Case No. 78085

In the Supreme Court of Nevada

CHEYENNE NALDER, an individual; and GARY LEWIS,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the County of Clark; THE HONORABLE DAVID M. JONES, District Judge; and THE HONORABLE ERIC JOHNSON, District Judge,

Respondents,

and

UNITED AUTOMOBILE INSURANCE COMPANY,

Real Party in Interest.

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Jul 10 2019 04:08 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

UNITED AUTOMOBILE INSURANCE COMPANY'S APPENDIX
VOLUME 1
PAGES 1–250

District Court Case No. 07A549111, Consolidated with 18-A-772220

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CLERK OF THE COURT

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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.	)	CASE NO: A549111
	)	DEPT. NO: VI
GARY LEWIS, and DOES I through V, inclusive ROES I through V	)	
Defendants.	)	

COMPLAINT

COMES NOW the Plaintiff, JAMES NALDER as Guardian Ad Litem for CHEYENNE NALDER, a minor, by and through Plaintiff's attorney, DAVID F. SAMPSON, ESQ., of CHRISTENSEN LAW OFFICES, LLC, and for a cause of action against the Defendants, and each of them, alleges as follows:

1. Upon information and belief, that at all times relevant to this action, the Defendant, GARY LEWIS, was a resident of Las Vegas, Nevada.

2. That Plaintiffs, JAMES NALDER, individually and as Guardian Ad Litem for CHEYENNE NALDER, a minor, (hereinafter referred to as Plaintiffs) were at the time of the accident residents of the County of Clark, State of Nevada.

3. That the true names or capacities, whether individual, corporate, associate or otherwise, of Defendants named as DOES I through V, inclusive, 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 DOE is responsible in some manner for the events and happenings referred to and caused damages proximately to Plaintiff as herein alleged, and that Plaintiff will ask leave of this Court to amend this Complaint to insert the true names and capacities of DOES I through V, when the dame have been ascertained, and to join such Defendants in this action.

4. Upon information and belief, Defendant, Gary Lewis, was the owner and operator of a certain 1996 Chevy Pickup (hereinafter referred to as "Defendant" vehicle") at all time relevant to this action.

5. On the 8th day of July, 2007, Defendant, Gary Lewis, was operating the Defendant's vehicle on private property located in Lincoln County, Nevada; that Plaintiff, Cheyenne Nalder was playing on private property; that Defendant, did carelessly and negligently operate Defendant's vehicle so to strike the Plaintiff, Cheyenne Nalder and that as a direct and proximate result of the aforesaid negligence of Defendant, Gary Lewis, and each of the Defendants, Plaintiff, Cheyenne Nalder sustained the grievous and serious personal injuries and damages as hereinafter more particularly alleged.

6. At the time of the accident herein complained of, and immediately prior thereto, Defendant, Gary Lewis in breaching a duty owed to the Plaintiffs, was negligent and careless, inter alia, in the following particulars:

A. In failing to keep Defendant's vehicle under proper control;

B. In operating Defendant's vehicle without due caution for the rights of the Plaintiff;

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C. In failing to keep a proper lookout for plaintiffs

D. The Defendant violated certain Nevada revised statutes and Clark County Ordinances, and the Plaintiff will pray leave of Court to insert the exact statutes or ordinances at the time of trial.

7. By reason of the premises, and as a direct and proximate result of the aforesaid negligence and carelessness of Defendants, and each of them, Plaintiff, Cheyenne Nalder, sustained a broken leg and was otherwise injured in and about her neck, back, legs, arms, organs, and systems, and was otherwise injured and caused to suffer great pain of body and mind, and all or some of the same is chronic and may be permanent and disabling, all to her damage in an amount in excess of $10,000.00.

8. By reason of the premises, and as a direct and proximate result of the aforesaid negligence and carelessness of the Defendants, and each of them, Plaintiff, Cheyenne Nalder, has been caused to expend monies for medical and miscellaneous expenses as of this time in excess of $41,851.89, and will in the future be caused to expend additional monies for medical expenses and miscellaneous expenses incidental thereto, in a sum not yet presently ascertainable, and leave of Court will be requested to include said additional damages when the same have been fully determined.

9. Prior to the injuries complained of herein, Plaintiff, Cheyenne Nalder, was an able-bodied male, capable of being gainfully employed and capable of engaging in all other activities for which Plaintiff was otherwise suited. By reason of the premises, and as a direct and proximate result of the negligence of the said Defendants, and each of them, Plaintiff, Cheyenne Nalder, was caused to be disabled and limited and restricted in her occupations and activities, and/or diminution of Plaintiff's earning capacity and future loss of wages, all to her damage in a sum

not yet presently ascertainable, the allegations of which Plaintiff prays leave of Court to insert herein when the same shall be fully determined.

10. Plaintiff has been required to retain the law firm of CHRISTENSEN LAW OFFICES, LLC to prosecute this action, and is entitled to a reasonable attorney's fee.

CLAIM FOR RELIEF:

1. General damages in an amount in excess of $10,000.00;

2. Special damages for medical and miscellaneous expenses in excess of $41,851.89, plus future medical expenses and the miscellaneous expenses incidental thereto in a presently unascertainable amount;

3. Special damages for loss of wages in an amount not yet ascertained and/or diminution of Plaintiff's earning capacity, plus possible future loss of earnings and/or diminution of Plaintiff's earning capacity in a presently unascertainable amount;

4. Costs of this suit;

5. Attorney's fees; and

6. For such other and further relief as to the Court may seem just and proper in the premises.

DATED this 1st day of Oct, 2007.

CHRISTENSEN LAW OFFICES, LLC

BY:_____

DAVID F. SAMPSON, ESQ.,
Nevada Bar #2326
THOMAS CHRISTENSEN, ESQ.,
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1000 S. Valley View Blvd.
Las Vegas, Nevada 89107
Attorney for Plaintiff

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DISTRICT COURT

CLARK COUNTY, NEVADA

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CLERK OF THE COURT

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

DEFAULT

It appearing from the files and records in the above entitled action that GARY LEWIS, Defendant herein, being duly served with a copy of the Summons and Complaint on October 24, 2007: that more than 20 days, exclusive of the day of service, having expired since service upon the Defendants; that no answer or other appearance having been filed and no further time having been granted, the default of the above-named Defendant for failing to answer or otherwise plead to Plaintiff's Complaint is hereby entered.

The undersigned hereby requests
And directs the entry of Default.

DAVID F. SAMPSON, ESQ.
Attorney for Plaintiff
1000 S. Valley View Blvd.
Las Vegas, NV 89107

CHARLES SHORT, CLERK OF COURT

BY: Michelle McCarthy DEC 13 2007
DEPUTY CLERK DATE
MICHELLE McCARTHY

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CLERK OF THE COURT

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JMT
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CLERK OF THE COURT

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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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DISTRICT COURT

CLARK COUNTY, NEVADA

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

PLAINTIFF'S OPPOSITION TO MOTION TO INTERVENE

Date: 9/19/2018
Time: Chambers

Cheyenne Nalder, through her attorney, David A. Stephens, Esq., opposes the Motion to Intervene filed by United Automobile Insurance Company, as follows:

POINTS AND AUTHORITIES

I. INTRODUCTION

Initially, Counsel for Plaintiff apologizes for the lateness filing of this opposition to the motion to intervene. Counsel first learned of this motion to intervene on September 10, 2018. Counsel then contacted Matthew Douglas, Esq., by email requesting an extension of time to respond to the motion in that he had never received the motion to intervene.[1]

Mr. Douglas responded by stating that the motion to intervene was served by mail on August 17, 2018. Counsel for Plaintiff indicated that it had not been received. Mr. Douglas then indicated

[1] Counsel for Plaintiff does not mean to imply, by this statement, that counsel for UAIC did not serve the motion properly. He can only represent that he did not receive the motion. He does not know the reason why it was not received.

that he needed to know the grounds for opposing the motion before he could agree to an extension. Thus, it became easier to do the research and file the opposition late, than do the research on the possible grounds to get an extension of time to file an opposition. Thus, this opposition is being filed late.

II. FACTS

On the 8th day of July, 2007, Defendant, Gary Lewis, ("Lewis"), ran over Cheyenne Nalder, ("Cheyenne"), while he was driving his vehicle on private property located in Lincoln County, Nevada.[2]

Cheyenne was a minor at the time of the accident.

Gary Lewis carelessly and negligently drove his car such that it struck Cheyenne Nalder.

This accident caused serious injuries to Cheyenne.

Following the accident, Cheyenne, with her father as guardian ad litem, filed suit against Lewis. Lewis did not respond to the suit. Therefore, on June 3, 2008, Cheyenne obtained a default judgment against Lewis for $3,500,00.00. A notice of entry of this judgment was filed on August 26, 2008.

When the lawsuit was filed, and at the time the judgment was entered on June 3, 2008, Cheyenne was represented by Christensen Law Offices.[3]

None of that judgment has ever been paid, with the exception of $15,000.00, which was later paid by United Auto Insurance Company, ("UAIC"), following a suit filed against UAIC, which was alleged to be the insurer for Lewis at the time of the accident, for bad faith, failure to defend, and other claims for relief.

In 2018, Cheyenne, due to the fact she had reached the age of majority, filed a motion to amend the judgment to make herself the plaintiff, rather than her father, who had been her guardian

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[2] These statements of facts are based upon allegations in the pleadings filed in this matter, and the statements made in the motion to intervene.

[3] It is counsel's understanding that Cheyenne is still represented by Tom Christensen, Esq., and also by Dennis Prince, Esq., in the litigation and pending appeals involving UAIC's duty to defend Lewis and any related claims.

ad litem.

The amended judgment was signed by this Court and filed on March 28, 2018. On May 18, 2018, a notice of entry of judgment was served on Mr. Lewis.

Until it filed this motion to intervene, UAIC had never appeared in this lawsuit. Now it seeks to intervene.

III. UAIC IS NOT ENTITLED TO INTERVENE IN THIS MATTER

It is too late for UAIC to file a motion to intervene.

A party cannot intervene into a matter where a judgment is final.

> "We conclude that once the district court dismissed this case with prejudice, it lost all jurisdiction concerning that judgment, except to alter, set aside, or vacate its judgment in conformity with the Nevada Rules of Civil Procedure."

SFPP, LP v. District Court, 123 Nev. 608, 173 P.3d 715, (2007).

While the *SFPP* case involved a dismissal of the case, rather than judgment in the case, the analysis still applies. Here, there is a judgment which disposes of all issues in the case. It is too late to intervene. That final judgment disposed of all issues in the case.

> "To avoid any confusion regarding this matter, we clarify that a final judgment is one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs. A post-judgment order awarding attorney's fees and/or costs may be appealed as a special order made after final judgment, pursuant to NRAP 3A(b)(2). *See Smith v. Crown Financial Services,* 111 Nev. 277, 280 n. 2, 890 P.2d 769, 771 n. 2 (1995)."

Lee v. GNLV Corp., 116 Nev. 424, 996 P.2d 416, 417 (2000).

Thus, this Court lacks the jurisdiction to even consider a motion to intervene after the entry of a final judgment, which has occurred.

Additionally, the Nevada Supreme Court has held, "The plain language of NRS 12.130 does not permit intervention subsequent to the entry of a final judgment." *Lopez v. Merit Insurance Co.*, 109 Nev. 553, 556, 853 P.2d 1266, 1268 (1993). Thus, the language of the statue on intervention

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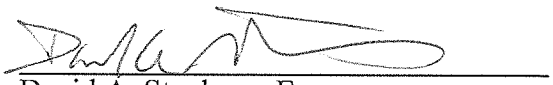
has been held to not permit intervention after the entry of a final judgment.

Because final judgment has been entered in this case, the court lacks jurisdiction to consider a motion to intervene. Additionally, it has been held that the statute on intervention does not allow a post judgment intervention in a case.

For these reasons it is respectfully requested that this Court deny the motion to intervene.

Dated this 11 day of September, 2018.

STEPHENS & BYWATER, P.C.



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Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of September, 2018, I served the following document: **PLAINTIFF'S OPPOSITION TO MOTION TO INTERVENE**

☐ VIA ELECTRONIC FILING; (N.E.F.R. 9(b))

☐ VIA ELECTRONIC SERVICE (N.E.F.R. 9)

■ BY MAIL: by placing the documents(s) listed above in a sealed envelope, postage prepaid in the U. S. Mail at Las Vegas, Nevada, addressed as set forth below:

Matthew J. Douglas, Esq.
Atkin Winner & Sherrod
117 S. Rancho Drive
Las Vegas, NV 89102

■ BY FAX: by transmitting the document(s) listed above via telefacsimile to the fax number(s) set forth below. A printed transmission record is attached to the file copy of this document(s).

Matthew J. Douglas, Esq., 702-243-7059

☐ BY HAND DELIVER: by delivering the document(s) listed above to the person(s) at the address(es) set forth below.

An Employee of Stephens & Bywater

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Send Result Report

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

No.	Date and Time	Destination	Times	Type	Result	Resolution/ECM
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYANNE NALDER, Plaintiff, vs. GARY LEWIS and DOES I through V, inclusive, Defendants.	CASE NO.: 07A549111 DEPT. NO.: 29 **UAIC'S REPLY IN SUPPORT OF ITS MOTION TO INTERVENE**

COMES NOW, UNITED AUTOMOBILE INSURANCE COMPANY (hereinafter referred to as "UAIC"), by and through its attorney of record, ATKIN WINNER & SHERROD and hereby submits this Reply in support of its Motion to Intervene in the present action, pursuant to the attached Memorandum of Points and Authorities, all exhibits attached to its initial Motion, all papers and pleadings on file with this Court and such argument this Court may entertain at the time of hearing.

DATED this 18 day of SEPTEMBER, 2018.

ATKIN WINNER & SHERROD

Matthew J. Douglas
Nevada Bar No. 11371
1117 South Rancho Drive
Las Vegas, Nevada 89102
Attorneys for Proposed Intervenor

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REPLY IN SUPPORT OF MOTION FOR INTERVENTION

I.

Response to Plaintiff's Fact Section

UAIC notes that it has set forth the factual background in regards to this matter in its initial motion and refers the Court to same. However, UAIC must also briefly respond to Plaintiff's fact section.

Plaintiff notes that the original judgment in this case was filed August 26, 2008. What Plaintiff fails to mention, however, is that, thereafter, Plaintiff failed to renew this 2008 judgment against Lewis pursuant to Nevada law. Specifically, as this Court is aware, under N.R.S. 11.190(1)(a) the limitation for action to execute on such a judgment would be six (6) years, unless renewed under N.R.S. 17.214. Accordingly, the date to renew said judgment would have been, by the latest, August 26, 2014. This was never done and, as such, **Plaintiff's judgment in this matter expired as a matter of law in 2014.** Accordingly, Plaintiff's *ex parte* attempts to amend this judgment without advising the Court of same was improper.

Additionally, Plaintiff agrees she filed suit against UAIC alleging bad faith for failure to defend Lewis, but fails to note that two United States District court judges found and, the Ninth Circuit for the U.S. Court of Appeals has affirmed, **that UAIC committed no bad faith in the handling of Plaintiff's claims against Lewis.** However, the Court also found, in late 2013, that UAIC had a duty to defend Lewis. Initially, in late 2013, there was no active need to defend Lewis as, this suit had gone to judgment and, the time to vacate this judgment under N.R.C.P. 60 had passed. Only after the completely opaque attempt to try an 'end around' the expiration of this judgment and, the jurisdiction of the Nevada Supreme Court and Ninth Circuit, by Plaintiff's amendment of the judgment here, did a 'new' controversy arise for which UAIC believes its duty to defend has again been triggered. Of course, as set forth in UAIC's initial Motion, its initial

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attempt to retain counsel for Mr. Lewis to defend him and seek relief from this alleged 'amended judgment' ***<u>has been thwarted by Plaintiff's own counsel who claims he also represents Lewis and has attempted to forbid any action on his behalf.</u>***

Indeed, UAIC must note that Plaintiff's counsel admits in his response that Mr. Christensen continues to represent his client on this original judgment and in the ongoing Appellate matters. Accordingly, for Plaintiff's co-counsel in this case, Mr. Stephens, to allege he was merely seeking to amend the judgment for Cheyenne upon reaching majority, while ignoring Mr. Christensen's continued representation of her and, apparently, the judgment-debtor, Mr. Lewis – as well as the ongoing appellate matters – stretches the bounds of reality. As will be set forth in detail below, we see an attempt of fraud upon the court which should not be countenanced.

II.

ARGUMENT

It is clear from Plaintiff's Opposition that it is late and, as such, this Court may disregard it and grant UAIC's Motion. Alternatively, should this Court consider the merits of the Opposition it is also clear that Plaintiff does not dare dispute that UAIC has properly followed the procedure for intervention pursuant to NRCP 24(a)(2) nor, that UAIC does not have an interest which will negatively impacted should its intervention be denied as it is not adequately represented herein. Rather, the Plaintiff's sole argument appears to be a technical one – that as judgment has been entered, UAIC can no longer intervene. However, UAIC will note that the cases cited by Plaintiff are distinguishable and, more importantly, what Plaintiff is attempting is a fraud upon the court which should overcome the normal prohibition against such an intervention. Accordingly, UAIC asks this Court to grant its Motion to intervene. Alternatively, that this Court may vacate or set aside the Amended Judgment on its own Motion.

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A. Plaintiff's Opposition is clearly late and, as such, should be stricken or disregarded.

As this Court knows, E.D.C.R. 2.20(e) requires any Opposition to be a Motion to be filed within 10 days of service. Here, as the present Motion was filed and served August 16, 2018, allowing 3 days for mailing, the Opposition was due no later than September 4, 2018. As the present Opposition was filed on September 14, 2018 it is technically late and this Court may disregard it and grant UAIC's Motion.

E.D.C.R. 2.20(e) states, as follows:

> (e) Within 10 days after the service of the motion, and 5 days after service of any joinder to the motion, the opposing party must serve and file written notice of nonopposition or opposition thereto, together with a memorandum of points and authorities and supporting affidavits, if any, stating facts showing why the motion and/or joinder should be denied. **Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same.** (emphasis added).

As this Court can see, Plaintiff's Opposition is clearly late pursuant to rule. Moreover, Plaintiff, while alleging she did not receive the Motion, makes no argument that it was not properly served. As such, this Court can exercise its discretion and choose to disregard this Opposition.

Given the lateness of the Opposition and lack of valid excuse justifying same, UAIC asks this Court to disregard the late Opposition and instead construe the failure to timely file an Opposition as an admission the Motion is meritorious and grant same.

B. Alternatively, Plaintiff's Opposition that UAIC is not Entitled to Intervene is Based on Distinguishable Case Law and, in any event, this Court should Exercise its Equitable Authority and Allow said Intervention Based upon Fraud Upon the Court.

For her Opposition, Plaintiff essentially makes one argument – that as this case involves a recently amended judgment which Plaintiff argues is "final" and, thus, UAIC is "too late" to intervene. However, some of the cases cited are distinguishable and, additionally, UAIC argues this involves a 'fraud upon the court' and, as such, this Court may exercise its discretion and allow this Intervention or, vacate the Amended Judgment on the Court's own Motion.

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First, Plaintiff cites to the case of *SFPP, LP v District Court,* 123 Nev. 608 (2007) for the proposition that, generally, a court loses jurisdiction of a case after entry of a final judgment. However, as Plaintiff's own brief notes, the Court in *SFPP* clearly noted an exception to this rule when a party seeks "to alter, set aside, or vacate its judgment in conformity with the Nevada Rules of Civil Procedure." *Id.* Here, UAIC has sought this intervention so as to file just such a Motion, under NRCP 60, and seek relief from a final judgment. *Attached to UAIC's Initial Motion, as Exhibit "I", is a copy of UAIC's proposed responsive pleading to this action, a Motion for Relief from the Judgment pursuant to N.R.C.P. 60.* As UAIC seeks a Motion for relief from judgment under Rule 60, it falls into the exception outlined by the Court in *SPFF* and, accordingly, that case serves as no bar to UAIC's Motion.

Similarly, Plaintiff relies upon *Lee v GNLV Corp.,* 116 Nev. 424 (2000), for the general proposition that a final judgment is one that disposes of all the issues in this case. In so ruling, the court in *Lee* was explaining that the Respondent's motion to dismiss the appeal, which the Appellant therein had filed on the judgment, because a post-judgment motion (regarding costs was still pending) was not well taken because the post-judgment proceeding on fees did delay enforcement of the judgment. Accordingly, the rule set forth in *Lee* only concerns the appealability of a final order has absolutely nothing to do with the separate concerns of a Rule 60 Motion for Relief from judgment. As such, like the *SPFF* case discussion above, the present matter is distinguishable because UAIC seeks to intervene to file a timely and good faith Motion, under NRCP 60, seeking relief from a final judgment. As such, the *Lee* case also serves as no bar to Plaintiff's Motion.

Finally, Plaintiff relies on *Lopez v Merit Ins. Co.*, 109 Nev. 553 (1993), for its main argument that NRS 12.130 does not permit entry intervention subsequent to entry of a final judgment. First, UAIC would like to point out that this case is distinguishable from the standpoint that *Lopez* dealt with a situation where an insurer was seeking to intervene in a case

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filed by its insured against an alleged tortfeasor and, not as here, where **UAIC is seeking to intervene to protect its insured from a judgment on a suit filed by a claimant.** As this Court is likely aware, the case of *Allstate Ins. Co. v Pietrosh,* 454 P.2d 106 (1969), provides generally that an insurer is bound by judgments in favor of its insured against a torfeasor, when it fails to intervene, for purposes of any Underinsured Motorist claim made by its insured. Accordingly, the Court in *Lopez* was dealing with a completely different situation than the case at bar in that, in *Lopez,* the insurer was seeking intervention after judgment to potentially alleviate its Underinsured motorist obligations on a judgment *in favor of its insured and against a tortfeasor* where it had an affirmative obligation to intervene before judgment to do so.

Quite simply, that is not the situation here. UAIC *not Plaintiff's insurer* and, more importantly, *UAIC had no such opportunity to intervene prior to entry of this 'amended judgment.'* As discussed in UAIC's initial Motion, Plaintiff failed to renew the original, 2008, judgment in this case pursuant to Nevada law. Specifically, as this Court is aware, under N.R.S. 11.190(1)(a) the limitation for action to execute on such a judgment would be six (6) years, unless renewed under N.R.S. 17.214. Upon realizing the judgment had never been timely renewed, UAIC filed a Motion to Dismiss the Appeal for Lack of Standing with the Ninth Circuit (in the sister litigation on appeal, which is also set forth in UAIC's initial Motion) on March 14, 2017. Thereafter, on February 23, 2018 the Nevada Supreme Court issued an order accepting this second certified question and ordered Appellants to file their Opening brief within 30 days, or by March 26, 2018. *A copy of the Order accepting the second certified question was attached as Exhibit 'B' to UAIC's initial Motion.* In accepting the certified question, the Nevada Supreme Court rephrased the question as follows:

In an action against an insurer for breach of the duty to defend its insured, can the plaintiff continue to seek consequential damages in the amount of a default judgment obtained against the insured when the judgment against the insured was not renewed and the time for doing so expired while the action against the insurer was pending?

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On August 2, Plaintiff (Appellant therein) filed her Opening Brief on this question and, UAIC has yet to file its Response Brief and, accordingly, the above-quoted question and, issue, *remains pending before the Nevada Supreme Court.* Despite the above, in what appears to be a clear case of forum shopping, Plaintiff retained additional Counsel (Plaintiff's Counsel herein) who filed an *ex parte* Motion before this Court on March 22, 2018 seeking to "amend" the 2008 expired judgment to be in the name of Cheyenne Nalder individually. *A copy of the Ex Parte Motion is attached to UAIC's initial Motion as Exhibit 'C.'* Thereafter, this Court, obviously not having been informed of the above-noted Nevada Supreme Court case, entered the amended judgment and same was filed with a notice of entry on May 18, 2018. *A copy of the filed Amended Judgment is attached to UAIC's initial Motion as Exhibit 'D.'* Upon learning of this "amended judgment" and "new" action (the sister case A-18-772220-C), on July 19, 2018[1], and, given the prior United States District Court's ruling that Gary Lewis is an insured under an *implied* UAIC policy for the loss belying these judgments, UAIC immediately sought to engage counsel to appear on Lewis' behalf in the present action. *A copy of the Judgment of the U.S. District Court finding coverage and implying an insurance policy is attached to UAIC's initial Motion as Exhibit 'G."* Following retained defense Counsel's attempts to communicate with Mr. Lewis to defend him in this action and, potentially, vacate this improper amendment to an expired judgment – retained defense counsel was sent a letter by Tommy Christensen, Esq. – the other Counsel for Plaintiff judgment-creditor herein and in the above-referenced appeal – stating in no uncertain terms that Counsel could not communicate with Mr. Lewis, nor appear and defend him in this action and take action to get relief from this amended judgment. *A copy of Tommy Christensen's letter of August 13, 2018 is attached to UAIC's initial Motion as Exhibit 'H."*

[1] UAIC was only informed of this alleged 'amended judgment' when it received a 3 day notice of intent to take default against Gary Lewis in the 'new' action filed by Nalder on the amended judgment on July 19, 2018.

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In this way, the case at bar is simply not analogous to *Lopez* as UAIC simply never had a duty to intervene prior to this amended judgment, much less ability to do so. That is, the original 2008 judgment was expired and only by Plaintiff's improper attempt to file this 'amended judgment' earlier this year did a need to intervene arise. Moreover, UAIC never even knew of these surreptitious actions on the expired judgment until July 2018 and, thus, intervening prior to that date would have been an impossibility. Accordingly, given the circumstances – Plaintiff attempting to improperly amend an expired judgment while such issues were on appeal in another matter – this Court should use its equitable and discretionary authority to allow such intervention here even if technically 'after judgment.'

Additionally, UACI argues that the circumstances set forth above also offer additional reasons to allow UAIC's intervention in this circumstance. That is, the clear conflict of interest and attempts at perpetrating a fraud upon the court by Plaintiff. As noted above, Plaintiff is represented by Mr. Christensen. Mr. Christensen also purports to be counsel for Lewis and has informed UAIC's first retained counsel for Lewis that he may not appear and attempt to vacate this judgment. Now, after learning of this and trying to intervene itself to protect Lewis and, its own interests, UAIC is told by Plaintiff it cannot intervene. So, per Plaintiff, UAIC's retained defense counsel cannot move to vacate this amended judgment and – UAIC cannot either. This is clearly an attempt at a fraud upon the court solely to benefit Plaintiff and her counsel - and same should not be tolerated.[2]

In *NC-DSH, Inc. v Garner,* 125 Nev. 647 (2009) the Nevada Supreme Court set forth the definition of a fraud upon the Court in considering motion for relief from judgment under NRCP 60. In *NC-DSH, Inc.* the lawyer for a plaintiff's malpractice case forged settlement documents and disappeared with the settlement funds. *Id.* In allowing the Plaintiff's Rule 60 motion to set aside the dismissal (and settlement) the Court set forth the following definition for such a fraud,

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as follows:

> **"The most widely accepted definition, which we adopt, holds that the concept embrace[s] only that species of fraud which does, or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases … and relief should be denied in the absence of such conduct.**

Id at 654.

In the case at bar it seems clear that Plaintiff's counsel (Mr. Christensen) is attempting just such a fraud. That is, besides the original judgment being expired and, the effect of its expiration on appeal before both the Nevada Supreme Court and the U.S. Court of Appeals for the Ninth Circuit, Plaintiff still attempted this 'amendment of judgment'. Moreover, Mr. Christensen (Plaintiff's additional Counsel) represents **both the judgment-creditor and judgment-debtor**. Further, in his role as counsel for Plaintiff and Defendant, Mr. Christensen is attempting, as an officer of the court, to prevent UAIC from exercising its contractual and legal duty to defend Mr. Lewis and vacate this farce of a judgment by telling UAIC's first retained counsel to not file the motion for relief from this judgment. Additionally, Plaintiff is now seeking to deny UAIC a chance to intervene. UAIC pleads this clearly a **fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases.** In other words, Mr. Christensen, Counsel for Plaintiff, is seeking on the one hand to enforce an invalid judgment and, with the other, prevent anyone from contesting it – **by representing both sides.** ***This is the definition of a conflict of interest.*** After all, Plaintiff's is attempting to improperly "fix" an expired multi-million judgment, while at the same time Counsel for Plaintiff is also claiming to represent the judgment-debtor (Lewis) and arising retained counsel not to vacate the amended judgment. How could this possibly benefit Mr. Lewis? Is having a multi-million dollar judgment against him which had expired be resurrected by an improper amendment of the judgment to his benefit? Is preventing anyone

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[2] Indeed, perhaps this should be reported to the State bar.

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from vacating or setting aside this improper amended judgment to his benefit? In short, it does not – **it only benefits Plaintiff and her counsel**. UAIC argues this is clear fraud and collusive conduct and, at the very least, the Court should therefore exercise its equitable power and allow UAIC's intervention and, thereafter, hold an evidentiary hearing on this fraud.

Should this Court decline to allow UAIC to intervene, UAIC further pleads, in the alternative, that this Court vacate the 2018 "amended judgment" on its own Motion given the clear fraud that appears to have been perpetrated and is set forth herein. As this Court is aware, District Courts have the inherent power to set aside judgments procured by extrinsic fraud. *Lauer v District Court,* 62 Nev. 78, 140 P.2d 953. In the case at bar the potential extrinsic fraud abounds. Besides the inherent conflict of interest of Plaintiff's Counsel, it also true that Plaintiff failed to advise this court that 1) the 2008 judgment had expired and, 2) that the issue over the effect of same expired judgment was before both the Nevada Supreme Court and the U.S. Court of Appeals for the Ninth Circuit when it filed its *ex parte* Motion to amend this judgment. Extrinsic fraud is usually found when conduct prevents a real trial on the issues or, prevents the losing party from having a fair opportunity of presenting his/her defenses. *Murphy v Murphy,* 65 Nev. 264 (1948). The Court may vacate or set aside a judgment under Rule 60 on its own Motion. *A-Mark Coin Co. v. Estate of Redfield,* 94 Nev. 495 (1978).

Given the fairly egregious attempt to prevent UAIC from vacating the improper attempt to amend an expired judgment, when such judgment was procured without notice, while these issues were on appeal and, with Plaintiff's counsel representing both sides – UAIC pleads with this Court to exercise its own discretion and authority to vacate the amended judgment based on all of the above.

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III.

CONCLUSION

Based on the foregoing, UAIC asks this Court grant it leave to intervene in this matter to protect its interests and LEWIS'. Alternatively, that this court exercise its inherent authority and discretion to vacate or set aside the improperly obtained amended judgment for the reasons set forth above.

