Case No. 78243

In the Supreme Court of Nevada

GARY LEWIS,

Petitioner,

vs.

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

Respondents,

and

UNITED AUTOMOBILE INSURANCE COMPANY; and CHEYENNE NALDER,

Real Parties in Interest.

Electronically Filed
Jul 10 2019 04:19 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

UNITED AUTOMOBILE INSURANCE COMPANY'S APPENDIX
VOLUME 4
PAGES 751–1000

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

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CHRONOLOGICAL TABLE OF CONTENTS TO APPENDIX

16	Opposition to UAIC's Motion to Consolidate and Countermotion to Set Aside Void Order and to Strike All Filings by Intervenor	11/27/18	2	310–333
17	UAIC's Opposition to Third Party Plaintiff Lewis' Counter-Motion for Summary Judgment & Counter-Motion to Strike Affidavit of Lewis in Support of Same Counter-Motion for Summary Judgment and/or Stay Proceedings Pen Appellate Ruling and/or Stay Counter-Motion for Summary Judgment Pending Necessary Discovery Pursuant to N.R.C.P. 56(f)	12/14/18	2 3	334–500 501–638
18	UAIC's Opposition to Third Party Plaintiff Lewis Motion for Relief from Order and Joinder in Motions for Relief from Orders on Order Shortening Time as well as UAIC's Opposition to Plaintiff's Motion to Set Aside Order, Pursuant to N.R.C.P. 60(b), Allowing UAIC to Intervene & Opposition to Defendant Lewis Motion for Relief from Orders and Joinder in Motions for Relief from Orders, and UAIC's Counter-Motion to Stay Pending Ruling on Appeal	12/31/18	3 4	639–750 751–971
19	UAIC's Reply in Support of its Motion for Relief from Judgment Pursuant to NRCP 60	01/02/19	4 5	972–1000 1001–1067
20	Opposition to Counter-Motion to Strike Affidavit of Lewis in Support of his Counter-Motion for Summary Judgment and Opposition to UAIC's Counter-Motion to Stay Proceedings Pending Appellate Ruling and Stay Counter-Motion for Summary Judgment Pending Necessary Discovery Pursuant to NRCP 56(f) and Reply in Support of Motion to Set Aside	01/02/19	5	1068–1081

	Order Allowing Intervention and Opposition and Replies in Support of Any Other Motions to be Heard on January 9, 2019			
21	Transcript of Proceedings	01/09/19	5	1082–1143
22	UAIC's Reply in Support of Its Motion to Dismiss Lewis' Third Party Complaint & Replies in Support of Its Counter-Motion to Strike Affidavit of Lewis in Support of the Counter-Motion for Summary Judgment and/or Stay Proceedings Pending Appellate Ruling and/or Stay Counter-Motion for Summary Judgment Pending Necessary Discovery Pursuant to N.R.C.P. 56(f)	01/16/19	5	1144–1168
23	Notice of Entry of Stipulation and Order for Dismissal of All Third-Party Claims, with Prejudice, Against Third Party Defendants Randall Tindall, Esq. and Resnick & Louis P.C.	01/29/19	5	1169–1175
24	UAIC's Motion for Relief from Judgment, Entered 1/23/19 in Case No. A-18-772220-C, Pursuant to NRCP 60 and/or, in the Alternative, Motion for Rehearing on Motion to Dismiss Plaintiff's First Cause of Action in Case No. A-18-772220-C on an Order Shortening Time	02/11/19	5 6	1176–1250 1251–1310
25	Notice of Entry of Order on Motions Heard on January 9, 2019	02/15/19	6	1311–1319
26	Notice of Entry of Order on Motions Heard on January 23, 2019	02/15/19	6	1320–1327
27	Motion for Reconsideration, Motion for Hearing and Motion for Relief from Order	03/01/19	6	1328–1486
28	Motion for Reconsideration of Orders Signed 2/11/19, Motion for Hearing and Motion for Relief from Orders	03/04/19	6 7 8	1487–1500 1501–1750 1751–1831
29	UAIC's Opposition to 3rd Party Plaintiff	03/15/19	8	1832–2000

	Lewis' Motion for Reconsideration, Motion for Hearing and Motion for Relief from Order		9	2001–2083
30	UAIC's Opposition to 3rd Party Plaintiff Lewis' Motion for Reconsideration of Orders Signed 2/11/19, Motion for Hearing, and Motion for Relief from Orders and UAIC's Counter-Motion to Strike Untimely Joinder by Plaintiff to Said Motion	03/18/19	9 10	2084–2250 2251–2271
31	Joinder in Motion for Reconsideration of Orders Signed 2/11/19, Motion for Hearing, and Motion for Relief from Orders	03/19/19	10	2272–2273
32	Reply in Support of Motion for Reconsideration, Motion for Hearing, and Motion for Relief from Order and Reply in Support of Motion for Reconsideration of Orders signed 2/11/19, Motion for Hearing and Motion for Relief from Orders	04/04/19	10	2274–2282
33	Court Minutes	04/10/19	10	2283
34	Transcript of Hearing – All Pending Motions	04/10/19	10	2284–2298
	Case No. A-18-772220-C			
35	Complaint	04/03/18	10	2299–2303
36	Stipulation to Enter Judgment	09/13/18	10	2304–2307
37	Plaintiff's Opposition to Motion to Intervene	09/17/18	10	2308–2315
38	UAIC's Reply in Support of Its Motion to Intervene	09/18/18	10	2316–2327
39	Court Minutes	09/19/18	10	2328
40	Defendant's Opposition to Motion to Intervene and Joinder to Plaintiff's Opposition to Motion to Intervene	09/21/18	10	2329–2335
41	UAIC's Motion to Dismiss Plaintiff's Complaint & Motion for Court to Deny Stipulation to Enter Judgment Between Plaintiff and Lewis and/or, in the	10/19/18	10	2336–2449

	Alternative to Stay Same Pending Hearing on Motion to Dismiss			
42	Notice of Entry of Order on Intervenor United Automobile Insurance Company's Motion to Intervene	10/19/18	10	2450–2453
43	Third Party Complaint	10/24/18	10	2454–2475
44	Answer to Complaint	10/24/18	10	2476–2478
45	Cross-Claimant's Opposition to UAIC's Motion to Dismiss Plaintiff's Complaint & Opposition to Motion for Court to Deny Stipulation to Enter Judgment Between Plaintiff and Lewis and/or in the Alternative to Stay Same Pending Hearing on Motion to Dismiss	10/29/18	10	2479–2491
46	UAIC's Motion to Dismiss Third Party Plaintiff Lewis' Third Party Complaint	11/15/18	10 11	2492–2500 2501–2685
47	Intervenor's Motion to Consolidate on Order Shortening Time	11/26/18	11	2686–2609
48	Opposition to UAIC's Motion to Consolidate and Countermotion to Set Aside Void Order and to Strike All Filings by Intervenor, or, in the Alternative, for Summary Judgment	11/27/18	11	2610–2742
49	Opposition to UAIC's Motion to Dismiss and Countermotion for Summary Judgment	11/27/18	11 12	2743–2750 2751–2789

ALPHABETICAL TABLE OF CONTENTS TO APPENDIX

27	Motion for Reconsideration, Motion for Hearing and Motion for Relief from Order	03/01/19	6	1328–1486
07	Notice of Entry of Order on Intervenor United Automobile Insurance Company's Motion to Intervene	10/19/18	1	31–34
42	Notice of Entry of Order on Intervenor United Automobile Insurance Company's Motion to Intervene	10/19/18	10	2450–2453
26	Notice of Entry of Order on Motions Heard on January 23, 2019	02/15/19	6	1320–1327
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12	Opposition to Gary Lewis' Motion to Strike Motion to Set Aside Judgment	11/01/18	1	152–165
16	Opposition to UAIC's Motion to Consolidate and Countermotion to Set Aside Void Order and to Strike All Filings by Intervenor	11/27/18	2	310–333

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49	Opposition to UAIC's Motion to Dismiss and Countermotion for Summary Judgment	11/27/18	11 12	2743–2750 2751–2789
15	Plaintiff's Opposition to Intervenor UAIC's Motion to Consolidate	11/27/18	2	302–309
04	Plaintiff's Opposition to Motion to Intervene	09/17/18	1	8–13
37	Plaintiff's Opposition to Motion to Intervene	09/17/18	10	2308–2315
11	Plaintiff's Opposition to UAIC's Motion for Relief from Judgment	10/29/18	1	134–151
32	Reply in Support of Motion for Reconsideration, Motion for Hearing, and Motion for Relief from Order and Reply in Support of Motion for Reconsideration of Orders signed 2/11/19, Motion for Hearing and Motion for Relief from Orders	04/04/19	10	2274–2282
36	Stipulation to Enter Judgment	09/13/18	10	2304–2307
43	Third Party Complaint	10/24/18	10	2454–2475
34	Transcript of Hearing – All Pending Motions	04/10/19	10	2284–2298
21	Transcript of Proceedings	01/09/19	5	1082–1143
08	UAIC's Motion for Relief from Judgment Pursuant to NRCP 60	10/19/18	1	35–75
24	UAIC's Motion for Relief from Judgment, Entered 1/23/19 in Case No. A-18-772220-C, Pursuant to NRCP 60 and/or, in the Alternative, Motion for Rehearing on Motion to Dismiss Plaintiff's First Cause of Action in Case No. A-18-772220-C on an Order Shortening Time	02/11/19	5 6	1176–1250 1251–1310

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13	UAIC's Opposition to Defendant's Motion to Strike Defendant's Motion for Relief from Judgment & Counter-Motion for Evidentiary Hearing for a Fraud Upon the Court or, Alternatively, for the Court to Vacate the 3/28/18 Amended Judgment on Its Own Motion	11/02/18	1	166–226
18	UAIC's Opposition to Third Party Plaintiff Lewis Motion for Relief from Order and Joinder in Motions for Relief from Orders on Order Shortening Time as well as UAIC's Opposition to Plaintiff's Motion to Set Aside Order, Pursuant to N.R.C.P. 60(b), Allowing UAIC to Intervene & Opposition to Defendant Lewis Motion for Relief from Orders and Joinder in Motions for Relief from Orders, and UAIC's Counter-Motion to Stay Pending Ruling on Appeal	12/31/18	3 4	639–750 751–971

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05	UAIC's Reply in Support of its Motion to Intervene	09/18/18	1	14–25
38	UAIC's Reply in Support of Its Motion to Intervene	09/18/18	10	2316–2327

CERTIFICATE OF SERVICE

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

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

☐ VIA ELECTRONIC SERVICE (N.E.F.R. 9)

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

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

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

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

An Employee of Stephens & Bywater

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DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER,

Plaintiff,

vs.

