IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES NALDER, GUARDIAN AD LITEM ON BEHALF OF CHEYANNE NALDER; AND GARY LEWIS, INDIVIDUALLY, Appellants, vs. UNITED AUTOMOBILE INSURANCE COMPANY, Appellee.	Case No. 70504 District Court Case No. A-09-590967-C

APPENDIX TO APPELLANT'S REPLY BRIEF

VOL. 1 OF 1

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TAB 1

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,

PLAINTIFF/APPELLANT/CROSS-APPELLEE,

V.

UNITED AUTOMOBILE INSURANCE COMPANY, DOES I THROUGH V, AND ROE CORPORATIONS I THROUGH V, INCLUSIVE,

DEFENDANTS/APPELLEES/CROSS-APPELLANTS.

APPEAL FROM A DECISION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA
CASE NO. 2:09-CV-01348 RCJ-GWF, THE HONORABLE ROBERT C. JONES

APPELLEE'S MOTION TO DISMISS FOR LACK OF STANDING

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CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1(a) United Automobile Insurance Company ("UAIC") is a Florida Corporation with its principal place of business in Florida. All stock of UAIC is wholly owned by United Automobile Insurance Group and neither entity is a publicly traded Company.

Pursuant to Federal Rule of Appellate Procedure 27, Appellee, UNITED AUTOMOBILE INSURANCE COMPANY ("UAIC"), brings this Motion to Dismiss for Lack of Standing by Appellants, JAMES NALDER, as Guardian Ad Litem for minor CHEYANNE NALDER, and GARY LEWS (collectively, the "Nalder Appellants"), as the default judgment that formed the basis for the underlying action herein was not properly renewed under Nevada law and has therefore expired, resulting in the invalidation of Appellants' assignment and their standing to pursue a direct action against UAIC for bad faith and consequential damages.

BACKGROUND[1]

1. This matter arises out of an automobile accident that occurred in 2007, involving UAIC's purported insured, Gary Lewis, and Cheyanne Nalder, the minor child of James Nalder. Following UAIC's denial of coverage, Mr. Nalder filed a personal injury action against Mr. Lewis. Mr. Nalder eventually obtained a default judgment against Mr. Lewis on June 3, 2008. (App. 0078-79). A Notice of Entry of Judgment was filed August 26, 2008. (App. 0076-79). Mr. Nalder and Mr. Lewis then filed the present action against UAIC on May 22, 2009, with Mr. Nalder claiming a right to pursue this action against UAIC as a "third party

[1] A full history of this matter is contained within UAIC's Response Brief in this appeal and is set forth in this Court's Order of June 1, 2016, certifying a question to the Nevada Supreme Court.

beneficiary" and as a judgment-creditor of Mr. Lewis. (Supp. Excerpt of Record on Appeal at 473). Later, Mr. Nalder produced an "Assignment" from Mr. Lewis, purporting to assign Mr. Lewis' rights against UAIC stemming from the entry of the June 3, 2008 judgment. (App. 0495).

2. The Assignment states that Mr. Lewis assigns to Mr. Nalder all bad faith rights Lewis has against UAIC to allow Mr. Nalder to recover the full amount of the $3,500,000 judgment Mr. Nalder has against Mr. Lewis, plus interest. (App. 0495). Any amount recovered above the full amount of the judgment and interest were to be retained by Mr. Lewis, and not assigned to Mr. Nalder. (App. 0495).

3. Following a previous appeal to this Court, the parties filed cross-motions for summary judgment. On October 30, 2013, the Honorable Robert C. Jones issued an Order and judgment on the cross-motions. (App. 0734-744). The district court found that UAIC had been reasonable in its coverage determination and, thus, committed no actionable "bad faith" such as to allow any claims for implied breach of the covenant of good faith and fair dealing or under Nevada's Unfair Claims Practices Act, N.R.S. 686A.310. However, the trial court found that an implied insurance policy covering the loss in question had been formed due to an ambiguity in UAIC's renewal statement, and therefore UAIC owed its contractual indemnity obligations. The district court also found that UAIC breached its duty to defend under this implied insurance policy, but it awarded no

damages to Mr. Lewis because he had expended no sums in defending against Mr. Nalder's personal injury action. The present appeal followed.

4. After briefing and oral argument, this Court certified a question to the Nevada Supreme Court as follows:

> Whether, under Nevada law, the liability of an insurer that has breached its duty to defend, but has not acted in bad faith, is capped at the policy limit plus any costs incurred by the insured in mounting a defense, or is the insurer liable for all losses consequential to the insurer's breach?

5. Mr. Nalder and Mr. Lewis argue they should be able to recover the full amount of the June 3, 2008 default judgment, plus interest and costs, as a consequential damage of UAIC's breach of its duty to defend Mr. Lewis. This matter has been fully briefed before the Nevada Supreme Court, but has not yet been ruled upon or set for oral argument.

6. Recently, it has come to UAIC's attention that the original state court default judgment underlying this action has not been renewed within the 6-year time period mandated by Nevada law. Therefore, the underlying default judgment is now expired and unenforceable.[2] And as the default judgment underlying Mr. Lewis' assignment to Mr. Nalder is unenforceable, so too must the assignment be

[2] The timeline demonstrates:
1. June 3, 2008, Default Judgment;
2. August 26, 2008, Notice of Entry of Judgment; and
3. August 26, 2014, Expiration of Judgment per Nevada law.

deemed unenforceable. (*See* Affidavit of Matthew J. Douglas, attached hereto as Exhibit 1). Accordingly, because Mr. Nalder and Mr. Lewis lack the injury necessary to establish standing before this Court, this matter must be dismissed.

ARGUMENT

I. THE DEFAULT JUDGMENT UNDERLYING APPELLANTS' CLAIMS AGAINST APPELLEE IS NO LONGER ENFORCEABLE AND, ACCORDINGLY, APPELLANTS NO LONGER HAVE STANDING TO PURSUE THEIR CLAIMS AGAINST APPELLEE.

A. The underlying default judgment obtained by Mr. Nalder against Mr. Lewis is void as it was not properly renewed and has, therefore, expired.

The record on appeal reflects that Mr. Nalder obtained a default judgment against Mr. Lewis on June 3, 2008, and a Notice of Entry of Judgment was filed on August 26, 2008. Under Nevada Revised Statute 11.190(1)(a), the statute of limitations for an action to execute upon a judgment is six years, and while a party may renew a judgment, Nevada Revised Statute 17.214 sets out specific procedures that must be strictly followed in order for the judgment to be properly renewed. Those procedures have not been followed here and it appears that no renewal has ever been attempted by Mr. Nalder or Mr. Lewis. Accordingly, the underlying default judgment expired, at a minimum, on August, 26, 2014, and is therefore unenforceable.

In *Leven v. Frey*, 168 P.3d 712 (Nev. 2007), the Nevada Supreme Court held that judgment creditors are required to strictly comply with the procedure for judgment renewal set out in N.R.S. 17.214. *Id.* at 713-14. The judgment in question in *Leven* had been entered on October 25, 1996, and as the expiration date approached in October of 2002, the judgment creditor sought renewal. *Id.* The court noted that although the judgment creditor had timely filed his affidavit for renewal on October 18, 2002, he failed to serve the affidavit until October 30, 2002, which was "well beyond the three-day requirement for recording and service." *Id.* at 714. The judgment creditor argued that he had substantially, if not strictly, complied with the statutory procedure for renewal. After reviewing the statute and its legislative history, however, the Nevada Supreme Court specifically held that the statute required strict compliance and, as the judgment creditor had failed to strictly comply, the court reversed the trial court's denial of the debtor's motion to declare the expired judgment void. *Id.* at 714-19. *See also Fid. Nat'l Fin., Inc. v. Friedman*, 402 F. App'x 194 (9th Cir. 2010) (reversing denial of motion to quash enforcement of judgment where judgment creditor failed to renew judgment pursuant to Arizona's judgment renewal statute).

Here, Mr. Nalder and Mr. Lewis have failed to make any attempt to renew the underlying default judgment against Mr. Lewis. Indeed, a review of the court record reveals that no affidavit pursuant to N.R.S. 17.214 has ever been filed. (*See*

Affidavit of Matthew J. Douglas, attached hereto as Exhibit 1). Accordingly, both Mr. Nalder and Mr. Lewis failed to comply with the strict requirements of N.R.S. 17.214, resulting in the expiration of the June 3, 2008 default judgment entered against Mr. Lewis, which was filed on August 26, 2008.

B. Due to the expiration of the underlying default judgment, Appellants no longer have standing to pursue their claims of bad faith against UAIC and consequential damages for breach of the duty to defend.

Under Nevada law only parties with a valid contractual relationship with the insurer have standing to bring a bad faith or breach of contract claim. *Gunny v. Allstate Ins. Co.*, 830 P.2d 1335, 1335-36 (Nev. 1992). This Court has previously affirmed that in Nevada an injured tort plaintiff must secure an assignment to advance a direct action against a putative insurer of the tortfeasor. In *Hicks v Dairyland Insurance Company*, 441 F. App'x. 463 (9th Cir. 2011), this Court held that only parties with a valid contractual relationship with the insurer have standing to bring claims against said insurer. Specifically, the *Hicks* Court affirmed that mere status as a judgment-creditor is insufficient to afford the party standing, stating that "absent a valid assignment of rights recognized under Nevada law, [the tort claimant] **lacked standing** to pursue a direct cause of action against [the insurer]." Thus, a valid assignment is an absolute prerequisite for a judgment creditor such as Mr. Nalder to maintain an action against UAIC.

The record reflects that Mr. Nalder obtained an assignment from Mr. Lewis on February 28, 2010. (App. 0495). The assignment provides as follows:

> "FOR VALUE RECEIVED, GARY LEWIS ("LEWIS"), assigns to JAMES NALDER, As Guardian ad Litem for Cheyenne Nalder ("NALDER"), LEWIS' rights that LEWIS has for damages against UNITED AUTOMOBILE INSURANCE CO. ("UAIC"), based upon its failure to negotiate in good faith the claim brought against LEWIS by NALDER. **Specifically, that portion of said right or cause of action being hereby assigned pertains to the judgment entered against the undersigned in favor of NALDER in the amount of $3,500,000.00 the total judgment earning interest at the statutory rate from the date of its entry until the said judgment is paid in full) ("the NALDER Judgment")**. As the total amount of the said judgment will not be known until the time it is finally paid given interest continues to accrue, the amount being assigned to NALDER is whatever amount is ultimately recovered that is necessary to satisfy the total NALDER Judgment. The NALDER judgment is at least $3,495,000.00 in excess of the $15,000.00 liability limit of the insurance policy with UAIC. LEWIS hereby represents that he was not insolvent at the time of the entry of said judgment and has been damaged thereby, as well as otherwise. The rights so assigned hereby include all funds necessary to satisfy the Judgment NALDER has against LEWIS including attorney fees, costs, interest, and the like to NALDER in their entirety (hereinafter referred to as "the NALDER Judgment damages").
>
> All rights, interests, and claims to any funds in addition to those necessary to pay the NALDER Judgment damages in full are hereby retained by LEWIS. In the event that this assignment is an improper splitting of LEWIS' causes of actions against UAIC then this assignment shall constitute a full assignment to

> NALDER of all rights interests and claims LEWIS has against UAlC in their entirety.
>
> If at any point in time, whether prior to or after the date of this assignment, JAMES NALDER, As Special Administrator For the Estate of Cheyenne Nalder is dismissed from the action against UNITED AUTOMOBILE INSURANCE CO., Case No.: 2:09-cv-1348, then this assignment is rendered null and void from its inception.

(App. 0495) (Emphasis added). The assignment clearly notes that the rights and cause of action being assigned pertain to the default judgment entered against Mr. Lewis and in favor of Mr. Nalder. However, as discussed above, said judgment is now expired and unenforceable. Accordingly, as Mr. Nalder and Mr. Lewis' assignment is based upon a judgment that is now unenforceable, this Court must also deem the assignment unenforceable and Mr. Nalder is without standing to continue to pursue a claim of bad faith against UAIC. Moreover, since Mr. Lewis and Mr. Nalder's rights depend upon the continued validity of the judgment (as contemplated by the assignment) both Mr. Nalder and Mr. Lewis' rights to sue the carrier were extinguished with the expiration of the judgment.

Furthermore, as with any tort, proof of damages is an element of recovery. *Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116 (Colo. 2010). *See also Fertitta v. Allstate Ins. Co.*, 439 So. 2d 531, 533 (La. Ct. App. 1983) (One factor to consider in a bad faith case is "the extent of damages recoverable in excess of policy coverage,"), *cited approvingly in Allstate v. Miller*, 125 Nev. 300, 312, 212 P.3d

318, 327 (2009). Nevada law on this point is therefore consistent with the "fundamental maxim of the Anglo-American tort law that a wrong without damage . . . is not actionable . . . ." 1 Stuart M. Speiser, *Charles F. Krause & Alfred W. Gans, The American Law of Torts* § 1:11 (1983); *see also Restatement (Second) of Torts* §§ 903, 912 cmt. a (1979). Indeed, actual damages are an essential element of a claim for bad faith breach of an insurance contract, which the insured must prove by a preponderance of the evidence. If an insured did not and cannot pay out any money in satisfaction of an excess judgment, the insured was not harmed, and, therefore, the insurer cannot be responsible for bad faith. *Nunn v. Mid-Century Ins. Co.,* 244 P.3d 116 (Colo. 2010).

The United States Supreme Court has held that Article III limits a federal court's subject matter jurisdiction by requiring that plaintiffs have standing, which includes establishing an "injury-in-fact." *Spokeo, Inc. v Robins*, 136 S.Ct. 1540 (2016). In *Spokeo, Inc.*, the Supreme Court succinctly explained the requirements for Article III standing as follows: "Our cases have established that the 'irreducible constitutional minimum' of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* at 1547 (internal citations omitted).

Given that Mr. Nalder's underlying judgment against Mr. Lewis has expired, it is doubtful that either of them has suffered any injury in fact. Moreover, as discussed above, Mr. Lewis' right to sue also lapsed with expiration of the judgment because he can no longer claim any actual damages for bad faith and breach of the duty to defend. More importantly, it is clear that no judicial decision will redress any issue. That is, even if the Nevada Supreme Court returns a favorable decision on the pending certified question—finding that an insured can collect an excess judgment as a consequential damage for an insurer's breach of the duty to defend in the absence of bad faith—the fact remains that there is no default judgment to collect on here. Therefore, UAIC encourages this Court to hold that Appellants no longer have standing to pursue their claims for consequential damages based on the breach of the duty to defend and bad faith failure to settle.

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/ / /

CONCLUSION

Based upon the foregoing arguments and cited legal authority, UAIC respectfully requests that this Honorable Court dismiss this action for lack of standing, as the underlying default judgment which forms the basis of Appellants' claims against UAIC has expired and is unenforceable, thereby depriving Appellants of standing to bring an action for bad faith against UAIC and otherwise depriving Appellants of any claim for consequential damages.

Dated this 14th day of March, 2017.

COLE, SCOTT & KISSANE, P.A.

/s/ Thomas E. Scott
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ATKIN, WINNER & SHERROD

/s/ Matthew J. Douglas
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Nevada Bar No. 11371
Thomas E. Winner, Esq.
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Las Vegas, NV 89102
Counsel for Respondent

[3] Application pending
[4] Application pending

CERTIFICATE OF SERVICE

I hereby certify that on March _14th _, 2017, 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/ECF system.

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

/s/_____*Victoria Hall*_____

EXHIBIT “1”

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,

PLAINTIFF/APPELLANT,

V.

UNITED AUTOMOBILE INSURANCE COMPANY, DOES I THROUGH V, AND ROE CORPORATIONS I THROUGH V, INCLUSIVE,

DEFENDANTS/APPELLEES.

AFFIDAVIT ACCOMPANYING RULE 27 MOTION TO DISMISS FOR LACK OF STANDING

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, MATTHEW J. DOUGLAS, first being duly sworn, hereby depose and state as follows:

1. I am an attorney licensed to practice law in the State of Nevada, Federal District Court for the District of Nevada and the United States Court of Appeals for the Ninth Circuit. I am a partner at the law firm of Atkin Winner & Sherrod, and I am counsel of record for Defendant/Appellee United Automobile Insurance Company in the above-referenced action;

2. On March 8, 2017 I reviewed the online Nevada Eighth Judicial District Court case docket (wiznet) as well as the online Register of Actions to review the docket for any action taken to renew the judgment entered in the District Court of Clark County in case A549111 titled James Nalder as Guardian Ad Litem for Cheyenne Nalder, a minor vs. Gary Lewis;

3. Case number A549111 per the Clerk of the District Court of Clark County Nevada is the case belying the present action before this court;
4. The review of said online docket and register of action revealed that the judgment in said cause was entered June 2, 2008 and filed with a Notice of Entry of same judgment on August 26, 2008;
5. Further, review of said online docket and register of action revealed that no filing has ever been made to renew that judgment through March 8, 2017;
6. A true and correct copy of the Register of Action for said case A549111 as printed from the District Court for Clark County, Nevada is attached hereto as Exhibit 'A'.

