

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

GARY LEWIS  
Petitioner and Real Party in Interest

vs.

EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF  
NEVADA IN AND FOR THE  
COUNTY OF CLARK THE  
HONORABLE ERIC JOHNSON,  
DISTRICT COURT JUDGE,

Respondent,

And  
UNITED AUTOMOBILE  
INSURANCE COMPANY, and  
CHEYANNE NALDER

Respondents.

Electronically Filed  
Mar 05 2019 08:17 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court  
Supreme Court No. \_\_\_\_\_

District Court Case No. 07A549111  
Consolidated with 18-A-772220  
DEPT. NO: XX

**PETITION FOR WRIT OF MANDAMUS**

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THOMAS CHRISTENSEN, ESQ., being first duly sworn, deposes and says:

1. That I am an attorney at law duly licensed to practice in the State of Nevada, with my office being located at 1000 South Valley View Blvd., Las Vegas, Nevada; and, I represent the Petitioner, Gary Lewis, Third Party Plaintiff below.
2. That the following narrative of facts and procedural history are based on my own personal knowledge, or are based on my belief and understanding as counsel. Petitioner is not personally giving this Affidavit because the salient issues involved in this Petition are issues of law and procedure.
3. Pursuant to NRS § 34.160, Petitioner requests relief in the form of a Writ of Mandamus directing the Respondent Court to: Vacate its December 27, 2018 Order, wherein the District Court Granted UAIC's Motion to Consolidate after Judgment had already been entered in this action. (See Exhibit 1). Further, all orders issued by the Court regarding the third

party complaint following consolidation should be voided and the case returned to the previously assigned Judge.

4. Pursuant to NRS § 34.160, Petitioners further request relief in the form of a Writ of Mandamus directing the Respondent Court to: Vacate its February 14, 2019 Order, wherein the District Court Granted UAIC's Motion to Void the Judgment entered by the Clerk. (See Exhibit 2.)
5. A Writ review is necessary because Petitioner contends and believes there are no disputed factual issues existing regarding the fact that consolidation was not granted until after judgment was entered, and there are no legal issues as consolidation is improper after judgment is entered in any action. Petitioner does not have a plain, speedy and adequate remedy in the ordinary course of law.
6. UAIC hired Randall Tindall to "defend" Gary Lewis. Randall Tindall did not obtain (or even seek) authority from Lewis. Further, Randall Tindall filed unauthorized pleadings on Lewis' behalf in both Nevada cases.
7. Lewis filed a third party claim against UAIC and Tindall for, among other things, fraud in filing unauthorized, frivolous pleadings in Lewis' name without Lewis' consent.

8. On October 19, 2019, without a hearing, and despite the entry of the final judgment and settlement in these respective matters, and despite the representation of Lewis by Tindall and Arntz, the lower court granted UAIC's improperly noticed motions to intervene. UAIC's improper intervention is the basis of a writ petition already filed with this Court. The Third Party Defendant, Gary Lewis, hereby joins in Nalder's Petition for a Writ. (See Supreme Court Case No. 78085, filed 2/7/19)
9. The lower court, Judge Jones, then held the first hearing in the case on October 24, 2018. The Court brought up his personal relationship with Tindall and asked if the parties would waive any potential conflict it presented. Lewis would not waive the conflict and Judge Jones recused himself from both cases. Judge Jones did not, however, vacate his prior order allowing for the improper intervention, which was entered after Tindall made appearances in both cases.
10. This improper intervention by UAIC is causing irreparable harm to both real parties in interest because they must incur additional fees and it prevents them from resolving the issues between them regarding the



continued validity of the underlying judgment in the other case they have on appeal against UAIC.

11. The 2007 case, identified as case number 07A549111, which was already to judgment for six months, was randomly assigned to Judge Johnson. The 2018 case, identified as case number 18-A-772220, which by virtue of the filed settlement agreement between Nalder and Lewis, was just the third party complaint by Lewis against UAIC and Randy Tindall, was assigned to Judge Cory. UAIC filed a peremptory challenge of Judge Cory. Case number 18-A-772220 was then randomly assigned to Judge Kephardt.
12. UAIC, having already used one peremptory challenge, then filed to consolidate both actions that were already resolved, in order to have a change of judicial officer in the pending third party claim that was recently filed by Gary Lewis (against UAIC and Randall Tindall). This was the only only remaining active litigation in this case number at that time.
13. The 75 page motion to consolidate by UAIC was provided to the Court ex-parte on November 5, 2018. It was not served on the parties until November 26, 2018 and contained a hearing date of November 28, 2018.