GARY LEWIS,

CASE NO.: 07A549111

DEPT NO.: XXIX

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EXHIBIT "G"

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DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER, Plaintiff, vs. GARY LEWIS, Defendant.	Case No. A-18-772220-C Dept. No. XXIX

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PLAINTIFF'S OPPOSITION TO MOTION TO INTERVENE

Date: 9/19/2018
Time: Chambers

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

POINTS AND AUTHORITIES

I. INTRODUCTION

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

[1] Counsel for Plaintiff does not mean to imply, by this statement, that counsel for UAIC did not serve the motion properly. He can only represent that he did not receive the motion. He does not know the reason why it was not received. It may have been because he was not yet registered for eservice when the motion was filed.

Mr. Douglas responded by stating that the motion to intervene was eserved on August 16, 2018 on Counsel's email.[2] Counsel for Plaintiff indicated that it had not been received. Mr. Douglas then indicated that he needed to know the grounds for opposing the motion before he could agree to an extension. Thus, it became easier to do the research and file an opposition than do the research on the grounds for the opposition than to get an extension of time to file an opposition. Thus, this opposition is being filed late.

Additionally, the motion to intervene was never served on Mr. Lewis or his attorneys, which would be required in that he is a party and has not been defaulted. (See proof of service on Motion to Intervene).

II. FACTS

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

Cheyenne was a minor at the time of the accident.

The negligence of Gary Lewis was the cause of the accident.

Cheyenne suffered serious injuries due to this accident.

On June 3, 2008, Cheyenne, with her father as her guardian ad litem, obtained a default judgment against Lewis for $3,500,00.00.

At the time the judgment was entered Cheyenne was represented by Christensen Law Offices.[3]

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

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[2] Mr. Stephens is not sure when he set up eservice on him in this matter, but he believes that it was in early September, 2018, which was after the date the motion was filed and eserved.

[3] It is counsel's understanding that Cheyenne is represented by Tom Christensen, Esq., and Dennis Prince, Esq., in the litigation and pending appeals involving UAIC.

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failure to defend, and other claims for relief.

Out of an abundance of caution, upon learning that UAIC was maintaining that her judgment against Lewis had expired, Cheyenne filed this suit through Stephens & Bywater, P.C.

By filing this suit, Cheyenne is not seeking a double recovery, which would be impossible because she has never recovered anything, except the $15,000.00 payment from UAIC. Cheyenne will credit that payment against any judgment she receives in this suit.

III. UAIC SHOULD NOT BE ALLOWED TO INTERVENE IN THIS MATTER

NRCP 24 states:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) 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.
>
> **(b) Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.
>
> **(c) Procedure.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute

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gives a right to intervene.

UAIC does not argue for permissive intervention under NRCP 24(b), so the opposition will focus on NRCP 24(a).

A. UAIC HAS NO INTEREST TO PROTECT

UAIC does not point to any statute that gives it an unconditional right to intervene.

Thus, to intervene, UAIC must claim "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." (NRCP 24(a)(2)).

What is the interest that UAIC seeks to protect? That interest is ill-defined, at best.

UAIC does not have a direct interest in the claims at issue. Neither it nor its employees were involved in the accident. Thus, it has no direct liability for the accident.

It did not defend Lewis when Cheyenne initially filed suit against him in 2007 following the accident. UAIC denied that Lewis was covered by a UAIC policy at the time of the accident. When the US District Court found that there may have been coverage due to an ambiguity, UAIC still did not move to reopen the case in order to attempt to set aside the default judgment Cheyenne obtained against Lewis in 2008. It simply tendered the $15,000.00 policy limits to Cheyenne. Having paid Cheyenne the policy limits of the insurance policy which insured Lewis, UAIC has no risk under the insurance policy itself.

What UAIC appears to be worried about is some contingent and unliquidated liability, based on allegations of breach of the duty to defend or tort liability arising out of that same failure to defend in the original suit filed in 2007. Those issues are being litigated in US District Court and the Ninth Circuit. They are not plead in this matter. If UAIC is not willing to pay any judgment that might be awarded in this matter, then UAIC has no interest to protect in this suit and it should not be allowed to intervene. If intervention is allowed, then UAIC must consent to be liable for any judgment ultimately entered in this action.

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B. ANY CLAIMED UAIC INTERESTS ARE ADEQUATELY REPRESENTED

UAIC has misread or misconstrued the language of Exhibit H[4], attached to the moving papers. UAIC argues that in Exhibit H, Mr. Christensen prohibits UAIC from appearing in this matter. However, that is not what Exhibit H states. In Exhibit H, Mr. Christensen advises Mr. Rogers that Lewis does not want Mr. Rogers to take positions that are frivolous, not well supported, and might result in increased damages against Mr. Lewis unless UAIC is willing to be responsible for those increased damages and for any judgment ultimately entered against Mr. Lewis. This request makes sense. Why should Lewis consent to carte blanche representation by UAIC if the only person benefitting from the representation is UAIC, and UAIC's approach may cause greater harm to Lewis if UAIC's position is found to be frivolous? If Lewis is an insured of UAIC, it must put his interests equal to its own interests. There is no exhibit attached to the motion which explains why UAIC representing Lewis benefits Lewis. If there was such a communication, Plaintiff believes that it would have been attached to the motion to intervene. Apparently, rather than explaining to Lewis how the UAIC representation could benefit him and getting consent to represent him, UAIC has decided to just attempt to intervene.

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III. CHEYENNE IS RENEWING THE JUDGMENT IN THE ONLY WAY THAT IS CURRENTLY AVAILABLE

UAIC implies that there is some perfidy on the part of Cheyenne in filing this suit. However, nothing could be further from the truth. Statutes of limitation wait for no man, or woman, or for that matter appellate court decisions. Due to Cheyenne reaching the age of majority she has a risk that certain statutes of limitation may expire. She has every right to file suit to protect the loss of a right due to the running of any applicable statutes of limitation. She is not required to sit on her hands and

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[4] While the privilege is not Cheyenne's to claim, this letter appears to be a confidential communication between Tom Christensen, Esq., and Stephen Rogers, Esq., who were both representing Mr. Lewis at the time the letter was written, discussing the best litigation strategy for Mr. Lewis as to this lawsuit. Thus, it should be privileged from disclosure unless Mr. Lewis has consented to such disclosure. See NRS 49.095.

patiently await for an appellate decision which may not be issued before statutes run.

In the alternative, Cheyenne is renewing her judgment in the only way that is currently available to her an action on the judgment pursuant to *Mandlebaum v. Gregovich*, 50 P. 849, 24 Nev. 154 (Nev. 1897). This is the only avenue clearly available to renew because NRS 17.214, the judgment renewal statute, allows for renewal "within 90 days before the date the judgment expires by limitation." The six-year statute of limitations on the judgment was tolled by three separate tolling statutes and is still tolled today by NRS 11.300 because Mr. Lewis has been continually absent from the State of Nevada and not capable of service of process in the state since at least 2010. Thus a renewal under NRS 17.214 would be unnecessary, and even worse it could be invalid because it is too early.

As Plaintiff understands it, the issue certified to the Nevada Supreme Court, and accepted by them, is whether consequential damages based on a judgment that was not renewed are recoverable against an insurance carrier. That issue is much more narrow than the issues in this case. One of the issues plead in this case is whether the statute of limitation on the judgment was even running such that she needed to renew the judgment. If the judgment did not have to be renewed because the six-year statute was not running, or was tolled, then the issue certified to the Nevada Supreme Court is actually moot because the judgment is still valid. At minimum that issue is not before the Nevada Supreme Court.

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IV. UAIC'S MOTION IS NOT TIMELY

It is difficult to see what interest UAIC has that needs protection in this lawsuit that is not adequately represented by Lewis. Apparently, UAIC, at some point prior to March 14, 2017, (the date UAIC filed to dismiss the Nalder & Lewis v. UAIC federal court lawsuit), came to the flawed conclusion that the statute of limitations on the Nalder judgment against Lewis had expired. UAIC did not attempt to test that hypothesis for the benefit of Lewis by filing a declaratory relief action on his behalf or attempting to intervene to assert the statute of limitations as a defense on Lewis' behalf. UAIC instead filed a motion to dismiss the Nalder & Lewis federal lawsuit against

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UAIC which had been pending for nearly eight years had two judgments entered, two appeals argued and one certified question to the Nevada Supreme Court. Waiting to "protect" Lewis for over a year is not timely.

For these reasons the motion to intervene must be denied.

Dated this 17th day of September, 2018

__s/ David A Stephens_____
David A. Stephens, Esq.
Nevada Bar No. 00902
Stephens & Bywater, P.C.
3636 North Rancho Drive
Las Vegas, Nevada 89130
Attorney for Cheyenne Nalder

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of September, 2018, I served the following document: **PLAINTIFF'S OPPOSITION TO MOTION TO INTERVENE**

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

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

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

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

E. Breen Arntz, Esq.
5545 Mountain Vista, Suite E
Las Vegas, NV 89120
Attorney for Gary Lewis

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

E. Breen Arntz, Esq., 702-446-8164

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

s/ David A Stephens
An Employee of Stephens & Bywater

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EXHIBIT "H"

Electronically Filed
9/21/2018 11:24 AM
Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER, Plaintiff, vs. GARY LEWIS, Defendant.	Case No. A-18-772220-C Dept. No. XXIX Date: 9/19/2018 Time: 3am Chambers

DEFENDANT'S OPPOSITION TO MOTION TO INTERVENE AND JOINDER TO PLAINTIFF'S OPPOSITION TO MOTION TO INTERVENE

Gary Lewis, through his attorney, E. Breen Arntz, Esq., opposes the Motion to Intervene filed by United Automobile Insurance Company (UAIC). UAIC's Motion should be denied because it was not served on Defendant, UAIC has no interest to be protected, any alleged interest is adequately protected by Lewis' counsel, is not timely, and UAIC's statute of limitations defense is frivolous. Defendant joins in the opposition filed by David A. Stephens, Esq., counsel for Cheyenne Nalder.

