

Case No. 78085

In the Supreme Court of Nevada

CHEYANNE NALDER, and GARY LEWIS,
Petitioners,

vs.

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

Respondents,

and

UNITED AUTOMOBILE INSURANCE COMPANY,
Real Party in Interest.

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UNITED AUTOMOBILE INSURANCE COMPANY'S ANSWER

With Supporting Points and Authorities

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Real party in interest United Automobile Insurance Company (UAIC) is a privately held limited-liability company. No publicly traded company owns more than 10% of its stock.

UAIC is represented by Thomas E. Winner and Matthew J. Douglas at Atkin Winner & Sherrod, and by Daniel F. Polsenberg, Joel D. Henriod, and Abraham G. Smith at Lewis Roca Rothgerber Christie, LLP.

Dated this 10th day of July, 2019.

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INTRODUCTION

To petitioners Cheyanne Nalder and Gary Lewis, a decade-old judgment against Lewis has untold power. Although the judgment expired without its renewal under NRS 17.214, that has not stopped them from seeking (1) to amend it; (2) to beget a new action and a new (or renewed) judgment; and (3) to brandish it to prevent Lewis's insurer, United Automobile Insurance Company (UAIC), from intervening in either action or consolidating the two. Now they have asked for this Court's extraordinary intervention to keep the district court from making the very determinations about the judgment's expiration that would confirm that intervention and consolidation are justified.

The effect of an expired judgment on a district court's discretion in matters of intervention or consolidation might be an interesting issue, but it poorly and prematurely teed up in this petition. This Court should deny the petition.

ROUTING STATEMENT

Although UAIC disagrees with petitioner's characterizations about the record, UAIC agrees that it makes sense for the Supreme

Court to retain the petition because of its familiarity with the issues in the certified question, Docket No. 70504.

ISSUES PRESENTED

1. In an action purporting to renew a judgment, does a district court have discretion to let the defendant's insurer intervene before the trial or judgment in the action?

2. An expired judgment is a void judgment, *Leven v. Frey*, 123 Nev. 399, 410, 168 P.3d 712, 719 (2007), and a void judgment may be vacated under NRCP 60(b)(4) at any time, including by the court on its own motion, *Rawson v. Ninth Judicial Dist. Court*, 133 Nev., Adv. Op. 44, 396 P.3d 842, 848 & n.4 (2017). When a plaintiff seeks to revive an expired judgment against an insured, does a district court have discretion to let the insurer intervene to contest the expired judgment's validity, especially when the insured refuses to do so?

3. If *Ryan v. Landis*, 58 Nev. 253, 75 P.2d 734 (1938) holds otherwise, should that case be reconsidered or overruled?

STATEMENT OF FACTS

A. The Accident

Cheyenne Nalder alleges that on July 8, 2007 Gary Lewis negligently struck her with his car. (1 R. App. 2.)¹

B. The 2007 Lawsuit

On October 9, 2007, Nalder through her guardian ad litem filed suit against Lewis. (1 R. App. 1.) Lewis did not answer, and eight months later the district court entered a default judgment for \$3.5 million. (1 R. App. 5, 6–7.)

C. The Bad-Faith Action Against UAIC

Nalder then sued Lewis’s former insurer, UAIC, in federal court, based on an assignment of Lewis’s rights to a claim for bad faith. (1 R. App. 231–32; 11 R. App. 2531.)

1. Due to an Ambiguity, the Accident Is Deemed Covered

The federal court initially granted UAIC summary judgment because at the time of the accident, Lewis had let his policy lapse. (1 R.

¹ “R. App.” refers to real party in interest UAIC’s appendix.

App, 87, 99, 231–32.) The Ninth Circuit found an ambiguity in the renewal statement, however (1 R. App. 104, 11 R. App. 2547), and on remand the district court construed the ambiguity against UAIC to imply a policy covering the 2007 accident. (1 R. App. 110, 232.)

UAIC paid Nalder the \$15,000 policy limits and \$90,000 for her attorney's fees.

2. The Judgment Against Lewis Expires

Nalder appealed, however, because she considered the entire \$3.5 million default judgment a consequential damage of UAIC's failure to defend, even though UAIC had acted in good faith. (1 R. App. 110.)

Pending that appeal, Nalder let that default judgment expire without renewing it under NRS 17.214. (1 R. App. 15.)

3. This Court Accepts Certified Questions on the Availability of Consequential Damages

The Ninth Circuit certified to this Court two questions: first, whether an insurer who mistakenly but in good faith denies coverage can be liable for consequential damages beyond the payment of policy limits and the costs of defense; and second, whether the expiration of the judgment without renewal cuts off the right to seek, in an action

against the insurer, consequential damages based on that judgment. (2 R. App. 257, 268.)

**D. Nalder “Amends” the Expired
Judgment in the 2007 Suit**

Shortly after this Court accepted the second certified question, Nalder moved *ex parte* to “amend” the expired 2008 judgment to be in her own name rather than that of her guardian ad litem. (1 R. App. 62, 71, 74; 2 R. App. 273, 282; P. (Dkt. 78085) App. 6–7;² 5 R. App. 1108 (describing the amendment as “an amendment of the expired judgment”).)³

² “P. (Dkt. #) App.” refers to the petitioners’ appendix in the indicated docket.

³ Coverage counsel initially moved on Lewis’s behalf to vacate the amended judgment. (1 R. App. 26–28; 4 R. App. 841, 852) After the district court in a minute order granted UAIC permission to intervene (4 R. App. 839, 10 R. App. 2313) but before the entry of a written order (4 R. App. 874), Lewis, through another attorney, alleged that coverage counsel had not conferred with Lewis about the motion and moved to strike it. (1 R. App. 26–28.) Two days later, the district court entered its written order granting UAIC permission to intervene (1 R. App. 31), and UAIC was able to file its own motion to vacate the judgment (1 R. App. 35). Both Nalder and Lewis opposed the motion. (1 R. App. 78, 134.)

