Case No. 84181

IN THE SUPREME COURT OF NEVADA

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QBE INSURANCE CORPORATION, a foreign corporation
Petitioner,

v.

THE EIGHT JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, CLARK COUNTY; THE HONORABLE JESSICA K. PETERSON, DISTRICT JUDGE,
Respondent

and

LAMPLIGHT VILLAGE @ CENTENNIAL SPRINGS HOMEOWNERS ASSOCATION,
Real Party in Interest.

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF REAL PARTY IN INTEREST'S ANSWER TO WRIT OF MANDAMUS

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Docket 84181 Document 2022-13889

NRAP 26.1 DISCLOSURE

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

United Policyholders ("UP") is a non-profit 501(c) (3) organization founded in 1991 that is an information resource and a voice for insurance consumers in Nevada and throughout the United States. UP does not have a parent company and there is no publicly held company that owns 10% or more of UP.

UP did not appear in the underlying action and has submitted to this Court a motion for leave to file this brief. UP is represented in the pending appeal, *as amicus curiae*, by William C. Jeanney of Bradley, Drendel & Jeanney.

DATED May 2, 2022.

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SUMMARY OF THE ARGUMENT AND STATEMENT OF FACTS

General liability insurance policies are composed of two distinct promises. The first is the duty to indemnify, which is the insurance company's obligation to pay covered settlements and judgments that its policyholder owes to third parties.

The second is the "duty to defend," which is the insurance company's obligation to defend its insured against claims brought by third parties that potentially trigger the duty to indemnify. The duty to defend is typically provided in a standard policy term: "We will have the right and duty to defend the insured against any 'suit' seeking [covered] damages. We may at our discretion investigate any claim or 'occurrence' and settle any claim or 'suit' that may result." 20-129 Appleman on Insurance Law & Practice Archive § 129.2 (2nd 2011). The language in the policy in this case is in keeping with the standard language. [1P.App. 173].

In the present matter, petitioner QBE Insurance Corporation ("QBE") undertook the defense of its insured Lamplight Village @ Centennial Springs Homeowners Association ("Lamplight") [1P.App. 4, 30] in a tort lawsuit brought by a child who suffered extensive brain injuries after a swing set managed by Lamplight catastrophically failed. [4P.App. 758] QBE declined multiple times to resolve the lawsuit within Lamplight's $2 million policy limits, including for roughly $300,000 [3P.App. 653-55] relatively early on and $2 million [4P.App. 878-79] near to trial. The other tort defendants including the swing set

manufacturer and the swing set installer settled before trial for their respective policy limits of $2 million and $1 million. [4P.App. 881-82, 2P.App. 455] Only QBE forced its insured to go through trial, which resulted in an amended judgment of well over $20 million against Lamplight. [5P.App. 966-68]

QBE decided to appeal the trial verdict but refused to post a supersedeas bond to protect Lamplight from liens and garnishment during the pendency of appeal. [5P.App. 1067, 1077-78] Faced with the threat of financial ruin, Lamplight negotiated with the tort plaintiff to promise not to enforce judgment against Lamplight's assets or its members' real property, and in return Lamplight dismissed the appeal and sued QBE. [5P.App. 1024-26, 2P.App. 426] To this, QBE cried foul, arguing the dismissal of the appeal violated Lamplight's duty to cooperate by unfairly foreclosing any possible overturning of the trial verdict. [1P.App. 89-90]

The issue presented by this petition for writ of mandamus is whether an insurer who has repeatedly breached the duty to defend may still require its insured to "cooperate" in the defense of a lawsuit on appeal when doing so opens the insured to the threat of personal liability and economic ruin. The answer is no, and the Court should not grant QBE's extraordinary writ. (This brief does not address the inappropriateness of QBE's request for writ relief besides to note that it is generally not the proper vehicle for challenging a denial of summary judgment.)

ARGUMENT

A. Insurance Companies That Provide a Legal Defense and Control Litigation Owe Special Heightened Duties to Their Insured's.

In Nevada, insurance companies must treat their insureds with a special confidence. *Ainsworth v. Combined Ins. Co. of America*, 104 Nev. 587, 592, 763 P.2d 673, 676 (1988), citation omitted; *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1258 n. 3, 969 P.2d 949, 956 n.3 (1998).

This special confidence akin to a fiduciary duty requires insurers to make the interest of their insureds at minimum equal to their own and "requires that the insurer adequately protect the insured's interest." *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 311, 212 P.3d 318, 326 (2009), citing *Powers v. United Servs. Auto Ass'n*, 114 Nev. 690, 701-02, 969 P.2d 596, 603 (1998), modified on other grounds, 115 Nev. 38, 979 P.2d 1286 (1999).

