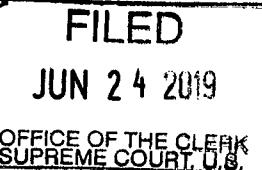


19-5816

NO. 19-

ORIGINAL

In the
Supreme Court of the United States



GABRIEL A. MAALOUF,

Petitioner,

v.

PRAETORIAN INSURANCE COMPANY,
a Foreign Corporation,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Nevada

**MOTION TO PROCEED IN FORMA PAUPERIS AND
PETITION FOR WRIT OF CERTIORARI**

GABRIEL MAALOUF
PETITIONER PRO SE
3516 EDISON AVE.
LAS VEGAS, NV 89121
(702) 523-2634

AUGUST 29, 2019



QUESTIONS PRESENTED

Petitioner seeks the reinstatement of his Complaint against the Respondent for negligence, breach of contract, and bad faith, and presents this honorable Court the following questions for review:

1. Should financial liability have reverted back to the motorist's uninsured/underinsured motorist policy Praetorian Insurance Company, after the Tortfeasor became uninsured due to the bankruptcy of his primary auto insurance company, American Sterling Insurance?
2. Should the Nevada courts have permitted the Nevada Insurance Guarantee Association (NIGA) to intervene on the Tortfeasors' behalf when all coverage options had not been exhausted?

LIST OF PROCEEDINGS

Nevada Supreme Court

No. 73640

Gabriel A. Maalouf, an individual, Appellant, v. Praetorian Insurance Company, a Foreign Corporation, Respondent.

Decision Date: January 25, 2019

Nevada Court of Appeals

No. 73640-COA

Gabriel A. Maalouf, an individual, Appellant, v. Praetorian Insurance Company, a Foreign Corporation, Respondent.

Decision Date: November 7, 2018

District Court, Clark County Nevada

Case No. A-16-735080-C

Gabriel A. Maalouf, an individual, and Mariar Corporation, an Nevada Corporation, dba Fairway Rent a Car System, Plaintiffs, v. Praetorian Insurance Company, a Foreign Corporation, and DOES I through V, Inclusive, Defendants.

Decision Date: July 6, 2017

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OPINIONS BELOW

The Order of the Supreme Court of Nevada Denying a Petition for Review dated January 25, 2019 is attached to this petition at App.1a. The Order of Affirmance of the Nevada Court of Appeals dated November 7, 2018 is attached to this petition at App.2a. The Order Granting Defendant's Motion for Summary Judgment dated July 6, 2017 (electronically filed July 11, 2017) is attached to this petition at App.8a.



JURISDICTION

On January 25, 2019, the Supreme Court of Nevada denied the Petitioner's review of the Nevada Court of Appeals decision (App.1a). This Court has jurisdiction under 28 U.S.C. § 1257(a) .



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional and statutory provisions are included in the appendix at App.18a:

- U.S. Const. amend. XIV
- 28 U.S.C. § 1257
- Chapter 687A—Insurance Guaranty Association

STATEMENT OF THE CASE

A. Historical Background of Claims

Briefly the accident occurred on August 3, 2008 in Las Vegas, NV. At that time Petitioner was driving one of Mariar Corporation's rental cars. The Petitioner's vehicle was struck by a car driven by Efrain Loza, who received a citation for Driving under the Influence of Intoxicating Alcohol.

Thereafter, Petitioner represented himself and attempted to settle the claim with Loza's insurance carrier *American Sterling* through its adjusters, Claims Professional, Inc.; the claim could not be settled before the running of the statute of limitations and Petitioner retained a law firm to file a lawsuit on August 2, 2011 entitled *Gabriel Maalouf/Mariar Corp. Dba Fairway Rent a Car System, v. Efrain Loza* in the Eighth District Court of Nevada (Case No. A622092). Thereafter, the case continued in litigation and mandatory statutory arbitration was scheduled. Then on or about October 26, 2011, without the knowledge of the firm representing Petitioner at the time, Mr. Loza's insurance carrier went into Receivership /Liquidation by the State of California (*See* insolvency notice at App.75a) The civil action continued, in a somewhat confusing state, until the Nevada Insurance Guaranty Association (NIGA) accepted a claim and instructed Petitioner's counsel, Richard Small, Esq., to first attempt to settle with Petitioner's insurance carrier, *Praetorian Insurance*, pursuant to NRS 687A. In other words, under NIGA based statutes, we must first attempt to settle with *Praetorian* before pursuing any claim

through NIGA. Therefore NIGA, using Chapter 687A and continuing the Tort Claim that became moot when Tortfeasor went into receivership and Petitioner's uninsured motorist insurance came into play as a matter of law. That at this time, an Arbitration meeting had been set for November 7, 2012 that the parties would have to appear for. If Mr. Loza failed to appear then the normal course of action would dictate that Petitioner's counsel would simply prove up damages.

