NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES NALDER, Guardian Ad Litem on behalf of Cheyanne Nalder; GARY LEWIS, individually, Plaintiffs-Appellants, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant-Appellee.	No. 13-17441 D.C. No. 2:09-cv-01348-RCJ-GWF ORDER* (Filed Jun. 4, 2020)

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, Presiding

Argued and Submitted January 6, 2016
Submission Withdrawn June 1, 2016
Resubmitted June 2, 2020
San Francisco, California

Before: O'SCANNLAIN, W. FLETCHER, and PAEZ, Circuit Judges.

We must resolve three motions that are before this court: United Automobile Insurance Company's (UAIC's) Motion to Dismiss for Lack of Standing (Dkt. 44); James Nalder and Gary Lewis's Motion to

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Supplement the Record (Dkt. 67); and Nalder and Lewis's Motion to Take Judicial Notice, or, in the Alternative to Supplement the Record (Dkt. 83). Because the facts are known to the parties, we repeat them only as necessary to explain our decision.

I

In its Motion to Dismiss for Lack of Standing, UAIC argues that Nalder's default judgment against Lewis expired and is therefore unenforceable. As a result, UAIC contends that Nalder and Lewis no longer have standing to bring their claims against UAIC.

Under Nevada Revised Statute § 11.190(1)(a), a judgment normally expires after six years unless a party either renews the judgment or brings "an action upon [the] judgment." *See Leven v. Frey*, 168 P.3d 712, 715 (Nev. 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 limitation in six years."). Renewing a judgment requires strict compliance with the procedures set out in Nev. Rev. Stat. § 17.214. *Id.* at 719.

In the case of Nalder's default judgment against Lewis, the Notice of Entry of Judgment was filed on August 26, 2008. Thus, the judgment would have expired on August 26, 2014, unless Nalder or Lewis either renewed the judgment or brought an action upon the judgment. There is no dispute that Nalder and Lewis did not follow the procedures of Nev. Rev. Stat. § 17.214 to renew the judgment. Therefore, the

remaining questions are whether Nalder and Lewis brought an action upon the judgment and, if they did not, whether they can continue to seek consequential damages based on the expired judgment.

The Nevada Supreme Court, answering a certified question from our court, held that Nalder and Lewis's federal action against UAIC for "breach of its duty to defend is not an action upon Nalder's state court judgment against Lewis." *Nalder v. United Auto. Ins. Co.*, No. 70504, 2019 WL 5260073, at *2 (Nev. Sept. 20, 2019). As the court explained, "[a]n 'action upon a judgment' as referenced in [Nev. Rev. Stat. §] 11.190(1)(a) is a distinct cause of action under the common law." *Id.* Because Nalder and Lewis's suit against UAIC is not such an action, it does not renew Nalder's default judgment against Lewis under § 11.190(1)(a).

Furthermore, the Nevada Supreme Court concluded that Nalder and Lewis cannot continue to seek consequential damages for breach of the duty to defend. *Id.* Because Nalder's default judgment against Lewis expired, Lewis is no longer liable to Nalder for that judgment. Consequently, "UAIC is not liable for that judgment as a result of breaching its duty to defend Lewis in the action that led to it." *Id.* at *3. And, because Nalder and Lewis did not suffer an injury as a result of UAIC's failure to defend Lewis, they lack standing.

II

Shortly after the Nevada Supreme Court answered our certified question, Nalder and Lewis filed a Motion to Supplement the Record. They subsequently filed a Motion to Take Judicial Notice, or, in the Alternative to Supplement the Record.

We have the "inherent authority to supplement the record in extraordinary cases." *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003). However, we normally "will not supplement the record on appeal with material not considered by the trial court." *Daly-Murphy v. Winston*, 837 F.2d 348, 351 (9th Cir. 1987). Moreover, as an appellate court, "[i]t is rarely appropriate for [us] to take judicial notice of facts that were not before the district court." *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 392 n.7 (9th Cir. 2000).

Nalder and Lewis claim that the proposed record supplements will show that there are still valid and enforceable judgments against Lewis. They also cite Nevada tolling statutes to argue that Nalder's judgment against Lewis did not expire. Thus, the underlying reason why Nalder and Lewis ask us to grant their motion is so that they may present arguments that they still have standing in their suit against UAIC.

If Nalder and Lewis had wanted us to consider their arguments about Nevada tolling statutes, they should have offered them in their response to UAIC's Motion to Dismiss for Lack of Standing over three years ago, before we certified our second question to the Nevada Supreme Court. Because they did not, such

arguments are waived. *See United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015). Furthermore, it is irrelevant whether Nalder has obtained additional judgments against Lewis in Nevada state court because such other judgments were not the basis for their complaint against UAIC in this case.

Accordingly, we conclude that Nalder and Lewis have not presented adequate justification for why we should take the extraordinary steps of supplementing the record or taking judicial notice of facts that were not before the district court.

III

Appellee's Motion to Dismiss for Lack of Standing, filed with this court on March 14, 2017, is GRANTED. Appellants' Motion to Supplement the Record, filed with this court on November 14, 2019, is DENIED. Appellants' Motion to Take Judicial Notice, or, in the Alternative to Supplement the Record, filed with this court on May 1, 2020, is DENIED.

APPEAL DISMISSED.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMES NALDER, Guardian Ad Litem for minor Cheyanne Nalder, real party in interest, and GARY LEWIS, Individually, Plaintiffs, v. UNITED AUTOMOBILE INSURANCE COMPANY, DOES I through V, and ROE CORPORATIONS I through V, inclusive, Defendants.	2:09-cv-1348-RCJ-GWF **ORDER** (Filed Oct. 30, 2013)

Currently before the Court are a Motion for Summary Judgment (#88) and a Counter-Motion for Summary Judgment (#89). This case, originally ruled upon by the Honorable Edward C. Reed, is on partial remand from the U.S. Court of Appeals for the Ninth Circuit. The Court heard oral argument on October 22, 2013.

BACKGROUND

In July 2009, Defendant United Automobile Insurance Company ("UAIC") filed a petition for removal based on diversity jurisdiction. (Pet. for Removal (#1) at 1-2). Defendant attached Plaintiffs James Nalder, guardian ad litem for minor Cheyanne Nalder, real

party in interest, and Gary Lewis's (collectively "Plaintiffs") complaint which had been filed in the Eighth Judicial District in Clark County, Nevada. (Compl. (#1) at 5-16).

The complaint alleged the following. (*Id.* at 5). Lewis was the owner of a 1996 Chevy Silverado and had an automobile insurance policy with Defendant on July 8, 2007. (*Id.* at 6). On July 8, 2007, Lewis drove over top of Cheyanne while Cheyanne was a pedestrian in a residential area and caused Cheyanne serious personal injuries. (*Id.* at 7). Cheyanne made a claim to Defendant for damages and offered to settle the claim for personal injuries and damages against Lewis within the policy limits. (*Id.*). Defendant refused to settle and denied the claim all together indicating that Lewis did not have coverage at the time of the accident. (*Id.*). Defendant was required to provide insurance coverage under the policy. (*Id.* at 9). Defendant never informed Lewis that Cheyanne was willing to settle the claim for the sum of $15,000, the policy limit. (*Id.*). Due to the dilatory tactics and failure of Defendant to protect its insured, Cheyanne filed a complaint on October 9, 2007 against Lewis for her personal injuries and damages. (*Id.*). Cheyanne procured a default judgment in the amount of $3,500,000 against Lewis. (*Id.*). Plaintiffs alleged breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, breach of Nev. Rev. Stat. § 686A.310, and fraud against Defendant. (*Id.* at 9-14).

In March 2010, Defendant filed a motion for summary judgment on all claims. (*See* Mot. for Summ. J.

(#17)). In December 2010, Judge Reed issued an order granting Defendant's motion for summary judgment on all claims and directed the Clerk of the Court to enter judgment accordingly. (Order (#42) at 13). The order provided the following factual history:

> Lewis was the owner of a 1996 Chevy Silverado insured, at various times, by Defendant. Lewis had an insurance policy issued by UAIC on his vehicle during the period of May 31, 2007 to June 30, 2007. Lewis received a renewal statement, dated June 11, 2007, instructing him to remit payment by the due date of June 30, 2007 in order to renew his insurance policy. The renewal statement specified that "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy." The renewal statement listed June 30, 2007 as effective date, and July 31, 2007 as an "expiration date." The renewal statement also states that the "due date" of the payment is June 30, 2007, and repeats that the renewal amount is due no later than June 30, 2007. Lewis made a payment on July 10, 2007.
>
> Defendant then issued a renewal policy declaration and automobile insurance cards indicating that Lewis was covered under an insurance policy between July 10, 2007 to August 10, 2007.

(*Id.* at 2-3).[1]

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[1] Record citations omitted.

The order stated the following. (*Id.* at 5). Defendant sought summary judgment on all claims on the basis that Lewis had no insurance coverage on the date of the accident. (*Id.*). Plaintiffs argued that Lewis was covered on the date of the accident because the renewal notice was ambiguous as to when payment had to be received in order to avoid a lapse in coverage and that any ambiguities had to be construed in favor of the insured. (*Id.* at 5-6). Defendants, in the alternative, requested that the Court dismiss Plaintiffs' extra-contractual claims or bifurcate the claim of breach of contract from the remaining claims. (*Id.* at 6).

The order stated the following regarding Lewis's insurance coverage on July 8, 2007:

> Plaintiffs contend that Lewis was covered under an insurance policy on July 8, 2007, the date of the accident, because Lewis' payment on July 10, 2007 was timely. Plaintiffs rely on the sentence "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy" contained in the renewal statement. Defendant contends that "expiration of your policy" did not refer to the expiration date of the renewal policy listed on the renewal statement, but to the expiration of Lewis' current policy, which coincided with the listed due date on the renewal statement. Plaintiffs contend that Lewis reasonably believed that while there was a due date on which UAIC preferred to receive payment, there was also a grace period within which

Lewis could pay and avoid any lapse in coverage.

The renewal statement cannot be considered without considering the entirety of the contract between Lewis and UAIC. Plaintiff attached exhibits of renewal statements, policy declarations pages, and Nevada automobile insurance cards issued by UAIC for Lewis. The contract, taken as a whole, cannot reasonably be interpreted in favor of Plaintiffs' argument.

Lewis received a "Renewal Policy Declarations" stating that he had coverage from May 31, 2007 to June 30, 2007 at 12:01 A.M. (Pls' Opp., Exhibit A at 29 (#20-1); Pls' Supp., Exhibit A at 11-12 (#26-1); Pls' Supp., Exhibit A at 15 (#26-1).) The declarations page stated that "[t]his declaration page with 'policy provisions' and all other applicable endorsements complete your policy." (Pls' Opp., Exhibit A at 29 (#20-1).) Lewis also received a Nevada Automobile Insurance Card issued by UAIC stating that the effective date of his policy was May 31, 2007, and the expiration date was June 30, 2007. (Id. at 30; Pls' Supp., Exhibit A at 11-12 (#26-1).) The renewal statement Lewis received in June must be read in light of the rest of the insurance policy, contained in the declarations page and also summarized in the insurance card.