Additional special duties attach to insurers who undertake the duty to defend. When an insurer undertakes the duty to defend without explicitly reserving the right to later deny coverage, it is typically given the right to control litigation as well as settlement negotiations on behalf of the insured. This results in significant powers that benefit the insurer including the ability to appoint defense counsel (who often conduct repeat work for insurance companies and as a result offer significantly discounted rates), to direct legal strategy, and, critically, to decide whether and when to settle the case.

But with great power comes great responsibility. As this Court has recognized, an insurer's right to control litigation as well as settlement discussions "creates additional duties for the insurer . . . [including] the duty of good faith and fair dealing during negotiations." *Miller*, 125 Nev. at 309, 212 P.3d at 325-326. The duty of good faith and fair dealing, particularly during settlement negotiations, is important because insurance companies in control of litigation are often incentivized to make decisions that are not in the best interest of their policyholder.

It is nearly always in the interest of the insured to settle a case with a third-party tort-claimant for an amount less than or equal to policy limits. But for the insurer, particularly if the demanded settlement amount is at or near policy limits, trial may seem like a better option. If the verdict ends up being less than the settlement demand, then the insurer has saved money. But if the verdict is greater than the settlement demand, the excess amount is born by the policyholder to the extent it exceeds policy limits.

B. Insurers Are Liable for Excess Judgments That Result From a Breach of the Duty to Defend.

Pursuant to the special duties discussed above, Nevada makes insurers liable for judgments in excess of policy limits that result from a breach of the duty to defend. *See Century Sur. Co. v. Andrew*, 134 Nev. 819, 826, 432 P.3d 180, 186 (2018) ("an insured may recover any damages consequential to the insurer's breach

of its duty to defend" and "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.").

This Court recognizes that an insurer can breach the duty to defend in numerous ways, such as by: rejecting an offer to settle within policy limits once liability has become reasonably clear, *see Cromer v. Bristol W. Ins. Group*, No. 63385, 131 Nev. 1268, 2015 WL 4611934, at *1 (2015) (unpublished disposition) (citing NRS 686A.310(1)(e)); failing to adequately inform the insured of an opportunity to settle even when the settlement demand exceeded policy limits, *see Miller*, 125 Nev. at 313, 212 P.3d at 327; failing to provide any defense at all, *see Century*, 134 Nev. at 825, 432 P.3d at 186; or failing to ensure retained counsel continued to defend a case after initially answering a complaint, *id.* at 825 (citing *Delatorre v. Safeway Ins. Co.*, 370 Ill.Dec. 880, 898 N.E.2d 268, 274 (2013).

As shown by the above examples, an insurance company's fiduciary-like and good faith duties are wide-ranging and apply to all aspects of a legal defense. They are not cabined to a single point in time such as appointment of counsel or evaluation of a settlement demand. Rather, an insurance company must continually prioritize and adequately protect its insured's interests.

In the present case, QBE does not dispute its liability for excess judgment, but rather appears to argue that its breaches are not relevant to Lamplight's

purported breach of the duty to cooperate. Ignoring QBE's prior breaches is wrong, both practically and as a matter of law.

C. Material Breach of the Duty to Defend by an Insurer Excuses the Insured from Its Ongoing Duty to Cooperate.

First, as a practical matter, there would not have been an over $20 million excess judgment if QBE had simply settled the case within policy limits (as the other tort defendants did). The prospect of challenging a massive excess judgment on appeal may be business as usual for an insurance company, but that is not the case for most people or businesses. Indeed, after suffering a huge trial loss, particularly if all other defendants settled within policy limits before trial, it is not reasonable to expect an insured to trust that its carrier would suddenly start prioritizing the insured's best interests on appeal.

Moreover, where a carrier truly wants to pursue an appeal, it posts a supersedeas bond in the full amount necessary to delay payment of the trial judgment until the appeal is over. Though perhaps not included in explicit contractual terms, the fiduciary-like and good faith duties of an insurer require it to adequately protect its insured throughout the entirety of a legal defense, which includes taking the minimum action necessary to prevent its policyholders' personal assets from being seized during the pendency of appeal. If not willing to post the supersedeas bond, at the very least an insurer should provide some other

form of binding assurance that it will protect its insured's personal assets against any attempt by the underlying tort plaintiff to collect on the trial judgment.

Indeed, if provided adequate protection against personal liability for excess judgment, it is hard to imagine that any policyholder would dismiss an appeal against the wishes of a carrier that has undertaken the duty to defend and therefore holds the right to control litigation. Doing so would present no economic benefit to the insured and would put the right to indemnification at risk.

Second, as a matter of law, QBE's prior breaches of the duty to settle excused Lamplight from any further cooperation with QBE.