FURTHER AFFIANT SAYETH NOT

DATED this 14th day of March, 2017.

MATTHEW J. DOUGLAS

Subscribed and sworn to before
me this 14th day of March, 2017.

NOTARY PUBLIC in and for
said County and State.

VICTORIA HALL
NOTARY PUBLIC
STATE OF NEVADA
APPT. No. 08-8181-1
MY APPT. EXPIRES JULY 22, 2020

ATKIN WINNER & SHERROD LLP
A NEVADA LAW FIRM

EXHIBIT "A"

Register of Actions
Case No. 07A549111

James Nalder vs Gary Lewis

Case Type: **Negligence - Auto**
Date Filed: **10/02/2007**
Location: **Department 29**
Cross-Reference Case Number: **A549111**

Party Information

		Lead Attorneys
Defendant	**Lewis, Gary**	
Guardian Ad Litem	**Nalder, James**	**Thomas F. Christensen** *Retained* 7028701000(W)
Plaintiff	**Nalder, James**	**Thomas F. Christensen** *Retained* 7028701000(W)
Subject Minor	**Nalder, Cheyenne**	**Thomas F. Christensen** *Retained* 7028701000(W)

Events & Orders of the Court

DISPOSITIONS

01/04/2008 **Order Approving Minor's Compromise** (Judicial Officer: Cadish, Elissa F.)
Converted Disposition:
Entry Date & Time: 01/07/2008 @ 08:24 Description: ORDER OF APPROVAL OF MINORS CLAIM Debtor: Lewis, Gary Creditor: Nalder, Cheyenne Amount Awarded: $66519.11 Attorney Fees: $33333.33 Costs: $147.56 Interest Amount: $0.00 Total: $100000.00

06/03/2008 **Default Judgment Plus Legal Interest** (Judicial Officer: Cadish, Elissa F.)
Converted Disposition:
Entry Date & Time: 06/05/2008 @ 11:00 Description: DEFAULT JUDGMENT PLUS LEGAL INTEREST Debtor: Lewis, Gary Creditor: Nalder, James Amount Awarded: $3500000.00 Attorney Fees: $0.00 Costs: $0.00 Interest Amount: $0.00 Total: $3500000.00

06/03/2008 **Default Judgment Plus Legal Interest** (Judicial Officer: Cadish, Elissa F.)
Converted Disposition:
Entry Date & Time: 06/05/2008 @ 11:09 Description: DEFAULT JUDGMENT PLUS LEGAL INTEREST Debtor: Lewis, Gary Creditor: Nalder, Cheyenne Amount Awarded: $3500000.00 Attorney Fees: $0.00 Costs: $0.00 Interest Amount: $0.00 Total: $3500000.00

OTHER EVENTS AND HEARINGS

10/02/2007 **Petition**

PETITION FOR ORDER APPOINTING GUARDIAN AD LITEM Fee $148.00
07A5491110001.tif pages

10/09/2007 **Order Appointing Guardian Ad Litem**
ORDER APPOINTING GUARDIAN AD LITEM
07A5491110002.tif pages

10/09/2007 **Initial Appearance Fee Disclosure**
INITIAL APPEARANCE FEE DISCLOSURE
07A5491110003.tif pages

10/09/2007 **Complaint**
COMPLAINT FILED
07A5491110004.tif pages

11/02/2007 **Summons**
SUMMONS
07A5491110005.tif pages

12/13/2007 **Default**
DEFAULT
07A5491110006.tif pages

12/21/2007 **Petition for Compromise of Minors Claim**
PETITION TO COMPROMISE CLAIM OF MINORS
07A5491110007.tif pages

01/04/2008 **Conversion Case Event Type**
STATUS CHECK: BLOCKED ACCOUNT /1
07A5491110008.tif pages

01/04/2008 **Judgment**
ORDER OF APPROVAL OF MINORS CLAIM
07A5491110009.tif pages

03/03/2008 **Status Check: Blocked Account** (3:00 AM) (Judicial Officer Cadish, Elissa F.)
STATUS CHECK: BLOCKED ACCOUNT /1
Minutes
Result: Continuance Granted

03/31/2008 *CANCELED* **Status Check: Blocked Account** (9:00 AM) (Judicial Officer Cadish, Elissa F.)
Vacated
Minutes
Result: Continuance Granted

04/08/2008 **Conversion Case Event Type**
HEARING RE: SHOW CAUSE /2
07A5491110010.tif pages

04/14/2008 **Motion**
ALL PENDING MOTIONS 4-14-08
07A5491110011.tif pages

04/14/2008 **Conversion Case Event Type**
STATUS CHECK: PAYMENT OF SANCTIONS/ FURTHER PROCEEDINGS VR 5/21/08
07A5491110012.tif pages

04/14/2008 *CANCELED* **Status Check: Blocked Account** (9:00 AM) (Judicial Officer Cadish, Elissa F.)
Vacated
Result: Continuance Granted

04/14/2008 **Show Cause Hearing** (9:00 AM) (Judicial Officer Cadish, Elissa F.)
HEARING RE: SHOW CAUSE /2

04/14/2008 **All Pending Motions** (9:00 AM) (Judicial Officer Cadish, Elissa F.)
ALL PENDING MOTIONS 4-14-08 Court Clerk: Keith Reed Reporter/Recorder: Jessica Ramirez Heard By: ELISSA CADISH
Minutes
Result: Matter Heard

04/21/2008 **Conversion Case Event Type**
PROVE UP OF DEFAULT /5
07A5491110013.tif pages

04/22/2008 **Motion**
ALL PENDING MOTIONS 4-22-08
07A5491110014.tif pages

04/22/2008 *CANCELED* **Status Check: Blocked Account** (9:00 AM) (Judicial Officer Cadish, Elissa F.)
Vacated

Result: Continuance Granted

04/22/2008 **Status Check** (9:00 AM) (Judicial Officer Cadish, Elissa F.)
STATUS CHECK: PAYMENT OF SANCTIONS/ FURTHER PROCEEDINGS VR 5/21/08
Result: Continuance Granted

04/22/2008 **All Pending Motions** (9:00 AM) (Judicial Officer Cadish, Elissa F.)
ALL PENDING MOTIONS 4-22-08 Court Clerk: Keith Reed Reporter/Recorder: Jessica Ramirez Heard By: ELISSA CADISH
Minutes
Result: Matter Heard

04/30/2008 **Motion**
ALL PENDING MOTIONS 4-30-08
07A5491110015.tif pages

04/30/2008 *CANCELED* **Status Check: Blocked Account** (9:00 AM) (Judicial Officer Cadish, Elissa F.)
Vacated
Result: Continuance Granted

04/30/2008 *CANCELED* **Status Check** (9:00 AM) (Judicial Officer Cadish, Elissa F.)
Vacated
Result: Continuance Granted

04/30/2008 **All Pending Motions** (9:00 AM) (Judicial Officer Cadish, Elissa F.)
ALL PENDING MOTIONS 4-30-08 Court Clerk: Keith Reed Reporter/Recorder: Jessica Ramirez Heard By: ELISSA CADISH
Parties Present
Minutes
Result: Matter Heard

05/15/2008 **Application**
APPLICATION FOR JUDGMENT BY DEFAULT
07A5491110016.tif pages

05/15/2008 **Notice**
NOTICE OF PAYING SANCTIONS
07A5491110017.tif pages

05/16/2008 **Application**
AMENDED APPLICATION FOR JUDGMENT BY DEFAULT
07A5491110018.tif pages

05/21/2008 **Minute Order** (3:00 AM) (Judicial Officer Cadish, Elissa F.)
MINUTE ORDER RE: BLOCKED ACCOUNT Relief Clerk: Phyllis Irby/pi Heard By: ELISSA CADISH
Minutes
Result: Matter Heard

05/22/2008 **Prove Up/Default** (9:00 AM) (Judicial Officer Cadish, Elissa F.)
PROVE UP OF DEFAULT /5 Relief Clerk: Phyllis Irby/pi Reporter/Recorder: Jessica Ramirez Heard By: ELISSA CADISH
Parties Present
Minutes
Result: Motion Granted

05/28/2008 **Conversion Case Event Type**
MINUTE ORDER RE: BLOCKED ACCOUNT
07A5491110019.tif pages

05/29/2008 **Conversion Case Event Type**
STATUS CHECK: PAYMENT OF SANCTIONS/ FURTHER PROCEEDINGS
07A5491110020.tif pages

05/29/2008 **Conversion Case Event Type**
STATUS CHECK: BLOCKED ACCOUNT
07A5491110021.tif pages

05/29/2008 *CANCELED* **Status Check: Blocked Account** (9:00 AM) (Judicial Officer Cadish, Elissa F.)
Vacated

05/29/2008 *CANCELED* **Status Check** (9:00 AM) (Judicial Officer Cadish, Elissa F.)
Vacated

05/29/2008 **Status Check** (9:00 AM) (Judicial Officer Cadish, Elissa F.)
STATUS CHECK: PAYMENT OF SANCTIONS/ FURTHER PROCEEDINGS Relief Clerk: Nora Pena Reporter/Recorder: Jessica Ramirez Heard By: ELISSA CADISH
Parties Present
Minutes

	Result: Matter Heard
06/03/2008	**Judgment** *DEFAULT JUDGMENT PLUS LEGAL INTEREST* 07A5491110022.tif pages
06/03/2008	**Judgment** *DEFAULT JUDGMENT PLUS LEGAL INTEREST* 07A5491110023.tif pages
06/26/2008	**Status Check** (9:00 AM) (Judicial Officer Cadish, Elissa F.) *STATUS CHECK: BLOCKED ACCOUNT Court Clerk: Keith Reed Reporter/Recorder: Jessica Ramirez Heard By: ELISSA CADISH* Parties Present Minutes
	Result: Blocked Account / Proof Filed
06/30/2008	**Acknowledgment** *ACKNOWLEDGEMENT OF BLOCKED ACCOUNT* 07A5491110024.tif pages
08/01/2008	**Motion** *PLTF'S MTN TO STRIKE SOCIAL SECURITY NUMBER/11 (vj 9/2/08)* 07A5491110025.tif pages
08/26/2008	**Notice of Entry of Judgment** *NOTICE OF ENTRY OF JUDGMENT* 07A5491110028.tif pages
09/02/2008	**Conversion Case Event Type** *MINUTE ORDER RE: PLTF'S MTN TO STRIKE SOCIAL SECURITY NUMBER* 07A5491110026.tif pages
09/02/2008	**Minute Order** (3:00 AM) (Judicial Officer Cadish, Elissa F.) *MINUTE ORDER RE: PLTF'S MTN TO STRIKE SOCIAL SECURITY NUMBER Relief Clerk: Monica Schmidt Heard By: ELISSA CADISH* Minutes
	Result: Matter Heard
09/03/2008	**Conversion Case Event Type** *STATUS CHECK: HEARING VI 10-3-08* 07A5491110027.tif pages
09/03/2008	*CANCELED* **Motion to Strike** (3:00 AM) (Judicial Officer Cadish, Elissa F.) *Vacated*
09/05/2008	**Acknowledgment** *ACKNOWLEDGEMENT OF BLOCKED ACCOUNT* 07A5491110029.tif pages
10/06/2008	*CANCELED* **Status Check** (3:00 AM) (Judicial Officer Cadish, Elissa F.) *Vacated* Minutes
	Result: Matter Heard
07/29/2009	**Writ of Execution**
02/01/2010	**Affidavit of Service** *Affidavit of Service*
06/24/2011	**Case Reassigned to Department 29** *Case reassigned from Judge Kathleen E. Delaney*
01/02/2017	**Case Reassigned to Department 29** *Case reassigned from Judge Susan Scann Dept 29*

Financial Information

	Conversion Extended Connection Type No Convert Value @ 07A549111	
	Total Financial Assessment	161.00
	Total Payments and Credits	161.00
	Balance Due as of 03/08/2017	**0.00**
10/02/2007	Transaction Assessment	148.00

10/02/2007	Conversion Payment	Receipt # 01384855	CHRISTENSEN LAW OFFICES LLC	(148.00)
07/22/2009	Transaction Assessment			6.00
07/22/2009	Payment (Window)	Receipt # 2009-40253-FAM	Christensen, Thomas F.	(6.00)
02/25/2010	Transaction Assessment			7.00
02/25/2010	Payment (Window)	Receipt # 2010-11919-FAM	Christensen, Thomas F.	(7.00)

TAB 2

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ATTORNEYS FOR DEFENDANT GARY LEWIS

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES - POMONA COURTHOUSE SOUTH

JAMES NALDER, individually and as Guardian ad Litem for CHEYENNE NALDER,

Plaintiff,

vs.

GARY LEWIS,

Defendant.

UNITED AUTOMOBILE INSURANCE COMPANY,

Intervenor

Case No. **KS021378**

[Assigned for All Purposes: Hon. Robert A. Dukes, Dept. "O"]

OPPOSITION TO UNITED AUTOMOBILE INSURANCE COMPANY'S MOTION FOR LEAVE TO INTERVENE

Date: November 7, 2018
Time: 8:31 a.m.
Dept.: O

RES ID: 180823342638

Date Action Filed: October 9, 2007

1. INTRODUCTION

UAIC's motion to intervene must be denied because UAIC waived its right to direct the defense and its right to intervene when it refused to defend its insured, Lewis, and failed to indemnify him. UAIC's claim to have a direct and immediate interest to warrant intervention is

contrary to California law. *See Hinton v. Beck* (2009) 176 Cal. App. 4th 1378, 1381. ["Grange, having denied coverage and having refused to defend the action on behalf of its insured, did not have a direct and immediate interest to warrant intervention in the litigation."] In addition, UAIC's proposed defense is unsupported by Nevada authority and is frivolous. UAIC misstates Nevada's statute of limitations and tolling statutes, and misstates Nevada cases regarding actions on a judgment to obtain a new judgment and its relationship to the optional and additional process to renew a judgment by affidavit. UAIC's motion is not supported by authority, is not timely, is not brought in good faith and is contrary to law.

2. ARGUMENT

A. UAIC's Denial of Coverage and Refusal to Defend Precludes its Right to Intervene.

The only facts and procedural history relevant to UAIC's motion to intervene in this action are that UAIC refused to defend their insured Lewis following Cheyenne's injury. Nalder sued Lewis. UAIC was notified of the litigation. UAIC refused to defend or indemnify Lewis. The original Judgment was entered on August 26, 2008. It is a final judgment.

Lewis and Nalder sued UAIC to collect on the judgment among other claims. That case was removed to federal court by UAIC. The federal district court erroneously granted summary judgment in favor of UAIC on December 20, 2010. (Decl. of Arthur I. Willner, par. 2, Exhibit 1.) The Ninth Circuit reversed the district court's erroneous ruling, and ordered further proceedings consistent with that order. The district court issued an order holding UAIC liable for insurance coverage of the incident and ordering payment of the policy limits but erroneously failed to award consequential damages in the amount of the judgment on October 30, 2013. (Decl. of Arthur I. Willner, par. 3, Exhibit 2.) This failure to award the amount of the judgment as damages to Lewis and Nalder was again appealed to the Ninth Circuit.

Following the District court's finding of coverage, UAIC did not take any action to intervene in the Nevada action at that time. UAIC did not take any action in 2014 to defend their insured regarding the expiration of the judgment which they claim -- wrongly -- could be done as

early as August 26, 2014. UAIC did not take any action in 2015 to defend their insured. UAIC did not take any action in 2016 to intervene and defend their insured. UAIC did not take any action in 2017 to intervene and defend their insured. Now UAIC seeks to intervene. This is not timely. UAIC by failing to defend has waived their right to intervene.

In order to bolster UAIC's groundless motion, they misstate Lewis' willingness to have counsel defend him. They state that "Lewis through his attorney in the subsequent action against UAIC, has refused to allow UAIC-appointed defense counsel to defend him in those lawsuits in the States of Nevada and California." UAIC purposely misleads the Court. Mr. Christensen's letter states that "Mr. Lewis does not wish you to file any motions until and unless he is convinced that they will benefit Mr. Lewis -- not harm him and benefit UAIC." This is a reasonable request, and is not a refusal to permit counsel to defend him.