**E. Nalder Brings a New Action Testing the
Validity of the Expired Judgment**

A few days later, on April 3, 2018, Nalder filed a new complaint against Lewis as a purported “action on the judgment,” seeking a new \$3.5 million judgment (minus \$15,000 plus interest) and a declaration that the six-year limitation for bringing such an action had not expired. (10 R. App. 2284–88.)

**F. UAIC Intervenes in the Pending Actions
and Moves to Consolidate Them**

To contest Nalder’s new effort to revive the expired 2008 default judgment against its insured, UAIC moved to intervene in both actions and moved for their consolidation. (P. (Dkt. 78085) App. 8; 10 App. 2083; 1 R. App. 227; P. (Dkt. 78085) App. 213; 11 R. App. 2610.) The motion to intervene was properly served both by mail and by electronic service (3 R. App. 732–74), and the motion to consolidate was properly e-served (11 R. App. 2624); Nalder and Lewis opposed both motions. (1 R. App. 8, 2 R. App. 310, 3 R. App. 741, 4 R. App. 754, 763, 10 R. App. 2308, 2329, 11 R. App. 2685, 2743.) Seeking to create a judgment in the 2018 action, Nalder and Lewis submitted a stipulated judgment against

Lewis for the full amount requested in Nalder’s complaint. (3 R. App. 595, 4 R. App. 771.)

The district court granted intervention in both cases (1 R. App 31, 10 R. App. 2450),⁴ and the judge in the lower-numbered 2007 case ordered the related cases consolidated (P. (Dkt. 78243) App. 2). The district court did not enter judgment on Nalder’s and Lewis’s stipulation. (5 R. App. 1133–34.)

**G. While the Case is Stayed, Nalder and Lewis Try
to Create a Judgment in the 2018 Action**

On January 9, 2019, the district court orally dismissed part of Nalder’s 2018 complaint and stayed the remaining proceedings. (5 R. App. 1129, 1141–42.) The district court gave no indication that the order staying proceedings was anything other than immediate; in fact, the district court made it clear that it was refusing to sign Nalder’s and

⁴ At the time, both cases were pending before Judge David Jones in Department 29. On October 24, 2018, a week after UAIC’s intervention, Judge Jones disclosed his prior work with Lewis’s then-coverage counsel, Randy Tindall. (1 R. App. 76–77.) Upon objection by Nalder’s counsel and a request to refer Tindall to the state bar, Judge Jones voluntarily recused himself. (1 R. App. 76–77.) (The claim against Tindall was later dismissed. (5 R. App. 1169.)) The 2007 case was eventually reassigned to Judge Eric Johnson in Department 20, who granted consolidation. (11 R. App. 2626.)

Lewis's proposed judgment. (5 R. App. 1132–33, 7 R. App. 1664–66.)

And again in a minute order on January 22, 2019, the district court granted a stay pending this Court's resolution of the certified questions. (7 R. App. 1664–66, 9 R. App. 2159.)

Yet that same day, Nalder and Lewis worked to evade the stay before a written order memorializing the then-in-effect stay could be entered (6 R. App. 1311, 1316–18⁵): Nalder served and Lewis accepted an offer of judgment for over \$5 million, and they submitted the judgment to the clerk for entry. (5 R. App. 1194, 1197, 1201.) As the notice of acceptance and the clerk's entry of judgment were filed at the same minute (5 R. App. 1194, 1201), neither UAIC nor the district judge had advance notice of this judgment. UAIC moved to vacate the judgment. (5 R. App. 1176, 8 R. App. 1853.) Based on the mistake or inadvertence in the clerk's entering judgment while the case was stayed, the district court vacated the judgment. (7 R. App. 1656, 1666–67.)

⁵ See also 9 R. App. 2002–04 (counsel's comments on the draft order, including the denial of Nalder's and Lewis's stipulation and the granting of the stay).

Nalder and Lewis complained that in vacating the judgment the district court violated their due process, and they asked the court to reinstate the judgment on grounds that the oral ruling and minute order could not restrain the parties until the entry of a written order staying the case. (6 R. App. 1328, 1487; 10 R. App 2272.) The district court denied the motions, noting that it had stayed the matter at the previous hearing, that the judgment entered by the clerk was void, and that vacating merely “put us back to where I thought I clearly had indicated I wanted us to be” at the time the district court stayed the case. (10 R. App. 2283; 7 R. App. 1656, 1666–67; 10 App. 2286–87.)

SUMMARY OF THE ARGUMENT

United Automobile Insurance Company timely intervened. In the 2018 action, intervention was timely because that case—seeking to revive an expired judgment from 2008—has not proceeded to trial or judgment.

And in the underlying 2007 action, intervention is likewise appropriate because (1) that case is consolidated with the 2018 action in which UAIC’s intervention is proper, (2) UAIC intervened not to reopen what the parties did in 2008 but to prevent Nalder from reopening that

expired judgment, (3) to the extent Nalder raises doubts about the 2008 judgment's expiration, the district court has not ruled on that mixed question of law and fact, so the objection to intervention is premature.

If a wooden reading of *Ryan v. Landis*, 58 Nev. 253, 75 P.2d 734 (1938) would prevent intervention in these circumstances, that case should be reconsidered or overruled.

ARGUMENT

Standard of review: Intervention may be as of right or permissive. Determining whether a party has met the requirements to intervene as of right “is within the district court’s discretion.” *Hairr v. First Judicial Dist. Court*, 132 Nev., Adv. Op. 16, 368 P.3d 1198, 1201 (2016) (quoting *Am. Home Assurance Co. v. Eighth Judicial Dist. Court*, 122 Nev. 1229, 1238, 147 P.3d 1120, 1126 (2006)). And “[a] district court’s ruling on permissive intervention is subject to ‘particularly deferential’ review.” *Id.*, 132 Nev., Adv. Op. 16, 368 P.3d at 1202 (quoting *United States v. City of New York*, 198 F.3d 360, 367 (2d Cir. 1999)). This is true even on the question of timeliness. *Lawler v. Ginocchio*, 94 Nev. 623, 626, 584 P.2d 667, 668 (1978).

