IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

21st CENTURY INSURANCE COMPANY, Defendant and Petitioner, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO Respondent. ESTATE OF CORY ALLEN DRISCOLL and CY TAPIA, Plaintiffs and Real Parties in Interest.	4th Civ. No. E062244 San Bernardino Superior Court, Case No. CIVDS 1014138 Hon. Brian S. McCarville Department S30J Telephone: (909) 708-8714

REPLY TO RETURN TO PETITION FOR WRIT OF MANDATE, ETC.; MEMORANDUM OF POINTS AND AUTHORITIES

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INTRODUCTION

The return does not answer the three questions that this Court posed in its November 18, 2014, order:

1. "[T]he effect on any additional duty to defend under the disputed policies of Cy Tapia's deposition testimony to the effect that the vehicle involved in the accident was available for his regular use";

2. "[I]f the duty to defend under the aunt's and grandmother's policies no longer existed at the time of the settlement, whether *Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718 applies"; and

3. "[W]hether the copies of the insurance policies in question, authenticated as coming from petitioner's files, were sufficient to prove the language of the policies in the absence of any showing that they are not correct copies[.]"

The return has *no* response to the first two questions. As to the third, it obfuscates and speculates. It goes on at length casting aspersions about exemplar copies of the aunt's and grandmother's insurance policies that 21st Century authenticated as coming from its files, but never comes to grips with the fact that the *only evidence* was that they were true and correct copies of the policies actually issued.

The return's treatment of the Court's authentication question is emblematic of its overall approach: It is long-winded and tries to achieve its ends by obfuscation rather than any force of logic; it is opposition by distraction and focus on irrelevancies.

We do not wish to burden the Court with unnecessary repetition, but given the return's attempt at distraction it is helpful to focus on the essential and critical facts here:

- The return *admits* that 21st Century was defending its insured, Tapia, when he settled. (Return 10 [¶ 8, admitting Petition ¶ 8].)

- The return *admits* that Tapia settled without 21st Century's consent and over its objection and opposition. (Return 14 [¶ 23, admitting Petition ¶ 23].)

- *Hamilton* is clear: A carrier is not liable for a settlement its insured makes over its objection when the carrier is defending the insured.

- To the extent that *Risely v. Interinsurance Exchange of the Automobile Club* (2010) 183 Cal.App.4th 196, creates an exception to *Hamilton*, it (1) is wrong as inconsistent with *Hamilton*; and (2) doesn't apply here, as the exception is limited to a failure to defend under a policy with a greater policy limit, not, as here, policies with much lower policy limits.

- *Risely* would not apply in any event, as there was no failure to defend under the aunt's or grandmother's policy, since no defense was owed. The return proffers *no argument* suggesting there was coverage under either the aunt's or grandmother's policy if the policy language is as 21st Century established. 21st Century's *evidence* on the subject of the policy language, in fact, issued is uncontroverted. Making voluntary indemnity payments in an attempt to dispel a potential dispute does not create a duty to defend where there never was one.

The writ should be issued as prayed for.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PLAINTIFFS ADMIT THAT TAPIA WAS BEING DEFENDED. UNDER *HAMILTON*, A CARRIER, EVEN ONE THAT UNREASONABLY DECLINES SETTLEMENT, DOES NOT CAUSE AND IS NOT LIABLE FOR THE INSURED'S SELF-INFLICTED JUDGMENT LIABILITY WHEN A DEFENDED INSURED SETTLES WITHOUT THE CARRIER'S CONSENT.

A. As 21st Century Was Defending Its Insured, *Hamilton* Applies.

The return admits that 21st Century defended the insured, Tapia, in the underlying action. (Return 10 [¶ 8, admitting Petition ¶ 8, which states, "21st Century acknowledged coverage and defended Tapia under the McGuire policy"].) That brings this case squarely under the holding in *Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718.

Under *Hamilton*, an insured who is being defended cannot settle without the carrier's consent. Why? Because unless and until there is a litigated judgment, one does not and cannot know whether the carrier's settlement conduct (even if it was derelict in one or more respects, e.g., refusing a reasonable settlement offer) caused the insured any damage. (See Petition 17-19, 25-32.) When you can't prove causation, you can't win your case. When the plaintiff can't win, the defendant is entitled to summary judgment.