Lewis requests that the defense attorneys appointed by UAIC explain the basis for any actions taken so that the client can understand and agree. The UAIC attorneys did not even attempt to justify the frivolous defense forced upon them by UAIC. The letter to Mr. Willner, UAIC's appointed California counsel, was even clearer "In order to advise Mr. Lewis regarding your proposed representation please provide me with the basis of your defense? Please include all facts, statutory provisions and case law regardless of whether those facts, statutes or cases are favorable together with your proposed course of action and your evaluations of the likelihood of success." This is not a refusal of a defense but merely an appropriate inquiry to enable an informed decision by the client. Mr. Lewis did not want a frivolous defense filed on his behalf. He cannot stop UAIC from making frivolous filings but he can and should refuse to participate in such sanctionable conduct.

UAIC fails to cite *Hinton*, *supra*. which is dispositive of the issue in this case. In *Hinton*, the court affirmed the trial court's striking of the insurer's complaint in intervention and concluded, "*Hamilton* speaks directly to the case before us because Grange rejected the opportunity and waived the chance to contest the liability of its insured when it denied Beck a defense. Hinton settled with Beck by agreeing to forego execution of her default judgment against

him in exchange for an assignment of his rights against Grange. Grange may not now inject itself into the litigation because it lost its right to control the litigation when it refused to defend or indemnify Beck." *Id.* at 1385. Likewise UAIC lost its right to control the litigation when it refused to defend or indemnify Lewis.

Hinton went on to distinguish *Reliance,* the only insurance case cited by defendant by stating: "In *Reliance*, the court held that where an insurer may be subject to a direct action under Insurance Code section 11580, intervention is appropriate. (Reliance, *supra*, 84 Cal.App.4th at pp. 386-387.) However, that case did not involve an insurer that had denied coverage and refused to provide a defense. Moreover, the defendant in that case was a corporation whose corporate status had been suspended, thus it could not defend the action against it." In the instant case, UAIC refused to defend and failed to defend for ten years. The insured can and is defending himself through defense counsel recently appointed by UAIC. The fact that it is not exactly the way UAIC would defend is not important UAIC waived the right to direct the defense when they failed to defend Lewis.

As if this lack of legal authority were not enough, UAIC makes false claims in paragraph B 1, 2 and 3. In paragraph 1, UAIC makes the unsupported and false claim that Lewis is not allowing a defense. Lewis is not allowing an unauthorized, uninformed and frivolous defense. UAIC has waived its right to direct the defense of Lewis by refusing to defend him initially. That is the law. In paragraph 2, UAIC makes the unsupported claim that Lewis moved to California in 2010 eight years ago to forum shop. UAIC also makes the unsupported claim that somehow insureds and injured parties cannot join together in suing the insurer who fails to defend and indemnify. UAIC cites no authority against this common practice in bad faith litigation. Finally, in paragraph 3, UAIC makes the claim that the Ninth Circuit court of appeals has jurisdiction to declare the judgment against UAIC not final or void. There is no judgment against UAIC. The Ninth Circuit certainly is not ruling on the validity of that judgment. It is not a trial court and that issue was not brought before the district court so it cannot possibly be ruled on by the Ninth Circuit.

B. UAIC Misstates Nevada Law Regarding the Validity and Collectability of the Judgment.

As to the validity of the judgment, UAIC misstates Nevada law in footnote 5 of its motion. NRS 11.190 is the statute of limitations for many types of actions including an action on a judgment. Its time calculation is tolled by many statutes in the same section. The three Nevada statutes applicable here are NRS 11.200 (the time in NRS 11.190 runs from the last transaction or payment), NRS 11.250 (the time in NRS 11.190 runs from the time the person reaches the age of majority) and NRS 11.300 (the time in NRS 11.190 is tolled for any time the defendant is out of the state of Nevada). Nowhere does NRS 11.190(1)(a) say "unless renewed under NRS 17.214." In fact it says within six years "an action upon a judgment...**OR** the renewal thereof." (emphasis added)

The judgment remains collectible even in the absence of an action upon the judgment or renewal of the judgment for three reasons. UAIC made three undisputed payments toward the judgment on June 23, 2014; June 25, 2014; and March 5, 2015. Pursuant to "**NRS 11.200 Computation of time.** The time in NRS 11.190 shall be deemed to date from the last transaction ... the limitation shall commence from the time the last payment was made." Further, when any payment is made, "the limitation shall commence from the time the last payment was made." Therefore, UAIC's last payment on the judgment extended the expiration of the six-year statute of limitations to March 5, 2021.

Additionally, NRS 11.250 outlines various circumstances that prevent the running of the statute of limitations and states, in relevant part:

> If a person entitled to bring an action other than for the recovery of real property be, at the time the cause of action accrued, either:
>
> 1. Within the age of 18 years;
>
> . . .
>
> the time of such disability ***shall not*** be a part of the time limited for the commencement of the action (emphasis added).

Cheyenne Nalder was a minor when she obtained the judgment. She turned 18 on April 4, 2016. Therefore, the earliest that the six-year statute of limitations runs is April of 2022. This judgment was never recorded and the provisions of NRS 17.214 relating to real property have no application here.

Furthermore, pursuant to NRS 11.300, the absence of Lewis from the State of Nevada tolls the statute of limitations to enforce a judgment and it remains tolled because of his absence. *See Bank of Nevada v. Friedman*, 82 Nev. 417, 421, 420 P.2d 1, 3 (1966) and *Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (1897) "The averments of the complaint and the undisputed facts are that, at the time of the rendition and entry of the judgment in 1882, the appellant was out of the state, and continuously remained absent therefrom until March, 1897, thereby preserving the judgment and all rights of action of the judgment creditor under the same. Notwithstanding nearly fifteen years had elapsed since the entry of the judgment, yet, for the purposes of action, the judgment was not barred — for that purpose the judgment was valid." UAIC admits that North Dakota is a state with similar renewal methods to Nevada. While they are partially correct, the language of the renewal statute in North Dakota contains a ten year period in the body of the statute and does not refer back to the limitations chapter and its tolling provision as does Nevada. Further, the case cited by UAIC, *F/S Manufacturing v. Kensmoe*, 798 N.W.2d 853 (N.D. 2011) supports the validity of the judgment here. As that Court notes:

> Of course, it may be easier to renew a judgment by affidavit; but it by no means follows that the old judgment may not be made the basis of a new suit, and *many cases arise where it is an advantage to be able to bring suit, instead of renewing by affidavit — the case at bar being an example.* It is our conclusion that the two remedies are not inconsistent, and that a judgment creditor may either sue upon his judgment, or renew it by affidavit, *if he complies with the respective laws. Id at 857.*

We express no opinion, however, whether the statute of limitations for an action on a judgment was tolled during the pendency of the bankruptcy automatic stay. See N.D.C.C. §§ 28-01-15(1) (ten-year statute of limitations for an action upon a judgment), 28-01-29 ("When the commencement of an action is stayed by injunction or other order of a court, or by a statutory prohibition, the time of the continuance of the stay is not a part of the time limited for the commencement of the action."). *Id. at 862.*

These tolling statutes present a catch-22 for the use of NRS 17.214 and the "strict compliance" interpretation given by the Nevada Supreme Court. One of the terms of the statute in Nevada is that the renewal needs to be brought within 90 days of the expiration of the statute of limitations. If that 90-day period is strictly construed, any renewal attempt pursuant to NRS 17.214 by Nalder at the present time, or earlier as argued by UAIC, might be premature and therefore maybe ineffective because it would not be filed within the 90 day window prior to expiration of the statute of limitations.

NRS 17.214 was enacted to give an optional, not "mandatory," statutory procedure in addition to the rights already present for an action on the judgment. UAIC claims the plain, permissive language of NRS 17.214: "A judgment creditor...**may** renew a judgment," (emphasis added) mandates use of NRS 17.214 as the only way to obtain a new judgment. This is contrary to the clear wording of the statute and the case law in Nevada. See *Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (1897) ["The law is well settled that a judgment creditor may enforce his judgment by the process of the court in which he obtained it, or he may elect to use the judgment as an original cause of action and bring suit thereon and prosecute such suit to final judgment."

UAIC cites no authority that NRS 17.214 is mandatory. The legislative history demonstrates that NRS 17.214 was adopted to give an easier way for creditors to renew judgments. This was to give an option for renewal of judgments that was easier and more certain,

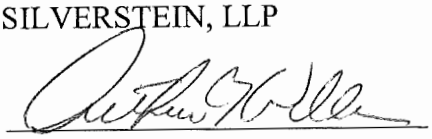
not make it a trap for the unwary and cut of rights of injured parties. Where as here, the timing of the expiration is in doubt, the best way to obtain a new judgment is the common law method, which is only supplemented by the statutory method, not replaced.

3. CONCLUSION

Because UAIC denied coverage and refused to defend and indemnify Lewis, it has waived any opportunity to intervene. For the foregoing reasons, defendant respectfully requests that the Court deny UAIC's motion to intervene.

Dated: October 24, 2018

LEADER BERKON COLAO & SILVERSTEIN, LLP

By: 

Arthur I. Willner
ATTORNEYS FOR

AFFIDAVIT AND DECLARATION OF PROOF OF SERVICE

JAMES NALDER. etc. et al. *v.* ***GARY LEWIS****, et al.*
Pomona Superior Court Case **KS021378**

I am over the age of eighteen years and not a party to the within action. I am employed by Leader & Berkon LLP, whose business address is: 660 S. Figueroa, Suite 1150, Los Angeles, California 90017 ("the firm").

On October 25, 2018, I served the within document(s) described as:

OPPOSITION TO UNITED AUTOMOBILE INSURANCE COMPANY'S MOTION FOR LEAVE TO INTERVENE

on the interested parties in this action:

☒ by placing ☐ the original ☒ true copy(ies) thereof enclosed in sealed envelope(s) addressed as follows:

Brian S. Inamine, Esq. *Samantha L. Barron, Esq.* *O'Hagan Meyer* *6303 Owensmouth Avenue, 10th Floor* *Woodland Hills, CA 91367*	*Attorneys for Intervenor* *United Automobile Insurance Company*
Mark J. Linderman, Esq. *Joshua M. Dietz* *Rogers Joseph O'Donnell* *311 California Street* *San Francisco, CA 94101*	*Attorneys for Plaintiffs* *James Nalder, Cheyenne Nalder*
David F. Sampson, Esq. *Thomas Christensen, Esq.* *1000 S. Valley View Blvd.* *Las Vegas, NV 89107*	*Attorneys for Plaintiffs* *James Nalder, Cheyenne Nalder*

☐ **BY MAIL** (C.C.P. § 1013(a))–I deposited such envelope(s) for processing in the mail room in our offices. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Marina del Rey, California, in the ordinary course of business. I am aware that on motion of a party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

☒ **BY OVERNIGHT DELIVERY.** I enclosed the document in an envelope or package provided by an overnight delivery carrier and addressed to the person at the address

above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☐ **ELECTRONICALLY.** I served the above-referenced document(s) electronically via e-mail on the recipients designated above, per agreement of the parties..

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

Executed October 25, 2018 at Los Angeles, California.

Sandra Alvarenga

TAB 3

OPPS

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DISTRICT COURT
CLARK COUNTY, NEVADA

CHEYENNE NALDER, Plaintiff, vs. GARY LEWIS and DOES I through V, inclusive Defendants,	CASE NO:A-18-772220-C DEPT. NO: XIX
UNITED AUTOMOBILE INSURANCE COMPANY, Intervenor.	
GARY LEWIS, Third Party Plaintiff, vs. UNITED AUTOMOBILE INSURANCE COMPANY, RANDALL TINDALL, ESQ., and RESNICK & LOUIS, P.C. And DOES I through V, Third Party Defendants.	

OPPOSITION TO UAIC'S MOTION TO DISMISS AND COUNTERMOTION FOR SUMMARY JUDGMENT

Defendant, Gary Lewis, by and through his counsel, Thomas Christensen, Esq., hereby presents his brief in Opposition to UAIC's Motion To Dismiss. UAIC brings a motion to dismiss plaintiffs entire complaint because the same claims were brought in 2009 but the majority of the failures and fraud giving rise to the 2018 claims handling case occurred in the last six months

and continue to occur. Third Party Plaintiff, Gary Lewis, brings this Countermotion for Summary Judgment pursuant to NRCP 56.

This opposition and countermotion are made and based upon the papers and pleadings on file herein, the Points and Authorities attached hereto and any oral argument that may be permitted by the Court.

CHRISTENSEN LAW OFFICES

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POINTS AND AUTHORITIES

I. OPPOSITION TO UAIC'S MOTION

A. UAIC's Motion must be treated as a Motion for Summary Judgment and be Denied.

UAIC has attached thirteen exhibits to its motion. UAIC misstates how its numerous exhibits comply with the exception in Baxter by stating "while Intervenor/Third Party Defendant's Motion to Dismiss does rely on certain documents which were not attached to the Complaint, those documents are either incorporated by reference (the Judgment and Amended Judgment) or integral to the claim (the Complaint in the 2007 cases)." (See *UAIC's Motion to Dismiss Lewis' complaint at page 8 lines 24-27.)* This is simply not true. Probably the reason it is not true and must be disregarded is that it is a poor adaptation from the Motion to Dismiss that UAIC already filed against Nalder, where UAIC makes the same statement: "While Intervenor's Motion to Dismiss does rely on certain documents which were not attached to the Complaint, those documents are either incorporated by reference (the Judgment and Amended Judgment) or

integral to the claim (the Complaint in the 2007 case)." *(See UAIC's Motion to Dismiss Nalder's Complaint, at page 7 lines 6-8.)* The three documents are not incorporated into Lewis' complaint, nor is the Complaint in the 2007 case integral to Lewis' claims, to say nothing of the other ten exhibits.

B. All of UAIC's (and their surrogate, Randall Tindall's) filings in this case and in case number 07A549111, filed in 2007, are based on the same defense that NRS 11.190 is not tolled by NRS 11.300. This defense lacks any legal authority and may be frivolous.

UAIC claims the statute of limitations on the judgment in case no. 07A549111 (obtained in 2008) has expired. UAIC made this same false claim, improperly, for the first time in the Ninth Circuit in the middle of an appeal. The truth is that Gary Lewis left the State of Nevada, continuously resided outside the State of Nevada and was not subject to service of process in Nevada from December 2008 until the present. Lewis' absence from the state of Nevada tolls the statute of limitations. The 2008 judgment, that was amended appropriately, is still valid. See *Mandelbaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (1897) (See Exhibit 1). (Plaintiff in *Mandelbaum* obtained a judgment and then brought an action on that judgment 15 years later because the statute of limitations was tolled as a result of the defendant's absence from the State of Nevada). Mr. Lewis understands this black letter law in Nevada and does not wish a frivolous defense put forward on his behalf. UAIC now admits, at page 11 of its brief filed with the Nevada Supreme Court that "The second method is via the bringing of an independent action on the original judgment …" (See Exhibit 2.) This action on a judgment brought by Nalder is timely and the statute of limitations defense is not supported by Nevada law.

C. Claim Preclusion does NOT Apply

The claims are not the same. The majority of the claims in Mr. Lewis' 2018 complaint are a result of UAIC's failure to deal in good faith **after** August 2018, in connection with the two actions in the Nevada State courts. These actions were obviously not part of the litigation filed in

2009, that went to judgment in 2013, and is currently on appeal. The first line of Lewis' 2018 complaint states: "... for acts and omissions committed by them and each of them, as a result of the finding of coverage on October 30, 2013 (the date of the judgment currently on appeal) and more particularly states as follows:" One wonders if UAIC read both complaints before making the allegation at page 10 that "A review of the 2009 Complaint (Exhibit 'C') and the 2018 Third Party Complaint (Exhibit 'M') reveal that the statutory and common law bad faith claims are essentially identical."

The motion of UAIC is not supported factually or in law and obviously not researched, but merely cut and pasted from its similar, improperly filed Motion to Dismiss Cheyenne Nalder's lawsuit. UAIC argues in the motion to dismiss Lewis' complaint: "Cheyenne's claims for personal injury in the instant (2018) suit clearly meet the five star factors for dismissal under the doctrine of claim preclusion." (*See Motion, page 9 line 23*.) Also, on that same page, UAIC states a three-part test, then only lists parts (2) and (3). Any motion based on this type of incomplete, jumbled nonsense must be denied.