14. Only third party plaintiff Lewis was able to quickly prepare and file an opposition. Lewis' defense counsel, E. Breen Arntz, intended to appear and argue at the hearing. Nalder's counsel, David A. Stephens, also intended to appear and argue against consolidation. All counsel intended to attend the hearing and present their arguments orally, since there was such short notice, but the court instead disregarded the clear law limiting consolidation, vacated the hearing, and ordered consolidation without an opportunity to be heard.
15. Finally, on January 9, 2019, nearly three months after many motions and counter motions had been filed, the first substantive hearing occurred in the consolidated case. The Court did not even verbally stay the entire case, and certainly did not stay Nalder's claims because the court still had Nalder's motion for summary judgment set for January 23, 2019. The Court stated, on the record, that the Court would deal with UAIC's motion to strike the settlement reached by the parties at the next hearing in the case (on January 23, 2019.)
16. Nalder served an offer of judgment on Lewis on January 11, 2019.

17. Lewis feared Nalder would ultimately prevail and receive a larger judgment and attorney fees because the defense presented on his behalf by UAIC was frivolous. Lewis, therefore, accepted the offer from Nalder and the clerk filed and issued judgment against Lewis on January 22, 2019. This resolved all claims against Lewis in favor of Nalder.
18. Late in the day on January 22, 2019, the court vacated the hearing set for January 23, 2019. The Court failed to inform counsel until they arrived at Court on January 23, 2019, prepared to argue.
19. UAIC provided a 135 page pleading to the Court, ex-parte, on February 8, 2019. Again, this document was not served on any other litigants until after the Court had reviewed and ruled on it.
20. The District Court signed a written order granting a stay, for the first time, on February 11, 2019. This was done at UAIC's ex-parte request, without any legal support, and again, without a hearing. The orders were not served on the other parties until February 14, 2019.
21. The Court ordered a hearing, at UAIC's request, on shortened time, for February 20, 2019. Then, prior to receiving any opposition from the other parties to the litigation, the Court vacated the hearing and ruled in favor of

UAIC on February 14, 2019. This ruling voided the judgment entered by the clerk on January 22, 2019.

22. This Petition is made and based upon the Memorandum of Points and Authorities attached below and the exhibits contained in the concurrently filed appendix.

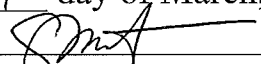
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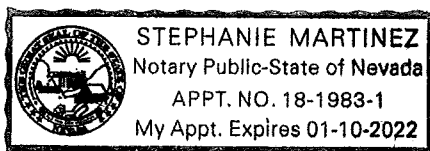
Thomas Christensen, Esq.

Subscribed and sworn to before me  
this 4 day of March, 2019.



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NOTARY PUBLIC, in and for said  
County and State



## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. STATEMENT OF ISSUES PRESENTED**

#### **A. May a case that is already concluded by final judgment be consolidated with a case that has also been concluded by settlement?**

May a case that is already concluded by final judgment be consolidated with a case that has also been concluded by settlement, but which also contains a newly filed third party complaint? The primary issue Petitioner wishes to place before this Honorable Court is whether the lower court abused its discretion when it granted UAIC's Motion to Consolidate subsequent to the entry of a final judgment in one case and after the consolidated case was settled when the plain language of NRCP 42 provides for consolidation of **pending actions** and both actions which are even arguably related herein were already resolved, not pending. Further, was it an abuse of discretion to consolidate cases in these circumstances when the effect was to obtain a new Judicial officer, more to UAIC's liking, for the only remaining active claim: the third party claim against UAIC and Randall Tindall.

#### **B. Is it a violation of due process to void a judgment ex-parte without notice or an opportunity to be heard?**

Is it violation of due process to void a judgment, ex-parte, without notice or an opportunity to be heard? Petitioner asks this Court to consider whether the

parties' due process rights, under the Constitution of the United States as well as the Constitution of the State of Nevada, were violated when the lower Court granted UAIC's Motion to Consolidate on one day notice and then vacated the hearing set and decided the issue without a hearing and with no opposition yet filed or heard from two parties? Further, and along the same lines, the Petition asks the Court to consider whether the parties' due process rights were violated when the Court also granted UAIC's Motion to Vacate the Judgment upon UAIC's ex-parte application, giving no opportunity to the real parties in interest to respond in writing or for a hearing?

