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

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

Appellants,

v.

UNITED AUTOMOBILE INSURANCE COMPANY,

Respondent.

APPELLANTS' REPLY BRIEF REGARDING SECOND CERTIFIED QUESTION OF LAW AND RESPONSE TO SUPPLEMENTAL BRIEF ADDRESSING RECENT CASE LAW

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

DENNIS M. PRINCE, ESQ.
Nevada Bar No. 5092
KEVIN T. STRONG, ESQ.
Nevada Bar No. 12107
EGLET PRINCE
400 South 7th Street, 4th Floor
Las Vegas, NV 89101
Attorneys for Appellants

RICHARD CHRISTENSEN, ESQ.
Nevada Bar No. 13846
CHRISTENSEN LAW OFFICES
1000 S. Valley View Blvd.
Las Vegas, NV 89107
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

Rules **Page(s)**

I. STATEMENT OF FACTS REGARDING THE PROCEEDINGS BELOW

UAIC has attempted to distract this Court with proceedings initiated by Appellants James Nalder ("Nalder") and Cheyanne Nalder ("Cheyanne") in the district courts of Nevada and California. UAIC decided to file its Motion to Dismiss with the Ninth Circuit based on the purported expiration of the default judgment after certification of the first question. 1 A.App. 0001-0023. As a result, the governing facts before this Court regarding the second certified question of law remain those facts that giving rise to the first certified question of law. There is no trial court record regarding the validity of the judgment that this Court even needs to evaluate because this issue was not raised in any lower court of competent jurisdiction. UAIC easily could have raised this issue in the lower court considering that, under its position, the underlying default judgment expired on June 3, 2014, nearly three years before UAIC filed its Motion to Dismiss with the Ninth Circuit. The Ninth Circuit articulates in its Certification Order that Nalder and Lewis make the procedural claim that: "a lapse in the default judgment, if any, may affect the amount of damages but does not affect liability, so the issue is inappropriate to address on appeal before the district court has evaluated the effect on damages." *Nalder v. United Auto Ins. Co.*, 878 F.3d 754, 747 (9th Cir. 2017). As such, the issue is inappropriate to address on appeal before the Federal District Court has evaluated the effect on damages and made factual findings.

UAIC also casts aspersions on Thomas F. Christensen, Esq., in its Answering Brief by implying that he represented Cheyanne and Nalder in obtaining new judgments while this matter has been pending. This is untrue. Cheyanne acted through independent counsel, David A. Stephens, Esq., in Nevada to obtain a new judgment against Lewis through an action on the judgment in accordance with *Mandelbaum v. Gregovich*, 24 Nev. 154, 50 P. 849 (1897). 1 A. App. 0081-0090; 1 A. App. 0108-0124. Nalder's independent counsel in California, Mark Linderman, Esq., acted to obtain a new judgment in California pursuant to NRS 11.300, a tolling statute, and the California ten-year statute of limitations for an action on a judgment because Appellant Gary Lewis ("Lewis") has lived in California since at least 2010. 1 A. App. 0114-0124.

UAIC further alleges Christensen requested extensions of time from this Court regarding the briefing schedule so that he could pursue these judgments. This is patently false as Appellants are also represented by Eglet Prince, which formally made requests for extensions without any knowledge of Nalder and Cheyanne's ongoing efforts to secure new judgments.

UAIC falsely accuses Mr. Christensen of representing Cheyanne in the Nevada state district court action and Nalder in the California district court action. The facts show that Cheyanne is represented by Stephens and Nalder is represented by Linderman, respectively. 1 A. App. 0024-0033; 1 A. App. 0108-0109. UAIC

also asserts that Christensen represents Lewis as a defendant in the Nevada and California district court actions, which is not true. Lewis is represented in the Nevada case by independent counsel E. Breen Arntz, Esq. pursuant to *State Farm v. Hansen*, 131 Nev. ___, 357 P.3d 338, 341 (2015).[1] 1 A. App. 0111-012. Lewis is represented as a defendant in the California case by Attorney Arthur Willner, defense counsel appointed and paid for by UAIC. 1 A. App. 0024-0033.