The parties are not the same. The parties in the federal suit were James Nalder and Gary Lewis v. UAIC. The parties in the present complaint are Gary Lewis v. UAIC, Randall Tindall and RESNICK & LOUIS, P.C. Many of the allegations involve improper claims handling and lack of good faith in the handling of the litigation like failure to provide Cumis counsel and the conspiracy with Randall Tindall, who was not even involved until 2018.

The judgment in federal court is on appeal and is not final. UAIC has cited no case law holding that a judgment on appeal is final for purposes of claim preclusion. It is not Lewis' burden to do the research, it is UAIC's responsibility to properly research motions before bringing them. To fail to cite any law supporting this allegation requires the court to deny the motion and UAIC cannot remedy this failure in its reply because Lewis will not be able to

respond. Certainly, Lewis expects that the finding by the Federal District Court that UAIC's failure to defend, failure to use it's policy limits to protect the insured, failure to communicate settlement offers to the insured and failure to file a declaratory relief action are breaches of the covenant of good faith and fair dealing; or, are at least issues of fact that should have been sent to a jury, not decided by the Federal District Court on summary judgment. When the Ninth Circuit reverses the trial court the judgement will be vacated and the case will again go back for trial.

The causes of action are not the same. As stated earlier, the preamble to the entire 2018 complaint states it is regarding actions and inactions as a result of the judgment entered against UAIC in 2013. The specific allegations of the 2018 complaint, Exhibit M to UAIC's motion, contain over a hundred paragraphs describing actions in detail, most of which occurred in the last three months. The 2009 complaint has around twenty such allegations, all referencing action and inaction occurring before 2009. Of course, there are going to be general allegations that overlap because that is the nature of a cause of action. All causes of action against insurance companies are going to allege that there are statutes that control the insurance companies conduct and that the insurance company breached those statutes. The specific actions and nature of the breach changes. The list of the ways UAIC breached the different duties has five examples in the 2009 complaint and nine in the 2018 complaint. As stated above, although the wording might be the same ie. UAIC failed to investigate. The investigation complained of is after 2013 in the 2018 complaint and before 2009 in the 2009 complaint--- these are distinct and different causes of action and claim preclusion does not apply. The 2018 complaint has additional claims resulting from the conspiracy between UAIC and Tindall. Obviously these claims did not exist in 2009 and are new and different claims.

II BACKGROUND LAW ON INSURANCE CLAIMS HANDLING LITIGATION AND VERDICTS ABOVE POLICY LIMITS

A. General Principles of Insurance : Insurance is a social device for reducing risk. By combining a sufficient number of similar or homogeneous exposure units - like homes, lives, or cars - losses are predictable, not individually, but collectively. People value their lives, health, and property, so they are able to buy insurance to soften the financial impact of losses and accidents. Insurance is intended to provide peace of mind and good service and to fulfill financial requirements of the varied beneficiaries.

B. Role of Insurance Companies: Insurance companies receive Certificates of Authority to sell policies in states where they are licensed. Insurance is imbued with the concept of public trust, presuming that insurers will conduct their activities legally and with a high degree of good faith and fair dealing. Insurers are often said to have "special" or "fiduciary-like" duties to insureds, and they must accomplish the purposes of the insurance policy, rather than attempting to prevent insureds from obtaining the benefits purchased.

By statute, regulation, commercial practice, and common law requirements, insurers must adopt and implement systems, instructions, and guidelines for the prompt investigation and settlement of claims. In the broad sense, insurance indemnifies, or makes whole, an insured to soften the financial consequences of an insured event. Sometimes this involves both first-party and third-party coverages. When payment for a covered claim is delayed or withheld, the insured suffers the very financial consequences insurance is bought to avoid. This is especially true in the case of loss of funds, where the insured is relying on the insurer's best efforts to make insurance payments properly. An adjuster's job, accordingly, is to facilitate use of the insurance contract by addressing and resolving claims following notice of the event. Insurers should ensure their practices don't undercut the public's confidence in the insurance mechanism.

C. Claims-Handling Standards: Claims-handling standards are fundamental to delivery of the insurance contract promises. Insurance adjusters commonly know and understand these principles. Knowing and following the underlying precepts of claims work is crucial to fair claim practices. For example, an insurer:

1. Must treat its insured's interests with equal regard as it does its own interests, without turning the claims handling into an adversarial or competitive process.
2. Must assist the insured with the claim to achieve the purpose of the coverage.
3. Must disclose all benefits, coverages, and time limits that may apply to the claim.
4. Must review and analyze the insured's submissions.
5. Must conduct a full, fair, and prompt investigation of the claim at its own expense, keeping the insured on equal footing with disclosure of the facts.
6. Must fairly and promptly evaluate and resolve the claim, making payments or defending in accordance with applicable law and policy language.
7. Must not deny a claim or any part of a claim based upon insufficient information, speculation, or biased information.
8. Must give a written explanation of any full or partial claim denial, pointing to the facts and policy provisions supporting the denial.
9. Must not engage in stonewalling or economic coercion leading to unwanted litigation that shows the unreasonableness of the company's assessments of coverage.
10. Must not misrepresent facts or policy provisions or make self-serving coverage interpretations that subvert the intent of the coverage.
11. Must continue to defend the insured until final resolution.
12. Must relieve the insured of a verdict above the policy limits at the earliest opportunity.

As a minimum standard, Nevada claim handlers should also adhere to state requirements and the unfair claim practices standards outlined in NRS 686A.310.

D. CLAIMS HANDLING LITIGATION

In general, there are a few different areas of litigation that involve failure by an insurance company to fulfill the promises of this important product. All of these actions, regardless of the parties involved, however, are founded in the general principle of contract law that in every contract, especially policies of insurance, there is an implied covenant of good faith and fair dealing that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. *Comunale v. Traders & General Insurance Company*, 50 Cal.2d 654, 328 P.2d 198, 68 A.L.R.2d 883. If the alleged failure to act in good faith is claimed by a first-party insured or a third-party beneficiary, the standards may vary between the states. Most courts have held, however, that an insurance company always fails to act in good faith whenever it breaches its duty to settle by failing adequately to consider the interest of the insured. Windt, Allan D., 1 Insurance Claims & Disputes 5th, Section 5:13 (Updated March, 2009).

Within the area of first-party failure to deal in good faith, there are essentially three standards which other courts have imposed on liability insurers in determining whether the insurer has met its duty to the insured. Those standards involve strict liability, negligence and failure to act in good faith. Shamblin v. Nationwide Mutual Insurance Company, 396 S.E.2d 766(W.Va. 1990), *citing*, *Schwartz, Statutory Strict Liability for an Insurer's Failure to settle: A Balanced Plan for an Unresolved Problem*, 1975 Duke L.J. 901; *Annotation, Liability Insurer's Negligence for Bad Faith in Conducting Defense as Ground of Liability to Insured*, 34 A.L.R.3d 533 (1970 & Supp. 1989).

The courts which have applied the strict liability standard have held that an insurer who fails to settle within policy limits does so at its own risk, and although its position may not have been entirely groundless, if the denial is ***later found to be wrongful***, it is liable for the full amount which will compensate the insured for all the detriment caused by the insurer's breach of the express and implied obligations of the contract. Id., citing, *Crisci v. Security Ins. Co*., 66 Cal2d 425, 58 Cal.Rptr. 13, 426 P.2d 173 (1967); *Rova Farms Resort, Inc. v. Investors Insurance Co.*, 65 N.J. 474, 323 A.2d 495 (1974). Many commentators have suggested that the relationship of the insurer and the insured when the insurer passes up an opportunity to settle within policy limits and a verdict above the policy limit results should give rise to strict liability on the insurer for the entire verdict. 22 AZSLJ 349.

The *Crisci* Court recognized that the insured's expectation of protection provides a basis for imposing strict liability in failure to settle cases because it will always be in the insured's best interest to settle within the policy limits when there is any danger, however slight, of a judgment above those limits. Crisci v. Security Insurance Company of New Haven, Conn. 426 P.2d 173, 66 Cal.2d 425, 58 Cal. Rptr. 13, (1967). And that there is more than a small amount of elementary justice in a rule that would require that, in this situation, where the insurer's and insured's interests necessarily conflict, the insurer, which may reap the benefits of its determination not to settle, should also suffer the detriments of its decision. *Id*.

This standard makes sense, as Chief Justice Neely concurred with the *Shamblin* Court:

> Can you honestly imagine a situation where an insurance company fails to settle within the policy limits, the policyholder gets stuck with an excess judgment, and this court *does not* require the insurance company to indemnify the policy holder? That will happen the same day the sun rises in the West! As far as I am concerned, even if the insurance company is run by angels, archangels, cherubim and seraphim, and the entire heavenly host sing of due diligence and reasonable care, I will *never*, under any circumstances, vote that a policyholder instead of an insurer pays the excess judgment when it was possible to settle a case within the coverage limits.

> When I buy insurance, I buy protection from untoward events. I do not object to an insurance company's vigorous defense of a claim, including going to jury trial and exhausting every appeal. Furthermore, as a policyholder, I will diligently assist my insurer to vindicate its rights and protect its reserves. However, I draw the line when the insurer decides that in the process of protecting its reserves, it will play "you bet *my* house." The insurance company can bet as much of its own money as it wants, and it can bet its own money at any odds that it wants, but it cannot bet one single penny of my money even when the odds are ten million to one in its favor!

Id. at 780.

The California Court has implemented a reasonableness or negligence aspect to its standard when it expanded on this rule, giving the following analysis:

> The only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer. Such factors as the limits imposed by the policy, a desire to reduce the amount of future settlements, or a belief that the policy does not provide coverage, should **not** affect a decision as to whether the settlement offer is a reasonable one.(Emphasis added.)

Johansen v. California State Automobile Association Inter-Insurance Bureau, 15 Cal.3d 9, 123 Cal.Rptr. 288, 538 P.2d 744, (1975). Moreover, in deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. *Id.*, *citing Crisci*.

Other states make no distinction on what standard to apply when dealing with a first-party claim as opposed to a third-party claim. Arizona has found no legal distinction between the duty or standard of good faith owed by an insurance company when dealing with the different types of claims. Instances of first and third-party failures merely involve different breaches of the same overall duty of good faith. Trus Joist Corp. v. Safeco Ins. Co. of America, 735 P.2d 125 (1986). They have also made clear that the tort of failure to act in good faith does not rise to the level of a traditional tort in the sense that the insurer must know with substantial certainty that its actions

will bring particular harm to the insured. *Id., citing* Restatement (Second) of Torts Section 8A, comment B (1956).

Most states apply this sort of standard when evaluating first-party rights against insurance companies. Utah has implemented a reasonableness standard wherein it determined that actions against insurance carriers for failure to resolve a claim in a commercially reasonable manner center on the question of whether the insurance carrier acted reasonably. Campbell v. State Farm, 840 P.2d 130 (Utah App. 1992). In Campbell, State Farm paid the entire verdict against the insured above the policy limits. State Farm was still liable for millions of dollars for the delay in paying the verdict above the policy. Under Oregon law, a liability insurer must exercise good faith and due care in the settlement and defense of claims on behalf of its insured. Baton v. Transamerica Insurance Company, 584 F.2d 907 (1978), *citing, Radcliffe v. Franklin National Insurance Co.,* 208 Or. 1, 298 P.2d 1002 (1956).

In Nevada, the question of which standard to apply when a verdict is more than the policy was answered in *Allstate Insurance Co. v. Miller*, 125 Nev. 300, 212 P.3d 318 (2009). The court held that an insurance company breaches the covenant of good faith and fair dealing if it fails to inform the insured of opportunities to settle and that the duty to defend includes the duty to inform the insured of settlement opportunities and to treat the insured's interest equal to the insurer's interest. Nevada has long recognized that there is a special relationship between the insurer and the insured. *Powers v. USAA,* 114 Nev. 690, 962 P.2d 596 (1998), *citing, Ainsworth v. Combined Ins. Co.* 104 Nev. 587, 763 P.2d 673 (1988).

Nevada has also established similar standards that apply in other types of failure to act in good faith situations. In *Pemberton v. Farmers Insurance Exchange*, 109 Nev. 789, 858 P.2d 380 (1993), the Nevada Supreme Court established standards to apply when an action is brought related to the lack or good faith in the denial of first-party benefits under uninsured or

underinsured coverage. There, the court noted that numerous appellate court decisions affirm that an insurer's failure to deal fairly and in good faith with an insured's UM claim is actionable. *Id.* at 794 (citations omitted) The *Pemberton* Court ultimately held that an insured may institute an action for breach of the duty of good faith and fair dealing against his or her own insurer once the insured has established "legal entitlement" and conduct not based on reason and logic by the insurer concerning its obligations to the insureds. *Id.* at 797.

Perhaps most instructional in Nevada, however, on the standard to be applied when dealing with negative effects resulting from an insurer's failure to settle a claim is *Landow v. Medical Ins. Exchange*, 892 F.Supp. 239 (D.Nev. 1995). The Court's ruling is enlightening because although it does not involve a verdict above the policy limit, it does involve a first-party insured bringing a claim for stress and damage to his reputation related to ongoing litigation that could have exposed him to a verdict but was concluded prior to a verdict. The underlying plaintiffs in *Landow* sought damages above Landow's policy limit after previously offering to settle for that limit. Landow requested that his insurance company pay the limit and accept the plaintiff's offer to end the case, but the insurance company refused and forced litigation. The *Landow* Court, following the rationale of California courts in above limit verdict situations accepted that, "the litmus test ... is whether the insurer, in determining whether to settle a claim, gave as much consideration to the welfare of its insured as it gave to its own interests," citing, *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d. 809, 818, 169 Cal.Rptr. 691, 620 P.2d 141 (1979). Ultimately, the Landow Court decided that the insurer has a duty to consider injury to the insured, such as emotional distress and injury to business goodwill that proximately flow from its failure to settle. *Id*. at 241.

III. LEWIS' COUNTERMOTION FOR SUMMARY JUDGMENT

Pursuant to N.R.C.P. 56, Gary Lewis moves this Honorable Court for summary judgment as to liability and the minimum damages, for a finding that UAIC has breached its duty of good faith

and fair dealing and is liable for the damages which were proximately caused by UAIC's breach, on the basis that the pleadings and documents on file show there is no genuine issue as to any material of fact and that Gary Lewis is entitled to judgment as a matter of law on this issue.

A. Standard for Granting Summary Judgment

Summary judgment is appropriate when a review of the record in the light most favorable to the nonmoving party reveals no genuine issues of material fact and judgment is warranted as a matter of law. *Butler v. Bogdanovich,* 101 Nev. 449, 451 (1985). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, admissions and affidavits on file, show there exists no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Bird v. Casa Royale*, 97 Nev. 67, 624 P.2d 17 (1981); *Montgomery v. Ponderosa Construction, Inc.*, 101 Nev. 416, 705 P.2d 652 (1985). Additionally, "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Wood v. Safeway*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005). As such, "The nonmoving party must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Id,* citing *Bulbman Inc. v. Nevada Bell*, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992). Finally, N.R.C.P. Rule 56(c) states Summary Judgment "may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

The evidence, even viewed in the light most favorable to UAIC, indicates GARY LEWIS is entitled to judgment as a matter of law on the issue of liability.

B. UAIC IS LIABLE FOR ANY JUDGMENT ENTERED AGAINST LEWIS IN THIS ACTION.

No reasonable interpretation of the facts could be construed by a finder of fact as placing liability anywhere but on UAIC for any judgment against Lewis in this case. In order to gain

intervention UAIC admitted: "As long as UAIC is obligated to … pay any judgment against LEWIS, UAIC's interests are clearly at stake in this action." Based on this admission alone, Lewis is entitled to judgment against UAIC. It must pay any judgment Nalder obtains against Lewis.