**C. Does EDCR 2.26 provide substantive and procedural due process to litigants when the Court vacates the hearing and rules in favor of the ex-parte applicant?**

Finally, as used in the proceedings below, does EDCR 2.26 provide substantive and procedural due process to litigants when the Court vacates the hearing and rules in favor of the ex-parte applicant? Petitioner asks this Court to consider whether the actions taken, as a whole, by the lower Court, at the suggestion of the wrongfully allowed Intervenor, result in a denial of the procedural due process of the Petitioner because both cases were resolved prior to

intervention and consolidation and UAIC has thrust itself into the litigation and denied resolution as to the real parties in interest?

## **II. STATEMENT OF RELIEF SOUGHT**

Petitioner requests that this Honorable Court: Issue a Writ of Mandamus requiring the District Court to vacate its prior order consolidating a case that was already to judgment with a case that was already settled in order to reassign a recently filed third party complaint to a different judicial officer.

Petitioner further requests that this Honorable Court: Issue a Writ of Mandamus directing the District Court to strike any and all orders filed in the 2018 case no. 18-A-772220 and return the case to the appropriate judicial officer for handling.

## **III. STATEMENT OF FACTS**

The following facts are based, in part, on express statements contained in *Nalder v. United Auto Ins. Co.*, 824 F.3d 854 (9<sup>th</sup> Cir. 2016). The *Nalder* case directly involves Cheyanne Nalder, Gary Lewis and UAIC. As discussed herein, the *Nalder* case has a complex procedural history, and the case has two underlying final judgments and is still ongoing in multiple different courts. Other statements of fact set forth herein are based on issues being litigated in other courts.<sup>1</sup>

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<sup>1</sup> Lewis is attaching various docket sheets as exhibits to demonstrate to the Court

### ***The Underlying Collision***

1. On July 8, 2007, Gary Lewis ran over Cheyanne Nalder.<sup>2</sup> At the time of the collision, Cheyanne (born April 4, 1998) was a nine-year-old girl. This incident, which occurred on private property, caused catastrophic injuries.

### ***Gary Lewis Was Insured by UAIC at the Time of the Collision***

4. Lewis had taken out an auto insurance policy with UAIC, which was renewable on a monthly basis. *Id.* Before the accident, Lewis had received a statement instructing him that his renewal payment was due by June 30, 2007. *Id.* The statement also specified that “[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy.” *Id.* The statement listed June 30, 2007, as the policy’s effective date and July 31, 2007, as its expiration date. *Id.*

6. Lewis paid to renew his policy on July 10, 2007, two days after the accident, but before the expiration of the policy. *Id.*

### ***UAIC Rejected a \$15,000 Policy Limits Offer to Settle Without Informing Lewis, Denied the Claim and Refused to Defend Lewis***

7. James Nalder (“Nalder”), Cheyanne’s father, made an offer to UAIC

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various matters relevant to this Writ petition. To the extent the Court believes additional documents are necessary or helpful, Lewis will certainly provide whatever is deemed necessary to the Court. Leave to supplement is also sought if the Court believes a particular matter needs to be further supported.

<sup>2</sup> *Nalder v. United Auto Ins. Co.*, 824 F.3d at 855.



to settle her claim for \$15,000, the insurance policy limit. *Id.* 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, 2007. *Id.* UAIC never informed Lewis that Nalder was willing to settle. *Id.*

***The First Lawsuit –  
State Court Litigation/Underlying Case and Resulting Judgment***

10. After UAIC rejected Nalder's offer, Nalder sued Lewis in Nevada state court (Case No. 07A549111). (See, Exhibit 3, Docket Sheet for 07A549111). UAIC was notified of the lawsuit, but declined to defend Lewis or file a declaratory relief action regarding coverage. Lewis failed to appear and answer the complaint. As a result, Nalder obtained a judgment against Lewis for \$3,500,000.00. Notice of entry of judgment was filed on August 26, 2008.

***Voluntary Assignment By Lewis Instead of Judicial Execution and Assignment***

14. After the judgment was entered, Lewis moved to California (prior to 2010). Rather than being executed upon, Lewis entered into a settlement agreement with Nalder regarding collection of the judgment from UAIC. As part of the settlement, Lewis assigned to Nalder his rights against UAIC to all funds necessary to satisfy the Judgment plus interest.