It doesn't matter whether the defense here was or should have been provided under the additional policies as well or whether the $150,000 settlement offer would have resolved the entire underlying litigation or only Cory Driscoll's claim. *Hamilton* precludes unauthorized settlement even where the carrier has acted unreasonably. (*Hamilton v. Maryland Casualty Co.*, *supra*, 27 Cal.4th at p. 731.) That makes an irrelevancy of plaintiffs' claim that 21st Century forwent a $150,000 settlement offer (whether or not that offer, in fact, would have resolved the entire underlying litigation). (Return 15-18, 45-52; see Petition 12.) *Hamilton*'s point is that whether the defending carrier has acted reasonably or not regarding settlement, the hand has to be played out at trial before there is causation. (*Hamilton*, *supra*, 27 Cal.4th at pp. 722, 726, 731.)

The return's effort to identify other supposed wrongdoing on 21st Century's part does not change the calculus. Much of what the return argues is simply that 21st Century stood in the way of an early settlement. But that is just a recasting of the *Hamilton* failure-to-accept-a-reasonable-settlement-offer circumstance.

The other claim is 21st Century's supposed failure to provide Tapia with independent *Cumis*/Civil Code section 2860 counsel. (Return 53-54.) But that does and should affect only whether 21st Century could ultimately hold on to its reserved rights. The facts remain *undisputed* that 21st Century was defending Tapia and that Tapia settled without 21st Century's consent. In any event, Civil Code section 2860 was *not* brought into play by the possibility (even likelihood) of a judgment exceeding policy limits. That is not a conflict triggering a right to

independent counsel: "*No conflict of interest shall be . . . deemed to exist solely because an insured is sued for an amount in excess of the insurance policy limits.*" (Civ. Code, § 2860, subd. (b).)

B. *Risely v. Interinsurance Exchange of the Automobile Club* Does Not Apply And, In Any Event, Is Wrong.

As expected, the return relies on *Risely v. Interinsurance Exchange of the Automobile Club* (2010) 183 Cal.App.4th 196, which held that an insurer's defense under one policy but failure to defend under another policy with a much greater limit is equivalent to no defense at all. (See Return 24, 40-42.) But as previously explained, *Risely* is both factually distinguishable from the present case (see Petition 33-34) and simply wrong (see Petition 34-38). The return does *not* dispute that *Risely* is distinguishable because the carrier there was not defending under a policy with much higher limits, and here the claimed other policies had much lower limits (even when combined).

The return, like *Risely*, relies on *Wint v. Fidelity & Casualty Co.* (1973) 9 Cal.3d 257, 263. (Return 40-41; see *Risely*, *supra*, 183 Cal.App.4th at p. 211.) But as explained in the petition, *Wint* doesn't help plaintiffs' position because (a) there the only defending carrier settled and *stopped defending*, so there was no ongoing defense (unlike here), and (b) *Wint* predates *Hamilton*, and accordingly, to the extent inconsistent, is superseded by it. (Petition 35-36.) *Risely*'s reliance on *Wint* is unjustified. Even on its own facts, *Risely* is at odds with *Hamilton*. But *Risely* is irrelevant, by its own terms, to the facts here.

C. Objecting To A Settlement Is Not Participating In It.

Finally, the return tries to escape *Hamilton* by insisting that material factual issues remain as to whether 21st Century participated in the settlement. (Return 44-45.) Plaintiffs are grasping at straws. Imaginary straws, at that. Plaintiffs *admit* paragraph 23 of the petition, which states that "21st Century's objection/lack of consent was clear and unmistakable" and quotes 21st Century's letter informing Tapia that 21st Century adamantly opposed his accepting the CCP 998 offers. (Return 14 ["Plaintiffs admit the allegations in paragraph 23"]; see Petition 13.) That is not "participating" in a settlement. Under plaintiffs' construct, had 21st Century remained silent, it would not have participated in the settlement, but by voicing its objections it did. That makes no sense.

Nor did 21st Century "participate" because it appointed and paid defense counsel. Defense counsel, even defense counsel retained by the carrier, doesn't speak for the carrier where the carrier expressly opposes a settlement that defense counsel recommends. (See Petition 29-31.)

* * *

Bottom line: *Hamilton* is clear. 21st Century was providing Tapia a defense in the underlying action. When he settled without 21st Century's consent (indeed, over its express objection), that was his sole responsibility. 21st Century, accordingly, is entitled to judgment.

II. PLAINTIFFS' ACTION FAILS AS A MATTER OF LAW BECAUSE 21st CENTURY SATISFIED ITS DEFENSE OBLIGATIONS UNDER THE ONLY APPLICABLE INSURANCE POLICY.

As just discussed, it really doesn't matter whether 21st Century owed a defense under the aunt's (Leith) or grandmother's (Velasquez) policies, because it defended its insured, Tapia, under the sister's (McGuire) policy and *Hamilton* precluded him, while being defended, from settling without 21st Century's consent. But the policy language established by the uncontradicted evidence and the undisputed facts here are clear that 21st Century did not even owe its insured Tapia a defense under the Leith or Velasquez policies. (See Petition 39-45.)

