

**IN THE SUPREME COURT OF THE STATE OF NEVADA
CASE NO. 70504**

JAMES NALDER, GUARDIAN AD LITEM ON BEHALF OF CHEYANNE
NALDER; AND GARY LEWIS, INDIVIDUALLY
Appellants,

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Elizabeth A. Brown
Clerk of Supreme Court

v.

UNITED AUTOMOBILE INSURANCE COMPANY,
Respondent.

**RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF TO SECOND
CERTIFIED QUESTION**

Ninth Circuit Case No. 13-17441
U.S.D.C. No. 2:09-cv-01348-RCJ-GWF

Thomas E. Winner, Esq.
Matthew J. Douglas, Esq.
Nevada Bar No. 11371
ATKIN WINNER & SHERROD
1117 South Rancho Drive
Las Vegas, Nevada 89102
(702) 243-7000 Telephone
(702) 243-7059 Facsimile

Thomas E. Scott, Esq.
Scott A. Cole, Esq.
COLE, SCOTT & KISSANE, P.A.
9150 South Dadeland Boulevard
Suite 1400
Miami, Florida 33156
(305) 350-5300 Telephone
(305) 373-2294 Facsimile

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are the persons and entities as described in NRAP 26.1(a)(1), and must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal:

Atkin, Winner & Sherrod – counsel for United Automobile Insurance Company

Cole, Scott & Kissane, P.A. – counsel for United Automobile Insurance Company

Matthew J. Douglas, Esq. – Atkin, Winner & Sherrod

Scott A. Cole, Esq. – Cole, Scott & Kissane, P.A.

Thomas E. Scott, Esq. – Cole, Scott & Kissane, P.A.

Thomas E. Winner, Esq. – Atkin, Winner & Sherrod

Dated this 19th day of November, 2018.

COLE, SCOTT & KISSANE, P.A.

ATKIN, WINNER & SHERROD

/s/ Thomas E. Scott

Thomas E. Scott, Esq.

Florida Bar No.: 149100

Scott A. Cole, Esq.

Florida Bar No.: 885630

9150 South Dadeland Boulevard

Suite 1400

Miami, FL 33156

Counsel for Respondent

Matthew J. Douglas, Esq.

Nevada Bar No. 11371

Thomas E. Winner, Esq.

1117 South Rancho Drive

Las Vegas, NV 89102

Counsel for Respondent

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The question of law presented for review, as certified by the United States Court of Appeals for the Ninth Circuit and rephrased by this Court, is as follows:

In an action against an insurer for breach of the duty to defend its insured, can the plaintiff continue to seek consequential damages in the amount of a default judgment obtained against the insured when the judgment against the insured was not renewed and the time for doing so expired while the action against the insurer was pending?

STATEMENT OF THE CASE AND FACTS¹

I. NATURE OF THE CASE

This appeal arises from an action by Appellants James Nalder, as guardian *ad litem* for his daughter Cheyanne Nalder, and Gary Lewis for claims of breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith,

¹ In providing the facts and procedural history in this matter, UAIC relies on the federal district court's articulation of that information in its certified question. *See In re Fontainebleau Las Vegas Holdings, L.L.C.*, 127 Nev. 941, 955, 267 P.3d 786, 795 (2011). For the limited purposes of providing context to the issues addressed in its brief on the certified question, however, UAIC also cites to other filings by the parties, which have been provided as part of UAIC's Appendix filed herewith. *See id.* (providing that an appendix that is submitted in a certified-question proceeding may help give context for the issues but should not be relied on "to contradict the certification order"). *See also Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc.*, 333 P.3d 229, 230 n.4 (Nev. 2014). Citations to UAIC's Appendix shall be designated "APPX. [page number]." Citations to the parties' filings in the underlying Ninth Circuit case, which have been provided as part of the record transmitted to this Court, will be to the document number reflected in this Court's docket, and shall be designated "D.E. [document number], [page number]."

