

**CASE NO. 70504**

**In the Supreme Court of Nevada**

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Elizabeth A. Brown  
Clerk of Supreme Court

JAMES NALDER,  
Guardian Ad Litem on Behalf  
of Cheyanne Nalder;  
and GARY LEWIS, Individually,

Appellants,

v.

UNITED AUTOMOBILE  
INSURANCE COMPANY,

Respondent.

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**PETITION FOR REHEARING**

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## **INTRODUCTION**

Nalder and Lewis request the Court rehear the Order issued on September 20, 2019, which strives to answer two certified questions from the Ninth Circuit. UAIC has swiftly moved the Court to Publish, rather than clarify the recently issued Order. Publication of the Order, as written, however, creates confusion and inconsistent treatment for litigants in the very important area of claims handling litigation. The purpose of having the body of claims handling law is to regulate claims practices that violate the public trust. Nevada recognizes that a "special relationship" exists between an insurer and its insured, and that "an insurer's duty to its policyholder is ... 'akin' to a fiduciary relationship." *Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 700 (Nev. 1998), *opinion modified on denial of reh'g*, 115 Nev. 38 (1999). These cases, by their nature, are inherently skewed in favor of the more powerful insurance industry and the Court must render law with precision and awareness of the consequences.

## **ARGUMENT**

### **1. The Standard for Rehearing**

Nevada Rule of Appellate Procedure 40 governs Petitions for rehearing and limits the scope as follows:

#### **(c) Scope of Application; When Rehearing Considered.**

(1) Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing.

(2) The court may consider rehearings in the following circumstances:

(A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or

(B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

In the Order issued, the Court misapprehended a material fact, making NRAP 40(c)(2)(A) applicable, in concluding that there is *any* record or assumption regarding expiration of the statute of limitations on bringing an action on the judgment. Further, applying NRAP 40(c)(2)(B), the Court overlooked or failed to consider its holdings in *Century Surety* and *Mandlebaum*. The issue of the consequential damages, including the judgment amount, must be decided by the jury pursuant to *Century Surety*. These cases are directly on point and apply in this

case. Therefore, the Court must revisit and revise its Order issued September 20, 2019 to be consistent with precedent.

2. **The Court has overlooked or failed to consider the holding in *Century Surety* that the issue of the consequential damages must be decided by a jury and the holding in *Mandlebaum* that a judgment is valid against an out of state debtor after 15 years due to tolling statutes.**

The Court has overlooked a material question of law. The second certified question in this case was the result of a Motion to Dismiss brought by UAIC for lack of standing. The Ninth Circuit asked if **all liability** of UAIC was extinguished if the judgment had not been renewed. The Nevada Supreme Court rephrased and narrowed the question. This Court only answered the question of whether the original judgment could be an item of damage **if** not timely **renewed**.

The answer to the first certified question was first made in the Court's published Opinion from *Century Surety Co. v. Andrew*, 134 Nev. Ad. Op 100 (2018). The Court's adoption and reaffirmation of that decision answers both questions by holding that **"The determination of the insurer's liability depends on the unique facts of each case and is one that is left to the jury's determination."** This Court should have resisted making factual findings that are reserved for a jury as to the consequential damages as between these parties. This Court, in analysing the second question, nevertheless confirmed the continuing

existence of a common law action on a judgment and answered the question of standing for the parties. The jump the Court then makes to assume an “expired judgment” (at page 3) renders the instant Order beyond the finding that the action against UAIC is not an action on the judgment. This is a disallowed advisory opinion by this Court.

The existence of an actual controversy is a constitutional prerequisite to any judicial determination: This court is confined to controversies in the true sense. The parties must be adverse and the issues ripe for determination. The Court does not have constitutional permission to render advisory opinions. *City of N. Las Vegas v. Cluff*, 85 Nev. 200, 201, 452 P.2d 461, 462 (1969). Accordingly, the duty of the Court, "as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Univ. of Nevada v. Tarkanian*, 95 Nev. 389, 394, 594 P.2d 1159, 1162 (1979). This case has Nalder and Lewis on one side of the “v.” and UAIC on the other. *Nalder v. United Auto. Ins. Co.*, 2:09-cv-1348-RCJ-GWF,(D. Nev. Oct. 30, 2013). There is no controversy between Nalder and Lewis for this court to determine with this question.



It is anticipated that on remand for the Court to determine consequential damages, Nalder and Lewis **will not be claiming consequential damages in the amount of the original default judgment.** There are other consequential damages, in addition to the old judgment, that must be considered by the trial court *even if* the Ninth Circuit does not reverse the summary judgment grant on the bad faith claims,<sup>1</sup> which must be given to **the jury** to determine pursuant to *Century Surety*. The Court overlooks its holding in *Century Surety* that the jury must determine factually what damages are a consequence of the breach of the duty to defend. Therein, this Court verifies “**The determination of the insurer’s liability depends on the unique facts of each case and is one that is left to the jury’s determination.**” *Id.* (Emphasis added). Instead of following this clear precedent, the Court invades the trial court’s responsibility and concludes that the judgment has expired with no factual record and no placement of that into issue by Lewis and Nalder.