UAIC initially hired Stephen Rogers, Esq. to defend Lewis in the Nevada state district court default judgment action and Cheyanne's new action to amend the default judgment. Christensen informed Rogers that he represented Lewis in the action against UAIC, outlined the scope of his involvement as counsel for Lewis, and asked Rogers to provide inform him of any proposed actions taken in the new district court actions so that he could advise Mr. Lewis. Ultimately, Rogers was not retained to defend Lewis and attorney Randall Tindall was hired instead. Since that time, Tindall has asserted defenses that directly conflict with Lewis's interests. UAIC also managed to convince the Nevada state district court to allow it to intervene in Cheyanne's district court action. Notably, UAIC's efforts to intervene in Nalder's California action to domesticate the underlying default judgment failed as intervention was appropriately denied pursuant to *Hinton v. Beck*, 176 Cal. App.

[1] Despite the obvious conflict of interest between Lewis and UAIC, UAIC refused to pay for independent counsel

4th 1378, 1380, 98 Cal. Rptr. 3d 612, 613 (Cal. Ct. App. 2009) ("Grange, having denied coverage and having refused to defend the action on behalf of its insured, did not have a direct and immediate interest to warrant intervention in the litigation").

Appellants request this Court to disregard UAIC's claims that Appellants' counsel is using this Court to somehow validate the underlying default judgment. Appellants' Complaint for breach of contract and bad faith filed against UAIC is a timely action on the judgment pursuant to NRS 11.190(1)(a). Alternatively, the underlying default judgment has not expired because the six-year statute of limitations was tolled because Cheyanne was a minor and because Lewis has resided in California for a number of years. Ultimately, UAIC wants to use this Court to pronounce that the underlying default judgment is invalid as a matter of law, which directly contravenes this Court's limited appellate jurisdiction.

II. ARGUMENT

A. UAIC Improperly Frames The Issue Before This Court As One of Fact, Not Of Law

It is abundantly clear that UAIC does not want this Court to answer the second question of law certified by the Ninth Circuit. Rather, UAIC wants this Court to determine the validity of the underlying $3,500,000.00 default judgment entered against Appellant Gary Lewis as a direct result of UAIC's breach of the contractual duty to defend. This Court is not tasked to make factual determinations giving rise to the certified question of law. "As the answering court, [this Court] is limited to

answering questions of law posed to [it]; the certifying court retains the duty to determine facts and to apply the law provided by the answering court to those facts," *Progressive Gulf Ins. Co. v. Faehnrich*, 130 Nev. ___, 327 P.3d 1061, 1063 (2014) (quoting *In re Fontainbleau Las Vegas Holdings, L.L.C.*, 127 Nev. 941, 955, 267 P.3d 786, 795 (2011)).

UAIC filed a motion to dismiss Appellants' appeal with the Ninth Circuit based on its belief that the underlying $3,500,000.00 default judgment is unenforceable because Appellants failed to renew the judgment or file an action on the judgment within the six-year statute of limitations. The Ninth Circuit was unable to decide the motion because Nevada law is unclear as to whether a bad faith/breach of contract action filed against the insurer to enforce a judgment entered against its insured within the six-year life of the judgment constitutes a valid action on the judgment. As a result, the Ninth Circuit certified a narrow question of law to this Court:

> Under Nevada law, if a plaintiff has filed suit against an insurer seeking damages based on a separate judgment against its insured, does the insurer's liability expire when the statute of limitations on the judgment runs, notwithstanding that the suit was filed within the six-year life of the judgment?

