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

APPELLANT'S ANSWER TO RESPONDENTS' PETITION FOR REHEARING

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NRAP 26.1 CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 16.1(a), and must be disclosed.

1. Plaintiff/Appellant Nautilus Insurance Company ("Nautilus") 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, which is a publicly traded corporation.

2. Linda Wendell Hsu and Casey J. Quinn of Selman Breitman LLP have represented Nautilus in this litigation.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED: April 19, 2021 Selman Breitman LLP

By: */s/ Casey J. Quinn*

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I. INTRODUCTION

Respondents Access Medical, LLC and Robert Clark Wood, II (the "Respondents") have petitioned this Court for a rehearing (the "Petition") of the Court's March 11, 2021 opinion (the "Opinion") finding in favor of Nautilus Insurance Company ("Nautilus"), yet they provide no legitimate basis for the Court to rehear this matter, much less reverse or amend its original decision.[1] Rather, Respondents set forth the same arguments that they originally made – and that the Court already considered and rejected – in their Answering Brief. Respondents seek to regurgitate their arguments in the hopes that this will sway the Court, even though the Court clearly considered and addressed these arguments prior to reaching its decision.

More importantly, Nevada applies a strict standard for the rehearing of cases, and Respondents simply cannot – and have not – met their burden. Accordingly, Nautilus respectfully requests that this Court summarily reject the Petition.

II. LEGAL ARGUMENT

A. Rehearing Standards

NRAP 40(c)(2) states that this Court may only consider a rehearing in the following two circumstances: (A) When the court has overlooked or

[1] On March 29, 2021, respondent Flournoy Management, LLC joined in Respondents' Petition.

misapprehended a material fact in the record or a material question of law in the case; or (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

Respondents fail to specify which of these alleged circumstances applies, which is fatal to their Petition. Regardless, a rehearing is not appropriate in this case because the Court did not overlook or misapprehend any material fact in the record or material question of law, not did it overlook, misapply, or fail to consider a statute, procedural rule, regulation, or decision directly controlling a dispositive issue in this case. All material facts and law were considered, and the correct decision was reached.

B. The Court Did Not Overlook Or Misapprehend The Applicability, Or Lack Thereof, Of The Policy In Reaching Its Decision

(1) The Court Did Not Overlook Or Misapprehend The Fact That The Existence Of The Policy Does Not Foreclose Nautilus's Unjust Enrichment Claim

Respondents assert that "[t]he Majority claimed the Policy did not address the certified question as the federal courts had already determined that the Policy did not apply." Respondents then attempt to argue that the Majority allegedly "overlooked or misapprehended the 9th Circuit's holding and the ability for it to consider the Policy." Petition at 2. Although unclear, the Petition seems to assert that this Court in some way questioned the validity and/or enforceability of the

Policy, as well as its applicability to the certified question, and therefore did not "consider it" when rendering its opinion. That is simply not accurate.

In the Opinion, the Court correctly stated that "[i]f neither the allegations of the complaint nor the facts known to the insurer show any possibility of coverage, then there is no duty to defend" and "the insurance policy simply does not apply." Opinion at 6-7. The Court also correctly noted that the lower federal courts determined that under the Policy, Nautilus never owed a duty to defend and in fact, there was never even "arguable or possible coverage." *Id.* at 7; *see Century Sur. Co. v. Andrew*, 134 Nev. 819, 822, 432 P.3d 180, 184 (2018). For that reason, the Court considered the issue and reached the correct conclusion that the Policy does not apply to the instant dispute. Opinion at 8. In reaching that conclusion, the Court explained that "the existence of that contract **does not foreclose an unjust enrichment claim**" (emphasis added). Opinion at 8.

The Ninth Circuit never restrained this Court by requiring that the Policy be utilized to answer the certified question. In fact, this Court made clear that it was not tasked with construing the Policy, nor was it confined by the Policy in answering the certified question.[2] There has been no misapprehension.

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[2] Even if the Court was required to consider specific Policy language, it stated as follows: "[W]hile we decline to consider specific insurance policy language that was not included in the certifying order, *see Fountainbleau,* 127 Nev. At 953, 267 P.3d at 793, any such policy language would not control. Nautilus did not have any contractual duty to defend respondents, so it could properly condition its provision of a defense on a reservation of its rights." Opinion at 13.

