IN THE SUPREME COURT OF THE STATE OF NEVADA

CHEYENNE NALDER, an individual, and GARY LEWIS, Petitioners and Real Parties in Interest, 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 COURT JUDGE, Respondents, And UNITED AUTOMOBILE INSURANCE COMPANY, Real Party in Interest.	Supreme Court No. 78085
GARY LEWIS, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; THE HONORABLE ERIC JOHNSON, DISTRICT COURT JUDGE, Respondents, and UNITED AUTOMOBILE INSURANCE COMPANY; and CHEYENNE NALDER, Real Parties in Interest.	Supreme Court No. 78243 (Consolidated original petitions for writs of mandamus challenging district court orders granting intervention, consolidation and relief from judgment in tort actions.)

Petition for En Banc Reconsideration

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PETITION FOR EN BANC RECONSIDERATION

I. INTRODUCTION

Nalder and Lewis request *en banc* consideration of the Opinion issued on April 30, 2020, (136 Nev. Advance Opinion 24), which corrected decisions made by Judge D. Jones and Judge E. Johnson. Nalder and Lewis filed a motion for reconsideration on May 18, 2020. It was denied on July 1, 2020.[1] The two lower court actions involved herein were both improperly intervened in and wrongly consolidated at UAIC's urging and have caused more than a year of unnecessary ongoing litigation for the real parties: Lewis and Nalder. The Court's Opinion stopped some of the continuing damage to the parties brought on by the improper actions taken by UAIC.

A limited portion of the Writ Petitions were denied, allowing intervention by UAIC in the 2018 case (No. A-18-772220-C). The Panel's decision in this regard is contrary to a long line of prior published opinions of the Supreme Court interpreting NRS 12.130 to require intervention "before the trial," including *Ryan v. Landis*, 58 Nev. 253, 74 P.2d 1179, 75 P.2d 734 (1938), *Dangberg Holdings v.*

[1] Lewis filed his Petition for Writ in the 2018 case subsequent to his joint Petition for Writ with Nalder on intervention in the 2007 case. The Court unilaterally consolidated the Writs. UAIC opposed Lewis' Motion for reconsideration, but did not serve the Opposition on any of Lewis's counsel. Only Nalder's counsel was registered for e-service in the initial, joint Writ.

Douglas Co., 115 Nev. 129, 139 (Nev. 1999), *Lopez v. Merit Ins. Co.*, 853 P. 2d 1266 (1993), *McLaney v. Fortune Operating Co*., 444 P.2d 5050 (1968), *American Home Assurance Co. v. Dist. Court*, 147 P. 3d 1120 (2006), *Valley Power Company v. Toiyabe Supply Co.*, 396 P. 2d 137 (1964) and *Eckerson v. C.E. Rudy, Inc.*, 72 Nev. 97, 295 P.2d 399 (1956). Most notably, the Panel seeks to overrule, by "clarifying" *Ryan* and *Dangberg Holdings,* which hold that **a signed settlement agreement eliminates any trial and stands in the place of a judgment preventing intervention**.

The *Ryan* court stated:

> In *Henry Lee Co. v. Elevator Co.*, 42 Iowa 33, it was so held. The court said: "The intervention must be made before the trial commences. After the verdict all would admit it would be too late to intervene. **But a voluntary agreement of the parties stands in the place of a verdict, and, as between the parties to the record as fully and finally determines the controversy as a verdict could do**. *** * * It is not the intention of the statute that one not a party to the record shall be allowed to interpose and open up and renew a controversy which has been settled between the parties to the record, either by verdict or voluntary agreement.** *Ryan v. Landis*, 58 Nev. 253, 260 (Nev. 1938). (Emphasis added.)

The *Dangberg* court stated:

> Additionally, in *Ryan v. Landis*, 58 Nev. 253, 260, 75 P.2d 734, 735 (1938) (quoting *Henry Lee Co. v. Elevator Co., 42 Iowa 33* (1918)), we reiterated that:
> "intervention must be made before the trial commences. After the verdict all would admit it would be too late to intervene. **But a voluntary agreement of the parties stands in the place of a**

> **verdict, and, as between the parties to the record as fully and finally determines the controversy as a verdict could do."**
> In the instant case, although *Dangberg Holdings* argues that its settlement offer with Douglas County operated as a final judgment that would bar subsequent intervention, our review of the record has failed to produce evidence indicating that **a settlement was ever finalized prior to the Glide Estate's and State of Nevada's intervention.** *Dangberg Holdings. v. Douglas Co.*, 115 Nev. 129, 139 (Nev. 1999). (Emphasis added.)