This Court, however, rephrased the question of law to ask whether a plaintiff can recover consequential damages against an insurer resulting from a default judgment that expired because it was not renewed. An unintended consequence of

this Court's revision of the question of law is that it presumes renewal is the only way to maintain the validity of the judgment. As a result, UAIC now argues this Court should conclude the underlying default judgment is invalid even though this is not the question before it. This Court is not tasked to determine the validity of the underlying default judgment.[2] Rather, this Court is charged to determine whether, assuming the underlying default judgment needed to be renewed, Appellants' bad faith/breach of contract lawsuit against UAIC is a timely action on the judgment that rendered renewal of the judgment unnecessary. Depending on this Court's answer to that limited question, it will be up to the Ninth Circuit to determine: (1) whether the default judgment remains valid; and (2) whether Appellants can recover the $3,500,000.00 default judgment from UAIC that resulted because of UAIC's breach of its contractual duty to defend. The law in Nevada is settled: an insurer that breaches its contractual duty to defend may be liable for all foreseeable consequential damages including a judgment that exceeds the policy limits. *Century Sur. Co. v. Andrew*, 134 Nev. Adv. Rep. 100, at *2, 14-15 (Dec. 13, 2018).

UAIC maintains that "Appellants can no longer continue to seek consequential damages in the amount of the default judgment obtained against Mr.

[2] UAIC has even misrepresented to the Eighth Judicial District Court currently presiding over Cheyanne Nalder's action on the default judgment that the validity of the default judgment will be decided by this Court. This misrepresentation ultimately caused Nevada's Eighth Judicial District Court to stay Cheyanne Nalder's action pending the outcome of this Court's decision.

Lewis for UAIC's breach of the duty to defend because the default judgment expired…" *See* Answering Brief, at p. 11. The nature and scope of this contention makes clear that UAIC requests this Court to circumvent its role as an appellate court and conclude that the underlying default judgment is invalid as a matter of law because the judgment was not renewed.

UAIC's request for this Court, and for the Ninth Circuit beforehand, to invalidate the default judgment conveniently ignores the utter lack of a factual record from a lower court regarding the judgment's validity. The validity of the underlying default judgment should have been adjudicated in the U.S. Federal District Court, where the current bad faith/breach of contract action is pending or, alternatively, in Nevada's Eighth Judicial District Court that actually entered the default judgment. In the absence of an adequate factual record from the courts below, this Court does not even have the ability to decide whether the judgment is valid or invalid. *See Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, 133 Nev. ___, 388 P.3d 970, 972 (2017) ("[T]his Court would not normally address an issue that the district court declined to consider and develop the factual record…"). A factually complete record that is fully developed allows the appellate court to comprehensively review the legal issues arising from that record. *In re Facebook, Inc.*, 986 F. Supp. 2d 524, 535 (S.D.N.Y. 2014). "It is not the function of the [appellate court] to find facts . . . [but] to review claims based on a complete factual

record developed by the trial court." *Levine v. 418 Meadow St. Assocs., LLC*, 163 Conn App. 701, 711 n.5, 137 A.3d 88, 94 (Conn. Ct. App. 2016).

Rather than ensure a well-developed factual record regarding the validity of the underlying default judgment, UAIC sought relief from the Ninth Circuit, an appellate court, to adjudicate the validity of a default judgment that was entered by the Eighth Judicial District Court of Nevada. The Ninth Circuit properly deferred ruling on this issue because Nevada law is unclear with regard to what constitutes an action on the judgment thereby absolving the necessity to renew the judgment. Now, UAIC asks this Court to enter a ruling regarding the validity of the default judgment that exceeds the scope of this Court's role as an appellate court answering a narrow question of law. This is improper. A ruling regarding the validity of the default judgment should come from the lower court that entered the judgment or otherwise adjudicated the judgment once this Court answers the pending question of law.

Ironically, UAIC implies in its argument that renewal is the only way to maintain the validity of a judgment even though it admits in its Answering Brief that an action on the judgment can also maintain its validity. Accordingly, this Court should only address whether Appellants' bad faith/breach of contract action to enforce the judgement against UAIC is an action on the judgment that maintains the validity and collectability of the underlying judgment. Any ruling from this Court

that exceeds the scope of the question of law or otherwise addresses the validity of the default judgment will directly undermine this Court's limited role of appellate review.

