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.

UNITED AUTOMOBILE INSURANCE COMPANY'S APPENDIX
VOLUME 11
PAGES 2501–2750

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

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

THOMAS E. WINNER (SBN 5168)
MATTHEW J. DOUGLAS (SBN 11,371)
ATKIN WINNER & SHERROD
1117 South Rancho Drive
Las Vegas, Nevada 89102
(702) 243-7000

Attorneys for Real Party in Interest
United Automobile Insurance Company

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17	UAIC's Opposition to Third Party Plaintiff Lewis' Counter-Motion for Summary Judgment & Counter-Motion to Strike Affidavit of Lewis in Support of Same Counter-Motion for Summary Judgment and/or Stay Proceedings Pen Appellate Ruling and/or Stay Counter-Motion for Summary Judgment Pending Necessary Discovery Pursuant to N.R.C.P. 56(f)	12/14/18	2 3	334–500 501–638
19	UAIC's Reply in Support of its Motion for Relief from Judgment Pursuant to NRCP 60	01/02/19	4 5	972–1000 1001–1067
22	UAIC's Reply in Support of Its Motion to Dismiss Lewis' Third Party Complaint & Replies in Support of Its Counter-Motion to Strike Affidavit of Lewis in Support of the Counter-Motion for Summary Judgment and/or Stay Proceedings Pending Appellate Ruling and/or Stay Counter-Motion for Summary Judgment Pending Necessary Discovery Pursuant to N.R.C.P. 56(f)	01/16/19	5	1144–1168
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(Nalder) stands in the shoes of the assignor (Lewis). See *First Fin. Bank, N.A. v Lane,* 130 Nev. Adv. Rep. 96, 339 P.3d 1289 (2014) (finding that an assignment operates to place the assignee in the shoes of the assignor and provides assignee with the same legal rights as the assignor has).

Second, the final judgment is valid. There is no question that the last Judgment issued in 2009 case issued October 30, 2013 is valid. See *Exhibit 'G.'* Merely because that judgment is now on appeal or, because UAIC has argued the underlying 2008 judgment is expired, does not open the door for Lewis to re-litigate his claims.

Third, the same claims are involved in both actions. A review of the 2009 Complaint (*Exhibit 'C)* and the 2018 Third Party Complaint (*Exhibit* 'M') reveal that the statutory and common law bad faith claims are essentially identical.

As the *Five Star* Court noted, public policy support claims preclusion in situations such as this. The *Five Star* Court cited Restatement (Second) of Judgments section 19, comment (a), noting that "the purposes of claim preclusion are 'based largely on the ground that fairness to the defendant, and sound judicial administration require that at some point litigation over the particular controversy come an end; and that such reasoning may apply ;even though the substantive issues have not been tried … *Id.* At 1058, 194 P..3d at 715, These policy reasons are applicable here. UAIC is entitled to finality. A Judgment was already entered against Lewis on his alleged "bad faith" claims stemming from the 2007 loss. UAIC should not be exposed to litigating these claims a second time, in a new venue.

Lewis extra-contractual bad faith claims are the very type to which claims preclusion applies. The public policy considerations supporting claims preclusion cited with approval the court in *Five Star* apply to this action. The claims against UAIC in the Third Party Complaint should be dismissed.

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V.

CONCLUSION

In his 2018 Third Party Complaint, Third Party Plaintiff Lewis sets forth no facts which, if true, would entitle him to the relief he seeks. His Third Party Complaint against UAIC should be dismissed in its entirety.

DATED this 15th 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 15th day of November, 2018, the foregoing **UAIC'S MOTION TO DISMISS THIRD PARTY PLAINTIFF LEWIS' THIRD PARTY COMPLAINT** 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:

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

ATKIN WINNER & SHERROD LTD
A NEVADA LAW FIRM

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EXHIBIT "A"

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,* v. UNITED AUTOMOBILE INSURANCE COMPANY, *Defendant-Appellee.*	No. 13-17441 D.C. No. 2:09-cv-01348-RCJ-GWF 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.*

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

18-01192

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

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> 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

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"

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

CLERK OF THE COURT

Jun 3 1 52 PM '08

FILED

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES NALDER, as Guardian ad Litem for CHEYENNE NALDER, a minor.

Plaintiffs,

vs.

GARY LEWIS, and DOES I through V, inclusive

Defendants.

CASE NO: A549111
DEPT. NO: VI

JUDGMENT

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

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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 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 "C"

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
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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 aforementioned 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 aforementioned 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.

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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.

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 "D"

ASSIGNMENT

FOR VALUE RECEIVED, GARY LEWIS ("LEWIS"), assigns to JAMES NALDER, As Guardian ad Litem for Cheyenne Nalder ("NALDER"), LEWIS' rights that LEWIS has for damages against UNITED AUTOMOBILE INSURANCE CO. ("UAIC"), based upon its failure to negotiate in good faith the claim brought against LEWIS by NALDER. Specifically, that portion of said right or cause of action being hereby assigned pertains to the judgment entered against the undersigned in favor of NALDER in the amount of $3,500,000.00 the total judgment earning interest at the statutory rate from the date of its entry until the said judgment is paid in full) ("the NALDER Judgment"). As the total amount of the said judgment will not be known until the time it is finally paid given interest continues to accrue, the amount being assigned to NALDER is whatever amount is ultimately recovered that is necessary to satisfy the total NALDER Judgment. The NALDER judgment is at least $3,495,000.00 in excess of the $15,000.00 liability limit of the insurance policy with UAIC. LEWIS hereby represents that he was not insolvent at the time of the entry of said judgment and has been damaged thereby, as well as otherwise.

The rights so assigned hereby include all funds necessary to satisfy the Judgment NALDER has against LEWIS including attorney fees, costs, interest, and the like to NALDER in their entirety (hereinafter referred to as "the NALDER Judgment damages"). All rights, interests, and claims to any funds in addition to those necessary to pay the NALDER Judgment damages in full are hereby retained by LEWIS. In the event that this assignment is an improper splitting of LEWIS' causes of actions against UAIC then this assignment shall constitute a full assignment to NALDER of all rights interests and claims LEWIS has against UAIC in their entirety.

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

Dated this 25 day of February, 2010

GARY LEWIS

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EXHIBIT "E"

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).

[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.

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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.

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.

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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

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EXHIBIT "F"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES NALDER, Guardian Ad Litem on behalf of Cheyanne Nalder and GARY LEWIS, individually, Plaintiffs - Appellants, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant - Appellee.	No. 11-15010 D.C. No. 2:09-cv-01348-ECR-GWF MEMORANDUM*

JAMES NALDER, Guardian Ad Litem on behalf of Cheyanne Nalder and GARY LEWIS, individually, Plaintiffs - Appellees, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant - Appellant.	No. 11-15462 D.C. No. 2:09-cv-01348-ECR-GWF

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, Senior District Judge, Presiding

Argued and Submitted December 7, 2012
San Francisco, California

Before: SILVERMAN, GOULD, and CHRISTEN, Circuit Judges.

Plaintiffs James Nalder, guardian *ad litem* of his daughter Cheyanne Nalder, and Gary Lewis appeal from the district court's grant of Defendant United Automobile Insurance Company's motion for summary judgment on all of Plaintiffs' claims. United Automobile Insurance Company cross-appeals from the district court's denial of United Automobile Insurance Company's motion for attorney's fees. We have jurisdiction under 28 U.S.C. § 1291, and we reverse in part and affirm in part.

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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

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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.

United Automobile Insurance Company's cross-appeal regarding attorney's fees is moot in light of our disposition. We therefore affirm the district court's denial of attorney's fees. *Electro Source, LLC v. Brandess-Kalt-Aetna Grp., Inc.*, 458 F.3d 931, 941 (9th Cir. 2006).

Each party shall bear its own costs.

REVERSED AND REMANDED IN PART, AFFIRMED IN PART.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

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Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

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(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

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Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor);
  - and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

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Form 10. Bill of Costs ..... *(Rev. 12-1-09)*

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			TOTAL:	$

* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page.

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Form 10. Bill of Costs - *Continued*

I, _____, swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____, Deputy Clerk

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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"

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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Filed June 1, 2016

Before: Alex Kozinski, John T. Noonan and Diarmuid F. O'Scannlain, Circuit Judges.

Order

SUMMARY*

Certification to Nevada Supreme Court

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

> 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?

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

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 is withdrawn pending further order. The parties shall notify the Clerk of this court within one week after the Nevada Supreme Court accepts or rejects the certified question, and again within one week after the Nevada Supreme Court renders its opinion.