fraud and breach of section 686A.310 of the Nevada Revised Statutes against Appellee, United Automobile Insurance Company (“UAIC”), following an incident in which Mr. Lewis, UAIC’s alleged insured, struck Cheyanne Nalder. *In re Nalder*, 824 F. 3d 854, 855-56 (9th Cir. 2016). Mr. Lewis and Mr. Nalder have appealed to the Ninth Circuit the district court’s determination that UAIC did not act in bad faith and that the only damages awardable for UAIC’s breach of the duty to defend were the fees and costs incurred by Mr. Lewis in defending the underlying tort action, of which Mr. Lewis had none.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Mr. Nalder, on behalf of his daughter Cheyanne, initiated suit against Mr. Lewis in Nevada state court for injuries sustained by Cheyanne when she was run over by Mr. Lewis’ truck in July of 2007. *In re Nalder*, 824 F. 3d at 855-56. On June 2, 2008, a default final judgment in the amount of \$3.5 million was entered against Mr. Lewis. *Id.* See also D.E. 16-17698, 0075-79. Thereafter, Mr. Nalder and Mr. Lewis filed suit against UAIC in Nevada state court, alleging claims for breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, fraud and breach of section 686A.310 of the Nevada Revised Statutes. *In re Nalder*, 824 F. 3d at 855-56.

UAIC removed the action to federal court and moved for summary judgment, which was granted by the district court. *Id.* at 856. The Ninth Circuit affirmed the

district court's grant of summary judgment with respect to the Nevada statutory arguments but reversed as to the remaining claims against UAIC. *Id.* See also *Nalder v. United Auto. Ins. Co.*, 500 F. App'x 701, 702 (9th Cir. 2012). On remand, the parties filed competing motions for summary judgment. *In re Nalder*, 824 F. 3d at 856.

The district court ultimately granted partial summary judgment to each party. The district court found that UAIC had been reasonable in its coverage determination and, thus, committed no actionable "bad faith," but also found that an implied insurance policy had been formed due to an ambiguity in UAIC's renewal statement, covering the loss in question, and therefore UAIC owed its contractual indemnity obligations. *Id.* The district court found that UAIC breached its duty to defend under this implied insurance policy, but it awarded no damages to Mr. Lewis because he had not spent any money defending against Mr. Nalder's personal injury action. *Id.*

Mr. Nalder and Mr. Lewis appealed to the Ninth Circuit Court of Appeals the district court's grant of summary judgment in favor of UAIC on the issue of bad faith, as well as its finding of no damages for UAIC's breach of its duty to defend. The Ninth Circuit thereafter certified to this Court the following question of law:

Whether, under Nevada law, the liability of an insurer that has breached its duty to defend, but has not acted in bad faith, is capped at the policy limit plus any costs incurred by the insured in mounting a defense, or is the insurer liable for all losses consequential to the insurer's breach?

Id. at 855. This Court accepted the Ninth Circuit’s certified question and ordered briefing by the parties.

After the certified question had been fully briefed, but before any oral argument or ruling by this Court, UAIC filed a motion with the Ninth Circuit to dismiss the appeal for lack of standing. *Nalder v. United Auto. Ins. Co.*, 878 F.3d 754, 757 (9th Cir. 2017). UAIC argued that the six-year life of the default judgment had run and that the judgment had not been renewed, thereby rendering the judgment no longer enforceable. *Id.* UAIC further argued that, as a result, there were no longer any damages in excess of the policy limit Mr. Nalder and Mr. Lewis could recover because the judgment that formed the basis for those damages had lapsed. *Id.* Accordingly, UAIC argued that the issue on appeal was moot because there was no longer any basis to seek damages above the policy limit amount already awarded by the district court and paid by UAIC. *Id.*

Finding “no controlling precedent of the Nevada Supreme Court or the Nevada Court of Appeals with regard to the issue of Nevada law raised by the motion to dismiss,” the Ninth Circuit certified to this Court the question of law presently at issue. *Id.* at 758. On February 23, 2018, this Court once again accepted the certified question and ordered briefing by the parties. Appellants’ counsel Mr. Christensen and his co-counsel requested multiple extensions of time to file their brief with this Court on the question of the expired judgment. On each request, Mr. Christensen

and his co-counsel asserted that the extension was not sought for any improper purpose, or for the purpose of delay.

UAIC later learned, however, that while briefing in this matter has been pending, the Nalders domesticated the Nevada default judgment against Mr. Lewis in California in or about July of 2018. APPX. 0001-0011. Back in Nevada, Cheyanne Nalder (having now reached the age of majority) filed an “Ex Parte Motion to Amend Judgment in the Name of Cheyanne Nalder, Individually” in the default judgment proceedings on March 22, 2018, seeking to amend the default judgment at issue to substitute herself as plaintiff/judgment creditor in place of her father and Guardian ad Litem, James Nalder. APPX. 0012-0019. An Amended Judgment was then apparently signed by the Nevada trial court on March 26, 2018, and it was subsequently filed with a Notice of Entry of the Amended Judgment on May 18, 2018. APPX. 0020-0024.

