to the certified question. This case is withdrawn from submission until further order from this court. The clerk is directed to administratively close this docket, pending further order. The panel will resume control and jurisdiction on the certified question upon receiving an answer to the certified question or upon the Nevada Supreme Court's decision to decline to answer the certified question.

The parties shall notify the clerk of this court within 14 days of any decision by the Nevada Supreme Court to accept or decline certification. If the Nevada Supreme Court accepts certification, the parties shall file a joint status report every six months after the date of acceptance, or more frequently if the circumstances warrant.

IT IS SO **ORDERED**.

Ronald M. Gould
Circuit Judge

Supplemental Material

Pursuant to Rule 5 of the Nevada Rules of Appellate Procedure, we include here the designation of the parties who would be the appellants and appellees in the Nevada Supreme Court, as well as the names and addresses of counsel.

For Appellant/Cross-Appellee Nautilus Insurance Company:

Linda Wendell Hsu
Selman Breitman LLP
33 New Montgomery Street
San Francisco, California 94105

For Appellees/Cross-Appellants Access Medical LLC and Robert Clark Wood II:

Jordan P. Schnitzer
The Schnitzer Law Firm
9205 W. Russell Road
Building 3, Suite 240
Las Vegas, Nevada 89148

L. Renee Green
Kravitz Schnitzer & Johnson, Chtd.
Suite 200
8985 S. Eastern Avenue
Las Vegas, Nevada 89123

For Defendant-Appellee/Cross-Appellant Flournoy Management LLC:

James E. Harper
Harper Selim
1707 Village Center Circle
Suite 140
Las Vegas, Nevada 89134

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of SELMAN BREITMAN LLP and on the 20th day of November, 2019, a true and correct copy of the above and foregoing document was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system and by United States First-Class mail to all unregistered parties as listed below:

Martin Kravitz
L. Renee Green
Kravitz, Schnitzer & Johnson
8985 S. Eastern Ave., Suite 200
Las Vegas, NV 89123
mkravitz@ksjattorneys.com
rgreen@ksjattorneys.com
Attorneys Robert Clark Wood, II and Access Medical, LLC

Jordan Schnitzer
The Schnitzer Law Firm
9205 W. Russell Road, Suite 240
Las Vegas, NV 89148
Jordan@theschnitzerlawfirm.com
Attorney for Robert Clark Wood, II and Access Medical, LLC

James E. Harper
Taylor G. Selim
Harper | Selim
1707 Village Center Circle, Suite 140
Las Vegas, NV 89134
eservice@harperselim.com

Attorneys for Flournoy Management Company, LLC

/s/ Bonnie Kerkhoff Juarez
BONNIE KERKHOFF JUAREZ
An Employee of Selman Breitman LLP