C. UAIC BREACHED THE COVENANT OF GOOD FAITH AND FAIR DEALING.

After the Ninth Circuit Court ruled against it finding UAIC had breached its duty to defend, UAIC paid its policy limit to relieve UAIC of the judgment entered against it, but UAIC did not attempt to relieve Gary Lewis of the judgment in case no. 07A549111. UAIC, which only recently hired Randall Tindall to "defend" Gary Lewis, did nothing to defend Gary Lewis in 2007, 2008, 2009, 2010, 2011, 2012 and 2013. UAIC also did not defend Gary Lewis or immediately attempt to set aside the judgment against him when the federal court found that UAIC had breached its duty to defend Gary Lewis in 2013. Then, UAIC did nothing to defend Lewis in 2013, 2014, 2015, 2016 and 2017. In 2018, UAIC claims to be defending Lewis. It is not. UAIC is putting its own interests above those of Mr. Lewis and causing harm in this litigation. As a result of both that initial failure and the continuing failures, Mr. Lewis will have a large judgment against him. UAIC waived its right to direct the defense and its right to intervene when it refused to defend Lewis and failed to indemnify him. The court in *Hinton v. Beck*, 176 Cal. App. 4th 1378 (Cal. Ct. App. 2009) has held: "Grange [the insurance company], having denied coverage and having refused to defend the action on behalf of its insured, did not have a direct and immediate interest to warrant intervention in the litigation."

Randall Tindall, Esq. now claims to be representing Gary Lewis based on a right that arises from that same policy of insurance. The same policy that UAIC breached in 2007. UAIC has already exhausted its policy limits because it paid the full policy amount (after the adverse finding from the Court). Although UAIC admits in this action that it will be liable for any

judgment entered against Mr. Lewis, it has not paid anything over the $15,000 policy limit it was ordered to pay by the Federal District Court. It has not pursued negotiations to relieve Lewis of the judgment. It has not investigated ways to relieve Lewis of the judgment. These actions are a breach of the duty of good faith and fair dealing. See *Allstate Insurance Co. v. Miller*, 125 Nev. 300, 212 P.3d 318 (2009)

Mr. Tindall admits he has **NEVER** talked to Mr. Lewis, nor anyone on his behalf prior to filing pleadings on behalf of Mr. Lewis. He attaches to his Opposition, a copy of a page from the breached insurance policy, but he fails to explain to the Court that UAIC has already breached it. UAIC and Tindall fail to inform the Court that Mr. Lewis requested that if UAIC hired anyone to defend Lewis in this action that UAIC "must include notice to those attorneys that they must first get Mr. Lewis' consent before taking any action … on his behalf." By disregarding this reasonable request UAIC has breached the duty of good faith and fair dealing. See *Powers v. USAA,* 114 Nev. 690, 962 P.2d 596 (1998) (USAA disregarded reasonable request by the insured and harrassed the insured) UAIC and Randall Tindall have no right to interpose a defense at all in the instant case, much less a frivolous defense that is not in the best interest of Mr. Lewis and is against his wishes. This is UAIC conspiring with Tindall to advance UAIC's interests, at the expense of Lewis. Putting its interests ahead of the insured's interests is a breach of the covenant of good faith and fair dealing. See *Allstate Insurance Co. v. Miller*, 125 Nev. 300, 212 P.3d 318 (2009)

UAIC has not yet paid any amount of the judgment, with the exception of the $15,000 it was ordered to pay after Mr. Lewis brought an action against it. UAIC's intervention in this case is improper and Mr. Tindall's involvement, under the guise of a long-since breached insurance contract, is also improper. On the other hand, if Mr. Tindall and UAIC are allowed to reopen the ministerial amendment that has been entered in case no. 07A549111, these cases would go

forward and will probably result in an **increased judgment against Mr. Lewis** because of the conspiracy and actions taken by Mr. Tindall and UAIC.

UAIC argued that the issue is before the Nevada Supreme Court. This is also a falsehood. The issue before the Nevada Supreme Court is UAIC's responsibility for the judgment, not Gary Lewis'. UAIC and its co-conspirator in this action, Mr. Tindall, have made false claims to gain intervention and then filed fraudulent and frivolous pleadings that increase the cost of litigation. In fact, these are only a ruse designed to have the Court distracted from the very simple issue in the case at bar: whether the 2008 judgment is valid.

It is clear under *Mandelbaum* that the judgment is valid. (See Exhibit 1.) No contrary case law exists. The "defense" by UAIC and/or its co-conspirator, Mr. Tindall, is frivolous and the risk is all Mr. Lewis'. He will end up with an even larger judgment and has already incurred attorney fees that, so far, UAIC refuses to pay. Failure to pay for Cumis counsel is a breach of the duty of good faith and fair dealing. See *State Farm Mut. Auto. Ins. Co. v. Hansen*, 357 P.3d 338 (Nev. 2015) "Nevada law requires an insurer to provide independent counsel for its insured when a conflict of interest arises between the insurer and the insured." Lewis brought this action against UAIC so that whatever the outcome of Nalder's 2018 action against Lewis, responsibility will be shifted from Mr. Lewis to UAIC. Mr. Lewis complaint against UAIC seeks indemnity from UAIC for any judgment entered in the Nalder action. In order to gain intervention in this action, UAIC admitted: "As long as UAIC is obligated to … pay any judgment against LEWIS, UAIC's interests are clearly at stake in this action." Lewis is entitled to judgment against UAIC that they must pay any judgment Nalder obtains against Lewis.

Additionally, UAIC states "Mr. Tom Christensen, Counsel for Plaintiff, who claimed to represent Mr. Lewis (through assignment) and refused retained counsel from speaking with Mr. Lewis." Again, this is not factual. Mr. Lewis has requested that contact and communication be

made through his attorney, Thomas Christensen, who is representing him against UAIC. This is because Mr. Lewis understands that Mr. Tindall has a conflict because he represents both Mr. Lewis and UAIC and their interests are not aligned. Mr. Lewis has now sued Mr. Tindall once and UAIC twice. Mr. Lewis has not waived that conflict. The disregarding of the requests by the insured for communication through his attorney is yet another new breach of the covenant of good faith and fair dealing. See *Powers v. USAA,* 114 Nev. 690, 962 P.2d 596 (1998) (USAA disregarded reasonable request by the insured and harrassed the insured)

Mr. Lewis does not want frivolous pleadings filed on his behalf. (See Exhibit 3, Affidavit of Gary Lewis). Mr. Christensen made this clear in the letter of August 13, 2018, which was attached to the motion but misquoted by UAIC. The letter actually welcomes UAIC to provide a basis for the proposed defense. It states, "These statutes make it clear that both an action on the judgment or an optional renewal is still available through today because Mr. Lewis has been in California since late 2008. If you have case law from Nevada contrary to the clear language of these statutes please share it with me so that I may review it and discuss it with my client." UAIC has not provided any Nevada law in response to this request. Nor is there any such case law in their exhaustive and voluminous briefs. That is because the only on point case law in Nevada, for over 100 years running, is *Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (1897). It clearly supports the validity of a judgment when tolling statutes apply:

> The averments of the complaint and the undisputed facts are that, at the time of the rendition and entry of the judgment in 1882, the appellant was out of the state, and continuously remained absent therefrom until March, 1897, thereby preserving the judgment and all rights of action of the judgment creditor under the same. **Notwithstanding nearly fifteen years had elapsed since the entry of the judgment**, yet, for the purposes of action, the judgment was not barred — for that purpose **the judgment was valid.** *Id., Mandlebaum at 851(emphasis added).*

Further the Nevada Supreme Court has held that the tolling statute applies if the defendant is not subject to service of process in the State of Nevada. See *Bank of Nevada v. Friedman*, 82 Nev. 417, 420 P.2d 1 (Nev. 1966). Also the Nevada Supreme Court in *Los Angeles Airways v. Est. of Hughes*, 99 Nev. 166, 168 (Nev. 1983)

> We recognize that in recent years, the continued viability of the tolling statute has been called into question in light of the enactment of statutes making it possible to obtain jurisdiction over defendants residing outside this state. Indeed, in granting summary judgment the district court expressed the view that the enactment of NRS 14.065, the so-called "long-arm" statute, rendered the tolling statute virtually inapplicable. Nevertheless, we note that in the number of years since the enactment of NRS 14.065 and similar provisions, the legislature has not repealed the tolling provision, and we are reluctant to do so by judicial declaration. *See* Duke University v. Chestnut, 221 S.E.2d 895 (N.C.Ct.App. 1976). *Los Angeles Airways v. Est. of Hughes*, 99 Nev. 166, 168 (Nev. 1983)

Rather than comply with these reasonable requests, UAIC conspired with Tindall to file a fraudulent pleading, putting its interest above the policyholder, Mr. Lewis. In these pleadings UAIC argues that renewal is the only method. Now, UAIC admits in its pleading filed with the Nevada Supreme Court that a "second method is via bringing of an independent action on the original judgment…" (See Exhibit 2, UAIC's appellate brief, at page 11.) Filing frivolous pleadings alleging just the opposite and against the wishes of the insured is improper. This is a new breach of the covenant of good faith and fair dealing.

UAIC refuses to provide Cumis counsel for Mr. Lewis and makes false allegations against Mr. Lewis' counsel. E. Breen Arntz was retained by Lewis when Mr. Rogers was hired by UAIC. Mr. Lewis asked that UAIC pay Mr. Arntz pursuant to CUMIS. Mr. Tindall was retained after Mr. Rogers and Mr. Arntz. Prior to UAIC hiring Tindall, Mr. Lewis asked UAIC that if other counsel was retained, that they contact him through his attorney in his claim against UAIC, Mr. Christensen. David Stephens is the only counsel who has represented Cheyenne Nalder in this case. He was retained after Cheyenne Nalder reached majority. Mr. Christensen represents

neither Gary Lewis as a defendant nor Cheyenne Nalder as the plaintiff in the instant case. Failure to retain or listen to Cumis counsel is a new breach of the duty of good faith and fair dealing. See *Powers v. USAA,* 114 Nev. 690, 962 P.2d 596 (1998).

D. ANY JUDGMENT ENTERED AGAINST LEWIS IS THE MINIMUM DAMAGES.

Damages for an insurer's breach of the covenant of good faith and fair dealing are dictated by case law. In such cases, by refusing to defend, or effect a settlement, the amount of the judgment is the prescribed measure of harm in the subsequent case against the insurer. *See Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 735, 49 P.3d 887, 890 (2002) (holding that courts have "long recognized if an insurer acts in bad faith… an insured can recover from the insurer the amount of a judgment rendered against the insured"); *Bird v. Best Plumbing Group, LLC,* 175 Wn.2d 756, 770, 287 P.3d 551 (2012) (holding that the amount of the judgment "is added to any other damages found by the jury"); *Miller v. Kenny,* 180 Wn. App. 772, 782, 801, 325 P.3d 278 (2014) (holding that the amount of the "judgment sets a floor, not a ceiling, on the damages a jury may award." Thus where a plaintiff prevails on his claim for breach of the covenant of good faith and fair dealing the "value of the judgment" is the least amount that should be awarded, and the only remaining question related to damages on Plaintiff's claims is for the "jury to make a factual determination of [the] insured's bad faith damages *other than* and *in addition to*" the underlying judgment. *Miller,* 180 Wn. App. at 801 (emphasis in original) This is the law in Nevada. *Allstate Insurance Co. v. Miller*, 125 Nev. 300, 212 P.3d 318 (2009) (underlying judgment against insured $703,619.88,verdict against insurer $1,079,784.88)

CONCLUSION

UAIC's motion to dismiss should be denied. Partial summary judgment should issue in favor of Lewis and against UAIC for breach of the covenant of good faith and fair dealing, and fraud, with a finding that the minimum damages are the amount of any judgment entered in this

case against Lewis together with attorney fees and costs. The only issues left for trial would be additional compensatory damages and punitive damages.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of CHRISTENSEN LAW OFFICES, LLC and that on this 27th day of Nov., 2018, I served a copy of the foregoing **OPPOSITION TO MOTION TO DISMISS AND COUNTERMOTION FOR SUMMARY 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

XX E-Served through the Court's e-service system.

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EXHIBIT 1

No. 1514.
Supreme Court of Nevada

Mandlebaum v. Gregovich

50 P. 849 (Nev. 1897)

Decided October 1st, 1897

The facts sufficiently appear in the opinion.

By the Court, MASSEY, J.:

The respondents instituted this suit against the appellant upon a judgment obtained in the Second Judicial District of the State of Nevada, on the fifth day of June, 1882, for the sum of $70462, with costs and interest. From a judgment in favor of the respondents, and an order denying appellant's motion for a new trial, this appeal has been taken.

It appears that the respondent, Mandlebaum, commenced an action against the appellant in said court on the 21st day of August, 1881; that on the 5th day of June, 1882, judgment was entered against the appellant upon an agreed statement of facts; that at the time said judgment was entered the appellant was absent from the State of Nevada, and so continued until about the 16th day of March, 1897; that after the rendition of said judgment, and some time in 1882, Mandlebaum duly sold and assigned to Coffin, one of the respondents in this action, one-half interest in said judgment; that this action was commenced within a few days after the return of the appellant to the state, and that no part of said judgment has been paid.

Upon these undisputed facts the appellant asks this court to reverse the judgment of the district court, and assigns as *158 reasons therefor: *First,* a misjoinder of parties plaintiff, and, *second,* that it is not shown by the complaint or record that a necessity exists for the bringing of the action.

Considering the questions in the order stated, we must hold that Coffin, the respondent, was a proper party plaintiff to the action. Our civil practice act provides that every action shall be prosecuted in the name of the real party in interest, and that all persons having an interest in the subject matter of the action, and in obtaining the relief demanded may be joined as plaintiffs, except when otherwise provided. (Gen. Stats, secs. 3026, 3034.)

The exceptions to the statutory rule above cited arise in actions by executors, administrators, trustees, married women, etc., and in such exceptions are specified in the other sections of the same act. The averment of the complaint and the undisputed fact are that the respondent, Coffin, held and owned by assignment a one-half interest in the judgment, the subject matter of the action. In the language of the statute he "had an interest in the subject of the action and in obtaining the relief demanded," and was therefore properly joined as a party plaintiff. (*McBeth* v. *VanSickle,* 6 Nev. 134; *Ricord* v. *C. P. R. R. Co.,* 15 Nev. 167.)

The determination of the second contention of appellant necessarily involves the consideration of our statutory provisions relating to the limitation of actions and to the right of a judgment creditor to the enforcement or execution of the judgment. The appellant argues that "If the respondents have the right to bring this action, they must first show as a condition precedent for bringing the same, a necessity for so doing. They must show that they cannot by the issuance of an execution recover the amount of the judgment.

They must show that they have exhausted their remedy, for, if the appellant had or has property within the State of Nevada out of which the judgment could be realized, it was the duty of respondents to have subjected that property to the payment of the debt."

Under the provisions of section 3644 of the General Statutes, the right of action upon a judgment of any court of the United States, or of any state or territory within the United States, is barred unless commenced within six years *159 after the right of action accrued. Section 3651 of the same act creates an exception to the above rule by providing that when a cause of action shall accrue against one out of the state, such action may be commenced within the time limited by the act after his return to the state.

The averments of the complaint and the undisputed facts are that, at the time of the rendition and entry of the judgment in 1882, the appellant was out of the state, and continuously remained absent therefrom until March, 1897, thereby preserving the judgment and all rights of action of the judgment creditor under the same. Notwithstanding nearly fifteen years had elapsed since the entry of the judgment, yet, for the purposes of action, the judgment was not barred — for that purpose the judgment was valid. Such being the fact, is it necessary, as appellant contends, that the complaint and record must show that a good cause exists therefor — that the right of action upon judgments exists in those cases only where a necessity is shown therefor?

Counsel have cited in support of this contention the case of *Solen* v. *V. T. R. R. Co.,* reported in 15 Nev. 312, but we do not consider that case as decisive of this point. That was an action upon a judgment which did not call for any interest. The judgment creditor had paid to the clerk of the district court the amount of the judgment and costs, without interest, in discharge thereof, and claimed there was no balance due thereon. The court was divided in its opinion in determining the case. The opinion was by Justice Hawley and held that under the rule announced in *Hastings* v. *Johnson,* 1 Nev. 617, that when the judgment of the court was silent as regards the collection of interest, the party is not entitled to interest. Under this rule the judgment of the lower court was affirmed. Justice Leonard, in a concurring opinion, stated that while he regarded the rule in *Hastings* v. *Johnson* as wrong, it must be regarded as settled law, and therefore gave his assent to the affirmance of the judgment. He then proceeds to discuss at great length the rule for which counsel contend in the case at bar, that the right of action upon judgments exists in those cases only where a necessity is shown therefor, and he concludes that all actions "upon judgments, except for good cause, are vexatious, oppressive *160 and useless." Chief Justice Beatty, in the dissenting opinion, argues that the rule announced in *Hastings* v. *Johnson, supra,* and reannounced by Justice Hawley in the opinion affirming the judgment of *Solen* v. *V. T. R. R. Co, supra,* to the effect that where a judgment is silent as regards interest, the judgment creditor is not entitled to any interest, was wrong, and dissents from the conclusions of Justice Leonard to the effect that the right of action upon judgments exists in those cases only where a necessity is shown therefor. Hence, the only question decided by the court in the case of *Solen* v. *V. T. R. R. Co.* was the one relating to the right to interest upon judgments which were silent as to that matter. The question argued by counsel in the case at bar remains open and unsettled so far as the decisions of this court are concerned. Under the provisions of our statute in force at the time of the entry of the judgment against appellant in 1882, it was the right of the respondent Mandlebaum at any time within five years after the entry thereof to have a writ of execution for the enforcement of the same. (Gen. Stats, sec. 3233.)