The Supreme Court should make clear that the *Century Surety* requirement to submit the issue of what consequential damages flow from the breach to the jury for decision. The Court may therein clarify that only items of damage that are

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<sup>1</sup> Which the Court must do if it follows this Court’s opinion in *Allstate v. Miller*, 212 P.3d 318, 125 Nev.300 (2009).

actually incurred and continuing apply and may be pursued. But, neither is Lewis estopped from recovering fees he has since incurred because of UAIC's breach of its' duty to defend and breach of the covenant of good faith and fair dealing. Nor is Nalder estopped from claiming against Lewis the full amount of all new, valid judgments in the State Courts of Nevada and California obtained pursuant to *Mandlebaum*.

The Court herein, in the Order, has made factual determinations between Nalder and Lewis in a case where they are not adverse parties. These issues have not been raised by them, but rather by the insurance company, UAIC, which is seeking to avoid all consequences for its breach of the duty to defend. Nalder and Lewis have argued that the appropriate place for the determination is the State of Nevada trial court, where the judgments have been entered. This Court is without jurisdiction to decide the factual issue of the applicability of the statute of limitations as between Nalder and Lewis. This is because "[a]n appellate court is not particularly well-suited to make factual determinations in the first instance." *Ryan's Express v. 6 Amador Stage Lines*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012). This applies to both the Ninth Circuit and the Nevada Supreme Court. The instant Order amounts to rendering an advisory opinion about an issue that is

not in controversy between adversary litigants. This exceeds the court's appellate jurisdiction.

**3. There is No Record to Support Expiration of the Statute of Limitations on Bringing an Action on the Judgment and the Court Misapprehended, Misapplied and Supplanted Assumptions for Facts Not in the Record**

With regard to NRCP 40(c)(A), in this case, the Court has overlooked material facts in the certifying order and grafted in facts not in the Order. The Nevada Supreme Court Order states “we accept the facts as given and therefore will not second-guess the certifying question’s assumption that the statute of limitations has otherwise run on the default judgment.” (See Order at page 6). The Nevada Supreme Court does not cite to the record nor the certifying order for the assumption that the statute of limitations had run on the default judgment. The certifying court did not supply that assumption. Even if the certifying court had supplied that assumption, there is no record establishing the statute of limitations running on the “action on a judgment.” The lack of a factual record was raised by Nalder and Lewis and included in the certifying order. To disregard this fact is error.

The most that can be said is Nalder and Lewis didn’t contest the fact that they did not *file for renewal* within 6 years of the judgment. This is not the same as an action on a judgment, as the Order does clarify. It is important to point out that

Nalder and Lewis are not adversaries in this litigation. This fact alone prevents a *Leven v. Frey*<sup>2</sup> analysis regarding expiration in this action. In *Leven*, the Debtor was contending the renewal was ineffective in the state court judgment action. The creditor did not raise the action on a judgment as an additional method of recovery nor the tolling statutes, as Nalder and Lewis have raised here. UAIC did not argue that the time for bringing an action on a judgment had expired. Under *Mandlebaum*, the judgment is still valid as a basis for an action on the judgment. It was ten years before Nalder brought the action on a judgment against Lewis in State Court, through new counsel, but just like the debtor in *Mandlebaum*, Lewis has been out of state. In *Mandlebaum*, the judgment was valid for an action on the judgment 15 years later due to applicable tolling.

These issues were raised by the argument that Lewis and Nalder made, noted in the certifying order that UAIC's motion was improper because there is no record finding the factual issues regarding the statute of limitations. Nor could there be, because Nalder and Lewis are not adverse in this litigation. This was disregarded by this Court. The statement that based on the certified question the judgment is expired is meaningless because there is no jurisdiction to make that determination.

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<sup>2</sup> 123 Nev. 399, 403, 168 P.3d 712, 715 (2007).

“UAIC argues that under Nev. Rev. Stat. 11.190(1)(a), the six-year statute of limitations during which Nalder could enforce his default judgment against Lewis expired on August 26, 2014, and Nalder did not renew the judgment.” (certifying order at P. 7) This was controverted by Nalder and Lewis stating 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.” (See Certifying Order at page 7). This is because the district court is the place to make findings of fact as set forth in *Century Surety*. No record -- no appellate issue. No controversy -- no jurisdiction.