Even if the Court had considered *only* the Policy, as Respondents now request, the same decision would be reached. The lack of a reimbursement provision in the Policy does not mean that the right does not exist, but rather, the implied right of reimbursement renders the inclusion of an express provision unnecessary. *Buss v. Superior Court*, 939 P.2d 766, 776, n.13 (Cal. 1997). This Court has previously determined that a court must recognize implied terms in contracts that are necessary to carry out the intent of the parties and make the agreements effective. *See Mohr Park Manor, Inc. v. Mohr*, 83 Nev. 107, 113 424 P.2d 101, 106 (1967).

Accordingly, Respondents' argument is not only confounding, but ineffective. For that reason alone, the Court should reject the Petition.

(2) The Court Appropriately Determined That The Matter At Hand Is Governed By More Than The Policy

Respondents then make an overlapping argument in the Petition:

> The Majority cites and agrees that the law does not allow for an unjust enrichment claim if the parties had an express contract governing their relationship. In finding that Nautilus is entitled to reimbursement under unjust enrichment, the Majority overlooked or misapprehended that the Policy governs the relationship between the parties in regards to whether Nautilus is entitled to reimbursement for tendering the defense. Petition at 4.

This is not an accurate recitation of the Court's holding. In fact, the Court specifically held as follows: ". . .Respondents answer that 'unjust enrichment is not available when there is an express written contract' governing the same subject

matter. Respondents contend that the insurance policy, and only the insurance policy, governs this dispute. **We disagree.**" (internal citation omitted) (emphasis added). As stated above, this is because there was never a duty to defend under the Policy.

Respondents continue to assert the same arguments that they made in their Answering Brief. Specifically, Respondents state that ambiguities in the Policy should be construed against Nautilus and that only the Policy governs the relationship between Nautilus and Respondents. As Nautilus previously made clear, these arguments miss the point because (1) there is no provision discussing reimbursement for defending non-covered claims and so there can be no ambiguity, *see* Laura A. Foggan, *Insurer Recoupment of Defense Costs: Why the Restatement Adopts the Wrong Approach*, 68 Rutgers U.L.Rev 193 (2015) (discussion at 197), and (2) the existence of a contract between Nautilus and Respondents does not, in itself, prohibit the Court from allowing restitution under a theory of unjust enrichment. *See Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 283 P.3d 250 (2012).

The Court also made clear that Respondents' argument suggesting "that the policy's express language requires Nautilus to bear 'all expenses [it] incur[s]' for any claim it chooses to defend" carries no weight. Opinion at 12. In refuting this argument, the Court plainly stated that it disagreed because Nautilus was not

attempting to amend the contract, nor did the contract govern the defense in these circumstances. *Id.* Respondents are obviously upset with this determination, yet their dismay hardly means that the Court has overlooked or misapprehended anything warranting rehearing under Nevada's clear and strict standard.

Respondents further allege that Nautilus received the full benefit of the Policy, while Respondents were deprived of their bargain. Again, Respondents seek to take a second bite at arguments that the Majority already addressed and refuted. Specifically, the Court noted that "[a]ny benefit is shared by the policyholder. Requiring the policyholder to pay for the defense would not provide a windfall or double benefit to the insurer." Opinion at 10, n. 6. In reaching this conclusion, the Court did not overlook or misapprehend any material fact or question of law. Rehearing this matter because the Respondents are not content with the outcome is not consistent with Nevada Appellate Procedure, and the Petition should be rejected accordingly.

(3) The Court Aptly Applied The Restatement

Respondents allege that the Majority overlooked or misapprehended the applicability of the Restatement (Third) of Restitution & Unjust Enrichment, § 35 (2011) (the "Restatement"). Specifically, the Petition states that "[i]f the Policy applies, there cannot be a claim for unjust enrichment. There was nothing preventing Nautilus from including in the Policy (especially since the Policy was a

contract of adhesion) a provision that if it tendered a defense that later proved to not be covered under the Policy, it would have the right to reasonable reimbursement." Opinion at 7. Again though, the Court clearly apprehended that the lack of an explicit reimbursement provision – coupled with the federal court's confirmation of no coverage under the Policy – meant that the Policy did not apply. Since the Restatement provides reimbursement illustrations providing its reasoning for insurance coverage disputes similar to the present one, the Court was well within its apprehension in applying the Restatement to this matter. *See* Opinion 9-10.