***The Second Lawsuit --  
Federal Court Coverage Action, Whereby the Ninth Circuit***

***Court of Appeals Ultimately Found that UAIC Breached Its Duty to Defend***

16. After the judgment was entered, Nalder and Lewis then filed suit against UAIC in state court (State Court Case No. A-09-590967-C). *Id.*

17. The case was then removed by UAIC to Federal Court. (Case No. 2:09-cv-01348-ECR-GWF). *Id.* (See, Exhibit 4, Docket Sheet,)

18. Nalder and Lewis alleged an action on the judgment, 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.

19. UAIC moved for summary judgment on the basis that Lewis had no insurance coverage on the date of the accident. Nalder and Lewis opposed the motion arguing 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. *Id.*

20. 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. *Id.*

21. An appeal thereafter occurred to the Ninth Circuit Court of Appeals

(Case No. 11-15010, Federal Court Appeal No. 1). (See Exhibit 5 Docket Sheet)

22. On December 17, 2012, the Ninth Circuit reversed the District Court holding “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).” *Id.*

23. On remand, on October 30, 2013, the district court [Robert C. Jones] granted partial summary judgment to each party. *Id.* 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. *Id.* Second, the court found that UAIC did not act in bad faith because it had a reasonable basis<sup>3</sup> to dispute coverage. *Id.* 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. *Id.* The court ordered UAIC “to pay Cheyanne Nalder the policy limits.” *Id.*

24. 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

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<sup>3</sup> The basis for reasonableness was the Court’s prior erroneous summary judgment ruling.

relieve him of the judgment against him.

25. Both Nalder and Lewis appealed from Judge Jones October 30, 2013 judgment (Case No 13-17441 Federal Court Appeal No. 2). *Id.* (See Exhibit 6, Docket Sheet). Two issues have since been certified by the Ninth Circuit Court of Appeals to the Nevada Supreme Court (from Federal Court Appeal No. 2).

***The First Certified Question in Appeal No. 2,  
Which Has Been Answered in Favor of Gary Lewis and Against UAIC***

27. The first certified question to the Nevada Supreme Court in Appeal No. 2 pertains to whether an insurer that breaches its duty to defend is liable for all foreseeable consequential damages to the breach. In *Nalder v. UAIC*, 824 F.3d 854 (9<sup>th</sup> Cir. 2016), the following question was certified 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?

Id. at 855.<sup>4</sup>

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<sup>4</sup> The first certified question arose in light of conflicting opinions within the Nevada District Court. Unlike Judge Jones' decision to cap damages in the underlying *Nalder* case, the Hon. Andrew P. Gordon issued a directly opposite decision in *Andrew v. Century Sur. Co.*, 134 F. Supp. 3d 1249 (D. Nev. 2015) whereby Judge Gordon ruled "[t]here is no special rule for insurers that caps their liability at policy limits for a breach of the duty to defend." *Id.* at 1249.

28. The first certified question was answered by the Nevada Supreme Court on December 13, 2018, wherein the Nevada Supreme Court held:

In answering the certified question, we conclude that an insured may recover any damages consequential to the insurer's breach of its duty to defend. As a result, an insurer's liability for the breach of the duty to defend is not capped at the policy limits, even in the absence of bad faith.

*Century Sur. Co. v. Andrew*, 134 Nev. Adv. Rep. 100, 432 P.3d 180 (Nev. 2018).<sup>5</sup>

29. Accordingly, Judge Jones October 30, 2013 decision limiting Gary Lewis' damages is erroneous such that Lewis has once again prevailed against UAIC.

***The Second Certified Question in Appeal No. 2, Which Has Not Yet Been Answered***

30. After the first certified question was fully briefed and pending before the Nevada Supreme Court, UAIC embarked on a new strategy putting its interests ahead of Lewis' interests. UAIC mischaracterized the law and brought in new facts and issues into the appeal process that were not addressed in the underlying case and were not part of the trial court record. UAIC claims that neither *Nalder*

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<sup>5</sup> As noted above, the certified question was the same in both the *Nalder* and *Andrew* cases.

nor Lewis have standing to maintain a lawsuit against UAIC. UAIC argues that a renewal of judgment pursuant to NRS 17.214 was not timely filed such that claims are time barred pursuant to NRS 11.190(1)(a).<sup>6</sup>

32. As a result, UAIC contends that unless Nalder takes some action in the underlying case to preserve the judgment against Lewis, Nalder can no longer recover damages above the \$15,000.00 policy limit for breach of the contractual duty to defend.<sup>7</sup>

34. The Ninth Circuit has 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. 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

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<sup>6</sup> 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. All of these actions would have been attempts to protect Gary Lewis. UAIC, instead, tried to protect itself and harm Lewis by filing a motion to dismiss Lewis' and Nalder's appeal with the Ninth Circuit for lack of standing.

