

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

UNITED AUTOMOBILE
INSURANCE COMPANY,

Respondent.

Case No. 70504

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Elizabeth A. Brown
Clerk of Supreme Court

**APPELLANTS' MOTION TO STRIKE PORTIONS OF RESPONDENT'S
SUPPLEMENTAL ANSWERING BRIEF TO SECOND CERTIFIED QUESTION
AND APPENDIX**

Appellants JAMES NALDER, GUARDIAN AD LITEM ON BEHALF OF CHEYANNE NALDER and GARY LEWIS, INDIVIDUALLY ("Appellants"), by and through their attorneys of record, Dennis M. Prince, Esq. and Kevin T. Strong, Esq. of EGLET PRINCE, and Thomas F. Christensen, Esq. and Richard V. Christensen, Esq. of CHRISTENSEN LAW OFFICES, hereby move to strike portions of Respondent United Automobile Insurance Company's ("UAIC") Supplemental Answering Brief to Second Certified Question and Appendix because they include facts that exceed the scope of the governing certification order.

I.

ARGUMENT

The Nevada Supreme Court is “bound by the facts as stated in the certification order.” *In re Fountainbleau Las Vegas Holdings, LLC*, 127 Nev. 941, 956, 267 P.3d 786, 795 (2011). This well-established legal principle is consistent with the Nevada Supreme Court’s role, which “is limited to answering the questions of law posed to it” *Id.* at 955, 794-95 (citing *Janson v. Christensen*, 167 Ariz. 470, 808 P.2d 1222, 1222 n.1 (Ariz. 1991)). The only circumstance articulated by the Nevada Supreme Court in which information may be considered outside the certification order is to help give context for the issues before it. *Brady, Vorweck, Ryder & Caspino v. New Albertson’s, Inc.*, 130 Nev. ___, 333 P.3d 229, 230 n.4 (2014).

In its Supplemental Answering Brief, UAIC refers to various facts that fall outside of this court’s certification order related to Appellants James Nalder and Cheyanne Nalder’s domestication of the underlying default judgment, Cheyanne Nalder’s Ex Parte Motion to Amend the Judgment, and Cheyanne Nalder’s new action against Appellant Gary Lewis (“Lewis”) filed in the Eighth Judicial District Court, Case No. A-18-772220-C. *See* Resp. Supp. Ans. Brief, at pp. 5-7. UAIC also includes various pleadings associated with these subsequent proceedings in its appendix:

(1) APPX. 0001-0011 (Volume I): This document is entitled “Judgment Based on Sister-State Judgment” that was filed in the Superior Court of California County of Los Angeles on July 24, 2018. This document was filed over six months after the Ninth Circuit issued its January 10, 2018 certification order and is not referenced anywhere in the certification order.

(2) APPX. 0012-0019 (Volume I): This document is entitled “Ex Parte Motion to Amend Judgment in the Name of Cheyanne Nalder, Individually” that was filed on March 22, 2018. This pleading is not referenced in the Ninth Circuit’s January 10, 2018 certification order because it was filed over two months later.

(3) APPX. 0020-0024 (Volume I): This document is entitled “Notice of Entry of Amended Judgment,” which was filed on May 18, 2018. The Amended Judgment was filed on March 26, 2018. These documents are not part of the Ninth Circuit’s certification order.

(4) APPX. 0025-0027 (Volume I): This document is a letter from Cheyanne Nalder’s counsel sent to UAIC’s counsel informing him of Appellant Gary Lewis’s failure to file an Answer to Appellant Cheyanne Nalder’s Complaint on the Amended Judgment and to provide a three-day notice of intent to default. The letter and notice are both dated July 17, 2018 and are not referenced in the certification order.

(5) APPX. 0028-0032 (Volume I): This document is Cheyanne Nalder's Complaint against Gary Lewis filed on April 3, 2018. This Complaint relates to the Amended Judgment, which was filed on March 26, 2018. Both filings occurred after the Ninth Circuit issued its certification order.

(6) APPX. 0033-0115 (Volume I, Volume II): This document is UAIC's Motion to Intervene in the action of Cheyanne Nalder v. Gary Lewis, the exhibits attached thereto, and the district court's order granting the motion. This motion was filed on August 17, 2018 and the Notice of Entry of Order granting the motion was filed on October 19, 2018.

(7) APPX. 00116-00270 (Volume II): This document is UAIC's Motion for Relief from Judgment Pursuant to NRCP 60 and exhibits attached thereto, which was filed on October 19, 2018.

(7) APPX. 00271-00294 (Volume II): These documents are letters between Gary Lewis's initial counsel UAIC retained to defend him against Cheyanne Nalder's Complaint, Stephen Rogers, Esq., and Appellants' counsel, Mr. Christensen, regarding any actions taken on behalf of Mr. Lewis in the action. Mr. Rogers attached a proposed motion to dismiss Cheyanne Nalder's Complaint and motion for relief from the amended judgment that he intended to file on behalf of Mr. Lewis. Both letters are dated August 10, 2018 and August 13, 2018, respectively.