I.

INTERVENTION IS SUBSTANTIVELY PROPER

Apart from the question of timeliness, there is little dispute that the district court acted within its discretion to allow intervention, whether as of right or for permissive intervention.

A. Intervention Gives Voice to Unrepresented Positions and Protects the Integrity of the Judicial Process

Intervention is an essential tool for protecting the integrity of the judicial process and ensuring that Courts resolve legal issues correctly. Rule 24 offers two paths to intervention: The district court *must* let a party intervene when a statute confers such a right or

when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

NRCP 24(a); *Am. Home Assurance Co.*, 122 Nev. at 1238, 147 P.3d at 1126.⁶

⁶ UAIC refers to the rules in effect as of the time of intervention in 2018.

But even without such an interest, the district court may allow intervention “when an applicant’s claim or defense and the main action have a question of law or fact in common.” NRCP 24(b)(2). In exercising discretion, the court should consider whether intervention will “unduly delay or prejudice the adjudication of the rights of the original parties.” NRCP 24(b). Of course, a case may take longer to resolve whenever a proposed intervenor demands “anything adversely to both the plaintiff and the defendant,” but that kind of “prejudice” is baked into the statutory right of intervention itself. NRS 12.130(1)(b); *see also St. Charles Tower, Inc. v. County of Franklin*, No. 4:09-CV-987-DJS, 2010 WL 743594, at *6–7 (E.D. Mo. Feb. 25, 2010) (“[P]rejudice that results from the mere fact that a proposed intervenor opposes one’s position and may be unwilling to settle always exists when a party with an adverse interest seeks intervention.” (quoting *United States v. Union Elec. Co.*, 64 F.3d 1152, 1159 (8th Cir. 1995))). The question is whether the delay in *moving* for intervention causes undue harm. *Lawler*, 94 Nev. at 626, 584 P.2d at 669; *St. Charles Tower*, 2010 WL 743594, at *6–7 (citing *Union Elec. Co.*, 64 F.3d at 1159).

**B. The District Court Had Discretion
to Allow UAIC's Intervention**

The district court had good cause to allow UAIC's intervention here. UAIC had a right to intervene based on its interest in preventing an expired judgment from being enforced or revived against its insured—for which Nalder expressly seeks to hold UAIC liable in the bad-faith lawsuit. NRCP 24(a). And given Lewis's refusal to cooperate in UAIC's defense—going so far as to collaborate with Nalder in trying to get a multimillion-dollar judgment entered against himself, and to prevent UAIC from protecting Lewis against such a judgment—there is no question that the original parties left UAIC's interest inadequately represented. NRCP 24(a). Had Lewis cooperated in the defense, UAIC arguably would not have needed to intervene; his refusal made intervention essential. *Cf. Hairr*, 132 Nev., Adv. Op. 16, 368 P.3d at 1201–02 (upholding denial of intervention where “petitioners and the State have the same ultimate objective” and petitioners could not “point to any arguments that the State was refusing to make”). Plus, the question of the judgment's expiration without renewal in the bad-faith lawsuit (now pending before this Court as a certified question) dovetails the main question in the 2007 litigation: whether the judgment can be amended

or revived after its expiration. In fact, to have refused intervention in these circumstances would have been an abuse of discretion.

II.

UAIC’S INTERVENTION IN THE 2018 ACTION, IN WHICH THERE IS NO JUDGMENT, WAS TIMELY

The real issue, then, is timing.

Half of Nalder’s and Lewis’s petition fails on its own terms. They tether their petition to the statement in *Lopez v. Merit Insurance Co.*, 109 Nev. 553, 556, 853 P.2d 1266, 1268 (1993) that “NRS 12.130 does not permit intervention subsequent to the entry of a final judgment.” But there is no judgment—final or otherwise—in the 2018 action. (5 R. App. 1132–33.)

They point to the statement that “a voluntary agreement of the parties stands in the place of a verdict” (Pet’n 23–24 (citing *Dangberg Holdings v. Douglas County*, 115 Nev. 129, 978 P.2d 311 (1999)), neglecting that what counts is not the mere agreement, but “*judgment . . . by agreement.*” *Ryan v. Landis*, 58 Nev. 253, 75 P.2d 734, 735–36 (1938) (emphasis added). *Estate of Lomastro ex rel. Lomastro v. Am. Family Ins. Grp.*, 124 Nev. 1060, 1071 n.29, 195 P.3d 339, 347 n.29

(2008) (describing *Lopez* as holding that “intervention after *entry of judgment* on a settlement agreement was not timely” (emphasis added)). In *Eckerson v. C.E. Rudy, Inc.*, for example, it was important in denying intervention that the parties had not only settled, but that “[b]y the time the application for intervention was made a default judgment had been entered.” 72 Nev. 97, 98–99, 295 P.2d 399, 399–400 (1956).

Here, in contrast, UAIC timely sought intervention before Nalder and Lewis submitted their proposed judgment. The district court did not enter judgment on that settlement. So even on the notion that a judgment cuts off all rights of intervention, the district court properly let UAIC intervene in the 2018 action.

And as discussed immediately below, that categorical view about the timing of intervention misreads the rule, the statute, and the case law.

III.

UAIC’S INTERVENTION IN THE 2007 ACTION, WHICH NALDER IS TRYING TO REVIVE, WAS TIMELY

The petition’s objection to UAIC’s intervention in the 2007 action is equally unfounded. First, because UAIC’s intervention in the 2018 action was timely and that action has been consolidated with the 2007 action, kicking UAIC out of the consolidated action would have been untenable. Second, UAIC’s intervention in the 2007 action was itself timely because UAIC is not seeking a new or different judgment; UAIC is just preventing Nalder from transforming the old, expired judgment into a valid one. No case forbids intervention in this circumstance, and other jurisdictions approve it. Third, even if the validity of the 2008 judgment were enough to prevent intervention, that mixed question of law and fact has not been resolved, making this petition premature. And fourth, if Nalder and Lewis are correct that this Court’s cases forbid intervention even to point out a judgment’s voidness due to expiration—an issue that could be raised by nonparty *amici* or the court on its own motion—those cases should be reconsidered or overruled.

