IN THE SUPREME COURT OF THE STATE OF NEVADA

NAUTILUS INSURANCE COMPANY,

Appellants,

vs.

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

Respondents.

Supreme Court Case No. 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

RESPONDENTS' ACCESS MEDICAL, LLC AND ROBERT CLARK WOOD, II PETITION FOR REHEARING

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I. INTRODUCTION

In its opinion, the Majority overlooked or misapprehended certain facts and law to reach the conclusion that Nautilus was entitled to reimbursement of attorneys' fees and costs through the doctrines of unjust enrichment and/or restitution.[1] While the Policy did not contain a right of reimbursement, it did contain clause stating Nautilus would pay all costs in any suit it ***chooses*** to defend. Considering this clause does not contradict the 9th Circuit's decision. The Majority overlooked or misapprehended that its holding gave Nautilus the full benefit of its bargain but failed to give Respondents the benefit of their bargain.

The Majority further overlooked or misapprehended that its decision only benefits insurance companies. It eliminates the safeguards the law has created to protect Nevada citizens and businesses from bad faith actions by insurers. By cutting out the policy in making its decision, the Majority abolished the protections available to insureds, such as good faith and fair dealing and the fiduciary relationship. Upon these grounds, Respondents respectfully request that this Court grant them rehearing according to NRAP 40.[2]

II. LEGAL ARGUMENT

A. STANDARDS FOR REHEARING

[1] The Court's March 11, 2021 opinion is attached as **Exhibit 1**.
[2]If the Court orders Nautilus to file an answer to this petition for rehearing, Respondents request the opportunity to file a reply. *See* NRAP 40(d).

NRAP 40(c)(2) provides that the Court may consider rehearing in the following circumstances: (A) When the court has overlooked or 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. *See, e.g., Am. Cas. Co. of Reading, Pa. v. Hotel and Rest. Employees and Bartenders Intern. Union Welfare Fund*, 113 Nev. 764, 766, 942 P.2d 172, 174 (1997). In the instant case, rehearing is necessary to allow the Court to consider several factual and legal points the majority has overlooked or misapprehended.

B. THE MAJORITY FURTHER OVERLOOKS OR MISAPPREHENDS THAT NAUTILUS' DEFENSE WAS PROVIDED AS A SPECIFIC TERM OF THE POLICY

i. The Majority Overlooks or Misapprehends Its Ability to Consider the Policy

The Majority claimed the Policy did not address the certified question as the federal courts had already determined that the Policy did not apply. The Majority overlooked or misapprehended the 9th Circuit's holding and the ability for it to consider the Policy. This Court stated in *Fontainbleau Las Vegas Holdings, LLC*:

> We are persuaded by the majority approach and hold that this court is bound by the facts as stated in the certification order and its attachment and that this court cannot make findings of fact in responding to a certified question. We are further convinced that while providing an appendix in a certification matter is not unusual and allows this court a greater understanding of the pending action, ***this court may not use information in the***

> ***appendix to contradict the certification order***. Because respondents' appendix has been filed solely to contradict the certification order and the complaint, we strike respondents' appendix in its entirety. We therefore direct the clerk of this court to strike the respondents' appendix.

Here, the arguments regarding the Policy do not contradict the certification order and, therefore, can be considered. Specifically, the certification order's only reference to the Policy states "where the insurance policy contains no reservation of rights [regarding reimbursement]." Respondent is not contesting or contradicting that point. There is no dispute that the Policy does not contain such a reservation of rights.

Rather, Respondent's position is that Policy provides an agreement between the parties that Nautilus would pay for ***any*** costs it incurs in any suit it ***chooses*** to defend.

"Contract interpretation ***is a question of law*** and, as long as ***no facts are in dispute***, this court reviews contract issues *de novo*, looking to the language of the agreement and the surrounding circumstances." *Redrock Valley Ranch, LLC v. Washoe Cty.*, 254 P.3d 641, 647–48 (Nev. 2011) (emphasis added).

The question of the Policy's applicability to the certification question is one of law, not of fact, and one that the Ninth Circuit did not address. There is no dispute that the Policy was enforceable as between the parties as the Ninth Circuit specifically relied on the plain language of the policy in making its determination.