I. FACTS

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

Case Number: A-18-772220-C

Cheyenne was a minor at the time of the accident.

The negligence of Gary Lewis was the cause of the accident.

Cheyenne suffered serious injuries due to this accident.

On June 3, 2008, Cheyenne, with her father as her guardian ad litem, obtained a default judgment against Lewis for $3,500,000.00.

At the time the judgment was entered Cheyenne was represented by Christensen Law Offices. It is counsel's understanding that Cheyenne Lewis are still represented by Thomas Christensen, Esq., and Dennis Prince, Esq., in the litigation and pending appeals involving UAIC.

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

UAIC never approached Lewis with the idea that the judgment had expired. UAIC never gathered any facts regarding Lewis' absence from the State of Nevada since 2010. UAIC never gathered any facts regarding Lewis not being subject to service of process in the State of Nevada since 2010 to the present. UAIC never attempted to defend Lewis and have the statute of limitations on the judgment declared expired. Upon learning that UAIC was maintaining that Nalder's judgment against Lewis had expired, Cheyenne filed this suit through Stephens & Bywater, P.C.

UAIC attempted to mislead various defense counsel to interpose a frivolous defense on behalf of Gary Lewis without his knowledge or consent. UAIC misused information obtained from Mr. Lewis to attempt to intervene in this action without notifying Mr. Lewis.

II. UAIC SHOULD NOT BE ALLOWED TO INTERVENE IN THIS MATTER

NRCP 24 states:

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(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) 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.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene.

UAIC does not argue for permissive intervention under NRCP 24(b), so the opposition will focus on NRCP 24(a).

UAIC does not point to any statute that gives it an unconditional right to intervene.

III. UAIC HAS NO INTEREST TO PROTECT

Thus, to intervene, UAIC must claim "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." (NRCP 24(a)(2)). UAIC does not have an interest in the claims at issue. Neither it nor its employees

were involved in the accident. Thus, it has no direct liability for the accident. In addition, UAIC has paid their policy limits and contend that they are not liable for any other payments to or on behalf of Lewis.

UAIC did not defend Lewis when Cheyenne Nalder initially filed suit against him in 2007 following the accident. UAIC denied that Lewis was covered by a UAIC policy at the time of the accident. When the Federal District Court found there was coverage, UAIC still did not move to set aside the default judgment Cheyenne obtained against Lewis in 2008. It simply tendered the $15,000.00 policy limits to Cheyenne.

What UAIC appears to be worried about is some contingent and unliquidated liability, based on allegations of breach of the duty to defend or tort liability arising out of that same failure to defend in the original suit filed in 2007. If UAIC is not willing to pay any part of any judgment that might be awarded against Lewis, then UAIC has no interest to protect in this suit and it should not be allowed to intervene. If intervention is allowed, then UAIC has consented to be liable for any judgment against Lewis ultimately entered in this action.

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IV. ANY CLAIMED UAIC INTERESTS ARE ADEQUATELY REPRESENTED

UAIC has misread or misconstrued the language of Exhibit H[1], attached to the moving papers. UAIC argues that in Exhibit H, Mr. Christensen prohibits UAIC from appearing in this matter. However, that is not what Exhibit H states. In Exhibit H, Mr. Christensen advises Mr. Rogers that Lewis does not want Mr. Rogers to take positions that are frivolous, not well supported, and might result in increased damages against Mr. Lewis unless UAIC is willing to be responsible for those increased damages and for any judgment ultimately entered against Mr. Lewis. This request makes sense. Why should Lewis consent to cart blanch representation by

[1] This letter is a confidential communication between Tom Christensen, Esq., and Stephen Rogers, Esq., who were both representing Mr. Lewis at the time, discussing the best litigation strategy for Mr. Lewis as to this lawsuit. Thus, it is privileged from disclosure and Mr. Lewis objects to its disclosure and suggests this indicates that UAIC is using its "duty to defend" to harm Mr. Lewis. See NRS 49.095.

UAIC if the only person benefiting from the representation is UAIC, and the approach may cause greater harm to Lewis if UAIC's position is found to be frivolous? There is no exhibit attached to the motion which explains why UAIC representing Lewis in this suit is a benefit to Lewis. There is no exhibit attached to the motion which explains why the statute of limitations on the judgment is not tolled by Mr. Lewis' absence from the State of Nevada. This is because no such letter exists. Rather than showing Mr. Lewis how the representation could benefit him and getting consent to represent him, UAIC has decided to just attempt to intervene.

V. UAIC'S STATUTE OF LIMITATIONS DEFENSE IS FRIVOLOUS

UAIC claims the statute of limitations on judgments is the only statute of limitations that is not tolled by the various tolling statutes. This defense is frivolous. UAIC implies that there is some perfidy on the part of Cheyenne in filing this suit. However, nothing could be further from the truth. Statutes of limitation wait for no man, or woman, or for that matter appellate court decisions. Due to Cheyenne reaching the age of majority she has a risk that certain statutes of limitation may expire. She has every right to file suit to protect the loss of a right due to the running of any applicable statutes of limitation. She is not required to sit on her hands and patiently await for an appellate decision which may not be issued before statutes run.

In the alternative, Cheyenne is renewing her judgment in the only way that is currently available to her -- an action on the judgment pursuant to *Mandlebaum v. Gregovich*, 50 P. 849, 24 Nev. 154 (Nev. 1897). This is the only avenue clearly available to renew because NRS 17.214 the renewal statute allows for renewal "within 90 days before the date the judgment expires by limitation." The 6 year statute of limitations on the judgment was tolled by three separate tolling statutes and is still tolled today by NRS 11.300. This is because Mr. Lewis has been continually absent from the state of Nevada and not capable of service of process in the state since at least 2010 through the present. Thus a renewal under NRS 17.214 would be unnecessary or may be invalid because

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it is too early. No such time frame applies to an action on a judgment which Cheyenne brought in the alternative.

VI. UAIC'S MOTION IS NOT TIMELY

It is difficult to see what interest UAIC has that needs protection in this lawsuit that is not adequately represented by Lewis. Apparently, UAIC at some point prior to March 14, 2017 (the date UAIC filed to dismiss the Nalder & Lewis v. UAIC federal court lawsuit) came to the flawed conclusion that the statute of limitations on the Nalder judgment against Lewis had expired. UAIC did not attempt to test that hypothesis for the benefit of Lewis by asking Lewis if he would like to file a declaratory relief action or attempt to invalidate the judgment as a result of the expiration of the statute of limitations. UAIC instead filed a motion to dismiss the Nalder & Lewis federal lawsuit against UAIC which had been pending for nearly eight years had two judgments entered, two appeals argued, one reversal, and one certified question to the Nevada Supreme Court. This would have left Lewis with a valid judgment and no claim against UAIC for abandoning their insured. Waiting to "protect" Lewis for over a year is not timely. Maintaining a frivolous defense does not protect Lewis either.

VII. CONCLUSION

Based upon the foregoing, UAIC's motion to intervene should be denied.

Dated this 21 day of September, 2018

/s/ E. Breen Arntz

E. Breen Arntz
Nevada Bar #3853
5545 S. Mountain Vista Street, Suite F
Las Vegas, NV 89120
breen@breen.com

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21 day of September, 2018, I served the following document: **DEFENDANT'S OPPOSITION TO MOTION TO INTERVENE & JOINDER TO PLAINTIFF'S OPPOSITION TO MOTION TO INTERVENE**

____ VIA ELECTRONIC FILING;

__X__ VIA ELECTRONIC SERVICE

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

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

David A. Stephens
3636 North Rancho Drive
Las Vegas, NV 89130

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

Matthew J. Douglas, Esq., 702-243-7059
David A. Stephens, Esq., 702-656-2776

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

/s/ Breen Arntz
Employee of Breen Arntz, Esq.

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EXHIBIT "I"

Electronically Filed
9/13/2018 12:26 PM
Steven D. Grierson
CLERK OF THE COURT

STPJ (CIV)
David A. Stephens, Esq.
Nevada Bar No. 00902
Stephens & Bywater
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Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER, Plaintiff, vs. GARY LEWIS, Defendant.	Case No. A-18-772220-C Dept. No. XXIX

STIPULATION TO ENTER JUDGMENT

Date: n/a
Time: n/a

Gary Lewis, through his attorney, E. Breen Arntz, Esq., and Cheyenne Nalder, through her attorney, David A. Stephens, Esq., to hereby stipulate as follows:

1. Gary Lewis has been continuously absent from the State of Nevada since at least 2010.

2. Gary Lewis has not been subject to service of process in Nevada since at least 2010 to the present.

3. Gary Lewis has been a resident and subject to service of process in California from 2010 to the present.

4. Plaintiff obtained a judgment against GARY LEWIS which was entered on August 26, 2008. Because the statute of limitations on the 2008 judgment had been tolled as a result of GARY LEWIS' absence from the State of Nevada pursuant to NRS 11.300, Plaintiff obtained an amended judgment that was entered on May 18, 2018.

5. Plaintiff filed an action on the judgment under *Mandlebaum v. Gregovich*, 50 P. 849, 851

(Nev. 1897), in the alternative, with a personal injury action should the judgment be invalid.

6. Gary Lewis does not believe there is a valid statute of limitations defense and Gary Lewis does not want to incur greater fees or damages.