A. The Language In The Two Other Policies Is Established By Uncontradicted Evidence.

Plaintiffs speculate at length that the policy language in the Leith or Velasquez policies might be other than what the uncontradicted evidence establishes. (Return 2-3, 31-32.) What the return does *not* say is important. It *never* disputes that *if* the policy language says what 21st Century asserts it does, then there is no coverage. It does *not* dispute that Tapia regularly used the vehicle or that as such his use of that vehicle was excluded from coverage. The petition demonstrated in detail why there can be no coverage under the aunt's or grandmother's policies. (Petition 40-42.) In a nutshell, Tapia isn't a named insured under either policy; neither policy lists as a covered vehicle the Ford Ranger that he drove in the accident; it is beyond dispute at this point (as, indeed, this Court noted in its November 18 order)

that the Ford Ranger was available for his regular use; and in order for there to be coverage under either policy, it had to *not* be available for his regular use. The return does attempt to distract by asserting that the aunt and grandmother may *also* have used the vehicle, but that does not negate the fact that Tapia regularly used it.

Rather, the return's sole attack is to claim that 21st Century's *evidence* is insufficient to prove the policy terms. It does so, again, by obfuscation. 21st Century offered *evidence* of the actual language employed by the policies as issued. (1 Exh. 126-127; see Petition 39-40.) That evidence was of exact policy language found in the specific policy files. That it was by exemplar language did not make it any less exacting. The same declarant testified to the same thing in his deposition. (4 Exh. 887-890.) This is precisely how the Supreme Court has said policy language can be proven. (See Petition 5, 20, 40, discussing *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1069-1070.)

Plaintiffs stress that because policy language can change over time, one can never know beyond a shadow of a doubt whether the claim-file exemplars are accurate. (Return 2-3, 12, 20, 31-33.) But that is not the standard. It isn't countervailing evidence, either; it's mere speculation and innuendo. (E.g., *Johnson v. Alameda County Medical Center* (2012) 205 Cal.App.4th 521, 528 [speculation insufficient to defeat summary judgment]; *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 421 [same].)

Only the McGuire policy provided potential coverage, and 21st Century defended and otherwise fully discharged its obligations under that policy. (See Petition 42-43.)

B. 21st Century's Volunteered Payments Did Not Create A Duty To Defend Where None Otherwise Existed.

The return insists at length that 21st Century must have owed defense and coverage under Leith and Velasquez policies because it paid the indemnity limits of those policies toward the judgment. (Return 3-6, 31-35.) Hogwash. The maxims of jurisprudence do not include "No good deed goes unpunished." That the carrier tried to resolve matters by offering moneys neither concedes coverage nor creates any duty to defend. No case holds that a carrier can create a duty to defend by after the fact trying to mitigate claims. Indeed, any such rule would be exceedingly bad precedent, discouraging carriers from attempting to defuse situations. Further, no such rule could be justified in circumstances such as here where the carrier has made clear its position that there is no coverage.

CONCLUSION

Hamilton controls: Tapia having agreed to entry of judgment against him, plaintiffs cannot prove causation. The Leith and Velasquez policies do not afford a way around *Hamilton*, because (1) they do not provide coverage or a duty to defend, (2) 21st Century was defending Tapia already and (3) with their far lesser policy limits they do not even fall within the *Risely* exception, an exception which itself is unjustified.

The Court should grant the petition and direct the trial court to vacate its order denying summary judgment and to instead enter summary judgment in 21st Century's favor.

DATED: January 5, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rules 8.204(c) and 8.486(a)(6), I certify that this **REPLY TO PETITION FOR WRIT OF MANDATE, ETC.** contains 2,142 words, not including the cover, the certification of interested parties, the tables of contents and authorities, the caption page, the verification page, the signature blocks, the supporting Exhibits, or this Certification page.

DATED: January 5, 2015

Feris M. Greenberger

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On January 5, 2015, I served the foregoing document described as: **REPLY TO PETITION FOR WRIT OF MANDATE, ETC.** on the parties in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

William D. Shapiro, Esq. Robinson Calcagnie Robinson Shapiro Davis, Inc. 893 East Brier Drive San Bernardino, California 92408 **[Attorney for Real Parties In Interest]**	Clerk to the Hon. Brian S. McCarville San Bernardino Superior Court, San Bernardino Justice Center 247 West Third Street San Bernardino, California 92415 **[Case No. CIVDS 1014138]**

(X) BY FED EX: I caused such envelope to be delivered by the Federal Express delivery service to the offices of the addressees.

Executed on January 5, 2015, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Pauletta Herndon