<sup>7</sup> UAIC has ignored, among other things, applicable Nevada case law that holds that a six-year statute of limitation for enforcing a judgment is tolled so long as the judgment debtor has not resided in the State of Nevada. *Mandlebaum v. Gregovich*, 24 Nev. 154, 50 P. 849 (1897)

calculated from the date when the suit against UAIC was initiated, or when the judgment was entered by the trial court.

35. The Ninth Circuit Court of Appeals has accordingly certified a second question to the Nevada Supreme Court, to wit:

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?

*Nalder v. United Auto. Ins. Co.*, 878 F.3d 754, 755-56 (9<sup>th</sup> Cir. 2017).

36. The Nevada Supreme Court has not, to date, answered the second certified question.

***Nalder, Through David A. Stephens, Esq., Recently Filed a Separate State Court Action to Preserve Her Judgment Against Lewis Pursuant to the Mandlebaum Decision***

37. 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 comply with UAIC's request. (See Exhibits 7 & 8)

38. The Nevada state court actions as well as a state court action in California are further harming Lewis and Nalder, but were undertaken at UAIC's request.

39. Nalder hired David Stephens to obtain a new judgment. David Stephens obtained an amended judgment in Cheyenne's name because the statute of limitations was tolled by Lewis' absence from Nevada by NRS 11.300. (See Exhibit 9) <sup>8</sup>

40. A separate action on the amended judgment was filed pursuant to *Mandelbaum* to obtain a new judgment. (See Exhibit 10.)<sup>9</sup>

41. Nalder also retained California counsel, who filed a judgment in California, which has a ten year statute of limitations regarding actions on a judgment. (See Exhibit 11) <sup>10</sup>

42. Nalder maintains that all of these actions are **unnecessary to the questions on appeal** regarding UAIC's liability for the judgment. However, because UAIC contends it is necessary, out of an abundance of caution, and to maintain the judgment against Lewis, Nalder brought the actions to demonstrate the proper way this issue should have been litigated in the State Court of Nevada. The way UAIC is attempting to litigate the issue----at the tail end of an appeal supported by no trial record---is improper.

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<sup>8</sup> Request is made that the Court may take judicial notice of the judgment.

<sup>9</sup> This is the judgment that was erroneously voided by Judge Johnson.

<sup>10</sup> Request is made that the Court may take judicial notice of the judgment.



***Lewis Welcomes a Defense Provided by UAIC, but Requests All Communication through Christensen Because of the Obvious Conflict With UAIC***

43. After Nalder's counsel, David Stephens, notified UAIC of the new action on a judgment, UAIC unilaterally appointed counsel – Stephen Rogers -- to represent Lewis. Lewis welcomed an ethical representation by Rogers and asked that Rogers communicate through Christensen, who represents Lewis against UAIC. Christensen requested that Rogers explain the basis for the proposed defense, with the case law and the likelihood of success in overcoming the clear precedent in Mandelbaum which is that the judgment is valid because of Lewis' absence from the state of Nevada for eight years (where the *Mandlebaum* judgment was still valid after a fifteen year absence from the state.) (See Exhibit 12).

44. After Rogers declined to represent Lewis, UAIC appointed different counsel--Randall Tindall, Esq. --to represent Lewis (without any authority from Lewis.) UAIC's appointment of Mr. Tindall was done without any discussion with Mr. Lewis or Mr. Lewis' independent counsel, E. Breen Arntz, Esq. or any discussion or communication with Lewis' counsel versus UAIC, Thomas Christensen, Esq.

***Lewis files a Second Action against UAIC for Cumis Fees, Recent Acts of Fraud, and Breach of the Covenant of Good Faith and Fair Dealing Occurring in 2018***

45. UAIC has also failed to recognize, Breen Arntz, Esq., who is representing Lewis as the defendant in both the 2007 and 2018 cases as independent *Cumis/Hansen*<sup>11</sup> counsel. UAIC had no right to control any defense, given that UAIC breached its duties to Lewis long ago.

47. Lewis, through Thomas Christensen, in the 2018 case, filed an action against UAIC for *Cumis* counsel fees, breach of the covenant of fair dealing, and fraud in presenting a frivolous defense in Lewis' name, without his authority.

48. UAIC's unilaterally imposed counsel, Mr. Tindall, has since withdrawn from representing Lewis because there is a conflict between Lewis and UAIC. (See Exhibit 13).