7. Cheyenne Nalder is willing to allow judgment to enter in the amount of the judgment plus interest minus the payment of $15,000.00 and without additional damages, attorney fees or costs. Plaintiff is also willing to accept the judgment so calculated as the resulting judgment of the alternatively pled injury claim. Plaintiff will not seek additional attorney fees from Defendant.

8. The parties stipulate to a judgment in favor of Cheyenne Nalder in the sum of $3,500,000.00, plus interest through September 4, 2018 of $2,211,820.41 minus $15,000.00 paid for a total judgment of $5,696,820.41, with interest thereon at the legal rate from September 4, 2018, until paid in full.

9. The attached judgment may be signed and entered by the Court.

Dated this 12 day of September, 2018

David A. Stephens, Esq.
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Stephens & Bywater
3636 North Rancho Drive
Las Vegas, Nevada 89130
Attorney for Cheyenne Nalder

E. Breen Arntz, Esq.
Nevada Bar No. 03853
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Las Vegas, NV 89120
Attorney for Gary Lewis

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Email: dstephens@sgblawfirm.com
Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER, Plaintiff, vs. GARY LEWIS, Defendant.	Case No. A-18-772220-C Dept. No. XXIX

JUDGMENT

Date: n/a
Time: n/a

Pursuant to the stipulation of the parties, and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that Plaintiff Cheyenne Nalder have and recover judgment from Defendant Gary Lewis in the sum of three million five hundred thousand dollars, ($3,500,000.00), plus prejudgment interest through September 4, 2018 in the sum of two million two hundred eleven thousand eight hundred twenty and 41/100 dollars, ($2,211,820.41), minus fifteen thousand dollars ,($15,000.00), previously paid to Cheyenne Nalder,

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for a total judgment of five million six hundred ninety six thousand eight hundred twenty and 41/100 dollars, ($5,696,820.41), with interest thereon at the legal rate from September 4, 2018, until paid in full.

DATED this _____ day of September, 2018.

_____
DISTRICT JUDGE

Submitted by:

STEPHENS & BYWATER, P.C.

_____
DAVID A. STEPHENS, ESQ.
Nevada Bar No. 00902
3636 North Rancho Drive
Las Vegas, Nevada 89130
Attorneys for Plaintiff

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EXHIBIT "J"

MATTHEW J. DOUGLAS
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1117 South Rancho Drive
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Phone (702) 243-7000
Facsimile (702) 243-7059
mdouglas@awslawyers.com

Attorneys for Proposed Intervenor United Automobile Insurance Company

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

DATED this 18 day of SEPTEMBER, 2018.

ATKIN WINNER & SHERROD

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

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

I.

Response to Plaintiff's Fact Section

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

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

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

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

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

II.

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

as follows:

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

Id at 654.

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

(Cont.)

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

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

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

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

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III.

CONCLUSION

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

DATED this 19th day of SEPTEMBER, 2018.

ATKIN WINNER & SHERROD

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

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CERTIFICATE OF SERVICE

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

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

An employee of ATKIN WINNER & SHERROD

ATKIN WINNER & SHERROD LTD
A NEVADA LAW FIRM

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EXHIBIT "K"

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Attorneys for Proposed Intervenor United Automobile Insurance Company

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYANNE NALDER, Plaintiff, vs. GARY LEWIS and DOES I through V, inclusive, Defendants.	CASE NO.: A-18-772220-C DEPT. NO.: 29 **UAIC'S REPLY IN SUPPORT OF ITS MOTION TO INTERVENE**

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

DATED this 18 day of SEPTEMBER, 2018.

ATKIN WINNER & SHERROD

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

Case Number: A-18-772220-C

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

I.

Response to Plaintiff's Introduction & Fact Section

UAIC must note, in response to Plaintiff's 'Introduction', that Plaintiff's suggestion UAIC's Motion is improper because they failed to serve Lewis or his attorneys is amusing. As set forth in UAIC's initial Motion UAIC had tried to retain counsel for Mr. Lewis, but said counsel was quickly advised by Counsel for Plaintiff he could not speak with Mr. Lewis nor, file any Motions on his behalf in regard to this suit. Apparently, Plaintiff wants to simply default Plaintiff (as she has already done apparently) and have no one contest her spurious claims. Accordingly, for Plaintiff to now suggest UAIC is improper for having failed to notify Lewis or his attorneys is the height of hypocrisy and, thus, same should disregarded by this Court. Regardless, now that Plaintiff has defaulted Lewis it would appear this argument is irrelevant anyway, should it have had any validity to begin with.

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

Plaintiff notes that an original default judgment was obtained on June 3, 2008 by Plaintiff's father, James Nalder, as Guardian *ad litem*. Plaintiff also notes that "at that time" she was represented by Christensen Law Offices but, then, in a footnote, admits Plaintiff is still currently represented by Mr. Christensen "in the pending appeals involving UAIC" – an admission that that Mr. Christensen still represents this Plaintiff. Further, Plaintiff fails to mention, that the judgment in the original 2007 matter was filed August 26, 2008 and, thereafter, **Plaintiff failed to renew this 2008 judgment against Lewis pursuant to Nevada law**. Specifically, as this Court is aware, under N.R.S. 11.190(1)(a) the limitation for action to execute

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on such a judgment would be six (6) years, unless renewed under N.R.S. 17.214. Accordingly, the date to renew said judgment would have been, by the latest, August 26, 2014. This was never done and, as such, **Plaintiff's judgment in this matter expired as a matter of law in 2014.** Accordingly, Plaintiff's *ex parte* attempts to amend that 2008 judgment in the sister case herein, 07A549111, without advising the Court of same was improper.

Indeed, Plaintiff offers a stunning admission in stating "upon learning UAIC was maintaining her judgment against Lewis had expired, Cheyenne filed this suit." First, Plaintiff has at least now finally admitted her true motivation for seeking to improperly amend the 2008 judgment and file this action. That is, she clearly knew the judgment was expired and, that this was at issue in the pending appeals, yet she still attempted this 'end around' the jurisdiction of both U.S. Court of Appeals for the Ninth Circuit and the Nevada Supreme Court as noted in UAIC's initial Motion. Moreover, this admission also directly undercuts the statements by Plaintiff's counsel in her Opposition to UAIC's Motion to Intervene in the sister case 07A549111. In that Opposition, *attached hereto as Exhibit 'A' at page 2 lines 22-23,* Plaintiff innocently claims she amended the judgment because she "reached the age of majority" with no mention made of the knowing she had an expired judgment. As this Court knows, the same omission occurred in her *ex parte* Motion to amend the 2008 judgment which underlies this action. *See attached as Exhibit "B", copy of Ex Parte Motion to amend.*

Additionally, Plaintiff agrees she filed suit against UAIC alleging bad faith for failure to defend Lewis, but fails to note that two United States District court judges found and, the Ninth Circuit for the U.S. Court of Appeals has affirmed, **that UAIC committed no bad faith in the handling of Plaintiff's claims against Lewis.** However, the Court also found, in late 2013, that UAIC had a duty to defend Lewis. Initially, in late 2013, there was no active need to defend Lewis as, this suit had gone to judgment and, the time to vacate this judgment under N.R.C.P. 60 had passed. Only after the completely opaque attempt to try an 'end around' the expiration of

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this judgment and, the jurisdiction of the Nevada Supreme Court and Ninth Circuit, by Plaintiff's amendment of the 2008 judgment and filing of the present action, did 'new' controversies arise for which UAIC believes its duty to defend has again been triggered. Of course, as set forth in UAIC's initial Motion, its initial attempt to retain counsel for Mr. Lewis to defend him and seek relief from this alleged 'amended judgment' ***has been thwarted by Plaintiff's own counsel who claims he also represents Lewis and has attempted to forbid any action on his behalf.***

Finally, Plaintiff's argument in the end of her fact section claiming she is not seeking double recovery is an obvious attempt to fool this Court and cover up her true intentions. Not only is this statement untrue **per Plaintiff's own pleadings in this case** it is also completely irrelevant to the issues before this Court on the Motion to Intervene. As this Court can see, Plaintiff's complaint herein not only seeks to have this Court "bless" her improper attempts to amend the expired 2008 judgment, but also seek new damages on the 2007 accident. Specifically, Plaintiff's 'Claims for relief' seeks not only the original 2008 judgment plus interest, but also :

> **"2. Special damages for medical and miscellaneous expenses in excess of $41,851.89, plus future medical expenses and the miscellaneous expenses incidental thereto in a presently unascertainable amount;**
> **3. Special damages for loss of wages in an amount not yet ascertained an/or diminution of Plaintiff's earning capacity, plus possible future loss of earning and/or diminution of Plaintiff's earning capacity in a presently unascertainable amount; "**

A copy of Plaintiff's Complaint is attached hereto as Exhibit 'E.' UAIC will leave it for this Court to draw its own conclusions, but that sure looks like attempts to recover additional monetary damages on the original 2007 loss against Lewis despite a judgment having already been entered against him on those same claims. This is clearly an attempt at double recovery. UAIC only points all of the above out to show the clear attempts to fool or mislead this Court. Attempts that UAIC now believes are a pattern, as will be set forth below. Regardless, these issues are simply not germane to the Motion to intervene. **Rather, it is just such issues which**

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justify allowing UAIC to intervene so these issues can be fully and fairly litigated once UAIC is in the case.

Finally, as Plaintiff's counsel admits in his response that Mr. Christensen continues to represent his client on the original judgment underlying all these actions and in the ongoing Appellate matters. Accordingly, for Plaintiff's co-counsel in this case, Mr. Stephens, to ignore Mr. Christensen's continued representation of her and, the judgment-debtor/Defendant in this matter, Mr. Lewis – *as well as the ongoing appellate matters* – stretches the bounds of reality and as they appear to be a genuine conflict of interest. As will be set forth in detail below, we see a pattern and an attempt of fraud upon the court which should not be countenanced.

II.