B. UAIC Ignores That The Binding Effect Of A Default Judgment Against An Insurer That Breaches Its Duty To Defend Renders A Bad Faith/Breach Of Contract Lawsuit An Action On The Judgment Pursuant To NRS 11.190(a)(1)

UAIC finally acknowledges that there are two ways to prevent the expiration of a judgment, renewal under NRS 17.214 or instituting an action on the judgment under NRS 11.190(a)(1). UAIC argues, however, that Appellants' bad faith and breach of contract lawsuit is not an action on the default judgment because "Appellants do not hold any judgment against UAIC." *See* Answering Brief, at p. 13. UAIC's position is not tenable because it ignores the binding effect of a judgment against an insurer that breaches its contractual duty to defend.

Nevada is not a direct-action state because the third-party claimant lacks a valid contractual relationship with the insurer. *Gunny v. Allstate Ins. Co.*, 108 Nev. 344, 345, 830 P.2d 1335, 1335-36 (1992). "Nevada law does not provide for a cause of action on the part of a third-party claimant against an alleged tortfeasor's insurer in contract or tort, where the claimant has ***not obtained a judgment*** against the alleged tortfeasor." *Hunt v. State Farm Mut. Auto. Ins. Co.*, 655 F. Supp. 284, 287 (D. Nev. 1987) (emphasis added); *see also, Hall v. Enter. Leasing Company-West*, 122 Nev. 685, 693, 137 P.3d 1104, 1109 (2006). Thus, once a third-party claimant

becomes a judgment creditor, he can sue the insurer to enforce the judgment entered against its insured. This is precisely what Appellants did when they filed their breach of contract and bad faith action against UAIC.

The underlying default judgment is not "merely evidence" for Appellants' damages claim as UAIC contends. *See* Answering Brief, at p. 13. A judgment provides the measure of recoverable damages resulting from an insurer's contractual breach of the duty to defend. UAIC's position that a resulting judgment against an insured is not binding on the insurer would in essence, preclude a third-party claimant from ever being able to exercise its right to enforce a judgment entered against the insured as a direct result of the insurer's conduct. Third-party injury claimants are permitted to sue on the judgment or seek to enforce the judgment against the tortfeasor's insurer directly to enforce a judgment under Nevada law. *Hall*, 122 Nev. at 693, 137 P.3d at 1109. Thus, UAIC's argument is unpersuasive.

UAIC's argument is also flawed because a judgment is binding on an insurer that breaches its contractual duty to defend. When an insurer breaches its duty to defend, it is bound by the determination of liability and damages made in the case it refused to defend. *Lodigensky v. American States Preferred Ins. Co.*, 898 S.W.2d 661, 664 (Mo. Ct. App. 1995). "In the absence of fraud or collusion, the insurer [is] bound by a judgment entered by default." *Blais v. Quincy Mut. Fire Ins. Co.*, 361 Mass. 68, 70, 278 N.E.2d 746, 747 (Mass. 1972). The rationale for this rule

makes sense because insurers retain complete control over the defense of their insureds during litigation. *Allstate v. Miller*, 125 Nev. 300, 309, 212 P.3d 318, 324-25 (2010). Therefore, insurers should be bound by the consequences of their breach of the contractual duty to defend, which oftentimes is a default or stipulated judgment.

UAIC ignores that its contractual breach of the duty to defend, which has been established as a matter of law, is the catalyst that renders the default judgment enforceable against it. Were it not for UAIC's breach of the contractual duty to defend, a default judgment would not have been entered against Lewis, its insured. This Court has formally accepted this legal position by way of its recent holding in *Andrew*, 134 Nev. Adv. Rep. 100, at *2:

> We conclude that an insurer's liability when it breaches it contractual duty to defend is not capped at the policy limits plus the insured's defense costs, and instead, an insurer may be liable for any consequential damages caused by its breach.

"Binding an insurer to the underlying judgment when it breaches its duty to defend incentivizes it to resolve all doubts about the duty to defend in the insured's favor by raising the risk level for an insurer who opts not to defend." *Andrew v. Century Surety Co.*, 134 F. Supp. 3d 1249, 1261 (D. Nev. 2015).