"In interpreting a contract, 'the court shall effectuate the intent of the parties, which may be determined in light of the

surrounding circumstances if not clear from the contract itself.'" *Anvui, LLC v. G.L. Dragon, LLC*, 163 P.3d 405, 407 (Nev. 2007). Plaintiffs contend that there was a course of dealing between Lewis and UAIC supporting a reasonable understanding that there was a grace period involved in paying the insurance premium for each month-long policy. In fact, the so-called course of dealing tilts, if at all, in favor of Defendant. Lewis habitually made payments that were late. UAIC never retroactively covered Lewis on such occasions. Lewis' new policy, clearly denoted on the declarations page and insurance cards Lewis was issued, would always become effective on the date of the payment.

Plaintiffs point to the fact that in April 2007, Lewis was issued a revised renewal statement stating that the renewal amount was due on May 6, 2007, a date after the effective date of the policy Lewis would be renewing through the renewal amount. This isolated occasion occurred due to the fact that Lewis added a driver to his insurance policy, resulting in an increase in the renewal amount, after UAIC had previously sent a renewal notice indicating that a lower renewal amount was due on April 29, 2007. UAIC issued a revised renewal statement dated April 26, 2007, and gave Lewis an opportunity to pay by May 6, 2007, instead of April 29, 2007, when the original renewal amount had been due upon expiration of his April policy. In that case, Lewis made a timely payment on April 28, 2007, and therefore there is not a single

> incident Plaintiffs can point to in which Lewis was retroactively covered for a policy before payment was made, even in the single instance UAIC granted him such an opportunity due to a unique set of circumstances.

(*Id.* at 7-9).

Plaintiffs appealed. (Notice of Appeal (#46)). In a two-page memorandum disposition, the Ninth Circuit held, *inter alia*, the following:

> We reverse the district court's grant of United Automobile Insurance Company's motion for summary judgment with respect to whether there was coverage by virtue of the way the renewal statement was worded. Plaintiffs came forward with facts supporting their tenable legal position that a reasonable person could have interpreted the renewal statement to mean that Lewis's premium was due by June 30, 2007, but that the policy would not lapse if his premium were "received prior to expiration of [his] policy," with the "expiration date" specifically stated to be July 31, 2007. We remand to the district court for trial or other proceedings consistent with this memorandum. The portion of the order granting summary judgment with respect to the statutory arguments is affirmed.

(Ninth Cir. Mem. Dispo. (#82) at 2-3).

The pending motions now follow.

LEGAL STANDARD

In reviewing a motion for summary judgment, the court construes the evidence in the light most favorable to the nonmoving party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). Pursuant to Fed.R.Civ.P. 56, a court will grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). Material facts are "facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*

The moving party bears the initial burden of identifying the portions of the pleadings and evidence that the party believes to demonstrate the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). A party asserting that a fact cannot be or is genuinely disputed must support the assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A)-(B). Once

the moving party has properly supported the motion, the burden shifts to the nonmoving party to come forward with specific facts showing that a genuine issue for trial exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512. The nonmoving party cannot defeat a motion for summary judgment "by relying solely on conclusory allegations unsupported by factual data." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356.

DISCUSSION

I. Plaintiff James Nalder's Motion for Summary Judgment (#88)

Nalder moves for partial summary judgment as to liability against Defendant. (Mot. for Summ. J. (#88) at 1). Nalder makes three arguments which will be addressed in turn.

A. Ambiguous Contract

Nalder argues that because the renewal statement was ambiguous it must be strictly construed against the insurance company pursuant to Nevada

law and, thus, Lewis had coverage at the time of the accident. (Mot. for Summ. J. (#88) at 10).

In response, Defendant argues that Lewis's renewal statement is not ambiguous and clearly demanded remittance of the policy premium for the subsequent term by the expiration of the present policy period. (Opp'n to Mot. for Summ. J. (#90) at 15). Defendant argues that a material issue of fact remains over whether the renewals were ambiguous. (*Id.*).

Nalder filed a reply. (Reply to Mot. for Summ. J. (#95)).

"Summary judgment is appropriate in contract cases only if the contract provision or the contract in question is unambiguous." *Econ. Forms Corp. v. Law Co., Inc.*, 593 F.Supp. 539, 540 (D. Nev. 1984). A contract is ambiguous if it is reasonably susceptible to more than one interpretation. *Shelton v. Shelton*, 78 P.3d 507, 510 (Nev. 2003). Whether a contract is ambiguous is a question of law. *Margrave v. Dermody Properties, Inc.*, 878 P.2d 291, 293 (Nev. 1994). "The interpretation of an ambiguous contract is a mixed question of fact and law." *Econ. Forms Corp.*, 593 F.Supp. at 541. However, in Nevada, "any ambiguity or uncertainty in an insurance policy must be construed against the insurer and in favor of the insured." *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, 99 P.3d 1153, 1156 (Nev. 2004).

In this case, the Court finds that the renewal statement is ambiguous based on the Ninth Circuit's reverse and remand. The Court finds that the renewal statement is reasonably susceptible to more than one

interpretation as demonstrated by both Judge Reed and the Ninth Circuit's conflicting interpretations. As such, the Court finds that, pursuant to Nevada law, this ambiguity is construed against Defendant and in favor of the insured such that Lewis was covered by the insurance policy on the date of the accident. The Court grants summary judgment on this issue in favor of Plaintiffs.

B. Bad Faith

Nalder argues that Defendant's actions constitute bad faith. (Mot. for Summ. J. (#88) at 19). Specifically, Nalder argues that Lewis properly renewed his policy pursuant to the policy's renewal statements, Defendant renewed Lewis's policy, and then Defendant claimed that there was a lapse in coverage. (*Id.*). Nalder asserts that Defendant never investigated to determine whether Lewis was covered, made a snap decision that there was no coverage, and left Lewis bereft of protection against Cheyanne's lawsuit. (*Id.*). Nalder contends that these facts constitute bad faith which requires Defendant to compensate Lewis, pay for the judgment currently entered against him, and pay for compensatory and punitive damages. (*Id.)*.

In response, Defendant argues that every case cited by Nalder involves a situation where there existed a policy in force at the time of the loss. (Opp'n to Mot. for Summ. J. (#90) at 21). Defendant asserts that, in this case, Nalder asks the Court to find an implied policy from an ambiguity in the renewal. (*Id.* at 22).

Defendant argues that Nevada law provides that a court may review an insurer's actions at the time they were made to determine whether the insurer's actions were reasonable as a matter of law and that bad faith cannot be premised upon an honest mistake, bad judgment, or negligence. (*Id.* at 25). Defendant asserts that Nevada law provides that an insurer cannot be found liable for bad faith, as a matter of law, if it had a reasonable basis to contest coverage. (*Id.)*. Defendant contends that if an insurer's actions are reasonable the court can decide as a matter of law to dismiss the extra-contractual claims. (*Id.* at 26). Defendant asserts that because Lewis admits that he did not make any policy payments between June 12, 2007 and July 10, 2007 its actions were reasonable. (*Id.*). Defendant contends that even if it may be found to owe coverage on an implied contract, Plaintiffs must admit that a genuine dispute existed as to coverage at the time of the accident. (*Id*.).

Nalder filed a reply. (Reply to Mot. for Summ. J. (#95)).

Nevada law imposes the covenant of good faith and fair dealing on insurers. *Allstate Ins. Co. v. Miller*, 212 P.3d 318, 324 (Nev. 2009). A violation of the covenant gives rise to a bad-faith tort claim. *Id*. The Nevada Supreme Court has defined "bad faith as 'an actual or implied awareness of the absence of a reasonable basis for denying benefits of the [insurance] policy.'" *Id*. (quoting *Am. Excess Ins. Co. v. MGM*, 729 P.2d 1352, 1354-55 (Nev. 1986). "To establish a prima facie case of bad-faith refusal to pay an insurance claim, the

plaintiff must establish that the insurer had no reasonable basis for disputing coverage, and that the insurer knew or recklessly disregarded the fact that there was no reasonable basis for disputing coverage." *Powers v. United Servs. Auto. Ass'n*, 962 P.2d 596, 604 (Nev. 1998) *opinion modified on denial of reh'g*, 979 P.2d 1286 (Nev. 1999).

In this case, the Court denies Nalder's motion for summary judgment on the bad faith claims. The procedural history of this case demonstrates that Defendant had a reasonable basis for disputing coverage during the time of the incident. As demonstrated by Judge Reed's original order, there was arguably sufficient evidence to find a basis for Defendant to deny Lewis benefits of the insurance policy. Even though the Ninth Circuit reversed and remanded Judge Reed's original order, this Court finds that the procedural history of this case demonstrates that Defendant had a reasonable basis to dispute coverage and, on one occasion, had succeeded in that argument. The Court denies Nalder's motion for summary judgment on this issue.

C. Pre and Post-Judgment Interest

Nalder argues that because there was arguable or possible coverage under the policy, Defendant had a duty to defend Lewis. (Mot. for Summ. J. (#88) at 20). Nalder asserts that Defendant's failure to provide coverage and its breach of the duty to defend was the proximate cause of the default judgment being entered

against Lewis. (*Id.*). Nalder contends that Defendant has the duty to indemnify Lewis. (*Id.*).

In response, Defendant argues that there are court cases where an insurer who investigated coverage and based its decision not to defend on a reasonable construction of the policy was not liable for bad faith breach of the duty to defend even after the court resolved the ambiguity in the contract in favor of the insured. (Opp'n to Mot. for Summ. J. (#90) at 33).

Nalder filed a reply. (Reply to Mot. for Summ. J. (#95)).

The Nevada Supreme Court has held that primary liability insurance policies create a hierarchy of duties between the insurer and the insured. *Allstate Ins.*, 212 P.3d at 324. One of these contractual duties is the duty to defend. *Id*. A breach of the duty to defend is a breach of a contractual obligation. *See id.* at 324-25. An insurer bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy. *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, 99 P.3d 1153, 1158 (Nev. 2004). Once the duty to defend arises, it continues through the course of litigation. *Id*. "If there is any doubt about whether the duty to defend arises, this doubt must be resolved in favor of the insured." *Id*. "The purpose behind construing the duty to defend so broadly is to prevent an insurer from evading its obligation to provide a defense for an insured without at least investigating the facts behind a complaint." *Id*. However, the duty to defend is not absolute. *Id*. "A potential for coverage only exists

when there is arguable or possible coverage." *Id*. "Determining whether an insurer owes a duty to defend is achieved by comparing the allegations of the complaint with the terms of the policy." *Id*. If an insurer breaches the duty to defend, damages are limited to attorneys' fees and costs incurred by the insured to defend the action. *See Home Sav. Ass'n v. Aetna Cas. & Sur. Co.*, 854 P.2d 851, 855 (Nev. 1993) (holding that an insured was not barred from further pursuing recovery from insurance company for fees and costs incurred in defending an action); *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 255 P.3d 268, 278 (Nev. 2011) (discussing damages related to an indemnitor's duty to defend an indemnitee).