DATED this 18th day of SEPTEMBER, 2018.

ATKIN WINNER & SHERROD

Matthew Douglas, Esq.
Nevada Bar No. 11371
1117 S. Rancho Drive
Las Vegas, Nevada 89102
Attorneys for UAIC

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CERTIFICATE OF SERVICE

I certify that on this 18th day of September, 2018, the foregoing **UAIC's REPLY IN SUPPORT OF MOTION TO INTERVENE** was served on the following by [X] Electronic Service pursuant to NEFR 9 [X] Electronic Filing and Service pursuant to NEFR 9 [ ] hand delivery [ ] overnight delivery [ ] fax [X] fax and mail [ ] mailing by depositing with the U.S. mail in Las Vegas, Nevada, enclosed in a sealed envelope with first class postage prepaid, addressed as follows:

PLAINTIFFS' COUNSEL
David A. Stephens, Esq.
STEPHENS, GOURLEY & BYWATER
3636 N. Rancho Dr.
Las Vegas, Nevada 89130

Victoria Hall

An employee of ATKIN WINNER & SHERROD

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Steven D. Grierson
CLERK OF THE COURT

MSTR
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

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

DEFENDANT'S MOTION TO STRIKE DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

Defendant, Gary Lewis, by and through his counsel, E. Breen Arntz, Esq., hereby brings his Motion to Strike Defendant's Motion for Relief from Judgment (that was filed without authority from Gary Lewis) by Randall Tindall, Esq. See Exhibit 1, attached hereto.

This motion is 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.

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Las Vegas, Nevada 89120
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breen@breen.com

NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL

PLEASE TAKE NOTICE that the foregoing DEFENDANT'S MOTION TO STRIKE DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT will come on for hearing before the above-entitled Court on the 12 day of Dec., 2018 at 9:00 a.m. in Department 29 of the Eighth Judicial District Court in Clark County, Nevada.

Dated this 17th day of October, 2018.

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POINTS AND AUTHORITIES

Defendant, Gary Lewis, was left high and dry by his insurance company, UAIC, back in 2007 when he was sued by Cheyenne Nalder and UAIC did not defend him, resulting in a large judgment against him in case 07A549111. As a result of UAIC's failure, it became the Defendant in a lawsuit brought by Nalder and Lewis against it. That case is currently on appeal in the 9th circuit. The instant lawsuit is brought by Nalder against Lewis and UAIC has hired Randall Tindall to file pleadings on behalf of Gary Lewis. Tindall is the third attorney UAIC has hired to defend Lewis, but the first to disregard his ethical duties of communication with his client and complying with his client's reasonable requests regarding representation. See NRPC 1.2, 1.4 and 3.3.

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The Motion filed by Tindall has been filed without authority and against the express wishes of the client and should be stricken.

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breen@breen.com

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of E. BREEN ARNTZ, ESQ. and that on this 17th day of October, 2018, I served a copy of the foregoing Defendant's **Motion to Strike** Defendant's Motion for Relief of Judgment and Motion to Dismiss 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

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

Randall Tindall, Esq.
Resnick & Louis
8925 W. Russell Road, Suite 225
Las Vegas, NV 89148
rtindall@rlattorneys.com

David A. Stephens, Esq.
Stephens, Gourley & Bywater
3636 North Rancho Drive
Las Vegas, NV 89130
dstephens@sgblawfirm.com

An employee of E. BREEN ARNTZ, ESQ.

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EXHIBIT 1

October 16, 2018

Randall Tindall, Esq.
Resnick and Louis, P.C.
8925 W. Russell Rd., Ste 220
Las Vegas NV 89148
FAX: 702-997-8478
rtindall@rlattorneys.com

Re: Stop telling the Court you represent me.

Dear Mr. Tindall :

You have never communicated with me and I have never retained you to represent me. I am writing to make it very clear to you that I do not want you to make any representations or communications on my behalf without first getting my authority to do so in connection with the lawsuits that are currently pending in Nevada. I left Nevada at the end of 2008. I believe the actions you have taken on my behalf are fraudulent, improper and inaccurate. You already know all of this because Steve Rogers, who was previously hired by UAIC to represent me, also was told this and then did not file anything on my behalf. I have had the issues explored by my own counsel and I do not agree that your actions are in my best interest. My attorney defending me in these two cases is Breen Amtz. My attorney representing me against UAIC is Thomas Christensen. Please communicate with him regarding my desires. Please withdraw your three motions filed on my behalf and discontinue making any representations to the court that you are acting on my behalf. You are not.

Thank you.

Gary Lewis

cc: breen@breen.com
thomasc@injuryhelpnow.com

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Steven D. Grierson
CLERK OF THE COURT

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mdouglas@awslawyers.com
Attorneys for Intervenor United Automobile Ins. Co.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES NALDER, Plaintiff, vs. GARY LEWIS and DOES I through V, inclusive, Defendants.	CASE NO.: 07A549111 DEPT. NO.: XXIX **NOTICE OF ENTRY OF ORDER ON INTERVENOR UNITED AUTOMOBILE INSURANCE COMPANY'S MOTION TO INTERVENE**

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

YOU WILL PLEASE TAKE NOTICE that the attached **ORDER ON INTERVENOR UNITED AUTOMOBILE INSURANCE COMPANY'S MOTION TO INTERVENE** was entered by the Court on the 19th day of October, 2018.

DATED this 19th day of October, 2018.

ATKIN WINNER & SHERROD

Matthew J. Douglas
Nevada Bar No. 11371
1117 South Rancho Drive
Las Vegas, Nevada 89102
Attorneys for Intervenor United Automobile Ins. Co.

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CERTIFICATE OF SERVICE

I certify that on this 19th day of October, 2018, the foregoing **NOTICE OF ENTRY OF ORDER ON INTERVENOR UNITED AUTOMOBILE INSURANCE COMPANY'S MOTION TO INTERVENE** was served on the following by [ ] Electronic Service pursuant to NEFR 9 [**X**] Electronic Filing and Service pursuant to NEFR 9 - to all counsel on the service list [ ] hand delivery [ ] overnight delivery [ ] fax [ ] fax and mail [**X**] mailing by depositing with the U.S. mail in Las Vegas, Nevada, enclosed in a sealed envelope with first class postage prepaid, addressed as follows:

David Stephens, Esq.
STEPHENS & BYWATER, P.C.
3636 North Rancho Drive
Las Vegas, NV 89130

Randall Tindall, Esq.
Carissa Christensen, Esq.
RESNICK & LOUIS, P.C.
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An employee of ATKIN WINNER & SHERROD

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Attorneys for Intervenor United Automobile Insurance Company

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

~~CHEYANNE~~ James NALDER, Plaintiff, vs. GARY LEWIS and DOES I through V, inclusive, Defendants.	CASE NO.: 07A549111 DEPT. NO.: 29

ORDER

Intervenor UNITED AUTOMOBILE INSURANCE COMPANY'S Motion to Intervene came on for hearing on the Chambers Calendar before the Honorable Judge David Jones, on September 19, 2018, and upon review of and consideration of the proceedings and circumstances of this matter, the papers and pleadings on file, and for good cause appearing, ~~and the Court's minute order stating there being no Opposition,~~

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Intervenor UNITED AUTOMBILE INSURANCE COMPANY'S Motion to Intervene is GRANTED;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Intervenor UNITED AUTOMBILE INSURANCE COMPANY'S shall file its responsive pleading within seven (7) days from the date of entry of this Order.

DATED this 11 day of October 2018

DISTRICT COURT JUDGE

Submitted by:

ATKIN WINNER & SHERROD

Matthew J. Douglas
Nevada Bar No.11371
1117 South Rancho Drive
Las Vegas, Nevada 89102
Attorneys for Intervenor UNITED
AUTOMOBILE INSURANCE COMPANY

ATKIN WINNER & SHERROD LTD
A NEVADA LAW FIRM

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Attorneys for Intervenor United Automobile Insurance Company

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES NALDER, Plaintiff, vs. GARY LEWIS and DOES I through V, inclusive, Defendants, UNITED AUTOMOBILE INSURANCE COMPANY, Intervenor.	CASE NO.: 07A549111 DEPT. NO.: XXIX **UAIC'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO NRCP 60**

COMES NOW, UNITED AUTOMOBILE INSURANCE COMPANY (hereinafter referred to as "UAIC"), by and through its attorney of record, ATKIN WINNER & SHERROD and hereby brings its Motion for Relief from Judgment Pursuant to NRCP 60(b), asking that this Court declare as void the Amended Judgment entered on March 28, 2018, because the underlying Judgment expired on 2014 and is snot capable of being revived.

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This Motion s made and based upon the papers and pleadings on file herein, the Memorandum of Points and Authorities attached hereto, and such oral argument as the Court may permit.

DATED this 19th day of OCTOBER, 2018.

ATKIN WINNER & SHERROD

Matthew J. Douglas
Nevada Bar No. 11371
1117 South Rancho Drive
Las Vegas, Nevada 89102
Attorneys for Intervenor UAIC

NOTICE OF MOTION

TO: ANY AND ALL PARTIES AND THEIR COUNSEL OF RECORD:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing **MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO NRCP 60** for hearing before the above-entitled Department XXIX on the 12 day of December, 2018, at the hour of 9:00 a.m. in the forenoon of said date, or as soon thereafter as counsel can be heard.

DATED this 19th day of OCTOBER, 2018.

ATKIN WINNER & SHERROD

Matthew Douglas, Esq.
Nevada Bar No. 11371
117 South Rancho Drive
Las Vegas, Nevada 89102
Attorneys for Intervenor UAIC

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This Court made a mistake of law based on incomplete/incorrect facts presented in and Ex Parte Motion to Amended Judgment, when entering the Oder granting the Motion on March 28, 2018. The judgment which Plaintiff, Cheyenne Nalder ("Cheyenne") moved to amend was entered on June 3, 2008. The judgment creditor, Cheyenne's guardian ad litem, James Nalder, did not renew the Judgment as required By Nevada Law before it expired on June 3, 2014, six (6) years after it was entered.

The Amended Judgment ostensibly revived the expired Judgment, despite the fact that Cheyenne presented this Court with no legal support for such revival. Cheyenne's Motion proposes that tolling provisions applicable to causes of action are also applicable to the deadlines to renew judgments. However, none of the authority cited in her Motion supports misappropriating tolling provisions applicable to certain causes of action to extend the time to renew a judgment, nor does any other authority. Pursuant to NRCP 60, the Court should declare that the Amended Judgment is void and that the original judgment has expired, and therefore is not enforceable.

II.

STATEMENT OF FACTS

This case involves a July 8, 2007 accident, Cheyenne Nalder, ("Cheyenne") who was then a minor, alleged injuries. On October 9, 2007, Cheyenne's guardian ad litem, James Nalder, filed a Complaint against Gary Lewis ("Lewis"). See Complaint attached hereto as Exhibit "A."

UAIC, the putative insurer for Lewis, initially denied coverage due to a lapse in

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coverage[1]. Lewis did not respond to the Complaint and a default was taken against him. *Id.* On June 3, 2008.[2] a judgment was entered against him in the amount of $3.5 million. See Judgment attached hereto as Exhibit "B". James Nalder as guardian ad litem for Cheyenne was the judgment creditor. *Id.* NRS 11.190(1)(a) provides that a judgment expires in six (6) years, unless it is timely renewed. As such, the Judgment expired on June 3, 2014.

On March 22, 2018 nearly 10 years after the Judgment was entered, and nearly four (4) years after it expired, Cheyenne filed an "Ex Parte Motion to Amend Judgment in the Name of Cheyenne Nalder, Individually" ("Ex Parte Motion") in her personal injury case, Case No. A-07-54911-C. *See* Exhibit "C." Her Motion did not advise the Court that the Judgment she sought to amend had expired. Rather, it cited two statutes, NRS 11280 and 11.300, without explaining why they were applicable to her request, and asked the Court to amend the Judgment to be in her name alone. In short, the Court was not put on notice that it was being asked to ostensibly revive an expired judgment. *Id.*

With an incomplete account of the issues presented, the Court granted Cheyenne's Ex Parte Motion and issued an Amended Judgment on March 28, 2018 which was filed with a Notice of Entry on May 18, 2018. *See* Exhibit "D."

As the judgment had expired and an Amended Judgment could not be issued to revive it. UAIC brings the instant Motion pursuant to NRCP 60(b), as it has now been found to be the insurer of Lewis under an implied policy and, thus, has an interest in this matter, and seeks to avoid the Amended Judgment and declare that the original Judgment has expired.

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[1] Later, during the subsequent action against UAIC (which remains on appeal in the Ninth Circuit for the U.S. Court of Appeals and, currently, on a 2nd certified question to the Nevada Supreme Court) the Court found an ambiguity in the renewal statement for Lewis' policy and, accordingly, *implied* a policy of insurance for Lewis' $15,000 policy limits in December 2013. Importantly, the Ninth Circuit has affirmed their was no "bad faith" on the part of UAIC. Regardless, per the orders of the Federal District Court and Ninth Circuit, UAIC has now been found to be Lewis' insurer, under this implied policy.

[2] Judgments are entered when filed, not when a Notice of Entry is made. NRCP 58(c).

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III.

ARGUMENT

A. The Judgment Expired on June 3, 2014

Nevada law provides that the statute of limitations for execution upon a judgment is six(6) years. NRS 11.190(1)(b). The judgment creditor may renew a judgment (and therefore the statute of limitation) for an additional six years by following the procedure mandated by NRS 17.214. The mandated procedures were not followed. Therefore the judgment expired.

NRS 17.214(1)(a) sets forth the procedure that must ne followed to renew a judgment. A document titled "Affidavit of Renewal" containing specific information outlined in the statute must be filed with the clerk of the court where the judgment is filed within 90 days before the date the judgment expires. Here, the Affidavit of Renewal was required to be filed by March 5, 2014. No such Affidavit of Renewal was filed by James Nalder, the judgement creditor. Cheyenne was still a minor on March 5, 2014. The Affidavit of Renewal must also be recorded if the original judgment was recorded, and the judgment debtor must be served. No evidence of recordation (if such was required) or service on Lewis is present in the record.

The Nevada Supreme Court, in *Leven v Frey*, 123 Nev.399,168 P.3d 712 (2007), held that judgment creditors must strictly comply with the procedure set forth in NRS 17.214 in order to validly renew a judgment. *Id.* At 405-408, 168 P.3d 717-719. There is no question that neither Cheyenne nor her guardian ad litem did so. Therefore the Judgment expired.

1. The deadline to renew the Judgment was not tolled by any statute or rule

In her Ex Parte Motion, Cheyenne suggested that the deadlines mandated by NRS 17.214 were somehow extended because certain statutes of information can be tolled for causes of action under some circumstances. No such tolling applies to renewal of a judgment because renewal of a judgment is not a cause of action.

The introduction to NRS 11.090, the statute of limitation law, states that it applies to:

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"...actions other than those from the recovery of real property, unless further limited by specific statute..." The list which follows includes various causes of action for which suit can be brought. Nowhere in the list is renewing a judgment defined as or analogized to a cause of action.

The Nevada Supreme Court has held that actions to enforce a judgment fall under the six year "catch all" provision of NRS 11.090(1)(a). *Leven* at 403, 168 P.3d at 715 ("An action on a judgment or its renewal must be commenced within six years under NRS 11.190 (1) (a); thus a judgment expires by limitation in six years"). In summary, neither statute, NRS 11.190 nor NRS 17.214, provides for any tolling of the time period to renew a judgment.

///

2. *The deadline to renew the Judgment was not tolled by Cheyenne's minority*

Setting aside the fact that the deadline to renew a judgment is not an action to which statutes of limitation/tolling apply, Cheyenne's proposition that the deadlines set forth in NRS 17.214 were tolled by her minority are inapt for a few reasons. First, the tolling statute cited by Cheyenne, NRS 11.280, does not universally toll all statutes of limitations while a plaintiff is a minor. Rather, it is expressly limited to actions involving sales of probate estates.

> **Legal disability prevents running of statute. NRS 11.260 and 11.270 shall not apply to minors or others under any legal disability to sue at the time when the right of action first accrues, but all such persons may commence an action at any time within 1 year after the removal of the disability.**

Emphasis added. NRS 11.260 applies to actions to recover an estate sold by a guardian. NRS 11.270 applies to actions to recover estates sold by an executor or administrator. Neither of those causes of action are at issue here. Therefore, NRS 11.260 would not authorize tolling the deadline for the renewal of a judgment while a judgment creditor was a minor. This statute would not apply in any instance because the judgment creditor, James, was not a minor, and so did not have a legal disability.

On March 5, 2014, the deadline to file the Affidavit of Renewal, Cheyenne was still a

minor. The judgment creditor was her guardian ad litem James Nalder. It was James Nalder, not Cheyenne, who had the responsibility to file the Affidavit of Renewal by the March 5, 2014 deadline. The fact that Cheyenne, the real party in interest was a minor is not legally relevant.

As Cheyenne was not the judgment creditor at any time prior to the date of the issuance of the Amended Judgment, anyone looking at the Judgment would believe that it expired on June 4, 2014, since there was no Affidavit of Renewal filed. If Cheyenne's apparent argument were given credence, either the judgment never expired, because she was the real party in interest and was a minor at the time, the Judgment would have otherwise expired, or the judgment did expire but was revived upon her reaching the age of majority. To adopt this proposition would frustrate the certainty NRS 17.214 was enacted to promote - the reliability of the title to real property.

If tolling of deadlines to amend judgments were sanctioned, title to real property owned by anyone who had ever been a judgment debtor would be clouded, as a title examiner would not know whether a judgment issued more that six years prior had expired pursuant to statute, or was still valid, or could be revived when a real party in interest who was a minor reached the age of majority. As the court held in *Leven,* one of the primary reasons for the need to strictly comply with NRS 17.214's recordation requirement is to "procure reliability of the title searches for both creditors and debtors since any lien on real property created when a judgment is recorded continues upon that judgment's proper renewal." *Id.* At 408-409, 168 P.3d 712, 719. Compliance with the notice requirement of NRS 17.124 is important to preserve the due process rights of the judgment debtor. *Id.* If a judgment debtor is not provided with notice of the renewal of a Judgment, he may believe that the judgment has expired and he need take no further action to defend himself against execution.

3. *Lewis' residency in California did not toll the deadline to renew the Judgment*

Cheyenne's Ex Parte Motion next cites NRS 11.3000, which provides "If, when the cause of action shall accrue against a person, the person is out of State, the action may be commenced

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within the time herein limited after the person's return to the State; and if after the cause of action shall have accrued the person departs from the State, the time of the absence shall not be part of the time prescribed for the commencement of the action." Cheyenne's argument that the deadline to renew the Judgment are tolled by NRS 11.300 fails because, again renewing a judgment is not a cause of action. As the Supreme Court of North Dakota, a state with similar statutes to Nevada regarding judgments, held in *F/S Manufacturing v Kensmore*, 789 N.W.2d 853 (N.D. 2011), "Because the statutory procedure for renewal by affidavit is not a separate action to renew the judgment, the specific time period[provided to renew] cannot be tolled under [the equivalent to NRS 11.300] based on a judgment debtor's absence for the state." *Id.* At 858.

In addition, applying Cheyenne's argument that the time to renew a judgment was tolled because of the judgment debtor's absence from Nevada would have a similarly negative impact on the ability for property owners to obtain clear title to their property. Nothing on a judgment would reflect whether a judgment debtor was outside of the state and a facially expired judgment was still valid. Therefore, essentially, a responsible title examiner would have to list any judgment that had ever been entered against a property owner on the title insurance policy, because he could not be sure the judgments older that six years for which no affidavit of renewal had been filed were expired or the expiration was tolled.

B. The Court made an Error of Law, Likely Based on Mistake of Fact, When it Granted the Ex Parte Motion to Amend Judgment

NRCP 60(b) allows this Court to relieve a party from a final judgment due to mistake (NRCP 60(b)(1) or because a judgment is void (NRCP 60(b)(4). Both of these provisions apply.

1. The Court mad a mistake of law when it granted the Amended Judgment

Because the Ex Parte Motion was ex parte, it was not served on Lewis or UAIC nor did Lewis or UAIC have an opportunity to make the Court aware that the Judgment had already expired on its own terms, and that Cheyenne's position that the deadline to renew the judgment

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was tolled was inapt. The Ex Parte Motion did not advise the Court that the Judgment had expired in 2014 and had not been properly renewed. Had the court been fully apprised of the facts, it likely would not have granted the Ex Parte Motion. Since the Amended Judgment was entered on March 28, 2018, and the Notice of Entry not filed until May 18, 2018, a motion to set aside the amended judgment on the basis of mistake is timely as it is made within six months of the entry of the judgment. Accordingly, this Motion is timely and this Court should rectify the mistake and void the Amended Judgment in accordance with NRCP 60(b)(1).

2. *The Amended Judgment is void.*

As demonstrated above, the Judgment expired. It was not renewed. There is no legal or equitable basis for the Court to revive it. The six-month deadline does not apply to requests for relief from a judgment because the judgment is void. Therefore , the instant motion is timely. The Amended Judgment is void and, pursuant to NRCP 60(b)(4) this Court should declare it void and unenforceable.

IV.

CONCLUSION

Since the Judgment expired in 2014, the Amended Judgment should not have been issued. It should be voided, and the Court should declare that the Judgment has expired.

DATED this 19th day of October, 2018.

ATKIN WINNER & SHERROD

Matthew Douglas, Esq.
Nevada Bar No. 11371
1117 S. Rancho Drive
Las Vegas, Nevada 89102
Attorneys for UAIC

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CERTIFICATE OF SERVICE

I certify that on this 19th day of October, 2018, the foregoing **UAIC'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO NRCP 60** was served on the following by [X] Electronic Service pursuant to NEFR 9 [X] Electronic Filing and Service pursuant to NEFR 9 [ ] hand delivery [ ] overnight delivery [ ] fax [ ] fax and mail [X] mailing by depositing with the U.S. mail in Las Vegas, Nevada, enclosed in a sealed envelope with first class postage prepaid, addressed as follows:

David Stephens, Esq.
STEPHENS & BYWATER, P.C.
3636 North Rancho Drive
Las Vegas, NV 89130

Randall Tindall, Esq.
Carissa Christensen, Esq.
RESNICK & LOUIS, P.C.
8925 West Russell Road Suite 220
Las Vegas, NV 89148

Victoria Hall

An employee of ATKIN WINNER & SHERROD

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EXHIBIT "A"

COM
THOMAS CHRISTENSEN, ESQ.
Nevada Bar No. 2326
DAVID F. SAMPSON, ESQ.
Nevada Bar No. 6811
CHRISTENSEN LAW OFFICES, LLC
1000 S. Valley View Blvd.
Las Vegas, Nevada 89107
Attorneys for Plaintiffs

FILED
MAY 22 1 48 PM '09
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES NALDER, Guardian Ad Litem for minor Cheyanne Nalder, real party in interest, and GARY LEWIS, Individually; Plaintiffs, vs. UNITED AUTOMOBILE INSURANCE CO, DOES I through V, and ROE CORPORATIONS I through V, inclusive Defendants.	Case No.: A-09-590967-C Dept No.: II

COMPLAINT

COME NOW the Plaintiffs, James Nalder, Guardian Ad Litem for minor, Cheyanne Nalder, real party in interest in this matter, and Gary Lewis, by and through their attorneys of record, DAVID SAMPSON, ESQ., of the law firm of CHRISTENSEN LAW OFFICES, LLC, and for Plaintiffs' Complaint against the Defendants, and each of them, allege as follows:

1. That Plaintiff, James Nalder, Guardian Ad Litem for minor, Cheyanne Nalder real party in interest, was at all times relevant to this action a resident of the County of Clark, State of Nevada.

2. That Plaintiff, Gary Lewis, was at all times relevant to this action a resident of the County of Clark, State of Nevada.

3. That Defendant, United Automobile Insurance Co. (hereinafter "UAI"), was at all times relevant to this action an automobile insurance company duly authorized to act as an insurer in the State of Nevada and doing business in Clark County, Nevada.

4. That the true names and capacities, whether individual, corporate, partnership, associate or otherwise, of Defendants, DOES I through V and ROE CORPORATIONS I through V, are unknown to Plaintiffs, who therefore sue said Defendants by such fictitious names. Plaintiffs are informed and believe and thereon allege that each of the Defendants designated herein as DOE or ROE CORPORATION is responsible in some manner for the events and happenings referred to and caused damages proximately to Plaintiffs as herein alleged, and that Plaintiffs will ask leave of this Court to amend this Complaint to insert the true names and capacities of DOES I through V and ROE CORPORATIONS I through V, when the same have been ascertained, and to join such Defendants in this action.

5. That, at all times relevant hereto, Gary Lewis was the owner of a certain 1996 Chevy Silverado with vehicle identification number 1GCEC19M6TE214944 (hereinafter "Plaintiff's Vehicle").

6. That Gary Lewis had in effect on July 8, 2007, a policy of automobile insurance on the Plaintiff's Vehicle with Defendant, UAI (the "Policy"); that the Policy provides certain benefits to Cheyanne Nalder as specified in the Policy; and the Policy included liability coverage in the amount of $15,000.00/$30,000.00 per occurrence (hereinafter the "Policy Limits").

7. That Gary Lewis paid his monthly premium to UAI for the policy period of June 30, 2007 through July 31, 2007.

8. That on July 8, 2007 on Bartolo Rd in Clark County Nevada, Cheyenne Nalder was a pedestrian in a residential area, Plaintiff's vehicle being operated by Gary Lewis when Gary Lewis drove over top of Cheyanne Nalder causing serious personal injuries and damages to Cheyanne Nalder.

9. That Cheyanne Nalder made a claim to UAI for damages under the terms of the Policy due to her personal injuries.

10. That Cheyanne Nalder offered to settle his claim for personal injuries and damages against Gary Lewis within the Policy Limits, and that Defendants, and each of them, refused to settle the claim of Cheyanne Nalder against Gary Lewis within the Policy Limits and in fact denied the claim all together indicating Gary Lewis did not have coverage at the time of the accident.

11. That Plaintiff, Gary Lewis has duly performed all the conditions, provisions and terms of the Policy relating to the loss sustained by Plaintiff, Cheyanne Nalder, and has furnished and delivered to the Defendants, and each of them, full and complete particulars of said loss and have fully complied with all of the provisions of the Policy relating to the giving of notice of said loss, and have duly given all other notices required to be given by the Plaintiffs under the terms of the Policy, including paying the monthly premium.

12. That Plaintiff, Cheyanne Nalder, is a third party beneficiary under the Policy as well as a Judgment Creditor of Gary Lewis and is entitled to pursue action against the Defendants directly under Hall v. Enterprise Leasing Co., West, 122 Nev. 685, 137 P.3d 1104, 1109 (2006), as well as Denham v. Farmers Insurance Company, 213 Cal.App.3d.1061, 262 Cal.Rptr. 146 (1989).

13. That Cheyanne Nalder conveyed to UAI her willingness to settle her claim against Gary Lewis at or within the policy limits of $15,000.00 provided they were paid in a commercially reasonable manner.

14. That Cheyanne Nalder and Gary Lewis cooperated with UAI in its investigation including but not limited to providing a medical authorization to UAI on or about August 2, 2007.

15. That on or about August 6, 2007 UAI mailed to Plaintiff, Cheyanne Nalders' attorney, Christensen Law Offices, a copy of "Renewal Policy Declaration Monthly Nevada Personal Auto Policy" for Gary Lewis with a note that indicated "There was a gap in coverage".

16. That on or about October 10, 2007 UAI mailed to Plaintiff, Cheyanne Nalders' attorney, Christensen Law Offices, a letter denying coverage.

17. That on or about October 23, 2007, Plaintiff, Cheyanne Nalder provided a copy of the complaint filed against UAI's insured Gary Lewis.

18. That on or about November 1, 2007, UAI mailed to Plaintiff, Cheyanne Nalders' attorney, Christensen Law Offices, another letter denying coverage.

19. That UAI denied coverage stating Gary Lewis had a "lapse in coverage" due to non-payment of premium.

20. That UAI denied coverage for non-renewal.

21. That UAI mailed Gary Lewis a "renewal statement" on or about June 11, 2007 that indicated UAI's intention to renew Gary Lewis' policy.

22. That upon receiving the "renewal statement", which indicated UAI's intention to renew Gary Lewis' policy, Gary Lewis made his premium payment and procured insurance coverage with UAI.

23. That UAI was required under the law to provide insurance coverage under the policy Gary Lewis had with UAI for the loss suffered by Cheyenne Nalder, and was under an obligation to defend Gary Lewis and to indemnify Gary Lewis up to and including the policy limit of $15,000.00, and to settle Cheyyene's claim at or within the $15,000.00 policy limit when given an opportunity to do so.

24. That UAI never advised Lewis that Nalder was willing to settle Nalder's claim against Lewis for the sum of $15,000.00.

25. UAI did not timely evaluate the claim nor did it tender the policy limits.

26. Due to the dilatory tactics and failure of UAI to protect their insured by paying the policy limits when given ample opportunity to do so, Plaintiff, Nalder, was forced to seek the services of an attorney to pursue his rights under her claim against Lewis.

27. Due to the dilatory tactics and failure of UAI to protect their insured by paying the policy limits when given ample opportunity to do so, Plaintiff, Cheyanne Nalder, was forced to file a complaint on October 9, 2007 against Gary Lewis for her personal injuries and damages suffered in the July 8, 2007 automobile accident.

28. The filing of the complaint caused additional expense and aggravation to both Cheyanne Nalder and Gary Lewis.

29. Cheyanne Nalder procured a Judgment against Gary Lewis in the amount of $3,500,000.00.

30. UAI refused to protect Gary Lewis and provide Gary Lewis with a legal defense to the lawsuit filed against Gary Lewis by Cheyanne Nalder.

31. That Defendants, and each of them, are in breach of contract by their actions which include, but are not limited to:

a. Unreasonable conduct in investigating the loss;

b. Unreasonable failure to provide coverage for the loss;

c. Unreasonable delay in making payment on the loss;

d. Failure to make a prompt, fair and equitable settlement for the loss;

e. Unreasonably compelling Plaintiffs to retain an attorney before making payment on the loss.

32. As a proximate result of the aforementioned breach of contract, Plaintiffs have suffered and will continue to suffer in the future, damages in the amount of $3,500,000.00 plus continuing interest.

33. As a further proximate result of the aformentioned breach of contract, Plaintiffs have suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses, all to their general damage in excess of $10,000.00.