48. UAIC's strategy has, at all times, been to benefit UAIC at Lewis' expense. The recent state court proceedings have involved Lewis' continued efforts to protect himself and to preserve his claims against UAIC, which stem from its original wrongful refusal to defend.

### ***UAIC Retaliatory SLAPP Suit***

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<sup>11</sup> See *San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc.*, Cal. Rptr. 494 (1984); *State Farm Mut. Auto. Ins. Co. v. Hansen*, 357 P. 3d 338 - Nev: Supreme Court (2015).

50. Rather than letting the ongoing litigation process unfold in the Ninth Circuit Court of Appeals and Nevada District Court, UAIC has lashed out against its insured, Lewis, and his attorneys by filing another lawsuit, in retaliation, against Lewis and his lawyers. (See Exhibit 14).

51. The only claim for relief asserted against the lawyers in the newest case is a medieval barratry claim, which the lawyers have moved to dismiss pursuant to Nevada's anti-SLAPP statute codified at NRS 41.660. *John v. Douglas County School District*, 219 P.3d 1276 (Nev. 2009). (See Exhibit 15, sans exhibits)

### **Other Relevant Procedural Facts**

On September 27, 2018 Randall Tindall filed pleadings at the request of UAIC in both Nevada state court cases. The Order allowing UAIC to intervene was filed and entered on October 19, 2018. (See Exhibit 16) Judge Jones, who granted intervention, has since recused himself because of Tindall's involvement in the cases, but did not vacate his order allowing intervention.

Since its intervention, UAIC has made several strategic filings which have delayed and caused additional fees and costs in the previously resolved matter, including a Motion to Consolidate this 2007 action with the 2018 action. Both cases had been resolved and UAIC's consolidation is a thinly

veiled attempt to remove a judicial officer from the third party claim filed by Lewis against UAIC. This Writ is therefore necessary. Nalder and Lewis must be allowed to resolve their cases without further costs and fees. Lewis can then continue with his claim against UAIC in the proper forum, with the appropriate judicial officer.

#### **IV. STATEMENT OF THE LAW**

##### **A. Writ of Mandamus Authority**

NRAP 21 sets forth the procedural rules required to qualify for a Writ of Mandamus. Rule 21(b) sets forth the general requirements of a Writ Petition. Writ Petitions require a statement of: (a) the relief sought; (b) the issues presented; (c) the facts necessary to understand the issues presented by the petition; and (d) the reasons why the writ should issue, including points and legal authorities.

Mandamus is an extraordinary remedy, and the decisions as to whether a petition will be entertained lies within the discretion of the Supreme Court. *Poulos v. Eighth Judicial Dist. Court of State of Nev. In and For Clark County*, 98 Nev. 272, 652 P.2d 1177 (1974). Mandamus should not be used unless the usual and ordinary remedies fail to provide a plain, speedy, and adequate remedy, and without it there would be a failure of justice. *See, Stromberg v. Second Jud. Dist.*

*Ct. ex rel. County of Washoe*, 125 Nev. 1, 200 P.3d 509, 511 (2009). This Court “will exercise [its] discretion to consider writ petitions despite the existence of an otherwise adequate legal remedy when an important issue of law needs clarification, and this court’s review would serve considerations of public policy, sound judicial economy, and administration.” *City of N. Las Vegas v. Eighth Judicial Dist. Court ex. Rel. County of Clark*, 122 Nev. 1197, 1204, 147 P.3d 1109, 1114 (2006).

## **V. ARGUMENT**

### **A. Intervention was Improper.**

Counsel for Defendant Gary Lewis and counsel for Plaintiff Cheyenne Nalder have already filed a Writ of Mandamus regarding the improper grant of intervention by the court below. Third Party Plaintiff Lewis hereby joins in that Writ.

### **B. Consolidation was Improper**

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 improper to grant consolidation after judgment is entered for the same reasons intervention is improper after judgment is entered. As this Court is aware, an action that has proceeded to judgment cannot be consolidated with a recently filed action. There is nothing to consolidate. There can be no common issues because one case is over. In the case at bar, Case No. 07A549111, captioned as Nalder v. Lewis, was to final judgment. Likewise, in Case No. 18-772220, the Nalder v. Lewis part of it was settled by filed stipulation and was awaiting signature of the judge. The third party complaint in Case No. 18-772220, Lewis v. UAIC, has not even had an answer filed yet. The similar parts of the two cases are already completely resolved and the Lewis v. UAIC part of case no. 18-772220 has just begun. There is no overlap of discovery or proof. There is no judicial economy in consolidation in this situation. Consolidation in these circumstances is an abuse of discretion.