In this case, as discussed at oral argument, the Court finds that Defendant breached its contractual duty to defend Gary Lewis in the underlying action. As such, Gary Lewis's damages are limited to the attorneys' fees and costs he incurred in defending that action. However, the Court awards no damages to Gary Lewis because he did not incur any fees or costs in defending the underlying action because he chose not to defend and, instead, took a default judgment.

As such, the Court grants in part and denies in part Nalder's motion for summary judgment. The Court grants summary judgment for Nalder on the ambiguity issue and finds that there is an ambiguity in the renewal statement and, thus, the policy is construed in favor of coverage at the time of the accident. Defendant must pay the policy limits of the implied insurance policy. The Court denies summary judgment

for Nalder on the remaining bad-faith claims. The Court grants in part and denies in part summary judgment for Nalder on the duty to defend issue. The Court finds that Defendant did breach its contractual duty to defend but denies Nalder's request for damages for that breach.

II. Defendant's Counter-Motion for Summary Judgment on All Extra-Contractual Claims or Remedies (#89)

Defendant seeks summary judgment on all of Plaintiff's claims for extra-contractual remedies and/or bad faith claims because there was a genuine dispute as to whether coverage existed at the time and its actions were reasonable. (Counter Mot. for Summ. J. (#89) at 15). Defendant argues that because it had a reasonable basis to deny coverage there can be no bad faith. (*Id.* at 16).

Nalder filed a response and Defendant filed a reply. (Opp'n to Counter Mot. for Summ. J. (#96); Reply to Counter Mot. for Summ. J. (#97)).

The Court grants Defendant's counter-motion for summary judgment on Plaintiffs' extra-contractual claims and/or bad faith claims. As discussed above, the procedural history of this case demonstrates that Defendant had a reasonable basis for disputing coverage during the time of the accident and, thus, there is no bad faith on the part of Defendant.

CONCLUSION

For the foregoing reasons, IT IS ORDERED that Plaintiff James Nalder's Motion for Summary Judgment (#88) is GRANTED in part and DENIED in part. The Court grants summary judgment in favor of Nalder and finds that the insurance renewal statement contained an ambiguity and, thus, the statement is construed in favor of coverage during the time of the accident. The Court denies summary judgment on Nalder's remaining bad-faith claims.

IT IS FURTHER ORDERED that Defendant's Counter-Motion for Summary Judgment on All Extra-Contractual Claims or Remedies (#89) is GRANTED. The Court grants summary judgment on all extra-contractual claims and/or bad faith claims in favor of Defendant.

The Court directs Defendant to pay Cheyanne Nalder the policy limits on Gary Lewis's implied insurance policy at the time of the accident.

The Clerk of the Court shall enter judgment accordingly.

DATED: This 30th day of October, 2013.

/s/ R. Jones
United States District Judge

UNITED STATES DISTRICT COURT

_____ DISTRICT OF NEVADA

Nalder et al.,

Plaintiffs,

V.

United Automobile Insurance Company,

Defendant.

JUDGMENT IN A CIVIL CASE

(Filed Oct. 30, 2013)

Case Number: 2:09-cv-01348-RCJ-GWF

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☐ **Notice of Acceptance with Offer of Judgment.** A notice of acceptance with offer of judgment has been filed in this case.

IT IS ORDERED AND ADJUDGED

The Court grants summary judgment in favor of Nalder and finds that the insurance renewal statement contained an ambiguity and, thus, the statement is construed in favor of coverage during the time of the accident. The Court denies summary judgment on Nalder's remaining bad-faith claims.

The Court grants summary judgment on all extra-contractual claims and/or bad faith claims in favor of

Defendant. The Court directs Defendant to pay Cheyanne Nalder the policy limits on Gary Lewis's implied insurance policy at the time of the accident.

October 30, 2013	/s/ Lance S. Wilson
Date	Clerk
[SEAL]	/s/ Summer Rivera
	(By) Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES NALDER, Guardian Ad Litem on behalf of Cheyanne Nalder; GARY LEWIS, individually, Plaintiffs-Appellants, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant-Appellee.	No. 13-17441 D.C. No. 2:09-cv-01348-RCJ-GWF District of Nevada, Las Vegas ORDER (Filed Jul. 14, 2020)

Before: O'SCANNLAIN, W. FLETCHER, and PAEZ, Circuit Judges.

The panel has voted unanimously to deny the petition for panel rehearing. Judges Fletcher and Paez have voted to deny the petition for rehearing en banc, and Judge O'Scannlain has so recommended. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

[LOGO]
CHRISTENSEN LAW

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January 29, 2019

Re: ***James Nalder et al v. United Automobile Insurance Co., Case No. 13-17441***
Appellants' Citation of Supplemental Authority Pursuant to Rule 28(j)

Pursuant to Fed.R.App.P.28(j), Appellants provide an additional citation of supplemental authority relevant to the issues presented for consideration by the court. This matter is currently submitted to the Nevada Supreme Court on two certified questions. The first and main certified question is directly and completely resolved. The second question is rendered moot because the default judgment is identified as just one of the possible consequential damages an insurer will be liable for as a result of the breach of the duty to defend. In addition, recently entered judgments against Lewis are attached which demonstrate the inapplicability of the second certified question.

Century Surety Company v. Andrew, 134 Nev. Advance Opinion 100, filed on December 13, 2008 and the

judgments entered in Nevada and California support Appellants' arguments set forth in Appellants' Opening Brief pp. 9-13 and in Appellants' Reply Brief pp. 2-4. Appellants' Response To Appellee's Motion To Dismiss For Lack Of Standing pp. 6-8.

In *Andrew*, the Nevada Supreme Court settled the law in Nevada on this issue by stating " . . . an insurer's liability where it breaches its contractual duty to defend is . . . for any consequential damages caused by its breach." All three judgments are recent judgments against Gary Lewis for the injuries to Ms. Nalder.

Attached are Exhibits: 1. *Century Surety Company v. Andrew,* 134 Nev. Advance Opinion 100, filed on December 13, 2018. 2. The Nevada Amended Judgment filed March 28, 2018. 3. The Nevada judgment in case No. 18-A-772220 filed January 22, 2019 in 07A549111(consolidated with 18-A-772220. 4. The California sister state judgment filed July 24, 2018.

Respectfully Submitted,

/s/ Thomas Christensen
Thomas Christensen
Attorney for Appellants

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EXHIBIT 1

134 Nev., Advance Opinion 100

IN THE SUPREME COURT
OF THE STATE OF NEVADA

CENTURY SURETY COMPANY,
Appellant,
vs.
DANA ANDREW, AS LEGAL GUARDIAN ON BEHALF OF RYAN T. PRETNER; AND RYAN T. PRETNER,
Respondents.

No. 73756

(Filed Dec. 13, 2018)

Certified question pursuant to NRAP 5 concerning insurer's liability for breach of its duty to defend. United States District Court for the District of Nevada; Andrew P. Gordon, Judge.

Question answered.

Gass Weber Mullins, LLC, and James Ric Gass and Michael S. Yellin, Milwaukee, Wisconsin; Christian, Kravitz, Dichter, Johnson & Sluga and Martin J. Kravitz, Las Vegas; Cozen O'Connor and Maria L. Cousineau, Los Angeles, California,
for Appellant.

Eglet Prince and Dennis M. Prince, Las Vegas,
for Respondents.

Lewis Roca Rothgerber Christie LLP and J. Christopher Jorgensen and Daniel F. Polsenberg, Las Vegas,
for Amicus Curiae Federation of Defense & Corporate Counsel.

Lewis Roca Rothgerber Christie LLP and Joel D. Henriod and Daniel F. Polsenberg, Las Vegas;. Crowell & Moring LLP and Laura Anne Foggan, Washington, D.C.,
for Amici Curiae Complex. Insurance Claims Litigation Association, American Insurance Association, and Property Casualty Insurers Association of America.

Matthew L. Sharp, Ltd., and Matthew L. Sharp, Reno, for Amicus Curiae Nevada Justice Association.

BEFORE THE COURT EN BANC.[1]

OPINION

By the Court, DOUGLAS, C.J.:

An insurance policy generally contains an insurer's contractual duty to defend its insured in any lawsuits that involve claims covered under the umbrella of the insurance policy. In response to a certified question submitted by the United States District Court for the District of Nevada, we consider "[w]hether, 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 [whether] the insurer [is] liable for all losses consequential to the insurer's breach." We conclude that an insurer's liability where it breaches its contractual duty to defend is not

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[1] The Honorable Ron D. Parraguirre, Justice, is disqualified from participation in the decision of this matter.

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.

FACTS AND PROCEDURAL HISTORY

Respondents Ryan T. Pretner and Dana Andrew (as legal guardian of Pretner) initiated a personal injury action in state court after a truck owned and driven by Michael Vasquez struck Pretner, causing significant brain injuries. Vasquez used the truck for personal use, as well as for his mobile auto detailing business, Blue Streak Auto Detailing, LLC (Blue Streak). At the time of the accident, Vasquez was covered under a personal auto liability insurance policy issued by Progressive Casualty Insurance Company (Progressive), and Blue Streak was insured under a commercial liability policy issued by appellant Century Surety Company. The Progressive policy had a $100,000 policy limit, whereas appellant's policy had a policy limit of $1 million.

Upon receiving the accident report, appellant conducted an investigation and concluded that Vasquez was not driving in the course and scope of his employment with Blue Streak at the time of the accident, and that the accident was not covered under its insurance policy. Appellant rejected respondents' demand to settle the claim within the policy limit. Subsequently, respondents sued Vasquez and Blue Streak in state district court, alleging that Vasquez was driving in the

course and scope of his employment with Blue Streak at the time of the accident. Respondents notified appellant of the suit, but appellant refused to defend Blue Streak. Vasquez and Blue Streak defaulted in the state court action and the notice of the default was forwarded to appellant. Appellant maintained that the claim was not covered under its insurance policy.

Respondents, Vasquez, and Blue Streak entered into a settlement agreement whereby respondents agreed not to execute on any judgment against Vasquez and Blue Streak, and Blue Streak assigned its rights against appellant to respondents. In addition, Progressive agreed to tender Vasquez's $100,000 policy limit. Respondents then filed an unchallenged application for entry of default judgment in state district court; Following a hearing, the district court entered a default judgment against Vasquez and Blue Streak for $18,050,183. The default judgment's factual findings, deemed admitted by default, stated that "Vasquez negligently injured Pretner, that Vasquez was working in the course and scope of his employment with Blue Streak at the time, and that consequently Blue Streak was also liable." As an assignee of Blue Streak, respondents filed suit in state district court against appellant for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair claims practices, and appellant removed the case to the federal district court.

The federal court found that appellant did not act in bad faith, but it did breach its duty to defend Blue Streak. Initially, the federal court concluded that

appellant's liability for a breach of the duty to defend was capped at the policy limit plus any cost incurred by Blue Streak in mounting a defense because appellant did not act in bad faith. The federal court stated that it was undisputed that Blue Streak did not incur any defense cost because it defaulted in the underlying negligence suit. However, after respondents filed a motion for reconsideration, the federal court concluded that Blue Streak was entitled to recover consequential damages that exceeded the policy limit for appellant's breach of the duty to defend, and that the default judgment was a reasonably foreseeable result of the breach of the duty to defend. Additionally, the federal court concluded that bad faith was not required to impose liability on the insurer in excess of the policy limit. Nevertheless, the federal court entered an order staying the proceedings until resolution of the aforementioned certified question by this court.

