

In the Supreme Court of Nevada

JAMES NALDER, guardian at litem
on behalf of CHEYENNE NALDER;
and GARY LEWIS, individually,

Appellant,

vs.

UNITED AUTOMOBILE
INSURANCE COMPANY,

Respondent.

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Elizabeth A. Brown
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MOTION TO REISSUE ORDER AS AN OPINION

The Ninth Circuit needed this Court to clarify an important issue under Nevada law because there was “no controlling precedent.” *See* NRAP 5(a). The *en banc* Court answered the certified question through thoroughly reasoned majority and concurring opinions. To create the “controlling precedent” that had been missing, this Court should publish those opinions. NRAP 36(f).

A. The Standard for Publication

This Court will decide a case by published opinion if it

(A) Presents an issue of first impression;

(B) Alters, modifies, or significantly clarifies a rule of law previously announced by the court; or

(C) Involves an issue of public importance that has application beyond the parties.

NRAP 36(c). Any one of these criteria justifies publication. NRAP

36(f)(3). Here, all three do.

**B. This Certified Question Necessarily Presents
a Substantial Issue of First Impression**

By their very nature, certified questions arise only when there is a gap in this Court’s jurisprudence. NRAP 5(a). Indeed, this Court only accepts a certified question if “there is no controlling [Nevada] precedent[] and the answer will help settle important questions of law.”

Volvo Cars of N. Am., Inc. v. Ricci, 122 Nev. 746, 749–51, 137 P.3d 1161, 1163–64 (2006).

Had this case not involved a substantial issue of first impression, the Ninth Circuit would not have needed to certify it. NRAP 5(a).

**C. This Court’s Answer Clarifies the Law in
Mandlebaum, Leven, and Century Surety**

**1. Mandlebaum’s Action “*on the Judgment*” Does
Not Extend to New Claims against New Parties**

In briefing the certified question, Nalder maintained that this Court’s decision sixscore years ago in *Mandlebaum v. Gregovich*, 24 Nev. 154, 50 P. 849 (1897) controlled. In answering, this Court clarified

Mandlebaum’s limits: to the extent the common law action *on* the judgment survives the judgment renewal procedure in NRS 17.214 (*see* Cadish, J.’s concurring opinion), such an action is solely “to recover the amount left unsatisfied from the original judgment, not to litigate new claims against a new party.” (Majority opinion, at 4.)

**2. *A Judgment’s Expiration under Leven
Defeats a Claim for Consequential
Damages under Century Surety***

This Court also clarified the relationship between the right to pursue consequential damages from an insurer’s breach of the duty to defend, *Century Surety Co. v. Andrew*, 134 Nev., Adv. Op. 100, 432 P.3d 180 (2018), and a judgment’s expiration, *Leven v. Frey*, 123 Nev. 399, 168 P.3d 712 (2007):

A plaintiff cannot continue to seek consequential damages for breach of the duty to defend based on an expired judgment[.]

(Majority opinion, at 6; *see also id.* at 7.) This, the heart of the second certified question, provided much-needed guidance on *Century Surety*’s application—namely, the necessity for actual damages based on a valid, continuing judgment.

D. This Court's Answer Gives Plaintiffs, Insured Defendants, and their Insurers Needed Clarity

Nalder's bid for consequential damages is not unusual. The caution that a plaintiff must renew the judgment for the insured to have a claim of consequential damages is a matter of public importance to plaintiffs, insured defendants, and their insurers.

There is no question that future courts in this state and in the federal judiciary will rely on this unpublished guidance for Nevada law: this Court's answer, after all, provides the needed "controlling law." Leaving the guidance unpublished only serves to hide it from the bench and bar, leaving surprised the party who did not find it first. Rather, this Court should publish this precedent for all to hear.

E. This Court Can Reissue its Order without Revision

This Court can publish the September 20 order as an opinion without revision. *See* NRAP 36(f)(4). Far from deferring to the parties' familiarity with the facts and procedural history, this Court succinctly did so in such a way that the unfamiliar reader can easily grasp the relevant background for the Court's analysis. (Majority opinion, at 1–2.) That legal analysis, too, is well-reasoned, with comprehensive citations to relevant authorities and a thoughtful application of those authorities

to the certified question. (Majority opinion, at 2–7.) Even the brief concurrence makes its points—a joinder in the Court’s answer and an unresolved question for a future case—with precision and authority. (Cadish, J.’s concurring opinion.)

CONCLUSION

The public—not just the Ninth Circuit panel—deserves to know about this Court’s controlling answer to a significant question of Nevada law. As with certified questions past, this Court’s order answering the certified question should reissue as an opinion.

Dated this 4th day of October, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

WINNER & SHERROD

By: /s/ Daniel F. Polsenberg
DANIEL F. POLSENBERG (SBN 2376)
ABRAHAM G. SMITH (SBN 13,250)
JOEL D. HENRIOD (SBN 8492)
J. CHRISTOPHER JORGENSEN (SBN 5382)
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

By: /s/ Matthew J. Douglas
MATTHEW J. DOUGLAS
(SBN 11,371)
1117 SOUTH RANCHO DRIVE
Las Vegas, Nevada 89102
(702) 243-7059

*Attorneys for Real Party in Interest
United Automobile Insurance Company*

CERTIFICATE OF SERVICE

I hereby certify that this “Motion to Reissue Order as an Opinion” was filed electronically with the Nevada Supreme Court on October 4, 2019. Electronic service shall be made in accordance with the master service list as follows:

Dennis M. Prince, Esq.
Robert T. Eglet, Esq.
Eglet Prince
400 South 7th Street, 4th Floor
Las Vegas, NV 89101

Richard Christensen, Esq.
Thomas Christensen, Esq.
Christensen Law Offices
1000 South Valley View Blvd.
Las Vegas, NV 89107

Matthew L. Sharp, Esq.
Matthew L. Sharp, Ltd.
432 Ridge Street
Reno, Nevada 89501

David T. Pursiano, Esq.
Pursiano Barry Bruce Lavelle, LLP
8551 South Rampart Blvd., Ste. 260
Las Vegas, Nevada 89145

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

Laura A. Foggan
Crowell and Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004

/s/ Lisa M. Noltie
An Employee of Lewis Roca Rothgerber Christie LLP