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I. The Parties

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 S. Valley View Blvd., Las Vegas, Nevada 89107, 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. Question of Law

The question of law to be answered is:

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

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

III. Background

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 didn't 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 wasn't covered at the time of the accident because he didn't 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 claim against UAIC in state court, which UAIC removed to federal court. Plaintiffs 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. 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 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 plaintiffs' argument, and granted summary judgment in favor of UAIC.

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We held that summary judgment "with respect to whether there was coverage" was improper because "[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

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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 UAIC didn't act in bad faith because it had a reasonable basis to dispute coverage. Third, the court found 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." Plaintiffs appeal.

IV. Discussion

Plaintiffs claim 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, the question now before us is how to calculate the damages that should be awarded to plaintiffs. Plaintiffs 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. The district court interpreted two Nevada Supreme Court cases to hold that "[i]f an insurer breaches the duty to defend, damages are limited to attorneys' fees and costs incurred by the insured to defend the action." *See Reyburn Lawn & Landscape Designers, Inc.* v. *Plaster Dev. Co.*, 255 P.3d 268, 278 (Nev. 2011); *Home Savings Ass'n* v. *Aetna Cas. & Sur. Co.*, 854 P.2d 851, 855 (Nev. 1993).

Home Savings Ass'n addressed whether a trial court properly dismissed with prejudice a claim raised by an insured against an insurer that had breached its duty to defend. 854 P.2d at 854–55. The Nevada Supreme Court reversed, holding that, because an insurer's duty to defend "continues throughout the course of the litigation against the insured[,] [t]he statute of limitations on a claim against an insurer for breach of its duty to defend commences when a final judgment in the underlying litigation against the insured is entered." *Id.* at 855 (citations omitted). In deciding that the insured wasn't barred from continuing to seek fees and costs incurred in defending an action, the Nevada Supreme Court didn't address the amount that could be recovered as a consequence of an adverse judgment against the insured. *See id.* at 854–56.

In *Reyburn Lawn & Landscape Designers*, the Nevada Supreme Court considered the scope of an indemnification clause in a construction contract between a general contractor and a subcontractor. 255 P.3d at 270–71. Largely based on its interpretation of the language in the indemnification clause, the Nevada Supreme Court held that "an indemnitor's duty to defend an indemnitee is limited to those claims directly attributed to the indemnitor's scope of work and does not include defending against claims arising from the negligence of other subcontractors or the indemnitee's own negligence." *Id.* at 278. Moreover, the indemnity clause in that case "expressly authorize[d] attorney fees." *Id.* at 279 n.11. Again, the Nevada Supreme Court didn't address the appropriate measure of damages for a breach of an insurer's duty to defend. *See id.* at 277–80.

In two recent orders, the U.S. District Court for the District of Nevada addressed the "proper measure of

damages" under Nevada law for an insurer's breach of the duty to defend. In its first order, the court recognized that the Nevada Supreme Court has never "articulated the measure of damages for an insurer's mere breach of the duty to defend absent bad faith." *Andrew* v. *Century Sur. Co.*, No. 2:12-cv-00978, 2014 WL 1764740, at *9 (D. Nev. Apr. 29, 2014). The court then looked to California law because the Nevada Supreme Court has "relied on [California law] in articulating the duty to defend." *Id.* (citing *United Nat'l Ins. Co.* v. *Frontier Ins. Co.*, 99 P.3d 1153, 1158 (Nev. 2004)). In California, "[w]here there is no opportunity to compromise the claim and the only wrongful act of the insurer is the refusal to defend, the liability of the insurer is ordinarily limited to the amount of the policy plus attorneys' fees and costs." *Comunale* v. *Traders & Gen. Ins. Co.*, 328 P.2d 198, 201 (Cal. 1958). Relying on *Comunale*, the *Andrew* court "conclude[d] that the Nevada Supreme Court would not allow for extra-contractual damages if the insurer did not act in bad faith." *Andrew*, 2014 WL 1764740, at *9.

The *Andrew* court, however, reconsidered and modified its ruling, relying on Nevada contract law. *Andrew* v. *Century Sur. Co.*, No. 2:12-cv-00978, 2015 WL 5691254, at *3 (D. Nev. Sept. 28, 2015). The court held: "There is no special rule for insurers that caps their liability at the policy limits for a breach of the duty to defend." *Id.* at *6. Under Nevada law, upon a breach of contract, a plaintiff may seek compensatory damages, which include expectancy damages. *Id.* at *3 (citing *Rd. & Highway Builders* v. *N. Nev. Rebar, Inc.*, 284 P.3d 377, 382 (Nev. 2012)). Nevada courts calculate expectancy damages pursuant to section 347 of the Restatement (Second) of Contracts. *Rd. & Highway Builders*, 284 P.3d at 382. This section provides:

> Subject to the limitations stated [elsewhere], the injured party has a right to damages based on his expectation interest as measured by
>
> (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
>
> (b) any other loss, including incidental or consequential loss, caused by the breach, less
>
> (c) any cost or other loss that he has avoided by not having to perform.

Restatement (Second) of Contracts § 347 (1981). Thus, the *Andrew* court found that "[u]nder § 347(b), [an insured] . . . is entitled to consequential damages for [an insurer's] breach of the duty to defend." *Andrew*, 2015 WL 5691254, at *3. "Consequential losses are those damages that 'aris[e] naturally, or were reasonably contemplated by both parties at the time they made the contract.'" *Id.* (alteration in original) (quoting *Hornwood* v. *Smith's Food King No. 1*, 772 P.2d 1284, 1286 (Nev. 1989)).

Andrew then concluded: "When the insurer breaches the duty to defend, a default judgment is a reasonably foreseeable result because, in the ordinary course, when an insurer refuses to defend its insured, a probable result is that the insured will default." *Id.* (citing *Hamlin Inc.* v. *Hartford Accident & Indem. Co.*, 86 F.3d 93, 94 (7th Cir. 1996)). Accordingly, "if the default judgment was a reasonably foreseeable consequence of [the insurer's] breach, then [the insurer] is liable for the entire amount of the default judgment as

consequential damages resulting from the breach of its duty to defend, regardless of the policy limits." *Id.* at *5. Thus, *Andrew*'s interpretation of Nevada law is directly contrary to the interpretation rendered by the district court in this case.

V. Conclusion

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 this case. We thus request the Nevada Supreme Court accept and decide the certified question. "The written opinion of the [Nevada] Supreme Court stating the law governing the question[] certified . . . shall be res judicata as to the parties." Nev. R. App. P. 5(h).

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, Alex Kozinski, John T. Noonan, Jr. and Diarmuid F. O'Scannlain, Circuit Judges.

Alex Kozinski
Circuit Judge

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EXHIBIT "I"

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.

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).

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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]

Douglas, C.J.

Cherry, J.

Gibbons, J.

Pickering, J.

Hardesty, J.

Stiglich, J.

[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 "J"

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
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.	07-A-549111 CASE NO.: ~~A549111~~ 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.

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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 "K"

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5/16/2018 3:37 PM
Steven D. Grierson
CLERK OF THE COURT

NOE
David A. Stephens, Esq.
Nevada Bar No. 00902
Stephens & Bywater
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

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

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CERTIFICATE OF MAILING

I hereby certify that I am an employee of the law office of STEPHENS & BYWATER, and that on the 15th 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

An employee of Stephens & Bywater

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

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

DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER,

Plaintiff,

vs.

GARY LEWIS,

Defendant.

07A549111
CASE NO: ~~A549111~~
DEPT. NO: XXIX

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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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Case Number: 07A549111

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IT IS ORDERED THAT PLAINTIFF HAVE JUDGMENT AGAINST DEFENDANT in the sum of $3,434,444.63 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 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 "L"

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

COMP
David A. Stephens, Esq.
Nevada Bar No. 00902
STEPHENS, GOURLEY & BYWATER
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 and DOES I through V, inclusive,

Defendants.

CASE NO.: ~~A-18-771911~~ 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 and/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 "M"

Electronically Filed
10/24/2018 1:38 PM
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.	

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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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as a result of the finding of coverage on October 30, 2013 and more particularly states as follows:

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

2. That United Automobile Insurance Company, hereinafter referred to as "UAIC", was at all times relevant to this action an insurance company doing business in Las Vegas, Nevada.

3. That third-party defendant, Randall Tindall, hereinafter referred to as "Tindall," was and is at all times relevant to this action an attorney licensed and practicing in the State of Nevada. At all times relevant hereto, third-party Defendant, Resnick & Louis, P.C. was and is a law firm, which employed Tindall and which was and is doing business in the State of Nevada.