This section was subsequently amended by extending the time in which the writ might be issued to six years. (Stats. 1889, p. 26.)

This statutory rule simply extends the time given under the common law, which limited the right to a year

and a day after the entry of the judgment, and we are unable to find any other statutory provision in any manner limiting or restricting this right. Neither have we been able to find any statutory provision in any manner restricting or limiting the right of action upon judgments as given by the common law. In the absence of statutory restrictions of the common law right of action upon judgments, then the common law rule must prevail, and the question be determined by such rule only. The inquiry then is, what right of action upon judgments is given by the common law? We must adopt the view expressed by Chief Justice Beatty in *Solen* v. *V. T. R. R. Co.* and hold that an action on a judgment would lie as a matter of course at common law; that while there may be some conflict in the decisions of this country upon this point, the decided weight of authority is in support of the rule. As early as 1858, the Supreme Court of *161 California, in the case of *Ames* v. *Hoy,* so held, and answering the same line of argument used by counsel for appellant in the case at bar, say: "The chief argument is that there is no necessity for a right of action on a judgment, inasmuch as execution can be issued to enforce the judgment already obtained, and no better or higher right or advantage is given to the subsequent judgment. But this is not true in fact, as in many cases it may be of advantage to obtain another judgment in order to save or prolong the lien; and in this case, the advantage of having record evidence of the judgment is sufficiently perceptible. The argument that the defendant may be vexed by repeated judgments on the same cause of action, is answered by the suggestion that an effectual remedy to the party against this annoyance is the payment of the debt." (*Ames* v. *Hoy,* 12 Cal. 11.)

Considering the provisions of our statutes under which a judgment is made a lien upon the real property of the judgment debtor for a term of two years after the judgment has been docketed, we can well say that it may be an advantage to obtain another judgment in order to save or prolong such lien. The Supreme Court of Indiana, in later cases than the one cited in the opinion of Chief Justice Beatty, say that the law is well settled that a judgment creditor may enforce his judgment by the process of the court in which he obtained it, or he may elect to use the judgment as an original cause of action and bring suit thereon and prosecute such suit to final judgment. (*Hansford et al.* v. *Van Auken, Administrator,* 79 Ind. 160; *Palmer* v. *Glover,* 73 Ind. 529.)

In the absence of direct legislation restricting or limiting the common law rule of the right of action upon judgments, there are found within our statutes provisions from which the court is authorized in holding, as a matter of inference, that no change in that rule was intended, otherwise some legislative restriction or limitation of the right under the common law rule would have been included in the statute other than the one barring the action if not commenced within six years after the right accrued. In other words, the legislature gave to the judgment creditor the right of action at any time within six years after such right accrued without other limitations.

*162 Furthermore, the statutory law preserved that right as against the judgment debtor who might be out of the state, by allowing such action to be commenced within the time limited after his return to the state, which might be, as in this case, long after the right of execution had been barred.

We must therefore hold, that under the common law rule, which prevails in this state, that the right of action upon an unsatisfied judgment is a matter of course, and that it is not necessary to aver in the complaint, or show by the record, that other good cause exists therefor.

We are also of the opinion that the contention of the respondents that the complaint and record show that a good cause does exist for the bringing of the action, from the facts that the complaint and record disclose, that at the time the action was commenced the statutory right of execution had been barred by more than nine years time, while the statute of limitations had only been running two days. The respondents held a

judgment, which is the highest evidence of indebtedness, without any right to enforce the same, and that right could be obtained by an action prosecuted to final judgment.

The judgment will therefore be affirmed.

EXHIBIT 2

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

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

v.

UNITED AUTOMOBILE INSURANCE COMPANY,
Respondent.

RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF TO SECOND CERTIFIED QUESTION

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

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ARGUMENT

I. Appellants Can No Longer Continue to Seek Consequential Damages in the Amount of the Default Judgment Obtained Against Mr. Lewis for UAIC's Breach of the Duty to Defend Because the Default Judgment Expired Due to Appellants' Failure to Renew the Judgment Pursuant to the Terms of NRS 17.214, and Appellants Have Not Otherwise Brought an Action on the Default Judgment.

Nevada's statute of limitations, NRS 11.190(1)(a), provides that "an action upon a judgment or decree of any court of the United States, or of any state or territory within the United States, or the renewal thereof" must be commenced within six years. Accordingly, there exist only two methods by which the self-executing expiration of a judgment six years following its issuance may be prevented. One method is renewal of the original judgment by the judgment creditor pursuant to the terms of NRS 17.214. The second method is via the bringing of an independent action on the original judgment, which allows a judgment creditor the opportunity, "when the limitations period has almost run on the judgment, to obtain a new judgment that will start the limitations period anew." *Salinas v. Ramsey*, 234 So. 3d 569, 571 (Fla. 2018).

Outside of renewing the original judgment or obtaining a wholly new judgment restarting the limitations period, however, a judgment in Nevada automatically expires by operation of law six years following its issuance pursuant to the terms of NRS 11.190. *Cf.* NRS 21.010 ("[T]he party in whose favor judgment is given may, at any time before the judgment expires, obtain the issuance of a writ

EXHIBIT 3

AFF

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DISTRICT COURT

CLARK COUNTY, NEVADA

Cheyenne Nalder Plaintiff, vs. Gary Lewis, Defendant.	CASE NO. A-18-772220-C DEPT NO. XIX
United Automobile Insurance Company, Intervenor,	
Gary Lewis, Third Party Plaintiff, vs. United Automobile Insurance Company, Randall Tindall, Esq. and Resnick & Louis, P.C., and DOES I through V, Third Party Defendants.	

STATE OF CALIFORNIA)
) ss:
COUNTY OF Los Angeles)

AFFIDAVIT OF GARY LEWIS

Comes now Cross-claimant/Third-party Plaintiff, GARY LEWIS, first being duly sworn deposes and says:

1. I, Gary Lewis was, at all times relevant to the injury to Cheyenne Nalder, a resident of the County of Clark, State of Nevada. I then moved my residence to California in December of 2008 and have had no presence for purposes of service of process in Nevada since that date.

2. I retained attorney, Thomas Christensen, Esq. to file a Cross-Claim/Third party complaint against United Automobile Insurance Co., Randall Tindall, Esq., and Resnick & Louis, P.C., for acts and omissions committed by them and each of them, as a result of the finding of coverage on October 30, 2013.

3. United Automobile Insurance Company, hereinafter referred to as "UAIC", was my insurance company.

4. Randall Tindall, hereinafter referred to as "Tindall," is an attorney licensed and practicing in the State of Nevada.

5. Resnick & Louis, P.C. was and is a law firm, which employed Tindall and which was and is doing business in the State of Nevada.

6. I requested that UAIC or any attorneys they hired to defend me in these two state court actions communicate through my current attorney in my claim against UAIC in Federal Court, Mr. Thomas Christensen.

7. I ran over Cheyenne Nalder (born April 4, 1998), a nine-year-old girl at the time, on July 8, 2007.

8. This incident occurred on private property.

9. I maintained an auto insurance policy with United Auto Insurance Company ("UAIC"), which was renewable on a monthly basis.

10. Before the subject incident, I received a statement from UAIC instructing me that my renewal payment was due by June 30, 2007.

11. The renewal statement also instructed me that I remit payment prior to the expiration of my policy "[t]o avoid lapse in coverage."

12. The statement provided June 30, 2007 as the effective date of the policy.

13. The statement also provided July 31, 2007 as the expiration date of the policy.

14. On July 10, 2007, I paid UAIC to renew my auto policy. My policy limit at this time was $15,000.00.

15. I wanted UAIC to pay these limits to offset the damage I did and to protect me from greater damages.

16. Following the incident, Cheyenne's father, James Nalder, extended an offer to UAIC to settle Cheyenne's injury claim for my policy limit of $15,000.00.

17. UAIC never informed me that Nalder offered to settle Cheyenne's claim.

18. UAIC never filed a declaratory relief action.

19. UAIC rejected Nalder's offer.

20. UAIC rejected the offer without doing a proper investigation and claimed that I was not covered under my insurance policy and that I did not renew my policy by June 30, 2007.

21. After UAIC rejected Nalder's offer, James Nalder, on behalf of Cheyenne, filed a lawsuit against me in the Nevada state court.

22. UAIC was notified of the lawsuit but declined to defend me or file a declaratory relief action regarding coverage.

23. I thought UAIC would defend me but they failed to appear and answer the complaint. As a result, Nalder obtained a default judgment against me for $3,500,000.00.

24. Notice of entry of judgment was filed on August 26, 2008.

25. On May 22, 2009, Nalder and I filed suit against UAIC alleging breach of contract, an action on the judgment, breach of the implied covenant of good faith and fair dealing, bad faith, fraud, and violation of NRS 686A.310.

26. I assigned to Nalder my right to "all funds necessary to satisfy the Judgment." I retained the rest of my claims against UAIC. I left the state of Nevada and located in California in December of 2008. Neither I nor anyone on my behalf has been subject to service of process in Nevada since January 7, 2009.

27. Once UAIC removed the underlying case to federal district court, UAIC filed a motion for summary judgment as to all of my and Nalder's claims, alleging I did not have insurance coverage on the date of the subject collision.

28. The federal district court erroneously granted UAIC's summary judgment motion because it determined the insurance contract was not ambiguous as to when I had to make payment to avoid a coverage lapse.

29. Nalder and I appealed to the Ninth Circuit. The Ninth Circuit reversed and remanded the matter because I and Nalder had facts to show the renewal statement was ambiguous regarding the date when payment was required to avoid a coverage lapse.

30. On remand, the district court entered judgment in favor of Nalder and me and against UAIC on October 30, 2013. The Court concluded the renewal statement was ambiguous and therefore, I was covered on the date of the incident because the court construed this ambiguity against UAIC.

31. The district court also determined UAIC breached its duty to defend me, but erroneously did not award damages because I did not incur any fees or costs in defense of the Nevada state court action.

32. The district court also granted summary judgment in favor of UAIC on my bad faith allegations even though there were questions of fact regarding the reasonableness of UAIC's actions and their failure to defend me or communicate offers of settlement to me were sufficient to sustain a bad faith claim under Miller v. Allstate. Nalder and I appealed this erroneous decision.

33. At this time I had already suffered damages as a result of the judgment entered against me.

34. I continued to suffer damages as a result of the entry of this judgment that UAIC has refused to remedy.

35. The district court ordered UAIC to pay the policy limit of $15,000.00.

36. UAIC made three payments on the judgment: on June 23, 2014; on June 25, 2014; and on March 5, 2015, but made no effort to defend me or relieve me of the judgment against me.

37. UAIC knew that a primary liability insurer's duty to its insured continues from the filing of the claim until the duty to defend has been discharged.

38. UAIC has admitted that their duty to defend has still not been discharged.

39. UAIC did an unreasonable investigation, did not defend me, did not attempt to resolve or relieve me from the judgment against me, did not respond to reasonable opportunities to settle and did not communicate opportunities to settle to me.

40. Our second appeal to the Ninth Circuit, ultimately led to certification of the first question to the Nevada Supreme Court, namely, whether an insurer that breaches its duty to defend is liable for all foreseeable consequential damages to the breach.

41. After the first certified question was fully briefed and pending before the Nevada Supreme Court, UAIC embarked on a new strategy putting their interests ahead of mine in order to defeat Nalder's and my claims against UAIC.

42. UAIC mischaracterized the law and brought new facts into the appeal process that had not been part of the underlying case. UAIC brought the false, frivolous and groundless claim that neither Nalder nor I had standing to maintain a lawsuit against UAIC without filing a renewal of the judgment pursuant to NRS 17.214.

43. Even though UAIC knew at this point that it owed a duty to defend me, UAIC did not undertake to investigate the factual basis or the legal grounds or to discuss this with me, nor did it seek declaratory relief on my behalf regarding the statute of limitations on the judgment.

44. This failure to investigate the factual basis for the validity of the judgment against me caused me additional damages.

45. UAIC, instead, tried to protect themselves and harm me by filing a motion to dismiss my and Nalder's appeal with the Ninth Circuit for lack of standing.

46. This was not something brought up in the trial court, but only in the appellate court for the first time. My understanding is that the Ninth Circuit is not a trial court that takes evidence.

47. This action could leave me with a valid judgment against me and no cause of action against UAIC.

48. UAIC ignored all of the tolling statutes and presented new evidence into the appeal process, arguing Nalder's underlying $3,500,000.00 judgment against me is not enforceable because the six-year statute of limitation to institute an action upon the judgment or to renew the judgment pursuant to NRS 11.190(1)(a) expired.

49. As a result, UAIC contends Nalder can no longer recover damages above the $15,000.00 policy limit for breach of the contractual duty to defend. UAIC admits the Nalder judgment was valid at the time the Federal District Court made its erroneous decision regarding damages.

50. The Ninth Circuit concluded the parties failed to identify Nevada law that conclusively answers whether a plaintiff can recover consequential damages based on a judgment that is over six years old and possibly expired. I must wonder whether the Ninth Circuit judges read the *Mandlebaum v. Gregovich*, 24 Nev. 154, 50 P. 849, (1897) case.

51. The Ninth Circuit was also unable to determine whether the possible expiration of the judgment reduces the consequential damages to zero or if the damages should be calculated from the date when the suit against UAIC was initiated, or when the judgment was entered by the trial court.

52. Both the suit against UAIC and the judgment against UAIC entered by the trial court were done well within even the non-tolled statute of limitations.

53. Even though Nalder believed the law is clear that UAIC is bound by the judgment, regardless of its continued validity against me, and took action in Nevada and California to insure and demonstrate the continued validity of the underlying judgment against me. Before the actions of UAIC questioning the validity of the judgment, as part of my assignment of a portion of my claim against UAIC Nalder's only efforts to collect the judgment had been directed at UAIC and not me. Thus UAIC's improper investigation and refusal to withdraw a fraudulent affidavit caused me and continue to cause me injury and damage.

54. These Nevada and California state court actions are further harming me and Nalder but were undertaken to demonstrate that UAIC has again tried to escape responsibility

by making misrepresentations to the Federal and State Courts and putting their interests ahead of mine.

55. Cheyenne Nalder reached the age of majority on April 4, 2016.

56. Nalder hired David Stephens to obtain a new judgment. First David Stephens obtained an amended judgment in Cheyenne's name as a result of her reaching the age of majority.

57. This was done appropriately by demonstrating to the court that the judgment was still within the applicable statute of limitations. I have read the *Mandlebaum v. Gregovich*, 24 Nev. 154, 50 P. 849, (1897) case. It is exactly my situation and it provides: "The averments of the complaint and the undisputed facts are that, at the time of the rendition and entry of the judgment in 1882, the appellant was out of the state, and continuously remained absent therefrom until March, 1897, thereby preserving the judgment and all rights of action of the judgment creditor under the same. Notwithstanding nearly fifteen years had elapsed since the entry of the judgment, yet, for the purposes of action, the judgment was not barred — for that purpose **the judgment was valid.**" *Id., Mandlebaum at 851.*

58. A separate action was then filed with three distinct causes of action pled in the alternative. The first, an action on the amended judgment to obtain a new judgment and have the total principal and post judgment interest reduced to judgment so that interest would now run on the new, larger principal amount. The second alternative action was one for declaratory relief as to when a renewal must be filed base on when the statute of limitations, which is subject to tolling provisions, is running on the judgment. The third cause of action was, should the court determine that the judgment is invalid, Cheyenne brought the injury claim within the applicable statute of limitations for injury claims - 2 years after her majority.

59. Nalder also retained California counsel, who filed a judgment in California, which has a ten year statute of limitations regarding actions on a judgment. Nalder maintains that all of these actions are unnecessary to the questions on appeal regarding UAIC's liability for the judgment; but out of an abundance of caution and to maintain the judgment against me, she brought them to demonstrate the actual way this issue should have been litigated in the State Court of Nevada, not at the tail end of an appeal by a fraudulent affidavit of counsel for UAIC.