34. As a further proximate result of the breach of contract, Plaintiffs were compelled to retain legal counsel to prosecute this claim, and Defendants, and each of them, are liable for their attorney's fees reasonably and necessarily incurred in connection therewith.

35. That Defendants, and each of them, owed a duty of good faith and fair dealing implied in every contract.

36. That Defendants, and each of them, were unreasonable by refusing to cover the true value of the claim of Cheyanne Nalder, wrongfully failing to settle within the Policy Limits when they had an opportunity to do so, and wrongfully denying coverage.

37. That as a proximate result of the aforementioned breach of the implied covenant of good faith and fair dealing, Plaintiffs have suffered and will continue to suffer in the future, damages in the amount of $3,500,000.00 plus continuing interest.

38. That as a further proximate result of the aformentioned breach of the implied covenant of good faith and fair dealing, Plaintiffs have suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses, all to their general damage in excess of $10,000.00.

39. That as a further proximate result of the aforementioned breach of the implied covenant of good faith and fair dealing, Plaintiffs were compelled to retain legal counsel to prosecute this claim, and Defendants, and each of them, are liable for their attorney's fees reasonably and necessarily incurred in connection therewith.

40. That Defendants, and each of them, acted unreasonably and with knowledge that there was no reasonable basis for its conduct, in its actions which include but are not limited to: wrongfully refusing to cover the value of the claim of Cheyanne Nalder, wrongfully failing to settle within the Policy Limits when they had an opportunity to do so and wrongfully denying the coverage.

41. That as a proximate result of the aforementioned bad faith, Plaintiffs have suffered and will continue to suffer in the future, damages in the amount of $3,500,000.00 plus continuing interest.

42. That as a further proximate result of the aformentioned bad faith, Plaintiffs have suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses, all to their general damage in excess of $10,000.00.

43. That as a further proximate result of the aforementioned bad faith, Plaintiffs were compelled to retain legal counsel to prosecute this claim, and Defendants, and each of them, are liable for their attorney's fees reasonably and necessarily incurred in connection therewith.

44. That Defendants, and each of them, violated NRS 686A.310 by their actions, including but not limited to: wrongfully refusing to cover the value of the claim of Cheyanne Nalder, wrongfully failing to settle within the Policy Limits when they had an opportunity to do so and wrongfully denying coverage.

45. That NRS 686A.310 requires that insurance carriers conducting business in Nevada adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies, and requires that carriers effectuate the prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear.

46. That UAI did not adopt and implement reasonable standards for the prompt investigation and processing of claims arising under its insurance policies, and did not effectuate the a prompt, fair and/or equitable settlement of Nalder's claim against Lewis in which liability of the insurer was very clear, and which clarity was conveyed to UAI.

47. That NAC 686A.670 requires that an insurer complete an investigation of each claim within 30 days of receiving notice of the claim, unless the investigation cannot be reasonably completed within that time.

48. That UAI received notice of Nalder's claim against Lewis, at the very latest, on or before August 6, 2007. That it was more than reasonable for UAI to complete its investigation of Nalder's claim against Lewis well within 30 days of receiving notice of the claim.

49. That UAI did not offer the applicable policy limits.

50. That UAI did failed to investigate the claim at all and denied coverage.

51. That as a proximate result of the aforementioned violation of NRS 686A.310, Plaintiffs have suffered and will continue to suffer in the future, damages in the amount of $3,500.000.00 plus continuing interest.

52. That as a further proximate result of the aforementioned violation of NRS 686A.310, Plaintiffs have suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses, all to their general damage in excess of $10,000.00.

53. That as a further proximate result of the aforementioned violation of NRS 686A.310, Plaintiffs were compelled to retain legal counsel to prosecute this claim, and Defendants, and each of them, are liable for their attorney's fees reasonably and necessarily incurred in connection therewith.

54. That the Defendants, and each of them, have been fraudulent in that they have stated that they would protect Gary Lewis in the event he was found liable in a claim. All of this was done in conscious disregard of Plaintiffs' rights and therefore Plaintiffs are entitled to punitive damages in an amount in excess of $10,000.00.

WHEREFORE, Plaintiffs, pray for judgment against Defendants, and each of them, as follows:

1. Payment for the excess verdict rendered against Lewis which remains unpaid in an amount in excess of $3,500,000.00;

2. General damages for mental and emotional distress and other incidental damages in an amount in excess of $10,000.00;

3. Attorney's fees and costs of suit incurred herein; and

4. Punitive damages in an amount in excess of $10,000.00;

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5. For such other and further relief as this Court deems just and proper.

DATED this 17 day of April, 2009.

CHRISTENSEN LAW OFFICES, LLC.

By: _____

Thomas Christensen, Esq.
David F. Sampson, Esq.
Nevada Bar No. 6811
1000 South Valley View Blvd
Las Vegas, Nevada 89107
Attorneys for Plaintiffs

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EXHIBIT "B"

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JUDG
DAVID F. SAMPSON, ESQ.,
Nevada Bar #6811
THOMAS CHRISTENSEN, ESQ.,
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(702) 870-1000
Attorney for Plaintiff,
JAMES NALDER As Guardian Ad
Litem for minor, CHEYENNE NALDER

FILED
AUG 26 11 00 AM '08
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

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

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

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

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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.	)	CASE NO: A549111
	)	DEPT. NO: VI
GARY LEWIS, and DOES I through V, inclusive	)	
Defendants.	)	

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:

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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.

[redacted]

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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EXHIBIT “C”

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Electronically Filed
3/22/2018 11:15 AM
Steven D. Grierson
CLERK OF THE COURT

MTN
David A. Stephens, Esq.
Nevada Bar No. 00902
STEPHENS, GOURLEY & BYWATER
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Facsimile: (702) 656-2776
Email: dstephens@sgblawfirm.com
Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER, Plaintiff, vs. GARY LEWIS, Defendants.	CASE NO.: ~~A549111~~ 07-A-549111 DEPT NO.: XXIX

EX PARTE MOTION TO AMEND JUDGMENT IN THE NAME OF CHEYENNE NALDER, INDIVIDUALLY

Date: N/A

Time: N/A

NOW COMES Cheyenne Nalder, by and through her attorneys at STEPHENS, GOURLEY & BYWATER and moves this court to enter judgment against Defendant, GARY LEWIS, in her name as she has now reached the age of majority. Judgment was entered in the name of the guardian ad litem. (See Exhibit 1) Pursuant to NRS 11.280 and NRS 11.300, Cheyenne now moves this court to issue the judgment in her name alone (See Exhibit 2) so that she may pursue collection of the same. Cheyenne turned 18 on April 4, 2016. In addition, Defendant Gary Lewis, has been absent from the State of Nevada since at least February 2010.

/ / / /

Therefore, Cheyenne Nalder hereby moves this court to enter the judgment in her name of $3,500,000.00, with interest thereon at the legal rate from October 9, 2007, until paid in full.

Dated this 19 day of March, 2018.

STEPHENS GOURLEY & BYWATER

David A. Stephens, Esq.
Nevada Bar No. 00902
3636 North Rancho Drive
Las Vegas, Nevada 89130
Attorneys for Plaintiff

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EXHIBIT "1"

JMT
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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.	)	CASE NO: A549111
	)	DEPT. NO: VI
GARY LEWIS, and DOES I through V, inclusive	)	
Defendants.	)	

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:

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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.

[redacted]
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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EXHIBIT "2"

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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
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Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER, Plaintiff, vs. GARY LEWIS, Defendant.	CASE NO: A549111 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 $3,434,4444.63 in pain, suffering, and disfigurement, with interest thereon at the legal rate from October 9, 2007, until paid in full.

DATED this _____ day of March, 2018.

_____
District Judge

Submitted by:
STEPHENS GOURLEY & BYWATER

DAVID A. STEPHENS, ESQ.
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STEPHENS GOURLEY & BYWATER
3636 North Rancho Dr
Las Vegas, Nevada 89130
Attorneys for Plaintiff

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EXHIBIT "D"

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5/18/2018 3:37 PM
Steven D. Grierson
CLERK OF THE COURT

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Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER, Plaintiff, vs. GARY LEWIS Defendant.	Case No. 07A549111 Dept. No. XXIX

NOTICE OF ENTRY OF AMENDED JUDGMENT

NOTICE IS HEREBY GIVEN that on the 26th day of March, 2018, the Honorable David M. Jones entered an **AMENDED JUDGMENT,** which was thereafter filed on March 28, 2018, in the above entitled matter, a copy of which is attached to this Notice.

Dated this 17 day of May, 2018.

STEPHENS & BYWATER

David A. Stephens, Esq.
Nevada Bar No. 00902
3636 North Rancho Drive
Las Vegas, Nevada 89130
Attorney for Brittany Wilson

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the law office of STEPHENS & BYWATER, and that on the 18th day of May, 2018, I served a true copy of the foregoing **NOTICE OF ENTRY OF AMENDED JUDGMENT,** by depositing the same in a sealed envelope upon which first class postage was fully prepaid, and addressed as follows:

Gary Lewis
733 S. Minnesota Ave.
Glendora, California 91740

M. Goldstein
An employee of Stephens & Bywater

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Steven D. Grierson
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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:

...

...

...

...

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

DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER, Plaintiff, vs. GARY LEWIS, Defendant.	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:

...

...

...

...

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

DATED this 26 day of March, 2018.

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

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07A549111

DISTRICT COURT
CLARK COUNTY, NEVADA

Negligence - Auto | **COURT MINUTES** | **October 24, 2018**

07A549111 James Nalder
vs
Gary Lewis

October 24, 2018 **10:55 AM** **Minute Order Re: Recusal**

HEARD BY: Jones, David M **COURTROOM:** RJC Courtroom 15A

COURT CLERK: April Watkins

RECORDER: Melissa Murphy-Delgado

PARTIES PRESENT:

Christensen, Thomas F.	Attorney for Pltf.
Douglas, Matthew J.	Attorney for Intervenor
Tindall, Randy W.	Attorney for Deft.
Winner, Thomas E.	Attorney for Intervenor

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JOURNAL ENTRIES

- E. Breen Arntz, Esq., present on behalf of Deft. David A. Stephens, Esq., present on behalf of Pltf. in A772220.

The Court disclosed Mr. Tindall worked with the Court in the firm for Farmers Insurance and does not see any conflict. Mr. Winner stated he does not see a conflict. Mr. Christensen stated he and Mr. Lewis does see a conflict because Mr. Lewis submitted a complaint to the bar because Mr. Tindall's representation is not authorized by Mr. Lewis and contrary to his interest. Court inquired what that has to do with the conflict. Mr. Christensen stated he is a Third Party Deft. in the cross claim and third party complaint that was filed. Further, Mr. Christensen requested the Court recuse at this time. Colloquy. Mr. Christensen requested time to review issues and from the very beginning the intervenor filed motion to Intervene. On the face of those motions, the certificate of service was improper on both motions and in both cases. On one it did not have anything filled in as to who was served and on the other one it was checked electronic service but Mr. Stephens was not on the Court's electronic service platform at the time that they signed and also did not have any service for Mr. Lewis or any attorney representing Mr. Lewis and those motions are defective to begin with. When Mr. Stephens discovered these motions were filed, filed oppositions and delivered courtesy copies to

the Court prior to the hearing date. The Intervenor also filed replies and those oppositions were not considered by the Court and the Court granted the motions that were not properly noticed and then had an order prepared that was not run by anyone in the case and did not sign stipulated judgment that was submitted to the Court prior to the hearing on the motion but did sign order allowing intervention which is improper. Post judgment intervention is clear Nevada law that you cannot intervene after trial and that is in the other case that is already to judgment. Additionally, still waiting for the stipulated judgment in this case and have no information why we have not received that. Gary Lewis submitted bar complaint against Mr. Tindall for his entering appearances on his behalf. Court stated he is not hearing this as it does not come before this Court. Mr. Winner objected to counsel advising of the bar complaint. Mr. Christensen further stated bar counsel immediately dismissed the bar complaint and said Mr. Tindall is involved in this ongoing case and they were not going to do anything. If a judge refers this to the bar, then they will investigate. Further, Mr. Christensen requested the Court refer Mr. Tindall to the bar. There has been letters sent to Mr. Tindall from Mr. Lewis advising his to stop representing him, stop putting forth frivolous defenses in case on Mr. Lewis' behalf and Mr. Tindall refuses to. Colloquy. Opposition by Mr. Winner as to the request for this Court to recuse and believes the new pleadings are frivolous and a clumsy effort forcing the Court to appoint another judge on the case. Colloquy. Further opposition by Mr. Winner. Due to this Court and Mr. Tindall having a previous working relationship, to avoid the appearance of impropriety and implied bias, this Court hereby disqualifies itself and ORDERS, this case be REASSIGNED at random.

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Steven D. Grierson
CLERK OF THE COURT

OPPM
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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 Date of Hearing: 12/12/18 Time of Hearing: 8:30am
UNITED AUTOMOBILE INSURANCE COMPANY, Intervenor.	

DEFENDANT'S OPPOSITION TO INTERVENOR'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO NRCP 60

Defendant, Gary Lewis, by and through his counsel, E. Breen Arntz, Esq., opposes Intervenor's motion for relief from judgment.

POINTS AND AUTHORITIES

UAIC's motion is unsupported by Nevada authority and is frivolous. UAIC misstates Nevada's statute of limitations and tolling statutes. UAIC 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. In addition, UAIC's

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motion to intervene was not properly noticed, is contrary to the well settled law in Nevada should have been denied and UAIC's resulting motion in intervention should now be denied, stricken and the intervention denied. The intervention statute provides for intervention **prior to trial** not after judgment. NRS 12.130 Intervention:...1. ...(a) Before the trial, any person may intervene in an action or proceeding.... Nevada law does not allow for intervention after judgment. In addition UAIC waived their right to direct the defense and their right to intervene when they refused to defend Lewis and failed to indemnify him. UAIC claims to have a direct and immediate interest to warrant intervention. However the California court in *Hinton v. Beck*, 176 Cal. App. 4th 1378 (Cal. Ct. App. 2009) has held just the opposite: "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."

The only facts and procedural history relevant to UAIC's motion in intervention for relief from the judgment in this action are that Nalder was born April 4, 1998. 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. Mr. Lewis moved from Nevada and was not subject to service of process in the State of Nevada from at the latest December of 2010 to the present. This case was removed to federal court by UAIC. The federal district court erroneously granted summary judgment in favor of UAIC on December 20, 2010. Exhibit 1. This erroneous ruling was appealed to the Ninth circuit who reversed the trial court and ordered further proceedings consistent with that order.

On remand the district court issued an order holding UAIC liable for insurance coverage of the incident and ordering payment of the policy limits but erroneously failing to award

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consequential damages in the amount of the judgment on October 30, 2013. Exhibit 2. This failure to award the amount of the judgment as damages to Lewis and Nalder was again appealed to the Ninth Circuit. UAIC made three undisputed payments toward the judgment on June 23, 2014; June 25, 2014; and March 5, 2015.

Following the District court's finding of coverage UAIC did not take any immediate steps to intervene in the Nevada action. 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 has obtained a void order allowing intervention and filed a frivolous motion for relief from judgment. This is not timely. UAIC by failing to defend has waived their right to intervene. The motion to intervene should not have been granted and now the motion in intervention must be denied, stricken and the intervention disallowed.

The case of *Hinton v. Beck*, 176 Cal. App. 4th 1378 (Cal. Ct. App. 2009) is dispositive of the issue in this case. In Hinton the court affirmed the trial court's striking of the insurers 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." Likewise UAIC lost its right to control the litigation when it refused to defend or indemnify Lewis.

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In regard to the validity of the judgment UAIC misstates Nevada law throughout its motion. NRS 11.190 is the statute of limitations for many types of actions including an action on a judgment. It's time calculation is tolled by many statutes in the same section. *Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (1897) The three 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.

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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.

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 there is a crucial difference in the renewal statutes between North Dakota and Nevada. The language of the renewal statute in North Dakota contains a ten year period in the body of the statute. The Nevada renewal statute refers one back to the statute of limitations for judgments. 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 ... *Id at 857.*

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 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 may be 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. UAIC cites no authority for this mandated use of NRS 17.214. 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. 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.

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 renewal method, not replaced. See *Mandlebaum* at 161-162

> 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

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> 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. 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…

This has been the law in Nevada for over a hundred years. It has not been modified by the legislature. UAIC's motion for relief from judgment should be denied, it is untimely and frivolous. UAIC's Motion in Intervention should be stricken and Intervention revoked.

Dated this 29th day of October, 2018.

E. BREEN ARNTZ, ESQ.
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5545 Mountain Vista Ste. E
Las Vegas, Nevada 89120
T: (702) 384-8000
F: (702) 446-8164
breen@breen.com

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of E. BREEN ARNTZ, ESQ. and that on this 29th day of Oct, 2018, I served a copy of the foregoing Defendant's **OPPOSITION TO MOTION IN INTERVENTION FOR RELIEF FROM 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

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

Randall Tindall, Esq.
Resnick & Louis
8925 W. Russell Road, Suite 225
Las Vegas, NV 89148
rtindall@rlattorneys.com

David A. Stephens, Esq.
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Matthew Douglas, Esq.
Atkin Winner & Sherrod
1117 South Rancho Drive
Las Vegas, NV 89102
mdouglas@awslawyers.com

An employee of E. BREEN ARNTZ, ESQ.

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EXHIBIT 1

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JAMES NALDER, Guardian Ad Litem for minor Cheyanne Nalder, real party in interest, and GARY LEWIS, Individually; Plaintiffs, vs. UNITED AUTOMOBILE INSURANCE COMPANY, DOES I through V, and ROE CORPORATIONS I through V, inclusive Defendants.	2:09-cv-1348-ECR-GWF **Order**

Plaintiffs in this automobile insurance case allege breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, breach of Nev. Rev. Stat. § 686A.310, and fraud. Now pending is Defendant's "motion for summary judgment on all claims; alternatively, motion for summary judgment on extra-contractual remedies; or, further in the alternative, motion stay [sic] discovery and bifurcate claims for extra-contractual remedies; finally, in the alternative, motion for leave to amend" ("MSJ") (#17).

The motion is ripe, and we now rule on it.

I. Background

Plaintiff Gary Lewis ("Lewis") is a resident of Clark County, Nevada. (Compl. ¶ 2 (#1).) Plaintiff James Nalder ("Nalder"), Guardian ad Litem for minor Cheyanne Nalder, is a resident of Clark County, Nevada. (Id. at ¶ 1.) Defendant United Automobile Insurance Co. ("UAIC") is an automobile insurance company duly authorized to act as an insurer to the State of Nevada and doing business in Clark County, Nevada. (Id. at ¶ 3.) Defendant is incorporated in the State of Florida with its principal place of business in the State of Florida. (Pet. for Removal ¶ VII (#1).)

Lewis was the owner of a 1996 Chevy Silverado insured, at various times, by Defendant. (Compl. at ¶ 5-6 (#1).) Lewis had an insurance policy issued by UAIC on his vehicle during the period of May 31, 2007 to June 30, 2007. (MSJ at 3 (#17).) Lewis received a renewal statement, dated June 11, 2007, instructing him to remit payment by the due date of June 30, 2007 in order to renew his insurance policy. (Id. at 3-4.) The renewal statement specified that "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy." (Pls.' Opp. at 3 (#20).) The renewal statement listed June 30, 2007 as effective date, and July 31, 2007 as an "expiration date." (Id.) The renewal statement also states that the "due date" of the payment is June 30, 2007, and repeats that the renewal amount is due no later than June 30, 2007. (MSJ at 7-8 (#17).) Lewis made a payment on July 10, 2007. (Id.)

Defendant then issued a renewal policy declaration and automobile insurance cards indicating that Lewis was covered under

an insurance policy between July 10, 2007 to August 10, 2007. (Pls' Opp. Exhibit 1 at 35-36; MSJ at 4.)

On July 8, 2007, Lewis was involved in an automobile accident in Pioche[1], Nevada, that injured Cheyanne Nalder. (MSJ at 3 (#17).) Cheyanne Nalder made a claim to Defendant for damages under the terms of Lewis's insurance policy with UAIC. (Compl. at ¶ 9 (#1).) Defendant refused coverage for the accident that occurred on July 8, 2007, claiming that Lewis did not have coverage at the time of the accident. (Id. at ¶ 10.) On October 9, 2007, Plaintiff Nalder, as guardian of Cheyanne Nalder, filed suit in Clark County District Court under suit number A549111 against Lewis. (Mot. to Compel at 3 (#12).) On June 2, 2008, the court in that case entered a default judgment against Lewis for $3.5 million. (Id.)

Plaintiffs then filed their complaint in this action in Nevada state court on March 22, 2009 against Defendant UAIC. On July 24, 2009, Defendant removed the action to federal court, invoking our diversity jurisdiction. (Petition for Removal (#1).)

On March 18, 2010, Defendant filed the MSJ (#17). On April 9, 2010, Plaintiffs opposed (#20), and on April 26, 2010, Defendant replied (#21). We granted leave for Plaintiffs to file a supplement (#26), and Defendant filed a supplement (#33) to its reply (#21).

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[1] Plaintiffs' complaint originally alleged that the accident occurred in Clark County, Nevada. It is unclear from the documents which site is the correct one, but neither party disputes jurisdiction and the actual location of the accident is irrelevant to the disposition of this motion.

II. Summary Judgment Standard

Summary judgment allows courts to avoid unnecessary trials where no material factual dispute exists. N.W. Motorcycle Ass'n v. U.S. Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). The court must view the evidence and the inferences arising therefrom in the light most favorable to the nonmoving party, Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996), and should award summary judgment where no genuine issues of material fact remain in dispute and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party. FED. R. CIV. P. 50(a). Where reasonable minds could differ on the material facts at issue, however, summary judgment should not be granted. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 116 S.Ct. 1261 (1996).

The moving party bears the burden of informing the court of the basis for its motion, together with evidence demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the party opposing the motion may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing that there exists a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the parties may submit evidence in an inadmissible form — namely, depositions, admissions, interrogatory answers, and affidavits — only evidence which might be admissible at trial may be considered

by a trial court in ruling on a motion for summary judgment. FED. R. CIV. P. 56(c); Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179, 1181 (9th Cir. 1988).

In deciding whether to grant summary judgment, a court must take three necessary steps: (1) it must determine whether a fact is material; (2) it must determine whether there exists a genuine issue for the trier of fact, as determined by the documents submitted to the court; and (3) it must consider that evidence in light of the appropriate standard of proof. Anderson, 477 U.S. at 248. Summary judgment is not proper if material factual issues exist for trial. B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir. 1999). "As to materiality, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248. Disputes over irrelevant or unnecessary facts should not be considered. Id. Where there is a complete failure of proof on an essential element of the nonmoving party's case, all other facts become immaterial, and the moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a disfavored procedural shortcut, but rather an integral part of the federal rules as a whole. Id.

III. Analysis

Defendant seeks summary judgment on all claims on the basis that Lewis had no insurance coverage on the date of the accident. Plaintiff contends that Lewis was covered on the date of the accident because the renewal notice was ambiguous as to when payment

must be received in order to avoid a lapse in coverage, and any ambiguities must be construed in favor of the insured. Defendants request, in the alternative, that we dismiss Plaintiffs' extra-contractual claims, or bifurcate the claim of breach of contract from the remaining claims. Finally, if we deny all other requests, Defendant requests that we grant leave to amend

A. Contract Interpretation Standard

In diversity actions, federal courts apply substantive state law. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); Nitco Holding Corp. v. Boujikian, 491 F.3d 1086, 1089 (9th Cir. 2007). Under Nevada law, "[a]n insurance policy is a contract that must be enforced according to its terms to accomplish the intent of the parties." Farmers Ins. Exch. v. Neal, 64 P.3d 472, 473 (Nev. 2003). When the facts are not in dispute, contract interpretation is a question of law. Grand Hotel Gift Shop v. Granite State Ins. Co., 839 P.2d 599, 602 (Nev. 1992). The language of the insurance policy must be viewed "from the perspective of one not trained in law," and we must "give plain and ordinary meaning to the terms." Farmers Ins. Exch., 64 P.3d at 473 (internal quotation marks omitted). "Unambiguous provisions will not be rewritten; however, ambiguities are to be resolved in favor of the insured." Id. (footnote omitted); see also Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co., 184 P.3d 390, 392 (Nev. 2008) ("In the insurance context, we broadly interpret clauses providing coverage, to afford the insured the greatest possible coverage; correspondingly, clauses excluding coverage are interpreted narrowly against the insurer.") (internal quotation marks omitted); Capitol Indemnity Corp. v. Wright, 341 F.

Supp. 2d 1152, 1156 (D. Nev. 2004) (noting that "a Nevada court will not increase an obligation to the insured where such was intentionally and unambiguously limited by the parties"). "When a contract is unambiguous and neither party is entitled to relief from the contract, summary judgment based on the contractual language is proper." Allstate Ins. Co. v. Fackett, 206 P.3d 572, 575 (Nev. 2009) (citing Chwialkowski v. Sachs, 834 P.2d 405, 406 (Nev. 1992)).

B. Plaintiff Lewis' Insurance Coverage on July 8, 2007

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

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

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

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

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

C. Statutory Arguments

Plaintiffs' arguments that Lewis had coverage due to Nev. Rev. Stat. § 687B.320 and § 687B.340 are untenable. Section 687B.320 applies in the case of midterm cancellations, providing that:

> 1. Except as otherwise provided in subsection 3, no insurance policy that has been in effect for at least 70 days or that has been renewed may be cancelled by the insurer before the expiration of the agreed term or 1 year from the effective date of the policy or renewal, whichever occurs first, except on any one of the following grounds:

(a) Failure to pay a premium when due;

. . .

2. No cancellation under subsection 1 is effective until in the case of paragraph (a) of subsection 1 at least 10 days and in the case of any other paragraph of subsection 1 at least 30 days after the notice is delivered or mailed to the policyholder.

The policies at issue in this case were month-long policies with options to renew after the expiration of each policy. Lewis' June policy expired on June 30, 2007, according to its terms. There was no midterm cancellation and Nev. Rev. Stat. § 687B.320 simply does not apply. Plaintiffs' arguments that between terms is equivalent to "midterm" simply defies the statutory language and the common definition of midterm. In a Ninth Circuit case interpreting Montana law, the Ninth Circuit noted that the district court's observation that "the policy expired by its own terms; it was not cancelled" was proper, and the Montana statute at issue in the case, similar to the Nevada statute here, "appl[ies] only to cancellation of a policy, not to its termination." State Farm Mut. Auto. Ins. Co. v. White, 563 F.2d 971, 974 (9th Cir. 1977). The Ninth Circuit went on to note that situations in which "the policy terminated by its own terms for failure of the insured to renew" is controlled by a different statute, which "does not require any notice to the policy-holder when the reason for the non-renewal of the policy is the holder's failure to pay the renewal premiums." Id.

Nev. Rev. Stat. § 687B.340 provides:

> 1. Subject to subsection 2, a policyholder has a right to have his or her policy renewed, on the terms then being applied by the insurer to persons, similarly situated, for an additional period equivalent to the expiring term if the agreed term is 1 year or less, or for 1 year if the agreed term is longer than 1 year, unless:
>
> . . .
>
> (b) At least 30 days for all other policies,
>
> before the date of expiration provided in the policy the insurer mails or delivers to the policyholder a notice of intention not to renew the policy beyond the agreed expiration date. If an insurer fails to provide a timely notice of nonrenewal, the insurer shall provide the insured with a policy of insurance on the identical terms as in the expiring policy.

Plaintiffs argues that Nev. Rev. Stat. § 687B.340 indicates how favorable the law is to the insured, and that there is no mention in the statute that payment is a prerequisite to a policyholder's "right to have his or her policy renewed." It is true that the Nevada statute does not include a provision similar to the one in the Montana statute providing that the section does not apply when the insured has "failed to discharge when due any of his obligations in connection with the payment of premiums for the policy, or the renewal therefor . . . ." White, 563 F.2d at 974 n.3. The Montana statute also stated that the section does not apply "[i]f the insurer has manifested its willingness to renew." Id.

Plaintiffs, however, fail to give credit to the entirety of the Nevada statute. The statute does not say that the policyholder's policy must be renewed, it says that the insurer shall provide the insured with a policy on "the identical terms as in the expiring policy." One of the terms of the expiring policy was payment of the renewal amount. UAIC did provide Lewis, the policyholder, with a renewal statement indicating that UAIC would renew the insurance policy as long as all the terms of the previous policy were met, i.e., payment.

Defendant correctly points out that this statute does not fit the circumstances of this case. Lewis' policy was not renewed not because UAIC had an intention not to renew, but because Lewis failed to carry out his end of the contract, that is, to pay a renewal amount. Lewis' policy was renewed on the date payment was received, but this date was after the date of the accident. Plaintiffs' statutory arguments, therefore, do not pass muster.

IV. Conclusion

Defendant's motion for summary judgment on all claims shall be granted because Lewis had no insurance coverage on the date of the accident. The renewal statement was not ambiguous in light of the entire contract and history between Lewis and UAIC. The term "expiration of your policy" referred to the expiration of Lewis' current policy, and Lewis was never issued retroactive coverage when his payments were late. His renewal policy would always begin on the date payment was received. We cannot find that Lewis was covered between the expiration of his policy in June and payment for

his next policy without straining to find an ambiguity where none exists, and creating an obligation on the part of insurance companies that would be untenable, i.e., to provide coverage when the insured has not upheld his own obligations under the contract to submit a payment.

The statutes cited by Plaintiffs simply do not apply. The expiration of Lewis' policy was not a midterm cancellation, and UAIC was not obligated to provide an insurance policy despite Lewis' failure to adhere to the terms of that policy.

Defendant's other requests are moot in light of our decision granting summary judgment.

IT IS, THEREFORE, HEREBY ORDERED that Defendant's motion for summary judgment on all claims (#17) is **GRANTED** with respect to all of Plaintiffs' claims.

The Clerk shall enter judgment accordingly.

DATED: December 17, 2010.

Edward C. Reed.
UNITED STATES DISTRICT JUDGE

EXHIBIT 2

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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

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

BACKGROUND

In July 2009, Defendant United Automobile Insurance Company ("UAIC") filed a petition for removal based on diversity jurisdiction. (Pet. for Removal (#1) at 1-2). Defendant attached Plaintiffs James Nalder, guardian ad litem for minor Cheyanne Nalder, real party in interest, and Gary Lewis's (collectively "Plaintiffs") complaint which had been filed in the Eighth Judicial District in Clark County, Nevada. (Compl. (#1) at 5-16).