4. That the true names and capacities, whether individual, corporate, partnership, associate or otherwise, of Defendants, DOES I through V, are unknown to cross-claimant, who therefore sues said Defendants by such fictitious names. cross-claimant 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 cross-claimant as herein alleged, and that cross-claimant will ask leave of this Court to amend this cross-claim to insert the true names and capacities of DOES I through V, when the same have been ascertained, and to join such Defendants in this action.

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

6. This incident occurred on private property.

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

8. Before the subject incident, Lewis received a statement from UAIC instructing him that his renewal payment was due by June 30, 2007.

9. The renewal statement also instructed Lewis that he remit payment prior to the expiration of his policy "[t]o avoid lapse in coverage."

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

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

12. On July 10, 2007, Lewis paid UAIC to renew his auto policy. Lewis's policy limit at this time was $15,000.00.

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

14. UAIC never informed Lewis that Nalder offered to settle Cheyenne's claim.

15. UAIC never filed a declaratory relief action.

16. UAIC rejected Nalder's offer.

17. UAIC rejected the offer without doing a proper investigation and claimed that Lewis was not covered under his insurance policy and that he did not renew his policy by June 30, 2007.

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

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

20. Lewis failed to appear and answer the complaint. As a result, Nalder obtained a default judgment against Lewis for $3,500,000.00.

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

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

23. Lewis assigned to Nalder his right to "all funds necessary to satisfy the Judgment." Lewis left the state of Nevada and located in California prior to 2010. Neither Mr. Lewis nor anyone on his behalf has been subject to service of process in Nevada since 2010.

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

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

26. Nalder and Lewis appealed 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.

27. On remand, the district court entered judgment in favor of Nalder and Lewis and against UAIC on October 30, 2013. The 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.

28. The 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.

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29. Based on these conclusions, the district court ordered UAIC to pay the policy limit of $15,000.00.

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

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

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

33. Both Nalder and Lewis appealed to the Ninth Circuit, which ultimately led to certification of the first question to the Nevada Supreme Court, namely, whether an insurer that breaches its duty to defend is liable for all foreseeable consequential damages to the breach.

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

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

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

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37. All of these actions would have been attempts to protect Gary Lewis.

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

39. This was not something brought up in the trial court, but only in the appellate court for the first time.

40. This action could leave Gary Lewis with a valid judgment against him and no cause of action against UAIC.

41. 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.

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

43. The Ninth Circuit concluded the parties failed to identify Nevada law that conclusively answers whether a plaintiff can recover consequential damages based on a judgment that is over six years old and possibly expired.

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

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

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46. Even though Nalder believed the law is clear that UAIC is bound by the judgment, regardless of its continued validity against Lewis, Nalder took action in Nevada and California to demonstrate the continued validity of the underlying judgment against Lewis.

47. These Nevada and California state court actions are further harming Lewis and Nalder but were undertaken to demonstrate that UAIC has again tried to escape responsibility by making misrepresentations to the Federal and State Courts and putting their interests ahead of their insured's.

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

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

50. This was done appropriately by demonstrating to the court that the judgment was still within the applicable statute of limitations.

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

52. Nalder also retained California counsel, who filed a judgment in California, which has a ten year statute of limitations regarding actions on a judgment. Nalder maintains that all of these actions are unnecessary to the questions on appeal regarding UAIC's liability for the

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judgment; but out of an abundance of caution and to maintain the judgment against Lewis, she brought them to demonstrate the actual way this issue should have been litigated in the State Court of Nevada, not at the tail end of an appeal.

53. UAIC did not discuss with its insured, GARY LEWIS, his proposed defense, nor did it coordinate it with his counsel Thomas Christensen, Esq.

54. UAIC hired attorney Stephen Rogers, Esq. to represent GARY LEWIS, misinforming him of the factual and legal basis of the representation. This resulted in a number of improper contacts with a represented client.

55. Thomas Christensen explained the nature of the conflict and Lewis's concern regarding a frivolous defense put forth on his behalf. If the state court judge is fooled into an improper ruling that then has to be appealed in order to get the correct law applied damage could occur to Lewis during the pendency of the appeal.

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56. A similar thing happened in another case with a frivolous defense put forth by Lewis Brisbois. The trial judge former bar counsel, Rob Bare, dismissed a complaint erroneously which wasn't reversed by the Nevada Supreme Court until the damage from the erroneous decision had already occured.

57. UAIC's strategy of delay and misrepresentation was designed to benefit UAIC but harm GARY LEWIS.

58. In order to evaluate the benefits and burdens to Lewis and likelihood of success of the course of action proposed by UAIC and each of the Defendants, Thomas Christensen asked for communication regarding the proposed course of action and what research supported it. It was requested that this communication go through Thomas Christensen's office because that was Gary Lewis's desire, in order to receive counsel prior to embarking on a course of action.

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

60. Stephen Rogers, Esq. never adequately responded to requests.

61. Instead, UAIC obtained confidential client communications and then misstated the content of these communications to the Court. This was for UAIC's benefit and again harmed Gary Lewis.

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

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

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

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

66. These actions by UAIC and counsel on its behalf are a violation of NRPC 3.5A.

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

68. The granting of UAIC's Motion to Intervene after judgment is contrary to NRS 12.130, which states: Intervention: Right to intervention; procedure, determination and costs; exception. 1. Except as otherwise provided in subsection 2: (a) **Before the trial** ...

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69. These actions by State Actor David Jones ignore due process, the law, the United States and Nevada constitutional rights of the parties. The court does the bidding of insurance defense counsel and clothes defense counsel in the color of state law in violation of 42 USCA section 1983.

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

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

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

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

74. Randall Tindall, Esq. filed unauthorized pleadings on behalf of Gary Lewis on September 26, 2018.

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

76. Tindall mischaracterized the law and filed documents designed to mislead the Court and benefit UAIC, to the detriment of Gary Lewis.

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

78. Gary Lewis was not consulted and he did not consent to the representation.

79. Gary Lewis did not authorize the filings by Randall Tindall, Esq.

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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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89. That Gary Lewis had to sue UAIC in order to get protection under the policy. That UAIC, and each of them, after being compelled to pay the policy limit and found to have failed to defend its insured, now fraudulently claims to be defending him when in fact it is continuing to delay investigating and processing the claim; not responding promptly to requests for settlement; doing a one-sided investigation, and have compelled Gary Lewis to hire counsel to defend himself from Nalder, Tindall and UAIC. All of the above are unfair claims settlement practices as defined in N.R.S. 686A.310 and Defendant has been damaged in an amount in excess of Ten Thousand Dollars ($10,000.00) as a result of UAIC's delay in settling and fraudulently litigating this matter.

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

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

92. The actions of UAIC and Tindall, and each of them, in this matter have been fraudulent, malicious, oppressive and in conscious disregard of Gary Lewis' rights and therefore Gary Lewis is entitled to punitive damages in an amount in excess of Ten Thousand Dollars ($10,000.00).

93. Upon information and belief, at all times relevant hereto, that all Defendants, and each of them, whether individual, corporate, associate or otherwise, were the officers, directors, brokers, agents, contractors, advisors, servants, partners, joint venturers, employees and/or alter-egos of their co-Defendants, and were acting within the scope of their authority as such

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agents, contractors, advisors, servants, partners, joint venturers, employees and/or alter-egos with the permission and consent of their co-Defendant.

94. That during their investigation of the claim, UAIC, and each of them, threatened, intimidated and harassed Gary Lewis and his counsel.

95. That the investigation conducted by UAIC, and each of them, was done for the purpose of denying coverage and not to objectively investigate the facts.

96. UAIC, and each of them, failed to adopt and implement reasonable standards for the prompt investigation and processing of claims.

97. That UAIC, and each of them, failed to affirm or deny coverage of the claim within a reasonable time after proof of loss requirements were completed and submitted by Gary Lewis.

98. That UAIC, and each of them, failed to effectuate a prompt, fair and equitable settlement of the claim after liability of the insured became reasonably clear.

99. That UAIC, and each of them, failed to promptly provide to Gary Lewis a reasonable explanation of the basis in the Policy, with respect to the facts of the Nalder claim and the applicable law, for the delay in the claim or for an offer to settle or compromise the claim.

100. That because of the improper conduct of UAIC, and each of them, Gary Lewis was forced to hire an attorney.

101. That Gary Lewis has suffered damages as a result of the delayed investigation, defense and payment on the claim.

102. That Gary Lewis has suffered anxiety, worry, mental and emotional distress as a result of the conduct of UAIC, and each of the Defendants.