The following will present Petitioner's claim for damages in this matter under *Praetorian Insurance* policy number P0007005430-08, under its uninsured motorist and underinsured coverage provision of \$100,000 coverage for "each accident" which is clearly discussed in the recently found paper policy that was misfiled (*See* policy at App.59a) as was told by a *Praetorian* Program Manager, Susan Metlock.

B. Description of the Accident, the Parties, and Vehicles Involved

The accident occurred on August 3, 2008 in Las Vegas, Nevada at approximately 5:59pm on Sunday which is documented by the Las Vegas Metropolitan Police Traffic Accident Report (LVMPD 080803-2529). At that time and place, Petitioner was driving a 1993 Mazda MX6, a vehicle owned by Mariar Corporation dba Fairway Rent a Car System and insured by *Praetorian Insurance Company*. There were no other passengers in the vehicle with Petitioner. Also at that time and place said vehicle was struck by a 1987 Toyota Corolla that was owned and operated by Efrain Loza and insured by *American Sterling*.

Further, at that time and place, Petitioner was traveling north bound on Maryland Parkway in travel lane number one of two travel lanes and Mr. Loza's

vehicle was south-bound on Maryland Parkway in the left turn lane. Of lane number one. Mr. Loza failed to yield the right of way to oncoming traffic and the front of his vehicle struck the left side of Petitioner's vehicle while Mr. Loza was attempting to make a left turn from Maryland Parkway onto Reno Avenue. Mr. Loza was cited for failing to yield the right of way and arrested for DUI for Alcohol. Petitioner will, under these circumstances, contend that liability was not contested.

C. Criminal Charges against E. Loza

Still Pending Under Warrant: Mr. Loza was indeed charged with DUI-2d as evidenced in the Court Minutes from Las Vegas Township Justice Court Case No. 08M22738X. (*See* criminal complaint at App.55a) These minutes reveal that on July 2, 2010 it is noted "Defendant not present Court, bench warrant issued, bail set at \$00/\$00 per count". The minutes further reveal that on April 3, 2009 a criminal complaint was filed with 1 count of driving or being in actual physical control while you are under the influence of intoxicating liquor; 1_count driving without an operator's license in possession, and 1 count operation of a motor vehicle without security. Since this may have been Mr. Loza's second DUI, he was facing a one-year suspension of his driving privileges and days in jail.

D. Masquerade by *American Sterling* Insurance in Settling Claim in Litigation

Petitioner would like to briefly describe the incredible hassle Mr. Loza has caused Petitioner. First, Mr. Loza is cited for his second DUI and fails to appear in court and a bench warrant is subsequently issued. Petitioner was subpoenaed a number of times for hearings and trial in this matter. Then came *American*

Sterling's grossly negligent claim handling through an out of state adjuster (adjusters for accidents in Nevada must be through Nevada and licensed in Nevada). Obviously, the delay of settling the claim was most likely due to concealed insolvency. Then to make matters worse, *American Sterling*, after filing the lawsuit against Loza, hires an attorney in Las Vegas, Nevada who simply pretends that his client is Mr. Loza, without a retainer agreement. In fact, Joseph Purdy, Esq., the attorney hired by *American Sterling*, admitted that he had never personally spoken to Mr. Loza. This raises extreme concerns as to the due process rights to Petitioner having to litigate against a Defendant that does not exist and/or may want to admit liability and settle without litigation.

Thus, Petitioner has been waiting many years attempting to settle this claim and is still stuck in NIGA's illegal arbitration. Obviously, if the arbitration goes forward Mr. Loza will not appear. This is this claim should be contractually litigated against Respondent under Petitioner's Uninsured Motorist/Underinsured Motorist policy that has a six-year statute of limitations that specifically includes physical damage.

E. Damage to the Vehicle

Petitioner was driving a 2 door 1993 Mazda MX6 that was towed from the scene and received substantial damage. An estimate of damages completed by Collision Specialists of Nevada puts this amount at \$10,977.06. It is not clear at this time what the damages were to the Loza vehicle, however the traffic accident report describes the extent of damage to the Loza vehicle as "moderate" and the estimated

speed was 35mph. Obviously there was a significant and violent collision that would support this repair estimate.

Before Petitioner retained counsel, he attempted to settle this damage claim of Marair Corp. Counsel had sent a demand letter dated June 9, 2010 from Petitioner to the Loza adjuster, Claims Professional, Inc. This letter was a reasonable estimate of the vehicle at the time and Petitioner's demand of \$2,425.00 including the Kelly Blue Book estimates of the market value of the vehicle in the amount of \$3,375.00.