Respondents seek to have it both ways. Respondents first argue that because Nautilus apparently "chose to exercise its right to defend," the Restatement does not apply. Petition at 8. Then, by recognizing the circumstances in which the Restatement is applicable – when it is impossible to obtain a legal determination "before the claimed performance is due" (Restatement cmt. A (Am. Law Inst. 2011)) – Respondents attempt to assert that Nautilus did not timely pursue its declaratory relief action, so the Restatement is again not applicable. *Id.* In one breath, Respondents seek to penalize Nautilus for tendering a defense, but in the other breath also penalize Nautilus for not seeking declaratory relief "immediately." Recognizing that these are nonsensical arguments, the Court specifically held that "[b]ecause an insurer risks unbounded liability if it loses the

coverage dispute after refusing to defend a suit, it is generally 'reasonable [for the insurer] to accede to the demand rather than to insist on an immediate test of the disputed obligation.'" Opinion at 10 (citation omitted).

In the Petition, Respondents strangely allege, for the first time, that Nautilus's "claim for unjust enrichment and restitution are barred by laches." Petition at 8. This argument appears nowhere in Respondents' Answering Brief and the Court was never asked to consider this argument. The Court cannot overlook or misapprehend an argument under NRAP 40(c)(2) that it was (1) never told to consider in the certifying order or (2) asked to consider by Respondents. Thus, this point should be ignored in its entirety.

For the reasons discussed above, it is clear that the Court aptly considered the applicability of the Restatement, as well as other potentially applicable alternatives, and thus cannot be said to have overlooked or misapprehended anything in applying the Restatement. Therefore, the Petition should be denied.

C. Respondents' Argument Regarding The Effect Of The Court's Decision On Nevada Citizens Or Businesses Is Inaccurate And Fails To Meet The Rehearing Standard Under NRAP 40(c)(2)

Respondents claim that the Court's decision erodes the duty to defend as "[t]he Majority overlooked or misapprehended that its holding allowed for insurers to receive the full benefit of the policies but left Nevada businesses and citizens with no recourse and with the bill." Petition at 10. In an attempt to support their

contention, Respondents reference the covenant of good faith and fair dealing.

Ironically, Respondents have no issue relying upon an implied Policy term – the covenant of good faith and fair dealing, which does not appear in the express terms of the insurance contract – when it suits their needs. *See e.g. Allstate Ins. Co. v. Miller*, 125 Nev. 300, 319, 212 P.3d 318, 330 (2009). Then, Respondents continue to assert the argument that Nautilus received countless benefits under the Policy, while the Respondents received none. As discussed above, the Court appropriately gave no weight to this argument.

More importantly though, the Court did not overlook or misapprehend anything in reaching its decision. Respondents' argument amounts to a contention that they are entitled to an unfettered defense from Nautilus under the Policy, but the Court aptly reasoned that "the duty to defend in Nevada has never been that expansive." Opinion at 15. The Court adequately considered Respondents' interests, as well as Nevada citizens' and businesses' interests, in holding as follows: "[T]he parties bargained for Nautilus to defend against certain kinds of allegations, and the federal courts have determined that Switzer's allegations were not of that kind. We do not erode the duty to defend by acknowledging its existing limits." *Id.*

Additionally, the Court may only consider a rehearing under the specific circumstances set forth in NRAP 40(c)(2). Respondents' argument regarding the

purported effect of the Court's holding on Nevada citizens and businesses does not meet any of these circumstances and should be ignored by the Court.

III. CONCLUSION

The arguments asserted by Respondents in the Petition are merely a reiteration of their arguments asserted in the Answering Brief and at the hearing. None of the contentions raised by Respondents meet the clear standard set for this Court to conduct a rehearing. The Court did not overlook or misapprehend a material fact in the record or a material question of law in the case, nor did it overlook, misapply or fail to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case. Therefore, the Court should deny the Petition and affirm its holding in the Opinion.

DATED: April 19, 2021 Selman Breitman LLP

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 40

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

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 40 because it is proportionally spaced, has a typeface of 14 points, contains 2,314 words, and does not exceed 10 pages.

3. I understand I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the NRAP.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of SELMAN BREITMAN LLP and on the 19th day of April, 2021, 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 on the attached service list.

/s/ Bonnie Kerkhoff Juarez
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