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103. The conduct of UAIC, and each of the Defendants, was oppressive and malicious and done in conscious disregard for the rights of Gary Lewis.

104. UAIC, and each of them, breached the contract existing between UAIC and Gary Lewis by their actions set forth above which include but are not limited to:

a. Unreasonable conduct in investigating the loss;

b. Unreasonable failure to affirm or deny 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 Gary Lewis to retain an attorney before affording coverage or making payment on the loss;

f. Failing to defend Gary Lewis;

g. Fraudulent and frivolous litigation tactics;

h. Filing false and fraudulent pleadings;

i. Conspiring with others to file false and fraudulent pleadings;

91. As a proximate result of the aforementioned breach of contract, Gary Lewis has suffered and will continue to suffer in the future damages as a result of the delayed payment on the claim in a presently unascertained amount. Gary Lewis prays leave of the court to insert those figures when such have been fully ascertained.

92. As a further proximate result of the aforementioned breach of contract, Gary Lewis has suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses, all to their general damage in excess of $10,0000.

93. As a further proximate result of the aforementioned breach of contract, Gary Lewis was compelled to retain legal counsel to prosecute this claim, and UAIC, and each of them, are liable for attorney's fees reasonably and necessarily incurred in connection therewith.

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

95. That UAIC, and each of the them, breached the covenant of good faith and fair dealing by their actions which include but are not limited to:

a. Unreasonable conduct in investigating the loss;

b. Unreasonable failure to affirm or deny 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 Gary Lewis to retain an attorney before affording coverage or making payment on the loss;

f. Failing to defend Gary Lewis;

g. Fraudulent and frivolous litigation tactics;

h. Filing false and fraudulent pleadings;

i. Conspiring with others to file false and fraudulent pleadings;

96. As a proximate result of the aforementioned breach of the covenant of good faith and fair dealing, Gary Lewis has suffered and will continue to suffer in the future damages as a result of the delayed payment on the claim in a presently unascertained amount. Gary Lewis prays leave of the court to insert those figures when such have been fully ascertained.

97. As a further proximate result of the aforementioned breach of the covenant of good faith and fair dealing, Gary Lewis has suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses, all to their general damage in excess of $10,0000.

98. As a further proximate result of the aforementioned breach of the covenant of good faith and fair dealing, Gary Lewis was compelled to retain legal counsel to prosecute this

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claim, and UAIC, and each of them, are liable for their attorney's fees reasonably and necessarily incurred in connection therewith.

99. The conduct of UAIC, and each of the Defendants, was oppressive and malicious and done in conscious disregard for the rights of Gary Lewis, and Gary Lewis is therefore entitled to punitive damages.

100. That UAIC, and each of the Defendants, acted unreasonably and with knowledge that there was no reasonable basis for their conduct, in their actions which include but are not limited to:

a. Unreasonable conduct in investigating the loss;

b. Unreasonable failure to affirm or deny 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 Gary Lewis to retain an attorney before affording coverage or making payment on the loss;

f. Failing to defend Gary Lewis;

g. Fraudulent and frivolous litigation tactics;

h. Filing false and fraudulent pleadings;

i. Conspiring with others to file false and fraudulent pleadings;

101. As a proximate result of the aforementioned breach of the covenant of good faith and fair dealing, Gary Lewis has suffered and will continue to suffer in the future damages as a result of the delayed payment on the claim in a presently unascertained amount. Gary Lewis prays leave of the court to insert those figures when such have been fully ascertained.

102. As a further proximate result of the aforementioned breach of the covenant of good faith and fair dealing, Gary Lewis has suffered anxiety, worry, mental and emotional

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distress, and other incidental damages and out of pocket expenses, all to their general damage in excess of $10,0000.

103. As a further proximate result of the aforementioned breach of the covenant of good faith and fair dealing, Gary Lewis was compelled to retain legal counsel to prosecute this claim, and UAIC, and each of them, are liable for their attorney's fees reasonably and necessarily incurred in connection therewith.

104. The conduct of UAIC, and each of the Defendants, was oppressive and malicious and done in conscious disregard for the rights of Gary Lewis, and Gary Lewis is therefore entitled to punitive damages.

105. That UAIC, and each of them, violated NRS 686A.310 by their actions which include but are not limited to:

a. Unreasonable conduct in investigating the loss;

b. Unreasonable failure to affirm or deny 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 Gary Lewis to retain an attorney before affording coverage or making payment on the loss;

f. Failing to defend Gary Lewis;

g. Fraudulent and frivolous litigation tactics;

h. Filing false and fraudulent pleadings;

i. Conspiring with others to file false and fraudulent pleadings;

106. As a proximate result of the aforementioned violation of NRS 686A.310, Gary Lewis has suffered and will continue to suffer in the future damages as a result of the delayed

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payment on the claim in a presently unascertained amount. Gary Lewis prays leave of the court to insert those figures when such have been fully ascertained.

107. As a further proximate result of the aforementioned violation of NRS 686A.310, Gary Lewis has suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses, all to his general damage in excess of $10,0000.

108. As a further proximate result of the aforementioned violation of NRS 686A.310, Gary Lewis was compelled to retain legal counsel to prosecute this claim, and UAIC, and each of them, are liable for their attorney's fees reasonably and necessarily incurred in connection therewith.

109. The conduct of UAIC, and each of them, was oppressive and malicious and done in conscious disregard for the rights of Gary Lewis, and Gary Lewis is therefore entitled to punitive damages.

110. That UAIC, and each of them, had a duty of reasonable care in handling Gary Lewis' claim.

111. That at the time of the accident herein complained of, and immediately prior thereto, UAIC, and each of them, in breaching its duty owed to Gary Lewis, was negligent and careless, inter alia, in the following particulars:

a. Unreasonable conduct in investigating the loss;

b. Unreasonable failure to affirm or deny 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 Gary Lewis to retain an attorney before affording coverage or making payment on the loss;

f. Failing to defend Gary Lewis;

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g. Fraudulent and frivolous litigation tactics;

h. Filing false and fraudulent pleadings;

i. Conspiring with others to file false and fraudulent pleadings;

112. As a proximate result of the aforementioned negligence, Gary Lewis has suffered and will continue to suffer in the future damages as a result of the delayed payment on the claim in a presently unascertained amount. Plaintiff prays leave of the court to insert those figures when such have been fully ascertained.

113. As a further proximate result of the aforementioned negligence, Gary Lewis has suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses, all to his general damage in excess of $10,0000.

114. As a further proximate result of the aforementioned negligence, Gary Lewis was compelled to retain legal counsel to prosecute this claim, and UAIC, and each of them, is liable for his attorney's fees reasonably and necessarily incurred in connection therewith.

115. The conduct of UAIC, and each of them, was oppressive and malicious and done in conscious disregard for the rights of Gary Lewis, and Gary Lewis are therefore entitled to punitive damages.

116. The aforementioned actions of UAIC, and each of them, constitute extreme and outrageous conduct and were performed with the intent or reasonable knowledge or reckless disregard that such actions would cause severe emotional harm and distress to Gary Lewis.

117. As a proximate result of the aforementioned intentional infliction of emotional distress, Gary Lewis has suffered severe and extreme anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses, all to his general damage in excess of $10,0000.

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118. As a further proximate result of the aforementioned negligence, Gary Lewis was compelled to retain legal counsel to prosecute this claim, and UAIC, and each of them, are liable for his attorney's fees reasonably and necessarily incurred in connection therewith.

119. The conduct of UAIC, and each of them, was oppressive and malicious and done in conscious disregard for the rights of Gary Lewis and Gary Lewis is therefore entitled to punitive damages.

120. That Randall Tindall, as a result of being retained by UAIC to represent Gary Lewis, owed Gary Lewis the duty to exercise due care toward Gary Lewis.

121. Randall Tindall also had a heightened duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise.

122. Randall Tindall breached the duty of care by failing to communicate with Gary Lewis, failing to follow his reasonable requests for settlement, case strategy and communication.

123. That breach caused harm to Gary Lewis including but not limited to anxiety, emotional distress, delay, enhanced damages against him.

124. Gary Lewis was damaged by all of the above as a result of the breach by Randall Tindall.

WHEREFORE, Gary Lewis prays judgment against UAIC, Tindall and each of them, as follows:

1. Indemnity for losses under the policy including damages paid to Mr. Lewis, attorney fees, interest, emotional distress, and lost income in an amount in excess of $10,000.00;

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

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

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4. Special damages in the amount of any Judgment ultimately awarded against him in favor of Nalder plus any attorney fees, costs and interest.