F. Lost Profits to the Mariar Vehicle

The 1993 Mazda was a rental car in the Fairway rental car fleet. In August 2008 although the vehicle was used, as are all of the Fairway rental car vehicles, the vehicle was available to be rented for approximately \$25.00 per day. A request was made for reimbursement of \$750 for the lost profits due to the business.

G. Injuries and Damages to Gabriel Maalouf

At the time of the accident Petitioner was 70 years old and is not 80 years old. Before this accident on August 3, 2008, Petitioner was an exceptionally healthy and active senior citizen, with the normal aches and pains of a man his age. On or before August 3, 2008 Petitioner did not have any serious health problems with his lower back, which developed after this accident.

Petitioner did not immediately seek treatment after the August 3, 2008 accident and essentially went on with his life accepting the pains and stiffness. Eventually, Petitioner's back pain became so severe, he sought consultation with his primary physician, Dr. Douglas Budde at Southwest Medical Associates. Petitioner's injuries

were established as follows; L2-L3 there is an annular bulging and tear and 1.9cm tear; at L3-L4 there is a 1.9cm annular bulging and indenting; at L4-L5 there is an annular bulging and disk protrusion measuring 1.2cm and at L5-S1 there is an annular bulging and protrusion/extrusion of the right S1 nerve root.

These are significant findings of Petitioner's injuries that again, did not exist before or were not asymptomatic on August 3, 2008 Other than this MRI, Petitioner does not have any other medical records at this time. Petitioner's physician offered to submit an affidavit or other correspondence noting that through his treatment of Petitioner, before this accident he did not exhibit the severity of symptoms for the injuries, before August 3, 2008, that are illustrated in his medical records as of July 2010.

H. Asymptomatic Pre-Existing Conditions

On or before August 3, 2008, Petitioner was an extremely healthy and vital father of ten (10) children, who was not undergoing any medical treatment or therapy for any of the bulging protrusions or tears that were revealed in his July 2010 medical records. In Nevada, "in order for evidence of a prior injury or preexisting condition to be admissible, a defendant must present by competent evidence a causal connection between the prior injury and the injury at issue" (moreover, unless it is readily apparent to a lay person the defendant seeking to introduce evidence of a prior injury generally must produce expert testimony demonstrating the relationship between the prior injury and the injury complained of, and why it is relevant to a fact of consequences.) *See FGA Inc v. Giglio*, 128

Nevada Advanced Opinion 26, 278 P. 3d 490 (2012). In other words, an expert must testify to a reasonable degree of medical probability that Petitioner's preexisting condition caused the injuries that now exist.

What we are trying to describe here is that Petitioner is entitled to recover full compensation for all the damages that proximately result from Mr. Loza's actions, even if some or all of the injuries might not have occurred but for Petitioner's preexisting physical condition and susceptibility to injury. This is sometimes known as the "eggshell skull" rule that Mr. Loza must take Petitioner as he found him on August 3, 2008 to spite nay preexisting conditions. In this theory, even if Petitioner suffered from any latent conditions that were brought to life by the injury, Mr. Loza may be held responsible for all the damages resulting from his triggering of the condition. There is a large body of law in the last fifty (50) years that describes this in addition to a latent condition as one that is a "trigger" or one that tends to "excite" or "flare up" that was the cause of his current condition. However, if Petitioner's condition was largely "asymptomatic" it nonetheless made him more susceptible to the serious injuries revealed in his July 2010 medical documents and therefore, Mr. Loza can be held accountable for the full consequences of the injury, even though the full extent of Petitioner's damages as a result of the accident were not even foreseeable.

In the alternative, under Nevada Law, Petitioner, even with preexisting conditions, is also entitled to damages for the aggravation of any preexisting condition to his lower back.

At this time, the amount of Petitioner's medical expenses are not clearly ascertainable. Generally, an MRI in 2012 costs approximately \$1,200 and Dr. Budde's examination would be a few hundred dollars more. The exact cost of Petitioner's treatment is forthcoming from his Medicare advantage carrier.

Although, Petitioner is 80 years old now and severely impaired, he may or may not be a candidate for future surgery based on the lack of any preexisting injury, accident or serious condition before the accident herein. Petitioner nonetheless is entitled to damages for impairment and past/future pain and suffering. Therefore, Petitioner made a demand for the full policy limit of \$100,000.00.



REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. COVERAGE WAS DENIED WHEN THE STATUTE NRS 687A.100 WAS MISQUOTED

Prior to the fugitive tortfeasor NIGA's November 7, 2012 illegal arbitration, Petitioner's then counsel, Richard Small, Esq., was bombarded by NIGA's attorney to sign NIGA's Claim form and *Praetorian* Declaration Page from December 2011 as well as stating "documentation needed in order to determine NIGA's rights, duties, and possible settlement authorities". Petitioner has uninsured motorist personal injury coverage and was not sure as to why NIGA would be involved if he has insurance for exactly this type of incidents. NIGA's attorney, Krystal Kemp wrote in her April 2, 2012 letter addressed to the Arbitrator, Randall Tindall, "As you may recall this case concerns an auto accident in which Defendant's insurance company,

American Sterling, went bankrupt and NIGA stepped in to provide Mr. Loza with defense pursuant to the NIGA Act found in NRS 687 A". Ms. Kemp went on to state "I still await information from Mr. Small that is required pursuant to NRS 687 A.100, *I.e.*, the status of any other potential source of insurance coverage available to the Plaintiff including but not limited uninsured motorist coverage. I am unaware if such coverage exists or if the insurers are on notice of the Plaintiff's claim. In order for any potential judgment to be enforced against an uninsured motorists' carrier, the carrier must be put on notice. Pursuant to NRS 687A.100 any other potential source of insurance is primary over any funds that may be paid by NIGA."

This was a direct misquote of the actual NRS 687A.100 wherein it states that all other insurance is primary over what may be covered by NIGA. "Funds" should never have been used in this quote. This is exactly what precluded Petitioner from filing against *Praetorian Insurance* for contractual claims that have six-year statute of limitations. *Praetorian* issued two checks based off of NIGA's illegal arbitration that were never cashed on April 3, 2017, four years and four months too late. This was made in an effort to preclude Petitioner from filing a claim against *Praetorian* that was subsequently dismissed. Again, per NIGA's own counsel, all other sources of insurance must be exhausted, including but not limited to uninsured motorist/underinsured motorist. Petitioner, to be sure he was understanding correctly, went as far as to look up the definition of "exhaust" in Black's Law Dictionary wherein it states "that an administrative remedy is provided by statute relief must first be

sought by exhausting such remedies before the court will act." As to the status of Petitioner's insurance coverage available to the Petitioner, the only thing Ms. Kemp represented was in regards to the fugitive Tortfeasor is the August 3, 2008 accident report wherein it states that Petitioner has coverage through *Praetorian Insurance*.

II. PETITIONER HAS A CONSTITUTIONAL RIGHT TO SUE RESPONDENT

Petitioner has a constitutional right to sue Respondent under his own uninsured/underinsured motorist coverage when Tortfeasor, *American Sterling Insurance*, went bankrupt (*See* notice letter at App.109a) and District Court dismissal due to Nevada State agency's Arbitration Award conducted through a repugnant statute. That is if NIGA had any legal right to continue Tortfeasor two-year Tort of Arbitration being in a secondary coverage of \$15,000 and ignoring the Respondent as Primary Carrier with existing uninsured/underinsured motorist coverage of \$100,000. Petitioner further has a right to sue Respondent contractually as a matter of law, without NIGA stepping in to defend a Fugitive Tortfeasor at the expense of Petitioner. Petitioner further contends that Nevada Law violates the 14th Amendment wherein its states that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". If this Honorable Court rules that *Praetorian Insurance* does not have to maintain their policy and pay on the uninsured/underinsured motorist coverage, then it is effectively ignoring State of Nevada NRS 687A.100 provision regarding exhausting all other sources of

insurance, which includes but is not limited to uninsured/underinsured motorist coverage.

III. RESPONDENTS CONTINUES TO COMMIT FRAUD AGAINST PETITIONER

That Respondents continue to commit fraud against Petitioner as is evidenced by the Policy provided to Petitioner by Respondents. Petitioner has tried to undo the illegal arbitration aware and urges this Court to review the Nevada Supreme Court and Court of Appeals decisions (App.1a, 2a). The record clearly contains a Declaration page that shows wherein uninsured coverage was accepted by Petitioner but this has never been produced by Respondent in their Declaration or exhibits.

Petitioner prays this court, as a last resort, reinstates the Complaint against Respondent alleging “negligence, breach of contract, and bad faith” (See complaint at App.42a). The Tortfeasor became uninsured and underinsured motorist coverage due to *American Sterling Insurance* becoming bankrupt on October 26, 2011 thus transferring the responsibility back on Praetorian’s uninsured/underinsured motorist policy which was included by Petitioner on his personal injury policy. That NIGA had no right to intervene on the Fugitive Tortfeasor’s behalf when not all coverage options had been exhausted. Once this infraction was realized, NIGA became moot and the responsibility reverted back to *Praetorian Insurance Company*. This court only has to review the respective Court Docket sheets to see the efforts made to correct the incorrect shift of responsibility and involvement and thus granting the Petition for Writ of Certiorari.

Respectfully submitted,



GABRIEL MAALOUF
PETITIONER PRO SE
3516 EDISON AVE.
LAS VEGAS, NV 89121
(702) 523-2634

AUGUST 26, 2019