A. The 2007 Action Is Consolidated with the 2018 Action, in which UAIC Properly Intervened

Because UAIC properly intervened in the 2018 action, it is a proper party to this action, which has now been consolidated with the 2007 action. Nalder and Lewis assume that a party must justify intervening in each of a consolidated action's constituent cases before intervention in any one of those cases will be honored for the consolidated action. There is no basis for that assumption. As set forth in the answer to the petition in Docket No. 78243, consolidation was proper. So UAIC's demonstrated right to intervene in the 2018 action renders them a proper party to this now-consolidated action.

B. Intervention Properly Attaches to Nalder's Pending Quest to Revive an Expired Judgment

1. *What Cuts Off Intervention Is the Absence of a Pending Issue, Not a Judgment*

This Court's "cases generally reflect that intervention is timely if the procedural posture of the action allows the intervenor to protect its interest." *Estate of Lomastro*, 124 Nev. at 1071 n.29, 195 P.3d at 347 n.29. So while an intervenor "must take the action as he finds it," *Ryan*, 58 Nev. 253, 75 P.2d at 736, if a "matter[] would otherwise be subject to reconsideration," the intervenor can raise that issue just as

well as any party. *Estate of Lomastro*, 124 Nev. at 1068 n.10, 195 P.3d at 345 n.10 (quoting *Arizona v. California*, 460 U.S. 605, 615 (1983)).

The entry of a judgment does not, in itself, cut off the right to intervene. Although this Court has occasionally denounced as untimely attempts to intervene to reopen a final judgment—“where the controversy already is ended and settled to the satisfaction of the parties litigant”—“it would more accurately be said that there was no pending action to which the intervention might attach.” *Eckerson*, 72 Nev. at 98–99, 295 P.2d at 399–400, *quoted in Lopez*, 109 Nev. at 556, 853 P.2d at 1268.

a. USUALLY, AN INTERVENOR IS PRECLUDED
ONLY FROM MOST CHALLENGES TO
A FACIALLY VALID JUDGMENT

“No intervention after a final judgment” is a decent rule of thumb, for in most cases only a *party* to a judgment can appeal that judgment or challenge it in the district court. *See Anthony S. Noonan IRA, LLC v. Bank of New York Mellon*, No. 71365, 429 P.3d 294 (Nev. Oct. 12, 2018) (unpublished table disposition) (citing *Lopez*, 109 Nev. at 556–57, 853 P.2d at 1268–69). That includes most motions under Rule 60(b). *Id.* And in many cases, such as when an insured is pursuing tort claims

that will require the insurer to pay out uninsured-motorist benefits, the need for intervention becomes clear well before the judgment. *See Lopez*, 109 Nev. at 556–57, 853 P.2d at 1268–69.

b. AN EXPIRED JUDGMENT IS NOT A JUDGMENT

Not so with a judgment that, without facing a threat of being reopened or relitigated, simply expires by its own terms. In contrast with a judgment that appears valid on its face, after the time for enforcing a judgment has passed without renewal, “a judgment no longer exists to be renewed.” *Kroop & Kurland, P.A. v. Lambros*, 703 A.2d 1287, 1293 (Md. Ct. Spec. App. 1998) (citations omitted). The expired judgment is void. *Leven v. Frey*, 123 Nev. 399, 410, 168 P.3d 712, 719 (2007). And that can be raised not just on direct appeal from proceedings to enforce that judgment, but as a collateral attack in the underlying case. *Rawson v. Ninth Judicial Dist. Court*, 133 Nev., Adv. Op. 44, 396 P.3d 842, 848 & n.4 (2017); NRCP 60(b)(4). Not only can the *parties* mount such an attack, but the court on its own motion can, too. *A-Mark Coin Co., Inc. v. Redfield’s Estate*, 94 Nev. 495, 498, 582 P.2d 359, 361 (1978). The burden for establishing renewal rests with the party asserting its continued validity. *Leven*, 123 Nev. at 405, 168 P.3d at 717. “Either a

judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly.” 11 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2862 (3d ed.). In a real sense, when the parties take action to revive and expired judgment, they are no longer operating “*after* a final judgment.”

Other jurisdictions have held that an interested party such as an insurer can bring a Rule 60(b) motion to vacate certain judgments against its insureds—even without the insured’s consent. *Crawford v. Gipson*, 642 P.2d 248, 249–50 (Okla. 1982) (citing *Kollmeyer v. Willis*, 408 S.W.2d 370 (Mo. Ct. App. 1966)). Particularly when the *plaintiff* undertakes to enforce a void judgment, “any interested person[] may show such nullity.” *Gumina v. Dupas*, 159 So. 2d 377, 379 (La. Ct. App. 1964).

Ryan v. Landis, 58 Nev. 253, 75 P.2d 734 (1938) is not to the contrary. There, this Court rejected intervention as “a proper remedy to vacate a judgment alleged to be void,” *id.*, 58 Nev. 253, 75 P.2d at 735–36, relying on the Washington Supreme Court’s decision in *Seattle & N. Ry. Co. v. Bowman*, 102 P. 27 (Wash. 1909). That case, however, makes

clear that it is not talking about a motion under modern Rule 60(b)(4); far from it, the proposed intervenors in *Bowman* who claimed defective service did not directly attack the judgment in the trial court but came up with that theory only on appeal:

As the judgment is regular upon its face and recites due and personal service, it would seem that the validity of such service and the question whether the person upon whom it had been made was an authorized officer of the defendant *could only be questioned in a proceeding directly attacking the judgment, properly instituted by motion or petition*

102 P. at 28–29 (emphasis added). The problem was not that such a motion was unavailable to the proposed intervenors, but that they elected not to use it.