DISCUSSION

Appellant argues that the liability of an insurer that breaches its contractual duty to defend, but has not acted in bad faith, is generally capped at the policy limits and any cost incurred in mounting a defense.[2] Conversely, respondents argue that an insurer that breaches its duty to defend should be liable for all consequential damages, which may include a judgment

[2] The Federation of Defense & Corporate Counsel, Complex Insurance Claims Litigation Association, American Insurance Association, and Property Casualty Insurers Association of America were allowed to file amicus briefs in support of appellant.

against the insured that is in excess of the policy limits.[3]

In Nevada, insurance policies are treated like other contracts, and thus, legal principles applicable to contracts generally are applicable to insurance policies. *See Century Sur. Co. v. Casino W., Inc.,* 130 Nev. 395, 398, 329 P.3d 614, 616 (2014); *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, 120 Nev. 678, 684, 99 P.3d 1153, 1156-57 (2004); *Farmers Ins. Exch. v. Neal*, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003). The general rule in a breach of contract case is that the injured party may be awarded expectancy damages, which are determined by the method set forth in the Restatement (Second) of Contracts § 347 (Am. Law Inst. 1981). *Rd. & Highway Builders, LLC v. N. Nev. Rebar, Inc.*, 128 Nev. 384, 392, 284 P.3d 377, 382 (2012). The Restatement (Second) of Contracts § 347 provides, in pertinent part, as follows:

> [T]he injured party has a right to damages based on his expectation interest as measured by
>
> (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
>
> (b) any *other loss, including incidental or consequential loss, caused by the breach,* less

[3] The Nevada Justice Association was allowed to file an amicus brief in support of respondents.

> (c) any cost or other loss that he has avoided by not having to perform.

(Emphasis added.)

An insurance policy creates two contractual duties between the insurer and the insured: the duty to indemnify and the duty to defend. *Allstate Ins. Co. v. Miller,* 125 Nev. 300, 309, 212 P.3d 318, 324 (2009). "The duty to indemnify arises when an insured becomes legally obligated to pay damages in the underlying action that gives rise to a claim under the policy." *United Nat'l,* 120 Nev. at 686, 99 P.3d at 1157 (internal quotation marks omitted). On the other hand, "[an] insurer . . . bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy." *Id.* at 687, 99 P.3d at 1158 (alteration in original) (internal quotation marks omitted).

Courts have uniformly held the duty to defend to be "separate from," 1 Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* §5.02[a], at 327 (17th ed. 2015) (internal quotation marks omitted), and "broader than the duty to indemnify," *Pension Tr. Fund for Operating Eng'rs v. Fed. Ins. Co.,* 307 F.3d 944, 949 (9th Cir. 2002). The duty to indemnify provides those insured financial protection against judgments, while the duty to defend protects those insured from the action itself, "The duty to defend is a valuable service paid for by the insured and one of the principal benefits of the liability insurance policy." *Woo v. Fireman's Fund Ins. Co.,* 164 P.3d 454,

459-60 (Wash. 2007). The insured pays a premium for the expectation that the insurer will abide by its duty to defend when such a duty arises. In Nevada, that duty arises "if facts [in a lawsuit] are alleged which if proved would give rise to the duty to indemnify," which then "the insurer *must* defend." *Rockwood Ins. Co. v. Federated Capital Corp.,* 694 F. Supp. 772, 776 (D. Nev. 1988) (emphasis added); *see also United Nat'l,* 120 Nev. at 687, 99 P.3d at 1158 ("Determining whether an insurer owes. a duty to defend is achieved by comparing the allegations of the complaint with the terms of the policy.").[4]

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[4] Appellant correctly notes that we have previously held that this duty is not absolute. In the case appellant cites, *United National,* we held that "Where is no duty.to defend [w]here there is no *potential* for coverage," 120 Nev. at 686, 99 P.3d at 1158 (second alteration in original) (internal quotation marks omitted). We take this opportunity to clarify that where there is potential for coverage based on "comparing the allegations of the complaint with the terms of the policy," an insurer does have a duty to defend. *Id.* at 687, 99 P.3d at 1158. In this instance, as a general rule, facts outside of the complaint cannot justify an insurer's refusal to defend its insured. Restatement of Liability Insurance § 13 cmt. c (Am. Law Inst., Proposed Final Draft No. 2, 2018) ("The general rule is that insurers may not use facts outside the complaint as the basis for refusing to defend. . . ."), Nonetheless, the insurer can always agree to defend the insured with the limiting condition that it does not waive any right to later deny coverage based on the terms of the insurance policy under a reservation of rights. *See Woo,* 164 P.3d at 460 ("Although the insurer must bear the, expense of defending the insured, by doing so under a reservation of rights . . . the insurer avoids breaching its duty to defend and incurring the potentially greater expense of defending itself from a claim of breach."). Accordingly, facts outside the complaint may be used in an action brought by the insurer seeking to terminate its duty to defend its insured in an

In a case where the duty to defend does in fact arise, and the insurer breaches that duty, the insurer is at least liable for the insured's reasonable costs in mounting a defense in the underlying action. *See Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.,* 127 Nev. 331, 345, 255 P.3d 268, 278 (2011) (providing that a breach of the duty to defend "may give rise to damages in the form of reimbursement of the defense costs the indemnitee was thereby forced to incur in defending against claims encompassed by the indemnity provision" (internal quotation marks omitted)). Several other states have considered an insurer's liability for a breach of its duty to defend, and while no court would disagree that the insurer is liable for the insured's defense cost, courts have taken two different views when considering whether the insurer may be liable for an entire judgment that exceeds the policy limits in the underlying action.

The majority view is that "[w]here there is no opportunity to compromise the claim and the only wrongful act of the insurer is the refusal to defend, the liability of the insurer is ordinarily limited to the amount of the policy plus attorneys' fees and costs." *Comunale v. Traders & Gen. Ins. Co.,* 328 P.2d 198, 201 (Cal. 1958); *see also Emp'rs Nat'l Ins. Corp. v. Zurich*

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action whereby the insurer is defending under a reservation of rights. Restatement of Liability Insurance § 13 cmt. c (Am. Law Inst., Proposed Final Draft No. 2, 2018) ("Only in a declaratory-judgment action filed while the insurer is defending, or in a coverage action that takes place after the insurer fulfilled the duty to defend, may the insurer use facts outside the complaint as the basis for avoiding coverage.").

Am. Ins. Co. of Ill., 792 F.2d 517, 520 (5th Cir. 1986) (providing that imposing excess liability upon the insurer arose as a result of the insurer's refusal to entertain a settlement offer within the policy limit and not solely because the insurer refused to defend); *George R. Winchell, Inc. v. Norris,* 633 P.2d 1174, 1177 (Kan. Ct. App. 1981) ("Absent a settlement offer, the plain refusal to defend has no causal connection with the amount of the judgment in excess of the policy limits."). In *Winchell,* the court explained the theory behind the majority view, reasoning that when an insurer refuses a settlement offer, unlike a refusal to defend, "the insurer is causing a discernible injury to the insured" and "the injury to the insured is traceable to the insurer's breach." 633 P.2d at 1777. "A refusal to defend, in itself, can be compensated for by paying the costs incurred in the insured's defense." *Id.* In sum, "[a]n [insurer] is liable to the limits of its policy plus attorney fees, expenses and other damages where it refuses to defend an insured who is in-fact covered," and "[t]his is true even though the [insurer] acts in good faith and has reasonable ground[s] to believe there is no coverage under the policy." *Allen v. Myers,* 512 S.W.3d 17, 38-39 (Mo. 2016) (first and fifth alteration in original) (internal quotation marks omitted), *cert. denied by Atain Specialty Ins. Co. v. Allen, U.S.,* 138 S. Ct. 212 (2017).

The minority view is that damages for a breach of the duty to defend are not automatically limited to the amount of the policy; instead, the damages awarded depend on the facts of each case. *See Burgraff v. Menard, Inc.,* 875 N.W.2d 596, 608 (Wis. 2016). The objective is

to have the insurer "pay damages necessary to put the insured in the same position he would have been in had the insurance company fulfilled the insurance contract." *Id.* (internal quotation marks omitted). Thus, "[a] party aggrieved by an insurer's breach of its duty to defend is entitled to recover all damages naturally flowing from the breach." *Id.* (internal quotation marks omitted). Damages that may naturally flow from an insurer's breach include:

> (1) the amount of the judgment or settlement against the insured plus interest [even in excess of the policy limits]; (2) costs and attorney fees incurred by the insured in defending the suit; and (3) any additional costs that the insured can show naturally resulted from the breach.

Newhouse v. Citizens Sec. Mut. Ins. Co., 501 N.W.2d 1, 6 (Wis. 1993).

For instance, in *Delatorre v. Safeway Insurance Co.,* the insurer breached its duty to defend by failing to ensure that retained counsel continued defending the insured after answering the complaint, which ultimately led to a default judgment against the insured exceeding the policy limits. 989 N.E.2d 268, 274 (Ill. App. Ct. 2013). The court found that the entry of default judgment directly flowed from the insurer's breach, and thus, the insurer was liable for the portion that exceeded the policy limit. *Id.* at 276. The court reasoned that a default judgment "could have been averted altogether had [the insurer]. seen to it that its insured was actually defended- as contractually required." *Id.*

On the other hand, in *Hamlin Inc. v. Hartford Accident & Indemnity Co.,* the court considered whether the insured had as good of a defense as it would have had had the insurer provided counsel. 86 F.3d 93, 95 (7th Cir. 1996). The court observed that although the "insurer did not pay the entire bill for [the insured's] defense," the insured is not "some hapless individual who could not afford a good defense unless his insurer or insurers picked up the full tab." *Id.* Moreover, the court noted that the insured could not have expected to do better with the firm it hired, which "was in fact its own choice, and not a coerced choice, that is, not a choice to which it turned only because the obstinacy of the [insurers] made it unable to 'afford' an even better firm (if there is one)." *Id.* Therefore, because the entire judgment was not consequential to the insurer's breach of its duty to defend, the insured was not entitled to the entire amount of the judgment awarded against it in the underlying lawsuit. *Id.*

We conclude that the minority view is the better approach. Unlike the minority view, the majority view places an artificial limit to the insurer's liability within the. policy limits for a breach of its duty to defend. That limit is based on the insurer's duty to indemnify but "[a] duty to defend limited to and coextensive with the duty to indemnify would be essentially meaningless. insureds pay a premium for what is partly litigation insurance designed to protect . . . the insured from the expense of defending suits brought against him." *Capitol Envtl. Servs., Inc. v. N. River Ins. Co.,* 536 F. Supp. 2d 633, 640 (E.D. Va. 2008) (internal quotation

marks omitted). Even the *Comunale* court recognized that "Where is an important difference between the liability of an insurer who performs its obligations and that of an insurer who breaches its contract." 328 P.2d at 201. Indeed, the insurance policy limits "only the amount the insurer may have to pay in the performance of the contract as compensation to a third person for personal injuries caused by the insured; they do not restrict the damages recoverable by the insured for a breach of contract by the insurer." *Id.*