5. Attorney's fees; and

6. Costs of suit;

7. For such other and further relief as the Court may deem just and proper.

DATED THIS 24 day of October, 2018.

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 Cross-Claimant
Third-party Plaintiff

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NEFCR 9, I certify that I am an employee of CHRISTENSEN LAW OFFICES and that on this 24th day of Oct, 2018, I served a copy of the foregoing Cross-Claim/Third Party Complaint as follows:

xx E-Served through the Court's e-service system to the following registered recipients:

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

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

Matthew J. Douglas
Atkin Winner & Sherrod
12117 South Rancho Drive
Las Vegas, NV 89102
mdouglas@awslawyers.com
vhall@awslawyers.com
eservices@awslawyers.com

E. Breen Arntz, Esq.
Nevada Bar No. 3853
5545 Mountain Vista Ste. E
Las Vegas, Nevada 89120
breen@breen.com

An employee of CHRISTENSEN LAW OFFICES

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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

A-18-772220-C

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.

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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.

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"**;

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"**;

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"

ORIGINAL

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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

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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 October, 2007.

CHRISTENSEN LAW OFFICES, LLC

BY: _____

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

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EXHIBIT "C"

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Steven D. Grierson
CLERK OF THE COURT

COMP
David A. Stephens, Esq.
Nevada Bar No. 00902
STEPHENS, GOURLEY & BYWATER
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 and DOES I through V, inclusive,

Defendants.

CASE NO.: ~~A-549111~~ 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

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 "D"

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*, v. UNITED AUTOMOBILE INSURANCE COMPANY, *Defendant-Appellee.*	No. 13-17441 D.C. No. 2:09-cv-01348-RCJ-GWF 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.*

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

18-01193

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

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 "E"

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.

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).

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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]

Douglas, C.J.

Cherry, J.

Gibbons, J.

Pickering, J.

Hardesty, J.

Stiglich, J.

[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 "F"

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
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

07-A-549111

CHEYENNE NALDER, Plaintiff, vs. GARY LEWIS, Defendants.	CASE NO.: ~~A549111~~ 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.

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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.

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:

. . .

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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 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"

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 "G"

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

NOE
David A. Stephens, Esq.
Nevada Bar No. 00902
Stephens & Bywater
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

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

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CERTIFICATE OF MAILING

I hereby certify that I am an employee of the law office of STEPHENS & BYWATER, and that on the 15th 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

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.
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.	07A549111 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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Case Number: 07A549111

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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.	07A549111 CASE NO: ~~A549111~~ DEPT. NO: XXIX

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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 $3,434,444.63 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 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 "H"

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

COMP
David A. Stephens, Esq.
Nevada Bar No. 00902
STEPHENS, GOURLEY & BYWATER
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 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.

15. After reaching the age of majority an amended judgment was entered in Cheyenne Naider'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 "I"

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)
David A. Stephens, Esq.
Nevada Bar No. 00902
STEPHENS, GOURLEY & BYWATER
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 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

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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

An Employee of
Stephens Gourley & Bywater

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EXHIBIT "J"

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 "K"

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

OPPS
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

JAMES NALDER, Plaintiff, vs. GARY LEWIS and DOES I through V, inclusive Defendants,	CASE NO: 18-772220 DEPT. NO: 19
UNITED AUTOMOBILE INSURANCE COMPANY, Intervenor.	
GARY LEWIS, Third Party Plaintiff, vs. UNITED AUTOMOBILE INSURANCE COMPANY, RANDALL TINDALL, ESQ., and RESNICK & LOUIS, P.C. And DOES I through V, Third Party Defendants.	

OPPOSITION TO UAIC'S MOTION TO CONSOLIDATE AND COUNTERMOTION TO SET ASIDE VOID ORDER AND TO STRIKE ALL FILINGS BY INTERVENOR, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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Third party Plaintiff, Gary Lewis, by and through his counsel, Thomas Christensen, Esq., hereby presents his brief in Opposition to UAIC's Motion To Consolidate. UAIC purports to seek judicial economy, but in fact it is confusing issues and misstating the facts and the law to gain advantage over its insured, Gary Lewis. UAIC's motion should be denied. This action is already to judgment, the action sought to be consolidated is still awaiting an answer from two of the parties. This action is a simple and constitutes a completed judgment amendment, the action sought to be consolidated is an insurance claims handling case and a legal malpractice case. Third party Plaintiff, Gary Lewis, brings this countermotion for relief from order and to strike all filings by intervenor in this case, this course represents judicial economy and is consistent with black letter Nevada law. In the alternative, Gary Lewis moves for summary judgment.

This opposition and countermotion 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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CHRISTENSEN LAW OFFICES

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

POINTS AND AUTHORITIES

I. OPPOSITION TO UAIC'S MOTION TO CONSOLIDATE

A. UAIC's Motion to Consolidate is not appropriate post judgment and will not result in judicial economy.

The Nevada rule concerning consolidation is stated in NRCP 42(a):

> (a) Consolidation. 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**. (Emphasis added.)

A reading of this applicable rule makes it obvious that it is just as improper to ask for consolidation after judgment is entered as it is to seek intervention after judgment is entered. As this Court is aware, an action that has proceeded to judgment cannot be consolidated with a recently filed action. One action is over the other action has just begun. There is no overlap of discovery or proof. There can be no judicial economy.

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FRCP 42 was amended in 2007 for ease of understanding and style. (FRCP 42, Commentary (2010)). Based thereon, application of the rule should be the same despite the revisions. Because no Nevada decisions have distinguished between the federal and state court applications of the rule, the Nevada Supreme Court's reliance on federal case law when interpreting NRCP 42(a) should remain consistent. Indeed, the Nevada Supreme Court has relied on federal case law when interpreting NRCP 42(a). See, e.g., *Mikulich v. Carner*, 68 Nev. 161, 228 P.2d 257, 231 P.2d 603 (1957).

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In Nevada, as in the federal system, consolidation is permitted as a matter of discretion, to avoid unnecessary costs or delays, or as a matter of convenience and economy in administration. NRCP 42(a); FRCP 42(a); *Mikulich*, 68 Nev. 161, 228 P.2d 257, 231 P.2d 603 (1957). The court is given broad discretion to determine when consolidation is proper. *Id.* In *Ward v. Sheeline Banking &*

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Trust Co., 54 Nev. 442, 22 P.2d 358 (1933), the Nevada Supreme Court indicated that where consolidation is not a matter of right, the trial court is vested with discretion to grant or refuse consolidation, subject to reversal only in case of abuse of that discretion. *Id*. at 452, 22 P.2d at 361.

When determining whether to order consolidation, the trial court should consider if the cases are at different stages of pretrial preparation. Even when two actions involve common questions of law and fact, consolidation may be improper if only one action is ready for trial and the other is in an early discovery phase. *Prudential Ins. Co. of Am. v. Marine Nat'l Exch. Bank*, 55 F.R.D. 436 (E.D. Wis. 1972). Not only do the cases herein not involve common questions of law and fact, but it is also certainly the case here where one matter has been to judgment for over six months and the other still awaits an answer from one of the parties. In essence, the court must weigh the time, effort, and expense consolidation would save against any inconvenience, delay, or expense that it would cause. *Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984). Also, consolidation may be improper if it results in aligning parties, like Lewis and UAIC, who have conflicting interests, *Dupont v. S. Pac. Co*., 366 F.2d 193, 195-96 (5th Cir. 1966), or if the common issue is not central or material. *Shump v. Balka*, 574 F.2d 1341, 1344-45 (10th Cir. 1978).

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II. MOTION FOR RELIEF FROM ORDER

A. VOID ORDER ALLOWING INTERVENTION

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UAIC's Motion to Intervene in case number A549111 contains no proof of service on its face. This motion should never have been accepted for filing as there is no proof of service. This defective motion can certainly not be the basis for an order allowing intervention. The filing of a pleading without serving the pleading amounts to an ex-parte communication with the Court and a violation of the due process. This lack of service was brought to the attention of the UAIC attorneys, who refused to correct the error or grant additional time to the parties to interpose an opposition. Taking advantage of a lawyer in this way by counsel for UAIC is a violation of NRPC 3.5A and results in any action by the Court being void. Lewis requests the Court relieve him from the resulting order allowing intervention pursuant to NRCP 60 (b). The motion not having been served, the order is void. It is appropriate for this Court to grant Lewis relief from this order pursuant to NRCP 60 (b).