But even supposing that good reasons exist for denying a third party the right to challenge as void a judgment that is “regular upon its face,” there is no reason to bar intervention that merely points out a judgment’s facial invalidity due to expiration. As the court could so conclude on its own, or with the help of *amici*, so should an intervenor be able to make that same point. *Cf., e.g., United States v. Windsor*, 570 U.S. 744, 755 (2013) (*amicus* appointed to argue that the Court lacks jurisdiction, a position not taken by either party).

2. *Nalder’s Attempt to Revive an Expired Judgment Creates a New, Pending Issue in the 2007 Case*

Here, the district court appreciated the difference between intervening in a case after a valid, final judgment and intervening in new litigation to revive an expired judgment:

But I do see, you know, a distinction between that case, those cases, and what we have here, which is you now have essentially the prospect of new litigation, which is that 2018 case, on—to enforce that 2007 judgment.

And that new litigation creates new issues, which is whether that judgment has expired . . . or has been renewed. And I think definitely UAIC . . . has an interest in that and meets the elements necessary to intervene.

(5 R. App. 1132–33.) UAIC is not challenging or seeking to reopen the 2007 judgment, even in the sense discussed in *Ryan v. Landis*. Those issues were long ago decided, and but for Nalder’s harried reaction to this Court’s certified question, that case would have stayed closed. Rather, it is Nalder who is attempting to resuscitate a decade-old judgment without timely renewing it under NRS 17.214. (5 R. App. 1109–10 (describing this case as “litigation to declare that judgment a valid or continuing, renewed or whatever, judgment”).) That new controversy has not gone to trial or otherwise to judgment, and while that dispute hinges in part on what to make of a document called “judgment” in the

docket from 2008, UAIC's intervention in this present, pending dispute is timely.

**C. The Undeveloped Record Underscores
the Impropriety of Writ Relief**

Nalder and Lewis are not just wrong in their legal position. They are also bringing this challenge in the wrong form: a premature petition for extraordinary relief rather than an appeal in the ordinary course. Because the status of the 2008 judgment is uncertain, and Nalder and Lewis swear that nothing this Court does will resolve it, this Court cannot prejudge the validity of the 2008 judgment to bar intervention.

**1. Orders Granting Intervention Are Appealable,
and this Court Should Not Hear the Petition**

When a district court has *denied* intervention, the party seeking intervention cannot appeal, so “a mandamus petition is an appropriate method to seek review of such an order.” *Hairr*, 132 Nev., Adv. Op. 16, 368 P.3d at 1200 (citing *Am. Home Assurance Co.*, 122 Nev. at 1234, 147 P.3d at 1124).

In contrast, a party contesting an order *granting* intervention can do so on appeal. *See Lopez*, 109 Nev. at 554, 853 P.2d at 1266. This

Court should abstain from hearing the petition now and allow the district court to more fully develop the issues.

2. *This Court Should Not Grant Mandamus in the Face of Legal and Factual Uncertainty*

“Mandamus is an important escape hatch from the final judgment rule, but such relief must be issued sparingly and thoughtfully due to its disruptive nature. Advisory mandamus, like any form of interlocutory review, carries the significant negative risks of delaying the ultimate resolution of the dispute and undermining the ‘mutual respect that generally and necessarily marks the relationship between . . . trial and appellate courts.’” *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev., Adv. Op. 101, 407 P.3d 702, 709 (2017) (quoting *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 653 (9th Cir. 1977)).

3. *Further Findings Are Necessary to Resolve the Threshold Question of Renewal or Expiration*

Here, even assuming for a moment Nalder’s and Lewis’s position that a final judgment precludes intervention, it is far too early to say whether there *is* such a judgment. Integral to their argument against intervention is the assumption that they will prevail in her new claim about renewal, proving a final judgment in the 2007 action. But the

case is stayed pending this Court’s resolution of the certified questions (6 R. App. 1311, 1316–18), and even then, Lewis and Nalder repeatedly assert that this Court is “NOT deciding if the judgment is expired.” (*E.g.*, 6 R. App. 1330, 1489; 10 R. App. 2277.) The district court will eventually consider this Court’s decision, any decision from the Ninth Circuit, and its own factfinding to decide whether the 2008 judgment is valid. The district court’s decision may provide grounds for the district court to reconsider the intervention question or for an appeal.

For now, though, that remains uncertain. Simply assuming that they win on this crucial question is an abuse of the extraordinary writ procedure.

**D. Preventing Intervention Would
Produce Waste and Absurd Results**

Ignoring the circumstances that call for intervention in a case such as this—where a party is attempting to revive a facially invalid judgment—would produce tremendous waste and perverse results.

**1. Denying Intervention Would
Waste this Court's Resources**

That UAIC has intervened to participate in the consolidated case below, rather than to appeal to this Court, highlights an absurd consequence of Nalder's and Lewis's petition. By their logic, this Court's work would triple: this Court would grant their petition, then UAIC would file its own petition challenging a judgment affecting its interests without its joinder, then the district court would join UAIC as a party, and finally, after a final judgment, the losing party could appeal.

