Case No. 79487

In the Supreme Court of Nevada

UNITED AUTOMOBILE INSURANCE COMPANY,

Appellant,

vs.

CHEYENNE NALDER; and GARY LEWIS,

Respondents.

REPLY BRIEF ON MOTION FOR EXTENSION TO FILE OPENING BRIEF AND APPENDIX

Based on extraordinary circumstances, appellant United Automobile Insurance Company (UAIC) moved in good faith to extend the deadline for its opening brief. Respondents object to what they perceive as this Court's laxity in the granting the previous extension and then manufacture a distinction between "extenuating" and "extraordinary" (the standard they think must apply) and posit that this Court lacks discretion to accommodate an extension during this unprecedented global crisis. Respondents also contend that because, in their view, the appeal is "simple," the appeal can be summarily dismissed, without giving UAIC a hearing. This is improper. This Court should grant the extension.

1. The COVID-19 Pandemic Has Created Genuine, Extenuating—and Extraordinary–Circumstances

There is little question that appellants' counsel has been genuinely affected by the COVID-19 pandemic. Attorneys and staff have struggled with school closings and the elimination of child care. This particularly impacted the attorney who had primary responsibility for drafting the opening brief, who (as discussed in the motion) has faced difficult decisions with his family after his wife lost much of her business. His family and those of other attorneys and staff have had to significantly change their schedules. And the firm has struggled to address emergencies in other cases, including issues stemming from party insolvency.

The district court's administrative orders, entered in coordination with the Chief Justice, thus recognize that "the COVID-19 emergency" "constitut[es] 'good cause' and 'excusable neglect' warranting the extension of time in non-essential civil case types," and "[t]his is not the time to press for unwarranted tactical advantages, unreasonably deny continuances or other accommodations." (Admin. Order 20-13, ¶¶ 2, 17.) There is good cause for an extension here.

2. This Court Has Discretion to Grant the Extension

Instead, respondents blame this Court for granting the last request for an extension without what they call the "required statement" that UAIC demonstrate "extraordinary circumstances and extreme need." (Opp. 1.)[1] Indeed, they argue that "[i]t is not up to this Court's discretion" to grant the extension. (Opp. 3.) This Court, of course, has discretion to suspend its rules for good cause. NRAP 2; *cf.* NRAP 26(b) (allowing extensions for "extraordinary and compelling circumstances"). Regardless, UAIC's "extenuating circumstances" also demonstrate the "extraordinary circumstances and extreme need" that respondents demand: UAIC's counsel has never faced a similar disruption, and it has worked diligently to respond to the needs of litigation but has required some extensions to do so.

3. Respondents' Opinion about the Merits of the Appeal Do Not Justify Summary Dismissal

This Court should not summarily dismiss the appeal. The parties, of course, vigorously dispute the merits of the appeal. According to respondents, the appeal "is frivolous yet simple" because the district

[1] Numbered page "1" of the opposition is the second page.

court allegedly held that the statute of limitations on Nalder's judgment had been tolled, and this Court supposedly ruled that the district court must decide that issue. (Opp. 1, 2.)

But nowhere in this Court's answer to two certified questions did this Court assign such a task to the *state* trial court: indeed, in declining to revisit the issue whether Nalder's judgment had expired, this Court noted that doing so would "intrud[e] into the *certifying court's* sphere." (Order Answering Certified Questions, at 5–6 (emphasis added) (quoting *In re Fountainbleau Las Vegas Holdings, LLC*, 127 Nev. 941, 955-56, 267 P.3d 786, 794-95 (2011)).)[2]

Regardless, the order from which UAIC appeals contains no analysis on the statute-of-limitations question. To the contrary, the district court expressly held that the judgment's amendment was just "a ministerial thing," without addressing the merits of the statute-of-limitations argument. (1/9/19 Hr'g Tr., at 47:5–6, Ex. A.)

[2] This Court declined to exercise its discretion to hear UAIC's writ petition seeking a stay of the district-court proceedings, but this Court did not express any opinion about the merits of those proceedings. (Docket 80965.)