(8) APPX. 00295-00298 (Volume II): This document is titled “Stipulation to Enter Judgment” between Cheyanne Nalder and Gary Lewis. This stipulation was filed on September 13, 2018 in relation to the amended judgment filed on March 26, 2018. E. Breen Arntz, Esq. is Gary Lewis’s attorney of record in the stipulation.

(9) APPX. 0299-0348 (Volume III): This document is titled “Defendant’s Motion for Relief from Judgment Pursuant to NRCp 60” that attorney Randall Tindall, Esq. filed on behalf of Gary Lewis to set aside the March 26, 2018 Amended Judgment. This motion was filed on September 27, 2018

(10) APPX. 0349-0365 (Volume III): This document is titled “Defendant’s Motion to Strike Defendant’s Motion for Relief from Judgment,” which was filed on October 17, 2018, and exhibits attached thereto. Attorney E. Breen Arntz, Esq. filed the motion on behalf of Mr. Lewis stating that the motion for relief from judgment was filed without Mr. Lewis’s authority.

(11) APPX 0366 (Volume III): This document is an e-mail dated October 19, 2018 from Mr. Lewis to attorney Randall Tindall, Esq. advising that he stop communicating directly with him and to communicate with Appellants’ attorney, Mr. Christensen.

(12) APPX 0367-0388 (Volume III): This document is titled Third-Party Complaint filed by Gary Lewis against UAIC and Randall Tindall, Esq. and was filed on October 24, 2018.

Nowhere in the Ninth Circuit's certification order is there any reference to these various judicial proceedings and filings because they occurred *after* this Court accepted the Ninth Circuit's certification order. This Court has tasked itself to answer a very narrow question of law: whether a plaintiff can seek consequential damages resulting from a default judgment arising from an insurer's breach of its contractual duty to defend when the time to renew that judgment expired during the pendency of the action against the insurer. The action to which this question of law refers is the May 22, 2009 lawsuit Appellants filed against UAIC for breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, fraud, and violations of NRS 686A.310. *Nalder v. United Auto. Ins. Co.*, 878 F.3d 754, 756 (2017). Any subsequent judicial actions taken by the Nalders following this Court's acceptance of the Ninth Circuit's certification order do not provide any necessary factual context for this Court to answer the pending legal question.

UAIC acknowledges that these subsequent judicial proceedings are irrelevant to the subject question of law because UAIC does not rely on any of this information to support the legal arguments conveyed in its Supplemental

Answering Brief. *See* Resp. Supp. Ans. Brief, at pp. 7-24. Rather, UAIC refers to these subsequent judicial proceedings to somehow imply that Appellants sought extensions to file their Supplemental Answering Brief for an untoward purpose:

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.

See Resp. Supp. Ans. Brief, at pp. 4-5.

This statement immediately precedes UAIC's recitation of the subsequent, separate judicial proceedings. By way of this statement, UAIC acknowledges that it refers to these subsequent judicial proceedings solely to imply to this Court that Appellants sought extensions of the underlying briefing schedule for an improper purpose. While Appellants vehemently deny UAIC's implication, the context in which UAIC provides these facts to this Court underscores precisely why they should be stricken. UAIC's reference to additional judicial proceedings that fall outside the certification order is meant to unduly influence this Court about Appellants' legal positions taken in their Opening Supplemental Brief.

The legal question this Court has decided to answer will help to clarify precisely whether an action instituted against an insurer arising from its breach of the duty to defend that resulted in a default judgment absolves the plaintiff from renewing the default judgment. The answer to this question is not dependent upon

the facts in any subsequent judicial proceedings that were instituted. Evidence of any subsequent judicial proceedings does not provide any needed context to answer the certified question that was not already provided by the Ninth Circuit in its certification order. *See Brady, Vorweck, Ryder & Caspino*, 333 P.3d at 230 n. 4 (This Court looked to the appendix provided because the certification order did not explain why one entity was a party to the proceeding and not the other). Accordingly, there is no legal basis for this Court to evaluate any additional facts UAIC provides that exceed the governing certification order from the Ninth Circuit.

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II.

CONCLUSION

Based on the foregoing, Appellants respectfully request this Court to **GRANT** their Motion and strike pages 5-7 of UAIC's Supplemental Answering Brief to Second Certified Question and to strike the corresponding pages, bates stamped APPX 00001-0388 from UAIC's appendix. Appellants further request this Court to order UAIC to file an amended brief and appendix that does not contain any reference to the stricken documents or facts related thereto.

DATED this 10th day of December, 2018.

EGLET PRINCE

/s/ Dennis M. Prince

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed electronically with the Nevada Supreme Court on the 10th day of December, 2018. Electronic service of the foregoing **APPELLANTS' MOTION TO STRIKE PORTIONS OF RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF TO SECOND CERTIFIED QUESTION AND APPENDIX** shall be made in accordance with the Master Service List as follows:

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