ARGUMENT

It is clear from Plaintiff's Opposition that it is late and, as such, this Court may disregard it and grant UAIC's Motion. Alternatively, should this Court consider the merits of the Opposition it is also clear that Plaintiff does not dispute that UAIC has properly followed the procedure for intervention pursuant to NRCP 24(a)(2). Rather, the Plaintiff makes a litany of arguments **which are unsupported by any case law or other authority** and, quite frankly, are completely baseless or speculative and another attempt to mislead this Court. This Court should not be swayed by such arguments. The fact is, UAIC clearly has an interest to protect, is not adequately represented and the Motion to intervene is timely. Finally, Plaintiff's arguments concerning her needs to amend the judgment are irrelevant for consideration of this Motion. UAIC will note the defects in Plaintiff's claimed arguments and, more importantly, show that what Plaintiff is attempting is a fraud upon the court which should overcome the normal prohibition against such an intervention.

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

As this Court knows, E.D.C.R. 2.20(e) requires any Opposition to be a Motion to be filed

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within 10 days of service. Here, as the present Motion was filed and served August 17, 2018, allowing 3 days for mailing, the Opposition was due no later than September 4, 2018. As the present Opposition was filed on September 17, 2018 it is technically late and this Court may disregard it and grant UAIC's Motion.

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

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

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

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

B. The insurer UAIC must be permitted to intervene in this action because it has an interest to protect given UAIC's duty to defend LEWIS per the October 30, 2013 Order of the U.S. District court, has its own interests to protect, is not adequately represented in this action and, its Motion is timely.

NRCP 24(a)(2) provides for the intervention of right under the following circumstances:

> Upon timely application anyone shall be permitted to intervene an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Intervention is governed by NRCP 24 and NRS 12.130. Although strikingly similar, NRCP 24 requires "timely application" to intervene whereas NRS 12.130 merely requires

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intervention at the district court level. *Stephens v. First National Bank*, 64 Nev. 292, 182 P.2d 146 (1947). NRS 12.130(1)(c), however, specifically provides that intervention may be made as provided by the Nevada Rules of Civil Procedure.

NRCP 24(a)(2) imposes four (4) requirements for the intervention of right: (1) the application must be timely; (2) it must show an interest in the subject matter of the action; (3) it must show that the protection of the interest may be impaired by the disposition of the action; and (4) it must show that the interest is not adequately represented by an existing party. *State Indus. Ins. Sys. v. Eighth Judicial Dist. Court*, 111 Nev. 28, 888 P.2d 911 (1995). [1]

1. UAIC has interests to protect both on its own behalf and on behalf of its insured, Gary Lewis.

The named Defendant LEWIS has been found to be an insured per the United States District Court Order under an implied policy of insurance with UAIC policy at the time of the accident underlying the judgments./losses for which Plaintiff seeks relief in the present action. *Exhibit 'G" to UAIC's initial Motion.* When UAIC became informed of the present action and attempted to retain counsel to defend LEWIS, UAIC was informed by Counsel for Plaintiff that he would not allow retained defense counsel to file any motion to defend LEWIS or vacate the amended judgment. *Exhibit "H" to UAIC's Initial Motion.* Without the ability of retained defense counsel to appear and mount a defense on LEWIS' behalf, it is apparent that UAIC cannot provide him an effective defense. As long as UAIC is obligated to provide such a defense, and to potentially pay any judgment against LEWIS, UAIC's interests are clearly at stake in this action. Moreover, besides protecting its insured LEWIS from a "new" action

[1] The Rule specifically reads: (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

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seeking to improperly revive an expired judgment, it is also true that this matter seeks to litigate issues that may directly affect UAIC by dint of the Plaintiff's seeking declaratory relief in her action on issues which may have bearing on the pending appeal involving Plaintiff and UAIC (as noted in UAIC's initial Motion. Despite what appear to be clear interests UAIC needs to protect, Plaintiff makes some irrelevant and baseless arguments and, thus this Court should disregard same.

First, in terms of defending Lewis, Plaintiff seems to argue that because UAIC did not defend him in the original action nor, set aside the 2008 judgment after the District Court found a duty to defend, it should somehow be precluded from intervening here. This argument is irrelevant and, not supported by the record. That is, what UAIC did or, did not do in the original action is not relevant for the examination of whether it has an issue to protect in this case. More importantly, however, two Federal District Court judges and the U.S. Court of Appeals for the Ninth Circuit have found **that UAIC committed no bad faith when they failed to defend Lewis in 2007 action, because they had a reasonably belief no policy was in effect for him**. However, given the U.S. District Court's order, in late 2013, finding an implied policy of insurance, as UAIC has now been put on notice of a duty to defend, it is trying to comply with said duty to defend Lewis, but Plaintiff's co-counsel, Mr. Christensen has thwarted this attempt thus far – leaving UAIC no choice but to intervene to protect Lewis. Finally, the argument that UAIC did not move to vacate the 2008 judgment, after the policy coverage was implied in 2013 is baseless because the 6-month timeframe to challenge the judgment on Rule 60 had long since passed.

Next, Plaintiff's argument that, as UAIC has paid $15,000 policy limit it has "no risk" under the insurance policy itself is also baseless. As noted above, as a policy has been implied as in force by the Courts, UAIC has a duty to defend. As this Court well knows, the duty to defend is broader than the duty to indemnify. *Allstate Ins. Co. v. Miller , 125 Nev. 300*. Accordingly, and

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separate and apart from the "contingent or unliquidated liability" at issue in the pending appeal between Plaintiff and UAIC, it is likely that, should Plaintiff obtain some new judgment against Lewis in this case, Plaintiff will claim UAIC breached its duty to defend and/or owes on the new judgment. To suggest Plaintiff would do otherwise is preposterous. This is especially true where, as here, Plaintiff is seeking new damages against Lewis. Specifically, Plaintiff's 'Claims for relief' seeks not only the original 2008 judgment plus interest, but also :

> **"2. Special damages for medical and miscellaneous expenses in excess of $41,851.89, plus future medical expenses and the miscellaneous expenses incidental thereto in a presently unascertainable amount;**
> **3. Special damages for loss of wages in an amount not yet ascertained an/or diminution of Plaintiff's earning capacity, plus possible future loss of earning and/or diminution of Plaintiff's earning capacity in a presently unascertainable amount;"**

A copy of Plaintiff's Complaint is attached hereto as Exhibit 'E.' Accordingly, for Plaintiff to seek new damages against UAIC's insured, but then claim UAIC has no interest or, no exposure, if it does not defend these claims should be summarily disregarded as pure fancy.

Finally, Plaintiff alleges that UAIC's interest to protect is "ill-defined" and then makes the completely absurd argument that, as UAIC was 'not involved in the loss", it has no "direct liability. First, this is ridiculous because, as noted above, UAIC may have liability under a theory of breach of the duty to defend this action under *Miller* as set forth above. More importantly, however, Plaintiff also omits the "claims for relief" she makes in her complaint which go directly to issues that may affect UAIC in the pending appeals with Plaintiff. Specifically, Plaintiff's 'Claims for relief' seeks not only the original 2008 judgment plus interest and, new damages, but also :

> **"5. A declaration that the statute of limitations on the judgment is still tolled as a result of 21 the Defendant's continued absence from the state."**

A copy of Plaintiff's Complaint is attached hereto as Exhibit 'E.' Accordingly, for Plaintiff claim UAIC has no interest to protect herein while at the same time seeking this Court for a

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judicial determination of the validity of her attempts to improperly resurrect an expired judgment – **an issue now pending on appeal as between Plaintiff and UAIC** – is contradictory and such argument should also be summarily disregarded as pure fancy. More importantly, however, it is understandable why Plaintiff would omit the true nature of her action – because this claim for relief also clearly demonstrates UAIC's independent interest to protect.

Accordingly, as this Court can see, besides not being based in any known precedent or rule, Plaintiff's arguments that UAIC has no interest to protect are baseless. UAIC has in an interest in both protecting its insured from additional damages, but also protecting itself from potential damages and rulings which could infringe or, impact, its Appellate case.

2. UAIC's Interests are not Adequately Represented in this Suit.

Plaintiff's second argument, that UAIC's interests are adequately protected is quite unbelievable given the background of this case and the arguments set forth in section (1), herein. The facts is, as there is currently no defendant defending this cause, UAIC's interest is not sufficiently protected. Indeed, UAIC understands that Plaintiff may have already taken a default against Mr. Lewis. Such action undermines Plaintiff's arguments that UAIC's interests are adequately protected. Regardless, UAIC will respond, briefly to Plaintiff's arguments, but incorporates its arguments set forth in section one, above, as if they were set forth herein and, accordingly, asks this Court to find UAIC has an interest to protect.

For her argument, Plaintiff claims UAIC has misconstrued her co-counsel, Tommy Christensen's letter and actually tries to argue that *Exhibit 'H',* to the original Motion, does not preclude UAIC from having it initial chosen retained defense counsel, Steve Rogers, Esq.,to and defend Lewis appear. This is curious because because the letter from Mr. Christensen states the following:

"I repeat, please do not take any actions, including requesting more time or filing anything on behalf of Mr. Lewis without first getting authority from Mr. Lewis through me. Please only communicate through this office with Mr. Lewis. If you have already filed

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something or requested an extension without written authority from Mr. Lewis, he requests that you immediately reverse that action."

Exhibit "H" to UAIC's initial Motion. As such, despite Plaintiff's sly attempts to 'unwind' Mr. Christensen's statements, I think this Court can agree that a reasonable interpretation of this statement is that the initial retained defense counsel cannot speak to Mr. Lewis nor, file any response in this action. Indeed, this is just how Mr. Steve Rogers, Esq., the Counsel UAIC initially tried to retain, perceived these statements as he wrote letters to both Mr. Christen and, Mr. Stephens, informing them that due to Mr. Christensen's refusal to let him speak to his client, Lewis, he could not represent him. *See copies of letters from Steve Rogers, Esq., attached hereto as Exhibit 'C.'* Accordingly, if the initial Counsel retained by UAIC to represent Lewis believes his representation is impossible based on Mr. Christensen's letters, the Court can take judicial notice of this and, at the very least, it reasonable to understand why UAIC believes its defense has been frustrated by Plaintiff.