UAIC contends on appeal that the judgment is expired and therefore void under Rule 60(b)(4). *Leven v. Frey*, 123 Nev. 399, 410, 168 P.3d 712, 719 (2007). Especially in light of this Court's answer to the certified question—accepting that "[b]ased on what is before this court on the certified question presented, Lewis has not actually suffered a loss in the form of the $3.5 million state court judgment because *the judgment expired* and, thus, it is no longer enforceable against him" (Order Answering Certified Questions, at 6, Ex. B (emphasis added))—that issue is far from frivolous.

UAIC deserves a hearing on the merits.

Dated this 24th day of April, 2020.

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By: */s/ Abraham G. Smith*

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CERTIFICATE OF SERVICE

I certify that on April 24, 2020, I submitted the foregoing "Reply Brief on Motion for Extension to File Opening Brief and Appendix" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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EXHIBIT A

EXHIBIT A

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

JAMES NALDER, et al, Plaintiffs, vs. GARY LEWIS, et al, Defendants. AND ALL RELATED PARTIES	)	CASE NO. 07A549111 A-18-772220-C DEPT NO. XX **Transcript of Proceedings**

BEFORE THE HONORABLE ERIC JOHNSON, DISTRICT COURT JUDGE

DEFENSE'S MOTION TO WITHDRAW ON ORDER SHORTENING TIME DEFENDANT'S MOTIONS TO DISMISS AND MOTIONS FOR RELIEF DEFENDANT'S MOTIONS TO STRIKE MOTIONS TO DISMISS AND FOR RELIEF UAIC'S MOTION FOR RELIEF, MOTION TO DISMISS PLAINTIFFS' COMPLAINT, MOTION FOR COURT TO DENY STIPULATION TO ENTER JUDGMENT BETWEEN PLAINTIFF AND LEWIS, AND OPPOSITION TO THIRD PARTY PLAINTIFF LEWIS'S MOTION FOR RELIEF FROM ORDER AND JOINDER IN MOTIONS FOR RELIEF FROM ORDERS ON ORDER SHORTENING TIME

WEDNESDAY, JANUARY 9, 2019

APPEARANCES:

FOR THE PLAINTIFFS:	DAVID ALLEN STEPHENS, ESQ.
FOR THE THIRD PARTY PLAINTIFF GARY LEWIS:	THOMAS F. CHRISTENSEN, ESQ.
FOR THE DEFENDANT GARY LEWIS:	BREEN E. ARNTZ, ESQ.
FOR THIRD PARTY DEFENDANTS:	DAN R. WAITE, ESQ. MATTHEW J. DOUGLAS, ESQ. THOMAS E. WINNER, ESQ.

RECORDED BY: ANGIE CALVILLO, COURT RECORDER
TRANSCRIBED BY: JULIE POTTER, TRANSCRIBER

moving the case from the name of the father to the name of the now adult plaintiff.

And, you know, I would ask, you know, whoever ends up drafting the -- the order in that regard to -- to make that point clear. I don't see -- you know, I see that as just being a ministerial thing that was requested by plaintiffs' counsel to -- to get it into her name at this point since dad really doesn't have any authority over her anymore.

At this point I am going to grant and withdraw, you know, Defendant Lewis's motion for relief from judgment pursuant to NRCP 60, defendant's motion to dismiss, and Defendant Lewis's motion to strike defendant's motion for relief from judgment -- well, no, not that one. I mean, that's the one, essentially, I'm granting. I'm going to -- the ones that Mr. Tindall filed, I'm going to pull those. I'm going to grant Mr. Arntz, whoever filed it, I can't -- everybody is representing everybody here, the motion to -- to pull those.

I don't see -- you know, the issue here is whether you've got anything under the contract or under case law that gives you a right to -- to assert anything. And so if Mr. Lewis wants to use Mr. Arntz as his attorney in this one, and Mr. Christensen on the other one, I mean, that, I think, is his choice. And to the degree that there's any legal implications from that, that's the case.

As far as your motion for an evidentiary hearing for a

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

Julie Potter
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EXHIBIT B

EXHIBIT B

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES NALDER, GUARDIAN AD LITEM ON BEHALF OF CHEYENNE NALDER; AND GARY LEWIS, INDIVIDUALLY,
Appellants,
vs.
UNITED AUTOMOBILE INSURANCE COMPANY,
Respondent.