UAIC’s counsel subsequently received a letter from David A. Stephens, Esq., counsel for Cheyanne Nalders, with a three-day notice of intent to take default on a “new” complaint in *Cheyenne Nalder v. Gary Lewis*, Case No. A-18-772220-C, pending before the Eighth Judicial District of Nevada, which was the first notice UAIC had of these proceedings by the Nalders. APPX. 0025-0027. This newly filed action is not a collection action, but rather actively seeks declaration by the Eighth Judicial District of Nevada that the “statute of limitations on the judgment is tolled,”

which is one of the issues presently before this Court. APPX. 0028-0032. UAIC has been granted leave to intervene in both the default judgment action and the new action before the Eighth Judicial District of Nevada, APPX. 0033-0115, and has moved to set aside the March 26, 2018 Amended Judgment and to dismiss the new action before the Eighth Judicial District of Nevada. APPX. 0116-0270. Both motions remain pending at this time.

Upon learning of the foregoing developments, UAIC also sought to secure counsel to defend Mr. Lewis in both the default judgment action and the new action pending before the Eighth Judicial District of Nevada, as well as the domesticated judgment proceedings in California, based upon the district court's prior determination that Mr. Lewis was covered on the date of the accident under an implied insurance policy and UAIC therefore owed Mr. Lewis a duty to defend. UAIC's efforts to comply with the district court's ruling, however, were opposed by Mr. Nalder's counsel, Thomas F. Christensen, Esq., purporting to act as counsel for Mr. Lewis as well, who advised that communications with Mr. Lewis could only occur through Mr. Christensen and his law firm. APPX. 0271-0294. UAIC retained Randy W. Tindall, Esq. to represent Mr. Lewis, but E. Breen Arntz, Esq. subsequently appeared as personal counsel on behalf of Mr. Lewis in the new 2018 action and sought to enter into a stipulated judgment on behalf of Mr. Lewis with Cheyanne Nalder. APPX. 0295-0298. Mr. Tindall, in turn, sought to defend Mr.

Lewis by moving to set aside the March 26, 2018 Amended Judgment and to dismiss the new action before the Eighth Judicial District of Nevada. APPX. 0299-0348. Mr. Arntz, purportedly on behalf of Mr. Lewis, continues to oppose Mr. Tindall's efforts, including by moving to strike Mr. Tindall's filings and by filing a third-party complaint on behalf of Mr. Lewis against UAIC, Mr. Tindall and his law firm alleging, among other things, claims of breach of contract, bad faith and violations of 42 U.S.C. § 1983. APPX. 0349-0388. All motions remain pending at this time.

SUMMARY OF THE ARGUMENT

I. Appellants can no longer continue to seek consequential damages in the amount of the default judgment obtained against Mr. Lewis for UAIC's breach of the duty to defend because the default judgment expired due to Appellants' uncontested failure to renew the default judgment pursuant to the terms of NRS 17.214, and Appellants have not otherwise brought an action on the default judgment.

Mr. Nalder does not contest that he failed to renew the default judgment pursuant to the terms of NRS 17.214, and Appellants' underlying action against UAIC was not an action to collect on the default judgment because UAIC was not a judgment debtor thereon. In fact, prior to commencing the underlying action, Appellants did not hold any judgment against UAIC on which they could bring an

action. Instead, Appellants sought to have a judgment entered against UAIC for the first time in the underlying action.

The default judgment instead served merely as evidence for Appellants' claims of damage allegedly caused by UAIC's breach of the duty to defend. And in order to continue to serve as evidence for their consequential damages claim, the default judgment had to remain valid and enforceable, which required that the judgment be renewed pursuant to the requirements of NRS 17.214 or, alternatively, required Mr. Nalder to bring an action on the judgment against Mr. Lewis—neither of which were done by the Appellants.

II. Furthermore, the statute of limitations to pursue renewal of the default judgment has not been extended or tolled. UAIC's satisfaction of the underlying judgment entered by the district court did not acknowledge the validity of the default judgment because the underlying action was not an action upon the default judgment and UAIC's satisfaction of the underlying judgment could not serve to extend the life of a default judgment previously entered in a wholly separate proceeding of which UAIC was not even a party.