Additionally, in terms of Plaintiff's esoteric musings about how UAIC's defense may or may not harm Lewis, UAIC would respond to Plaintiff with these questions : *How could not allowing UAIC to intervene and defend this action possibly benefit Mr. Lewis? Is having a multi-million dollar judgment against him which had expired be resurrected by a potential judicial declaration in this action be to his benefit? Is having the potential for additional damages to be assessed against Lewis for the 2007 loss to his benefit? Is preventing anyone from vacating or setting aside this improper amended judgment to his benefit?* Plaintiff certainly has not sought to protect Mr. Lewis in seeking default against him.

For all of the above, it is clear UAIC's interests, much less Mr. Lewis', are not adequately protected in this matter and, thus, UAIC satisfies this element and should be allowed to intervene.

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3. UAIC's Motion is Timely.

Plaintiff apparently tries to allege that UAIC's Motion is not timely because of some imagined duty on behalf of UAIC to file a declaratory judgment on the issue of the expiration of the original 2008 judgment. First, this argument is non-sensical because there is no affirmative duty, that UAIC is aware of, to file such a declaratory action. That is, the judgment expired by operation of law. Filing a declaratory action in such a circumstance is not required and, is impractical. Next, even assuming, *arguendo*, that UAIC should have filed such a declaratory action, it is still irrelevant to the Motion here. Instead the question is whether *UAIC's Motion to intervene in this action timely* and the answer is clearly yes.

When determining the timeliness of an application for intervention, it is not the length of the delay by the intervenor that is of primary importance, per se, but the extent of prejudice to the rights of existing parties resulting from the delay. *Lawler v. Ginochio*, 94 Nev. 623, 584 P.2d 667 (1978). This determination is, of course, within the sound discretion of the court. *Id.* Here, this matter is newly filed, LEWIS was only recently served, and, although Plaintiff recently claims to have taken default, no discovery has progressed, **and the matter has had no dispositive rulings made nor, trial date set**; as such, UAIC'S intervention in the instant matter will not delay the trial proceedings and, thus, should be considered timely.

Accordingly, as set forth herein, UAIC's Motion meets all the requirements for N.R.C.P. 24(c) and is timely, so the Motion should be granted.

4. Plaintiff's arguments regarding her reasons for attempting this improper renewal of the expired judgment are irrelevant to the present Motion except insofar as they are germane to the issues at stake herein – which UAIC believes further supports its Motion.

In an obvious attempt to try and justify its clear attempt to improperly revive an expired judgment, Plaintiff includes a section in her Opposition attempting to explain her actions. That is Plaintiff claims she was merely trying to amend the judgment because she reached majority or

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because Lewis was out of state. First, these issues are simply not germane to the Motion at bar. That is, the issues Plaintiff is arguing are the among the claims at issue in this case and ones for which UAIC has sought to intervene and be heard on. Accordingly, this court need not address the merits of Plaintiff's action now (though it is telling Plaintiff already feels the need to "explain" her actions). Rather, this Court only need address *if UAIC may be granted Leave to intervene so as to contest these very issues.* Accordingly, the fact that Plaintiff not only admits she has improperly attempted to "renew" her expired judgment, but also argues case law and issues directly at issue in the pending appeal between Plaintiff and UAIC only serves to underscore UAIC's interest in this matter and, Plaintiff's attempts to fool this Court and attempt an 'end around' the jurisdiction of the Appellate Courts.

Specifically, Plaintiff argues that she is "renewing her judgment in the only way... available to her... pursuant to *Mandelbaum v Gregovich,* 50 P. 849, 24 Nev. 154 (1897)." This is telling because this is already the same argument she has made to the U.S. Court of Appeals for the Ninth Circuit and, which, is also before the Nevada Supreme Court. For the Court's convenience, please find attached, *as Exhibit "D", hereto*, a copy of the Ninth Circuit decision on the Motion to dismiss in the sister case *Nalder v UAIC*, 878 F3d. 754, 2017 U.S. App. LEXIS 26850. On page 3-4 this Court can observe where the Court notes that Plaintiff made this same argument (arguing *Mandlebaum)* in response to the Motion to dismiss and, moreover, the Court was unable to resolve the question of law and, thus, certified the question to the Nevada Supreme Court – *where it is currently pending.*

As such, besides offering concrete admission of UAIC's interest in this case, Plaintiff also proves she is attempting to circumvent the Nevada Supreme Court's jurisdiction on this issue and, forum shop with this Court. This should not be countenanced and, in any event, certainly, falls in favor of UAIC's Motion to Intervene being granted.

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C. UAIC also asks this Court to consider, based on all of the above, that there has been an attempt at a fraud upon the Court and hold an evidentiary hearing on this issue.

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

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

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

Id at 654.

In the case at bar it seems clear that Plaintiff's counsel (Mr. Christensen) is attempting just such a fraud. That is, besides the original judgment being expired and, the effect of its expiration on appeal before both the Nevada Supreme Court and the U.S. Court of Appeals for

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

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the Ninth Circuit, Plaintiff still attempted this 'amendment of judgment' and, then, filed this new action. Moreover, Mr. Christensen (Plaintiff's additional Counsel) represents **both the Plaintiff/judgment-creditor and Defendant/judgment-debtor**. Further, in his role as counsel for Plaintiff and Defendant, Mr. Christensen is attempting, as an officer of the court, to prevent UAIC from exercising its contractual and legal duty to defend Mr. Lewis and defend this farce of lawsuit by telling UAIC's first retained counsel to not to appear or file anything to defend Lewis. Additionally, Plaintiff is now seeking to deny UAIC a chance to intervene. UAIC pleads this clearly a **fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases.** In other words, Mr. Christensen, Counsel for Plaintiff, is seeking on the one hand to enforce an invalid judgment and, with the other, prevent anyone from contesting it – **by representing both sides.** ***This is the definition of a conflict of interest.*** After all, Plaintiff's is attempting to improperly "fix" an expired multi-million judgment, while at the same time Counsel for Plaintiff is also claiming to represent the judgment-debtor (Lewis) and arising retained counsel not to vacate the amended judgment. How could this possibly benefit Mr. Lewis? Is having a multi-million dollar judgment against him which had expired be resurrected by an improper amendment of the judgment to his benefit? Is preventing anyone from vacating or setting aside this improper amended judgment to his benefit? In short, it does not – **it only benefits Plaintiff and her counsel**. UAIC argues this is clear fraud and collusive conduct and, at the very least, the Court should therefore exercise its equitable power and allow UAIC's intervention and, thereafter, hold an evidentiary hearing on this fraud.

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III.

CONCLUSION

Based on the foregoing, UAIC asks this Court grant it leave to intervene in this matter to protect its own interests and LEWIS'. Alternatively, that this court exercise its inherent authority and discretion and hold an evidentiary hearing on the fraud attempted for the reasons set forth above.

DATED this 19th day of SEPTEMBER, 2018.

ATKIN WINNER & SHERROD

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

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CERTIFICATE OF SERVICE

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

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

An employee of ATKIN WINNER & SHERROD

ATKIN WINNER & SHERROD LTD
A NEVADA LAW FIRM

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EXHIBIT "A"

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

DISTRICT COURT

CLARK COUNTY, NEVADA

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

PLAINTIFF'S OPPOSITION TO MOTION TO INTERVENE

Date: 9/19/2018
Time: Chambers

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

POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

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

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

II. FACTS

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

Cheyenne was a minor at the time of the accident.

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

This accident caused serious injuries to Cheyenne.

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

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

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

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

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

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

ad litem.

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

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

III. UAIC IS NOT ENTITLED TO INTERVENE IN THIS MATTER

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

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

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

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

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

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

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

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

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

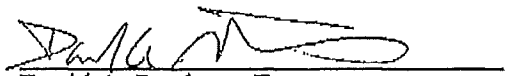
has been held to not permit intervention after the entry of a final judgment.

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

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

Dated this 11 day of September, 2018.

STEPHENS & BYWATER, P.C.



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

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CERTIFICATE OF SERVICE

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

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

☐ VIA ELECTRONIC SERVICE (N.E.F.R. 9)

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

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

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

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

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

An Employee of Stephens & Bywater

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EXHIBIT "B"

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

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

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

Date: N/A

Time: N/A

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

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

Dated this 19 day of March, 2018.

STEPHENS GOURLEY & BYWATER

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

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EXHIBIT "1"

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

CLERK OF THE COURT

JUN 3 1 52 PM '08

FILED

DISTRICT COURT
CLARK COUNTY, NEVADA

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

JUDGMENT

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

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

DATED THIS 2 day of ~~May~~ June, 2008.

DISTRICT JUDGE

Submitted by:
CHRISTENSEN LAW OFFICES, LLC.

BY: _____
DAVID SAMPSON
Nevada Bar #6811
1000 S. Valley View
Las Vegas, Nevada 89107
Attorney for Plaintiff

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EXHIBIT "2"

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

DISTRICT COURT

CLARK COUNTY, NEVADA

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

AMENDED JUDGMENT

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

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

DATED this _____ day of March, 2018.

_____
District Judge

Submitted by:
STEPHENS GOURLEY & BYWATER

DAVID A. STEPHENS, ESQ.
Nevada Bar No. 00902
STEPHENS GOURLEY & BYWATER
3636 North Rancho Dr
Las Vegas, Nevada 89130
Attorneys for Plaintiff

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EXHIBIT "C"

ROGERS
MASTRANGELO
CARVALHO &
MITCHELL

Attorneys At Law
Stephen H. Rogers
Rebecca L. Mastrangelo
Daniel E. Carvalho
Bert Mitchell*
Imran Anwar
Charles A. Michalek
Dawn L. Davis^
Marissa R. Temple
Will C. Mitchell
Kimberly C. Beal
*Of Counsel
^Also admitted in AZ

August 23, 2018

Via Email: thomasc@injuryhelpnow.com

Thomas F. Christensen, Esq.
Christensen Law Office, LLC
1000 South Valley View Blvd.
Las Vegas, Nevada 89107

Re: Cheyenne Nalder v. Gary Lewis
Court Case Nos.: A-07-549111-C and A-18-772220-C

Dear Tommy:

You have advised that, as Mr. Lewis' personal counsel, I will not be permitted to speak with him. As such, I will not be able to defend him with respect to the amended judgment and the current Complaint. You have also advised that I am not to copy him on any letters. As I copied him on my initial letter, I ask that you advise him that I cannot represent him as he will communicate with me.