Something similar happened in the two-part saga of *Gladys Baker Olsen Family Trust ex rel. Olsen v. Olsen*. In part one, the district court entered a judgment invading the assets of a nonparty trust, removing the nonparty trustee, and taking other adverse actions. 109 Nev. 838, 839, 858 P.2d 385, 385 (1993) (*Olsen I*). The trust moved to intervene after the judgment, but “only for purposes of appealing” the order. *Id.* This Court vacated the intervention order, noting that the district court could not grant intervention solely to confer party status for standing to appeal. *Id.* at 841–42, 858 P.2d at 386–87. Without being a proper party, the trust lacked standing to appeal the order, so this Court dismissed the appeal without prejudice to file a writ petition instead. *Id.*

In part two, this Court heard and granted the petition heard the trust's writ petition challenge to the order of June 2, 1993. *Gladys Baker Olsen Family Trust ex rel. Olsen v. Eighth Judicial Dist. Court*, 110 Nev. 548, 874 P.2d 778 (1994) (*Olsen II*). This Court held that “joinder rather than knowledge of a lawsuit and opportunity to intervene is the method by which potential parties are subjected to the jurisdiction of the court.” *Id.* at 553, 874 P.2d at 781. The trust was an indispensable party to a judgment regarding trust property, and “failure to join an indispensable party may be raised by the appellate court sua sponte.” *Id.* at 554, 874 at 782 (citing *Schwob v. Hemsath*, 98 Nev. 293, 646 P.2d 1212 (1982)). This Court vacated the order as void and remanded for the trust to be . . . joined as a party. *Id.*

It cannot be that every time a court fails to join an indispensable party to a judgment—rendering the judgment void—the party and the district court are powerless to remedy that defect and instead must petition this Court for extraordinary relief. Rather, the problem in *Olsen* was that the district court tried to confer *only* appellate standing, without actually joining the trust to any proceedings in the district court. By contrast, the recognition that the judgment was void—something,

again, the district court could decide *sua sponte*—freed the court to join the trust as a party to the district-court proceedings.

Here, too, it would be absurd to deny UAIC intervention now, only to have to vacate the judgment affecting UAIC’s rights on the basis that UAIC was an indispensable party who ought to have been joined. Instead, the district court properly exercised its discretion to join UAIC, not merely to appeal a judgment between other parties, but to participate as an indispensable party in Nalder’s pending efforts to revive a judgment that on its face appeared expired.

2. *Denying Intervention Would Spur Collusive Settlements*

A basic principle of intervention is that an intervening party cannot “be prejudiced by not doing an act that they had no right to do” before the intervention. *State ex rel. Moore v. Fourth Judicial Dist. Court*, 77 Nev. 357, 361, 364 P.2d 1073, 1075–76 (1961).

Yet to deny intervention in these circumstances would also create a disastrous template for collusive settlements in preparation for a claim against an insurer. The defendant could refuse to cooperate with the insurer, stipulate to an exorbitant judgment, then prevent the insurer from coming in to vacate the judgment on behalf of the insured.

3. *Denying Intervention Would Give UAIC Fewer Rights than an Amicus*

As discussed, where the court has power to act on its own motion, anyone could appear *amicus* to assist the court's resolution. Indeed, this Court has approved of "allowing a proposed intervenor to file an amicus brief" where doing so "is an adequate alternative to permissive intervention." *See, e.g., Hairr*, 132 Nev., Adv. Op. 16, 368 P.3d at 1203 (quoting *McHenry v. Comm'r*, 677 F.3d 214, 227 (4th Cir. 2012)). And *amici* can appear at any stage of litigation, including rehearing on appeal. *E.g., Powers v. United Services Auto. Ass'n*, 115 Nev. 38, 40–41, 979 P.2d 1286, 1287–88 (1999); *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 608, 245 P.3d 1182, 1184 (2010). In such a circumstance, it makes no sense to bar a party whose interests are adversely affected from intervening to make the same arguments. *Id.* (recognizing that amicus briefing may be inadequate when the proposed intervenor's interests are not represented by the original parties).

E. *If Ryan v. Landis Is Read to Prevent Intervention, It Should Be Overruled*

The rule UAIC proposes—that an intervenor may appear after judgment when (1) the judgment appears void on its face, (2) the original parties raise new issues regarding the validity of the facially void judgment, (3) the dispute does not reopen or relitigate any issue in the original judgment, and (4) the court or *amici* could raise the same arguments, without the original parties’ acquiescence—does no violence to the principles that thread through the case law from *Ryan* to *Eckerman* to *Lopez* to *Lomastro*. It remains true that “[a]n intervener must take the action as he finds it”: the intervenor cannot make arguments regarding previously decided issues that, under NRCP 60(b) or NRAP 3A only a party could make. *Ryan*, 58 Nev. 253, 75 P.2d at 736. And these limitations preserve the “simplicity, clarity and certainty” of a jurisdiction rule that nonetheless does not force absurd, and duplicative, writ petitions or appeals. *See Olsen I*, 109 Nev. 838, 841, 858 P.2d 385, 387 (1993). It would simply bring Nevada into the mainstream of jurisdictions interpreting Rule 24. *See McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1071 (5th Cir. 1970) (describing limits on intervention after judg-

ment, including that the intervention not reopen or relitigate the original lawsuit); *see generally* 7C WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1916 & n.23 (3d ed.) (listing cases in nearly every circuit allowing intervention in limited circumstances after a final judgment);.⁷