UAIC's reliance on *Mont v. Encompass Ins. Co.*, 2014 Mass. Super. LEXIS 27, 2014 WL 885916 (Mass. Super. Ct. Jan. 22, 2014), a trial court decision from Massachusetts, is irrelevant to the narrow question before this Court. In *Mont*, the

issue before the trial court was whether a judgment creditor could initiate an action against the insurer for failure to pay post-judgment interest on a judgment that the insurer satisfied on behalf of its insured. *Id* at *11. The *Mont* Court ruled the judgment creditor had no claim against the insurer because she did not hold the judgment against the insurer. *Id.* at *13. However, *Mont* is clearly distinguishable from this case for one critical reason: the insurer in *Mont* did ***not breach its contractual duty to defend its insured***. UAIC's breach of the duty to defend is what binds it to the resulting default judgment because UAIC affirmatively ***chose*** not to participate in the defense of its insured during litigation. By contrast, in *Mont*, a jury trial commenced against the insured, which ultimately lead to entry of the judgment. *Id.* at *4.

UAIC's decision to ignore its breach of the duty to defend and the resulting consequences of that breach in no way undermines the binding effect of the underlying default judgment against it. Appellants filed their action for breach of contract and bad faith against UAIC to enforce the default judgment that resulted from UAIC's breach of the contractual duty to defend. Any ruling to the contrary would signify a clear departure of this Court's jurisprudence that an insurance company that fails to participate in litigation is bound by the resulting default judgment. *Lomastro v. Am Family Ins. Group*, 124 Nev. 1060, 1069-70, 195 P.3d 339, 346 (2008) (A default judgment binds an insurer that chooses not to intervene

in an action against the uninsured motorist.) (citing *State Farm Mut. Auto. Ins. Co. v. Christensen*, 88 Nev. 160, 162-63, 494 P.2d 552, 553 (1972). Appellants' Complaint for breach of contract and bad faith against UAIC is a valid action on the underlying default judgment that was timely filed during the six-year life of the judgment. As a result, Appellants were under no obligation to renew the default judgment pursuant to NRS 17.214 within the six-year life of the judgment. *Mandlebaum*, 24 Nev. at 161, 50 P. at 851.

C. The Six-Year Statute Of Limitations For Both An Action On The Judgment Or Renewal Of The Judgment Is Tolled Under NRS 11.200, NRS 11.250, and NRS 11.300

It is well-established Nevada law that a judgment creditor can exercise one of two options to maintain the life of a judgment

> ***The law is well settled*** that a judgment creditor may enforce his judgment by the process of the court in which he obtained it, or he may elect to use the judgment as an original cause of action and bring suit thereon and prosecute such suit to final judgment.

Mandlebaum, 24 Nev. at 161, 50 P. at 851 (emphasis added).

Mandlebaum also supports Appellants' alternative argument that the six-year statute of limitations is tolled because Lewis has resided outside the State of Nevada for a number of years:

> The averments of the complaint and the undisputed facts are that, at the time of the rendition and entry of the judgment in 1882, the appellant was out of the state, and continuously remained absent therefrom until March, 1897, thereby preserving the judgment and all rights of action

> of the judgment creditor under the same. ***Notwithstanding nearly fifteen years had elapsed since the entry of the judgment,*** yet, for the purposes of action, the judgment was not barred — for that purpose ***the judgment was valid***.

Id. at 159, 850 (emphasis added)

Mandlebaum establishes that the statute of limitations in Nevada for an action on the judgment or a renewal remains tolled because the judgment debtor lives outside the State of Nevada. Therefore, any renewal pursuant to NRS 17.214 would be premature. (more than 90 days prior to the running of the statute of limitations) UAIC urges this Court to conclude that the timeframes articulated to renew a judgment under NRS 17.214 and NRS 11.190(a)(1) are not affected by any of the tolling statutes in the same chapter. Yet, UAIC cites to no case law from this jurisdiction to support this position. In actuality, this Court has determined that the time to file a renewal under NRS 17.214 may be subject to statutory or equitable tolling provisions. *O'Lane v. Spinney,* 110 Nev. 496, 501-502, 874 P.2d 754, 757 (1994).