Further, in the Certifying Order, the Court states “In support of this argument, they (Nalder and Lewis) point out that UAIC has already paid out more than \$90,000 in this case, which they say, acknowledges the validity of the underlying judgment...” This is one of the factual basis contained in the certification order for the tolling of the statute of limitations to at least March 5, 2021 regarding the action on a judgment. Finally, because there is no factual record Nalder and Lewis argued “that it is inappropriate to address on appeal the effect of the statute of limitations on the size of damages they may collect...”

#### **4. The Court Exceeded the Scope of the Certified Question as Rephrased**

Can Nalder and Lewis “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?” (See Order accepting second certified question as rephrased, P. 2). Thus, the only assumption regarding expiration in the certified question was the time expiring for filing a renewal affidavit pursuant to NRS 17.214. Nalder and Lewis did not contest that a renewal affidavit was not filed -- arguing instead that renewal is not required because the judgment is still valid for an action on the judgment, even if not renewed. The court states, “UAIC argues that because Nalder did not bring an action upon the default judgment he obtained against Lewis within six years, or otherwise renew the judgment, the judgment has expired and is therefore not a consequential damage of its breach of the duty to defend Lewis.” (See Order answering Certified Questions, page 3).

This Court says it is not deciding Lewis and Nalder’s tolling arguments because it is outside the certifying order. Any argument by UAIC that the time for bringing an action on the judgment has expired is likewise outside the certifying order. It also is not argued by UAIC. “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.” (See Response Brief, page 4). That is all UAIC argued. That is all that is in the second certified question. So even if the Court wants to render an advisory opinion on this topic it must be limited to the narrow question asked -- anything more is inconsistent with the Court’s own pronouncements and would undermine the public policy that favors enforceability of judgments. “Public policy undoubtedly favors the enforceability of judgments. Were it otherwise, lawsuits seeking monetary damages would be rendered ineffective.” See, e.g., *Thomas, Head and Greisen Employees Trust v. Buster*, 95 F.3d 1449, 1455 (9th Cir. 1996) (“Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.” (quoting *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166, 187, 18 L.Ed. 768 (1867))) *Merchant Transaction Systems, Inc. v. Necela, Inc.*, No. 02-1954-PHX-MHM, at 7 (D. Ariz. Jan. 21, 2010).

## **5. The Court Should Grant Rehearing in Order to Issue an Opinion**

“NRAP 5(h) Opinion. The written opinion of the Supreme Court...” This section of NRAP 5 contemplates responses to certified questions would be done by the more rigorous standard of an Opinion as opposed to just an Order. Further, the Court’s internal rules provide that the more rigorous Opinion method would be

used in circumstances such as these where the federal courts seek guidance on questions of law for which there is no precedent: “**Rule 9. Orders and Opinions.** An opinion **shall** be prepared if the case presents a novel question of law, an issue of public importance, or sets a new legal precedent.” The importance of following proper procedure when making decisions is demonstrated by UAIC’s recently filed Motion to Publish where it takes the narrow ruling that the non-renewal and the assumed expiration of the statute of limitations renders the judgment no longer an item of damage in itself and tries to make it that the “expiration of the judgment” defeats all consequential damages incurred by Nalder and Lewis. That is contrary to the holding in *Century Surety*, contrary to the Order, contrary to logic and contrary to justice. A more polished opinion would help alleviate misuse of the Court's published decisions.

### **CONCLUSION**

This issue was not presented in the trial court, and so this court ***cannot*** answer the 2nd certified question as it did because there is **no record** to reference for the facts. The pronouncement taken by the Court regarding the “expired judgment” is advisory, hypothetical and not binding between Lewis and Nalder, as there is no controversy between them in this litigation, there are no factual findings in the

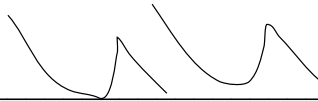


record and the Court has held that UAIC is a stranger to the Nalder v. Lewis judgment.

The Court should therefore rehear the matter, or clarify its Order prior to any publication. Following the law of *Century Surety*, the Court should answer the second certified question by referring the Ninth Circuit to the factual issues on the record pertaining to consequential damages in the case. Further, this Court should clarify that it is not making any specific factual findings, just making hypothetical findings based on assumptions in the question. This Court's Order should not be allowed to be paraded as a substantive ruling affecting the rights of Nalder, vis a vi Lewis.

Dated this 8<sup>th</sup> day of October, 2019.

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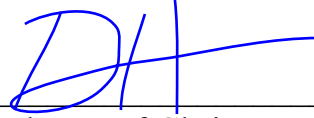
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 8<sup>th</sup> day of October, 2019, this document was filed electronically with the Supreme Court of Nevada. I served the foregoing PETITION FOR REHEARING by electronically filing and serving the document(s) listed above with the Nevada Supreme Court.



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An Employee of Christensen Law Offices