No. 70504

ORDER ANSWERING CERTIFIED QUESTIONS[1]

Appellant James Nalder previously sued appellant Gary Lewis in Nevada district court and obtained a $3.5 million default judgment. Nalder and Lewis then sued Lewis's insurance company, respondent United Automobile Insurance Company, for claims related to UAIC's failure to defend Lewis in the first action. UAIC removed this second action to federal court. The United States Court of Appeals for the Ninth Circuit certified two separate questions to this court related to Nalder and Lewis's action against UAIC. The first question is:

> 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?

The second question, as we rephrased it, is:

> In an action against an insurer for breach of the duty to defend its insured, can the plaintiff

[1]The Honorable Nancy M. Saitta, Senior Justice, was appointed to sit in place of the Honorable Ron Parraguirre, Justice, who recused.

> 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?

First certified question

Our recent decision in *Century Surety Co. v. Andrew*, 134 Nev., Adv. Op. 100, 432 P.3d 180 (2018), answers the first question. *Century Surety* held that "an insured may recover any damages consequential to the insurer's breach of its duty to defend" and that "an insurer's liability for the breach of the duty to defend is not capped at the policy limits, even in the absence of bad faith." *Id.* at 186. Despite the federal courts certifying identical questions in both cases, UAIC argues that *Century Surety* is "factually and legally distinguishable" from the present case and that we should not apply *Century Surety*'s holding to "cases where the complaint did not allege a loss within the policy period and an insurer's breach of a duty to defend is based on a reasonable, good faith determination that the insurance policy at issue was not in effect at the time of the loss." UAIC's argument—essentially that UAIC's refusal to defend in this case was more reasonable than the insurer's refusal to defend in *Century Surety*—is undermined by *Century Surety*'s holding "that good-faith determinations are irrelevant for determining damages upon a breach of [the duty to defend]." *Id.* at 182. We therefore decline to answer the question posed in *Century Surety* again, or differently, in this case.

Second certified question

To prevent the statute of limitations from barring enforcement of a default judgment after six years, a party normally must either bring "an action upon [the] judgment or decree" or obtain "the renewal thereof"

within that time period. NRS 11.190(1)(a)[2]; *Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007) ("An action on a judgment or its renewal must be commenced within six years under NRS 11.190(1)(a); thus a judgment expires by limitations in six years."). 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. This second certified question therefore asks if Nalder and Lewis's action against UAIC in federal court was "an action upon [the] judgment" under NRS 11.190(1)(a). And, if it was not, and the state court judgment has expired, we must then determine whether Lewis and Nalder

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[2]NRS 11.190(1)(a):

> Except as otherwise provided in NRS 40.4639, 125B.050 and 217.007, actions other than those for the recovery of real property, unless further limited by specific statute, may only be commenced as follows:
>
> 1. Within 6 years:
>
> (a) Except as otherwise provided in NRS 62B.420 and 176.275, 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.

(as Lewis's assignee) can still seek consequential damages against UAIC in the amount of that judgment.

Nalder and Lewis's federal action for breach of the duty to defend is not "an action upon a judgment"

An "action upon a judgment" as referenced in NRS 11.190(1)(a) is a distinct cause of action under the common law. *See Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (1897) ("[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."); *Ewing v. Jennings*, 15 Nev. 379, 382 (1880) (addressing what facts are sufficient to state a cause of action upon a judgment); 47 Am. Jur. 2d Judgments § 722 (2017) ("Every judgment gives rise to a common-law cause of action to enforce it, called an action upon a judgment."). It is "not simply an action in some way related to the earlier judgment, but rather a specific form of suit—the common law action *on* a judgment." *Fid. Nat'l Fin. Inc. v. Friedman*, 238 P.3d 118, 121 (Ariz. 2010). This is because the goal of an action upon a judgment is to recover the amount left unsatisfied from the original judgment, not to litigate new claims against a new party. *See id.* ("[T]he defendant in an action on the judgment . . . is generally the judgment debtor, and the amount sought is the outstanding liability on the original judgment."); 47 Am. Jur. 2d Judgments § 723 ("The main purpose of an action on a judgment is to obtain a new judgment which will facilitate the ultimate goal of securing the satisfaction of the original cause of action.").