UAIC also raises the real property lien issue as a basis to preclude application of tolling provisions to the renewal of a judgment. However, this is not a real property issue and the underlying default judgment was not even recorded. Even if it was recorded, the property lien would expire, but the judgment would not. UAIC claims "NRS 17.214 was enacted to promote —namely, the reliability of title to real property." *See* Answering Brief, at p. 18. However, any concerns regarding the

reliability of title searches for creditors and debtors regarding real property only applies if the judgment is recorded and the creditor seeks to renew the lien on real property. *Levin v. Frey*, 123 Nev. 399, 403, 168 P.2d. 712, 715 (2007). This rationale is not consequential in a setting such as this where the judgment was not recorded because the action on a judgment results in a new judgment. As a result, any potential property liens resulting from the new judgment would be new and could not retroactively affect title.

UAIC's reliance on *F/S Mfg. v. Kensmoe*, 798 N.W.2d 853 (N.D. 2011) for the proposition that a renewal time period cannot be tolled under the relevant statute of limitations is not persuasive. In Nevada, the time period for renewal under NRS 17.214 is found, not in the body of the statute, but in NRS 11.190(a)(1). NRS 11.190(a)(1) does not remove the tolling statutes from the computation of time, like the North Dakota statutes at issue in *Kensmoe* 798 N.W.2d at 858. The language of the renewal statute in North Dakota contains a ten-year period ***in the body of the statute.*** *Id.* at 856. By contrast, NRS 17.214 refers one back to the statute of limitations for judgments. (File an affidavit of renewal within 90 days "before the date the judgment expires by limitation"). *Kensmoe* actually provides further support of the ongoing validity of the underlying default judgment:

> Of course, it may be easier to renew a judgment by affidavit; but it by no means follows that the old judgment may not be made the basis of a new suit, and <u>many cases arise where it is an advantage to be able to bring suit, instead of renewing by affidavit — the case at bar being an</u>

> example. It is our conclusion that the two remedies are not inconsistent, and that a judgment creditor may either sue upon his judgment, or renew it by affidavit . . . .

Kensmoe, 798 N.W.2d at 857.

UAIC also claims that the tolling provisions of NRS 11.300 do "not apply when the absent defendant is otherwise subject to service of process."[3] *See* Answering Brief, at p. 21; *see also, Simmons v. Trivelpiece*, 98 Nev. 167, 168, 643 P.2d 1219, 1220 (1982). However, UAIC overlooks this Court's recent case of *Los Angeles Airways v. Est. of Hughes*, 99 Nev. 166, 168, 659 P.2d 871, 872 (1983):

> We recognize that in recent years, the continued viability of the tolling statute (NRS 11.300) has been called into question in light of the enactment of statutes making it possible to obtain jurisdiction over defendants residing outside this state. Indeed, in granting summary judgment the district court expressed the view that the enactment of NRS 14.065, the so-called "long-arm" statute, rendered the tolling statute virtually inapplicable. Nevertheless, we note that in the number of years since the enactment of NRS 14.065 and similar provisions, the legislature has not repealed the tolling provision, and we are reluctant to do so by judicial declaration. *See Duke University v. Chestnut*, 221 S.E.2d 895 (N.C. Ct. App. 1976).

UAIC continues to argue that the underlying default judgment expired by operation of law without citation to any case law to support this argument. Liens expire by operation of law. Judgments do not. *See Evans v. Samuels*, 119 Nev. 378,

[3] NRS 11.300 states that when a cause of action accrues against a person who resides out of state, the action "may be commenced within the time herein limited after the person's return to the State; and if after the cause of action shall have accrued the person departs from the State, the time of the absence ***shall not*** be part of the time prescribed for the commencement of the action (emphasis added).