The complaint alleged the following. (*Id.* at 5). Lewis was the owner of a 1996 Chevy Silverado and had an automobile insurance policy with Defendant on July 8, 2007. (*Id.* at 6). On July 8, 2007, Lewis drove over top of Cheyanne while Cheyanne was a pedestrian in a residential area and caused Cheyanne serious personal injuries. (*Id.* at 7). Cheyanne made

a claim to Defendant for damages and offered to settle the claim for personal injuries and damages against Lewis within the policy limits. (*Id.*). Defendant refused to settle and denied the claim all together indicating that Lewis did not have coverage at the time of the accident. (*Id.*). Defendant was required to provide insurance coverage under the policy. (*Id.* at 9). Defendant never informed Lewis that Cheyanne was willing to settle the claim for the sum of $15,000, the policy limit. (*Id.*). Due to the dilatory tactics and failure of Defendant to protect its insured, Cheyanne filed a complaint on October 9, 2007 against Lewis for her personal injuries and damages. (*Id.*). Cheyanne procured a default judgment in the amount of $3,500,000 against Lewis. (*Id.*). Plaintiffs alleged breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, breach of Nev. Rev. Stat. § 686A.310, and fraud against Defendant. (*Id.* at 9-14).

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

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

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

The order stated the following. (*Id.* at 5). Defendant sought summary judgment on all

[1] Record citations omitted.

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

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

> Plaintiffs contend that Lewis was covered under an insurance policy on July 8, 2007, the date of the accident, because Lewis' payment on July 10, 2007 was timely. Plaintiffs rely on the sentence "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy" contained in the renewal statement. Defendant contends that "expiration of your policy" did not refer to the expiration date of the renewal policy listed on the renewal statement, but to the expiration of Lewis' current policy, which coincided with the listed due date on the renewal statement. Plaintiffs contend that Lewis reasonably believed that while there was a due date on which UAIC preferred to receive payment, there was also a grace period within which Lewis could pay and avoid any lapse in coverage.
>
> The renewal statement cannot be considered without considering the entirety of the contract between Lewis and UAIC. Plaintiff attached exhibits of renewal statements, policy declarations pages, and Nevada automobile insurance cards issued by UAIC for Lewis. The contract, taken as a whole, cannot reasonably be interpreted in favor of Plaintiffs' argument.
>
> Lewis received a "Renewal Policy Declarations" stating that he had coverage from May 31, 2007 to June 30, 2007 at 12:01 A.M. (Pls' Opp., Exhibit A at 29 (#20-1); Pls' Supp., Exhibit A at 11-12 (#26-1); Pls' Supp., Exhibit A at 15 (#26-1).) The declarations page stated that "[t]his declaration page with 'policy provisions' and all other applicable endorsements complete your policy." (Pls' Opp., Exhibit A at 29 (#20-1).) Lewis also received a Nevada Automobile Insurance Card issued by UAIC stating that the effective date of his policy was May 31, 2007, and the expiration date was June 30, 2007. (Id. at 30; Pls' Supp., Exhibit A at 11-12 (#26-1).) The renewal statement Lewis received in June must be read in light of the rest of the insurance policy, contained in the declarations page and also summarized in the insurance card.
>
> "In interpreting a contract, 'the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself.'" *Anvui, LLC v. G.L. Dragon, LLC*, 163 P.3d 405, 407 (Nev. 2007). Plaintiffs contend that there was a course of dealing between Lewis and UAIC supporting a reasonable understanding that there was a grace period involved in paying the insurance premium for each month-long policy. In fact, the so-called course of dealing tilts, if at all, in favor of Defendant. Lewis habitually made payments that were late. UAIC never retroactively covered Lewis on such occasions. Lewis' new policy, clearly denoted on the declarations page and insurance cards Lewis was issued, would always become effective on the date of the payment.
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> Plaintiffs point to the fact that in April 2007, Lewis was issued a revised renewal statement stating that the renewal amount was due on May 6, 2007, a date after the effective date of the policy Lewis would be renewing through the

> renewal amount. This isolated occasion occurred due to the fact that Lewis added a driver to his insurance policy, resulting in an increase in the renewal amount, after UAIC had previously sent a renewal notice indicating that a lower renewal amount was due on April 29, 2007. UAIC issued a revised renewal statement dated April 26, 2007, and gave Lewis an opportunity to pay by May 6, 2007, instead of April 29, 2007, when the original renewal amount had been due upon expiration of his April policy. In that case, Lewis made a timely payment on April 28, 2007, and therefore there is not a single incident Plaintiffs can point to in which Lewis was retroactively covered for a policy before payment was made, even in the single instance UAIC granted him such an opportunity due to a unique set of circumstances.

(*Id.* at 7-9).

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

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

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

The pending motions now follow.

LEGAL STANDARD

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

The moving party bears the initial burden of identifying the portions of the pleadings and evidence that the party believes to demonstrate the absence of any genuine issue of material

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fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). A party asserting that a fact cannot be or is genuinely disputed must support the assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A)-(B). Once the moving party has properly supported the motion, the burden shifts to the nonmoving party to come forward with specific facts showing that a genuine issue for trial exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512. The nonmoving party cannot defeat a motion for summary judgment "by relying solely on conclusory allegations unsupported by factual data." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356.

DISCUSSION

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

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

A. Ambiguous Contract

Nalder argues that because the renewal statement was ambiguous it must be strictly construed against the insurance company pursuant to Nevada law and, thus, Lewis had coverage at the time of the accident. (Mot. for Summ. J. (#88) at 10).

In response, Defendant argues that Lewis's renewal statement is not ambiguous and clearly demanded remittance of the policy premium for the subsequent term by the expiration

of the present policy period. (Opp'n to Mot. for Summ. J. (#90) at 15). Defendant argues that a material issue of fact remains over whether the renewals were ambiguous. (*Id.*).

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

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

In this case, the Court finds that the renewal statement is ambiguous based on the Ninth Circuit's reverse and remand. The Court finds that the renewal statement is reasonably susceptible to more than one interpretation as demonstrated by both Judge Reed and the Ninth Circuit's conflicting interpretations. As such, the Court finds that, pursuant to Nevada law, this ambiguity is construed against Defendant and in favor of the insured such that Lewis was covered by the insurance policy on the date of the accident. The Court grants summary judgment on this issue in favor of Plaintiffs.

B. Bad Faith

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

(*Id.*).

In response, Defendant argues that every case cited by Nalder involves a situation where there existed a policy in force at the time of the loss. (Opp'n to Mot. for Summ. J. (#90) at 21). Defendant asserts that, in this case, Nalder asks the Court to find an implied policy from an ambiguity in the renewal. (*Id.* at 22). Defendant argues that Nevada law provides that a court may review an insurer's actions at the time they were made to determine whether the insurer's actions were reasonable as a matter of law and that bad faith cannot be premised upon an honest mistake, bad judgment, or negligence. (*Id.* at 25). Defendant asserts that Nevada law provides that an insurer cannot be found liable for bad faith, as a matter of law, if it had a reasonable basis to contest coverage. (*Id.*). Defendant contends that if an insurer's actions are reasonable the court can decide as a matter of law to dismiss the extra-contractual claims. (*Id.* at 26). Defendant asserts that because Lewis admits that he did not make any policy payments between June 12, 2007 and July 10, 2007 its actions were reasonable. (*Id.*). Defendant contends that even if it may be found to owe coverage on an implied contract, Plaintiffs must admit that a genuine dispute existed as to coverage at the time of the accident. (*Id.*).

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

Nevada law imposes the covenant of good faith and fair dealing on insurers. *Allstate Ins. Co. v. Miller*, 212 P.3d 318, 324 (Nev. 2009). A violation of the covenant gives rise to a bad-faith tort claim. *Id.* The Nevada Supreme Court has defined "bad faith as 'an actual or implied awareness of the absence of a reasonable basis for denying benefits of the [insurance] policy.'" *Id.* (quoting *Am. Excess Ins. Co. v. MGM*, 729 P.2d 1352, 1354-55 (Nev. 1986). "To establish a prima facie case of bad-faith refusal to pay an insurance claim, the plaintiff must establish that the insurer had no reasonable basis for disputing coverage, and that the insurer knew or recklessly disregarded the fact that there was no reasonable basis for disputing coverage." *Powers v. United Servs. Auto. Ass'n*, 962 P.2d 596, 604 (Nev. 1998) *opinion modified on denial of reh'g*, 979 P.2d 1286 (Nev. 1999).

In this case, the Court denies Nalder's motion for summary judgment on the bad faith

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

C. Pre and Post-Judgment Interest

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

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

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

The Nevada Supreme Court has held that primary liability insurance policies create a hierarchy of duties between the insurer and the insured. *Allstate Ins.*, 212 P.3d at 324. One of these contractual duties is the duty to defend. *Id.* A breach of the duty to defend is a breach of a contractual obligation. *See id.* at 324-25. An insurer bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy. *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, 99 P.3d 1153, 1158 (Nev. 2004). Once the duty to defend arises, it continues through the course of litigation. *Id.* "If there is any doubt about whether the duty to defend arises, this doubt must be resolved in favor of the insured." *Id.* "The purpose behind construing the duty to defend so broadly is to prevent an insurer from

evading its obligation to provide a defense for an insured without at least investigating the facts behind a complaint." *Id.* However, the duty to defend is not absolute. *Id.* "A potential for coverage only exists when there is arguable or possible coverage." *Id.* "Determining whether an insurer owes a duty to defend is achieved by comparing the allegations of the complaint with the terms of the policy." *Id.* If an insurer breaches the duty to defend, damages are limited to attorneys' fees and costs incurred by the insured to defend the action. *See Home Sav. Ass'n v. Aetna Cas. & Sur. Co.*, 854 P.2d 851, 855 (Nev. 1993) (holding that an insured was not barred from further pursuing recovery from insurance company for fees and costs incurred in defending an action); *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 255 P.3d 268, 278 (Nev. 2011) (discussing damages related to an indemnitor's duty to defend an indemnitee).

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

As such, the Court grants in part and denies in part Nalder's motion for summary judgment. The Court grants summary judgment for Nalder on the ambiguity issue and finds that there is an ambiguity in the renewal statement and, thus, the policy is construed in favor of coverage at the time of the accident. Defendant must pay the policy limits of the implied insurance policy. The Court denies summary judgment for Nalder on the remaining bad-faith claims. The Court grants in part and denies in part summary judgment for Nalder on the duty to defend issue. The Court finds that Defendant did breach its contractual duty to defend but denies Nalder's request for damages for that breach.

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

Defendant seeks summary judgment on all of Plaintiff's claims for extra-contractual

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

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

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

CONCLUSION

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

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

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

The Clerk of the Court shall enter judgment accordingly.

Dated this 30th of October, 2013.

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JAMES NALDER, Guardian Ad Litem for minor Cheyanne Nalder, real party in interest, and GARY LEWIS, Individually; Plaintiffs, vs. UNITED AUTOMOBILE INSURANCE COMPANY, DOES I through V, and ROE CORPORATIONS I through V, inclusive Defendants.	2:09-cv-1348-ECR-GWF **Order**

Plaintiffs in this automobile insurance case allege breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, breach of Nev. Rev. Stat. § 686A.310, and fraud. Now pending is Defendant's "motion for summary judgment on all claims; alternatively, motion for summary judgment on extra-contractual remedies; or, further in the alternative, motion stay [sic] discovery and bifurcate claims for extra-contractual remedies; finally, in the alternative, motion for leave to amend" ("MSJ") (#17).

The motion is ripe, and we now rule on it.

I. Background

Plaintiff Gary Lewis ("Lewis") is a resident of Clark County, Nevada. (Compl. ¶ 2 (#1).) Plaintiff James Nalder ("Nalder"), Guardian ad Litem for minor Cheyanne Nalder, is a resident of Clark County, Nevada. (Id. at ¶ 1.) Defendant United Automobile Insurance Co. ("UAIC") is an automobile insurance company duly authorized to act as an insurer to the State of Nevada and doing business in Clark County, Nevada. (Id. at ¶ 3.) Defendant is incorporated in the State of Florida with its principal place of business in the State of Florida. (Pet. for Removal ¶ VII (#1).)

Lewis was the owner of a 1996 Chevy Silverado insured, at various times, by Defendant. (Compl. at ¶ 5-6 (#1).) Lewis had an insurance policy issued by UAIC on his vehicle during the period of May 31, 2007 to June 30, 2007. (MSJ at 3 (#17).) Lewis received a renewal statement, dated June 11, 2007, instructing him to remit payment by the due date of June 30, 2007 in order to renew his insurance policy. (Id. at 3-4.) The renewal statement specified that "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy." (Pls.' Opp. at 3 (#20).) The renewal statement listed June 30, 2007 as effective date, and July 31, 2007 as an "expiration date." (Id.) The renewal statement also states that the "due date" of the payment is June 30, 2007, and repeats that the renewal amount is due no later than June 30, 2007. (MSJ at 7-8 (#17).) Lewis made a payment on July 10, 2007. (Id.)

Defendant then issued a renewal policy declaration and automobile insurance cards indicating that Lewis was covered under

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an insurance policy between July 10, 2007 to August 10, 2007. (Pls' Opp. Exhibit 1 at 35-36; MSJ at 4.)

On July 8, 2007, Lewis was involved in an automobile accident in Pioche[1], Nevada, that injured Cheyanne Nalder. (MSJ at 3 (#17).) Cheyanne Nalder made a claim to Defendant for damages under the terms of Lewis's insurance policy with UAIC. (Compl. at ¶ 9 (#1).) Defendant refused coverage for the accident that occurred on July 8, 2007, claiming that Lewis did not have coverage at the time of the accident. (Id. at ¶ 10.) On October 9, 2007, Plaintiff Nalder, as guardian of Cheyanne Nalder, filed suit in Clark County District Court under suit number A549111 against Lewis. (Mot. to Compel at 3 (#12).) On June 2, 2008, the court in that case entered a default judgment against Lewis for $3.5 million. (Id.)

Plaintiffs then filed their complaint in this action in Nevada state court on March 22, 2009 against Defendant UAIC. On July 24, 2009, Defendant removed the action to federal court, invoking our diversity jurisdiction. (Petition for Removal (#1).)

On March 18, 2010, Defendant filed the MSJ (#17). On April 9, 2010, Plaintiffs opposed (#20), and on April 26, 2010, Defendant replied (#21). We granted leave for Plaintiffs to file a supplement (#26), and Defendant filed a supplement (#33) to its reply (#21).

[1] Plaintiffs' complaint originally alleged that the accident occurred in Clark County, Nevada. It is unclear from the documents which site is the correct one, but neither party disputes jurisdiction and the actual location of the accident is irrelevant to the disposition of this motion.

II. Summary Judgment Standard

Summary judgment allows courts to avoid unnecessary trials where no material factual dispute exists. N.W. Motorcycle Ass'n v. U.S. Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). The court must view the evidence and the inferences arising therefrom in the light most favorable to the nonmoving party, Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996), and should award summary judgment where no genuine issues of material fact remain in dispute and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party. FED. R. CIV. P. 50(a). Where reasonable minds could differ on the material facts at issue, however, summary judgment should not be granted. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 116 S.Ct. 1261 (1996).

The moving party bears the burden of informing the court of the basis for its motion, together with evidence demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the party opposing the motion may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing that there exists a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the parties may submit evidence in an inadmissible form — namely, depositions, admissions, interrogatory answers, and affidavits — only evidence which might be admissible at trial may be considered

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by a trial court in ruling on a motion for summary judgment. FED. R. CIV. P. 56(c); Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179, 1181 (9th Cir. 1988).

In deciding whether to grant summary judgment, a court must take three necessary steps: (1) it must determine whether a fact is material; (2) it must determine whether there exists a genuine issue for the trier of fact, as determined by the documents submitted to the court; and (3) it must consider that evidence in light of the appropriate standard of proof. Anderson, 477 U.S. at 248. Summary judgment is not proper if material factual issues exist for trial. B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir. 1999). "As to materiality, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248. Disputes over irrelevant or unnecessary facts should not be considered. Id. Where there is a complete failure of proof on an essential element of the nonmoving party's case, all other facts become immaterial, and the moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a disfavored procedural shortcut, but rather an integral part of the federal rules as a whole. Id.

III. Analysis

Defendant seeks summary judgment on all claims on the basis that Lewis had no insurance coverage on the date of the accident. Plaintiff contends that Lewis was covered on the date of the accident because the renewal notice was ambiguous as to when payment

must be received in order to avoid a lapse in coverage, and any ambiguities must be construed in favor of the insured. Defendants request, in the alternative, that we dismiss Plaintiffs' extra-contractual claims, or bifurcate the claim of breach of contract from the remaining claims. Finally, if we deny all other requests, Defendant requests that we grant leave to amend

A. Contract Interpretation Standard

In diversity actions, federal courts apply substantive state law. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); Nitco Holding Corp. v. Boujikian, 491 F.3d 1086, 1089 (9th Cir. 2007). Under Nevada law, "[a]n insurance policy is a contract that must be enforced according to its terms to accomplish the intent of the parties." Farmers Ins. Exch. v. Neal, 64 P.3d 472, 473 (Nev. 2003). When the facts are not in dispute, contract interpretation is a question of law. Grand Hotel Gift Shop v. Granite State Ins. Co., 839 P.2d 599, 602 (Nev. 1992). The language of the insurance policy must be viewed "from the perspective of one not trained in law," and we must "give plain and ordinary meaning to the terms." Farmers Ins. Exch., 64 P.3d at 473 (internal quotation marks omitted). "Unambiguous provisions will not be rewritten; however, ambiguities are to be resolved in favor of the insured." Id. (footnote omitted); see also Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co., 184 P.3d 390, 392 (Nev. 2008) ("In the insurance context, we broadly interpret clauses providing coverage, to afford the insured the greatest possible coverage; correspondingly, clauses excluding coverage are interpreted narrowly against the insurer.") (internal quotation marks omitted); Capitol Indemnity Corp. v. Wright, 341 F.

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Supp. 2d 1152, 1156 (D. Nev. 2004) (noting that "a Nevada court will not increase an obligation to the insured where such was intentionally and unambiguously limited by the parties"). "When a contract is unambiguous and neither party is entitled to relief from the contract, summary judgment based on the contractual language is proper." Allstate Ins. Co. v. Fackett, 206 P.3d 572, 575 (Nev. 2009) (citing Chwialkowski v. Sachs, 834 P.2d 405, 406 (Nev. 1992)).

B. Plaintiff Lewis' Insurance Coverage on July 8, 2007

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

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

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

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

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

C. Statutory Arguments

Plaintiffs' arguments that Lewis had coverage due to Nev. Rev. Stat. § 687B.320 and § 687B.340 are untenable. Section 687B.320 applies in the case of midterm cancellations, providing that:

> 1. Except as otherwise provided in subsection 3, no insurance policy that has been in effect for at least 70 days or that has been renewed may be cancelled by the insurer before the expiration of the agreed term or 1 year from the effective date of the policy or renewal, whichever occurs first, except on any one of the following grounds:

(a) Failure to pay a premium when due;

. . .

2. No cancellation under subsection 1 is effective until in the case of paragraph (a) of subsection 1 at least 10 days and in the case of any other paragraph of subsection 1 at least 30 days after the notice is delivered or mailed to the policyholder.

The policies at issue in this case were month-long policies with options to renew after the expiration of each policy. Lewis' June policy expired on June 30, 2007, according to its terms. There was no midterm cancellation and Nev. Rev. Stat. § 687B.320 simply does not apply. Plaintiffs' arguments that between terms is equivalent to "midterm" simply defies the statutory language and the common definition of midterm. In a Ninth Circuit case interpreting Montana law, the Ninth Circuit noted that the district court's observation that "the policy expired by its own terms; it was not cancelled" was proper, and the Montana statute at issue in the case, similar to the Nevada statute here, "appl[ies] only to cancellation of a policy, not to its termination." State Farm Mut. Auto. Ins. Co. v. White, 563 F.2d 971, 974 (9th Cir. 1977). The Ninth Circuit went on to note that situations in which "the policy terminated by its own terms for failure of the insured to renew" is controlled by a different statute, which "does not require any notice to the policy-holder when the reason for the non-renewal of the policy is the holder's failure to pay the renewal premiums." Id.

Nev. Rev. Stat. § 687B.340 provides:

> 1. Subject to subsection 2, a policyholder has a right to have his or her policy renewed, on the terms then being applied by the insurer to persons, similarly situated, for an additional period equivalent to the expiring term if the agreed term is 1 year or less, or for 1 year if the agreed term is longer than 1 year, unless:
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> . . .
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> (b) At least 30 days for all other policies,
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> before the date of expiration provided in the policy the insurer mails or delivers to the policyholder a notice of intention not to renew the policy beyond the agreed expiration date. If an insurer fails to provide a timely notice of nonrenewal, the insurer shall provide the insured with a policy of insurance on the identical terms as in the expiring policy.

Plaintiffs argues that Nev. Rev. Stat. § 687B.340 indicates how favorable the law is to the insured, and that there is no mention in the statute that payment is a prerequisite to a policyholder's "right to have his or her policy renewed." It is true that the Nevada statute does not include a provision similar to the one in the Montana statute providing that the section does not apply when the insured has "failed to discharge when due any of his obligations in connection with the payment of premiums for the policy, or the renewal therefor . . . ." White, 563 F.2d at 974 n.3. The Montana statute also stated that the section does not apply "[i]f the insurer has manifested its willingness to renew." Id.

Plaintiffs, however, fail to give credit to the entirety of the Nevada statute. The statute does not say that the policyholder's policy must be renewed, it says that the insurer shall provide the insured with a policy on "the identical terms as in the expiring policy." One of the terms of the expiring policy was payment of the renewal amount. UAIC did provide Lewis, the policyholder, with a renewal statement indicating that UAIC would renew the insurance policy as long as all the terms of the previous policy were met, i.e., payment.

Defendant correctly points out that this statute does not fit the circumstances of this case. Lewis' policy was not renewed not because UAIC had an intention not to renew, but because Lewis failed to carry out his end of the contract, that is, to pay a renewal amount. Lewis' policy was renewed on the date payment was received, but this date was after the date of the accident. Plaintiffs' statutory arguments, therefore, do not pass muster.

IV. Conclusion

Defendant's motion for summary judgment on all claims shall be granted because Lewis had no insurance coverage on the date of the accident. The renewal statement was not ambiguous in light of the entire contract and history between Lewis and UAIC. The term "expiration of your policy" referred to the expiration of Lewis' current policy, and Lewis was never issued retroactive coverage when his payments were late. His renewal policy would always begin on the date payment was received. We cannot find that Lewis was covered between the expiration of his policy in June and payment for

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his next policy without straining to find an ambiguity where none exists, and creating an obligation on the part of insurance companies that would be untenable, i.e., to provide coverage when the insured has not upheld his own obligations under the contract to submit a payment.

The statutes cited by Plaintiffs simply do not apply. The expiration of Lewis' policy was not a midterm cancellation, and UAIC was not obligated to provide an insurance policy despite Lewis' failure to adhere to the terms of that policy.

Defendant's other requests are moot in light of our decision granting summary judgment.

IT IS, THEREFORE, HEREBY ORDERED that Defendant's motion for summary judgment on all claims (#17) is **GRANTED** with respect to all of Plaintiffs' claims.

The Clerk shall enter judgment accordingly.

DATED: December 17, 2010.

Edward C. Reed.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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

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

BACKGROUND

In July 2009, Defendant United Automobile Insurance Company ("UAIC") filed a petition for removal based on diversity jurisdiction. (Pet. for Removal (#1) at 1-2). Defendant attached Plaintiffs James Nalder, guardian ad litem for minor Cheyanne Nalder, real party in interest, and Gary Lewis's (collectively "Plaintiffs") complaint which had been filed in the Eighth Judicial District in Clark County, Nevada. (Compl. (#1) at 5-16).

The complaint alleged the following. (*Id.* at 5). Lewis was the owner of a 1996 Chevy Silverado and had an automobile insurance policy with Defendant on July 8, 2007. (*Id.* at 6). On July 8, 2007, Lewis drove over top of Cheyanne while Cheyanne was a pedestrian in a residential area and caused Cheyanne serious personal injuries. (*Id.* at 7). Cheyanne made

a claim to Defendant for damages and offered to settle the claim for personal injuries and damages against Lewis within the policy limits. (*Id.*). Defendant refused to settle and denied the claim all together indicating that Lewis did not have coverage at the time of the accident. (*Id.*). Defendant was required to provide insurance coverage under the policy. (*Id.* at 9). Defendant never informed Lewis that Cheyanne was willing to settle the claim for the sum of $15,000, the policy limit. (*Id.*). Due to the dilatory tactics and failure of Defendant to protect its insured, Cheyanne filed a complaint on October 9, 2007 against Lewis for her personal injuries and damages. (*Id.*). Cheyanne procured a default judgment in the amount of $3,500,000 against Lewis. (*Id.*). Plaintiffs alleged breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, breach of Nev. Rev. Stat. § 686A.310, and fraud against Defendant. (*Id.* at 9-14).

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

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

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

The order stated the following. (*Id.* at 5). Defendant sought summary judgment on all

[1] Record citations omitted.

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

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

> Plaintiffs contend that Lewis was covered under an insurance policy on July 8, 2007, the date of the accident, because Lewis' payment on July 10, 2007 was timely. Plaintiffs rely on the sentence "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy" contained in the renewal statement. Defendant contends that "expiration of your policy" did not refer to the expiration date of the renewal policy listed on the renewal statement, but to the expiration of Lewis' current policy, which coincided with the listed due date on the renewal statement. Plaintiffs contend that Lewis reasonably believed that while there was a due date on which UAIC preferred to receive payment, there was also a grace period within which Lewis could pay and avoid any lapse in coverage.
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> The renewal statement cannot be considered without considering the entirety of the contract between Lewis and UAIC. Plaintiff attached exhibits of renewal statements, policy declarations pages, and Nevada automobile insurance cards issued by UAIC for Lewis. The contract, taken as a whole, cannot reasonably be interpreted in favor of Plaintiffs' argument.
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> Lewis received a "Renewal Policy Declarations" stating that he had coverage from May 31, 2007 to June 30, 2007 at 12:01 A.M. (Pls' Opp., Exhibit A at 29 (#20-1); Pls' Supp., Exhibit A at 11-12 (#26-1); Pls' Supp., Exhibit A at 15 (#26-1).) The declarations page stated that "[t]his declaration page with 'policy provisions' and all other applicable endorsements complete your policy." (Pls' Opp., Exhibit A at 29 (#20-1).) Lewis also received a Nevada Automobile Insurance Card issued by UAIC stating that the effective date of his policy was May 31, 2007, and the expiration date was June 30, 2007. (Id. at 30; Pls' Supp., Exhibit A at 11-12 (#26-1).) The renewal statement Lewis received in June must be read in light of the rest of the insurance policy, contained in the declarations page and also summarized in the insurance card.
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> "In interpreting a contract, 'the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself.'" *Anvui, LLC v. G.L. Dragon, LLC*, 163 P.3d 405, 407 (Nev. 2007). Plaintiffs contend that there was a course of dealing between Lewis and UAIC supporting a reasonable understanding that there was a grace period involved in paying the insurance premium for each month-long policy. In fact, the so-called course of dealing tilts, if at all, in favor of Defendant. Lewis habitually made payments that were late. UAIC never retroactively covered Lewis on such occasions. Lewis' new policy, clearly denoted on the declarations page and insurance cards Lewis was issued, would always become effective on the date of the payment.
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> Plaintiffs point to the fact that in April 2007, Lewis was issued a revised renewal statement stating that the renewal amount was due on May 6, 2007, a date after the effective date of the policy Lewis would be renewing through the

> renewal amount. This isolated occasion occurred due to the fact that Lewis added a driver to his insurance policy, resulting in an increase in the renewal amount, after UAIC had previously sent a renewal notice indicating that a lower renewal amount was due on April 29, 2007. UAIC issued a revised renewal statement dated April 26, 2007, and gave Lewis an opportunity to pay by May 6, 2007, instead of April 29, 2007, when the original renewal amount had been due upon expiration of his April policy. In that case, Lewis made a timely payment on April 28, 2007, and therefore there is not a single incident Plaintiffs can point to in which Lewis was retroactively covered for a policy before payment was made, even in the single instance UAIC granted him such an opportunity due to a unique set of circumstances.

(*Id.* at 7-9).

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

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

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

The pending motions now follow.

LEGAL STANDARD

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

The moving party bears the initial burden of identifying the portions of the pleadings and evidence that the party believes to demonstrate the absence of any genuine issue of material

fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). A party asserting that a fact cannot be or is genuinely disputed must support the assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A)-(B). Once the moving party has properly supported the motion, the burden shifts to the nonmoving party to come forward with specific facts showing that a genuine issue for trial exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512. The nonmoving party cannot defeat a motion for summary judgment "by relying solely on conclusory allegations unsupported by factual data." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356.

DISCUSSION

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

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

A. Ambiguous Contract

Nalder argues that because the renewal statement was ambiguous it must be strictly construed against the insurance company pursuant to Nevada law and, thus, Lewis had coverage at the time of the accident. (Mot. for Summ. J. (#88) at 10).

In response, Defendant argues that Lewis's renewal statement is not ambiguous and clearly demanded remittance of the policy premium for the subsequent term by the expiration

of the present policy period. (Opp'n to Mot. for Summ. J. (#90) at 15). Defendant argues that a material issue of fact remains over whether the renewals were ambiguous. (*Id.*).

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

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

In this case, the Court finds that the renewal statement is ambiguous based on the Ninth Circuit's reverse and remand. The Court finds that the renewal statement is reasonably susceptible to more than one interpretation as demonstrated by both Judge Reed and the Ninth Circuit's conflicting interpretations. As such, the Court finds that, pursuant to Nevada law, this ambiguity is construed against Defendant and in favor of the insured such that Lewis was covered by the insurance policy on the date of the accident. The Court grants summary judgment on this issue in favor of Plaintiffs.

B. Bad Faith

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

(*Id.*).

In response, Defendant argues that every case cited by Nalder involves a situation where there existed a policy in force at the time of the loss. (Opp'n to Mot. for Summ. J. (#90) at 21). Defendant asserts that, in this case, Nalder asks the Court to find an implied policy from an ambiguity in the renewal. (*Id.* at 22). Defendant argues that Nevada law provides that a court may review an insurer's actions at the time they were made to determine whether the insurer's actions were reasonable as a matter of law and that bad faith cannot be premised upon an honest mistake, bad judgment, or negligence. (*Id.* at 25). Defendant asserts that Nevada law provides that an insurer cannot be found liable for bad faith, as a matter of law, if it had a reasonable basis to contest coverage. (*Id.*). Defendant contends that if an insurer's actions are reasonable the court can decide as a matter of law to dismiss the extra-contractual claims. (*Id.* at 26). Defendant asserts that because Lewis admits that he did not make any policy payments between June 12, 2007 and July 10, 2007 its actions were reasonable. (*Id.*). Defendant contends that even if it may be found to owe coverage on an implied contract, Plaintiffs must admit that a genuine dispute existed as to coverage at the time of the accident. (*Id.*).