The Panel's Opinion herein stated, at Page 9-10:

> We also clarify that to the extent that our opinion in *Ryan* relies on *Henry, Lee & Co. v. Cass County Mill & Elevator Co.*, 42 Iowa 33 (1875), that reliance was intended to explain why **our statute does not distinguish between a judgment rendered through verdict or through agreement of the parties.** See *Ryan*, 58 Nev. at 260, 75 P.2d at 735. **We did not, nor do we intend today, to state that a settlement agreement on its own stands in the place of a judgment**. Neither does our opinion in *Dangberg Holdings Nevada, LLC v. Douglas County*, 115 Nev. 129, 139-40, 978 P.2d 311, 317 (1999), suggest so. In *Dangberg Holding*s, we only noted that there was nothing in the record to support petitioner's assertion that there was a finalized settlement agreement barring intervention. *See id.* We hold that it is the judgment that bars intervention, not the agreement itself reached by the parties.

The prior case law interpreted the statute's reference to "before the trial" to include settlement agreements because settlement agreements resolved the controversy and removed the need for trial. The Panel's decision essentially rewrites the statute and prior case law to require "a judgment." That is the legislature's job -- not the Court's. In addition, the only difference in having a signed and filed settlement agreement and a judgment is the signing of the judgment by the Court and

filing the judgment. That situation **does not** create the need for a trial, and, therefore, the statute does not allow intervention. Apparently, the Panel leaves open the door for insurers to intervene post-trial if the Court has yet to sign a judgment on jury verdict. Review of the Panel decision is necessary to secure and maintain uniformity of the decisions of the Supreme Court and fealty to the role of the Court under the Nevada Constitution.

This petition is also based on two substantial precedential, constitutional and public policy issues, to wit: 1) NRS 12.130 is a limited grant of intervention by the legislative branch to intervene "**before the trial**"; and 2) Nevada law does not allow a liability carrier to intervene in the underlying tort lawsuit.

The Panel's Opinion herein opens the door to liability insurance carriers being allowed to intervene at will when the Defendant tortfeasor is already represented by counsel chosen by the liability carrier. The panel's decision opens the flood gates to liability insurance carriers untimely and improperly meddling in underlying tort claims, which will cause untold issues with regard to allowing insurance into the jury deliberation room.

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II. SUPPORTING LAW AND ARGUMENT

The Court Should Grant Rehearing to Correct the Panel's Misstatement of Nevada Law.

Nevada Rule of Appellate Procedure 40A governs Petitions for rehearing en banc and limits the scope as follows:

RULE 40A. PETITION FOR EN BANC RECONSIDERATION
(a) Grounds for En Banc Reconsideration. En banc reconsideration of a decision of a panel of the Supreme Court is not favored and ordinarily will not be ordered except when (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue...

A. The Panel's decision is contrary to prior, published opinions of the Supreme Court interpreting NRS 12.130 to require intervention "before the trial" and violates important public policy and constitutional concerns limiting intervention under NRS 12.130

NRS 12.130 requires intervention to happen "before the trial," when there is still a controversy, not only after final judgment is rendered. All of the cases interpreting this statute do not allow intervention if there is no trial to be had, as in the instant case. The statute reads:

> NRS 12.130 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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Dangberg Holdings. v. Douglas Co., 115 Nev. 129, (Nev. 1999) holds:

> **"[A] voluntary agreement of the parties stands in the place of a verdict, and, as between the parties to the record as fully and finally determines the controversy as a verdict could do."** at 139.