Nautilus Ins. Co. v. Access Med., LLC, 780 Fed.Appx. 457, 459 (9th Cir. 2019). By looking at the express terms of the Policy, this Court would not be contradicting the federal courts. Rather, the Court would be following the findings already made by the Ninth Circuit, that the Policy is valid and enforceable.

This Court is not faced with the issue of determining the scope of the duty to defend. It is faced with the question of what rights to reimbursement Nautilus is entitled to when there is ***no express*** provision allowing for reimbursement when no duty to defend arose, but the insurer chose to tender defense anyways. Using the Policy, which the Ninth Circuit has already determined is valid and enforceable, to answer the certified question would not in any way contradict the federal courts' determinations. Rather, it would provide the answer the Ninth Circuit asked. Therefore, the Majority overlooked or misapprehended its ability to take the Policy into consideration and should so consider it.

ii. The Majority Overlooked or Misapprehended the Fact That the Policy Governs the Relationship Between the Parties

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.

"In Nevada, insurance policies are treated like other contracts, and thus, legal principles applicable to contracts generally are applicable to insurance policies." *Century Sur. Co. v. Andrew*, 432 P.3d 180, 183 (Nev. 2018). A valid, enforceable contract exists when the parties have mutually assented to material terms and there is consideration. *See Grisham v. Grisham*, 289 P.3d 230, 234–35 (Nev. 2012). "Furthermore, a court should not interpret a contract so as to make meaningless its provisions, and every word must be given effect if at all possible." *Mendenhall v. Tassinari*, 403 P.3d 364, 373 (Nev. 2017) (internal citations and quotations omitted). Any ambiguity should be construed against the drafter. *Id*.

Here, the pertinent parts of the policy state:

- "This policy contains all the agreements between ***you and us*** concerning the insurance afforded." Joint Appendix at 687 (emphasis added).
- We will have ***the right and*** duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'personal and advertising injury' to which this insurance does not apply. We may, ***at our discretion***, investigate any 'occurrence' and settle any claim or 'suit' that may result. Joint Appendix at 694 (emphasis added).
- "We will pay, with respect to any claim we investigate or settle, or any 'suit' against an insured we defend: a. ***All expenses we incur***." Joint Appendix at 696 (emphasis added).

The language outlined above plainly anticipated the situation at hand. The Policy expressly states it is the full agreement between the parties and defines the relationship between them. It further states that Nautilus "***will have the right…to***

defend", in addition to the duty to defend, any suit seeking damages against Respondents. JA at 694 (emphasis added). The Policy further states that at Nautilus' discretion, it has the right to "investigate any 'occurrence' and settle any claim or 'suit' that may result." JA at 694. The policy also places a burden on Respondents to not incur any expense without Nautilus' consent. In exchange, Nautilus promised to cover ***all expenses it incurred*** while exercising those rights.

The Policy unequivocally gives Nautilus the right to defend and control the litigation ***at its discretion***. Nautilus exercised its rights under the Policy. It chose to protect ***its*** interest by tendering the defense knowing full well that there was no express term allowing for reimbursement and with an express term that it was responsible for the expenses it incurred. It exercised its complete and total right to defend and to direct litigation during the time it tendered defense. It unmistakably received the benefit of the Policy.

The Majority overlooked or misapprehended the gravity of Nautilus' exercise of its rights under the Policy—***but for*** the Policy, Nautilus would not have had the right to provide and ***direct*** the defense for Respondents. Nautilus used the terms of the Policy as a shield for itself and wants to abandon them when it can't use it as sword. The Majority gave meaning to Nautilus' right to provide and direct the defense but left meaningless the clear terms that Nautilus was responsible for the costs of providing the defense.

The question before the Court is only before it because Nautilus exercised ***its rights*** under the Policy, not because the Policy did not ultimately apply. The effect of the Majority's ruling leaves the full benefit of the Policy to Nautilus (because it exercised the rights and benefits it received under the Policy) and deprives Respondents of the benefit of their bargain (stating that Nautilus will cover its expenses on cases it ***chooses*** to defend).

Not only is this contrary to contract principles generally, but it is specifically contrary to Nautilus' fiduciary role as an insurer. Accordingly, the Majority overlooked or misapprehended the Policy governs the relationship between the parties and should order a rehearing and find that the Policy does define the relationship between the parties.

iii. The Majority further overlooked or misapprehended the applicability the Restatement

The Majority relied heavily on Restatement (Third) of Restitution & Unjust Enrichment, § 35 (2011) (hereinafter "§ 35") in making its decision. If 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. It chose not to do so. It did just the opposite.