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 & 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 does the only remaining active part of case no. 18-772220 not involve common questions of law and fact with case no. 07A549111, but it is also certainly the case here, where both similar matters have been resolved, that consolidation is improper and an abuse of discretion. 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). Here, the only arguable common issue in both cases had already gone to judgment in the one case and had already been settled in the other. The only remaining claims to be tried were in their infancy and involved Lewis' claims against UAIC and Tindall. Nalder is not even a party to the third party complaint.

### **C. Voiding the Judgment was improper.**

Nalder served an Offer of Judgment on Lewis on January 11, 2019. This offer was accepted and judgment entered by the Court Clerk pursuant to NRCP 68 on January 22, 2019. The only written order staying anything in these consolidated cases was not signed until February 11, 2019 and served on February 15, 2019. The Court's ex-parte ruling, February 14, 2019, that the judgment was void because the case was stayed, at the time judgment was entered, is clearly



erroneous. Until a written order is entered, the case could not have been stayed. The Nevada Supreme Court has stated, “Consequently, we hold that dispositional court orders that are not administrative in nature, but deal with the procedural posture or merits of the underlying controversy, must be written, signed, and filed before they become effective. *State, Div. Child Fam. Servs. v. Dist. Ct.*, 120 Nev. 445, 92 P.3d 1239 (Nev. 2004). The reasons for that are many. “Prior to the entry of a final judgment, the district court remains free to reconsider and issue a written judgment different from its oral pronouncement.” *Rust v. Clark County School Dist.*, 747 P. 2d 1380 (NV Supreme Court 1987) *citing Tener v. Babcock*, 97 Nev. 369, 632 P.2d 1140 (1981); *Lagrange Constr. v. Del E. Webb Corp.*, 83 Nev. 524, 435 P.2d 515 (1967); See also *Rae v. All American Life & Cas. Co.*, 95 Nev. 920, 605 P.2d 196 (1979).

Even if the case was stayed, which it clearly was not, the parties can still settle and resolve the case during a stay. In fact, third party plaintiff Lewis and third party Defendant Tindall resolved and dismissed their claims during this same time

frame. The case *Westside Chtr. Serv. v. Gray Line Tours*, 99 Nev. 456 (Nev. 1983), which has been cited by UAIC as authority for interfering with the parties settlement of the claims, is totally inapplicable to this situation. That case involved administrative action while a prior judgment had been entered by a reviewing court and that judgment was on appeal to the Nevada Supreme Court.

#### **D. Due Process was Denied to Petitioner.**

The United States Constitution as well as the Constitution of the State of Nevada guarantee that a person must receive due process before the government may deprive him of his property. See, U.S Const. amend. XIV, § 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law”); Nev. Const. art. 1, § 8(5) (“No person shall be deprived of life, liberty, or property, without due process of law.”). This Court has recognized that procedural due process “requires notice and an opportunity to be heard.” *Maiola v. State*, 120 Nev. 671, 675, 99 P.3d 227, 229 (2004); see also *Browning v. Dixon*, 114 Nev. 213, 217, 954 P.2d 741, 743 (1998).

The requirements of procedural due process apply to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property.

When protected interests are implicated, the right to some kind of prior hearing is paramount. *Board of Regents v. Roth*, 408 U.S. 564, 569–71 (1972). The trial court has consistently ignored UAIC’s failures to give notice. Then, the trial court has, on multiple occasions, failed to provide adequate notice and opportunity to be heard. These actions have culminated in the court’s ex-parte voiding of the parties’ judgment. The Orders from the Court are arbitrary and are unsupported by the record. The Court ruled on UAIC’s ex-parte request for an order shortening time and set the matter for hearing on February 20, 2019. Just three days after UAIC served the granted order shortening time on the parties in the case, and before any opposition could be filed, the Court then vacated the hearing and ruled in favor of UAIC. This decision voided the judgment which had resulted from a settlement of the parties. This ruling was six days **before** the hearing set on the granted Order shortening time.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and **afford them an opportunity to present their objections.** *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950),

citing, *Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, 132 A.L.R. 1357.