Insurance policies are contracts and are therefore generally subject to the same principles of law as other contracts. *See United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, 120 Nev. 678, 684, 99 P.3d 1153, 1156-57 (2004). It is black letter law that a party's material breach of a contract discharges the non-breaching party's duty to perform and gives rise to a claim for damages. *Cain v. Price*, 134 Nev. 193, 196–97, 415 P.3d 25, 29 (2018) ("the injured party is both excused from its contractual obligation and entitled to seek damages for the other party's breach") (quotations and citations omitted).

Accordingly, an insurer's breach of its duty to defend by repeated failure to settle within policy limits correspondingly excuses the policyholder from its duty to cooperate. This means that after QBE's first refusal to settle within policy limits,

Lamplight could have entered into a stipulated judgment with the underlying tort plaintiff and moved to enforce that settlement against QBE. Lamplight's decision to let QBE continue to control litigation after QBE's initial breach does not excuse QBE's breach nor does it prohibit Lamplight from later taking matters into its own hands to protect its personal assets when necessary.

Even California – which unlike the majority of states requires there to be a trial judgment in excess of policy limits in order for an insured to maintain a cause of action for bad faith refusal to settle – allows an insured to protect itself against the threat of personal liability when the insurer breaches its obligation of good faith settlement. *See Critz v. Farmers Ins. Group*, 41 Cal. Rptr. 401, 408 (Ct. App. 1964), disapproved of on other grounds by *Crisci v. Sec. Ins. Co. of New Haven, Conn.*, 66 Cal. 2d 425 (1967). As stated by the California Supreme Court: an insured "need not indulge in financial masochism . . . [w]hatever may be his obligation to the carrier, it does not demand that he bare his breast to the continued danger of personal liability." *Id.* Moreover, "[a]n insurer may be estopped to claim breach of a cooperation clause which has been induced by its own action." *Id.*

Along with the failure to settle, QBE's refusal to post a supersedeas bond constituted an additional breach of its fiduciary-like and good faith duties. QBE has suggested that since no reservation of rights was issued to Lamplight, it could continue to require Lamplight to cooperate in the appeal even though QBE's

wrongful conduct caused the excess verdict and judgment. This argument is inconsistent with general rules of contract and QBE's fiduciary-like and good faith duties particularly given the refusal to post a bond. An insurer that causes an excess verdict must still adequately protect its insured's interest when on appeal.

Furthermore, a liability insurer can still violate its duty of good faith and fair dealing even if it ultimately covers an insured's losses if the insured suffers injury in the interim through an inadequately provided legal defense. "[I]t does not matter for purposes of liability under the implied covenant that an insurer avoids liability for breach of contract by finally making good on the policy after lengthy and unnecessary delay that injures an insured, or, as is alleged here, after taking some action concerning coverage that injures an insured." *Am. Med. Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 244 F.3d 715, 720 (9th Cir. 2001). Just so here. The imminent threat of Lamplight's personal assets being seized due to QBE's failure to post a supersedeas bond constitutes the type of interim damage contemplated by the court in *Am. Med.* that results in a violation of the covenant of good faith and fair dealing implicit in a liability insurer's duty to defend.

When an insurer fails to settle within policy limits, the insured is allowed to assign its cause of action in return for agreement from the tort plaintiff not to execute. This is the baseline rule that operates in the absence of appeals. Applied to the present matter, QBE breached its duty of good faith and fair dealing resulting

in an excess verdict and judgment and as a result, Lamplight's causes of action against QBE accrued no later than the entry of the judgment.

Lamplight then accrued additional causes of action when QBE chose not to post the supersedeas bond. In so doing, QBE sought to impose the financial consequences of its poor decisions on its insured. When there are appeals, tort plaintiffs can be expected to execute on judgments. In such a case, the insured must be given the ability to protect its personal assets if its insurer fails to do so.

As illustrated by *Critz,* an insurer should not be allowed to weaponize the duty to cooperate and in so doing force its insured to engage in financial masochism. QBE acknowledges that a breach of the duty to settle allows an insured to enter into a non-collusive agreement with a plaintiff to resolve an underlying lawsuit, but at the same time appears to argue that the insured continues to owe a complete duty to cooperate in the defense of a case during appeal even after an excess judgment has been entered. This gives an insurance company a luxury that no other contracting party has – the right to commit a material breach while at the same time insisting that the other party perform under a contract. This position is particularly hard on policyholders who must rely on the good faith of their insurer for legal defense and have limited means of protecting their own interest. The rule advocated by QBE would require a solvent defendant to pay the excess judgment and a poor defendant to declare bankruptcy.