In *Gralnick v. Eighth Judicial Dist. Court of Nev.*, No. 72048 (Nev. App. Mar. 21, 2017) The court held that intervention and setting aside of a judgment was improper and the court granted writ relief, reversing the trial court, because intervention was allowed after judgment, which is contrary to NRS 12.130. As the Court noted:

> Here, real party in interest Liberty Mutual Insurance Company moved to intervene in the underlying action after judgment was entered against real party in interest Tessea Munn. Because "**NRS 12.130 does not permit intervention subsequent to the entry of a final judgment,**" *Lopez v. Merit Ins. Co.*, 109 Nev. 553, 556, 853 P.2d 1266, 1268 (1993), the district court was **required, as a matter of law**, to deny the motion to intervene.As the district court did not deny the motion to intervene, but instead, granted intervention and then improperly set aside the judgment based on Liberty Mutual's motion, *see id.* at 557, 853 P.2d at 1269 (explaining that, where an insurance company was improperly allowed to intervene, it was not a party to the lawsuit and, thus, could not move to set aside the judgment), writ relief is warranted. *See Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991) (explaining that whether to consider a writ petition is discretionary); *cf. Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558-59 (explaining that writ relief may be warranted to challenge a district

> court order denying a motion to dismiss if no factual disputes exist and the district court was obligated by clear authority to dismiss the action). **Accordingly, we grant the petition and direct the clerk of the court to issue a writ of mandamus directing the district court to vacate its orders granting intervention and setting aside the judgment and to reinstate the default judgment.** (Emphasis added.)

In addition, UAIC's motion to intervene should have been denied because UAIC waived its right to direct the defense and its right to intervene when it refused to defend Lewis and failed to indemnify him. UAIC claims to have a direct and immediate interest to warrant intervention. However the court in *Hinton v. Beck*, 176 Cal.App.4th 1378 (Cal. Ct. App. 2009) held just the opposite: "Grange[the insurance company], having denied coverage and having refused to defend the action on behalf of its insured, did not have a direct and immediate interest to warrant intervention in the litigation." In addition, UAIC's proposed defense 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.

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B. UAIC'S DEFENSE IS FRIVOLOUS

UAIC's claims that "the underlying judgment expired on 2014." This is not true. This statement of fact is not supported by the evidence. This allegation is not supported in the motion by **ANY** Nevada legal authority. There is no Nevada legal authority to support this statement. UAIC knew there was no Nevada legal authority for this argument because they had been asked to provide it and failed to provide any Nevada legal authority.

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In fact, UAIC's defense is contrary to the "well established" law in Nevada for the past one hundred years. 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. (Emphasis added.)

The facts in *Mandlebaum* are identical to Nalder's action on a judgment:

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

UAIC then accuses the Court of a mistake that resulted from some improper conduct on the part of Lewis' counsel. This is also not true. The Motion to Amend Judgment had, as its basis, the tolling statutes and the operation of Mandelbaum. (See Exhibit 1). It would have been an abuse of discretion for the Court to refuse to sign the Amended Judgment. UAIC has now admitted in pleadings filed before the Nevada Supreme Court that Nalder's action on a judgment is appropriate. (See Exhibit 2, UAIC's appellate brief, page 11). As will be detailed later in this motion, UAIC disregards the effect of all the tolling statutes on the judgment statute of limitations without citing any authority and against the weight of Nevada authority that the tolling statutes in NRS Chapter 11 apply to the statute of limitations in NRS 11.190. This contention is not a good faith attempt to change the law, but a frivolous and fraudulent attempt to mislead the Court and increase the cost of litigation for all involved.

UAIC then makes the claim that judgments in Nevada are required to be renewed in six years. This is not what the Nevada statute says. UAIC purposely misstates the statute: NRS

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17.214 says one "may renew a judgment ... by ... filing an affidavit ... within 90 days before the date the judgment expires by limitation." The two misstatements: 1. This procedure is permissive not mandatory, nor exclusive of an action on a judgment; and 2. The renewal statute sends one to NRS chapter 11 with its statutes of limitations and tolling statutes regarding the timing of filing an affidavit of renewal if that is the course one wishes to take.

Then UAIC makes the claim that the amended judgment revived the original judgment. UAIC goes on to say that Nalder did not cite any authority for reviving the judgment. While it is true that Nalder did not cite authority for reviving the judgment, it is frivolous for UAIC to argue the need for authority for this imagined need. As has been set forth above, and will be set forth below, the original judgment is valid. It has not expired. It does not need to be revived. A renewal pursuant to NRS 17.214 would be premature.

UAIC states "Cheyenne's Motion proposes that tolling provisions applicable to certain causes of action are also applicable to the deadlines to renew judgments." That is not anywhere in Cheyenne's Motion. It is a factual misstatement. It was made on purpose to mislead the Court. UAIC also claims "In short, the Court was not put on notice that it was being asked to ostensibly revive an expired judgment." This statement is false. Cheyenne cited tolling provisions applicable to NRS 11.190 1.(a) actions on judgments to demonstrate that the underlying judgment was still valid and could be amended. Nowhere did she ask to renew the judgment or revive the judgment.

UAIC does not request that the Court set aside the amended judgment pursuant to NRCP 60, but instead states that it wants to "avoid the Amended Judgment" and have declaratory relief that the "original Judgment has expired." **This is well beyond anything provided by NRCP 60.** All UAIC could possibly ask for is to set aside the amended judgment, which

would leave the original judgment as the operative document. This does not change anything other than the caption from the now adult back to her guardian ad litem. Cheyenne is an adult she has the right to have the judgment in her name. It is inappropriate in a motion to set aside a judgment to ask for declaratory relief. This request is an unsupported and improper claim.

UAIC claims "NRS 11.190(1)(a) provides that a judgment expires by limitation in six (6) years." What the statute says is **"NRS 11.190 Periods of limitation. ...** actions .. may only be commenced as follows: 1. Within 6 years: (a) ... an action upon a judgment…" Further NRS 11.190 is obviously modified by the many tolling statutes in Chapter 11. To claim they do not apply is frivolous. To make the claim without authority is shameful. 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. NRS 11.300 tolled the 6 year statute of limitations in NRS 11.190 in the case of *Bank of Nevada v. Friedman*, 82 Nev. 417, 420 P2d 1 (Nev. 1966) and also in *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 valid 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**

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time. The time in NRS 11.190 shall be deemed to date from the last transaction ... the limitation shall commence from the time the last payment was made." Further, when any payment is made, "the limitation shall commence from the time the last payment was made." Therefore, UAIC's last payment on the judgment extended the expiration of the six-year statute of limitations to March 5, 2021.

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

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

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

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.

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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

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17.214 was adopted to give an easier way for creditors to renew judgments not replace the common law action on a judgment to obtain a new judgment. 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 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 in Intervention should be stricken and Intervention not allowed. UAIC's motion for relief from judgment should be stricken or denied, it is untimely and

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frivolous.

UAIC continues with the false premise that the only thing Cheyenne Nalder could do was renewal under NRS 17.214. UAIC claims that the tolling statutes that apply and extend the time to file actions upon a judgment don't apply to extend the time for renewal under NRS 17.214. UAIC makes these claims disregarding the fact that NRS 17.214 does not have a specific time period in the body of the statute, but only refers to the expiration pursuant to NRS 11.190. According to UAIC, the expiration of the judgment will be different for actions on the judgment than for renewal even though there is not language in either statute providing for that different result. Regardless, Cheyenne is seeking to obtain a new judgment by filing a separate timely action on the original judgment, a procedure approved by NRS 11.190 and the Nevada Supreme Court. See *Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (Nev 1897).

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UAIC makes the claim that "The judgment expired on June 3, 2014" UAIC's logic is -- if it wasn't renewed pursuant to NRS 17.214, it is expired. This circular reasoning is a knowing misstatement of the law. The statute of limitations under NRS 11.190 is 6 years it is true, however the numerous tolling statutes apply to and do extend the 6 year period of the judgment expiration. In this case those are NRS 11.200, NRS 11.250(incorrectly cited as NRS 11.280 by Nalder) and NRS 11.300. If there was any question about these tolling statutes applying to the 6 year period in NRS 11.190 the wording of NRS 11.200 removes all doubt. **"NRS 11.200 Computation of time.** The time in NRS 11.190 shall be …"

UAIC argues "the deadline to renew the Judgment was not tolled by any statute or rule." First UAIC misstates and says that Cheyenne discussed NRS 17.214 in her Ex Parte Motion. This is a fabrication, sophistry and disingenuous. Cheyenne discussed the tolling statutes that

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obviously apply to the statute of limitations for actions on a judgment to demonstrate that the judgment she was seeking to put in her name was still valid. The Court agreed and issued the amended judgment. UAIC states the obvious: that NRS 11.190, the limitation statute, does not have any tolling provision in it. That is because the tolling statutes NRS 11.200, NRS 11.250, NRS 11.300 and others apply to toll it. It being tolled necessarily extends the time to renew under NRS 17.214 because the judgment is not yet expired. The limitation statute is tolled.