The Policy clearly states: "We will pay, with respect to any claim we investigate or settle, or any 'suit' against an insured we defend: a. ***All expenses we incur***." Joint Appendix at 696 (emphasis added). Thus, when it assumed the right to defend and control the litigation, it also agreed that it would cover all expenses it incurred in exercising this right.

Furthermore, § 35 characterizes its applicability as "overperformance". That simply is not the case here. Nautilus chose to exercise its right to defend and control the defense ***outside of its duty to defend***. Thus, § 35 does not apply as Nautilus exercised its rights under the Policy.

The comments § 35 also discuss how it only applies where it is impossible to obtain a legal determination "before the claimed performance is due." § 35 cmt. a. Respondents sent Nautilus numerous letters and it was approximately six (6) months ***after*** it agreed to tender defense before it actually performed. It had adequate time to seek declaratory relief in that time frame.

Both unjust enrichment and restitution are matters that are equitable principles. *See* Restatement (Third) of Restitution & Unjust Enrichment, § 1 (2011), cmt. b. Nautilus waited nine (9) months ***after*** accepting the tender of defense to seek declaratory relief before the federal courts. Instead of seeking the declaratory relief immediately, as it should have, Nautilus sat on its hands. Accordingly, its claim for unjust enrichment and restitution are barred by laches.

See Building and Const. Trades Council of Northern Nevada v. State ex rel. Public Works Bd., 836 P.2d 633, 636–37 (Nev. 1992) ("Laches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstance which would make the grant of relief to the delaying party inequitable.").

Nautilus kept the right to direct and defend to itself ***while incurring defense fees*** instead of seeking immediate declaratory relief. Therefore, the Majority overlooked or misapprehended the applicability of § 35 and should order a rehearing and find that §35 does not apply.

C. THE MAJORITY OVERLOOKED OR MISAPPREHENDED THAT ITS DECISION DOES NOT PROTECT NEVADA CITIZENS OR BUSINESS, JUST INSURANCE COMPANIES

The Majority claims it disagrees with the notion that its holding would erode the broad duty to defend, a policy that promotes the financial welfare of all Nevada businesses, both large and small, and individuals who purchase insurance. This holding merely helps insurance companies, the vast majority of which are based outside of Nevada.

The Majority reasoned that since the contract never covered the defense here, that it was not eroding the duty to defend because said duty is tied directly to the Policy itself. However, the Majority overlooked or misapprehended the fact that this holding gives the insurance companies ***the full benefit*** of the policies (e.g.

tendering a defense where it has the ***full right*** to direct the defense, decide how much fees it will incur, and ensure ***its*** interests are protected) while ignoring the benefit of the bargain to the insureds. The Majority's opinion further overlooked or misapprehended the effect this will have in insurer and insurance relationships.

The Court's decision overlooks the danger to insureds because its decision leaves no safeguards keeping an insurer from incurring massive litigation costs to protect its interest and shoving that off onto the insured under the Majority's holding. The answer cannot be good faith or a fiduciary relationship as those claims are created by the policy. *See Powers v. United Servs. Auto. Ass'n*, 962 P.2d 596, 602 (Nev. 1998) (holding that the fiduciary relationship between insurers and insureds is created through covenant of good faith and fair dealing).

The Majority overlooked and 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. Therefore, the Court should grant rehearing and hold Nautilus is not entitled reimbursement as the Policy controls.

III. CONCLUSION

For the foregoing reasons, the Court should grant a rehearing and find that Nautilus is not entitled to reimbursement under the Policy.

DATED this 25th day of March 2021.

BY: /s/ Jordan P. Schnitzer, Esq.
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this petition complies with the page- or type-volume limitations of NRAP 40 or 40A because it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 2,422 words; or

☒ does not exceed 10 pages.

DATED this 25th day of March 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of The Schnitzer Law Firm and on the 25th day of March 2021, a true and correct copy of the above and foregoing document was filed electronically and e-served on all registered parties to the Supreme Court's electronic filing system and by United States First-Class mail to all parties as listed below:

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