The fact that Cheyanne was a minor when the cause of action giving rise to the default judgment accrued does not serve to extend or toll the deadline to renew the default judgment because the default judgment was not issued to Cheyanne, but rather Mr. Nalder, who was not a minor at the time the default judgment expired and

so did not have a legal disability that would toll the six-year statute of limitations to renew the default judgment.

Mr. Lewis' alleged absence from the State of Nevada also did not serve to toll the deadline for renewal of the default judgment under NRS 11.300 because renewal of a judgment is not a separate cause of action. Moreover, Mr. Lewis' alleged absence from the State of Nevada did not impede Mr. Nalder from attempting to either execute the default judgment, comply with the requirements for renewal under NRS 17.214, or bring an action on the judgment against Mr. Lewis because Mr. Nalder and his counsel Mr. Christensen (who, notably, also represents Mr. Lewis in the underlying proceedings and other related proceedings) were well aware of Mr. Lewis' location in California and assuredly would have had no difficulty serving Mr. Lewis with process in California. NRS 11.300 does not apply when the absent defendant is otherwise subject to service of process.

III. The Judgment based on a Sister-State Judgment obtained by Mr. Nalder against Mr. Lewis in California is invalid because the Nevada default judgment upon which it is based was expired as a matter of Nevada law at the time Mr. Nalder domesticated the judgment in California. Therefore, the statute of limitations on such judgments in California is irrelevant, inapplicable, and immaterial.

IV. Finally, because the default judgment can no longer be executed against Mr. Lewis, Mr. Lewis has suffered no damages as a result of his assignment to Mr.

Nalder of his rights against UAIC. And because Mr. Lewis no longer has any damages he can claim against UAIC, Mr. Nalder as Mr. Lewis' assignee also has no damages he can claim against UAIC, nor does he have an independent cause of action for damages against UAIC.

ARGUMENT

I. Appellants Can No Longer Continue to Seek Consequential Damages in the Amount of the Default Judgment Obtained Against Mr. Lewis for UAIC's Breach of the Duty to Defend Because the Default Judgment Expired Due to Appellants' Failure to Renew the Judgment Pursuant to the Terms of NRS 17.214, and Appellants Have Not Otherwise Brought an Action on the Default Judgment.

Nevada's statute of limitations, NRS 11.190(1)(a), provides that "an action upon a judgment or decree of any court of the United States, or of any state or territory within the United States, or the renewal thereof" must be commenced within six years. Accordingly, there exist only two methods by which the self-executing expiration of a judgment six years following its issuance may be prevented. One method is renewal of the original judgment by the judgment creditor pursuant to the terms of NRS 17.214. The second method is via the bringing of an independent action on the original judgment, which allows a judgment creditor the opportunity, "when the limitations period has almost run on the judgment, to obtain a new judgment that will start the limitations period anew." *Salinas v. Ramsey*, 234 So. 3d 569, 571 (Fla. 2018).

Outside of renewing the original judgment or obtaining a wholly new judgment restarting the limitations period, however, a judgment in Nevada automatically expires by operation of law six years following its issuance pursuant to the terms of NRS 11.190. *Cf.* NRS 21.010 ("[T]he party in whose favor judgment is given may, at any time before the judgment expires, obtain the issuance of a writ

of execution for its enforcement as prescribed in this chapter. The writ ceases to be effective when the judgment expires.”); *Trubenbach v. Amstadter*, 109 Nev. 297, 849 P.2d 288, 300-01 (1993) (“Under Oklahoma law, a judgment becomes unenforceable when the judgment creditor does not execute on it within five years.”). Here, Mr. Nalder does not contest that he failed to renew the default judgment pursuant to the terms of NRS 17.214. Instead, Appellants contend that their underlying bad faith and breach of contract action against UAIC constitutes an action on the judgment.

An action upon a judgment is one that seeks to collect upon a debt owed. *See, e.g., Fid. Nat'l Fin. Inc. v. Friedman*, 225 Ariz. 307, 310, 238 P.3d 118, 121 (2010) (“Our post-statehood case law confirms that every judgment continues to give rise to an ‘action to enforce it, called an action upon a judgment.’ . . . As was true at common law, *the defendant in an action on the judgment under our statutory scheme is generally the judgment debtor*, and the amount sought is the outstanding liability on the original judgment. The judgment debtor cannot deny the binding force of the judgment, but can assert such defenses as satisfaction or partial payment. If indebtedness remains on the original judgment, the action results in a new judgment in the amount owed.”) (internal citations omitted and emphasis added). Appellants’ action against UAIC, however, was not an action to collect on the default judgment, as UAIC was not a judgment debtor thereon. In fact, prior to commencing the

underlying action, Appellants did not hold any judgment against UAIC on which they could bring an action. Instead, Appellants sought to have a judgment entered against UAIC for the first time in the underlying action.