⁷ *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 458–461 (1940); *Flynt v. Lombardi*, 782 F.3d 963 (8th Cir. 2015); *Blum v. Merrill Lynch Pierce Fenner & Smith Inc.*, 712 F.3d 1349 (9th Cir. 2013); *United States v. City of Detroit*, 712 F.3d 925 (6th Cir. 2013); *In re Lease Oil Antitrust Litig.*, 570 F.3d 244 (5th Cir. 2009); *Tweedle v. State Farm Fire & Cas. Co.*, 527 F.3d 664 (8th Cir. 2008); *Alstom Caribe, Inc. v. Geo. P. Reintjes Co.*, 484 F.3d 106 (1st Cir. 2007); *Elliott Indus. Ltd. P’ship v. BP Am. Prod. Co.*, 407 F.3d 1091 (10th Cir. 2005); *Acree v. Republic of Iraq*, 370 F.3d 41, 50 (D.C. 2004); *Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994); *United States ex rel. McGough v. Covington Techs. Co.*, 967 F.2d 1391 (9th Cir. 1992); *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470 (9th Cir. 1992); *Ceres Gulf v. Cooper*, 957 F.2d 1199 (5th Cir. 1992); *Officers for Justice v. Civil Serv. Comm’n*, 934 F.2d 1092 (9th Cir. 1991); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424 (10th Cir. 1990); *United States v. Yonkers Bd. of Educ.*, 902 F.2d 213 (2d Cir. 1990); *Grubbs v. Norris*, 870 F.2d 343 (6th Cir. 1989); *Bank of Am. Nat’l Trust & Savs. Ass’n v. Hotel Rittenhouse Assocs.*, 844 F.2d 1050 (3d Cir. 1988); *Fiandaca v. Cunningham*, 827 F.2d 825 (1st Cir. 1987); *Hill v. W. Elec. Co.*, 672 F.2d 381, 387 (4th Cir. 1982); *Brown v. Eckerd Drugs, Inc.*, 663 F.2d 1268, 1278 (4th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982); *Howse v. S/V “Canada Goose I”*, 641 F.2d 317 (5th Cir. 1981); *Fleming v. Citizens For Albemarle, Inc.*, 577 F.2d 236 (4th Cir. 1978); *McDonald*, 430 F.2d 1065 (reversing denial of insurer’s motion to intervene); *Shy v. Navistar Int’l Corp.*, 291 F.R.D. 128 (S.D. Ohio 2013); *Nextel Commc’ns of Mid-Atlantic, Inc. v. Town of*

Hanson, 311 F. Supp. 2d 142 (D. Mass 2004); *S. Pac. Co. v. City of Portland*, 221 F.R.D. 637 (D. Or. 2004); *Van Etten v. Bridgestone/Firestone, Inc.*, 117 F. Supp. 2d 1375 (S.D. Ga. 2000), *vacated on other grounds sub nom. Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304 (11th Cir. 2001); *Smith v. Bd. of Election Comm'rs*, 586 F. Supp. 309 (N.D. Ill. 1984); *Wilson v. Sw. Airlines Co.*, 98 F.R.D. 725 (N.D. Tex. 1983); *In re Franklin Nat'l Bank Secs. Litig.*, 92 F.R.D. 468 (E.D.N.Y. 1981); *Armstrong v. Bd. of Sch. Dirs.*, 471 F. Supp. 827, 846 (E.D. Wis. 1979); *New York State ex rel. New York County v. United States*, 65 F.R.D. 10 (D.D.C. 1974); *EEOC v. Am. Tel. & Tel. Co.*, 365 F. Supp. 1105 (E.D. Pa. 1973), *aff'd*, 506 F.2d 735 (3d Cir. 1974); *Winders v. People*, 45 N.E.3d 289, 293 (Ill. App. Ct. 2015); *R.D.B. v. A.C.*, 27 So. 3d 1283, 1286 (Ala. Civ. App. 2009); *Olver v. Fowler*, 168 P.3d 348, 352–53 (Wash. 2007); *Ex parte Caremark RX, Inc.*, 956 So. 2d 1117, 1129 (Ala. 2006); *City of Chicago v. Ramirez*, 852 N.E.2d 312, 322 (Ill. Ct. App. 2006); *Johnson Turf & Golf Mgmt., Inc. v. City of Beverly*, 802 N.E.2d 597, 600 (Mass. App. Ct. 2004); *Jenkins v. City of Coll. Park*, 840 A.2d 139, 146 (Md. 2003); *Taylor v. Abernethy*, 560 S.E.2d 233, 236 (N.C. Ct. App. 2002); *Wichman v. Benner*, 948 P.2d 484, 488 (Alaska 1997); *Humana Health Plans, Inc. v. Durant*, 650 So. 2d 203, 204 (Fla. Dist. Ct. App. 1995); *Cruz Mgmt. Co., Inc. v. Thomas*, 633 N.E.2d 390, 393 (Mass. 1994); *Blue Cross/Blue Shield of R.I. v. Flam ex rel. Strauss*, 509 N.W.2d 393, 396 (Minn. Ct. App. 1993) (reversing denial of insurer's motion to intervene to vacate judgment against insured); *Weimer v. Ypparila*, 504 N.W.2d 333, 336 (S.D. 1993); *Rosenbalm v. Commercial Bank of Middlesboro*, 838 S.W.2d 423, 427 (Ky. Ct. App. 1992); *Bouhl v. Gross*, 478 N.E.2d 620, 624 (Ill. App. Ct. 1985) *Petition of City of Shawnee*, 687 P.2d 603, 612 (Kan. 1984) (“The trial court not only had jurisdiction to grant the motion to intervene, but also authority to grant relief from the final judgment”); *Salvatierra v. Nat'l Indem. Co.*, 648 P.2d 131, 135 (Ariz. Ct. App. 1982); *Vicendese v. J-Fad, Inc.*, 389 A.2d 1021, 1024 (N.J. Super. Ct. 1978); *Elwell v. Vt. Commc'ns Mktg. Grp., Inc.*, 349 A.2d 218, 220 (Vt. 1975) (“While there is some authority for the proposition that intervention after final judgment is untimely, we feel that the better view is that intervention may be permitted even after final judgment where those already parties are not prejudiced, and

But if *Ryan* and its progeny are read to bar *every* intervention in a case whose docket includes a document labeled “judgment,” this Court should reconsider those cases today.

1. *The Washington Authority on which Ryan Relied Has Been Discarded*

Stare decisis is at its weakest when the cases relied upon to create a rigid rule have themselves been discarded. *In re Estate of Sarge*, 134 Nev., Adv. Op. 105, 432 P.3d 718, 722 (2018) (overruling *Mallin v. Farmers Ins. Exch.*, 106 Nev. 606, 797 P.2d 978 (1990), which had relied on now-overruled federal cases).