As stated previously, Nalder incorrectly identified NRS 11.280 as the general disability tolling statute when the actual general disability tolling statute applicable in this case is NRS 11.250. UAIC does not, in candor, bring this to the Court's attention, but instead wastes judicial resources evaluating the effect of NRS 11.280. Then UAIC discusses the effect on real property when UAIC knows this judgment was never recorded and does not have any application to real property concerns. Nor do any real property concerns change the effect of the tolling statutes on the limitation statute as alleged by UAIC without any supporting case law.

UAIC's final claim is that NRS 11.300 does not apply to NRS 11.190 and by extension NRS 17.214. UAIC supports this novel claim by misquoting the F/S Manufacturing v. Kensmoe, 798 N.W.2d 853 (N.D. 2011) case. First, this is a North Dakota case, not Nevada. The North Dakota renewal by affidavit statute is 28-20-21 Renewal of judgments by affidavit it provides a **specific time set forth in the statute within which to renew**, unlike Nevada's statute that provides the time to renew by reference to the expiration of the judgment set forth in NRS 11.190. This means that Nevada's statute refers back to the the limitations statute

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NRS 11.190 and all of the applicable tolling statutes. In North Dakota, the renewal statute has a specific time set forth in the statute:

> 28-20-21. Renewal of judgments by affidavit Any judgment ... may be renewed by the affidavit of the judgment creditor ... at any time within ninety days preceding **the expiration of ten years** from the first docketing of such judgment. (emphasis added)

This was the basis for the North Dakota ruling and was misquoted in UAIC's motions. The correct quote is "Because the statutory procedure for renewal by affidavit is not a separate action to renew the judgment, the **specific time period in** N.D.C.C. § 28-20-21 cannot be tolled under N.D.C.C. § 28-01-32 based on a judgment debtor's absence from the state." *Id.* at 858. (Emphasis added.)

Pursuant to NRS 11.300, the absence of Lewis from the State of Nevada tolls the statute of limitations in NRS 11.190. Therefore, when NRS 17.214 does not have a specific time but rather refers to the limitations statutes the tolling statutes necessarily apply and the time in NRS 11.190 remains tolled because of his absence. *See Bank of Nevada v. Friedman*, 82 Nev. 417, 421, 420 P.2d 1, 3 (1966). UAIC admits that North Dakota is a state with similar renewal methods to Nevada. While UAIC is partially correct, the language of the renewal statute in North Dakota contains a ten year period in the body of the statute and does not refer back to the limitations chapter and its tolling provision as does Nevada. Further, the case cited by UAIC, *F/S Manufacturing v. Kensmoe*, 798 N.W.2d 853 (N.D. 2011) makes UAIC's claims even more frivolous. 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.

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UAIC, based on these flawed arguments, and without any supporting authority or additional facts, claims that the motion was brought in a reasonable time even though it was filed more than six months after the judgment. UAIC then claims the judgment is void as a result of the Court's mistake and can therefore be set aside. This is done without any additional authority or discussion.

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

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

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

By statute, regulation, commercial practice, and common law requirements, insurers must adopt and implement systems, instructions, and guidelines for the prompt investigation and settlement of claims. In the broad sense, insurance indemnifies, or makes whole, an insured to

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soften the financial consequences of an insured event. Sometimes this involves both first-party and third-party coverages. When payment for a covered claim is delayed or withheld, the insured suffers the very financial consequences insurance is bought to avoid. This is especially true in the case of loss of funds, where the insured is relying on the insurer's best efforts to make insurance payments properly. An adjuster's job, accordingly, is to facilitate use of the insurance contract by addressing and resolving claims following notice of the event. Insurers should ensure their practices don't undercut the public's confidence in the insurance mechanism.

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

1. Must treat its insured's interests with equal regard as it does its own interests, without turning the claims handling into an adversarial or competitive process.
2. Must assist the insured with the claim to achieve the purpose of the coverage.
3. Must disclose all benefits, coverages, and time limits that may apply to the claim.
4. Must review and analyze the insured's submissions.
5. Must conduct a full, fair, and prompt investigation of the claim at its own expense, keeping the insured on equal footing with disclosure of the facts.
6. Must fairly and promptly evaluate and resolve the claim, making payments or defending in accordance with applicable law and policy language.
7. Must not deny a claim or any part of a claim based upon insufficient information, speculation, or biased information.
8. Must give a written explanation of any full or partial claim denial, pointing to the facts and

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policy provisions supporting the denial.

9. Must not engage in stonewalling or economic coercion leading to unwanted litigation that shows the unreasonableness of the company's assessments of coverage.

10. Must not misrepresent facts or policy provisions or make self-serving coverage interpretations that subvert the intent of the coverage.

11. Must continue to defend the insured until final resolution.

12. Must relieve the insured of a verdict above the policy limits at the earliest opportunity.

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

D. CLAIMS HANDLING LITIGATION

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

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

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

The *Crisci* Court recognized that the insured's expectation of protection provides a basis for imposing strict liability in failure to settle cases because it will always be in the insured's best interest to settle within the policy limits when there is any danger, however slight, of a judgment above those limits. Crisci v. Security Insurance Company of New Haven, Conn. 426 P.2d 173, 66 Cal.2d 425, 58 Cal. Rptr. 13, (1967). And that there is more than a small amount of elementary

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justice in a rule that would require that, in this situation, where the insurer's and insured's interests necessarily conflict, the insurer, which may reap the benefits of its determination not to settle, should also suffer the detriments of its decision. *Id*.

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

> Can you honestly imagine a situation where an insurance company fails to settle within the policy limits, the policyholder gets stuck with an excess judgment, and this court *does not* require the insurance company to indemnify the policy holder? That will happen the same day the sun rises in the West! As far as I am concerned, even if the insurance company is run by angels, archangels, cherubim and seraphim, and the entire heavenly host sing of due diligence and reasonable care, I will *never*, under any circumstances, vote that a policyholder instead of an insurer pays the excess judgment when it was possible to settle a case within the coverage limits.
>
> When I buy insurance, I buy protection from untoward events. I do not object to an insurance company's vigorous defense of a claim, including going to jury trial and exhausting every appeal. Furthermore, as a policyholder, I will diligently assist my insurer to vindicate its rights and protect its reserves. However, I draw the line when the insurer decides that in the process of protecting its reserves, it will play "you bet *my* house." The insurance company can bet as much of its own money as it wants, and it can bet its own money at any odds that it wants, but it cannot bet one single penny of my money even when the odds are ten million to one in its favor!

Id. at 780.

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

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

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

Other states make no distinction on what standard to apply when dealing with a first-party claim as opposed to a third-party claim. Arizona has found no legal distinction between the duty or standard of good faith owed by an insurance company when dealing with the different types of claims. Instances of first and third-party failures merely involve different breaches of the same overall duty of good faith. Trus Joist Corp. v. Safeco Ins. Co. of America, 735 P.2d 125 (1986). They have also made clear that the tort of failure to act in good faith does not rise to the level of a traditional tort in the sense that the insurer must know with substantial certainty that its actions will bring particular harm to the insured. *Id., citing* Restatement (Second) of Torts Section 8A, comment B (1956).

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

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

Nevada has also established similar standards that apply in other types of failure to act in good faith situations. In *Pemberton v. Farmers Insurance Exchange*, 109 Nev. 789, 858 P.2d 380 (1993), the Nevada Supreme Court established standards to apply when an action is brought related to the lack or good faith in the denial of first-party benefits under uninsured or underinsured coverage. There, the court noted that numerous appellate court decisions affirm that an insurer's failure to deal fairly and in good faith with an insured's UM claim is actionable. *Id.* at 794 (citations omitted) The *Pemberton* Court ultimately held that an insured may institute an action for breach of the duty of good faith and fair dealing against his or her own insurer once the insured has established "legal entitlement" and conduct not based on reason and logic by the insurer concerning its obligations to the insureds. *Id.* at 797.