60. UAIC did not discuss with me any proposed defense, nor did it coordinate it with my counsel Thomas Christensen, Esq.

61. UAIC hired attorney Stephen Rogers, Esq. to represent me, misinforming him of the factual and legal basis of the representation. This resulted in a number of improper contacts with me. These contacts were made in spite of my requests to discuss any matters related to my claims against UAIC with my attorney handling my action against UAIC Thomas Christensen.

62. Thomas Christensen explained the nature of the conflict and my concern regarding a frivolous defense put forth on my behalf. I fear that if the state court judge is fooled into an improper ruling that then has to be appealed in order to get the correct law applied damage could occur to me during the pendency of the appeal.

63. Regardless of potential greater damage should the trial court be fooled these actions by UAIC and Tindall are causing immediate damages of continued litigation, litigation costs and fees and damage to my contractual relationship with Cheyenne Nalder.

64. UAIC's strategy of trickery, delay and misrepresentation was designed to benefit UAIC but harm me.

65. In order to evaluate the benefits and burdens to me and the likelihood of success of the course of action proposed by UAIC and the defense attorneys hired by UAIC, I asked through my attorney Thomas Christensen that UAIC and their attorneys communicate to

Thomas Christensen regarding the proposed course of action and what research supported it. It was requested that this communication go through Thomas Christensen's office because that was my desire, in order to receive counsel prior to embarking on a course of action.

66. My attorney Thomas Christensen informed Stephen Rogers, Esq. that when I felt the proposed course by UAIC was not just a frivolous delay and was based on sound legal research and not just the opinion of UAIC's counsel, that it could be pursued.

67. Stephen Rogers, Esq. never provided any Nevada law or assurances that UAIC will be responsible if their proposed defense fails or documents or communications regarding my representation.

68. Instead, UAIC obtained my confidential client communications and then misstated the content of these communications to the Court. That is why I sought Cumis counsel. The conflict of having UAIC as a co-client with any attorney representing me is a conflict I am unwilling to waive. This was for UAIC's benefit and again harmed me.

69. UAIC, without notice to me or any attorney representing me, then filed two motions to intervene, which were both defective in service on the face of the pleadings.

70. In the motions to intervene, UAIC claimed that they had standing because they would be bound by and have to pay any judgment entered against me.

71. In the motions to intervene, UAIC fraudulently claimed that I refused representation by Stephen Rogers.

72. I was concerned about Steve Rogers representing me but taking direction from UAIC who is a defendant in my lawsuit in federal court against them. I therefore hired additional CUMIS counsel E. Breen Arntz. I requested Steve Rogers have UAIC pay Mr. Arntz because of the conflict in Rogers representing both me and UAIC.

73. I am informed that David Stephens, Esq., counsel for Nalder in her 2018 action, through diligence, discovered the filings on the court website. He contacted Matthew Douglas, Esq., described the lack of service, and asked for additional time to file an opposition.

74. These actions by UAIC and counsel on its behalf are harmful to me and benefit UAIC and not me.

75. I am informed that David Stephens thereafter filed oppositions and hand-delivered courtesy copies to the court. UAIC filed replies. The matter was fully briefed before the in chambers "hearing," but the court granted the motions citing in the minuted order that "no opposition was filed."

76. I do not understand why the court granted UAIC's Motion to Intervene after judgment since it is contrary to NRS 12.130, which states: Intervention: Right to intervention; procedure, determination and costs; exception. 1. Except as otherwise provided in subsection 2: (a) **Before the trial** …

77. These actions by State Actor David Jones ignore my rights to due process and the law and constitution of the United States and Nevada. The court does the bidding of UAIC and clothes defense counsel in the color of state law in violation of 42 USCA section 1983.

78. David Stephens representing Nalder and E. Breen Arntz representing me worked out a settlement of the action and signed a stipulation. This stipulation was filed and submitted to the court with a judgment prior to the "hearing" on UAIC's improperly served and groundless motions to intervene.

79. I was completely aware of the settlement entered into by E. Breen Arntz. I authorized that action because the defense put forward by UAIC is frivolous. I do not want to incur greater fees and expenses in a battle that I will most likely loose. I also don't want to create the situation where Nalder will have even greater damages against me than the judgment.

From all the information I have gathered from UAIC the judgment against me is valid. I don't want a frivolous defense that will ultimately fail. I don't want to take that risk.

80. Instead of signing the judgment and ending the litigation as I had requested, the court asked for a wet signed stipulation as a method of delaying signing the stipulated judgment.

81. This request was complied with prior to the September 19, 2018 "hearing" on the Motion to Intervene. The judge, without reason, failed to sign the judgment resolving the case.

82. Instead, the judge granted the Motion to Intervene, fraudulently claiming, in a minute order dated September 26, 2018, that no opposition had been filed.

83. Randall Tindall, Esq. fraudulently filed unauthorized pleadings on my behalf on September 26, 2018 and on September 27, 2018.

84. UAIC hired Tindall to further its strategy to defeat Nalder and my claims. Tindall agreed to the representation despite his knowledge and understanding that this strategy amounted to fraud and required him to act against the best interests of his "client" me.

85. Tindall mischaracterized the law and filed documents designed to mislead the Court and benefit UAIC, to the detriment of me.

86. These three filings by Randall Tindall, Esq. are almost identical to the filings proposed by UAIC in their motion to intervene.

87. I was not consulted and I did not consent to the representation.

88. I did not authorize the filings by Randall Tindall, Esq.

89. I and my attorneys, Thomas Christensen, Esq. and E. Breen Arntz, Esq., have requested that Tindall withdraw the pleadings filed fraudulently by Tindall.

90. Tindall has refused to comply and continues to violate ethical rules regarding his claimed representation of me.

91. I filed a bar complaint against Tindall, but State Actors Daniel Hooge and Phil Pattee dismissed the complaint claiming they do not enforce the ethical rules if there is litigation pending. This makes no sense to me. Why won't the bar protect the public from these unethical fraudulent practices by Tindall?

92. With this affidavit I am appealing the dismissal of my bar complaint against Randall Tindall.

93. With this affidavit I am requesting an investigation of Daniel Hooge and Phil Pattee regarding the dismissal of my bar complaint.

94. Following Mr. Tindall's involvement the court signed an order granting intervention while still failing to sign the judgment resolving the case.

95. I later discovered Judge Jones and Mr. Tindall had a business relationship while working together at another insurance company.

96. Although Judge Jones removed himself from these cases he did not rescind the orders he issued after Mr. Tindall's involvement in the case. These orders are tainted by Mr. Tindall's prior involvement.

97. UAIC and Tindall, and each of the state actors, by acting in concert, intended to accomplish an unlawful objective for the purpose of harming me.

98. I sustained damage resulting from defendants' acts in incurring attorney fees, litigation costs, loss of claims, delay of claims, and as more fully set forth below.

99. UAIC and Tindall acting under color of state law deprived me of rights, privileges, and immunities secured by the Constitution or laws of the United States.

100. I have duly performed all the conditions, provisions and terms of the agreements or policies of insurance with UAIC relating to the claim against me, have furnished and delivered to UAIC full and complete particulars of said loss and have fully complied with all the

provisions of said policies or agreements relating to the giving of notice as to said loss, and have duly given all other notices required to be given by me under the terms of such policies or agreements.

101. That I had to sue UAIC in order to get protection under the policy. That UAIC, and each of them, after being compelled to pay the policy limit and found to have failed to defend me, now fraudulently claim to be defending me when in fact UAIC is continuing to delay investigating and processing the claim; not responding promptly to requests for settlement; doing a one-sided investigation, and have compelled me to hire counsel to defend myself from Nalder, Tindall and UAIC. All of the above are unfair claims settlement practices as defined in N.R.S. 686A.310 and I have been damaged.

102. That UAIC failed to settle the claim when given the opportunity to do so and then compounded that error by making frivolous and fraudulent claims and represented to the court that it would be bound by any judgment and is therefore responsible for the full extent of any judgment against me in this action.

103. UAIC and Tindall's actions have interfered with the settlement agreement Breen Arntz had negotiated with David Stephens and have caused me to be further damaged.

104. The actions of UAIC and Tindall, and each of them, in this matter have been fraudulent, malicious, oppressive and in conscious disregard of my rights.

105. It seems to me that the above mentioned parties have communicated with each other and conspired together to harm me.

106. During the litigation and investigation of the claim, UAIC, and Tindall, threatened, intimidated and harassed me and my counsel.

107. The investigation conducted by UAIC, and Tindall, was done for the purpose of denying coverage and not to objectively investigate the facts.

108. UAIC and Tindall, failed to adopt and implement reasonable standards for the prompt investigation and processing of claims.

109. UAIC and Tindall, failed to affirm or deny coverage of the claim within a reasonable time after proof of loss requirements were completed and submitted by me.

110. UAIC and Tindall, failed to effectuate a prompt, fair and equitable settlement of the claim after my liability became reasonably clear.

111. UAIC and Tindall, failed to promptly provide to me a reasonable explanation of the basis in the Policy, with respect to the facts of the Nalder claim and the applicable law, for the delay in the claim or for an offer to settle or compromise the claim.

112. Because of the improper conduct of UAIC and Randall Tindall, I was forced to hire an attorney.

113. I have suffered damages as a result of the delayed investigation, defense and payment on the claim.

114. I have suffered anxiety, worry, mental and emotional distress as a result of the conduct of UAIC and Tindall.

115. The conduct of UAIC and Tindall, was oppressive and malicious and done in conscious disregard of my rights.

116. UAIC and Tindall, breached the contract existing between me and UAIC, breached the covenant of good faith and fair dealing, acted unreasonably and with knowledge that there was no reasonable basis for their conduct, violated NRS 686A.310 and were negligent by their actions set forth above which include but are not limited to: Unreasonable conduct in investigating the loss; Unreasonable failure to affirm or deny coverage for the loss; Unreasonable delay in making payment on the loss; Failure to make a prompt, fair and equitable settlement for the loss; Unreasonably compelling me to retain an attorney before affording

coverage or making payment on the loss; Failing to defend me; Fraudulent and frivolous litigation tactics; Filing false and fraudulent pleadings; Conspiring with others to file false and fraudulent pleadings;

117. As a proximate result of the aforementioned, I have suffered and will continue to suffer in the future damages as a result of the fraudulent litigation tactics and delayed payment on the judgment.

118. As a further proximate result of the aforementioned, I have suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses.

119. As a further proximate result of the aforementioned, I was compelled to retain legal counsel to prosecute this claim, and UAIC and Tindall, are liable for attorney's fees reasonably and necessarily incurred in connection therewith.

120. The conduct of UAIC and Tindall, was oppressive and malicious and done in conscious disregard of my rights.

121. The aforementioned actions of UAIC and Tindall, constitute extreme and outrageous conduct and were performed with the intent or reasonable knowledge or reckless disregard that such actions would cause severe emotional harm and distress to me.

122. As a proximate result of the aforementioned intentional infliction of emotional distress, I have suffered severe and extreme anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses.

123. As a further proximate result of the aforementioned intentional infliction of emotional distress, I was compelled to retain legal counsel to prosecute this claim, and UAIC and Tindall, are liable for attorney's fees reasonably and necessarily incurred in connection therewith.

124. Randall Tindall breached the duty of care by failing to communicate with me, failing to follow my reasonable requests for settlement, case strategy and communication.

125. That breach caused harm to me including but not limited to anxiety, emotional distress, delay, enhanced damages against me.

126. I was damaged by all of the above as a result of the breach by Randall Tindall.

127. I request that E. Breen Arntz and/or Randall Tindall withdraw the fraudulent, unauthorized, frivolous, improperly filed motions filed by Randall Tindall in both CASE NO. A-18-772220-C and CASE NO. 07A549111. I want the settlement worked out with my knowledge and consent signed by the court.

FURTHER AFFIANT SAYETH NAUGHT.

GARY LEWIS

SUBSCRIBED and SWORN to before me this 26th day of November, 2018.

Notary Public in and for said County and State.

SEAN H. HOUSTON
Notary Public – California
Los Angeles County
Commission # 2218583
My Comm. Expires Oct 16, 2021

TAB 4

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED AUTOMOBILE INSURANCE COMPANY, Plaintiff, vs. THOMAS CHRISTENSEN, an individual; E. BREEN ARNTZ,, an individual; GARY LEWIS; an individual; Defendants.	CASE NO.: 2:18-cv-2269

COMPLAINT FOR DECLARATORY RELIEF

Plaintiff alleges:

JURISDICTION AND VENUE

1. The claims asserted in this Complaint arise under the Federal Declaratory Act, 28 U.S.C. § 2201. The Court has jurisdiction over the subject matter of such claims pursuant to 28 U.S.C. §§ 1331 and 1337(a).

2. The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332 as the parties are diverse, and the amount in controversy exceeds $75,000.

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a), (b), and (c) and 15 U.S.C. § 22, because (i) a substantial part of the events or omissions giving rise to the claim

occurred in this district, (ii) Defendants are deemed to be residents of and/or are found in this district, (iii) Defendants transact business in this district, and/or (iv) at least one defendant may be found in this district.

PARTIES

4. Plaintiff, UNITED AUTOMOBILE INSURANCE COMPANY (hereinafter "UAIC") is a corporation organized and existing under the laws of the State of Florida with its principal place of business in Miami Gardens, Florida. At all relevant times, UAIC was licensed to write insurance policies in the State of Nevada.

5. Plaintiff is informed and believes and thereon alleges that defendants CHRISTENSEN and ARNTZ are licensed attorneys, purporting to represent defendant LEWIS, and are both residents of the County of Clark, State of Nevada; Upon information and belief, defendant LEWIS is a resident of the State of California.

6. The true names and capacities, whether individual, corporate, partnership, associate or otherwise, of Defendants DOES I-V are unknown to Plaintiff, who therefore sues said Defendants by such fictitious names. Plaintiff is informed and believes and thereon alleges that each of the Defendants designated herein as DOES has an interest in some manner related to the events and happenings herein alleged, and the Plaintiff will ask leave of this Court to amend this Complaint to insert the true names and capacities of DOES I-V when the same have been ascertained, and to join such Defendants in this action.

FACTUAL ALLEGATIONS

7. Defendant GARY LEWIS was formerly insured under a UAIC liability insurance policy, which policy had expired due to non-payment of premiums prior to a 2007 motor vehicle accident.

8. At all times relevant, UAIC sold and adjusted month-to-month insurance policies, thirty-day policies of insurance paid by a month-to-month premium, typically for consumers considered too high-risk to qualify for more traditional insurance policies. Such policies would renew for an additional thirty days by timely payment of a premium, and would expire at the end

of the month-long policy period if a renewal payment was not made or received.

9. At some time prior to July 8, 2007, defendant Gary Lewis purchased a single-month liability insurance policy. Defendant Lewis failed to pay for a policy renewal, and the policy expired prior to July 8, 2007.

10. After expiration of the policy, Gary Lewis was involved in a motor vehicle accident on July 8, 2007 with Cheyenne Nalder, then a minor of Gary Lewis' acquaintance.

11. Gary Lewis was thereafter advised that he had no policy in effect at the time of the motor vehicle accident, as he had failed to pay for renewal of the policy.

12. On information and belief, Gary Lewis then cooperated with Cheyenne Nalder and her attorneys, who took a $3.5 million default judgment against Lewis in Clark County, Nevada District Court Case No. 07A54911.

13. On March 22, 2009, Attorney Thomas Christensen, on behalf of Nalder, brought a suit of 'insurance bad faith' against Plaintiff which was removed to Federal District Court for the District of Nevada under case no. 2:09-cv-1348. In that lawsuit, it was alleged that Gary Lewis had, in fact, paid his premiums but that UAIC had lost the payment or had failed to credit Lewis for the payment. In discovery in that lawsuit, it was learned that Lewis had not, in fact, paid his premiums and knew that he had not.

14. Thereafter, Christensen changed his theory, and alleged that the renewal language in the UAIC policy was 'ambiguous' and he had been confused by it, which was why he hadn't paid the premium.

15. In discovery in that lawsuit, it was also learned that defendant Gary Lewis had communicated extensively with Thomas Christensen's office, while Christensen was securing a judgment against Lewis on behalf of Nalder. Attorney Christensen objected to questions about those conversations, claiming 'attorney client privilege,' thereby demonstrating that Christensen had actually represented both plaintiff and defendant in the same lawsuit.

16. In discovery in that lawsuit, it was learned that the 'assignment' on which Nalder brought her suit against UAIC did not exist at the time Christensen brought the lawsuit, but was

only executed long after the lawsuit was filed, and only produced in response to a motion to compel before the magistrate.