The obligation of the insurer to defend its insured is purely contractual and a refusal to defend is considered a breach of contract. Consistent with general contract principles, the minority view provides that the insured may be entitled to consequential damages resulting from the insurer's breach of its contractual duty to defend. *See* Restatement of Liability Insurance § 48 (Am. Law Inst., Proposed Final Draft No. 2, 2018). Consequential damages "should be such as may fairly and reasonably be considered as arising naturally, or were reasonably contemplated by both parties at the time they made the contract." *Hornwood v. Smith's Food King No. 1,* 105 Nev. 188, 190, 772 P.2d 1284, 1286 (1989) (internal quotation marks omitted). 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. *See Khan v. Landmark Am. Ins. Co.,* 757 S.E.2d 151, 155 (Ga. Ct. App. 2014) ("[W]hether the full amount of the judgment was recoverable was a jury question that depended upon what damages were

found to flow from the breach of the contractual duty to defend.").[5]

The right to recover consequential damages sustained as a result of an insurer's breach of the duty to defend does not require proof of bad faith. As the Supreme Court of Michigan explained:

> The duty to defend . . . arises solely from the language of the insurance contract. A breach of that duty can be determined objectively, without reference to the good or bad faith of the insurer. If the insurer had an obligation to defend and failed to fulfill that obligation, then, like any other party who fails to perform its contractual obligations, it becomes liable for all foreseeable damages flowing from the breach.

Stockdale v. Jamison, 330 N.W.2d 389, 392 (Mich. 1982). In other words, an insurer's breach of its duty to defend can be determined objectively by comparing the facts alleged in the complaint with the insurance 'policy. Thus, even in the absence of bad faith, the insurer may be liable for a judgment that exceeds the policy limits if the judgment is consequential to the insurer's breach. An insurer that refuses to tender a defense for "its insured takes the risk not only that it may eventually be forced to pay the insured's legal expenses but also that it may end up having to pay for a loss that it

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[5] Consequently, we reject appellant's argument that, as a matter of law, damages in excess of the policy limits can never be recovered as a consequence to an insurer's breach of its duty to defend.

did not insure against." *Hamlin,* 86 F.3d at 94. Accordingly, the insurer refuses to. defend at its own peril. However, we are not saying that an entire judgment is automatically a consequence of an insurer's breach of its duty to defend; rather, the insured is tasked with showing that the breach caused the excess judgment and "is obligated to take all reasonable means to protect himself and mitigate his damages." *Thomas v. W. World Ins. Co.,* 343 So. 2d 1298, 1303 (Fla. Dist. Ct. App. 1977); *see also Conner v. S. Nev. Paving, Inc.,* 103 Nev. 353, 355, 741 P.2d 800, 801 (1987) ("As a general rule, a party cannot recover damages for loss that he could have avoided by reasonable efforts.").

CONCLUSION

In answering the certified question, we conclude that an insured may recover any damages consequential to the insurer's breach of its duty to defend. As a result, 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.

/s/ Douglas, C.J.
Douglas

We concur:

/s/ Cherry, J.
Cherry

/s/ Gibbons, J.
Gibbons

/s/ Pickering, J.
Pickering

/s/ Hardesty, J.
Hardesty

/s/ Stiglich, J.
Stiglich

EXHIBIT 2

JMT
DAVID A. STEPHENS, ESQ.
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Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER, Plaintiff, vs. GARY LEWIS, Defendant.	07A549111 CASE NO: ~~A549111~~ DEPT. NO: XXIX

AMENDED JUDGMENT

(Filed March 28, 2018)

In this action the Defendant, Gary Lewis, having been regularly served with the Summons and having failed to appear and answer the Plaintiff's complaint filed herein, the legal time for answering having expired, and no answer or demurrer having been filed, the Default of said Defendant, GARY LEWIS, in the

premises, having been duly entered according to law; upon application of said Plaintiff, Judgment is hereby entered against said Defendant as follows:

. . .

. . .

. . .

. . .

IT IS ORDERED THAT PLAINTIFF HAVE JUDGMENT AGAINST DEFENDANT in the sum of $3,500,000.00, which consists of $65,555.37 in medical expenses, and ~~$3,434,4444.63~~ $3,434,444.63 in pain, suffering, and disfigurement, with interest thereon at the legal rate from October 9, 2007, until paid in full.

DATED this 26 day of March, 2018.

/s/ David Jones
District Judge

Submitted by:
STEPHENS GOURLEY & BYWATER

/s/ David A. Stephens
DAVID A. STEPHENS, ESQ.
Nevada Bar No. 00902
STEPHENS GOURLEY
& BYWATER
3636 North Ranch Dr
Las Vegas, Nevada 89130
Attorneys for Plaintiff

CERTIFIED COPY
DOCUMENT ATTACHED IS A
TRUE AND CORRECT COPY
OF THE ORIGINAL ON FILE

/s/ Steven D. Grierson
CLERK OF THE COURT

JAN 23, 2019

EXHIBIT 3

JUDG
E. BREEN ARNTZ, ESQ.
Nevada Bar No. 3853
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breen@breen.com

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES NALDER, Plaintiff, vs. GARY LEWIS and DOES I through V, inclusive Defendants	CASE NO: 07A549111 DEPT. NO: XXIX Consolidated with CASE NO: 18-A-772220

UNITED AUTOMOBILE INSURANCE COMPANY, Intervenor,
GARY LEWIS, Third Party Plaintiff, vs. UNITED AUTOMOBILE INSURANCE COMPANY, RANDAL J. TINDALL, ESQ, and RESNICK & LOUIS, P.C. And DOES I through V, Third Party Defendants.

JUDGMENT PURSUANT TO NRCP 68 IN CASE NO 18-A-772220

(Filed Jan. 22, 2019)

It appearing from the Notice of Acceptance of Offer of Judgment in the above-entitled matter that Cheyenne Nalder has accepted the Offer of Judgment served by Gary Lewis pursuant to NRCP 68, therefore, Judgment shall be entered as follows:

Judgment is hereby entered in favor of Plaintiff, Cheyenne Nalder, and against Defendant, Gary Lewis, in the sum of five million six hundred ninety-six thousand eight hundred ten dollars and forty-one cents, ($5,696,810.41), plus interest at the legal rate from September 4, 2018. All court costs and attorney's fees are included in this Judgment.

Dated this ___ day of January, 2019.

STEVEN D. GRIERSON
CLERK OF THE COURT

/s/ Michelle McCarthy
Deputy Clerk
07A549111 1/23/2019

Michelle McCarthy

Submitted by:

/s/ E. Breen Arntz
E. BREEN ARNTZ, ESQ.
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CERTIFIED COPY
DOCUMENT ATTACHED IS A
TRUE AND CORRECT COPY
OF THE ORIGINAL ON FILE

/s/ Steven D. Grierson
CLERK OF THE COURT

JAN 23, 2019

EXHIBIT 4

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES	Reserve for Clerk's File Stamp
COURTHOUSE ADDRESS: Pomona Courthouse, 400 Civic Center Plaza, Pomona CA 91766	(Filed Jul. 24, 2018)
PLAINTIFF/PETITIONER: James Nalder, individually and as Guardian ad Litem for Cheyenne Nalder	
DEFENDANT/RESPONDENT: Gary Lewis	
JUDGMENT BASED ON SISTER-STATE JUDGMENT (Code Civ. Proc., § 1710.25)	CASE NUMBER KS021378

An application has been filed for entry of judgment based upon judgment entered in the Slate of:

Nevada BY FAX

Pursuant to Code of Civil Procedure section 1710.25, judgment is hereby entered in favor of plaintiff/judgment creditor

James Nalder, individually and as Guardian ad Litem for Cheyenne Nalder

and against defendant/judgment debtor

Gary Lewis

For the amount shown in the application remaining unpaid under said Judgment in the sum of $ 3,485,000, together with interest on said Judgment In the sum of $ 2,174,998.52, Los Angeles Superior Court filing fees in the sum of $ 435, costs in the sum of $ 0, and interest on said judgment accruing from the time of entry of Judgment at the rate provided by law.

SHERRI R. CATER, Executive Officer/Clerk

Dated: JUL 24 2018 By /s/ G. Moreno
G. MORENO
Deputy Clerk

CERTIFICATE OF MAILING

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the **Judgment Based on Sister-State Judgment (Code Civ. Proc., § 1710.26)** upon each party or counsel named below by depositing In the United States mail at the courthouse in _____, California, one copy of the original filed herein in a separate sealed envelope for each address as shown below with the postage thereon fully prepaid.

SHERRI R. CATER, Executive Officer/Clerk

Dated: _____ By /s/ _____
Deputy Clerk

LACIV 209 (Rev. 09/13) LASC Approved For Optional Use	**JUDGMENT BASED ON SISTER-STATE JUDGMENT (Code Civ. Proc., § 1710.25)**	Code Civ. Proc., § 1710.25

14:29:38 2018-07-17

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address):*	TELEPHONE NO.	*FOR COURT USE ONLY*
Mark J. Linderman (State Bar No. 144685) mlinderma	415-956-2828	
Joshua M. Deitz (State Bar No. 267454) jdeitz@rjo.co 311 California Street San Francisco, California 94104	415-956-2828	(Filed Jul. 24, 2018)
ATTORNEY FOR *(Name)* Cheyenne Nalder, James Nalder		
NAME OF COURT: Superior Court of California, County of Los Angeles STREET ADDRESS: 400 Civic Center Plaza MAILING ADDRESS: CITY AND ZIP CODE: Pomona 91766 BRANCH NAME: Ponoma Courthouse		
PLAINTIFF: James Nalder, individually and as Guardian ad Litem for Cheyenne Nalder DEFENDANT: Gary Lewis		

NOTICE OF ENTRY OF JUDGMENT ON SISTER-STATE JUDGMENT	CASE NUMBER KS021378

BY FAX

1. TO JUDGMENT DEBTOR *(name)*: Gary Lewis 733 S. Minnesota Ave, Glendora, CA 91740
2. YOU ARE NOTIFIED
   a. Upon application of the judgment creditor, a judgment against you has been entered in this court as follows:
      (1) Judgment creditor *(name)*: James Nalder, individually and as Guardian ad Litem for Cheyenne Nalder
      (2) Amount of judgment entered in this court: $ 5,660,433.52
   b. This judgment was entered based upon a sister-state judgment previously entered against you as follows:
      (1) Sister state *(name)*: Nevada
      (2) Sister-stale court *(name and location)*: Eighth Judicial District Court, Clark County, Nevada 200 Lewis Ave, Las Vegas, NV. 89155
      (3) Judgment entered in sister state on *(date)*: June 2, 2008
      (4) Title of case and case number *(specify)*: Nalder v. Lewis, Case No. A549111
3. A sister-state judgment has been entered against you in a California court. Unless you file a motion

to vacate the judgment in this court within 30 DAYS after service of this notice, this judgment will be final.