Sincerely,

ROGERS, MASTRANGELO, CARVALHO
& MITCHELL

Dictated by Stephen Rogers, Esq.
Signed in his absence

Stephen H. Rogers, Esq.

SHR/mms
cc: Gary Lewis
M:\Rogers\Lewis adv. Nalder\Correspondence\Tommy Christensen letter 082318.wpd

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bcc: United Automobile Insurance Company
Brandon Carroll (via email)
Michael Harvey (via email)

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ROGERS
MASTRANGELO
CARVALHO &
MITCHELL

Attorneys At Law
Stephen H. Rogers
Rebecca L. Mastrangelo
Daniel E. Carvalho
Bert Mitchell*
Imran Anwar
Charles A. Michalek
Dawn L. Davis^
Marissa R. Temple
Will C. Mitchell
Kimberly C. Beal
*Of Counsel
^Also admitted in AZ

August 23, 2018

David A. Stephens, Esq.
Stephens, Gourley & Bywater
3636 North Rancho Drive
Las Vegas, Nevada 89130

Re: Gary Lewis adv. Cheyenne Nalder
Case No.: A-18-772220-C

Dear Mr. Stephens:

Thank you for your professional courtesy in agreeing to extend the deadline to file a responsive pleading. Mr. Christensen advises that he represents Gary Lewis, that I may not file any motions contesting the amended judgment or the current Complaint, and that I may not speak with Mr. Lewis. As Mr. Lewis will not communicate with me, I will not be able to represent him.

Again, thank you for your professional courtesy. Please contact me with any questions.

Sincerely,

ROGERS, MASTRANGELO, CARVALHO
& MITCHELL

Dictated by Stephen Rogers, Esq.
Signed in his absence

Stephen H. Rogers, Esq.

SHR/mms
cc: Tommy Christensen, Esq.
M:\Rogers\Lewis adv. Nalder\Correspondence\Stephens ltr 082318.wpd

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bcc: United Automobile Insurance Company
Brandon Carroll (via email)
Michael Harvey (via email)

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EXHIBIT "D"

Neutral
As of: September 18, 2018 12:33 AM Z

Nalder v. United Auto. Ins. Co.

United States Court of Appeals for the Ninth Circuit

January 6, 2016, Argued and Submitted, San Francisco, California; December 27, 2017, Filed

No. 13-17441

Reporter
878 F.3d 754 *; 2017 U.S. App. LEXIS 26850 **; 2017 WL 6601776

JAMES NALDER, Guardian Ad Litem on behalf of Cheyanne Nalder; GARY LEWIS, individually, Plaintiffs-Appellants, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant-Appellee.

Prior History: [**1] Appeal from the United States District Court for the District of Nevada. D.C. No. 2:09-cv-01348-RCJ-GWF. Robert Clive Jones, District Judge, Presiding.

Nalder v. United Auto. Ins. Co., 2014 U.S. Dist. LEXIS 75561 (D. Nev., June 3, 2014)

Core Terms

damages, renewal, default judgment, expiration, certified question, district court, insured, consequential damages, summary judgment, limitations, coverage, six-year, lapse

Case Summary

Overview
HOLDINGS: [1]-Neither side could have pointed to Nevada law that definitively answered the question of whether plaintiffs could have still recovered consequential damages based on the default judgment when six years passed during the pendency of the suit. Neither side squarely addressed whether the expiration of the judgment in fact reduced the consequential damages for the insurer's breach of the duty to defend. The court certified a question of law to the Nevada Supreme Court because it appeared that there was no controlling precedent of the Nevada Supreme Court or the Nevada Court of Appeals with regard to the issue of Nevada law raised by the motion to dismiss.

Outcome
Question certified. Further proceedings stayed.

Summary:

SUMMARY[**]

Certified Question to Nevada Supreme Court

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

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

Counsel: For JAMES NALDER, Guardian Ad Litem on behalf of Cheyanne Nalder, GARY LEWIS, individually, Plaintiffs - Appellants: Thomas Christensen, Esquire, Attorney, Christensen Law Offices, LLC, Las Vegas, NV; Dennis M. Prince, Attorney, Eglet Prince, Las Vegas, NV.

For UNITED AUTOMOBILE INSURANCE COMPANY, Defendant - Appellee: Matthew J. Douglas, Attorney, Susan M. Sherrod, Esquire, Attorney, Thomas E. Winner, Esquire, Attorney, Atkin Winner & Sherrod, Las Vegas, NV.

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

Opinion by: Diarmuid F. O'Scannlain

Opinion

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

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

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[*755] ORDER CERTIFYING QUESTION TO THE NEVADA SUPREME COURT

ORDER

Pursuant [**2] to *Rule 5* of the Nevada Rules of Appellate Procedure, we certify to the Nevada Supreme Court the question of law set forth in Part II of this order. The answer to this question may be determinative of the cause pending before this court, and there is no controlling precedent in the decisions of the Nevada Supreme Court or the Nevada Court of Appeals.

Further proceedings in this court are stayed pending receipt of an answer to the certified question. Submission remains withdrawn pending further order. The parties shall notify the Clerk of this court within one week after the Nevada Supreme Court accepts or rejects the certified question, and again within one week after the Nevada Supreme Court renders its opinion.

I

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

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

Thomas Christensen, Christensen Law Offices, LLC, 1000 South Valley View Boulevard, Las Vegas, Nevada 89107, and [**3] Dennis M. Prince, Eglet Prince, 400 South Seventh Street, Suite 400, Las Vegas, Nevada 89101, for appellants.

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

II

The question of law to be answered is:

> Under Nevada law, if a plaintiff has filed suit against an insurer seeking damages based on a separate judgment against its insured, does the insurer's liability expire when the statute of limitations [*756] on the judgment runs, notwithstanding that the suit was filed within the six-year life of the judgment?

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

III

A

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

On July 8, 2007, Gary Lewis ran over Cheyanne Nalder. Lewis had taken out an auto insurance policy with UAIC, which was renewable on a monthly basis. Before the accident, Lewis had received a statement instructing him that his renewal payment was due by June 30, 2007. The statement also specified that "[t]o avoid lapse in coverage, payment must be received prior to expiration of [**4] your policy." The statement listed June 30, 2007, as the policy's effective date and July 31, 2007, as its expiration date. Lewis did not pay to renew his policy until July 10, 2007, two days after the accident.

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

Nalder sued Lewis in Nevada state court and obtained a $3.5 million default judgment. Nalder and Lewis then filed the instant suit against UAIC in state court, which UAIC removed to federal court. Nalder and Lewis alleged breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, fraud, and breach of *section 686A.310 of the Nevada Revised Statutes.* UAIC moved for summary judgment on the basis that Lewis had no insurance coverage on the date of the accident. Nalder and Lewis argued that Lewis was covered on the date of the accident because the renewal notice was ambiguous as to when payment had to be received to avoid a lapse in coverage, and that this ambiguity had to be construed in favor [**5] of the insured. The district court found that the contract could not be reasonably interpreted in favor of Nalder and Lewis's argument and granted summary judgment in favor of UAIC.

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

On remand, the district court granted partial summary judgment to each party. First, the court found the renewal statement ambiguous, so it construed this ambiguity against UAIC by finding that Lewis was covered on the date of the accident. Second, the court found that UAIC did not act in bad faith because it had a reasonable basis to dispute coverage. Third, the court found that UAIC breached its duty to defend Lewis but awarded no damages "because [Lewis] did not incur any fees or costs in defending the underlying action" as he took a default judgment. The court ordered UAIC "to pay Cheyanne Nalder the policy limits on Gary Lewis's implied insurance policy at the time of the accident." Nalder and Lewis appeal.

B

Nalder and **[**6]** Lewis claim on appeal that they should have been awarded consequential **[*757]** and compensatory damages resulting from the Nevada state court judgment because UAIC breached its duty to defend. Thus, assuming that UAIC did not act in bad faith but did breach its duty to defend Lewis, one question before us is how to calculate the damages that should be awarded. Nalder and Lewis claim they should have been awarded the amount of the default judgment ($3.5 million) because, in their view, UAIC's failure to defend Lewis was the proximate cause of the judgment against him. The district court, however, denied damages because Lewis chose not to defend and thus incurred no attorneys' fees or costs. Because there was no clear state law and the district court's opinion in this case conflicted with another decision by the U.S. District Court for the District of Nevada on the question of whether liability for breach of the duty to defend included all losses consequential to an insurer's breach, we certified that question to the Nevada Supreme Court in an order dated June 1, 2016. In that order, we also stayed proceedings in this court pending resolution of the certified question by the Nevada Supreme Court. **[**7]**

After that certified question had been fully briefed before the Nevada Supreme Court, but before any ruling or oral argument, UAIC moved this court to dismiss the appeal for lack of standing. UAIC argues that the six-year life of the default judgment had run and that the judgment had not been renewed, so the judgment is no longer enforceable. Therefore, UAIC contends, there are no longer any damages above the policy limit that Nalder and Lewis can seek because the judgment that forms the basis for those damages has lapsed. For that reason, UAIC argues that the issue on appeal is moot because there is no longer any basis to seek damages above the policy limit, which the district court already awarded.

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

IV

In support of its motion to dismiss, UAIC argues that under *Nev. Rev. Stat. § 11.190(1)(a)*, the six-year statute of limitations during which Nalder could enforce his default judgment against Lewis expired on August 26, 2014, and Nalder did not renew the judgment. Therefore, says UAIC, the default judgment has lapsed, and because it **[**8]** is no longer enforceable, it no longer constitutes an injury for which Lewis or Nalder may seek damages from UAIC.