380, 75 P.3d 361, 363 (2003). *Mandelbaum and Evans* both concluded judgments that were 15 and 16 years old prior to renewal remained viable for renewal. *Mandlebaum*, 24 Nev. at 159, 50 P. at 850 ; *Evans*, 119 Nev. at, 379-80; 75 P.3d at 362-63. Even if this Court does not believe Appellants bad faith and breach of contract lawsuit against UAIC is an action on the judgment, Cheyanne's recently filed action on the judgment, which was commenced when the judgment was only ten years old, should alternatively maintain the validity of the judgment pursuant to NRS 11.250 and NRS 11.300 because: (1) Lewis resided out of state; and (2) Cheyanne was a minor during the pendency of the six-year statute of limitations under NRS 11.190(1)(a).[4]

NRS 11.300 is not the only tolling statute applicable here. NRS 11.200 also applies. NRS 11.200 states, in pertinent part:

> The time in NRS 11.190 shall be deemed to date from the last transaction or the last item charged or the last credit given; and whenever any payment on principal or interest has been or shall be made upon an existing contract, whether it be a bill of exchange, promissory note or other evidence of indebtedness if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made.

UAIC made three undisputed payments toward the judgment on June 23, 2014; June 25, 2014; and March 5, 2015. Therefore, UAIC's last payment on the

[4] NRS 11.250 states that the accrual of a minor's cause of action begins within the age of 18 years.

judgment extended the expiration of the six-year statute of limitations to March 5, 2021. UAIC claims its $15,000.00 payment was not on the judgment, which is absurd because the amount clearly represents payment of the $15,000.00 indemnity limit that Lewis carried at the time of the subject collision. The underlying default judgment was the basis for the Federal District Court ordering UAIC's payment of the policy limits.

D. <u>Alternatively, Nalder's Sister-State California Judgment Is Valid</u>

UAIC maintains that Nalder's subsequent renewal of the underlying default judgment in California is invalid because the Nevada default judgment was expired at the time. Since UAIC admits the viability of the action on the judgment pursuant to *Mandlebaum*, this defense is not valid. UAIC also fails to state the entirety of the Cal Code Civ Proc § 1710.40:

> (a) 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, including the ground that the amount of interest accrued on the sister state judgment and included in the judgment entered pursuant to this chapter is incorrect.
>
> (b) Not later than 30 days after service of notice of entry of judgment pursuant to Section 1710.30, proof of which has been made in the manner provided by Article 5 (commencing with Section 417.10) of Chapter 4 of Title 5 of Part 2, the judgment debtor, on written notice to the judgment creditor, may make a motion to vacate the judgment under this section.

The statute clearly delineates a specific timeframe for UAIC to contest the California judgment. UAIC has failed to contest the judgment within that timeframe.

Therefore, the California judgment remains valid and is not subject to challenge. The fact that there are now three judgments entered in favor of Nalder and/or Cheyanne and against Lewis establishes that UAIC's liability for the underlying default judgment has not expired.

III. UAIC'S SUPPLEMENTAL BRIEFING ADDRESSING THE FIRST CERTIFIED QUESTION OF LAW IS UNNECESSARY BECAUSE THIS QUESTION OF LAW WAS FULLY ANSWERED BY THIS COURT

On July 22, 2016, this Court accepted a question of law certified from the Ninth Circuit Court of Appeals:

> 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?

On June 13, 2017, this Court stayed its consideration of the first certified question because UAIC filed a motion to dismiss Appellants' appeal before the Ninth Circuit. UAIC's motion to dismiss prompted the Ninth Circuit to certify a second question of law, which this Court accepted on February 23, 2018.

During the pendency of this Court's stay of its decision on the above certified question of law, this Court accepted certification of the ***exact same*** question in the matter of *Century Surety Company v. Andrew*, Case No. 73756, on September 11, 2017. On December 13, 2018, this Court answered the certified question in the *Andrew* matter:

> We conclude that an insurer's liability where it breaches its contractual duty to defend is not capped at the policy limits plus the insured's defense costs, and instead, an insurer may be liable for any consequential damages caused by its breach. We further conclude that good-faith determinations are irrelevant for determining damages upon a breach of this duty.

Andrew, 134 Nev. Adv. Rep. 100, at *2.

The Nevada Supreme Court is the answering court, which means its role is limited to answering the question of law before it, not to apply the facts of the case to the law. *Faehnrich*, 130 Nev. ___, 327 P.3d at 1063 (2014). This Court has already answered the question of law that was first certified and accepted in this matter. As a result, there is nothing left for this Court to consider because the issue of law raised by the first question is entirely resolved.