This court may order that a writ of execution or other enforcement may issue. Your wages, money, and property could be taken without further warning from the court.

If enforcement procedures have already been issued, the property levied on II not be distributed until 30 days after you are served with this notice.

Dated: JUL 24 2018

SHERRI R. CATER, Clerk, by /s/ G. Moren G. MOREN , Deputy

4. ☑ NOTICE TO THE PERSON SERVED: You are served
   a. ☑ as an individual judgment debtor.
   b. ☐ under the fictitious name of *(specify)*:
   c. ☐ on behalf of *(specify)*:

[SEAL]

Under:
- ☐ CCP 416.10 (corporation)
- ☐ CCP 416.20 (defunct corporation)
- ☐ CCP 416.40 (association or partnership)
- ☐ CCP 416.60 (minor)
- ☐ CCP 416.70 (conservatee)
- ☑ CCP 416.90 (individual)
- ☐ other:

(Proof of service on reverse)

Form Approved by the Judicial Council of California EJ 110 (Rev. July 1 1983)	**NOTICE OF ENTRY OF JUDGMENT ON SISTER-STATE JUDGMENT** **14:29:38 2018-07-17**	CCP 1710.30, 171040 1710.45

PROOF OF SERVICE

(Use separate proof of service for each person served)

1. I served the Notice of Entry of Judgment on Sister-State Judgment as follows:
   a. on judgment debtor *(name)*: GARY LEWIS
   b. by serving ☑ judgment debtor
      ☐ other *(name and title or relationship to person served)*:
   c. ☑ by delivery ☑ at home ☐ at business
      (1) date: 07/26/18
      (2) time: 7:00 p.m.
      (3) address: 733 S. Minnesota Ave
      Glendora, CA 91740
   d. ☐ by mailing
      (1) date:
      (2) place:
2. Manner of service *(check proper box)*:
   a. ☑ **Personal service.** By personally delivering copies. (CCP 415.10)
   b. ☐ **Substituted service on corporation, unincorporated association (including partnership), or public entity.** By leaving, during usual office hours, copies in the office of the person served with the

person who apparently was in charge and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (CCP 415.20(a))

c. ☐ **Substituted service on natural person, minor, conservatee, or candidate.** By leaving copies at the dwelling house, usual place of abode, or usual place of business of the person served in the presence of a competent member of the household or a person apparently in charge of the office or place of business, at least 18 years of age, who was informed of the general nature of the papers, and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (CCP 415.20(b)) ***(Attach separate declaration or affidavit stating acts relied on to establish reasonable diligence in first attempting personal service.)***

d. ☐ **Mail and acknowledgment service.** By mailing (by first-class mail or airmail, postage prepaid) copies to the person served, together with two copies of the form of notice and acknowledgment and a return envelope, postage prepaid, addressed to the sender. (CCP 415.30) ***(Attach completed acknowledgment of receipt.)***

e. ☐ **Certified or registered mail service.** By mailing to an address outside California (by first-class mail, postage prepaid,

requiring a return receipt) copies to the person served. (CCP 415.40) ***(Attach signed return receipt or other evidence of actual delivery to the person served.)***

f. ☐ Other *(specify code section)*:

☐ Additional page is attached.

3. The "Notice to the Person Served" was completed as follows:

a. ☑ as an individual judgment debtor.

b. ☐ as the person sued under the fictitious name of *(specify)*:

c. ☐ on behalf of *(specify)*:

Under: ☐ CCP 416.10 (corporation)
☐ CCP 416.20 (defunct corporation)
☐ CCP 416.40 (association or partnership)
☐ CCP 416.60 (minor)
☐ CCP 416.70 (conservatee)
☐ CCP 416.90 (individual)
☐ other:

4. At the time of service I was at least 18 years of age and not a party to this action.

5. Fee for service: $

6. Person serving:

a. ☐ California sheriff, marshal, or constable.

b. ☑ Registered California process server.

c. ☐ Employee or independent contractor of a registered California process server.

d. ☐ Not a registered California process server.

e. ☐ Exempt from registration under Bus. & Prof. Code 22350(b).

f. Name, address and telephone number and, if applicable, county of registration and number:

Jorge Rivera (Reg# 4690 Los Angeles County)
52 Second Street, 3rd Floor
San Francisco, California 94105
(415) 546-6000

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 07/27/18

► Jorge Rivera
(SIGNATURE)

(For California sheriff, marshal, or constable use only)
I certify that the foregoing is true and correct.

Date:

►
(SIGNATURE)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address):*	TELEPHONE NO.	*FOR COURT USE ONLY*
Mark J. Linderman (State Bar No. 144685) mlinderman Joshua M. Deitz (State Bar No. 267454) jdeitz@rjo.com 311 California Street San Francisco, California 94104 ATTORNEY FOR *(Name)* Cheyenne Nalder, James Nalder	415-956-2828 415-956-2828	(Filed Jul. 17, 2018)

NAME OF COURT: Superior Court of California, County of Los Angeles STREET ADDRESS: 400 Civic Center Plaza MAILING ADDRESS: CITY AND ZIP CODE: Pomona 91766 BRANCH NAME: Ponoma Courthouse	
PLAINTIFF: James Nalder, individually and as Guardian ad Litem for Cheyenne Nalder DEFENDANT: Gary Lewis	
[Amended] APPLICATION FOR ENTRY OF JUDGMENT ON SISTER-STATE JUDGMENT ☐ AND ISSUANCE OF WRIT OF EXECUTION OR OTHER ENFORCEMENT ☐ AND ORDER FOR ISSUANCE OF WRIT OR OTHER ENFORCEMENT	CASE NUMBER KS021378

BY FAX

Judgment creditor applies for entry of a judgment based upon a sister-state judgment as follows:

1. Judgment creditor *(name and address)*:

   James Nalder, individually and as Guardian ad Litem for Cheyenne Nalder
   5037 Sparkling Sky Avenue
   Las Vegas, Nevada, 89130

2. a. Judgment debtor *(name)*: Gary Lewis

   b. ☑ An individual *(last known residence address):* 733 8. Minnesota Ave, Glendora, CA 91740

   c. ☐ A corporation of *(specify place of incorporation)*:

      (1) ☐ Foreign corporation

         ☐ qualified to do business in California

         ☐ not qualified to do business in California

   d. ☐ A partnership *(specify principal place of business)*:

      (1) ☐ Foreign partnership which

         ☐ has filed a statement under Corp C 15700

         ☐ has not filed a statement under Corp C 15700

3 a. Sister state *(name)*: Nevada

   b. Sister-state court *(name and location)*: Eighth Judicial District Court, Clark County, Nevada 200 Lewis Ave, Las Vegas, NV, 89155

   c. Judgment entered in sister state on *(date)*: June 2, 2008

4. **An authenticated copy of the sister-state Judgment is attached to this application.** Include accrued interest on the sister-state judgment in the California judgment (item 5c).

   a. Annual interest rate allowed by sister state *(specify)*: 6.5%

b. Law of sister state establishing interest rate *(specify)*: NRS 17.130

5. a. Amount remaining unpaid on sister-state judgment:..... $ 3,485,000

b. Amount of filing fee for the application: ..... $ 435

c. Accrued interest on sister-state. judgment: ..... $ 2,174,998.52

d. Amount of judgment to be entered *(total of 5a, b, and c)*..... $ 5,660,433.52

(Continued on reverse)

Form Approved by the Judicial Council of California EJ 105 [Rev. July 1 1983]	**[Amended] APPLICATION FOR ENTRY OF JUDGMENT ON SISTER-STATE JUDGMENT** **14:29:38 2018-07-17**	CCP 1/10, 15, 1/10, 20

SHORT TITLE: Nalder v. Lewis	CASE NUMBER: KS021378

6. ☐ Judgment creditor also applies for issuance of a writ of execution or enforcement by other means before service of notice of entry of judgment as follows:

a. ☐ Under CCP 1710.45(b).

b. ☐ A court order is requested under CCP 1710.45(c). Facts showing that great or irreparable injury will result to judgment creditor if issuance of the writ or

enforcement by other means is delayed are set forth as follows:

☐ continued in attachment 6b.

7. An action in this state on the sister-state judgment is not barred by the statute of limitations.

8. I am informed and believe that no stay of enforcement of the sister-state judgment is now in effect in the sister state.

9. No action is pending and no judgment has previously been entered in any proceeding in California based upon the sister-state judgment.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct except as to those matters which are stated to be upon information and belief, and as to those matters I believe them to be true.

Date: 7/17/18

Joshua M. Deitz ► Joshua M. Deitz

(TYPE OR PRINT NAME) *(SIGNATURE)*

EXHIBIT A

JUDG
DAVID F. SAMPSON, ESQ.,
Nevada Bar #6811
THOMAS CHRISTENSEN, ESQ.,
Nevada Bar #2326
1000 S. Valley View Blvd.
Las Vegas, Nevada 89107
(702) 870-1000
Attorney for Plaintiff,
JAMES NALDER As Guardian Ad
Litem for minor, CHEYENNE NALDER

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES NALDER, individually and as Guardian ad Litem for CHEYENNE NALDER, a minor. Plaintiffs, vs. GARY LEWIS, and DOES I through V, inclusive ROES I through V Defendants.	CASE NO: A549111 DEPT. NO: VI

NOTICE OF ENTRY OF JUDGMENT

PLEASE TAKE NOTICE that a Judgment against Defendant, GARY LEWIS, was entered in the

above-entitled matter on June 2, 2008. A copy of said Judgment is attached hereto.

DATED this 5th day of June, 2008.

CHRISTENSEN LAW OFFICES, LLC

By: /s/ David P. Sampson
DAVID P. SAMPSON, ESQ.
Nevada Bar #6811
THOMAS CHRISTENSEN, ESQ.,
Nevada Bar #2326
1000 S. Valley View Blvd.
Las Vegas, Nevada 89107
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of CHRISTENSEN LAW OFFICES, LLC., and that on this 5th day of ~~March~~ [June], 2008, I served a copy of the foregoing **NOTICE OF ENTRY OF JUDGMENT** as follows:

☒ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or

☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below and in the confirmation sheet filed herewith. Consent to service under NRCP 5(b)(2)(D) shall be assumed unless an objection to service by facsimile transmission is made in writing and sent to the sender via facsimile within 24 hours of receipt of this Certificate of Service; and/or

☐ Hand Delivery—By hand-delivery to the addresses listed below.