The Fourteenth Amendment specifically states: ". . . Nor shall any State deprive any person of life, liberty, or property without due process of law; . . ." The touchstone of due process is protection of the individual against arbitrary action of government. *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 2976, 41 L. Ed. 2d 935 (1974), and this is every bit as applicable to state court judges performing in official judicial capacity as it is to other state governmental officials. See, also, *Caldwell v. Texas*, 137 U.S. 697, 11 S. Ct. 224, 34 L. Ed. 816 (1891); *Malinski v. People of the State of New York*, 324 U.S. 401, 65 S. Ct. 781, 89 L. Ed. 1029 (1945); *N.A.A.C.P. v. State of Alabama, etc.*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). The essence of "substantive due process" is that state action which deprives a person of life, liberty or property must have a rational basis for so doing; the reason for the deprivation may not be so inadequate that it would be characterized as arbitrary. *Jeffries v. Turkey Run Consol. School Dist.*, 492 F.2d 1, 3-4 (7th Cir. 1974); *Anna Lee Brown v. Supreme Court of Nevada, et. al.*, 476 F. Supp 86 (1979).

Ultimately, substantive due process and procedural due process converge on the same broad issue: whether the government's action in depriving an individual of a liberty or property interest was arbitrary. "[T]he touchstone of due process is protection of the individual against arbitrary action of government,' ... whether the fault lies in a denial of fundamental procedural fairness ... , or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998)(quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)).

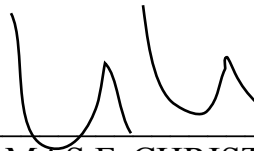
In the case at bar, the State of Nevada, via Judicial Officer Eric Johnson, has denied the parties due process by not allowing oppositions to be filed, cancelling hearings and ruling ex-parte.

## **VI. CONCLUSION AND RELIEF SOUGHT**

As a result of the foregoing, Petitioner prays for this Honorable Court to grant relief via a Writ of Mandamus directing the District Court to vacate its order consolidating the cases.

Petitioner likewise seek direction to the lower Court that any Orders issued by Eric Johnson be stricken as void in case 18-A-772220 that case no. 18-A-772220 be reassigned to Judge Kephardt.

DATED this 4<sup>th</sup> day of March, 2019.

A handwritten signature in black ink, consisting of a series of loops and peaks, positioned above a horizontal line.

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### **NRAP 26.1 DISCLOSURE STATEMENT**

The undersigned counsel of record certifies that the following are the persons and entities as described in NRAP 26.1(a)(1), and must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal:

Thomas Christensen, Esq., Christensen Law Offices, LLC., Attorney for Third Party Plaintiff, Gary Lewis

E. Breen Arntz, Esq., Attorney for Defendant Gary Lewis

David A. Stephens, Esq., Stephens & Bywater, P.C., Attorney for Cheyenne Nalder

Thomas Winner, Esq., Atkin Winner & Sherrod, Ltd., Attorney for UAIC

Matthew Douglas, Esq., Atkin Winner & Sherrod, Ltd., Attorney for UAIC

## **ROUTING STATEMENT**

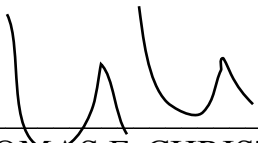
This matter is not retained by the Supreme Court under NRAP 17(a), nor is it presumptively assigned to the Court of Appeals pursuant to NRAP 17(b). Petitioner believes the Supreme Court should retain this writ because it relates to a matter that is currently pending before the Supreme Court pursuant to NRAP 17(a)(6). The Supreme Court has accepted two certified questions from the Ninth Circuit Court of Appeals in Supreme Court Case No. 70504. Intervenor misrepresented the issues the Supreme Court is deciding in Case No. 70504 in order to influence the trial court regarding the simple issues of a common law action on a judgment pursuant to *Mandlebaum v. Gregovich*, 24 Nev. 154, 50 P. 849 (1897). In addition, the judgment amount is over \$3,000,000.



## **CERTIFICATE OF COMPLIANCE**

I hereby certify that I have read the above and foregoing brief and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purposes. I further certify that this brief complies with all applicable Nevada Rules of appellate procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the records. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of appellate Procedure.

DATED this 4<sup>th</sup> day of March, 2019.



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## CERTIFICATE OF SERVICE

Pursuant to NRAP 21(a)(1) and NRAP 25(c)(1), I hereby certify that I am an employee of CHRISTENSEN LAW OFFICES and that on the 4<sup>th</sup> day of March, 2019, I caused the foregoing **PETITION FOR WRIT OF MANDAMUS** to be served as follows:

☒ via U.S. Mail

The Honorable Eric Johnson  
Eighth Judicial District Court  
Department XX  
Regional Justice Center,  
Courtroom 12A  
200 Lewis Ave  
Las Vegas, Nevada 89155  
Respondent Judge

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