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

Nevada law imposes the covenant of good faith and fair dealing on insurers. *Allstate Ins. Co. v. Miller*, 212 P.3d 318, 324 (Nev. 2009). A violation of the covenant gives rise to a bad-faith tort claim. *Id.* The Nevada Supreme Court has defined "bad faith as 'an actual or implied awareness of the absence of a reasonable basis for denying benefits of the [insurance] policy.'" *Id.* (quoting *Am. Excess Ins. Co. v. MGM*, 729 P.2d 1352, 1354-55 (Nev. 1986). "To establish a prima facie case of bad-faith refusal to pay an insurance claim, the plaintiff must establish that the insurer had no reasonable basis for disputing coverage, and that the insurer knew or recklessly disregarded the fact that there was no reasonable basis for disputing coverage." *Powers v. United Servs. Auto. Ass'n*, 962 P.2d 596, 604 (Nev. 1998) *opinion modified on denial of reh'g*, 979 P.2d 1286 (Nev. 1999).

In this case, the Court denies Nalder's motion for summary judgment on the bad faith

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

C. Pre and Post-Judgment Interest

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

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

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

The Nevada Supreme Court has held that primary liability insurance policies create a hierarchy of duties between the insurer and the insured. *Allstate Ins.*, 212 P.3d at 324. One of these contractual duties is the duty to defend. *Id.* A breach of the duty to defend is a breach of a contractual obligation. *See id.* at 324-25. An insurer bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy. *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, 99 P.3d 1153, 1158 (Nev. 2004). Once the duty to defend arises, it continues through the course of litigation. *Id.* "If there is any doubt about whether the duty to defend arises, this doubt must be resolved in favor of the insured." *Id.* "The purpose behind construing the duty to defend so broadly is to prevent an insurer from

evading its obligation to provide a defense for an insured without at least investigating the facts behind a complaint." *Id.* However, the duty to defend is not absolute. *Id.* "A potential for coverage only exists when there is arguable or possible coverage." *Id.* "Determining whether an insurer owes a duty to defend is achieved by comparing the allegations of the complaint with the terms of the policy." *Id.* If an insurer breaches the duty to defend, damages are limited to attorneys' fees and costs incurred by the insured to defend the action. *See Home Sav. Ass'n v. Aetna Cas. & Sur. Co.*, 854 P.2d 851, 855 (Nev. 1993) (holding that an insured was not barred from further pursuing recovery from insurance company for fees and costs incurred in defending an action); *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 255 P.3d 268, 278 (Nev. 2011) (discussing damages related to an indemnitor's duty to defend an indemnitee).

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

As such, the Court grants in part and denies in part Nalder's motion for summary judgment. The Court grants summary judgment for Nalder on the ambiguity issue and finds that there is an ambiguity in the renewal statement and, thus, the policy is construed in favor of coverage at the time of the accident. Defendant must pay the policy limits of the implied insurance policy. The Court denies summary judgment for Nalder on the remaining bad-faith claims. The Court grants in part and denies in part summary judgment for Nalder on the duty to defend issue. The Court finds that Defendant did breach its contractual duty to defend but denies Nalder's request for damages for that breach.

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

Defendant seeks summary judgment on all of Plaintiff's claims for extra-contractual

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

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

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

CONCLUSION

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

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

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

The Clerk of the Court shall enter judgment accordingly.

Dated this 30th of October, 2013.

United States District Judge

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DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER, Plaintiff, vs. GARY LEWIS, Defendants.	CASE NO.: 07A549111 DEPT NO.: XX

PLAINTIFF'S OPPOSITION TO UAIC'S MOTION FOR RELIEF FROM JUDGMENT

Date: 12/12/2018
Time: 9:00 a.m.

Cheyenne Nalder, through her attorney, David A. Stephens, Esq., opposes UAIC"s Motion for Relief from Judgment, as follows:

POINTS AND AUTHORITIES

I. INTRODUCTION

United Automobile Insurance Company's, ("UAIC"), motion should be denied because the tolling statutes, NRS 11.200, NRS 11.250 and NRS 11.300, apply to the statute of limitations for judgments contained in the same chapter at NRS 11.190(a)(1) and extend the time for filing an action on the judgment or for renewal under NRS 17.214.

UAIC argues that the tolling statutes, NRS 11.200, NRS 11.250, and NRS 11.300, do not apply to the statute of limitations for judgments contained in the same chapter at NRS 11.190(a)(1). UAIC provides no legal authority for this unreasonable position. Unfortunately for UAIC, this position is not supported in Nevada's statutory scheme, case law or common sense. NRS 11.200 specifically refers to NRS 11.190. The other two statutes are part of chapter 11 and deal specifically with when the statute of limitations is tolled. UAIC's position is frivolous and must be met with a firm rejection.

II. FACTS

A. FACTS ON UNDERLYING CASE

The underlying matter arises from an auto accident that occurred on July 8, 2007, where Gary Lewis, ("Lewis"), accidentally ran over Nalder. Nalder was born April 4, 1998 and was a nine-year-old girl at the time. At the time of the accident Lewis maintained an auto insurance policy with United Auto Insurance Company ("UAIC"), which was renewable on a monthly basis.

Following the accident, Nalder's father, James Nalder, extended an offer to UAIC to settle Nalder's injury claim for Lewis's policy limit of $15,000.00. UAIC never informed Lewis that Nalder offered to settle Cheyenne's claim. UAIC never filed a declaratory relief action. UAIC rejected Nalder's offer. UAIC rejected the offer because it believed that Lewis was not covered under his insurance policy given that he did not renew his policy by June 30, 2007.

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After UAIC rejected James Nalder's offer, James Nalder, on behalf of Cheyenne Nalder, filed this lawsuit against Lewis in the Nevada state district court.

UAIC was notified of the lawsuit but declined to defend Lewis or file a declaratory relief action regarding coverage. Lewis failed to appear and answer the complaint. As a result, Nalder obtained a default judgment against Lewis for $3,500,000.00. Notice of entry of judgment was filed on August 26, 2008.

Nalder recently obtained an amended judgment in this matter. She amended the judgment to get it into her name because she is not longer a minor.

Nalder wants to maintain her judgment against Lewis. This intention is irrespective of its enforceability against UAIC. Lewis and Nalder are still involved in ongoing claims handling litigation against Lewis's insurance company, UAIC, because of its failure to defend Lewis in the original case.

Because the statute of limitations on Nalder's personal injury action may have been approaching, Nalder recently took action in both Nevada and California to maintain her judgment against Lewis, who resides in California, or, in the alternative, to prosecute her personal injury action against Lewis to judgment.

Cheyenne Nalder reached the age of majority on April 4, 2016. Nalder hired David A. Stephens, Esq., to maintain her judgment. First, counsel obtained an amended judgment in this case in Cheyenne's name as a result of her reaching the age of majority. This amended judgment was obtained appropriately, by demonstrating to the Court that

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the judgment, as a result of the tolling provisions, was still within the applicable statute of limitations.

Nalder then filed a separate action with three distinct claims for relief, pled in the alternative. (See Case No. A-18-8772220-C). The first claim is an action on the amended judgment which will result in a new judgment which will 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 claim is for declaratory relief seeking a determination of when a renewal under NRS 17.214 must be filed and when the statute of limitations, which is subject to tolling provisions, will run on the judgment.

And finally, the third claim, should the Court determine that the judgment is invalid, is an action on the injury claim within the applicable statute of limitations for injury claims, that is, two years after her reaching the age of majority.

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, and most are unnecessarily early; however, out of an abundance of caution, she brings them to maintain a judgment against Lewis and to demonstrate the actual way this issue should have been litigated in the Eighth Judicial District Court of Nevada, not midway into an appeal by a self-serving affidavit of counsel for UAIC.

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UAIC has inserted itself into theses actions trying to assert the simple, but flawed, concept that unless a judgment renewal pursuant to NRS 17.214 is brought within six years, a judgment is no longer valid. UAIC's motivation for bringing this argument is not in good faith and is to avoid payment of damages arising from its claims handling failures that occurred in the first Nalder v. Lewis injury case.

UAIC made representations that it would be responsible for any judgment entered in this case in order to gain intervention into this case and the case filed by Nalder in 2018.

B. CLAIMS HANDLING CASE AGAINST UAIC

On May 22, 2009, James Nalder, on behalf of Cheyenne Nalder, and Lewis filed suit against UAIC alleging breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, fraud, and violation of NRS 686A.310. Lewis assigned to Nalder his right to "all funds necessary to satisfy the Judgment" and retaining to himself any funds recovered above the judgment. Lewis left the state of Nevada and relocated to California prior to 2010. Neither Lewis, nor anyone on his behalf, has been subject to service of process in Nevada since 2010.

Once UAIC removed the insurance case to federal district court, UAIC filed a motion for summary judgment as to all of Lewis and Nalder's claims, alleging Lewis did not have insurance coverage on the date of the subject collision. The federal district court granted UAIC's summary judgment motion because it determined the insurance

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contract was not ambiguous as to when Lewis had to make payment to avoid a coverage lapse. Nalder and Lewis appealed this decision to the Ninth Circuit. The Ninth Circuit reversed and remanded the matter because Lewis and Nalder had facts to show the renewal statement was ambiguous regarding the date when payment was required to avoid a coverage lapse.

On remand, the U.S. District Court concluded the renewal statement was ambiguous and therefore, Lewis was covered on the date of the incident because the court construed this ambiguity against UAIC. The U.S. District Court also determined UAIC breached its duty to defend Lewis, but did not award damages because Lewis did not incur any fees or costs in defense of the Nevada state court action. Based on these conclusions, the district court ordered UAIC to pay the policy limit of $15,000.00. UAIC then made three payments on the judgment: June 23, 2014; June 25, 2014; and March 5, 2015.

Both Nalder and Lewis appealed that decision to the Ninth Circuit, which ultimately led to the 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 of the breach.

After the first certified question was fully briefed and pending before the Nevada Supreme Court, UAIC had the idea that the underlying judgment could only be renewed pursuant to NRS 17.214. Even though UAIC knew at this point that they owed a duty

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to defend Gary Lewis, they did not undertake to investigate the factual basis or the legal grounds, or discuss this idea with Lewis, or seek declaratory relief on Lewis' behalf regarding the statute of limitations on the judgment. All of these actions would have been a good faith effort to protect Lewis. Instead, UAIC filed a motion to dismiss Lewis and Nalder's appeal with the Ninth Circuit for lack of standing. This allegation had not been raised in the trial court. It was something UAIC concocted solely for its own benefit. This allegation was brought for the first time in the appellate court. If UAIC's self-serving affidavit is wrong, this action will leave Lewis with a valid judgment against him and no cause of action against UAIC.

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 Lewis 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. The only proof that it expired was UAIC counsel's affidavit that no renewal pursuant to NRS 17.124 had been filed. 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 because the judgment lapsed after the judgment (in the case against UAIC) was entered in the U.S. District Court. This would be similar to arguing on appeal that a plaintiff is no longer entitled to medical expenses awarded because the time to file a lawsuit to recover them expired while the case was on appeal.

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Even though Nalder believes the law is clear that UAIC is bound by the judgment, regardless of its continued validity against Lewis, Nalder, in an abundance of caution, took action in Nevada and California to demonstrate the continued validity of the judgment against Lewis. These Nevada and California state court actions will demonstrate that UAIC has again tried to escape responsibility by making misrepresentations to the Federal and State Courts.

IV. ARGUMENT

UAIC seeks to set aside the amended judgment based on NRCP 60(b) arguing it the judgment was void prior to the court amending it.

NRCP 60(b)(3), which allows the court to relieve a party from a final judgment if it is void, "is normally invoked . . . in a case where the court entering the challenged judgment was itself disqualified from acting, [citation omitted], or did not have jurisdiction over the parties, [citation omitted], or of the subject matter of the litigation." *Misty Management Corp. v. First Judicial District Court*, 83 Nev. 180, 426 P.2d 728, 729 (1967).

None of those grounds apply unless, UAIC is arguing that if the judgment was not timely renewed it was disqualified from acting. UAIC provides no support for that position.

However, assuming, *arguendo*, that position is correct, UAIC still fails establish that the judgment had to be renewed or even that the time for renewal had expired.

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A. The Judgment is not expired because the statute of limitation is tolled

The Nevada six-year statute of limitations for bringing an action on a judgment is provided for in NRS 11.190(1)(a). That time period has either not expired, or it has been tolled.

i. The six-year time period was tolled by the three payments UAIC made on the judgment.

NRS 11.200, states:

> "The time in NRS 11.190 shall be deemed to date from the last transaction or the last item charged or last credit given; and whenever any payment on principal or interest has been or shall be made upon an existing contract, whether it be a bill of exchange, promissory note or other evidence of indebtedness if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made."

NRS 11.200 is specifically made applicable to the statues of limitation set forth in NRS 11.190

UAIC made its last payment on the judgment on March 5, 2015. Thus, as a result of this statute, the six-year statute to file suit to enforce the judgment began running on March 6, 2016 and would not expire until March 6, 2021, which is six years from the last payment.

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ii. The Nevada statute of limitations to bring an action on a judgment was also tolled during the period of time that Nalder was a minor.

NRS 11.250 states:

> "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."

Nalder reached the age of majority on April 4, 2016. The statute of limitation to enforce a judgment was tolled until she reached the age of 18. As a result, the statute of limitations to file an action to enforce the judgment does not run until April 4, 2022.

iii. Lewis' residency in California since 2010 tolls the statute of limitations.

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).

Pursuant to NRS 11.300, Lewis' California residency also tolls the six-year statute of limitations to enforce a judgment because Lewis has not been subject to service of process in the State of Nevada from 2010 to the present.

iv. The time to renew the judgment has not run

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NRS 17.214 provides that the renewal must 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, would be premature and therefore ineffective because it would not be filed within the 90-day window prior to expiration of the statute of limitations.

v. The renewal statute is optional, rather than mandatory

NRS 17.214 was enacted to give an optional, not "mandatory," statutory procedure in addition to the rights created at common law 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 renew a 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) and general statutory interpretation.

UAIC cites no authority for this mandated use of NRS 17.214. 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.

UAIC cites *Leven v. Frey*, 123 Nev. 399, 168 P.3d 712 (2007), for the proposition that judgment renewal is mandatory. However, that is not what the case held. It held that strict compliance with the statue was necessary to renew a judgment. That is not the

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same as holding that a judgment must be renewed by this statutory process. *Id.*, 168 P.3d at 719. The issue of enforcing a judgment by a suit was never considered by the Nevada Supreme Court in the *Leven* case.

Mandlebaum v. Gregovich, 24 Nev. 154, 161, 50 P. 849, 851 (1897), specifically allowed a judgment creditor to file a suit to enforce a judgment fifteen years after it was entered. The Nevada Supreme Court stated:

> "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 right of action of the judgment creditor under the same. Notwithstanding nearly fifteen years had elapsed since the entry of the judgment, yet, for the purpose of action, the judgment was not barred - for that purpose the judgment was valid."

Id.

Where as here, the timing of the expiration is in doubt, the best way to renew the judgment is the common law method, which is only supplemented by the statutory method, not replaced.

Though the statute of limitations on Nalder's judgment is not even close to running, this action was taken because Nalder's tort statute of limitations was about to run. If the judgment is deemed not valid, then Nalder still wants to protect her tort

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claim. Also, this action is the appropriate way to litigate and clarify the Nevada statutory scheme for actions on a judgment and judgment renewal.

B. The Statute of Limitations in California on a Judgment of a Sister State is Ten Years

Lewis now resides in California. In California, an action upon a judgment must be commenced within 10 years of entry of the judgment. *See* Cal. Code Civ. P. § 337.5. Alternatively, a judgment must be renewed within 10 years of entry of the judgment. *Kertesz v. Ostrovsky*, 115 Cal. App. 4th 369, 372, 8 Cal. Rptr. 3d 907, 911 (Cal. Ct. App. 2004); *see also,* Cal. Code Civ. P. §§ 683.020, 683.120, 683.130. Out of an abundance of caution, Nalder has incurred the expense to renew her judgment by filing actions in both Nevada and California. In spite of this action, Nalder contends that she timely instituted an action on the judgment or, alternatively, that the six-year limitations period has not yet expired.

C. The Underlying Judgment Did Not Expire As To Lewis Because Nalder Was Not Required to Institute an Action on the Judgment and Renew the Judgment

An action on a judgment is distinguishable from the treatment of an application to renew the prior judgment. *Pratali v. Gates*, 4 Cal. App. 4th 632, 637, 5 Cal. Rptr. 2d 733, 736 (Cal. Ct. App. 1992). This distinction is inherently recognized in the Nevada Revised Statutes' treatment of both courses of action. "A judgment creditor may enforce his judgment by the process of the court in which he obtained it, ***or he may elect to use***

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the judgment as an original cause of action and bring suit thereon and prosecute such suit to final judgment." *Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (1897) (emphasis added). NRS 11.190(a)(1) provides the option that either an action upon the judgement or a renewal of the judgment be commenced. The limitation period for judgments runs from the time the judgment becomes final. Statutes of limitations are intended to ensure pursuit of the action with reasonable diligence, to preserve evidence and avoid surprise, and to avoid the injustice of long-dormant claims. *Petersen v. Bruen*, 106 Nev. 271, 273-74, 792 P.2d 18, 19-20 (1990).

NRS 17.214 provides the procedural steps necessary to renew a judgment before the expiration of the statute of limitations set forth in NRS 11.190(1)(a). NRS 17.214 provides that a judgment creditor may renew a judgment that has not been paid by filing an affidavit with the clerk of the court where the judgment is entered, "…within 90 days before the date the judgment expires by limitation." NRS 11.190(a)(1), NRS 11.200, NRS 11.250, NRS 11.300 must be read together with NRS 17.214 because they relate to the same subject matter and are not in conflict with one another. *Piroozi v. Eighth Judicial Dist. Court*, 131 Nev. Adv. Op. 100, 363 P.3d 1168, 1172 (2015). When these five statutes are read together, they establish that a party must either file an action on the judgment or renew the judgment under NRS 17.214 before the statute of limitations runs.

The Nevada Supreme Court expressly adopted this result in *Levin v. Frey*, 123 Nev. 399, 403, 168 P.2d. 712, 715 (2007): "An action on a judgment ***or*** its renewal must

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be commenced within six years under NRS 11.190(1)(a); thus a judgment expires by limitation in six years."

The Nevada Supreme Court held that the time to file a renewal under NRS 17.214 is subject to statutory and equitable tolling provisions. See *O'Lane v. Spinney,* 110 Nev. 496, 874 P.2d 754 (1994). The statute of limitation tolling provisions in NRS 11.200, NRS 11.250, NRS 11.300 apply to the computation of the time for filing for renewal under NRS 17.214.

The Nevada Supreme Court also recognizes the well-established rule that it will not look beyond the plain language of the statute when the words "have a definite and ordinary meaning." *Harris Associates. v. Clark County School. District*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003). "Normal principles of statutory construction also preclude interpreting a statute to render part of it meaningless." *United States v. Bert*, 292 F.3d 649, 652 n.11 (9th Cir. 2002).

UAIC's apparent position is that even though Nalder filed an action upon the judgment, she was also required to file a renewal of the judgment. This interpretation ignores the clarity of the disjunctive "or". UAIC's proposed interpretation of the statute effectively renders the "or" used NRS 11.190(1)(a) meaningless. If the Nevada Legislature intended to require a judgment creditor to file an action on the judgment and renew the judgment, then the Nevada Legislature would have used the word "and". However, the Nevada Legislature uniquely understood that a party was only required to

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proceed with one course of action to ensure the validity of a judgment. This understanding is reflected in the permissive language of NRS 17.214(1), which states that a judgment creditor "***may*** renew a judgment which has not been paid. . . ."

Based on the unambiguous language of NRS 11.190(1)(a), NRS 11.200, NRS 11.250, NRS 11.300 and NRS 17.214, the underlying judgment did not expire in this matter. Indeed, any renewal pursuant to NRS 17.214 filed by Nalder would be premature and possibly held to be ineffective. Nalder timely commenced her action on the judgment before the statute of limitations expired. As a result, the judgment does not have to be renewed and any renewal under NRS 17.214 is not possible at this time. This is the reason for the declaratory relief allegation in Nalder's 2018 complaint.

VII. CONCLUSION

Nevada has two methods for dealing with the expiration of statutes of limitation. Both methods are dependent on the expiration of the statutes of limitation and the associated tolling statutes. The statute of limitations in this matter is tolled until well past the time Cheyenne Nalder, ("Nalder"), amended the judgment and filed an action on the judgment. The initial judgment never expired. The judgment does not have to be revived. This Court did not make a mistake. The amended judgment is not void. UAIC's motion must be denied.

For the reasons set forth above, Nalder respectfully requests that this Court deny the Motion to Set Aside the Judgment brought by Gary Lewis, (without his consent).

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Dated this 29th day of October, 2018.

STEPHENS & BYWATER, P.C.

S/ David A Stephens

David A. Stephens, Esq.
Nevada Bar No. 00902
3636 North Rancho Drive
Las Vegas, Nevada 89130
Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of October, 2018, I served the following document: **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE JUDGMENT**

■ VlA ELECTRONIC FILING; (N.E.F.R. 9(b))

Matthew J. Douglas, Esq.

Randall Tindall, Esq.

E. Breen Arntz, Esq.

☐ VIA ELECTRONIC SERVICE (N.E.F.R. 9) ·

☐ BY MAIL: by placing the documents(s) listed above in a sealed envelope, postage prepaid in the U. S. Mail at Las Vegas, Nevada, addressed as set forth below:

☐ BY FAX: by transmitting the document(s) listed above via telefacsimile to the fax number(s) set forth below. A printed transmission record is attached to the file copy of this document(s).

☐ BY HAND DELIVER: by delivering the document(s) listed above to the person(s) at the address(es) set forth below.

S/David A Stephens
An Employee of Stephens & Bywater

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Steven D. Grierson
CLERK OF THE COURT

ROPP
RESNICK & LOUIS, P.C.
RANDALL TINDALL
Nevada Bar No. 6522
rtindall@rlattorneys.com
8925 West Russell Road, Suite 220
Las Vegas, NV 89148
Telephone: (702) 997-3800
Facsimile: (702) 997-3800
Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES NALDER, Plaintiff, v. GARY LEWIS and DOES I through V, inclusive, Defendants.	CASE NO.: 07A549111 DEPT: 20 **OPPOSITION TO GARY LEWIS' MOTION TO STRIKE MOTION TO SET ASIDE JUDGEMENT**

Defendant, Gary Lewis, by and through his counsel, Randall Tindall of the law firm of Resnick & Louis, P.C., opposes Gary Lewis' motion to strike, as follows:

I, Randall Tindall, and my firm, Resnick & Louis, P.C., was retained by Mr. Lewis' insurance carrier, UAIC, to defend Mr. Lewis in this lawsuit and another case filed more recently on the same issues. That case currently is pending before Judge W. Kephart. Mr. Lewis has a $3,500,000 stipulated judgement pending in that case but it apparently has not yet been entered. Mr. Lewis has two other counsel, Breen Arntz and Tom Christensen.

In what appears to be one of the most serious cases of gamesmanship I have seen, Mr. Christensen has filed against me and Resnick & Louis, P.C. a third-party complaint.

According to paragraph 82, attached as Exhibit A, Mr. Lewis filed against me with the State Bar an ethics complaint. Also according to paragraph 82, to the State Bar dismissed it. According to what Tom Christensen argued before Judge David Jones on the day Judge Jones recused, the State Bar immediately dismissed the ethics complaint because it recognized that it was being made in an attempt to create a hammer to influence the litigation, and it was not going to allow that. This motion to strike is frivolous.

A. The motion must be denied because it violates EDCR 2.20(c) and EDCR 2.20(i).

EDCR 2.20(c) reads:

> A party filing a motion must also serve with it a memorandum of points and authorities in support of each ground thereof. The absence of such memorandum may be construed as an admission that the motion is no meritorious, as cause for its denial or as a waiver of all grounds not so supported.

EDCR 2.20(i) reads, in pertinent part:

> A memorandum which consists of bare citations to statutes, rules or case authority does not comply with this rule and the court may decline to consider it.

Although Mr. Arntz has written the title "POINTS AND AUTHORITIES" there actually are none. Or, if his vague reference to "see" a few ethical rules is considered compliance with EDCR 2.20(c), it certainly still violates EDCR 2.20(i). There is no indication about what those rules read and no explanation about how they allegedly were violated. The court should deny this frivolous motion for this reason alone.

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B. The ethical rules Mr. Arntz cites do not provide authority to strike the motion that has been filed. Mr. Tindall has been expressly authorized, pursuant to the insurance contract, to defend Mr. Lewis in this lawsuit.

Mr. Arntz vaguely refers to NRPC 1.2, 1.4 and 3.3. None of those apply to the situation.

NRPC 1.2 has no provision that allows the court to strike the motion. It actually provides authorization for me to represent Mr. Lewis. It reads, in pertinent part: "A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation." In this case, the representation actually is EXPRESSLY authorized, however. The express authority is the insurance contract into which Mr. Lewis entered. The pertinent provision is attached as Exhibit B, which reads at [page 2, in Part I – LIABILITY, second paragraph: "**We** will defend any suit or settle any claim for damages as we think appropriate." Of course, "**We**" is noted in the definitions section to mean "the Company providing this insurance." The company providing Mr. Lewis' insurance had duly retained me and Resnick & Louis, P.C. to defend the suit and claim for damages.

NRPC 1.4 has no provision that allows the court to strike the motion. Further, as can be seen from Exhibit C, Mr. Lewis has requested that I never contact him.

NRPC 3.3 address candor toward the tribunal. Mr. Arntz' motion does not set forth any alleged violation of this rule.

DATED this 1st day of November, 2018.

RESNICK & LOUIS, P.C.

/s/ Randall Tindall

RANDALL TINDALL
Nevada Bar No. 6522
8925 West Russell Road, Suite 220
Las Vegas, Nevada 89148
Attorneys for Defendant

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing OPPOSITION TO MOTION TO STRIKE was served this 1st day of November, 2018, by:

[ ] **BY U.S. MAIL**: by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada, addressed as set forth below.

[ ] **BY FACSIMILE**: by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document.

[ ] **BY PERSONAL SERVICE**: by causing personal delivery by an employee of Resnick & Louis, P.C. of the document(s) listed above to the person(s) at the address(es) set forth below.

[X] **BY ELECTRONIC SERVICE**: by transmitting via the Court's electronic filing services the document(s) listed above to the Counsel set forth on the service list on this date pursuant to EDCR Rule 7.26(c)(4).

An Employee of Resnick & Louis, P.C.

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Steven D. Grierson
CLERK OF THE COURT

TPC
Thomas Christensen, Esq.
Nevada Bar No. 2326
1000 S. Valley View Blvd.
Las Vegas, Nevada 89107
T: (702) 870-1000
F: (702) 870-6152
courtnotices@injuryhelpnow.com
Attorney for Third Party Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

Cheyenne Nalder Plaintiff, vs. Gary Lewis, Defendant.	CASE NO. A-18-772220-C DEPT NO. XXIX
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.	

THIRD PARTY COMPLAINT

Comes now Cross-claimant/Third-party Plaintiff, GARY LEWIS, by and through his attorney, Thomas Christensen, Esq. and for his Cross-Claim/Third party complaint against the cross-defendant/third party defendants, United Automobile Insurance Co., Randall Tindall, Esq., and Resnick & Louis, P.C., for acts and omissions committed by them and each of them,

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80. Gary Lewis himself and his attorneys, Thomas Christensen, Esq. and E. Breen Arntz, Esq., have requested that Tindall withdraw the pleadings filed fraudulently by Tindall.

81. Tindall has refused to comply and continues to violate ethical rules regarding Gary Lewis.

82. Gary Lewis 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.

83. This is a false statement as Dave Stephens was investigated by this same state actor Phil Pattee while he was currently representing the client in ongoing litigation.

84. The court herein signed an order granting intervention while still failing to sign the judgment resolving the case.

85. UAIC, and each of the defendants, and each of the state actors, by acting in concert, intended to accomplish an unlawful objective for the purpose of harming Gary Lewis.

86. Gary Lewis sustained damage resulting from defendants' acts in incurring attorney fees, litigation costs, loss of claims, delay of claims, judgment against him and as more fully set forth below.

87. Defendants and each of them acting under color of state law deprived plaintiff of rights, privileges, and immunities secured by the Constitution or laws of the United States.

88. Gary Lewis has duly performed all the conditions, provisions and terms of the agreements or policies of insurance with UAIC relating to the claim against him, has furnished and delivered to UAIC full and complete particulars of said loss and has fully complied with all the provisions of said policies or agreements relating to the giving of notice as to said loss, and has duly given all other notices required to be given by Gary Lewis under the terms of such policies or agreements.

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UNITED AUTOMOBILE INSURANCE GROUP

UNITED AUTOMOBILE INSURANCE COMPANY

NEVADA PERSONAL AUTOMOBILE POLICY

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United Automobile Insurance Company
P.O. Box 14950
Las Vegas, NV 89114 - 4950

WARNING:

Any person who knowingly files a statement of claim containing any misrepresentation or any false, incomplete or misleading information may be guilty of a criminal act punishable under state or federal law, or both, and may be subject to civil penalties and MAY LEAD TO THE DENIAL OF A CLAIM.

UAIC NV (3-07)

AGREEMENT

We agree with **you**, in return for **your** premium payment, to insure **you** subject to the terms of this policy. These policy provisions, along with **your** application, the declarations page and any applicable endorsements will constitute your policy of insurance. **We** will insure **you** for the coverages and Limits of Liability for which a premium is shown in the Declarations of this policy.