Gary Lewis
5049 Spencer St. #D
Las Vegas, NV 89119

/s/ Sandra Duritza
An employee of CHRISTENSEN LAW OFFICES, LLC

JMT
THOMAS CHRISTENSEN, ESQ.,
Nevada Bar #2326
DAVID F. SAMPSON, ESQ.,
Nevada Bar #6811
1000 S. Valley View Blvd.
Las Vegas, Nevada 89107
(702) 870-1000
Attorney for Plaintiff,

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES NALDER, as Guardian ad Litem for CHEYENNE NALDER, a minor. Plaintiffs, vs. GARY LEWIS, and DOES I through V, inclusive Defendants.	CASE NO: A549111 DEPT. NO: VI

JUDGMENT

In this action the Defendant, GARY LEWIS, having been regularly served with the Summons and having failed to appear and answer the Plaintiff's complaint filed herein, the legal time for answering having expired, and no answer or demurrer having been filed, the Default of said Defendant, GARY LEWIS, in the premises, having been duly entered according to law;

upon application of said Plaintiff, Judgment is hereby entered against said Defendant as follows:

. . .

. . .

. . .

IT IS ORDERED THAT PLAINTIFF HAVE JUDGMENT AGAINST DEFENDANT in the sum of $3,500,000.00, which consists of $65,555.37 in medical expenses, and $3,434,444.63 in pain, suffering, and disfigurement, with interest thereon at the legal rate from October 9, 2007, until paid in full.

DATED THIS 2nd day of ~~May~~ [June], 2008.

/s/ Elissa F. Cadish
DISTRICT JUDGE

Submitted by:
CHRISTENSEN LAW OFFICES, LLC.

BY: /s/ David Sampson
DAVID SAMPSON
Nevada Bar #6811
1000 S. Valley View
Las Vegas, Nevada 89107
Attorneys for Plaintiff

CERTIFIED COPY
DOCUMENT ATTACHED IS A
TRUE AND CORRECT COPY
OF THE ORIGINAL ON FILE

/s/ Steven D. Grierson
CLERK OF THE COURT

2-25-2010

DOCKET No.13-17441

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES NALDER, GUARDIAN AD LITEM FOR MINOR CHEYANNE NALDER, REAL PARTY IN INTEREST, AND GARY LEWIS, INDIVIDUALLY,

PLAINTIFFS/APPELLANTS,

v.

UNITED AUTOMOBILE INSURANCE COMPANY,

DEFENDANTS/APPELLEES.

APPEAL FROM A DECISION OF UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEVADA
CASE No. 2:09-cv-01348 RCJ-GWF

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

(Filed Jun. 18, 2020)

THOMAS CHRISTENSEN, ESQ.
Nevada Bar #2326
CHRISTENSEN LAW OFFICES
1000 S. Valley View Blvd.
Las Vegas, NV 89107
Attorney for Appellants

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[1] **I. Each of the overlooked or misapprehended points of law or facts below labeled A through H requires a finding of standing, independent of any other reason.**

Appellants Gary Lewis and James Nalder hereby petition for rehearing and hearing en banc of the Order (Doc #142) issued June 4, 2020. A panel rehearing is appropriate when a material point of law or fact was overlooked or misapprehended in the decision. Fed. R. App. P. 40(a)(2). Appellants have identified eight alphabetically enumerated reasons below, each independently supporting rehearing. Rehearing en banc is warranted under FRAP 35(b)(2) because the issues presented by this decision—whether the appellate court can disregard Nevada Supreme Court decisions and Nevada and California trial court judgments and thereby frustrate Nevada's regulation of the insurance

industry by cutting of the right to a jury trial by factual findings made by an appellate court—are of "exceptional importance." (See U.S. Constitution, Amendment VII).

II. Points of law or fact that the petitioner believes the court has overlooked or misapprehended and argument in support of the petition.

A. The Panel's decision misapprehended the Nevada Supreme Court holding.

The panel states "Furthermore, the Nevada Supreme Court concluded that Nalder and Lewis cannot continue to seek consequential damages for breach of the duty to defend. *Id.*" (At page 3 of the June 4, 2020 Order.) This, however, is [2] not what the Nevada Supreme Court stated or held. What the Nevada Supreme Court actually said was:

> "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." (Order page 7). (Emphasis added.)

The distinction is important. The Nevada Supreme Court cut off the consequential damage of **ONLY** the judgment in specific circumstances. The Court did not, in any way, however cut off *all* damages that would eliminate standing when there is a breach

of the duty to defend. The Nevada Supreme Court rephrased and narrowed the certified question posed by this Court. It noted that both a "common law action on a judgment" and a statutory renewal are valid under Nevada law. (Order page 4, citing *Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (1897). The Nevada Supreme Court further found that the action filed against UAIC, on appeal herein, is not an action on the judgment. (Order page 4.) The Nevada Supreme Court **did not address** whether the judgment expired, but held that *if* the judgment expired, the judgment amount would not be damages that Appellants could recover.

The Nevada Supreme Court held that "An insured may recover *any damages consequential* to the insurer's breach of its duty to defend." *Century* [3] *Surety Co. v. Andrew*, 134 Nev. Adv. Op. 100, 432 P.3d 180 (2018)(emphasis added.) And, "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.*, citing *Khan v. Landmark Am. Ins. Co.,*757, S.E.2d 151, 155 (Ga. Ct. App. 2014). Here, Appellants have standing based upon actual and concrete injury and the right to a jury trial must be restored by remand.[1]

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[1] State courts enjoy the benefit of having the final say on matters of state law. Certification is perhaps uniquely suited to further the principles of judicial federalism underlying the Supreme Court's decision in *Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).* See Bradford R. Clark, Ascertaining the Laws of the

B. The Panel's decision misapprehended the facts that the March 28, 2018 amended judgment in case number 07A549111 and the California enforcement action judgment entered July 24, 2018 provided to the Ninth Circuit on January 29, 2019 are extensions of the judgment in case number 07A549111, which was originally pled as one of the elements of damage, giving standing to Lewis.

The Panel stated "Furthermore, it is irrelevant whether Nalder has obtained additional judgments against Lewis in Nevada State Court because such other judgments were not the basis for their complaint against UAIC in this case." Therein, this Court dubbed "irrelevant" the judgment in the Nevada State Court case number 07A549111 on March 28, 2018, which is the very same case number that formed the basis of the original complaint against UAIC. Further, this Court [4] ignores the valid and enforceable California judgment, which was an enforcement action of that same judgment that formed the basis of the original complaint against UAIC. The existence of these judgments confirm Appellants' standing.

Several States: Positivism and Judicial Federalism After Erie, 145 U. PA. L. REV. 1459, 1495-1515, 1535-39 (1997).

C. The Panel's decision overlooks Appellants' standing resulting from other contractual damages, in addition to, or instead of, the judgment.

Appellants set forth at length in their opposition to UAIC's Motion to Dismiss, filed three years ago, that Lewis was damaged when Lewis assigned a portion of this lawsuit to Nalder. It was alleged that the assignment damaged Lewis in excess of $3.5 million dollars. Whether or not the judgment became enforceable afterward is irrelevant. Lewis was immediately damaged. Any actual or alleged expiration does not change the consequence and negative effect on Lewis of the assignment.

Appellants herein alleged, in their complaint against UAIC, additional damages that give standing and require remand for a jury trial in this case. As evidenced in the complaint:

> 32. As a proximate result of the aforementioned breach of contract, Plaintiffs have suffered and will continue to suffer in the future, damages in the amount of $3,500,000.00 **plus continuing interest.**
>
> **33. As a further proximate result of the aforementioned breach of contract, Plaintiffs have suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses, all to their damage in excess of $10,000."** (See Complaint filed May 22, 2009, Dkt Entry 20-4, at page 188 of 203, 783 of 999,

> Appellee's Excerpts of Record. Emphasis added.)

[5] These damages, giving rise to standing, have been overlooked by the Panel.

In addition, the Nevada Supreme Court has held (in other litigation involving these parties) that in order to remove the "expired judgment" UAIC must collaterally attack the judgment, which UAIC has not done.[2] Lewis has standing based upon having a multi-million dollar judgment pending against him and the **ongoing injury until it is affirmatively removed**.

On remand from the U.S. Supreme Court, the Ninth Circuit found that a plaintiff's allegations of inaccurate reporting of information about his marital status, age, education, and employment history constituted harm sufficiently concrete to satisfy the injury-in-fact requirement for standing. *Robins v. Spokeo, Inc.*, 867 F. 3d 1108, 9th Circuit (2017). Surely, the injury to Lewis of having an actual, active valid judgment against him for at least six years[3] is a greater injury in fact and concrete injury than having a false credit report. Likewise, financial consequences remain once a large judgment is a part of a person's credit history—whether expired or not. The years of financial ruin and involvement in litigation with UAIC, at the very least,

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[2] *Nalder v. Eighth Judicial Dist. Court and UAIC*, 136 Nev. Adv. Op. 24, (April 30, 2020).

[3] This is assuming the shortest, non-tolled or waived time frame, which Appellants only argue hypothetically, not wanting to be accused of inadvertently waiving.

are additional consequential damages [6] giving Appellants continued standing.[4]

D. The Panel overlooks Appellants' standing for damages for breach of the duty of good faith and fair dealing and violating NRS 686A.310.

The Nevada Supreme Court narrowed its ruling by stating that "**If** Lewis is not liable to Nalder for the $3.5 million judgment . . . "(Order page 6, emphasis added); and "Based on what is before this court on the certified question presented" (Order page 6). The decision limiting the damages under the contract has no application to the liability in tort for the default judgment, even if expired.[5]

As stated in Appellants' opening brief, and throughout this appeal, the original "state court judgment is the minimum measure of damages" and just

---

[4] One example is the *Cumis/Hansen* counsel fees incurred in defending the Nalder actions. *State Farm Mut. Auto. Ins. Co. v. Hansen*, 357 P. 3d 338 (NV Supreme Court 2015). Other damages include the publicity and resultant reputational loss in addition to the financial harm of a judgment against an insured that results from a failure of a duty to defend. *Starr Indemnity & Liability Company v. Limmie Young III*, 379 F. Supp. 3d 1103 (2019).

[5] UAIC admitted that there is potential for tort liability for the excess judgment "If an insurer violates its duty of good faith and fair dealing by failing to adequately inform the insured of a reasonable settlement opportunity, the insurer's actions can be a proximate cause of the insured's damages arising from a foreseeable settlement or excess judgment. *Allstate Ins. Co. v. Miller*, 125 Nev. at 313-14, 212 P.3d at 327." DktEntry 44, Appellee's Motion, page 10.

one item of damage in this appeal and that "all consequential damages should be awarded." (DktEntry 10, page ii, Appellant's opening Brief). See *Allstate v. Miller*, 125 Nev. 300, 212 P.3d 318 (2009), *Campbell v. State Farm*, 840 P.2d 130 [7] (Utah App.1992), *Powers v. USAA*, 114 Nev. 690, 962 P.2d 596(1998). This concept of more expansive tort damages than contract damages was presented in the trial court, argued in every Appellant Brief before this court, admitted in every brief filed by Respondent, argued by Appellants at oral argument and ignored by the Panel in its decision.