Policyholders in Lamplight's position must already tread a narrow and precarious path. Holding them to exceedingly high standards regarding self-help on appeal will incentivize insurance companies to ratchet up the pressure on their insureds (for instance, by never posting supersedeas bonds) knowing that a misstep by the insured will relieve the carrier of liability.

D. The Duty to Defend is a Critical Component of Liability Insurance Coverage That Must Be Safeguarded.

When considering the above arguments and authority, the Court should keep in mind the importance of upholding and promoting the heightened fiduciary-like and good faith duties of liability insurers that have undertaken the duty to defend.

This Court has often recognized the special importance of the duty to defend. "The duty to defend is a valuable service paid for by the insured and one of the principal benefits of the liability insurance policy." *Century*, 134 Nev. at 822, 432 P.3d at 183 quoting *Woo v. Fireman's Fund. Ins. Co.*, 161 Wash.2d 43, 164 P.3d 454, 459-60 (2007). "The insured pays a premium for the expectation that the insurer will abide by its duty to defend." *Id.* Stated similarly by the California Supreme Court: "The insured's desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to

obtain indemnity for possible liability." *Montrose Chem. Corp. v. Superior Court*, 6 Cal. 4th 287, 295-96 (1993).

People who want to drive cars, operate businesses, or borrow money to purchase homes are almost always economically required, and are very often legally required, to buy insurance. Once acquired, insurance provides peace of mind for policyholders to engage in all manner of productive activity, such as operating a business or driving a car, knowing that they will be protected from unforeseen calamities to their own person/property as well calamities suffered by others for which they may become liable.

After accidents occur, the prompt resolution of insurance claims is critical to fulfilling the economic and social good provided by a well-functioning private insurance market. When administered correctly, insurance programs efficiently spread the risk of unexpected losses by providing a quick and easy source of funds to injured entities, whether policyholders or (in the liability context) third parties. Relatedly, the provision of a good legal defense against third party claims protects insureds against unfair lawsuits and at the same time allows incentivizes the settlement of cases when liability is reasonably clear.

When liability is clear, the prompt payment of insurance claims accomplishes two important goals. First, it fulfills an insurance company's promise of protection to individual insureds. Second, it staves off a multitude of further

harms which may result from the economic dislocation and distress caused by the underlying loss. Downstream harms caused by non-payment of insurance claims are not limited to the individual policyholder and can include: an individual being unable to lead as productive a life due losing their means of transportation or roof to their house; a business being forced into bankruptcy due to the inability to pay a large tort judgment to a third party; or that injured third party being forced to use savings or rely on government assistance to cover medical bills that the tortfeasor's insurer should have covered.

When coverage is not provided the important societal functions of insurance are lost. This leaves the government, charitable institutions, and private individuals responsible for coming up with the money that otherwise should have been provided by the insurer. Even when an insurance company ultimately covers a loss, unreasonably delayed coverage can result in many of the same economic dislocations. While an insurance company reaps the time-value-of-money benefit from slow-rolling a payout, the insured (and in some cases the third-party tort claimant) suffers additional harm by not receiving critical funds at the needed time. Similarly, in the context of the duty to defend, an inadequate defense provided by an insurance company can result in negative outcomes that are sometimes worse than if no defense had been provided.

The outcome of the case at hand is perfect illustration of the above policy considerations. If QBE had provided an adequate defense by agreeing to any one of the multiple demands to settle the case within policy limits, the underlying tort lawsuits against Lamplight would have been resolved years ago for an amount significantly less than what resulted at trial.

In this alternative world, the tort victim would have received fair compensation in a timely fashion. Lamplight would have been able to continue operating its business without the ongoing threat of financial ruin. The litigants and court system would have avoided a costly tort lawsuit that included extensive expert discovery. There would not have been a punitive damages jury verdict and an award that was an order of magnitude greater than the amount formerly demanded by the tort victim to settle the matter before trial. And Lamplight and QBE would have avoided the present drawn-out derivative insurance litigation. Put simply, the proper entities would have been promptly compensated, and all parties would have been able to move on with their lives.

Because of QBE's breaches, the underlying tort litigation was not efficiently resolved. QBE should not be allowed now to escape liability for its prior self-interested decisions about, and mishandling of, the underlying claim.

CONCLUSION

QBE's petition should be denied.

DATED May 2, 2022.

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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 3428 words.

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

DATED May 2, 2022.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 31, I hereby certify that I electronically filed and served a true and correct copy of the foregoing **BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF REAL PARTY IN INTEREST** via eFlex Program, which will send a notice of electronic filing to the following:

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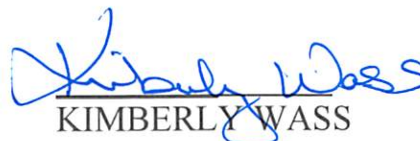
DATED May 2, 2022.



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