Nalder and Lewis's suit in federal court regarding UAIC's breach of its duty to defend is not an action upon Nalder's state court judgment against Lewis. The federal court complaint does "not simply

recite the amount owed and seek a judgment on that debt," but instead seeks remedies for UAIC's failure to defend Lewis in the original action between Nalder and Lewis. *See Friedman*, 238 P.3d at 123 (holding that a racketeering suit based on the judgment debtors' actions to frustrate collection of a judgment "clearly was not a common law action on the judgment"). That the action is not upon the default judgment is further illustrated by the fact that the suit was not filed solely by Nalder against Lewis—who is the judgment debtor in the state court action—but instead was filed by both Nalder and Lewis, and filed against UAIC, a third party to the state court action. *See, e.g., id.* at 121; *Apollo Real Estate Inv. Fund, IV, L.P. v. Gelber*, 935 N.E.2d 949, 961 (Ill. App. Ct. 2009) ("[G]enerally, an action on a judgment can only be brought against the defendant of record in the judgment or his successor in interest, not against an entity or person not named in judgment."). Nalder and Lewis's action alleging breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, fraud, and breach of NRS 686A.310 is not "an action upon [the state court default] judgment" that renewed the judgment under NRS 11.190(1)(a).

Nalder makes various alternative arguments for holding that the six-year statute of limitations has not expired. We decline to address the arguments because they exceed the scope of the certified question, require application of law to facts that are disputed, or involve alleged facts not included in the original or supplemental certified question orders. *See In re Fountainbleau Las Vegas Holdings, LLC*, 127 Nev. 941, 955-56, 267 P.3d 786, 794-95 (2011) (recognizing that "this court is bound by the facts as stated in the certification order" and will not apply the law to facts or resolve factual disputes, because it would "intrud[e] into the certifying

court's sphere"). When answering a certified question under NRAP 5, 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 id.* (constraining review to the facts in the certification order when respondents contended that "the assumptions included in the certified questions [were] not true").

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

It is black letter contract law that an "injured party is limited to damages based on his actual loss caused by the breach." Restatement (Second) of Contracts § 347 cmt. e (1981); 24 Williston on Contracts § 64:12 (4th ed.) ("The proper measure of recovery for a breach of contract claim is the loss or damage actually sustained."). And "[t]he purpose of an award of damages is to put the nonbreaching party in as good a position as if the contract had been performed." *Covington Bros. v. Valley Plastering, Inc.*, 93 Nev. 355, 363, 566 P.2d 814, 819 (1977).

Based on what is before this court on the certified question presented, Lewis has not actually suffered a loss in the form of the $3.5 million state court judgment because the judgment expired and, thus, it is no longer enforceable against him. *See Riofrio Anda v. Ralston Purina Co.*, 959 F.2d 1149, 1153 (1st Cir. 1992) ("It is beyond cavil that a party must suffer actual loss before it is entitled to damages."). If Lewis is not liable to Nalder for the $3.5 million judgment, it follows that UAIC is not liable for that judgment as a result of breaching its duty to defend Lewis in the action that led to it; Lewis no longer needs UAIC to pay him $3.5 million to give him the benefit of his insurance contract. *See id.* at 1152 ("[T]he law does not allow awards for phantom injuries."). To hold otherwise would give Lewis (and his assignee, Nalder) a benefit greater than what he could have

expected had UAIC performed under the contract. *See id.* at 1153 ("To allow [plaintiffs] to recover for expenses that they did not incur would be tantamount to giving them a windfall, resulting in punitive damages against [the defendant]."). Without more, the expired state court judgment cannot form the basis for consequential damages from UAIC's breach of its duty to defend Lewis.

Accordingly, we answer the second certified question in the negative. 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 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.

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Pickering

_____, J.
Stiglich

_____, J.
Silver

cc: Eglet Adams
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Clerk, United States Court of Appeals for the Ninth Circuit

CADISH, J., with whom HARDESTY, J., and SAITTA, Sr. J., agrees, concurring:

While I join the court's answer to the certified questions herein, I write separately to note that the parties did not raise, and we do not today decide, whether a common law action on the judgment still exists in Nevada after the adoption of the judgment renewal procedure under NRS 17.214. This court's opinion in *Leven v. Frey*, 123 Nev. 399, 402 n.6, 168 P.3d 712, 714 n.6 (2007), can be read to indicate that it does not.[1]

_____, J.
Cadish

We concur:

_____, J.
Hardesty

_____, Sr. J.
Saitta

[1]The Honorable Nancy M. Saitta, Senior Justice, participated in the decision of this matter under a general order of assignment.