DEFINITIONS USED THROUGHOUT THIS POLICY

(1) **"We," "us,"** and **"our"** mean the Company providing this insurance.
(2) **"You"** and **"your"** mean the Policyholder named in the Declarations and spouse if living in the same household.
(3) **"Bodily injury"** means **bodily injury,** sickness, disease or death.
(4) **"Property damage"** means damage to or destruction of tangible property, including loss of its use.
(5) **"Car"** means a licensed and registered automobile of the private passenger type designed for use upon a public road. "Car" also means a vehicle with a load capacity of 1,500 pounds or less of the pick-up or van type not used in any **business**. This definition shall not include:
   (a) motorcycles, scooters, mopeds;
   (b) midget cars;
   (c) golf mobiles;
   (d) tractors;
   (e) farm machinery;
   (f) any vehicle operated on rails or crawler treads;
   (g) or any vehicle used as a residence or premises.
   (h) go carts
(6) **"Utility trailer"** means a vehicle designed to be towed by a **private passenger car.**
(7) **"Your insured car"** means:
   (a) the **car** owned by **you** described in the Declarations.
   (b) a **car** you acquire during the policy period.
      1. **"Replacement Car":** The car must replace the car described in the Declarations. It will have the same coverages as the car it replaced with the exception of Car Damage Coverage. <u>If you want coverage to apply to the replacement car you must notify us within 30 days of the date you acquire it.</u>
         When **you** ask **us** to add Car Damage Coverage for the replacement **car**, such coverage will be in effect no earlier than the time and day on which **you** ask **us** to add the coverage. If **you** ask **us** to add Car Damage Coverage in writing, the coverage will not be in effect until 12:01 AM. on the day following the date of the postmark shown on the envelope containing your request. If a postage meter is used on the envelope containing **your** request to add Car Damage Coverage, coverage will be in effect no earlier than the time and day **your** request is received by **us**. All insurance for the car being replaced is ended when you take delivery of the replacement **car**.
      2. **"Newly Acquired Additional Car":** When **you** ask **us** to add an additional car, not previously owned by **you**, a **relative**, or a **resident**, acquired by **you** while this policy is in effect, **you** must notify **us** of the **newly acquired additional car** within 14 days of date it was acquired to have liability coverage apply.
      3. **"Substitute Car":** any substitute **car** or **utility trailer** not owned by **you**, a **relative**, or a **resident** being temporarily used by **you** with the express permission of the owner. The **car** must be a substitute for another **car** covered which is withdrawn from normal use due to breakdown, repair, servicing, loss or destruction.

   For purposes of this policy, any **car** leased by **you** under a written agreement for a continuous period of at least six months shall be deemed to be owned by **you**.
(8) "**Non-owned car**" means a **car** used by **you** with the express permission of the owner and not owned by, furnished, or available for the regular use of **you**, a **relative** or a **resident**.
(9) "**Private passenger car**" means a **car** of the private passenger type with not less than four wheels. This definition shall not include a van or pick-up truck.
(10) **"Auto business"** means the business or occupation of selling, leasing, repairing, servicing, delivering, testing, storing or parking cars.
(11) **"Business"** includes trade, profession, or occupation, or any use where compensation of any type is received.
(12) **"Relative"** means a person living in **your** household and related to **you** by blood, marriage or adoption, including a ward or foster child.
(13) **"Resident"** means a person, other than a **relative**, living in **your** household.
(14) **"Occupying"** means in, on, getting into or out of.
(15) **"State"** means the District of Columbia and any **state** of the United States of America.
(16) **"Racing"** means preparation for any **racing,** speed, demolition or stunting contest or activity. **Racing** also includes participation in the event itself, whether or not such event, activity or contest is organized.
(17) **"Crime"** means any felony and or misdemeanor and any act of eluding the police.
(18) **"Diminution in value"** means the actual loss in market or resale value of property which results from a **loss.**

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(19) **"Loss"** means sudden, direct, and accidental loss or damage.
(20) **"Regular use"** means authorized use of a **car** without being required to ask permission each time it is used or recurring use of a **car.**
(21) **"Compensatory money damages"** means any money required to be paid to compensate a person for economic or non-economic damages resulting from **bodily injury** or **property damage.**
(22) **"Punitive or Exemplary damages"** means any money required to be paid for any purpose other than **compensatory money damages** for **bodily injury** or **property damage**.

PART I - LIABILITY

COVERAGE A - LIABILITY COVERAGE INSURING AGREEMENT

We will pay damages for **bodily injury** or **property damage** for which an **insured person** is legally liable because of the ownership or use of **your insured car** or a **non-owned car. The bodily injury** or **property damage** must be caused by an auto accident.

We will defend any suit or settle any claim for damages as **we** think appropriate. We will not defend or settle any suit or claim after **we** reach our limit of liability. **We** have no duty to defend any suit or settle any claim for **bodily injury** or **property damage** not covered under this policy.

ADDITIONAL DEFINITIONS USED IN THIS PART ONLY

As used in this Part, "**insured person**" means:

(1) **you**, a **relative** or **resident.**
(2) any person using **your insured car** with **your** express or implied permission.
(3) any other person or organization but only with respect to legal liability for acts or omissions of:
  (a) a person covered under this Part while using **your insured car**; or
  (b) **you** while using a **car** other than **your insured car**. The **car** must not be owned or hired by that person or organization.

As used in this Part, "**insured person**" means with respect to a **non-owned car** only **you**, a **relative** or a **resident**.

ADDITIONAL PAYMENTS

We will pay, in addition to **our** limit of liability:
(1) all costs **we** incur in the settlement of a claim or defense of a suit.
(2) all costs assessed against **you** in **our** defense of a suit.
(3) interest on damages awarded in a suit **we** defend accruing after a judgment is entered. Our duty to pay interest ends when **we** offer to pay that part of the judgment which does not exceed **our** limit of liability for this coverage.
(4) Any other reasonable expenses incurred at **our** request

EXCLUSIONS

We do not provide coverage for **bodily injury** or **property damage:**
(1) resulting from the ownership or use of a vehicle when used to carry persons or property for a charge. This includes rental of **your insured car** to others. This exclusion does not apply to shared expense **car** pools.
(2) resulting from the ownership or use of a vehicle when used for wholesale or retail delivery. This includes, but is not limited to, mail, newspaper, floral and food delivery.
(3) caused intentionally by or at the direction of an **insured person**.
(4) for which a person is an insured under a nuclear energy liability insurance policy. This exclusion applies even if the limits of that policy are exhausted.
(5) to an employee of an **insured person** arising in the course of employment by an **insured person**. Coverage does apply to a domestic employee unless workers' compensation benefits are required or available for that employee.
(6) resulting from the ownership or use of a vehicle by any person while that person is employed or otherwise engaged in a **business**, unless **we** were told of this use before an **accident**, and an additional premium was charged.
(7) to property owned or being transported by an **insured person**.
(8) to property rented to, used by or in the care of an **insured person**, except a residence or private garage.
(9) resulting from the ownership, maintenance or use of a motorized vehicle with less than four wheels.
(10) arising out of the ownership or use of any vehicle, other than **your insured car**, which is owned by or available for regular use by **you**, a **relative** or **resident.**
(11) resulting from the use of any vehicle for **racing**.
(12) assumed by an **insured person** under any contract or agreement.
(13) arising out of the ownership, maintenance or use of a **car** when rented or leased to others by any **insured person**.
(14) incurred while the **car** is used for towing a trailer designed for use with other than a **private passenger car.**
(15) For any amount in excess of the minimum financial responsibility laws of the **state** where the accident occurs or the State of

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Randall Tindall

From: Gary Lewis <gsl6971@yahoo.com>
Sent: Friday, October 19, 2018 5:56 PM
To: Randall Tindall
Cc: breen@breen.com; Thomas Christensen
Subject: cease communication

Mr Tindall I ask that all communication with me directly cease! All communication should be done through Tom Christensen.

Thank you,

Gary Lewis

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Steven D. Grierson
CLERK OF THE COURT

MATTHEW J. DOUGLAS
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Phone (702) 243-7000
Facsimile (702) 243-7059
mdouglas@awslawyers.com

Attorneys for Intervenor United Automobile Insurance Company

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYANNE NALDER, Plaintiff, vs. GARY LEWIS and DOES I through V, inclusive, Defendants.	CASE NO.: 07A549111 DEPT. NO.: 20 **UAIC'S OPPOSITION TO DEFENDANT'S MOTION TO STRIKE DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT & COUNTER-MOTION FOR EVIDENTIARY HEARING FOR A FRAUD UPON THE COURT OR, ALTERNATIVELY, FOR THE COURT TO VACATE THE 3/28/18 AMENDED JUDGMENT ON ITS OWN MOTION**

COMES NOW, Intervenor, UNITED AUTOMOBILE INSURANCE COMPANY (hereinafter referred to as "UAIC"), by and through its attorney of record, ATKIN WINNER & SHERROD and hereby submits this Opposition to Defendant's Motion to Strike Defendant's Motion for Relief from judgment and Counter-Motion for Evidentiary hearing or, alternatively, to vacate the 3/28/18 Amended judgment on the Court's own Motion, pursuant to the attached Memorandum of Points and Authorities, all exhibits attached to its initial Motion,

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all papers and pleadings on file with this Court and such argument this Court may entertain at the time of hearing.

DATED this 1st day of November, 2018.

ATKIN WINNER & SHERROD

Matthew J. Douglas
Nevada Bar No. 11371
1117 South Rancho Drive
Las Vegas, Nevada 89102
Attorneys for Intervenor

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO MOTION TO STRIKE

I.

Introduction

Here we are presented with odd circumstance of a party, Defendant Lewis, *seeking to strike his own Motion.* Even more strange is the fact that the Motion sought to be stricken is one that seeks relief for that same party (Lewis) from a multi-million dollar "amended judgment." UAIC begs that this outlandish situation requires close scrutiny by this court. In short, to bring the Court up to speed, this is a very old case with many issues raised herein already on appeal before the United States Court of Appeal for the Ninth Circuit and, further, on a certified question to the Nevada Supreme Court. Specifically, it is currently before the Nevada Supreme Court on a certified question as to whether Plaintiff's original judgment herein, *from 2008*, has expired as it was not renewed per statute in 2014. However, while this appellate issue was pending, Plaintiff filed an *ex parte* Motion earlier this year and "amended" the judgment. UAIC argues can only be seen as a clear attempt to try and fix their expired judgment and, potentially, circumvent the Appellate courts' jurisdiction and forum shop. Regardless, when UAIC, the insurer for Mr. Lewis (per ruling of the U.S. District court for Nevada) sought to retain counsel to appear for Mr. Lewis and get relief from this "amended judgment", they were met with demands and directives from Mr. Tom Christensen, Counsel for Plaintiff, who claimed to

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represent Mr. Lewis (through assignment) and refused retained counsel from speaking with Mr. Lewis and forbade him from filing the pending Rule 60 Motion. Thereafter, new counsel retained for Lewis appeared and filed the pending Rule 60 Motion – *seeking to vacate a multi-million dollar judgment* – and, in response, Plaintiff's Counsel (Tom Christensen) arranged for Mr. Arntz to also appear on Lewis' behalf and file the instant Motion. Clearly, despite the protestations of professional conduct rule violations by Plaintiff, this completely unsupported Motion only serves to advance Plaintiff's (and her counsel, Tom Christensen's) interests and not Mr. Lewis and, thus should be denied. Moreover, UAIC again raises the argument that this Court vacate the Amended judgment on its own authority and hold an evidentiary hearing for what UAIC sees at a fraud upon the court.

II.

Factual Background

This action was originally filed back in 2007 in regard to an automobile accident that occurred *in July 2007* between Cheyanne Nalder and Gary Lewis. Intervenor will not re-state the entire history as it is adequately set forth in Order Certifying a Second Question to the Nevada Supreme Court by United States Court of Appeals for the Ninth Circuit, which was filed on January 11, 2018. *A copy of the Order certifying the second question of law is attached hereto as Exhibit 'A.'* Rather, the salient points are that Plaintiff's "amended judgment", entered recently in 2018, is premised on an original judgment which had been entered against Gary Lewis *on August 26, 2008*. After obtaining the judgment, Counsel for Plaintiff[1] then filed an action against Mr. Lewis' insurer, United Automobile Insurance Company ("UAIC"), Intervenor herein. Despite the prohibition against direct actions against an insurer, Plaintiff failed to obtain an assignment prior to filing that action against UAIC and, only later, during the litigation obtained an assignment from Lewis.

[1] At that time, in 2008, Ms. Nalder was a minor so the judgment was entered in favor of her through her Guardian Ad Litem and, father, James Nalder.

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In any event, that action - on coverage for the 2008 judgment by Nalder against UAIC – has proceeded in the United States District Court for the District of Nevada and, the United States Court of Appeals for the Ninth Circuit, *since 2009*. During the pendency of those appeals it was observed that Plaintiff had failed to renew her 2008 judgment against Lewis pursuant to Nevada law. Specifically, under N.R.S. 11.190(1)(a) the limitation for action to execute on such a judgment would be six (6) years, unless renewed under N.R.S. 17.214. Upon realizing the judgment had never been timely renewed, UAIC filed a Motion to Dismiss the Appeal for Lack of Standing with the Ninth Circuit on March 14, 2017. On December 27, 2017 the Ninth Circuit certified a second question to the Nevada Supreme Court – **specifically certifying the following question:**

> "Under Nevada law, if a plaintiff has filed suit against an insurer seeking damages based on a separate judgment against its insured, does the insurer's liability expire when the statute of limitations on the judgment runs, notwithstanding that the suit was filed within the six-year life of the judgment?"

See Exh. 'A.'

On February 23, 2018 the Nevada Supreme Court issued an order accepting this second certified question and ordered Appellants to file their Opening brief within 30 days, or by March 26, 2018. *A copy of the Order accepting the second certified question is attached hereto as Exhibit 'B.'* In accepting the certified question, the Nevada Supreme Court rephrased the question as follows:

> **In an action against an insurer for breach of the duty to defend its insured, can the plaintiff continue to seek consequential damages in the amount of a default judgment obtained against the insured when the judgment against the insured was not renewed and the time for doing so expired while the action against the insurer was pending?**

On August 2, Plaintiff (Appellant therein) filed her Opening Brief on this question and, UAIC has yet to file its Response Brief and, accordingly, the above-quoted question and, issue, *remains pending before the Nevada Supreme Court.*

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Despite the above, in what appears to be a clear case of forum shopping, Plaintiff retained additional Counsel (Plaintiff's Counsel herein, David Stephens, Esq.) who filed an *ex parte* Motion on March 22, 2018 seeking, innocently enough, to "amend" the 2008 expired judgment to be in the name of Cheyenne Nalder individually. *A copy of the Ex Parte Motion is attached hereto as Exhibit 'C.'* Thereafter, the Court obviously not having been informed of the above-noted Nevada Supreme Court case, entered the amended judgment and same was filed with a notice of entry on May 18, 2018. *A copy of the filed Amended Judgment is attached hereto as Exhibit 'D.'*

Furthermore, Plaintiff then initiated a "new" action, under case no. A-18-772220-C[2] in a thinly veiled attempt to have this Court rule on issues pending before the Nevada Supreme Court and "fix" their expired judgment. This intent appears clearly evidenced by paragraph five (5) of Plaintiff's prayer for relief herein which states Plaintiff is seeking this Court to make "a declaration that the statute of limitations on the judgment on the judgment is still tolled as a result of Defendant's continued absence from the state." *A copy of Plaintiff's Complaint for that action is attached hereto as Exhibit 'E."* Plaintiff then apparently served Lewis and, on July 17, 2018, sent a letter to UAIC's counsel with a copy of a "three Day notice to Plead", and, as such, threatening default of Lewis on this "new" action. *A copy of Plaintiff's letter and three day notice is attached hereto as Exhibit 'F.'*

Upon learning of this "amended judgment" and "new" action and, given the United States District Court's ruling that Gary Lewis is an insured under an *implied* UAIC policy for the loss belying these judgments and, present action, UAIC immediately sought to engage counsel to appear on Lewis' behalf in the present action. *A copy of the Judgment of the U.S. District Court finding coverage and implying an insurance policy is attached hereto as Exhibit 'G."* Following

[2] This case is currently pending, but a new judge has not been assigned. UAIC has intervened in that case and filed a Motion to dismiss that action which is pending. Interestingly, Mr. Tom Christensen has now appeared in that case *for Mr. Lewis* and has filed a third party complaint.

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retained defense Counsel's attempts to communicate with Mr. Lewis to defend him in this action and vacate this improper amendment to an expired judgment as well as defend in him in the newly filed action – retained defense counsel was sent a letter by Tom Christensen, Esq. – ***the Counsel for Plaintiff judgment-creditor in the above-referenced action and appeal*** – stating in no uncertain terms that Counsel could not communicate with Mr. Lewis, nor appear and defend him in this action and take action to get relief from this amended judgment. *A copy of Tom Christensen's letter of August 13, 2018 is attached hereto as Exhibit 'H."*

Despite the apparent contradiction of counsel representing both the judgment-creditor and judgment-debtor in the same action, it is also clear that Mr. Christensen's letter has caused the need for UAIC to intervene in the present action. Moreover, it also creates the completely absurd situation we have now where counsel for Lewis, through Mr. Christensen, has filed a Motion to strike retained defense counsel's Motion for relief from judgment - *a multi-million dollar judgment against his own client*. As will be set forth in detail below, besides denying this Motion, we see an attempt of fraud upon the court which should not be countenanced and an evidentiary hearing should be held.

II.

ARGUMENT

A. Opposition to Motion to Strike

In short, Mr. Arntz, additional Counsel for Defendant Lewis' Motion to strike is improper, unsupported and, may be a fraud upon the Court. No case law whatsoever is supplied in support of the Motion. Instead there is an unverified allegation that Mr. Lewis does not want the amended judgment, for over $3.5 million dollars against him, vacated and citation to 3 rules of professional conduct. Despite the audacity of raising rules of professional conduct in this circumstance given Plaintiff's counsel's actions (noted herein), it also true these serve as no basis to grant the Motion. The fact is, UAIC has a duty to retain counsel to defend Lewis, per earlier

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court rulings, and such Counsel has appeared and filed a Motion seeking to vacate this judgment and protect Lewis. Accordingly, said Motion for Relief from judgment is proper and, the Court should deny this Motion.

1. UAIC has a duty to defend Lewis and, accordingly, seek relief from this 'amended judgment' on his behalf.

As noted above, although UAIC initially contested coverage for Mr. Lewis, the Ninth Circuit and, then, the United States District Court, found an ambiguity in a renewal statement to Lewis and, implied a policy of insurance covering the date of loss belying this "amended judgment." *See Exh. "G."* Accordingly, as of that 2013 ruling, UAIC was found to have a policy in effect and, an attendant duty to defend. Although Plaintiff and/or Lewis will undoubtedly argue UAIC breached its duty to defend previously, in allowing the original judgment in 2007, the fact remains UAIC's duty to defend was only established, at law, in 2013 and, thus, UAIC is trying to comply with same here. The issues surrounding the emending of the 2008 judgment and, new suit filed, only arose this year and, thus, **UAIC's duty to defend these new judgments and claims only arose now**.

It is axiomatic that a policy a liability insurance comes with a duty to defend and, that same duty is broader than the duty to indemnify. *United Nat'l Ins. Co. v. Frontier Ins. Co.,* 120 Nev. 678 (2004). It is further well-settled in Nevada that when an insurer retains defense counsel to defend its insured, same counsel represents **both** the insurer and insured and has duties to both. *Nev. Yellow Cab Corp. v Eight Jud. Dist. Court of Nev.,* 123 Nev. 44 (2007). Such dual representation is allowed as long as no actual conflict exists. *Id.*

Accordingly, under the above noted case law, UAIC has a duty to defend this action on Lewis' behalf – and attempt to relieve Lewis from this "amended judgment- and has retained counsel to do just that.

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Moreover, in the case at bar, although Lewis (through Counsel) claims he does not wish to have the Motion filed or, the judgment vacated, there is no actual attestation from Mr. Lewis that this is his wish – much less that he has fully been advised of the potential consequences for not vacating the judgment. Furthermore, it is also true that there has been no showing that an actual conflict exists. Mr. Christensen, Counsel for Plaintiff, is seeking on the one hand to enforce an invalid judgment and, with the other, prevent anyone from contesting it – **by representing both sides.** ***This is the definition of a conflict of interest.*** After all, Plaintiff's is attempting to improperly "fix" an expired multi-million judgment, while at the same time Counsel for Plaintiff is also claiming to represent the judgment-debtor (Lewis) and advising retained counsel not to vacate the amended judgment. *How could this possibly benefit Mr. Lewis? Is having a multi-million dollar judgment against him which had expired be resurrected by an improper amendment of the judgment to his benefit? Is preventing anyone from vacating or setting aside this improper amended judgment to his benefit?* In short, it does not – **it only benefits Plaintiff and her counsel**. UAIC argues these questions underline the argument that there is no actual conflict here anyway and, thus, again, this Motion should be denied.

2. *The Rules of professional conduct cited offer no basis to strike the Motion and, rules of professional conduct 1.7 and 1.8 appear to be violated by Plaintiff's Counsel.*

Although allegedly claiming Mr. Tindall's Motion, on Mr. Lewis' behalf, violates N.R.C.P. 1.2, 1.4 and 3.3, the Motion offers absolutely no support that same would serve as a basis to strike the Motion for Relief from Judgment. Indeed, it appears hypocritical for Counsel retained for Lewis by Mr. Christensen to lodge such allegations when Mr. Christensen appears to be in violation of N.R.P.C. 1.7 and 1.8 given his clear conflict of interest in representing both the judgment-creditor and judgment-debtor. Accordingly, overall, these purported issues serve as no basis for this Motion and same should be denied.

In any event, each rule can be examined, as follows:

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Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer.

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decision concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

In regards to N.R.P.C. 1.2, although not flushed out in any detail, it seems the Motion is attempting to suggest Mr. Tindall is not abiding by the client's decision or, has not consulted with Mr. Lewis, in advancing a Motion to relieve him from a multi-million dollar judgment that, per Plaintiff's counsel and, now Mr. Arntz, Lewis does not want filed. First, it must be pointed out that in regards to consulting with Mr. Lewis – Mr. Christensen has forbade communication – in obvious attempt to manufacture this alleged violation. As such, this cannot serve as a violation. Finally, and most importantly, as noted above, Nevada law in this situation (insurer retained counsel) provides for dual representation. *Nev. Yellow Cab Corp. v Eight Jud. Dist. Court of Nev.,* 123 Nev. 44 (2007). This scenario is contemplated in the rule, in section (a), where it states "A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation". As such, there is no violation.

Rule 1.4. Communication.

(a) A lawyer shall:

(1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules;

(2) Reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) Keep the client reasonably informed about the status of the matter;

(4) Promptly comply with reasonable requests for information; and

(5) Consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) **Lawyer's Biographical Data Form.** Each lawyer or law firm shall have available in written form to be provided upon request of the State Bar or a client or prospective client a factual statement detailing the background, training and experience of each lawyer or law firm.

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(1) The form shall be known as the "Lawyer's Biographical Data Form" and shall contain the following fields of information:

(i) Full name and business address of the lawyer.

(ii) Date and jurisdiction of initial admission to practice.

(iii) Date and jurisdiction of each subsequent admission to practice.

(iv) Name of law school and year of graduation.

(v) The areas of specialization in which the lawyer is entitled to hold himself or herself out as a specialist under the provisions of Rule 7.4.

(vi) Any and all disciplinary sanctions imposed by any jurisdiction and/or court, whether or not the lawyer is licensed to practice law in that jurisdiction and/or court. For purposes of this Rule, disciplinary sanctions include all private reprimands imposed after March 1, 2007, and any and all public discipline imposed, regardless of the date of the imposition.

(vii) If the lawyer is engaged in the private practice of law, whether the lawyer maintains professional liability insurance, and if the lawyer maintains a policy, the name and address of the carrier.

(2) Upon request, each lawyer or law firm shall provide the following additional information detailing the background, training and experience of each lawyer or law firm, including but not limited to:

(i) Names and dates of any legal articles or treatises published by the lawyer, and the name of the publication in which they were published.

(ii) A good faith estimate of the number of jury trials tried to a verdict by the lawyer to the present date, identifying the court or courts.

(iii) A good faith estimate of the number of court (bench) trials tried to a judgment by the lawyer to the present date, identifying the court or courts.

(iv) A good faith estimate of the number of administrative hearings tried to a conclusion by the lawyer, identifying the administrative agency or agencies.

(v) A good faith estimate of the number of appellate cases argued to a court of appeals or a supreme court, in which the lawyer was responsible for writing the brief or orally arguing the case, identifying the court or courts.

(vi) The professional activities of the lawyer consisting of teaching or lecturing.

(vii) The names of any volunteer or charitable organizations to which the lawyer belongs, which the lawyer desires to publish.

(viii) A description of bar activities such as elective or assigned committee positions in a recognized bar organization.

(3) A lawyer or law firm that advertises or promotes services by written communication not involving solicitation as prohibited by Rule 7.3 shall enclose with each such written communication the information described in paragraph (c)(1)(i) through (v) of this Rule.

(4) A copy of all information provided pursuant to this Rule shall be retained by the lawyer or law firm for a period of 3 years after last regular use of the information.

[Added; effective May 1, 2006; as amended; effective November 21, 2008.]

In regards to N.R.P.C. 1.4, again not flushed out in any detail, it seems the Motion is attempting to suggest Mr. Tindall is not communicating or, consulting, with Mr. Lewis, in advancing a Motion to relieve him from a multi-million dollar judgment Again, it must be pointed out that in regards to consulting with Mr. Lewis – *Mr. Christensen has forbade communication – in obvious attempt to manufacture this alleged violation.* As such, this cannot serve as a violation.

Rule 3.3. Candor Toward the Tribunal.

(a) A lawyer shall not knowingly:

(1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

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(2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) Offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

[Added; effective May 1, 2006.]

In regard to N.R.C.P. 3.3 which, again, the Motion fails to explain exactly what the alleged violation is in regards to, it would seem that the Motion is alleging Mr. Tindall has somehow made a false statement, under sub-paragraph (a)(1) to the Court by filing the Motion Plaintiff's Counsel and, Mr. Anrtz, claim he does not want filed. However, as noted above, Nevada law in this situation (insurer retained counsel) provides for dual representation as boted above. *Nev. Yellow Cab Corp. v Eight Jud. Dist. Court of Nev.*, 123 Nev. 44 (2007).

For all of the above, these cursory allegations of violations of the rules of professional conduct are baseless and, serve as no basis to strike the Motion anyway and, thus, the Motion should be denied.

B. **Counter-Motion for Evidentiary Hearing on a Fraud upon the Court and/or set aside amended judgment on the Court's own Motion.**

Additionally, UAIC argues that the circumstances set forth above also offer grounds for this Court to hold a hearing on attempt to perpetrate a fraud upon the court. That is, the clear conflict of interest by Plaintiff. As noted above, Plaintiff is represented by Mr. Christensen. Mr. Christensen also purports to be counsel for Lewis and has informed UAIC's first retained counsel for Lewis that he may not appear and attempt to vacate this judgment. Now, counsel retained by UAIC for Lewis files a Motion for Relief from this 'amended judgment', Counsel secured by Mr. Christensen for Lewis, Mr. Arntz, files a Motion to Strike claiming Lewis does not want this multi-million dollar judgment vacated. So, per Plaintiff, UAIC's retained defense

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counsel cannot move to vacate this amended judgment which *would benefit Plaintiff*. This is clearly an attempt at a fraud upon the court solely to benefit Plaintiff and her counsel - and same should not be tolerated.[3]

In *NC-DSH, Inc. v Garner,* 125 Nev. 647 (2009) the Nevada Supreme Court set forth the definition of a fraud upon the Court in considering motion for relief from judgment under NRCP 60. In *NC-DSH, Inc.* the lawyer for a plaintiff's malpractice case forged settlement documents and disappeared with the settlement funds. *Id.* In allowing the Plaintiff's Rule 60 motion to set aside the dismissal (and settlement) the Court set forth the following definition for such a fraud, as follows:

> **"The most widely accepted definition, which we adopt, holds that the concept embrace[s] only that species of fraud which does, or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases ... and relief should be denied in the absence of such conduct.**

Id at 654.

In the case at bar it seems clear that Plaintiff's counsel (Mr. Christensen) is attempting just such a fraud. That is, besides the original judgment being expired and, the effect of its expiration on appeal before both the Nevada Supreme Court and the U.S. Court of Appeals for the Ninth Circuit, Plaintiff still attempted this 'amendment of judgment'. Moreover, Mr. Christensen (Plaintiff's additional Counsel) represents **both the judgment-creditor and judgment-debtor**. Further, in his role as counsel for Plaintiff and Defendant, Mr. Christensen is attempting, as an officer of the court, to prevent UAIC from exercising its contractual and legal duty to defend Mr. Lewis and vacate this farce of a judgment by telling UAIC's first retained counsel to not file the motion for relief from this judgment. Additionally, Plaintiff is now seeking to strike the Motion of new retained counsel for Lewis seeking relief from this judgment. UAIC pleads this clearly a **fraud perpetrated by officers of the court so that the judicial machinery**

[3] Indeed, perhaps this should be reported to the State bar.

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cannot perform in the usual manner its impartial task of adjudging cases. In other words, Mr. Christensen, Counsel for Plaintiff, is seeking on the one hand to enforce an invalid judgment and, with the other, prevent anyone from contesting it – **by representing both sides.** ***This is the definition of a conflict of interest.*** After all, Plaintiff's is attempting to improperly "fix" an expired multi-million judgment, while at the same time Counsel for Plaintiff is also claiming to represent the judgment-debtor (Lewis) and advising retained counsel not to vacate the amended judgment. *How could this possibly benefit Mr. Lewis*? Is having a multi-million dollar judgment against him which had expired be resurrected by an improper amendment of the judgment to his benefit? Is preventing anyone from vacating or setting aside this improper amended judgment to his benefit? In short, it does not – **it only benefits Plaintiff and her counsel**. UAIC argues this is clear fraud and collusive conduct and, at the very least, the Court should therefore exercise its equitable power and allow UAIC's intervention and, thereafter, hold an evidentiary hearing on this fraud.

UAIC further pleads, in the alternative, that this Court vacate the 2018 "amended judgment" on its own Motion given the clear fraud that appears to have been perpetrated and is set forth herein. As this Court is aware, District Courts have the inherent power to set aside judgments procured by extrinsic fraud. *Lauer v District Court,* 62 Nev. 78, 140 P.2d 953. In the case at bar the potential extrinsic fraud abounds. Besides the inherent conflict of interest of Plaintiff's Counsel, it also true that Plaintiff failed to advise this court that 1) the 2008 judgment had expired and, 2) that the issue over the effect of same expired judgment was before both the Nevada Supreme Court and the U.S. Court of Appeals for the Ninth Circuit when it filed its *ex parte* Motion to amend this judgment. Extrinsic fraud is usually found when conduct prevents a real trial on the issues or, prevents the losing party from having a fair opportunity of presenting his/her defenses. *Murphy v Murphy,* 65 Nev. 264 (1948). The Court may vacate or set aside a

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judgment under Rule 60 on its own Motion. *A-Mark Coin Co. v. Estate of Redfield,* 94 Nev. 495 (1978).