Here, as discussed, *Ryan* rejected “the proposition that intervention is a proper remedy to vacate a judgment alleged to be void” based on a Washington Supreme Court case, though that case did not actually

that where there is real potential for harm to the intervenor intervention should be denied as untimely only in extreme circumstances.”); *E. Constr. Co. v. Cole*, 217 N.W.2d 108, 110 (Mich. Ct. App. 1974); *Wags Transp. Sys., Inc. v. City of Miami Beach*, 88 So. 2d 751, 752 (Fla. 1956); *Zeitinger v. Hargadine-McKittrick Dry Goods Co.*, 250 S.W. 913, 916 (Mo. 1923); *Sizemore v. Dill*, 220 P. 352, 355 (Okla. 1923); *Casey v. Ohio State Nurses Ass’n*, 114 N.E.2d 866, 867–68 (Ohio Ct. App. 1951); *Brown v. Brown*, 98 N.W. 718, 721 (Neb. 1904).

categorically bar such a remedy. *See Ryan*, 58 Nev. 253, 75 P.2d at 735–36 (citing *Seattle & N. Ry. Co. v. Bowman*, 102 P. 27 (Wash. 1909)).

But even if it did, Washington has abandoned such a categorical approach, holding now intervention is permitted after judgment upon a “strong showing” of the factors. *Olver v. Fowler*, 168 P.3d 348, 352–53 (Wash. 2007); *compare also Safely v. Caldwell*, 42 P. 766 (Mont. 1895) (cited in *Ryan* and prohibiting intervention after default judgment), *with In re Marriage of Glass*, 697 P.2d 96, 99 (Mont. 1985) (“motions to intervene made after judgment are not per se untimely”).

2. *Under Ryan’s Strict Reading, NRS 12.130 Would Be Unconstitutional*

Cases such as *Ryan v. Landis* often invoke NRS 12.130’s reference to intervention “[b]efore the trial” as a limitation on the time for intervention. It is not. The Legislature was simply respecting the separation of powers, enacting a substantive standard for intervention (“an interest in the matter in litigation”) and allocating costs, NRS 12.130(1), but not treading on the judiciary’s exclusive power to “manage the litigation process” and “provide finality.” *See Berkson v. LePome*, 126 Nev. 492, 501, 245 P.3d 560, 566 (2010) (invalidating NRS 11.340, a statute

allowing plaintiffs to refile claims after their reversal on appeal, for violating separation of powers).

The Legislature can “sanction the exercise of inherent powers by the courts,” but it cannot “limit or destroy” them. *Lindauer v. Allen*, 85 Nev. 430, 434, 456 P.2d 851, 854 (1969). Thus, a statute that attempted to limit the preclusive effect of a judgment was unconstitutional for interfering with a “judicial function.” *State Farm Mut. Auto. Ins. Co. v. Christensen*, 88 Nev. 160, 162–63, 494 P.2d 552, 553 (1972). If possible, however, this Court reads statutes so as not to impinge on the judiciary’s rulemaking, adjudicative, and other incidental powers. *Borger v. Eighth Judicial Dist. Court*, 120 Nev. 1021, 1029–30, 102 P.3d 600, 606 (2004). In *Borger*, for example, because the expert-affidavit requirement for medical-malpractice claims “contains no explicit prohibition against amendments [of defective affidavits], and because legislative changes in the substantive law may not unduly impinge upon the ability of the judiciary to manage litigation,” this Court held that district courts retained their discretion to allow amendments. *Id.* “Retention of this discretion . . . is consistent with well-recognized notions of separation of legislative and judicial powers.” *Id.*

Thus, the Nebraska Supreme Court held that a statute allowing intervention “before the trial commences” could not restrict the judiciary from allowing intervention after judgment:

[H]owever that section may affect the right of a party to intervene, we are satisfied that it was not intended, and should not be permitted, to require a court to pursue an erroneous theory to a worthless decree, nor to curtail, in any degree, its power to do complete justice, so long as it retains jurisdiction of the cause and the parties.

Brown v. Brown, 98 N.W. 718, 721 (Neb. 1904).

Here, too, this Court should read NRS 12.130 to avoid an unconstitutional infringement on judicial power. The Legislature cannot *force* the judiciary to accept intervention after a final judgment; that is why the statute only addresses intervention “[b]efore the trial.” At the same time, though, the Legislature cannot *restrict* the judiciary’s rulemaking authority or *ad hoc* decisionmaking to permit intervention in limited circumstances after a final judgment; the statute simply does not address it. The court remains free to apply its own rules of civil procedure, as the federal courts and many state courts have, to govern post-judgment intervention. The district courts retain jurisdiction after judgment over some matters, including to declare a judgment void. So

to read NRS 12.130 as categorically barring intervention after the trial would render the statute unconstitutional for infringing on the judiciary's exclusive power.

IV.

NALDER AND LEWIS WERE ACCORDED DUE PROCESS THROUGH PROPER, TIMELY SERVICE

Nalder and Lewis do not articulate any due process violation. They claim to have been improperly served (Pet'n 28), but substantial evidence shows that they were properly served (3 R. App. 732–74, 11 R. App. 2609) and indeed opposed the motions. (1 R. App. 8, 2 R. App. 310, 3 R. App. 741, 4 R. App. 754, 763, 10 R. App. 2293, 2314, 11 R. App. 2670, 2728.) Any error, moreover, would have been harmless because Nalder and Lewis had repeated opportunities to be heard on reconsideration. (2 R. App. 310 (countermotion to set aside intervention order); 6 R. App. 1328 (motion for reconsideration); 6 R. App. 1487 (motion for reconsideration); 10 R. App. 2272 (joinder in motion for reconsideration).) Regardless, this Court is ill-equipped to decide that fact question in the first instance. *See Beazer Homes Holding Corp. v. Eighth Judicial Dist. Court*, 128 Nev. 723, 736, 291 P.3d 128, 137 (2012) (“The district court

is in the best position to analyze the facts and circumstances of this case”).

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Dated this 10th day of July, 2019.

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CERTIFICATE OF COMPLIANCE

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2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 7869 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

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