In an analogous case interpreting a Massachusetts' statute relating to execution of judgments, the Superior Court of Massachusetts held that a plaintiff could not bring an action against an insurer on a judgment entered against the insurer's insured. *Mont v. Encompass Ins. Co.*, 32 Mass. L. Rep. 39 (2014). The court stated that the statute relied upon by the plaintiff was directed to remedies that a judgment creditor may invoke against a judgment debtor, and noted that the plaintiff obtained a judgment against the insured and not the insurer, who was not a party to the prior action. The court ultimately held that the statute was "manifestly inapplicable" to the claims asserted by the plaintiff against the insurer because the plaintiff did not hold a judgment against the insurer "but rather, for the first time, prays that a judgment enter against [the insurer]."

Here, the default judgment instead served merely as evidence for Appellants' claims of damage allegedly caused by UAIC's breach of the duty to defend. And in order to continue to serve as evidence for their consequential damages claim, the default judgment had to remain valid and enforceable, which required that the judgment be renewed pursuant to the requirements of NRS 17.214 or, alternatively, required Mr. Nalder to bring an action on the judgment against Mr. Lewis—neither

of which were done by the Appellants. *See* NRS 11.190(1)(a). Accordingly, the default judgment has now expired by operation of law. *Id.* Therefore, Appellants can no longer continue to claim consequential damages in the amount of the default judgment for UAIC's breach of the duty to defend. For without a judgment entered against Mr. Lewis in Mr. Nalder's state court tort action, Mr. Lewis (and by extension Mr. Nalder, as the assignee of Mr. Lewis' rights and causes of action pertaining to said judgment) cannot demonstrate any damages caused by, or as a consequence of, UAIC's breach of the duty to defend.

Appellants' reliance on this Court's decision in *Mandlebaum v. Gregovich*, 24 Nev. 154, 50 P. 849 (1897), is misplaced, as *Mandlebaum* supports UAIC's position above. Specifically, *Mandlebaum* arose from an action filed by a judgment creditor and his assignee against a judgment debtor to recover on an unsatisfied prior judgment obtained by the creditor against the debtor. *Id.* at 157. This Court ultimately affirmed the new judgment entered in favor of the judgment creditor and his assignee, holding, in pertinent part, that while the statutory right of execution on the prior judgment had been barred by the passage of more than nine years' time, the statute of limitations on the judgment creditor's right to file an action on the prior judgment was tolled due to the judgment debtor's absence from the state. *Id.* at 158-161.

Thus, *Mandlebaum* is distinguishable from the present matter on several significant points. First, the action in *Mandlebaum* constituted an action on the judgment because it was brought by the judgment creditor and his assignee against *the judgment debtor* directly, to recover on an unsatisfied prior judgment obtained by the creditor against the debtor. In contrast, as discussed above, Appellants' action against UAIC cannot be considered an action on the judgment for purposes of NRS 11.190 because UAIC is not a judgment debtor on the default judgment. Second, while this Court held in *Mandlebaum* that the judgment creditor's and assignee's action was timely brought because the statute of limitations was tolled due to the judgment debtor's absence from the State of Nevada (an issue discussed in greater detail in Section II below), this Court did *not* find that the statutory right of execution on the prior judgment was similarly tolled due to the judgment debtor's absence from the State of Nevada. UAIC argues here that the right of execution on the default judgment is similarly barred due to Mr. Nalder's uncontested failure to renew the default judgment pursuant to the terms of NRS 17.214, rendering the default judgment expired by operation of law.

Accordingly, because Appellants have not brought an action on the default judgment as did the plaintiffs in *Mandlebaum* and because Mr. Nalder otherwise failed to renew the judgment pursuant to the terms of NRS 17.214, UAIC urges this Court to find that the default judgment has expired as a matter of law and can no

longer serve as evidence for Appellants' claims of damage allegedly caused by UAIC's breach of the duty to defend.