E. The Panel overlooked UAIC's waiver of the statute of limitations defense.

UAIC did not bring the alleged "expiration" of the judgment to the Court's attention in UAIC's Opening Brief on appeal.[6] UAIC did not raise the issue in the trial court, nor was it raised in its Reply Brief filed May 21, 2014, nor was it raised when it made payment in exchange for a partial satisfaction of

[6] As stated in Appellant's first brief opposing dismissal: "As a general rule, an appellate court will not hear an issue raised for the first time on appeal." *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992) (Dkt Entry 45, page 5.) UAIC agrees: "Raise it or waive it is the rule on appeal. *United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015)(generally, an appellee waives any argument it fails to raise in its answering brief."); *In re Cellular 101, Inc.*, 539 F.3d 1150, 1155 (9th Cir. 2008); *cf. Parmalat Capital Finance Ltd. v. Bank of Am. Corp.*, 671 F.3d 261, 270-71 (2d Cir. 2012) (parties waived argument by failing to raise it in the first round of appeal." (DktEntry 75, page 3).

judgment on March 5, 2015, nor was it raised in UAIC's 28(j) letter filed December 30, 2015, nor was it raised at oral argument on January 6, 2016, nor was it raised when the 9th Circuit certified the first question to the Nevada Supreme Court on June 1, 2016, nor was it raised when the Nevada Supreme Court accepted the certified question on July [8] 22, 2016, nor was it raised when UAIC moved to associate counsel on Dec 14, 2016, nor was it raised when UAIC filed its 31-page brief on January 6, 2017, nor was it raised in the amicus brief filed on January 24, 2017. It was not until March 14, 2017, nearly three years after UAIC alleges the "expiration" occurred—after all briefing was complete on the first certified question.[7]

The second certified question was the result of the belated introduction (by affidavit of UAIC's counsel) of alleged facts and issues that were not part of the record below. Appellants' objected in their initial Opposition to the Motion to Dismiss (filed three years ago on March 28, 2017) that arguments raised by UAIC four years after the judgment and three years after it alleges the issue became ripe were improper and waived. (DktEntry 45, page 5.) The Panel overlooked and excused UAIC's waiver without comment or justification.

---

[7] UAIC also violated NRS 686A.310(p) when the issue was belatedly raised before this Court.

F. The Panel overlooked Appellants' timely arguments against expiration.

Appellants, in their Opposition to UAIC's Motion to Dismiss, argued that the question of the effect of non-renewal was "a substantive legal issue that should be placed before the District Court once this Court reaches a final ruling on the appeal." (DktEntry 45, at page 4.) The Nevada Supreme Court's unpublished [9] order confirms this. This Court should be reviewing the District Court's legal rulings based on the factual record before it at the time of the rulings that are on Appeal herein. Appellants argued, correctly as confirmed by the Nevada Supreme Court, that on appeal is not the proper place to find facts or evaluate statute of limitations and tolling issues. FRCP 52(a) serves two important functions: it informs appellate courts about the basis for the trial court's decision, and it ensures reasoned decision making by trial courts. See *TEC Engineering Corp v Budget Molders Supply, Inc.*, 82 F3d 542, 545(1st Cir 1996)(discussing the importance of creating a record adequate for review); and *United States v Merz*, 376 US 192, 199(1964)(discussing the importance of reasoned decision making). The Nevada Supreme Court has recognized that the question of whether the six year limitations period expires "require[s] application of law to facts that are disputed . . . " (See DktEntry 55, NV Supreme Court Order Answering Certified Questions, at page 5). The trial court is the appropriate forum for such factual findings, which could clarify the consequential damages issue, but which does not defeat standing.

The Panel seeks to apply waiver to Appellants while allowing UAIC to bring up untimely issues, as set forth above. Comparing the two waivers, the Panel has failed to articulate a reasonable basis for its refusal to find a waiver on the part [10] of UAIC, which filed or argued more than ten times, in various aspects of this appeal, dealing directly with this judgment, and did not even touch on the issue of the expiration of the statute of limitations.[8]

And yet the panel enforces a draconian waiver on Appellants even though Appellants, in the first brief opposing dismissal for lack of standing, stated "If the Nevada Supreme Court concludes that a default judgment is a recoverable consequential damage for an insurer's breach of the duty to defend, then it should be left to the district court on remand to collect and weigh evidence to make a factual determination as to what amount of consequential damages are recoverable in this case." (See DktEntry 45, pages 7-8). Of course, that factual determination would include a determination of any statute of limitations and tolling statute issues. Appellants brought up the payments[9] that form the basis of tolling under NRS 11.200 in their Opposition to the Motion to Dismiss for lack of standing, but inartfully claimed they "acted as a Mechanism for Renewal." Appellants go on to argue that UAIC acknowledged "the underlying judgment through payment." Though this is not a perfect statement of the

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[8] As set forth in Section E, above.

[9] The payments are part of the record below.

tolling statute, it can hardly be viewed as an affirmative waiver.[10]

[11] If there was any ambiguity about any claimed waiver Appellants removed all doubt when filing their very first pleading following the belated issue brought up by UAIC "C. The Six-Year Statute of Limitations to Pursue an Action Upon the Default Judgment or a Renewal of that Judgment was Extended and Tolled" and argued "Pursuant to NRS 11.200, the statute of limitations "dates from the last transaction or the last item charged or the last credit given." Further, when any payment is made, "the limitation shall commence from the time the last payment was made. See Nev. Rev. Stat. 11.200. Therefore, UAIC's last payment on the judgment extended the expiration of the six-year statute of limitations to February 5, 2021."[11]

Nevada courts have consistently applied applicable tolling principles to the action on a judgment and even to Nevada statutory judgment renewal under NRS 17.214. *Mandlebaum v. Gregovich*, 24 Nev. 154, 50 P. 849 (Nev. 1897), *O'Lane v. Spinney*, 110 Nev. 496, 8 74 P.2d 754 (1994), *Worsnop v. Karam*, No. 77248, at *7 (Nev. Feb. 27, 2020), *Wisniewski v. Wisniewski*, No.

[10] "A waiver is the intentional relinquishment of a known right." *Mahban v. MGM Grand Hotels, Inc., 100 Nev. 593, 596 (Nev. 1984).*

[11] This is at the earliest. Appellants are not waiving other applicable tolling statutes by not setting them forth in this page limited brief.

66248 (Nev. App. Oct. 22, 2015), *Los Angeles Airways v. Est. of Hughes*, 99 Nev. 166 (Nev. 1983).

The Panel decision overlooks and misapprehends the comparative equities [12] of the applied "waivers." The Panel's decision finds that UAIC did not waive an issue, even though it was not brought up in more than ten affirmative filings over a four year period, but Appellants are guilty of waiver for not crisply stating the issue until the first brief filed on the issue. This is not a reasonable use of discretion. This is an abuse of discretion that should shock the judicial conscience and amounts to arbitrary and capricious denial of due process to these litigants and a miscarriage of justice further delaying and extending resolution. (See U.S. Constitution, Amendment XIV.)

Long before the Nevada Supreme Court answered the certified questions in this case, on January 29, 2019, Appellants filed a Fed.R.App.P.28(j) supplemental authority (DktEntry 52), providing this Court with the Nevada Supreme Court opinion issued in *Century Surety Co. v. Andrew*, 134 Nev. Adv. Op. 100 (Dec. 13, 2018) (en banc), 432 P.3d 180 (2018). (Supporting Appellants' statement that the consequential damage from the judgment is a factual issue to be determined by the jury, not on appeal with no record). Appellants' January 29, 2019 Fed.R.App.P.28(j) letter also provided the Court with three final judgments in favor of Nalder and against Lewis that were entered in 2018—two in Nevada and one in California. One of these Nevada judgments is the judgment Nalder originally obtained against Lewis, confirmed by the trial

court to be valid as a [13] result of tolling statutes. This judgment is binding on Lewis and damaging him currently.

G. The Panel overlooked the lack of a case and controversy between Nalder and Lewis.

The Panel states that "unless Nalder or Lewis either renewed the judgment or brought an action upon the judgment." This statement demonstrates that the Panel disregarded an important aspect of waiver: that it be an issue in the litigation knowingly waived. "A waiver is the intentional relinquishment of a known right." *Mahban v. MGM Grand Hotels, Inc.*, 100 Nev. 593, 596 (Nev. 1984). The statute of limitations and the tolling statutes that apply are not issues that can be ruled on directly in this litigation, even at the trial court level. **Nalder is not suing Lewis in this case**. There is no controversy between the two here. The statute of limitations and tolling issues are factual and legal issues that exist between Nalder and Lewis. These can only be litigated in controversies between Nalder and Lewis styled Nalder v. Lewis in the State Courts of Nevada and California. This was brought up by Appellants in the Opposition to the Motion to Dismiss, as set forth above and was not waived, but was overlooked by the Panel.

H. Appellants ask for oral argument regarding these important issues of judicial estoppel and restraint.

Appellants request oral argument to aid in maintaining the federal-state [14] balance. The State of Nevada must have its insurance regulatory scheme operate properly. The decisions of the Nevada Supreme Court must be followed. This Panel's decision ignores and undermines state court determinations regarding the underlying liability and damage to Lewis, and more importantly, undermines the consistent jurisprudence of Nevada of submitting the question of an insurer's liability for breach of the duty to defend, breach of the duty of good faith and fair dealing and violation of NRS 686A.310 to a jury. If this Court does not allow rehearing to correct the clear errors, the judgments and litigation in the state courts caused by UAIC's breaches of good faith and fair dealing will go forward, causing further delay and damage to the insured, the insured public in general and the Nevada State Courts.

It would be judicially economical for this Court to send the case back to the Federal District Court with instructions to hold a jury trial to determine whether the breach of the duty to defend was also a breach of the covenant of good faith and fair dealing or a violation of NRS 686A.310 and what the consequential damages are from each and from breach of the duty to defend. The answers to the two certified questions are not undermined, as the District court will be instructed that this case is not an action on the

judgment. Therefore, any consequential damages in the form of a judgment will have to be proven currently valid and enforceable.

[15] **III. Each one of the considerations labeled A through H above warrant reconsideration or a hearing en banc.**

In conclusion, rehearing or a hearing en banc is warranted because the Panel overlooked or misapprehended important issues of law and fact in interpreting the Supreme Court's answers to the two Certified Questions. This Court should hold that 1) UAIC is liable for all consequential damages that stem from its breach of its duty to defend regardless of policy limits or defense costs; 2) this Court should overturn the District Court's clearly erroneous Summary Judgment on the tort claims; and, 3) the case must be remanded to the District Court for a determination of the full extent of the consequential damages suffered by Lewis, including but not limited to any judgments that are still collectable by Nalder against Lewis, attorney fees incurred by Lewis, damage arising from the assignment agreement, lost rights or claims of Lewis, interest, loss of income or employment, financial hardship or ruin, and any other consequential damages that flow from UAIC's conduct.

Dated this 18 day of June, 2020.

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/s/ Thomas Christensen
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Attorney for Appellants

[16] **Certificate of Compliance for Petitions for Rehearing**

I am the attorney for Appellants herein.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is:

X In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Dated this 18th day of June, 2020.

/s/ Thomas Christensen
Counsel for Appellants

[17] **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/DktEntry system on June 18, 2020.

I certify that all participants in the case are registered CM/DktEntry users and that service will be accomplished by the appellate CM/DktEntry system.

/s/ Thomas Christensen
Counsel for Appellants