17. Plaintiff UAIC filed a motion in that Federal action to amend the pleadings, to assert claims of champerty or barratry, as the judgment appeared to have been collusive, with one law firm attempting to represent both sides in one dispute, and manufacturing evidence for use in the 'bad faith' case. That motion to amend was never heard, as the Federal court granted summary judgment in favor of Plaintiff herein, finding no coverage for the loss and no 'bad faith.'

18. Christensen appealed this ruling to the Ninth Circuit Court of Appeals. A three judge panel agreed that the renewal language was amgiguous and remanded. On remand, the Federal District Judge specifically found no evidence of 'bad faith,' but found an "implied policy" of insurance as between Lewis and UAIC covering the loss, found that UAIC had breached the duty to defend, and ordered UAIC to pay its $15,000 limits, in addition to Christensen's taxable costs and attorney's fees, which UAIC promptly paid.

19. Christensen appealed this ruling to the Ninth Circuit as well. He asked the Ninth Circuit that, even in the absence of 'bad faith,' that UAIC was responsible for the entire $3.5 million judgment as a consequential damage of the breach of the implied contract he alleged. This has been certified to the Nevada Supreme Court by the Ninth Circuit.

20. In 2014, the initial judgment against Gary Lewis expired, as Christensen never renewed it.

21. On observing that the judgment had expired, UAIC filed a motion to dismiss the appeal in the Ninth Circuit, since the Federal Judge had expressly and specifically found no 'bad faith,' and the only consequential damage Gary Lewis could claim was the judgment against him, which had now expired.

22. This motion to dismiss the appeal was likewise certified to the Nevada Supreme Court.

23. Christensen and his co-counsel requested multiple extensions of time to file his

brief in the Nevada Supreme Court on the question of the expired judgment. On each such request, Christensen and his co-counsel asserted that the extension was not sought for any improper purpose, or for the purpose of delay.

24. While requesting these extensions of time, Christensen referred Nalder to Attorney David Stephens, who attempted to renew or amend the expired 2008 judgment four years after it had expired. Christesen also caused to be filed a second action to collect on that judgment, and to demand more damages from Gary Lewis.

25. Christensen also hired defendant E. Breen Arntz to represent UAIC's putative insured, Gary Lewis, to appear in the action.

26. On learning of this, and mindful of the Federal Court's contested ruling that a contract had been implied in law based on the allegedly ambiguous renewal language, UAIC retained counsel Stephen Rogers to file the appropriate paperwork to dismiss the expired judgment against Gary Lewis.

27. On information and belief, Attorney Christensen ordered Rogers not to file any paperwork which would dismiss the large judgment against Rogers' client, and refused to allow Rogers to speak with his own client. In so doing, Christensen identified himself as counsel for both the judgment creditor (Nalder) as well as the judgment debtor (Lewis).

28. UAIC then hired Attorney Randall Tindall to file the necessary paperwork to dismiss the expired judgment against Lewis. Tindall did so, filing the appropriate motions immediately before the deadline for doing so.

29. In response to this, Attorney Christensen identified himself as counsel for Gary Lewis, and demanded that Tindall withdraw from representing Lewis, and (for reasons which have not been explicitly explained) insists that Lewis wants the large judgment against him to stand.

30. Attorney Christensen has now filed a new third party complaint on Gary Lewis' behalf, suing UAIC and Randall Tindall, which third party complaint also includes allegations against the sitting Nevada District Court judge, the State Bar of Nevada.

31. In the new 2018 collection action on the expired judgment, Christensen has represented that he is counsel for Gary Lewis, the judgment debtor in the 2007 action in which Christensen represents Nalder, the judgment creditor.

32. Christensen has demanded that UAIC pay the legal fees of E. Breen Arntz, hired by Christensen to defend Lewis in the collection action, based on a 'conflict of interest.'

FIRST CAUSE OF ACTION
(For Declaratory Relief Against All Defendants regarding payment of legal fees where no actual conflict exists)

21. Plaintiff UAIC repeats and re-alleges each and every allegation contained in the above paragraphs as set forth fully herein.

22. An actual controversey has arisen and now exists between UAIC and the defendants, concerning the respective rights and duties under the Policy and related to said Policy.

23. UAIC desires a judicial determination of its rights and duties, and a declaration as to its liability under the insurance contract. Specifically, UAIC seeks a declaration that its obligation to defend Gary Lewis, based upon the contract implied in law, does not extend to payment of legal fees incurred by defendant Christensen or Arntz.

24. UAIC further desires a judicial determination that UAIC has no obligation to pay either Arntz or Christensen, or any other 'independent counsel' in the absence of an actual conflict of interest.

25. UAIC further desires a judicial determination that the only purported 'conflict of interest' is entirely of Christensen's own invention, and triggers no further obligation under the policy;

26. UAIC further desires a judicial determination that UAIC has no duty, in law or otherwise, to allow the expired judgment against its putative policyholder to stand, at the

insistence of Attorney Christensen or attorneys hired by him;

SECOND CAUSE OF ACTION
(For Declaratory Relief Against Defendant Lewis regarding non-cooperation under the policy of insurance)

27. Plaintiff UAIC repeats and re-alleges each and every allegation contained in the above paragraphs as set forth fully herein.

28. An actual controversey has arisen and now exists between UAIC and the defendants, concerning the respective rights and duties under the Policy and related to said Policy.

29. UAIC's policy with Lewis contains the following provision:

PART VII WHAT TO DO IN CASE OF AN AUTO ACCIDENT OR LOSS

***

OTHER DUTIES

A person claiming coverage under this policy must also:

(1) Cooperate with us and assist us in any matter concerning a claim or suit, including presence at a trial.
(2) Send us promptly any legal papers received relating to any claim or suit.

30. That since the Federal Court in the preceding litigation found an implied policy and, a duty to defend, in 2013, Nalder has attempted to amend her 2008 judgment in the original action, Clark County Nevada case No. 07A549111 in 2018 and, thereafter, filed a new action on same amended judgment in Clark County Nevada case no. A-18-772220-C (hereinafter referred to as "the lawsuits").

31. That UAIC has requested Lewis' assistance in defending the lawsuits and, retained defense counsel for Lewis to defend the lawsuits on his behalf.

32. That Lewis has refused to cooperate in the defense of the lawsuits and each of the Defendants have refused to allow UAIC to talk to Lewis and have maintained that retained

defense counsel may not file anything on behalf of Lewis.

33. That due to Lewis refusal to cooperate in the defense of the lawsuits, Lewis has breached the aforenoted cooperation provisions in the implied policy of insurance as between Lewis and UAIC.

34. That based upon this breach of the implied policy of insurance by Lewis, Plaintiff has and owes no duty to indemnify Defendant Lewis for or in connection with any claim which has been made or may be made arising out of the subject accident in the lawsuits for any amount above the mandatory minimum limits of liability insurance in the State of Nevada pursuant to N.R.S. 485.3091.

THIRD CAUSE OF ACTION
(For damages including attorneys fees against Defendants Christensen and Arntz for common law barratry)

35. Plaintiff UAIC repeats and re-alleges each and every allegation contained in the above paragraphs as set forth fully herein.

36. That, as set forth herein, Defendant Christensen represents both the judgment-creditor (Nalder) and the judgment-debtor (Lewis) in actions related to the 2007 accident between Lewis and Nalder and the original judgment arising from same accident.

37. That Defendant Christensen has had Lewis retain Defendant Arntz to advance Nalder and Christensen's interests in the lawsuits.

38. That Defendant Christensen has had Lewis and Arntz prevent retained defense counsel for Lewis, by UAIC, from talking to Lewis and has maiuntained they cannot mount a defense.

39. That Christensen and Arntz's actions are collusive and fradulent and intended only to benefit Christensen and Nalder.

40. That Christensen and Arntz, by the above-described actions, have comitted

common law barratry in that they have fomented legal disputes as between UAIC and its insured and counsel retained to defend its insured for their sole benefit.

41. UAIC seeks legal fees incurred for the improper litigation fomented by Defendants in the lawsuits.

PRAYER

WHEREFORE, Plaintiff UAIC prays that judgment be entered against Defendants as follows:

1. For a Declaratory Judgment against defendants, finding that UAIC's obligation to Gary Lewis, to the extent such exists in the expired policy implied by law, imposes no additional duties to pay 'independent counsel' hired by counsel for the judgment creditor;

3. For a Declaratory Judgment against Defendants that UAIC's actions, in hiring counsel to file paperwork to dismiss the expired judgment against Gary Lewis, do not constitute bad faith;

4. For a Declaratory Judgment against the defendants that UIAC's actions, in moving to intervene in the related State Court actions, due to Christensen's refusing to allow counsel to speak with Gary Lewis, do not constitute actionable 'bad faith;'

5. That due to Lewis non-cooperation in defense of the lawsuits, UAIC's obligation to Gary Lewis, policy implied by law, is abrogated such that UAIC owes no duty to indemnify Defendant Lewis for or in connection with any claim which has been made or may be made arising out of the July 8, 2007 loss or from the lawsuits, Clark County Nevada case No. 07A549111 and Clark County Nevada case no. A-18-772220-C, for any amount above the mandatory minimum limits of liability insurance in the State of Nevada pursuant to N.R.S. 485.3091, said amount being $15,000.00;

6. That Defendants Christensen and Artnz have committed common law barratry for fomenting improper litigation for their sole benefit and, thus, UAIC is entitled to attorney's fees for the costs of the defense of the lawsuits and, the additional litigation fomented;

7. For costs of suit and attorney's fees; and

8. For such other and further relief as the Court deems just and proper.

DATED this 27th day of November, 2018.

ATKIN WINNER & SHERROD

THOMAS E. WINNER
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MATTHEW J. DOUGLAS
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Attorneys for UAIC

TAB 5

CHRISTENSEN LAW

Molly C. Dwyer, Clerk of the Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103
Electronically Filed and Served

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,

Thomas Christensen
Attorney for Appellants

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
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

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 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.

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

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 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

[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.

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

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
>
> (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, "[a]n 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 "[t]here 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 action whereby the insurer is defending under a reservation of rights. Restatement of Liability

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 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

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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.").

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. Bryers*, 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 "[t]here 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

[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.

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 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.

Douglas, C.J.

We concur:

Cherry, J.

Gibbons, J.

Pickering, J.

Hardesty, J.

Stiglich, J.

Exhibit 2

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3/28/2018 3:05 PM
Steven D. Grierson
CLERK OF THE COURT

JMT
DAVID A. STEPHENS, ESQ.
Nevada Bar No. 00902
STEPHENS GOURLEY & BYWATER
3636 North Rancho Dr
Las Vegas, Nevada 89130
Attorneys for Plaintiff
T: (702) 656-2355
F: (702) 656-2776
E: dstephens@sbglawfirm.com
Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

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

AMENDED 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~~ $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.

District Judge

Submitted by:
STEPHENS GOURLEY & BYWATER

DAVID A. STEPHENS, ESQ.
Nevada Bar No. 00902
STEPHENS GOURLEY & BYWATER
3636 North Rancho Dr
Las Vegas, Nevada 89130
Attorneys for Plaintiff

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

JAN 23 2019

Exhibit 3

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Steven D. Grierson
CLERK OF THE COURT

JUDG
E. BREEN ARNTZ, ESQ.
Nevada Bar No. 3853
5545 Mountain Vista Ste. E
Las Vegas, Nevada 89120
T: (702) 384-8000
F: (702) 446-8164
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: XX
Consolidated with
CASE NO: 18-A-772220

UNITED AUTOMOBILE INSURANCE COMPANY,
Intervenor.

GARY LEWIS,
Third Party Plaintiff,
vs.
UNITED AUTOMOBILE INSURANCE COMPANY, RANDALL 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

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

Deputy Clerk
07A549111 1/23/2019
Michelle McCarthy

Submitted by:

E. BREEN ARNTZ, ESQ.
Nevada Bar No. 3853
5545 Mountain Vista Ste. E
Las Vegas, Nevada 89120
T: (702) 384-8000
breen@breen.com

CERTIFIED COPY
DOCUMENT ATTACHED IS A
TRUE AND CORRECT COPY
OF THE ORIGINAL ON FILE
CLERK OF THE COURT
JAN 23 2019

Exhibit 4

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES	Reserved for Clerk's File Stamp FILED Superior Court of California County of Los Angeles JUL 24 2018 Sherri R. Carter, Executive Officer/Clerk By _____ Deputy C. Moreno
COURTHOUSE ADDRESS: Pomona Courthouse, 400 Civic Center Plaza, Pomona CA 91766	
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 State of: **BY FAX**
Nevada

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. CARTER, Executive Officer/Clerk

Dated: JUL 24 2018

By: _____ C. 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., § 1710.25)** 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. CARTER, Executive Officer/Clerk

Dated. _____

By: _____
Deputy Clerk

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address):	TELEPHONE NO.:	FOR COURT USE ONLY
Mark J. Linderman (State Bar No. 144685) mlinderma Joshua M. Deitz (State Bar No. 267454) jdeitz@rjo.co 311 California Street San Francisco, California 94104	415-956-282. 415-956-2828	
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: Pomona Courthouse	RECEIVED JUL 17 2018 EAST DISTRICT	FILED Superior Court of California County of Los Angeles JUL 24 2018 Sherri R. Carter, Executive Officer/Clerk By _____ Deputy G. Moreno
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

1. TO JUDGMENT DEBTOR (name): Gary Lewis
733 S. Minnesota Ave, Glendora, CA 91740

BY FAX

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-state 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 will not be distributed until 30 days after you are served with this notice.

Date: JUL 24 2018 SHERRI R. CARTER, Clerk, by _____ G. MORENO, 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):

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

[SEAL]

(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

CCP 1710.30, 1710.40 1710.45

14:29:38 2018-07-17

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

▶ _____
(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	415-956-28.. 415-956-2828	FILED Superior Court of California County of Los Angeles JUL 17 2018 Sherri R. Carter, Executive Officer/Clerk By _____ Deputy C. Moreno
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: Pomona Courthouse	RECEIVED JUL 17 2018 EAST DISTRICT	
PLAINTIFF: James Nalder, individually and as Guardian ad Litem for Cheyenne Nalder DEFENDANT: Gary Lewis		
Amended.		CASE NUMBER KS021378

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

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

BY FAX

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 S. 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)

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
(TYPE OR PRINT NAME)

(SIGNATURE OF JUDGMENT CREDITOR OR ATTORNEY)

EXHIBIT A

ORIGINAL

FILED
Aug 26 11 00 AM '08
CLERK

9

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 5 day of June, 2008.

CHRISTENSEN LAW OFFICES, LLC

By: _____
DAVID F. SAMPSON, ESQ.
Nevada Bar #6811
THOMAS CHRISTENSEN, ESQ.,
Nevada Bar #2326
1000 S. Valley View Blvd.
Las Vegas, Nevada 89107
Attorneys for Plaintiff

RECEIVED
AUG 26 2008
CLERK OF THE COURT

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

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,

CLERK OF THE COURT

JUN 3 1 52 PM '08

FILED

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:

. . .

. . .

. . .

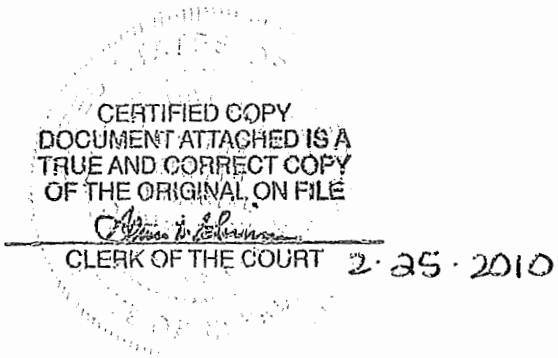
IT IS ORDERED THAT PLAINTIFF HAVE JUDGMENT AGAINST DEFENDANT in the sum of $3,500,000.00, which consists of $65,555.37 in medical expenses, and $3,434,444.63 in pain, suffering, and disfigurement, with interest thereon at the legal rate from October 9, 2007, until paid in full.

DATED THIS 2 day of ~~May~~ June, 2008.

DISTRICT JUDGE

Submitted by:
CHRISTENSEN LAW OFFICES, LLC.

BY: _____
DAVID SAMPSON
Nevada Bar # 6811
1000 S. Valley View
Las Vegas, Nevada 89107
Attorney for Plaintiff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OF THE ORIGINAL ON FILE
CLERK OF THE COURT
2-25-2010