Given the fairly egregious attempt to prevent UAIC, or Counsel retained on Lewis' behalf, from vacating the improper attempt to amend an expired judgment, when such judgment was procured without notice, while these issues were on appeal and, with Plaintiff's counsel representing both sides – UAIC pleads with this Court to exercise its own discretion and authority to vacate the amended judgment based on all of the above.

III.

CONCLUSION

Based on the foregoing, UAIC asks this Court to deny Defendant's Motion to Strike. Further, and additionally, that this court grant UAIC's Counter-Motion and hold an evidentiary hearing on the potential fraud upon the court or, alternatively, that this court exercise its inherent authority and discretion to vacate or set aside the improperly obtained amended judgment for the reasons set forth above.

DATED this 1st day of November, 2018.

ATKIN WINNER & SHERROD

Matthew Douglas, Esq.
Nevada Bar No. 11371
1117 S. Rancho Drive
Las Vegas, Nevada 89102
Attorneys for UAIC

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CERTIFICATE OF SERVICE

I certify that on this 2ND day of November, 2018, the foregoing **UAIC'S OPPOSITION TO DEFENDANT'S MOTION TO STRIKE DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT & COUNTER-MOTION FOR EVIDENTIARY HEARING FOR A FRAUD UPON THE COURT OR, ALTERNATIVELY, FOR THE COURT TO VACATE THE 3/28/18 AMENDED JUDGMENT ON ITS OWN MOTION** was served on the following by [ ] Electronic Service pursuant to NEFR 9 [X] Electronic Filing and Service pursuant to NEFR 9 [ ] hand delivery [ ] overnight delivery [ ] fax [ ] fax and mail [ ] mailing by depositing with the U.S. mail in Las Vegas, Nevada, enclosed in a sealed envelope with first class postage prepaid, addressed as follows:

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Attorney for Plaintiff

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Carissa Christensen, Esq.
RESNICK & LOUIS, P.C.
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Additional Attorney for Defendant Lewis

An employee of ATKIN WINNER & SHERROD

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EXHIBIT "A"

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 70504

JAMES NALDER, Guardian Ad Litem on behalf of Cheyanne Nalder; GARY LEWIS, individually, *Plaintiffs-Appellants*,	No. 13-17441
v.	D.C. No. 2:09-cv-01348-RCJ-GWF
UNITED AUTOMOBILE INSURANCE COMPANY, *Defendant-Appellee.*	ORDER CERTIFYING QUESTION TO THE NEVADA SUPREME COURT

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

Argued and Submitted January 6, 2016
San Francisco, California

Filed December 27, 2017

Before: Diarmuid F. O'Scannlain and
William A. Fletcher, Circuit Judges.*

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* This case was submitted to a panel that included Judge Kozinski, who recently retired.

18-01692

SUMMARY**

Certified Question to Nevada Supreme Court

The panel certified the following question of law to the Nevada Supreme Court:

> Under Nevada law, if a plaintiff has filed suit against an insurer seeking damages based on a separate judgment against its insured, does the insurer's liability expire when the statute of limitations on the judgment runs, notwithstanding that the suit was filed within the six-year life of the judgment?

ORDER

Pursuant to Rule 5 of the Nevada Rules of Appellate Procedure, we certify to the Nevada Supreme Court the question of law set forth in Part II of this order. The answer to this question may be determinative of the cause pending before this court, and there is no controlling precedent in the decisions of the Nevada Supreme Court or the Nevada Court of Appeals.

Further proceedings in this court are stayed pending receipt of an answer to the certified question. Submission remains withdrawn pending further order. The parties shall notify the Clerk of this court within one week after the

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Nevada Supreme Court accepts or rejects the certified question, and again within one week after the Nevada Supreme Court renders its opinion.

I

Plaintiffs-appellants, James Nalder, guardian ad litem for Cheyanne Nalder, and Gary Lewis will be the appellants before the Nevada Supreme Court. Defendant-appellee, United Automobile Insurance Company ("UAIC"), a Florida corporation with its principal place of business in Florida, will be the respondent.

The names and addresses of counsel for the parties are as follows:

Thomas Christensen, Christensen Law Offices, LLC, 1000 South Valley View Boulevard, Las Vegas, Nevada 89107, and Dennis M. Prince, Eglet Prince, 400 South Seventh Street, Suite 400, Las Vegas, Nevada 89101, for appellants.

Thomas E. Winner, Susan M. Sherrod and Matthew J. Douglas, Atkin Winner & Sherrod, 1117 South Rancho Drive, Las Vegas, Nevada 89102, for respondent.

II

The question of law to be answered is:

> Under Nevada law, if a plaintiff has filed suit against an insurer seeking damages based on a separate judgment against its insured, does the insurer's liability expire when the

> statute of limitations on the judgment runs, notwithstanding that the suit was filed within the six-year life of the judgment?

The Nevada Supreme Court may rephrase the question as it deems necessary.

III

A

This is the second order in this case certifying a question to the Nevada Supreme Court. We recount the facts essentially as in the first order.

On July 8, 2007, Gary Lewis ran over Cheyanne Nalder. Lewis had taken out an auto insurance policy with UAIC, which was renewable on a monthly basis. Before the accident, Lewis had received a statement instructing him that his renewal payment was due by June 30, 2007. The statement also specified that "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy." The statement listed June 30, 2007, as the policy's effective date and July 31, 2007, as its expiration date. Lewis did not pay to renew his policy until July 10, 2007, two days after the accident.

James Nalder ("Nalder"), Cheyanne's father, made an offer to UAIC to settle her claim for $15,000, the policy limit. UAIC rejected the offer, arguing Lewis was not covered at the time of the accident because he did not renew the policy by June 30. UAIC never informed Lewis that Nalder was willing to settle.

Nalder sued Lewis in Nevada state court and obtained a $3.5 million default judgment. Nalder and Lewis then filed the instant suit against UAIC in state court, which UAIC removed to federal court. Nalder and Lewis alleged breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, fraud, and breach of section 686A.310 of the Nevada Revised Statutes. UAIC moved for summary judgment on the basis that Lewis had no insurance coverage on the date of the accident. Nalder and Lewis argued that Lewis was covered on the date of the accident because the renewal notice was ambiguous as to when payment had to be received to avoid a lapse in coverage, and that this ambiguity had to be construed in favor of the insured. The district court found that the contract could not be reasonably interpreted in favor of Nalder and Lewis's argument and granted summary judgment in favor of UAIC.

We held that summary judgment "with respect to whether there was coverage" was improper because the "[p]laintiffs came forward with facts supporting their tenable legal position." *Nalder v. United Auto. Ins. Co.*, 500 F. App'x 701, 702 (9th Cir. 2012). But we affirmed "[t]he portion of the order granting summary judgment with respect to the [Nevada] statutory arguments." *Id.*

On remand, the district court granted partial summary judgment to each party. First, the court found the renewal statement ambiguous, so it construed this ambiguity against UAIC by finding that Lewis was covered on the date of the accident. Second, the court found that UAIC did not act in bad faith because it had a reasonable basis to dispute coverage. Third, the court found that UAIC breached its duty to defend Lewis but awarded no damages "because [Lewis] did not incur any fees or costs in defending the underlying

action" as he took a default judgment. The court ordered UAIC "to pay Cheyanne Nalder the policy limits on Gary Lewis's implied insurance policy at the time of the accident." Nalder and Lewis appeal.

B

Nalder and Lewis claim on appeal that they should have been awarded consequential and compensatory damages resulting from the Nevada state court judgment because UAIC breached its duty to defend. Thus, assuming that UAIC did not act in bad faith but did breach its duty to defend Lewis, one question before us is how to calculate the damages that should be awarded. Nalder and Lewis claim they should have been awarded the amount of the default judgment ($3.5 million) because, in their view, UAIC's failure to defend Lewis was the proximate cause of the judgment against him. The district court, however, denied damages because Lewis chose not to defend and thus incurred no attorneys' fees or costs. Because there was no clear state law and the district court's opinion in this case conflicted with another decision by the U.S. District Court for the District of Nevada on the question of whether liability for breach of the duty to defend included all losses consequential to an insurer's breach, we certified that question to the Nevada Supreme Court in an order dated June 1, 2016. In that order, we also stayed proceedings in this court pending resolution of the certified question by the Nevada Supreme Court.

After that certified question had been fully briefed before the Nevada Supreme Court, but before any ruling or oral argument, UAIC moved this court to dismiss the appeal for lack of standing. UAIC argues that the six-year life of the

default judgment had run and that the judgment had not been renewed, so the judgment is no longer enforceable. Therefore, UAIC contends, there are no longer any damages above the policy limit that Nalder and Lewis can seek because the judgment that forms the basis for those damages has lapsed. For that reason, UAIC argues that the issue on appeal is moot because there is no longer any basis to seek damages above the policy limit, which the district court already awarded.

In a notice filed June 13, 2017, the Nevada Supreme Court stayed consideration of the question already certified in this case until we ruled on the motion to dismiss now pending before us.

IV

In support of its motion to dismiss, UAIC argues that under Nev. Rev. Stat. § 11.190(1)(a), the six-year statute of limitations during which Nalder could enforce his default judgment against Lewis expired on August 26, 2014, and Nalder did not renew the judgment. Therefore, says UAIC, the default judgment has lapsed, and because it is no longer enforceable, it no longer constitutes an injury for which Lewis or Nalder may seek damages from UAIC.

In response, Nalder and Lewis do not contest that the six-year period of the statute of limitations has passed and that they have failed to renew the judgment, but they argue that UAIC is wrong that the issue of consequential damages is mooted. First, they make a procedural argument that a lapse in the default judgment, if any, may affect the amount of damages but does not affect liability, so the issue is inappropriate to address on appeal before the district court

has evaluated the effect on damages. Second, they argue that their suit against UAIC is itself "an action upon" the default judgment under the terms of Nev. Rev. Stat. § 11.190(1)(a) and that because it was filed within the six-year life of the judgment it is timely. In support of this argument, they point out that UAIC has already paid out more than $90,000 in this case, which, they say, acknowledges the validity of the underlying judgment and that this suit is an enforcement action upon it.

Neither side can point to Nevada law that definitively answers the question of whether plaintiffs may still recover consequential damages based on the default judgment when six years passed during the pendency of this suit. Nalder and Lewis reach into the annals of Nevada case law to find an opinion observing that at common law "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." *Mandlebaum v. Gregovich*, 50 P. 849, 851 (Nev. 1897); *see also Leven v. Frey*, 168 P.3d 712, 715 (Nev. 2007) ("An action on a judgment *or* its renewal must be commenced within six years." (emphasis added)). They suggest they are doing just this, "us[ing] the judgment, as an original cause of action," to recover from UAIC. But that precedent does not resolve whether a suit against an insurer who was not a party to the default judgment is, under Nevada law, an "action on" that judgment.

UAIC does no better. It also points to *Leven* for the proposition that the Nevada Supreme Court has strictly construed the requirements to renew a judgment. *See Leven*, 168 P.3d at 719. Be that as it may, Nalder and Lewis do not

rely on any laxity in the renewal requirements and argue instead that the instant suit is itself a timely action upon the judgment that obviates any need for renewal. UAIC also points to Nev. Rev. Stat. § 21.010, which provides that "the party in whose favor judgment is given may, at any time before the judgment expires, obtain the issuance of a writ of execution for its enforcement as prescribed in this chapter. The writ ceases to be effective when the judgment expires." That provision, however, does not resolve this case because Nalder and Lewis are not enforcing a writ of execution, which is a direction to a sheriff to satisfy a judgment. *See* Nev. Rev. Stat. § 21.020.

Finally, apart from Nalder and Lewis's argument that it is inappropriate to address on appeal the effect of the statute of limitations on the size of damages they may collect, neither side squarely addresses whether the expiration of the judgment in fact reduces the consequential damages for UAIC's breach of the duty to defend. Does the judgment's expiration during the pendency of the suit reduce the consequential damages to zero as UAIC implies, or should the damages be calculated based on when the default judgment was still enforceable, as it was when the suit was initiated? Neither side provides Nevada law to answer the question, nor have we discovered it.

V

It appears to this court that there is no controlling precedent of the Nevada Supreme Court or the Nevada Court of Appeals with regard to the issue of Nevada law raised by the motion to dismiss. We thus request the Nevada Supreme Court accept and decide the certified question. "The written opinion of the [Nevada] Supreme Court stating the law

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governing the question[] certified . . . shall be res judicata as to the parties." Nev. R. App. P. 5(h).

If the Nevada Supreme Court accepts this additional certified question, it may resolve the two certified questions in any order it sees fit, because Nalder and Lewis must prevail on both questions in order to recover consequential damages based on the default judgment for breach of the duty to defend.

The clerk of this court shall forward a copy of this order, under official seal, to the Nevada Supreme Court, along with copies of all briefs and excerpts of record that have been filed with this court.

IT IS SO ORDERED.

Respectfully submitted, Diarmuid F. O'Scannlain and William A. Fletcher, Circuit Judges.

Diarmuid F. O'Scannlain
Circuit Judge

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EXHIBIT "B"

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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,
Respondent.

No. 70504

FILED

FEB 23 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER ACCEPTING SECOND CERTIFIED QUESTION AND DIRECTING SUPPLEMENTAL BRIEFING

The United States Ninth Circuit Court of Appeals previously certified a legal question to this court under NRAP 5, asking us to answer the following question:

> 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?

Because no clearly controlling Nevada precedent answers that legal question and the answer could determine part of the federal case, we accepted that certified question and directed the parties to file briefs addressing that question. After briefing had been completed, respondent United Automobile Insurance Company informed this court that it had filed a motion to dismiss in the federal case. We then stayed our consideration of the certified question because a decision by the Ninth Circuit granting the motion to dismiss would render the question before this court advisory.

18-07125

The Ninth Circuit has now certified another legal question to this court under NRAP 5. The new question, which is related to the motion to dismiss pending in the Ninth Circuit, asks us to answer the following:

> Under Nevada law, if a plaintiff has filed suit against an insurer seeking damages based on a separate judgment against its insured, does the insurer's liability expire when the statute of limitations on the judgment runs, notwithstanding that the suit was filed within the six-year life of the judgment?

That question is focused on the insurer's liability, but elsewhere in the Ninth Circuit's certification order, it makes clear that the court is concerned with whether the plaintiff in this scenario can continue to seek the amount of the separate judgment against the insured as consequential damages caused by the insurer's breach of the duty to defend its insured when the separate judgment was not renewed as contemplated by NRS 11.190(1)(a) and NRS 17.214 during the pendency of the action against the insurer. We therefore choose to accept the Ninth Circuit's invitation to "rephrase the question as [we] deem necessary." Consistent with language that appears elsewhere in the certification order, we rephrase the question as follows:

> In an action against an insurer for breach of the duty to defend its insured, can the plaintiff continue to seek consequential damages in the amount of a default judgment obtained against the insured when the judgment against the insured was not renewed and the time for doing so expired while the action against the insurer was pending?

As no clearly controlling Nevada precedent answers this legal question and the answer may determine the federal case, we accept this certified question as rephrased. *See* NRAP 5(a); *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 749-51, 137 P.3d 1161, 1163-64 (2006).

Appellants shall have 30 days from the date of this order to file and serve a supplemental opening brief. Respondent shall have 30 days from the date the supplemental opening brief is served to file and serve a supplemental answering brief. Appellants shall then have 20 days from the date the supplemental answering brief is served to file and serve any supplemental reply brief. The supplemental briefs shall be limited to addressing the second certified question and shall comply with NRAP 28, 28.2, 31(c), and 32. *See* NRAP 5(g)(2). To the extent that there are portions of the record that have not already been provided to this court and are necessary for this court to resolve the second certified question, the parties may submit a joint appendix containing those additional documents. *See* NRAP 5(d). Given the relationship between the two certified questions, we lift the stay as to the first certified question.

It is so ORDERED.[1]

_____, C.J.
Douglas

_____, J.
Cherry

_____, J.
Gibbons

_____, J.
Pickering

_____, J.
Hardesty

_____, J.
Stiglich

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[1]As the parties have already paid a filing fee when this court accepted the first certified question, no additional filing fee will be assessed at this time.

The Honorable Ron D. Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter.

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cc: Eglet Prince
Christensen Law Offices, LLC
Atkin Winner & Sherrod
Cole, Scott & Kissane, P.A.
Lewis Roca Rothgerber Christie LLP/Las Vegas
Pursiano Barry Bruce Lavelle, LLP
Laura Anne Foggan
Mark Andrew Boyle
Matthew L. Sharp, Ltd.
Clerk, United States Court of Appeals for the Ninth Circuit

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EXHIBIT "C"

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Electronically Filed
3/22/2018 11:15 AM
Steven D. Grierson
CLERK OF THE COURT

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David A. Stephens, Esq.
Nevada Bar No. 00902
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3636 North Rancho Drive
Las Vegas, Nevada 89130
Telephone: (702) 656-2355
Facsimile: (702) 656-2776
Email: dstephens@sgblawfirm.com
Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER, Plaintiff, vs. GARY LEWIS, Defendants.	CASE NO.: ~~A549111~~ 07-A-549111 DEPT NO.: XXIX

EX PARTE MOTION TO AMEND JUDGMENT IN THE NAME OF CHEYENNE NALDER, INDIVIDUALLY

Date: N/A

Time: N/A

NOW COMES Cheyenne Nalder, by and through her attorneys at STEPHENS, GOURLEY & BYWATER and moves this court to enter judgment against Defendant, GARY LEWIS, in her name as she has now reached the age of majority. Judgment was entered in the name of the guardian ad litem. (See Exhibit 1) Pursuant to NRS 11.280 and NRS 11.300, Cheyenne now moves this court to issue the judgment in her name alone (See Exhibit 2) so that she may pursue collection of the same. Cheyenne turned 18 on April 4, 2016. In addition, Defendant Gary Lewis, has been absent from the State of Nevada since at least February 2010.

/ / / /

Therefore, Cheyenne Nalder hereby moves this court to enter the judgment in her name of $3,500,000.00, with interest thereon at the legal rate from October 9, 2007, until paid in full.

Dated this 19 day of March, 2018.

STEPHENS GOURLEY & BYWATER

David A. Stephens, Esq.
Nevada Bar No. 00902
3636 North Rancho Drive
Las Vegas, Nevada 89130
Attorneys for Plaintiff

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EXHIBIT "1"

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.	)	CASE NO: A549111 DEPT. NO: VI
GARY LEWIS, and DOES I through V, inclusive	)	
Defendants.	)	

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:

. . .

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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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EXHIBIT "2"

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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 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:

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

DATED this _____ 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

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EXHIBIT "D"

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5/18/2018 3:37 PM
Steven D. Grierson
CLERK OF THE COURT

NOE
David A. Stephens, Esq.
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Las Vegas, Nevada 89130
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Facsimile: (702) 656-2776
Email: dstephens@sgblawfirm.com
Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER, Plaintiff, vs. GARY LEWIS Defendant.	Case No. 07A549111 Dept. No. XXIX

NOTICE OF ENTRY OF AMENDED JUDGMENT

NOTICE IS HEREBY GIVEN that on the 26th day of March, 2018, the Honorable David M. Jones entered an **AMENDED JUDGMENT,** which was thereafter filed on March 28, 2018, in the above entitled matter, a copy of which is attached to this Notice.

Dated this 17 day of May, 2018.

STEPHENS & BYWATER

David A. Stephens, Esq.
Nevada Bar No. 00902
3636 North Rancho Drive
Las Vegas, Nevada 89130
Attorney for Brittany Wilson

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the law office of STEPHENS & BYWATER, and that on the 18th day of May, 2018, I served a true copy of the foregoing **NOTICE OF ENTRY OF AMENDED JUDGMENT,** by depositing the same in a sealed envelope upon which first class postage was fully prepaid, and addressed as follows:

Gary Lewis
733 S. Minnesota Ave.
Glendora, California 91740

M. Goldstein
An employee of Stephens & Bywater

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

JMT
DAVID A. STEPHENS, ESQ.
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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:

...

...

...

...

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JMT
DAVID A. STEPHENS, ESQ.
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3636 North Rancho Dr
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Attorneys for Plaintiff
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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:

...

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

DATED this 26 day of March, 2018.

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

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EXHIBIT "E"

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4/3/2018 3:07 PM
Steven D. Grierson
CLERK OF THE COURT

COMP
David A. Stephens, Esq.
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Facsimile: (702) 656-2776
Email: dstephens@sgblawfirm.com
Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER, Plaintiff, vs. GARY LEWIS and DOES I through V, inclusive, Defendants.	CASE NO.: ~~A549111~~ A-18-772220-C DEPT NO.: ~~XXIX~~ Department 29

COMPLAINT

Date: n/a
Time: n/a

COMES NOW the Plaintiff, CHEYENNE NALDER, by and through Plaintiff's attorney, DAVID A. STEPHENS, ESQ., of STEPHENS & BYWATER, and for a cause of action against the Defendants, and each of them, alleges as follows:

1. Upon information and belief, that at the time of the injury the Defendant, GARY LEWIS, was a resident of Las Vegas, Clark County, Nevada, and that on or about December 2008 GARY LEWIS moved out of state and has not been present or resided in the jurisdiction since that time.

2. That Plaintiff, CHEYENNE NALDER, was at the time of the accident, a resident of the County of Clark, State of Nevada

3. That the true names or capacities, whether individual, corporate, associate or otherwise, of Defendants names as DOES I through V, inclusive, are unknown to Plaintiff, who

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therefore sues said Defendant by such fictitious names. Plaintiff is informed and believes and thereon alleges that each of the Defendants designated herein as DOE is responsible in some manner for the events and happenings referred to and caused damages proximately to Plaintiff as herein alleged, and that Plaintiff will ask leave of this Court to amend this Complaint to insert the true names and capacities of DOES I through V, when the names have been ascertained, and to join such Defendants in this action.

4. Upon information and belief, Defendant, Gary Lewis, was the owner and operator of a certain 1996 Chevy Pickup (hereafter referred as "Defendant vehicle") at all times relevant to this action.

5. On the 8th day of July, 2007, Defendant, Gary Lewis, was operating the Defendant's vehicle on private property located in Lincoln County, Nevada; that Plaintiff, Cheyenne Nalder, was playing on the private property; that Defendant, did carelessly and negligently operate Defendant's vehicle so to strike the Plaintiff, Cheyenne Nalder, and that as a direct and proximate result of the aforesaid negligence of Defendant, Gary Lewis, and each of the Defendants, Plaintiff, Cheyenne Nalder, sustained the grievous and serious personal injuries and damages as hereinafter more particularly alleged.

6. At the time of the accident herein complained of, and immediately prior thereto, Defendant, Gary Lewis, in breaching a duty owed to Plaintiffs, was negligent and careless, inter alia, in the following particulars:

A. In failing to keep Defendant's vehicle under proper control;

B. In operating Defendant's vehicle without due care for the rights of the Plaintiff;

C. In failing to keep a proper lookout for plaintiffs

D. The Defendant violated certain Nevada Revised Statutes and Clark County Ordinances, and the Plaintiff will pray leave of Court to insert the exact statutes or ordinances at the time of trial.

7. By reason of the premises, and as a direct and proximate result of the aforesaid negligence and carelessness of Defendants, and each of them, Plaintiff, Cheyenne Nalder, sustained a broken leg and was otherwise injured in and about her neck, back, legs, arms, organs, and

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systems, and was otherwise injured and caused to suffer great pain of body and mind, and all or some of the same is chronic and may be permanent and disabling, all to her damage in an amount in excess of $10,000.00

8. By reason of the premises, and as a direct and proximate result of the aforesaid negligence and carelessness of the Defendants, and each of them, Plaintiff, Cheyenne Nalder, has been caused to expend monies for medical and miscellaneous expenses as of this time in excess of $41,851.89, and will in the future be caused to expend additional monies for medical expenses and miscellaneous expenses incidental thereto, in a sum not yet presently ascertainable, and leave of Court will be requested to include said additional damages when the same have been fully determined.

9. Prior to the injuries complained of herein, Plaintiff, Cheyenne Nalder, was an able-bodied female, capable of being gainfully employed and capable of engaging in all other activities for which Plaintiff was otherwise suited. By reason of the premises, and as a direct and proximate result of the negligence of the said Defendants, and each of them, Plaintiff, Cheyenne Nalder, was caused to be disabled and limited and restricted in her occupations and activities, and/or suffered a diminution of Plaintiff's earning capacity and future loss of wages, all to her damage in a sum not yet presently ascertainable, the allegations of which Plaintiff prays leave of Court to insert here when the same shall be fully determined.

10. That James Nalder as guardian ad litem for Plaintiff, Cheyenne Nalder, obtained judgment against Gary Lewis.

11. That the judgment is to bear interest at the legal rate from October 9, 2007 until paid in full.

12. That during Cheyenne Nalder's minority which ended on April 4, 2016 all statutes of limitations were tolled.

13. That during Gary Lewis' absence from the state of Nevada all statutes of limitations have been tolled and remain tolled.

14. That the only payment made on the judgment was $15,000.00 paid by Lewis's insurer on February 5, 2015. This payment extends any statute of limitation.

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15. After reaching the age of majority an amended judgment was entered in Cheyenne Nalder's name.

16. Plaintiff, in the alternative, now brings this action on the judgment to obtain a judgment against Gary Lewis including the full damages assessed in the original judgment plus interest and minus the one payment made.

17. In the alternative Plaintiff requests declaratory relief regarding when the statutes of limitations on the judgments expire.

18. Plaintiff has been required to retain the law firm of STEPHENS & BYWATER to prosecute this action, and is entitled to a reasonable attorney's fee.

CLAIM FOR RELIEF;

1. General damages in an amount in excess of $10,000.00;

2. Special damages for medical and miscellaneous expenses in excess of $41,851.89, plus future medical expenses and the miscellaneous expenses incidental thereto in a presently unascertainable amount;

3. Special damages for loss of wages in an amount not yet ascertained an/or diminution of Plaintiff's earning capacity, plus possible future loss of earning and/or diminution of Plaintiff's earning capacity in a presently unascertainable amount;

4. Judgment in the amount of $3,500,000 plus interest through April 3, 2018 of $2,112,669.52 minus $15,000.00 paid for a total judgment of $5,597,669.52.

5. A declaration that the statute of limitations on the judgment is still tolled as a result of the Defendant's continued absence from the state.

4. Costs of this suit;

5. Attorney's fees; and

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6. For such other and further relief as to the Court may seem just and proper in the premises.

DATED this 3rd day of April, 2018.

STEPHENS GOURLEY & BYWATER

/s David A. Stephens
David A. Stephens, Esq.
Nevada Bar No. 00902
3636 North Rancho Drive
Las Vegas, Nevada 89130
Attorneys for Plaintiff

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EXHIBIT "F"

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STEPHENS & BYWATER, P.C.

ATTORNEYS AT LAW

David A. Stephens email: dstephens@sgblawfirm.com Gordon E. Bywater email: gbywater@sgblawfirm.com

July 17, 2018

VIA REGULAR U.S. MAIL
Thomas E. Winner, Esq.
Atkin Winner & Sherrod
1117 S. Rancho Drive
Las Vegas, Nevada 89102

RE: Cheyenne Nalder vs. Gary Lewis

Dear Tom:

I am enclosing with this letter a Three Day Notice to Plead which I filed in the above entitled matter.

I recognize that you have not appeared in this matter. I served Mr. Lewis some time ago and he has never filed an answer. Thus, as a courtesy to you, who I understand to be representing Mr. Lewis in related cases, I am providing this Three Day Notice to you in addition to Mr. Lewis.

I appreciate your consideration.

Sincerely,

STEPHENS & BYWATER

David A. Stephens, Esq.

DAS:mlg
enclosure

3636 N. Rancho Drive, Las Vegas, Nevada 89130
Telephone: (702) 656-2355 | Facsimile: (702) 656-2776
Website: www.sgblawfirm.com

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Electronically Filed
7/18/2018 3:54 PM
Steven D. Grierson
CLERK OF THE COURT

TDNP (CIV)
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Las Vegas, Nevada 89130
Telephone: (702) 656-2355
Facsimile: (702) 656-2776
Email: dstephens@sgblawfirm.com
Attorney for Cheyenne Nalder

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.: XXIX

THREE DAY NOTICE TO PLEAD

Date: n/a
Time: n/a

To: Gary Lewis, Defendant

PLEASE TAKE NOTICE that the Plaintiff intends to take a default and default judgment against you if you have not answered or otherwise filed a response of pleading within three (3) days of the date of this notice.

Dated this 17 day of July 2018.

David A. Stephens, Esq.
Nevada Bar No. 00902
Stephens Gourley & Bywater
3636 N. Rancho Drive
Las Vegas, NV 89130
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that service of this THREE DAY NOTICE TO PLEAD was made this 17th day of July, 2018, by depositing a copy thereof in the U.S. Mail, first class postage prepaid, addressed to:

Gary Lewis
733 Minnesota Avenue
Glendora, CA 91740

Thomas E. Winner, Esq.
Atkin Winner Shorrod
1117 S. Rancho Drive
Las Vegas, NV 89102

M. Holdstein
An Employee of
Stephens Gourley & Bywater

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EXHIBIT "G"

AO450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

DISTRICT OF Nevada

Nalder et al.,

Plaintiffs,

V.

United Automobile Insurance Company,

Defendant.

JUDGMENT IN A CIVIL CASE

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

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

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

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

IT IS ORDERED AND ADJUDGED

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

The Court grants summary judgment on all extra-contractual claims and/or bad faith claims in favor of Defendant.
The Court directs Defendant to pay Cheyanne Nalder the policy limits on Gary Lewis's implied insurance policy at the time of the accident.

October 30, 2013

Date

/s/ Lance S. Wilson

Clerk

/s/ Summer Rivera

(By) Deputy Clerk

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EXHIBIT "H"

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CHRISTENSEN LAW
www.injuryhelpnow.com

August 13, 2018

Stephen H. Rogers, Esq.
ROGERS, MASTRANGELO, CARVALHO & MITCHELL
700 S. Third Street
Las Vegas, Nevada 89101

VIA Fax: (702)384-1460
Email: srogers@rmcmlaw.com

Re: Gary Lewis

Dear Stephen:

I am in receipt of your letter dated Friday, August 10, 2018. I was disappointed that you have chosen to disregard my request that you communicate with me and not directly with my client. You say you have "been retained to defend Mr. Lewis with regard to Ms. Nalder's 2018 actions." Would you be so kind as to provide me with all communications written or verbal or notes of communications you have had with UAIC, their attorneys and/or Mr. Lewis from your first contact regarding this matter to the present?