The intervention was allowed in *Dangberg* not because a signed judgment was required, but rather because "our review of the record has failed to produce evidence indicating that a settlement was ever finalized prior to the Glide Estate's and State of Nevada's intervention." *Dangberg Holdings. v. Douglas Co.*, 115 Nev. 129, 139 (Nev. 1999). That is not the case here. Not only was an agreement reached that eliminated the need for trial in the instant case, it was written, signed and filed with the court prior to intervention. It was also a part of the record on appeal.[2] This was a reasoned settlement based on the available defenses, not collusive nor in bad faith.

B. Nevada law does not allow a liability carrier to intervene in the underlying tort lawsuit, which is the situation here.

The Panel mistakenly applies *Allstate Ins. Co. v. Pietrosh*, 85 Nev. 310, 454 P.2d 106(1969) to this action. Allstate was an **uninsured motorist carrier** intervening in the underlying tort lawsuit. Nevada is not a "direct action" state,

[2] See Petitioners' Appendix, Docket 78085, bates 0142-0143, Stipulation to Enter Judgment, dated September 13, 2018.

but rather, allows actions by third-party tort claimants against third-party liability coverage providers only after a judgment against the tortfeasor has been obtained. *Hall v. Enterprise Leasing Company West*, 122 Nev. 685, 137 P.3d 1104 (Nev. 2006).

What we have below in this case is a **liability carrier,** UAIC**,** intervening in the tort lawsuit between Nalder and Lewis. Prior to UAIC's request for intervention in this case, Randall Tindall, Esq., who was an attorney picked and paid for by UAIC, made an appearance and was already representing the defense interest. In addition, an attorney the insured picked, that the carrier is refusing to pay under *Cumis/Hansen*,[3] E. Breen Arntz, also represented the defendant's interests. The liability insurance company only has rights granted to it under the insurance contract with the insured, Lewis. Because of the fiduciary like nature of the insurer -- insured relationship, those rights must be used keeping the insured's interest at least equal to the insurer's interests.[4]

Intervention is not provided for in the policy and the insured objected to intervention by UAIC. The insured only requested an ethical defense be provided

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[3] See *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc*., 162 Cal App3d. 358, 208 Cal Rptr. 494(1984) and *State Farm Mutual Automobile Insurance Company v. Hansen*, 357 P. 3d 338 (2015).

[4] *Allstate Ins. Co. v. Miller*, 212 P.3d 318 (Nev., 2009).

to him pursuant to the policy and Nevada law. This is the most that UAIC should have been granted to continue to control the litigation through defense counsel. The *Hinton v. Beck*, 176 Cal. App. 4th 1378 (Cal. Ct. App. 2009), Court would not have even allowed that type of participation by a recalcitrant insurer:

> Grange [the liability insurer like UAIC here], 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." An insurer who denies coverage and refuses to defend its insured does not have a direct interest in the litigation between the plaintiff and the insured to warrant intervention. The rationale behind this rule is that by its denial, the insurer has lost its right to control the litigation. *Id.*, citing, *Eigner v. Worthington* (1997) 57 Cal. App. 4th 188, 196 [66 Cal. Rptr. 2d 808].

III. CONCLUSION

Based upon the foregoing, the parties to the state court controversy below herein request reconsideration *en banc* to create consistency with prior, published opinions of the Supreme Court interpreting NRS 12.130 to require intervention "before the trial." It is necessary to secure and maintain uniformity of the decisions of the Supreme Court. Further, reconsideration is warranted to clarify the substantial precedential, constitutional and public policy issues involved when NRS 12.130 is a limited grant of intervention created by the legislative branch and explicitly states "before the trial." Finally, public policy requires the court slam

the door on recalcitrant insurers intervening in underlying tort claims. Public policy supports this and relies upon the Court to protect the public interest.

Dated this 14th day of July, 2020.

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Certificate of Compliance Pursuant to Rules 40 and 40A

1. I hereby certify that this petition for rehearing/reconsideration or answer complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: It has been prepared in a proportionally spaced typeface using Google Docs in Times New Roman font size 14 point.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 40 or 40A because it does not exceed 10 pages.

Dated this 14th day of July, 2020.

/s/ Thomas Christensen

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing via the Court's eFlex system on July 14, 2020 and thereby served this document upon all registered users in this case.

/s/ Thomas Christensen