II. The Statute of Limitations to Pursue Renewal of the Default Judgment Has Not Been Extended or Tolloed and Has Expired, and the Underlying Action was not an Action on the Judgment Satisfying NRS 11.190.

A. UAIC's Payment of the Underlying Judgment

Contrary to Mr. Lewis' and Mr. Nalder's assertion, the payments made by UAIC were not "payments toward the [default] judgment." I.B. at 14. Instead, the payments made by UAIC went toward satisfaction of the judgment entered by the district court in the underlying action. And because the underlying action was not an action upon the default judgment, UAIC did not acknowledge the validity of the default judgment by satisfying the judgment entered against it by the district court. As such, UAIC's satisfaction of the underlying judgment against it could not serve to extend the life of a default judgment previously entered in a wholly separate proceeding of which UAIC was not even a party.

Instead, UAIC's satisfaction of the underlying judgment against it merely reflected its acknowledgment that an implied insurance policy existed that afforded coverage for Mr. Lewis' accident, as the district court ultimately concluded, and that the underlying judgment reflected an obligation on its part to pay the policy limits of Mr. Lewis' policy. *See Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 275 (1935). This in no way can be considered an acknowledgment of the default

judgment's continuing validity, especially given UAIC's continued opposition to Appellants' efforts in the district court and on appeal to collect on the excess judgment.

B. Cheyenne's Status as a Minor at the Time of the Incident

Similarly, the fact that Cheyenne was a minor when the cause of action giving rise to the default judgment accrued does not serve to extend or toll the deadline to renew the default judgment at issue. NRS 11.250 clearly speaks in terms of "bring[ing]" a cause of action, the "accru[al]" of a cause of action, and "commencement" of a cause of action, all of which do not apply to the renewal of a default judgment resulting from a cause of action that has already been brought. Renewal of a default judgment in order to prevent its expiration does not constitute a cause of action. *See F/S Manufacturing v. Kensmore*, 798 N.W.2d 853, 858 (N.D. 2011) ("Because the statutory procedure for renewal by affidavit is not a separate action to renew the judgment, the specific time period [provided to renew] cannot be tolled under [the equivalent to NRS 11.300] based on a judgment debtor's absence from the state.").

Moreover, the default judgment was not issued to Cheyenne, but rather James Nalder. Mr. Nalder was not a minor at the time the default judgment expired and so did not have a legal disability that would toll the six-year statute of limitations to renew the default judgment. It was Mr. Nalder as judgment creditor that had the

responsibility to file the Affidavit of Renewal required by NRS 17.214, and the fact that Cheyanne was a minor at the time is legally irrelevant.

Additionally, because Cheyanne was not the judgment creditor, anyone looking at the default judgment would believe that it expired since there was no Affidavit of Renewal filed. Thus, if this Court were to adopt the argument that Cheyanne's status as a minor extended the deadline to renew the default judgment, the certainty NRS 17.214 was enacted to promote—namely, the reliability of title to real property—would be frustrated.

If tolling of deadlines to renew judgments were sanctioned, title to real property owned by anyone who had ever been a judgment debtor would be clouded, as a title examiner would not know whether a judgment issued more than six years prior had expired pursuant to statute, or was still valid, or could be revived when a real party in interest who was a minor reached the age of majority. As this Court held in *Leven v. Frey*, 168 P.3d 712 (Nev. 2007), one of the primary reasons for the need to strictly comply with NRS 17.214's recordation requirement is to “procure reliability of title searches for both creditors and debtors since any lien on real property created when a judgment is recorded continues upon that judgment's proper renewal.” *Id.* at 719. Compliance with the notice requirement of NRS 17.214 is important to preserve the due process rights of the judgment debtor. *Id.* If a judgment debtor is not provided with notice of the renewal of a judgment, he may

believe that the judgment has expired and he need take no further action to defend himself against execution.

C. Mr. Lewis' Alleged Absence from the State of Nevada

Appellants' argument that the deadline to renew the default judgment is tolled by NRS 11.300 also fails because again, as discussed above, renewing a judgment is not a cause of action. As the Supreme Court of North Dakota, a state with similar statutes to Nevada regarding judgments, held in *F/S Manufacturing v. Kensmore*, “[b]ecause the statutory procedure for renewal by affidavit is not a separate action to renew the judgment, the specific time period [provided to renew] cannot be tolled under [the equivalent to NRS 11.300] based on a judgment debtor’s absence from the state.” 798 N.W.2d at 858. *See also Mandlebaum*, 24 Nev. at 158-161 (holding, in relevant part, that the judgment debtor’s absence from the State of Nevada did *not* toll the statutory right of execution on a prior judgment under Nevada law).