In its supplemental brief, UAIC attempts to distinguish the conduct of Century Surety Company in *Andrew* with its conduct in this case. UAIC makes this argument to somehow secure a decision from this Court that UAIC's breach of its contractual duty to defend does not expose it to liability for the resulting $3,500,000.00 default judgment. This request is completely inappropriate because UAIC has asked this Court to apply the law to the underling facts of this case. This Court is not tasked to determine the extent of UAIC's liability for its judicially established contractual breach of the duty to defend. It will be up to the federal district court to decide whether UAIC is liable for the entire $3,500,000.00 default judgment as a result of its contractual breach of the duty to defend.

UAIC even attempts to chip away at the scope of this Court's pronouncement of the law in *Andrew* by suggesting that "an insurer's good faith basis for declining to defend its insured should be deemed relevant and bar liability for damages in excess of the policy limits." *See* Supplemental Brief, at p. 7. This request totally contradicts this Court's express determination in *Andrew*: "We further conclude that good-faith determinations are irrelevant for determining damages upon a breach of this duty [to defend]. *Andrew*, 134 Nev. Adv. Rep. 100, at *2. The law is clear: an insurer may be liable for a judgment that exceeds the policy limits irrespective of good faith or bad faith. UAIC cannot now ask this Court to clarify its answer to precisely the exact same question of law presented in both this matter and *Andrew* simply because it is dissatisfied with this Court's answer. The law is settled in this regard.

IV. CONCLUSION

For the reasons set forth above, Appellants respectfully request this Court to conclude that a judgment creditor who timely files lawsuits against an insurer to enforce a judgment entered against the insured has instituted an action on the judgment that absolves the judgment creditor of any judgment renewal obligations pursuant to NRS 17.214.

DATED this 7th day of February, 2019.

EGLET PRINCE

/s/ Dennis M. Prince
DENNIS M. PRINCE, ESQ.
Nevada Bar No. 5092
KEVIN T. STRONG, ESQ.
Nevada Bar No. 12107
400 South 7th Street, 4th Floor
Las Vegas, NV 89101
Attorneys for Appellants

CHRISTENSEN LAW OFFICES

/s/ Thomas F. Christensen
THOMAS F. CHRISTENSEN, ESQ.
Nevada Bar No. 13846
1000 S. Valley View Blvd.
Las Vegas, NV 89107
Attorneys for Appellants

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 Office Word 365, Version 1811 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 5,533 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 subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

DATED this 7th day of February, 2019.

EGLET PRINCE

/s/ Dennis M. Prince
DENNIS M. PRINCE, ESQ.
Nevada Bar No. 5092
KEVIN T. STRONG, ESQ.
Nevada Bar No. 12107
400 South 7th Street, 4th Floor
Las Vegas, NV 89101
Attorneys for Appellants

CHRISTENSEN LAW OFFICES

/s/ Thomas F. Christensen
THOMAS F. CHRISTENSEN, ESQ.
Nevada Bar No. 2326
RICHARD V. CHRISTENSEN, ESQ.
Nevada Bar No. 13846
1000 S. Valley View Blvd.
Las Vegas, NV 89107
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of February, 2019, I served the foregoing **APPELLANTS' REPLY BRIEF REGARDING SECOND CERTIFIED QUESTION OF LAW AND RESPONSE TO SUPPLEMENTAL BRIEF ADDRESSING RECENT CASE LAW** by electronically filing and serving the document(s) listed above with the Nevada Supreme Court.

Matthew J. Douglas, Esq.
ATKIN, WINNER & SHERROD
1117 South Rancho Drive
Las Vegas, NV 89102

Scott A. Cole
COLE, SCOTT & KISSANE
9150 South Dadeland Blvd., Suite 1400
Miami, Florida 33156

Thomas F. Christensen, Esq.
CHRISTENSEN LAW OFFICES, LLC
1000 South Valley View Blvd.
Las Vegas, NV 89107

/s/ Nicole Littlejohn
An Employee of EGLET PRINCE