Perhaps most instructional in Nevada, however, on the standard to be applied when dealing with negative effects resulting from an insurer's failure to settle a claim is *Landow v. Medical Ins. Exchange*, 892 F.Supp. 239 (D.Nev. 1995). The Court's ruling is enlightening because although it does not involve a verdict above the policy limit, it does involve a first-party insured bringing a claim for stress and damage to his reputation related to ongoing litigation that could have exposed

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him to a verdict but was concluded prior to a verdict. The underlying plaintiffs in *Landow* sought damages above Landow's policy limit after previously offering to settle for that limit. Landow requested that his insurance company pay the limit and accept the plaintiff's offer to end the case, but the insurance company refused and forced litigation. The *Landow* Court, following the rationale of California courts in above limit verdict situations accepted that, "the litmus test ... is whether the insurer, in determining whether to settle a claim, gave as much consideration to the welfare of its insured as it gave to its own interests," citing, *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d. 809, 818, 169 Cal.Rptr. 691, 620 P.2d 141 (1979). Ultimately, the Landow Court decided that the insurer has a duty to consider injury to the insured, such as emotional distress and injury to business goodwill that proximately flow from its failure to settle. *Id*. at 241.

IV. LEWIS' COUNTERMOTION FOR SUMMARY JUDGMENT IN THE ALTERNATIVE

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Pursuant to N.R.C.P. 56, Gary Lewis moves this Honorable Court for summary judgment as to liability and the minimum damages, for a finding that UAIC has breached its duty of good faith and fair dealing and is liable for the damages which were proximately caused by UAIC's breach, on the basis that the pleadings and documents on file show there is no genuine issue as to any material of fact and that Gary Lewis is entitled to judgment as a matter of law on this issue.

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A. Standard for Granting Summary Judgment

Summary judgment is appropriate when a review of the record in the light most favorable to the nonmoving party reveals no genuine issues of material fact and judgment is warranted as a matter of law. *Butler v. Bogdanovich,* 101 Nev. 449, 451 (1985). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, admissions and

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

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

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

No reasonable interpretation of the facts could be construed by a finder of fact as placing liability anywhere but on UAIC for any judgment against Lewis in this case. In order to gain intervention UAIC admitted: "As long as UAIC is obligated to … pay any judgment against LEWIS, UAIC's interests are clearly at stake in this action." Based on this admission alone, Lewis is entitled to judgment against UAIC. It must pay any judgment Nalder obtains against Lewis.

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

After the Ninth Circuit Court ruled against it finding UAIC had breached its duty to defend, UAIC paid its policy limit to relieve UAIC of the judgment entered against it, but UAIC

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

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Randall Tindall, Esq. now claims to be representing Gary Lewis based on a right that arises from that same policy of insurance. The same policy that UAIC breached in 2007. UAIC has already exhausted its policy limits because it paid the full policy amount (after the adverse finding from the Court). Although UAIC admits in this action that it will be liable for any judgment entered against Mr. Lewis, it has not paid anything over the $15,000 policy limit it was ordered to pay by the Federal District Court. It has not pursued negotiations to relieve Lewis of the judgment. It has not investigated ways to relieve Lewis of the judgment. These actions are a breach of the duty of good faith and fair dealing. See *Allstate Insurance Co. v. Miller*, 125 Nev. 300, 212 P.3d 318 (2009)

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

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

UAIC argued that the issue is before the Nevada Supreme Court. This is also a falsehood. The issue before the Nevada Supreme Court is UAIC's responsibility for the judgment, not Gary

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Lewis'. UAIC and its co-conspirator in this action, Mr. Tindall, have made false claims to gain intervention and then filed fraudulent and frivolous pleadings that increase the cost of litigation. In fact, these are only a ruse designed to have the Court distracted from the very simple issue in the case at bar: whether the 2008 judgment is valid.

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

Additionally, UAIC states "Mr. Tom Christensen, Counsel for Plaintiff, who claimed to represent Mr. Lewis (through assignment) and refused retained counsel from speaking with Mr. Lewis." Again, this is not factual. Mr. Lewis has requested that contact and communication be made through his attorney, Thomas Christensen, who is representing him against UAIC. This is because Mr. Lewis understands that Mr. Tindall has a conflict because he represents both Mr. Lewis and UAIC and their interests are not aligned. Mr. Lewis has now sued Mr. Tindall once

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and UAIC twice. Mr. Lewis has not waived that conflict. The disregarding of the requests by the insured for communication through his attorney is yet another new breach of the covenant of good faith and fair dealing. See *Powers v. USAA,* 114 Nev. 690, 962 P.2d 596 (1998) (USAA disregarded reasonable request by the insured and harrassed the insured)

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

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

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

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

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

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UAIC refuses to provide Cumis counsel for Mr. Lewis and makes false allegations against Mr. Lewis' counsel. E. Breen Arntz was retained by Lewis when Mr. Rogers was hired by UAIC. Mr. Lewis asked that UAIC pay Mr. Arntz pursuant to CUMIS. Mr. Tindall was retained after Mr. Rogers and Mr. Arntz. Prior to UAIC hiring Tindall, Mr. Lewis asked UAIC that if other counsel was retained, that they contact him through his attorney in his claim against UAIC, Mr. Christensen. David Stephens is the only counsel who has represented Cheyenne Nalder in this case. He was retained after Cheyenne Nalder reached majority. Mr. Christensen represents neither Gary Lewis as a defendant nor Cheyenne Nalder as the plaintiff in the instant case. Failure to retain or listen to Cumis counsel is a new breach of the duty of good faith and fair dealing. See *Powers v. USAA,* 114 Nev. 690, 962 P.2d 596 (1998).

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

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

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CONCLUSION

UAIC's motion to consolidate should be denied. UAIC's intervention order should be voided and all filings by UAIC in case no. 07A549111 be stricken. In the alternative, Partial summary judgment should issue in favor of Lewis and against UAIC for breach of the covenant of good faith and fair dealing, and fraud, with a finding that the minimum damages are the

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amount of any judgment entered in this case against Lewis together with attorney fees and costs. The only issues left for trial would be additional compensatory damages and punitive damages.

CHRISTENSEN LAW OFFICES

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

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CERTIFICATE OF SERVICE

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

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

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

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

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

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

An employee of CHRISTENSEN LAW OFFICES, LLC.

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EXHIBIT 1

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No. 1514.
Supreme Court of Nevada

Mandlebaum v. Gregovich

50 P. 849 (Nev. 1897)

Decided October 1st, 1897

The facts sufficiently appear in the opinion.

By the Court, MASSEY, J.:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The judgment will therefore be affirmed.

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EXHIBIT 2

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

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

v.

UNITED AUTOMOBILE INSURANCE COMPANY,
Respondent.

RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF TO SECOND CERTIFIED QUESTION

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

Thomas E. Winner, Esq.
Matthew J. Douglas, Esq.
Nevada Bar No. 11371
ATKIN WINNER & SHERROD
1117 South Rancho Drive
Las Vegas, Nevada 89102
(702) 243-7000 Telephone
(702) 243-7059 Facsimile

Thomas E. Scott, Esq.
Scott A. Cole, Esq.
COLE, SCOTT & KISSANE, P.A.
9150 South Dadeland Boulevard
Suite 1400
Miami, Florida 33156
(305) 350-5300 Telephone
(305) 373-2294 Facsimile

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ARGUMENT

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

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

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

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EXHIBIT 3

AFF

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. XIX
United Automobile Insurance Company, Intervenor,	
Gary Lewis, Third Party Plaintiff, vs. United Automobile Insurance Company, Randall Tindall, Esq. and Resnick & Louis, P.C., and DOES I through V, Third Party Defendants.	

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

AFFIDAVIT OF GARY LEWIS

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

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

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

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

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

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

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

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

8. This incident occurred on private property.

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

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

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

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

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

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

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

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

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

18. UAIC never filed a declaratory relief action.

19. UAIC rejected Nalder's offer.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FURTHER AFFIANT SAYETH NAUGHT.

GARY LEWIS

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

Notary Public in and for said County and State.

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

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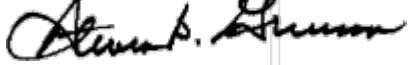

OPPS

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

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

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

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

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

CHRISTENSEN LAW OFFICES

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

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POINTS AND AUTHORITIES

I. OPPOSITION TO UAIC'S MOTION

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

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

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

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

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

C. Claim Preclusion does NOT Apply

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. CLAIMS HANDLING LITIGATION

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

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

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