Furthermore, Mr. Lewis’ alleged absence from the State of Nevada did not impede Mr. Nalder from attempting to execute the default judgment or comply with the requirements for renewal under NRS 17.214, as Mr. Nalder and his counsel Mr. Christensen (who, notably, also represents Mr. Lewis in the underlying proceedings and other related proceedings) were well aware of Mr. Lewis’ location in California and assuredly would have had no difficulty serving Mr. Lewis with process in California. For example, as early as March of 2010, Mr. Lewis’ executed verified

answers to interrogatories through Mr. Christensen's office that provided his address in California. *See* D.E. 16-17699, 87, 95, 165-166; D.E. 16-17698, 0082. Thus, as early as four years before the expiration of the default judgment, Mr. Nalder and his counsel were well aware of Mr. Lewis' location in California and fully capable of taking the necessary steps to prevent expiration of the default judgment under the requirements of NRS 11.190 and NRS 17.214.

Moreover, accepting the argument that the time to renew a judgment is tolled because of the judgment debtor's absence from Nevada would have a similarly negative impact on the ability for property owners to obtain clear title to their property. Nothing on a judgment would reflect whether a judgment debtor was outside of the state and a facially expired judgment was still valid. Therefore, essentially, a responsible title examiner would have to list any judgment that had ever been entered against a property owner on the title insurance policy, because he could not be sure that judgments older than six years for which no affidavit of renewal had been filed were expired or the expiration was tolled.

Finally, any reliance by Appellants on this Court's holding in *Mandlebaum* that the judgment creditor's and assignee's action was timely brought because the statute of limitations was tolled due to the judgment debtor's absence from the State of Nevada, is again misplaced because, as discussed at length above, the underlying action herein is not an action on the judgment sufficient to satisfy the requirements

of NRS 11.190. Furthermore, this Court has more recently held that NRS 11.300 “does not apply when the absent defendant is otherwise subject to service of process.” *Simmons v. Trivelpiece*, 98 Nev. 167, 168, 643 P.2d 1219, 1220 (1982). As discussed above, Mr. Nalder and his counsel Mr. Christensen were not prevented from pursuing an action on the judgment against Mr. Lewis due to his absence from the State of Nevada because they were well aware of his location in California and assuredly would have had no difficulty serving Mr. Lewis with process in California, pursuant to NRCP 4(e)(2) for example. *See, e.g., Simmons*, 98 Nev. at 168, 643 P.2d at 1219.

III. The Judgment Based on Sister-State Judgment Obtained by Mr. Nalder Against Mr. Lewis in California is Invalid and Therefore the Statute of Limitations on Such Judgments in California is Irrelevant, Inapplicable, and Immaterial.

First, the statute of limitations for bringing an action on a judgment or renewing a judgment in California is irrelevant to this Court’s determination of the Nevada default judgment’s continuing viability under Nevada law. Second, because the Nevada default judgment was expired as a matter of Nevada law at the time Mr. Nalder domesticated it in California, the resulting California Judgment based on a Sister-State Judgment rendered against Mr. Lewis is also invalid. *See* Cal Code Civ Proc § 1710.40 (“A judgment entered pursuant to this chapter may be vacated on any ground which would be a defense to an action in this state on the sister state judgment[.]”). Accordingly, because the Judgment based on a Sister-State Judgment

obtained by Mr. Nalder against Mr. Lewis in California is invalid, the statute of limitations on such judgments in California is, again, irrelevant, inapplicable, and immaterial.

IV. Mr. Lewis Has Not Suffered Any Damages Because the Default Judgment is Now Expired and Therefore Unenforceable Against Him.

Contrary to Mr. Nalder's contention, his ability to collect against UAIC is controlled by his right to collect against Mr. Lewis, the judgment debtor under the default judgment. *See* I.B. at 16 ("Nalder's ability to collect against UAIC is not controlled by his right to collect against Lewis, the original judgment debtor."). Moreover, Mr. Lewis' ability to seek relief from UAIC is also dependent on the default judgment's validity because if the default judgment is determined to be invalid, then Mr. Lewis has suffered no damages as a result of UAIC's breach of the duty to defend.