Please confirm that UAIC seeks now to honor the insurance contract with Mr. Lewis and provide a defense for him and pay any judgment that may result? This is the first indication I am aware of where UAIC seeks to defend Mr. Lewis. I repeat, please do not take any actions, including requesting more time or filing anything on behalf of Mr. Lewis without first getting authority from Mr. Lewis through me. Please only communicate through this office with Mr. Lewis. If you have already filed something or requested an extension without written authority from Mr. Lewis, he requests that you immediately reverse that action. Please also only communicate with UAIC that any attempt by them to hire any other attorneys to take action on behalf of Mr. Lewis must include notice to those attorneys that they must first get Mr. Lewis' consent through my office before taking any action including requesting extensions of time or filing any pleadings on his behalf.

Regarding your statement that Mr. Lewis would not be any worse off if you should lose your motions. That is not correct. We agree that the validity of the judgment is unimportant at this stage of the claims handling case. UAIC, however, is arguing that Mr. Lewis' claims handling case should be dismissed because they claim the judgment is not valid. If you interpose an insufficient improper defense that delays the inevitable entry of judgment against Mr. Lewis and the Ninth Circuit dismisses the appeal then Mr. Lewis will have a judgment against him and no claim against UAIC. In addition, you will cause additional damages and expense to both parties for which, ultimately, Mr. Lewis would be responsible.

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Could you be mistaken about your statement that "the original Judgment expired and cannot be revived?" I will ask your comment on just one legal concept -- Mr. Lewis' absence from the state. There are others but this one is sufficient on its own. There are three statutes applicable to this narrow issue: NRS 11.190; NRS 11.300 and NRS 17.214.

NRS 11.190 Periods of limitation. ... actions .. may only be commenced as follows:

1. Within 6 years:

(a) ... 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.

NRS 11.300 Absence from State suspends running of statute. If, ... after the cause of action shall have accrued the person (defendant) departs from the State, the time of the absence shall not be part of the time prescribed for the commencement of the action.

NRS 17.214 Filing and contents of affidavit; recording affidavit; notice to judgment debtor; successive affidavits.

1. A judgment creditor or a judgment creditor's successor in interest may renew a judgment which has not been paid by:

(a) Filing an affidavit with the clerk of the court where the judgment is entered and docketed, within 90 days before the date the judgment expires by limitation.

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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.

Your prompt attention is appreciated. 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. Mr. Lewis would like all your communications to go through my office. He does not wish to have you copy him on correspondence with my office. Please do not communicate directly with Mr. Lewis.

Very truly yours,

Tommy Christensen
CHRISTENSEN LAW OFFICE, LLC

1000 S. Valley View Blvd. Las Vegas, NV 89107 | office@injuryhelpnow.com | P: 702.870.1000 | F: 702.870.6152

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Steven D. Grierson
CLERK OF THE COURT

MCSD
THOMAS E. WINNER
Nevada Bar No. 5168
MATTHEW J. DOUGLAS
Nevada Bar No. 11371
ATKIN WINNER & SHERROD
1117 South Rancho Drive
Las Vegas, Nevada 89102
Phone (702) 243-7000
Facsimile (702) 243-7059
mdouglas@awslawyers.com

Attorneys for Intervenor United Automobile Insurance Company

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYANNE NALDER, Plaintiff, vs. GARY LEWIS and DOES I through V, inclusive, Defendants.	CASE NO.: 07A549111 DEPT. NO.: XX

INTERVENOR'S MOTION TO CONSOLIDATE ON ORDER SHORTENING TIME

COMES NOW, Intervenor, United Automobile Insurance Company, by and through their counsel of record, Thomas E. Winner and Matthew J. Douglas of the law firm Atkin Winner & Sherrod, hereby moves this Court for an Order to Consolidate Case No. A-18-772220-C into the preceding case, Case No. 07A549111, pursuant to Nev. R. Civ. P. 42(a) and EDCR 2.50(a). This Motion is based upon the pleadings and papers on file herein, the Memorandum of Points and Authorities attached hereto and any oral arguments this Court may entertain at the hearing of this Motion.

DATED this 5 day of November, 2018.

ATKIN WINNER & SHERROD

Thomas E. Winner
Nevada Bar No. 5168
Matthew J. Douglas
Nevada Bar No. 11371
1117 South Rancho Drive
Las Vegas, Nevada 89102
Attorneys for Intervenor

ORDER SHORTENING TIME

Good cause appearing therefore, IT IS HEREBY ORDERED that the time for hearing the Motion to Consolidate on an Order Shortening Time is hereby shortened to the 20TH day of November 2018 at the hour of 10:30 a.m./p.m. or as soon as counsel may be heard in the above-entitled Department of the District Court, Clark County, Nevada.

DATED this 21 day of November 2018

DISTRICT COURT JUDGE
ERIC JOHNSON

Submitted by,

ATKIN WINNER & SHERROD

Thomas E. Winner
Nevada Bar No. 5168
Matthew J. Douglas
Nevada Bar No. 11371
1117 South Rancho Drive
Las Vegas, Nevada 89102
Attorneys for Defendant

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AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANT'S MOTION TO CONSOLIDATE AND FOR ORDER SHORTENING TIME

STATE OF NEVADA)
) SS:
COUNTY OF CLARK)

Matthew J. Douglas, Esq., having been first duly sworn, deposes and states:

1. I am a duly licensed and practicing attorney of the State of Nevada and I am partner of the law firm of Atkin Winner & Sherrod maintaining offices at 1117 South Rancho Drive, Las Vegas, Nevada 89102.

2. I represent Intervenor, UAIC, in the above-captioned action as well as in another cases titled *Nalder v Lewis*, Case No. A-18-772220-C.

3. I have reviewed the facts and circumstances surrounding this matter and I am competent to testify to those facts contained herein upon personal knowledge, or if so stated, upon my best information and belief.

4. That the following is true and accurate to the best of affiant's knowledge and information.

5. That prior to October 24, 2018 both the instant action and, *Nalder v Lewis*, Case No. A-18-772220-C were proceeding together before the same judge, The Honorable David Jones, Department 29

6. on October 24, 2018, for a hearing, Additional Counsel for Gary Lewis in Case No. A-18-7722220-C, Thomas Christensen, Esq., asked the Court to recuse itself for what Counsel perceived as a conflict.

7. At that time, Judge Jones recused himself on both cases and the matters were sent to the Clerk to be re-assigned and, thereafter, on October 29, 2018, the Clerk randomly re-assigned this action to this Department, but re-assigned Case No. A-18-7722220-C to Department 1. However, following a challenge, Case No. A-18-7722220-C was then re-assigned to Department 19, Judge Kephart, on October 31, 2018 and, accordingly, these to cases are proceeding in different Departments.

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8. Moreover, each case had similar Motions pending before it at the time of the re-assignments and, accordingly, each newly assigned Department has issued new hearing dates on the pending Motions.

9. That, currently, in Case No. A-18-7722220-C there are hearing set for November 8, 2018 (in Chambers) as well as December 11, 2018 and December 13, 2018. *A copy of the Order re-assigning Case No. A-18-7722220-C to Department 19 with attendant hearing dates is attached hereto as* ***Exhibit 'A.'***

10. That although the parties are attempting to agree on a stipulation to move all hearings in both cases to one date for each case, there is no agreement as of yet and, further, the Plaintiff has not agreed to consolidation.

11. That Intervenor requests this order be heard on an Order shortening time so that this motion may be heard and, these cases may be consolidated, prior to the first currently set Chambers hearing date in Case No. A-18-7722220-C, which is set for November 8, 2018.

12. The cases that are the subject of Intervenor's Motion to Consolidate arise from the same motor vehicle accident, which occurred on July 8, 2007 in Pioche, Nevada, and in regards to the same policy of insurance between United Automobile Insurance Company ("UAIC") and Gary Lewis.[1]

13. That is has been alleged that, Gary Lewis was operating his vehicle when he backed into and hit Plaintiff Cheyanne Nalder causing injury in the July 8, 2007 accident. A Suit was brought for same injuries in this matter and, a judgment entered against Lewis in 2008.

14. Thereafter, Plaintiff Nalder alleging to have an assignment from Defendant Lewis, filed a bad faith action against UAIC. UAIC defended that claim asserting Lewis' policy

[1] *See* Complaint, Case No. 07A549111, attached hereto as **Exhibit "B"**; *See also* Complaint, Case No. A-18-772220-C, attached hereto as **Exhibit "C"**;

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8. Moreover, each case had similar Motions pending before it at the time of the re-assignments and, accordingly, each newly assigned Department has issued new hearing dates on the pending Motions.

9. That, currently, in Case No. A-18-7722220-C there are hearing set for November 8, 2018 (in Chambers) as well as December 11, 2018 and December 13, 2018. *A copy of the Order re-assigning Case No. A-18-7722220-C to Department 19 with attendant hearing dates is attached hereto as* ***Exhibit 'A.'***

10. That although the parties are attempting to agree on a stipulation to move all hearings in both cases to one date for each case, there is no agreement as of yet and, further, the Plaintiff has not agreed to consolidation.

11. That Intervenor requests this order be heard on an Order shortening time so that this motion may be heard and, these cases may be consolidated, prior to the first currently set Chambers hearing date in Case No. A-18-7722220-C, which is set for November 8, 2018.

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14. Thereafter, Plaintiff Nalder alleging to have an assignment from Defendant Lewis, filed a bad faith action against UAIC. UAIC defended that claim asserting Lewis' policy

[1] *See* Complaint, Case No. 07A549111, attached hereto as **Exhibit "B"**; *See also* Complaint, Case No. A-18-772220-C, attached hereto as **Exhibit "C"**;

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expired and, was not renewed prior to the loss. The Federal District Court judge hearing that case agreed with UAIC and granted summary judgment. Plaintiff appealed to the Ninth Circuit and that court found an ambiguity in the renewal statement and remanded.Back in the district Court, on subsequent cross-Motions for summary judgment, the Court found that, due to the ambiguity in the renewal, the Court implied a policy at law as between UAIC and Lewis for the July 2007 loss – however, the Court also specifically found no bad faith on the part of UAIC as they had issued a reasonable denial. UAIC paid its applicable $15,000 to Nalder, plus her attorney's fees of nearly $90,000.00.

15. Plaintiff, however, appealed to the Ninth Circuit again, claiming, among other things, that UAIC owed them the 2008 default judgment (for $3.5 million) as a consequential damage of their breach of the duty to defend and, the Ninth Circuit certified this question to the Nevada Supreme Court. While that matter was pending before the Nevada Supreme Court UAIC noticed that Plaintiff had failed to renew the 2008 judgment against Lewis in 2014 and, thus, moved to dismiss the appeal as the judgment had expired. The Ninth Circuit then certified that issue to the Nevada Supreme Court, where it remains pending.

16. While Plaintiff's other counsel in the appeals moved for extensions to file their brief earlier this year, Plaintiff here filed her ex-parte motion to "amend the judgment" in March 2018 in this case. Thereafter, Plaintiff then filed a "new" action against Lewis in Case No. A-18-7722220-C.

17. As this Court can see, both actions involve the same parties, for issues regarding damages for the same loss and, indeed, regarding issues of the legitimacy of the judgment in this case.

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18. The cases that are the subject of Intervenor's Motion to Consolidate are both at appropriate stages of litigation to accommodate consolidation as both have dispositive motions pending – for similar issues – that have not been ruled upon.

19. Judicial economic efficiency requires these matters to be consolidated.

20. No prejudice will come to any party if these matters are consolidated at this time.

21. Intervenor's Motion to Consolidate is brought for good cause and not for purposes of unnecessary delay.

Further Affiant Sayeth Naught.

MATTHEW J. DOUGLAS, ESQ.

Subscribed and Sworn to before me

this 5th day of November 2018.

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

I.

GOOD CAUSE EXISTS FOR AN ORDER SHORTENING TIME

The grounds necessitating the present Motion to Shorten time relate to the timing of the first motion hearing in Case No. A-18-7722220-C, which is currently set for November 8, 2018. Time is of the essence and thus an Order Shortening Time is appropriate.

LR IA 6-1 governs Orders Shortening Time states that:

(a) A motion or stipulation to extend time must state the reasons for the extension requested and must inform the court of all previous extensions of the subject deadline the court granted.

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In the present matter the reasons for the Order are set forth and this is the first such request for an Order shortening time. No other previous extensions have been sought.

For all of the above reasons, an Order Shortening Time is necessary and this Motion should be granted.

MEMORANDUM OF POINTS AND AUTHORITIES FOR MOTION TO CONSOLIDATE

I.

INTRODUCTION

Both of the cases that are the subject of this Motion to Consolidate (Case No. 07A549111, and Case No. A-18-772220-C, hereinafter as "subject cases") involve the same vehicle versus pedestrian accident, which occurred on July 8, 2007, in Pioche, Nevada. (hereinafter, "subject accident").[2] The Plaintiff in both cases is the same, Cheyanne Nalder. The Defendant in both cases is the same, Gary Lewis. The damages sought are the same in both cases, namely a $3.5 million default judgment, plus interest.

Additionally, as noted herein, some of the issues in both cases are presently on appeal before the Nevada Supreme Court, in *James Nalder, Guardian ad Litem on behalf of Cheyanne Nalder; and Gary Lewis v United Automobile Insurance Co.,* case number 70504 and, in the U.S. Court of Appeals for the Ninth Circuit under case no. No. 13-17441. Accordingly, given that there are the same parties in an ongoing appeal dealing many of the same issues herein, further good cause is shown that these actions proceed in one court herein.

No parties to either case will be prejudiced by consolidation. Moreover, because these cases involve the exact same motor vehicle accident, the exact same parties and, indeed, the

[2] *See* Affidavit of Blake A. Doerr, ¶ 4-5, attached hereto.

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same damages and issues, judicial economy will be served by the consolidation.

II.

FACTUAL BACKGROUND

This action was originally filed back in 2007 in regard to an automobile accident that occurred *in July 2007* between Cheyanne Nalder and Gary Lewis. Intervenor will not re-state the entire history as it is adequately set forth in Order Certifying a Second Question to the Nevada Supreme Court by United States Court of Appeals for the Ninth Circuit, which was filed on January 11, 2018. *A copy of the Order certifying the second question of law is attached hereto as Exhibit 'D.'* Rather, the salient points are that Plaintiff's "amended judgment", entered recently in 2018, is premised on an original judgment which had been entered against Gary Lewis *on August 26, 2008*. After obtaining the judgment, Counsel for Plaintiff[3] then filed an action against Mr. Lewis' insurer, United Automobile Insurance Company ("UAIC"), Intervenor herein. Despite the prohibition against direct actions against an insurer, Plaintiff failed to obtain an assignment prior to filing that action against UAIC and, only later, during the litigation obtained an assignment from Lewis.

In any event, that action - on coverage for the 2008 judgment by Nalder against UAIC – has proceeded in the United States District Court for the District of Nevada and, the United States Court of Appeals for the Ninth Circuit, *since 2009*. During the pendency of those appeals it was observed that Plaintiff had failed to renew her 2008 judgment against Lewis pursuant to Nevada law. Specifically, under N.R.S. 11.190(1)(a) the limitation for action to execute on such a judgment would be six (6) years, unless renewed under N.R.S. 17.214. Upon realizing the judgment had never been timely renewed, UAIC filed a Motion to Dismiss the Appeal for Lack

[3] At that time, in 2008, Ms. Nalder was a minor so the judgment was entered in favor of her through her Guardian Ad Litem and, father, James Nalder.

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of Standing with the Ninth Circuit on March 14, 2017. On December 27, 2017 the Ninth Circuit certified a second question to the Nevada Supreme Court – **specifically certifying the following question:**

> "Under Nevada law, if a plaintiff has filed suit against an insurer seeking damages based on a separate judgment against its insured, does the insurer's liability expire when the statute of limitations on the judgment runs, notwithstanding that the suit was filed within the six-year life of the judgment?"

See Exh. 'D.'

On February 23, 2018 the Nevada Supreme Court issued an order accepting this second certified question and ordered Appellants to file their Opening brief within 30 days, or by March 26, 2018. *A copy of the Order accepting the second certified question is attached hereto as Exhibit 'E.'* In accepting the certified question, the Nevada Supreme Court rephrased the question as follows:

> **In an action against an insurer for breach of the duty to defend its insured, can the plaintiff continue to seek consequential damages in the amount of a default judgment obtained against the insured when the judgment against the insured was not renewed and the time for doing so expired while the action against the insurer was pending?**

On August 2, Plaintiff (Appellant therein) filed her Opening Brief on this question and, UAIC has yet to file its Response Brief and, accordingly, the above-quoted question and, issue, *remains pending before the Nevada Supreme Court.*

Despite the above, in what appears to be a clear case of forum shopping, Plaintiff retained additional Counsel (Plaintiff's Counsel herein, David Stephens, Esq.) who filed an *ex parte* Motion on March 22, 2018 seeking, innocently enough, to "amend" the 2008 expired judgment to be in the name of Cheyenne Nalder individually. *A copy of the Ex Parte Motion is attached hereto as Exhibit 'F.'* Thereafter, the Court obviously not having been informed of the above-noted Nevada Supreme Court case, entered the amended judgment and same was filed with a

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notice of entry on May 18, 2018. *A copy of the filed Amended Judgment is attached hereto as Exhibit 'G.'*

Furthermore, Plaintiff then initiated a "new" action, under case no. A-18-772220-C[4] in a thinly veiled attempt to have the Court there rule on issues pending before the Nevada Supreme Court and "fix" their expired judgment. This intent appears clearly evidenced by paragraph five (5) of Plaintiff's prayer for relief herein which states Plaintiff is seeking this Court to make "a declaration that the statute of limitations on the judgment on the judgment is still tolled as a result of Defendant's continued absence from the state." *A copy of Plaintiff's Complaint for that action is attached hereto as Exhibit 'H."* Plaintiff then apparently served Lewis and, on July 17, 2018, sent a letter to UAIC's counsel with a copy of a "three Day notice to Plead", and, as such, threatening default of Lewis on this "new" action. *A copy of Plaintiff's letter and three day notice is attached hereto as Exhibit 'I.'*

Upon learning of this "amended judgment" and "new" action and, given the United States District Court's ruling that Gary Lewis is an insured under an *implied* UAIC policy for the loss belying these judgments and, present action, UAIC immediately sought to engage counsel to appear on Lewis' behalf in the present action. *A copy of the Judgment of the U.S. District Court finding coverage and implying an insurance policy is attached hereto as Exhibit 'J."* Following retained defense Counsel's attempts to communicate with Mr. Lewis to defend him in this action and vacate this improper amendment to an expired judgment as well as defend in him in the newly filed action – retained defense counsel was sent a letter by Tom Christensen, Esq. – ***the Counsel for Plaintiff judgment-creditor in the above-referenced action and appeal*** – stating in no uncertain terms that Counsel could not communicate with Mr. Lewis, nor appear and defend

[4] This case is currently pending before Judge Kephart, Department 19. UAIC has intervened in that case and filed a Motion to dismiss that action which is pending. Interestingly, Mr. Tom Christensen has now appeared in that case *for Mr. Lewis* and has filed a third party complaint.

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him in this action and take action to get relief from this amended judgment. *A copy of Tom Christensen's letter of August 13, 2018 is attached hereto as Exhibit 'K."*

Despite the apparent contradiction of counsel representing both the judgment-creditor and judgment-debtor in the same action, it is also clear that Mr. Christensen's letter has caused the need for UAIC to intervene in the present action. Moreover, it also creates the completely absurd situation we have now where counsel for Lewis, through Mr. Christensen, has filed a Motion to strike retained defense counsel's Motion for relief from judgment - *a multi-million dollar judgment against his own client*.

As will be set forth in detail below, besides granting this Motion to consolidate, because of all the issues raised above have a common nucleus of fact and issues, we see an attempt of fraud upon the court which should not be countenanced and an evidentiary hearing should be held and, same should be held before one judge in both matters.

III.

LEGAL ARGUMENT

NRCP 42(a) states;

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.[5]

Consolidation is permitted for a variety of reasons including, but not limited to, judicial discretion, avoidance of unnecessary costs or delay, convenience, and/or economy in administration.[6] In the State of Nevada, several actions can be combined into one case, tried all at once, with each matter retaining its separate character and the trial court can enter separate

[5] Nev. R. Civ. P. 42(a).
[6] *Mikulich v. Carner*, 68 Nev. 161, 169, 228 P. 2d 257, 261 (1957).

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judgments as appropriate.[7] Further, pursuant to the Eighth Judicial District Court Rules, "[m]otions for consolidation of two or more cases must be heard by the judge assigned to the case first commenced. If consolidation is granted, the consolidated case will be heard before the judge ordering the consolidation."[8]

The Complaint in Case No. 07A549111 was filed in 2007. The Complaint in Case No. A-18-7722220-C was filed in 2018. Pursuant to EDCR 2.50(a), those cases, if consolidated, must be consolidated into the *earlier case*, Case No. 07A549111, which was the first commenced.

The subject cases meet the requirements for consolidation mandated by NRCP 42(a), in that they arise out of the same motor vehicle accident, they involve the same defendant and, they involve the same damages and issues (i.e. a $3.5 million default judgment); therefore each case involves the same questions of fact. Additionally, as noted herein, some of the issues in both cases are presently on appeal before the Nevada Supreme Court, in *James Nalder, Guardian ad Litem on behalf of Cheyanne Nalder; and Gary Lewis v United Automobile Insurance Co.,* case number 70504 and, in the U.S. Court of Appeals for the Ninth Circuit under case no. No. 13-17441. Accordingly, given that there are the same parties in an ongoing appeal dealing many of the same issues herein, further good cause is shown that these actions proceed in one court herein.

The consolidation of these matters will avoid unnecessary costs and delay, and will promote convenience and judicial economy.

///

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[7] *Randall v. Salvation Army*, 100 Nev. 466, 686 P.2d 241 (1984); and *Mikulich v. Carner*, *Supra.*
[8] EDCR 2.50(a).

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III.

CONCLUSION

For the reasons set forth above, Intervenor request that this honorable Court grant its Motion to Consolidate the subject cases into the earlier case, Case No.: 07A549111, currently assigned to Department 20.

DATED this 5 day of November, 2018.

ATKIN WINNER & SHERROD

Thomas E. Winner
Nevada Bar No. 5168
Matthew J. Douglas
Nevada Bar No. 11371
1117 South Rancho Drive
Las Vegas, Nevada 89102
Attorneys for Defendants

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CERTIFICATE OF SERVICE

I certify that on this 26th day of November, 2018, the foregoing **INTERVENOR'S MOTION TO CONSOLIDATE ON AN ORDER SHORTENING TIME** was served on the by [ ] Electronic Service pursuant to NEFR 9 **[X]** Electronic Filing and Service pursuant to NEFR 9 [ ] hand delivery [ ] overnight delivery [ ] fax [ ] fax and mail [ ] mailing by depositing with the U.S. mail in Las Vegas, Nevada, enclosed in a sealed envelope with first class postage prepaid, addressed as follows:

David Stephens, Esq.
STEPHENS & BYWATER, P.C.
3636 North Rancho Drive
Las Vegas, NV 89130
Attorney for Plaintiff

Randall Tindall, Esq.
Carissa Christensen, Esq.
RESNICK & LOUIS, P.C.
8925 West Russell Road Suite 220
Las Vegas, NV 89148
Attorney for Defendant Lewis

Breen Arntz, Esq.
5545 S. Mountain Vista St. Suite F
Las Vegas, NV 89120
Additional Attorney for Defendant Lewis

Thomas Christensen, Esq.
CHRISTENSEN LAW OFFICES
1000 S. Valley View Blvd.
Las Vegas, NV. 89107
Counsel for Third Party Plaintiff Lewis

An employee of ATKIN WINNER & SHERROD

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EXHIBIT "A"

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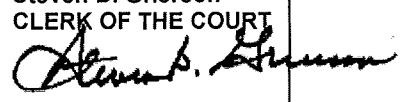
Steven D. Grierson
CLERK OF THE COURT



DISTRICT COURT
CLARK COUNTY, NEVADA
* * * *

CHEYENNE NALDER, PLAINTIFF(S)	Case No.: A-18-772220-C
VS.	DEPARTMENT 19
GARY LEWIS, DEFENDANT(S)	

NOTICE OF DEPARTMENT REASSIGNMENT

NOTICE IS HEREBY GIVEN that the above-entitled action has been randomly reassigned to Judge William D. Kephart.

☒ This reassignment follows the filing of a Peremptory Challenge of Judge Kenneth Cory.

ANY TRIAL DATE AND ASSOCIATED TRIAL HEARINGS STAND BUT MAY BE RESET BY THE NEW DEPARTMENT. PLEASE INCLUDE THE NEW DEPARTMENT NUMBER ON ALL FUTURE FILINGS.

12-13-18 Motion to Strike – In Chambers
12-11-18 Motion to Dismiss – 9:00am
12-11-18 Motion to Dismiss – 9:00am
11-8-18 Motion for Relief – In Chambers

STEVEN D. GRIERSON, CEO/Clerk of the Court

By:/s/Allison Behrhorst
Allison Behrhorst,
Deputy Clerk of the Court

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CERTIFICATE OF SERVICE

I hereby certify that this 31st day of October, 2018

☒ The foregoing Notice of Department Reassignment was electronically served to all registered parties for case number A-18-772220-C.

/s/Allison Behrhorst
Allison Behrhorst
Deputy Clerk of the Court

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EXHIBIT "B"

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COMP
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

FILED

2001 OCT -9 P 12: 12

CLERK OF THE COURT

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

COMPLAINT

COMES NOW the Plaintiff, JAMES NALDER as Guardian Ad Litem for CHEYENNE NALDER, a minor, by and through Plaintiff's attorney, DAVID F. SAMPSON, ESQ., of CHRISTENSEN LAW OFFICES, LLC, and for a cause of action against the Defendants, and each of them, alleges as follows:

1. Upon information and belief, that at all times relevant to this action, the Defendant, GARY LEWIS, was a resident of Las Vegas, Nevada.

2. That Plaintiffs, JAMES NALDER, individually and as Guardian Ad Litem for CHEYENNE NALDER, a minor, (hereinafter referred to as Plaintiffs) were at the time of the accident residents of the County of Clark, State of Nevada.

3. That the true names or capacities, whether individual, corporate, associate or otherwise, of Defendants named as DOES I through V, inclusive, 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 DOE is responsible in some manner for the events and happenings referred to and caused damages proximately to Plaintiff as herein alleged, and that Plaintiff will ask leave of this Court to amend this Complaint to insert the true names and capacities of DOES I through V, when the dame have been ascertained, and to join such Defendants in this action.

4. Upon information and belief, Defendant, Gary Lewis, was the owner and operator of a certain 1996 Chevy Pickup (hereinafter referred to as "Defendant" vehicle") at all time relevant to this action.

5. On the 8th day of July, 2007, Defendant, Gary Lewis, was operating the Defendant's vehicle on private property located in Lincoln County, Nevada; that Plaintiff, Cheyenne Nalder was playing on private property; that Defendant, did carelessly and negligently operate Defendant's vehicle so to strike the Plaintiff, Cheyenne Nalder and that as a direct and proximate result of the aforesaid negligence of Defendant, Gary Lewis, and each of the Defendants, Plaintiff, Cheyenne Nalder sustained the grievous and serious personal injuries and damages as hereinafter more particularly alleged.

6. At the time of the accident herein complained of, and immediately prior thereto, Defendant, Gary Lewis in breaching a duty owed to the Plaintiffs, was negligent and careless, inter alia, in the following particulars:

A. In failing to keep Defendant's vehicle under proper control;

B. In operating Defendant's vehicle without due caution for the rights of the Plaintiff;

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C. In failing to keep a proper lookout for plaintiffs

D. The Defendant violated certain Nevada revised statutes and Clark County Ordinances, and the Plaintiff will pray leave of Court to insert the exact statutes or ordinances at the time of trial.

7. By reason of the premises, and as a direct and proximate result of the aforesaid negligence and carelessness of Defendants, and each of them, Plaintiff, Cheyenne Nalder, sustained a broken leg and was otherwise injured in and about her neck, back, legs, arms, organs, and systems, and was otherwise injured and caused to suffer great pain of body and mind, and all or some of the same is chronic and may be permanent and disabling, all to her damage in an amount in excess of $10,000.00.

8. By reason of the premises, and as a direct and proximate result of the aforesaid negligence and carelessness of the Defendants, and each of them, Plaintiff, Cheyenne Nalder, has been caused to expend monies for medical and miscellaneous expenses as of this time in excess of $41,851.89, and will in the future be caused to expend additional monies for medical expenses and miscellaneous expenses incidental thereto, in a sum not yet presently ascertainable, and leave of Court will be requested to include said additional damages when the same have been fully determined.

9. Prior to the injuries complained of herein, Plaintiff, Cheyenne Nalder, was an able-bodied male, capable of being gainfully employed and capable of engaging in all other activities for which Plaintiff was otherwise suited. By reason of the premises, and as a direct and proximate result of the negligence of the said Defendants, and each of them, Plaintiff, Cheyenne Nalder, was caused to be disabled and limited and restricted in her occupations and activities, and/or diminution of Plaintiff's earning capacity and future loss of wages, all to her damage in a sum

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not yet presently ascertainable, the allegations of which Plaintiff prays leave of Court to insert herein when the same shall be fully determined.

10. Plaintiff has been required to retain the law firm of CHRISTENSEN LAW OFFICES, LLC to prosecute this action, and is entitled to a reasonable attorney's fee.

CLAIM FOR RELIEF:

1. General damages in an amount in excess of $10,000.00;

2. Special damages for medical and miscellaneous expenses in excess of $41,851.89, plus future medical expenses and the miscellaneous expenses incidental thereto in a presently unascertainable amount;

3. Special damages for loss of wages in an amount not yet ascertained and/or diminution of Plaintiff's earning capacity, plus possible future loss of earnings and/or diminution of Plaintiff's earning capacity in a presently unascertainable amount;

4. Costs of this suit;

5. Attorney's fees; and

6. For such other and further relief as to the Court may seem just and proper in the premises.

DATED this 1st day of Oct, 2007.

CHRISTENSEN LAW OFFICES, LLC

BY: _____

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Nevada Bar #2326
THOMAS CHRISTENSEN, ESQ.,
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EXHIBIT "C"

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