In the case of Mr. Nalder, only parties with a valid contractual relationship with the insurer have standing to bring a bad faith or breach of contract claim. *See Gunny v. Allstate Ins. Co.*, 830 P.2d 1335, 1335-36 (Nev. 1992). Accordingly, an injured tort plaintiff such as Mr. Nalder may advance a direct action against a putative insurer of the tortfeasor only after securing an assignment from said tortfeasor. Here, although initially bringing the underlying action without such an assignment, Mr. Nalder ultimately obtained an assignment from Mr. Lewis on February 28, 2010. This assignment, however, is expressly dependent on the

continuing validity of the default judgment entered against Mr. Lewis, as it provides, in pertinent part, “that [the] portion of said right or cause of action being hereby assigned pertains to the judgment entered against the undersigned [Mr. Lewis] in favor of NALDER in the amount of \$3,500,000.00[.]” *See* D.E. 16-17698, 0495. As such, Mr. Nalder’s ability to collect against UAIC *is* controlled by his right to collect against Mr. Lewis, as the right or cause of action assigned expressly pertains to the default judgment.

The assignment is also invalidated by the default judgment’s expiration, as it now lacks consideration. *See, e.g., Hicks v. Dairyland Ins. Co.*, 441 Fed. App’x 463, 465 (9th Cir. 2011) (holding that an assignment of insured’s first-party claims to tort judgment creditor was not effective because it was not a “bargained for exchange,” as there was no valid consideration given for the assignment). Specifically, although not expressly stated in the assignment, presumably Mr. Nalder agreed not to execute on the default judgment against Mr. Lewis in exchange for the assignment of Mr. Lewis’ rights and causes of action. If the default judgment has expired and can no longer be executed against Mr. Lewis, however, then the assignment no longer reflects a bargained for exchange, as it lacks consideration on the part of Mr. Nalder. For these same reasons, Mr. Lewis also cannot claim any damages simply from assigning his right of action against UAIC to Mr. Nalder. Indeed, the expiration of the default judgment now creates a conflict between Mr. Nalder and Mr. Lewis, as

it is in Mr. Lewis' interest that this Court determine that the default judgment against him has expired because such a determination will mean that the judgment cannot be executed against him under any circumstances.

CONCLUSION

For the reasons set forth above, UAIC respectfully requests that this Honorable Court hold that in an action against an insurer for breach of the duty to defend its insured, a plaintiff cannot continue to seek consequential damages in the amount of a default judgment obtained against the insured when the judgment against the insured was not renewed and the time for doing so expired while the action against the insurer was pending.

Additionally, UAIC respectfully suggests that the decisional process will be aided through oral argument, and hereby requests that this Honorable Court grant oral argument in this cause.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this 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). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point, double-spaced Times New Roman font.
2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 6,975 words.
3. Finally, I hereby certify that I have read this appellate 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 subjected to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

COLE, SCOTT & KISSANE, P.A.

/s/ Thomas E. Scott

Thomas E. Scott, Esq.

Florida Bar No.: 149100

Scott A. Cole, Esq.

Florida Bar No.: 885630

9150 South Dadeland Boulevard

Suite 1400

Miami, FL 33156

Counsel for Respondent

ATKIN, WINNER & SHERROD

Matthew J. Douglas, Esq.

Nevada Bar No. 11371

Thomas E. Winner, Esq.

1117 South Rancho Drive

Las Vegas, NV 89102

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of November, 2018, I served the foregoing **Respondent's Supplemental Answering Brief to Second Certified Question** by electronically filing and serving the document listed above with the Nevada Supreme Court.

Richard Christensen, Esq.
Thomas Christensen
CHRISTENSEN LAW OFFICES
1000 S. Valley View Blvd.
Las Vegas, NV 89107

Dennis M. Prince, Esq.
Kevin T. Strong, Esq.
EGLET PRINCE
400 South 7th Street, 4th Floor
Las Vegas, NV 89101

COLE, SCOTT & KISSANE, P.A.

ATKIN, WINNER & SHERROD

/s/ Thomas E. Scott
Thomas E. Scott, Esq.
Florida Bar No.: 149100
Scott A. Cole, Esq.
Florida Bar No.: 885630
9150 South Dadeland Boulevard
Suite 1400
Miami, FL 33156
Counsel for Respondent

Matthew J. Douglas, Esq.
Nevada Bar No. 11371
Thomas E. Winner, Esq.
1117 South Rancho Drive
Las Vegas, NV 89102
Counsel for Respondent