In response, Nalder and Lewis do not contest that the six-year period of the statute of limitations has passed and that they have failed to renew the judgment, but they argue that UAIC is wrong that the issue of consequential damages is mooted. First, they make a procedural argument that a lapse in the default judgment, if any, may affect the amount of damages but does not affect liability, so the issue is inappropriate to address on appeal before the district court has evaluated the effect on damages. Second, they argue that their suit against UAIC is itself "an action upon" the default judgment under the terms of *Nev. Rev. Stat. § 11.190(1)(a)* and that because it was filed within the six-year life of the judgment it is timely. In support of this argument, they point out that UAIC has already paid out more than $90,000 in this case, which, they say, acknowledges the validity of the underlying judgment and that this suit is an enforcement action upon it.

Neither side can point to Nevada law that definitively answers the question of whether plaintiffs may still recover consequential damages based on the **[**9]** default **[*758]** judgment when six years passed during the pendency of this suit. Nalder and Lewis reach into the annals of Nevada case law to find an opinion observing that at common law "a judgment creditor may

enforce his judgment by the process of the court in which he obtained it, or he may elect to use the judgment, as an original cause of action, and bring suit thereon, and prosecute such suit to final judgment." *Mandlebaum v. Gregovich, 24 Nev. 154, 50 P. 849, 851 (Nev. 1897)*; *see also Leven v. Frey, 123 Nev. 399, 168 P.3d 712, 715 (Nev. 2007)* ("An action on a judgment *or* its renewal must be commenced within six years." (emphasis added)). They suggest they are doing just this, "us[ing] the judgment, as an original cause of action," to recover from UAIC. But that precedent does not resolve whether a suit against an insurer who was not a party to the default judgment is, under Nevada law, an "action on" that judgment.

UAIC does no better. It also points to *Leven* for the proposition that the Nevada Supreme Court has strictly construed the requirements to renew a judgment. *See Leven, 168 P.3d at 719*. Be that as it may, Nalder and Lewis do not rely on any laxity in the renewal requirements and argue instead that the instant suit is itself a timely action upon the judgment that obviates any need for renewal. UAIC also points to *Nev. Rev. Stat. § 21.010*, which provides **[**10]** that "the party in whose favor judgment is given may, at any time before the judgment expires, obtain the issuance of a writ of execution for its enforcement as prescribed in this chapter. The writ ceases to be effective when the judgment expires." That provision, however, does not resolve this case because Nalder and Lewis are not enforcing a writ of execution, which is a direction to a sheriff to satisfy a judgment. *See Nev. Rev. Stat. § 21.020*.

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

V

It appears to this court that there is no controlling precedent of the Nevada Supreme Court or the Nevada **[**11]** Court of Appeals with regard to the issue of Nevada law raised by the motion to dismiss. We thus request the Nevada Supreme Court accept and decide the certified question. "The written opinion of the [Nevada] Supreme Court stating the law governing the question[] certified . . . shall be res judicata as to the parties." *Nev. R. App. P. 5(h)*.

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

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

IT IS SO ORDERED.

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

Diarmuid F. O'Scannlain

Circuit Judge

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Steven D. Grierson
CLERK OF THE COURT

MATTHEW J. DOUGLAS
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Facsimile (702) 243-7059
mdouglas@awslawyers.com
Attorneys for Intervenor United Automobile Ins. Co.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYANNE NALDER,

Plaintiff,

vs.

GARY LEWIS and DOES I through V, inclusive,

Defendants.

CASE NO.: A-18-772220-C
DEPT. NO.: XXIX

NOTICE OF ENTRY OF ORDER ON INTERVENOR UNITED AUTOMOBILE INSURANCE COMPANY'S MOTION TO INTERVENE

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

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

DATED this 19th day of October, 2018.

ATKIN WINNER & SHERROD

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

ATKIN WINNER & SHERROD
A NEVADA LAW FIRM

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CERTIFICATE OF SERVICE

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

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

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

Breen Arntz, Esq.
5545 S. Mountain Vista St. Suite F
Las Vegas, NV 89120

An employee of ATKIN WINNER & SHERROD

ATKIN WINNER & SHERROD LTD
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EXHIBIT "L"

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mdouglas@awslawyers.com

Attorneys for Proposed Intervenor United Automobile Insurance Company

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYANNE NALDER, Plaintiff, vs. GARY LEWIS and DOES I through V, inclusive, Defendants.	CASE NO.: A-18-772220-C DEPT. NO.: 29 **UAIC'S REPLY TO LEWIS' OPPOSITION IN SUPPORT OF ITS MOTION TO INTERVENE**

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

DATED this 18 day of SEPTEMBER, 2018.

ATKIN WINNER & SHERROD

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

Case Number: A-18-772220-C

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

UAIC received notice late today that, apparently, the carousel keeps turning in the ongoing collusive/fraudulent acts between Plaintiff and, now, potentially, 'new' counsel for Defendant Lewis or, Lewis himself, as Lewis filed an Opposition to UAIC's Motion to intervene.

UAIC notes that this pleading has apparently yet to be accepted by the Court, but in case it is UAIC files this Reply out of an abundance of caution.

In short, the Opposition by Defendant is unsigned and, thus, as an initial matter, UAIC asks this Court not to consider same pursuant to Rule 11.

Should this court consider Lewis' Reply, UAIC further notes the pleading appears to be a *nearly exact carbon copy of Plaintiff's Opposition* and, accordingly, UAIC asks this Court to consider its Reply to Plaintiff's Opposition in reply to this pleading. Namely, that the Reply is late and none of the arguments made are based on case law or other authority and do not defeat UAIC's interest or, right to intervene.

The only 'new' item UAIC could find in this pleading was the second to last sentence that was inserted which argues that, if UAIC is successful on the certified question it would "leave Lewis with a valid judgment against him and, no claim against UAIC." In response, UAIC strongly disagrees. UAIC has argued the 2008 judgment expired (and obviously Plaintiff tacitly agrees or she would not have tried these machinations currently pending) and therefore, should UAIC prevail on the certified question – **there simply would be no valid judgment against Lewis as it is expired.**

Moreover, UAIC must also add that this pleading is curious for several other reasons, which UAIC hopes will further alert this court to the fraud that is being attempted. Namely, *why does the Defendant and, purported party opponent to Plaintiff in this case, file the exact same*

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opposition as Plaintiff has? UAIC poses that it is because they are not opponents, but obviously in collusion. It is also curious that Lewis' counsel obviously felt it more important to oppose UAIC's right to intervene (and its attempt to seek and prevent further damages against him) *rather than first answering the complaint, despite Plaintiff admitting he has sought default of Mr. Lewis*. In short, Defendant again argues this is clear additional evidence of the fraud attempted to be perpetrated on this Court and UAIC again asks it intervention be granted and, then, this Court hold an evidentiary hearing on these issues.

III.

CONCLUSION

Based on the foregoing, UAIC asks this Court grant it leave to intervene in this matter to protect its own interests and LEWIS'. Alternatively, that this court exercise its inherent authority and discretion and hold an evidentiary hearing on the fraud attempted for the reasons set forth above.

DATED this 19th day of SEPTEMBER 2018.

ATKIN WINNER & SHERROD

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

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CERTIFICATE OF SERVICE

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

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

VIA fax to (702) 656-2776

DEFENDANT'S COUNSEL
E. Breen Arntz, Esq.
5545 S. Mountain Vista St., Suite F
Las Vegas, NV. 89120

VIA fax to: (702) 446-8164

An employee of ATKIN WINNER & SHERROD

ATKIN WINNER & SHERROD LTD
A NEVADA LAW FIRM

EXHIBIT "M"

07A549111

DISTRICT COURT
CLARK COUNTY, NEVADA

Negligence - Auto | **COURT MINUTES** | **September 19, 2018**

07A549111 James Nalder
vs
Gary Lewis

September 19, 2018 **3:00 AM** **Motion to Intervene**

HEARD BY: Jones, David M **COURTROOM:** Chambers

COURT CLERK: Haly Pannullo

RECORDER: Melissa Murphy-Delgado

JOURNAL ENTRIES

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- There being no opposition, COURT ORDERED, Motion GRANTED.

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CLERK'S NOTE: This Minute Order was electronically served by Courtroom Clerk, Haly Pannullo, to all registered parties for Odyssey File & Serve *hvp/9/26/18*

EXHIBIT "N"

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9/27/2018 2:10 PM
Steven D. Grierson
CLERK OF THE COURT

RANDALL TINDALL
Nevada Bar No. 6522
RESNICK & LOUIS, P.C.
8925 W. Russell Rd., Ste. 220
Las Vegas, Nevada 89148
Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES NALDER, individually and as Guardian ad Litem for CHEYENNE NALDER, a minor, Plaintiff, vs. GARY LEWIS and DOES I through V, inclusive, ROES I through V, Defendants.	CASE NO.: A549111 DEPT. NO.: 6

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

Defendant, Gary Lewis, by and through his counsel Randall Tindall brings his Motion for Relief from Judgment Pursuant to NRCP 60, asking that this Court declare as void the Amended Judgment entered on March 28, 2018, because the underlying Judgment expired in 2014 and is not capable of being revived.

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

DATED this 27th day of September, 2018.

RESNICK & LOUIS, P.C.

RANDALL TINDALL
Nevada Bar No. 6522
8925 W. Russell Rd., Ste. 220
Las Vegas, Nevada 89148
Attorneys for Defendant

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NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that the foregoing **DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO NRCP 60** will come on for hearing before the above-entitled Court on the ____ day of October 31, 2018 at 9:00 a.m. in Department 29 of the Eighth Judicial District Court, Clark County, Nevada.

DATED this 27th day of September, 2018.

RESNICK & LOUIS, P.C.

RANDALL TINDALL
Nevada Bar No. 6522
8925 W. Russell Rd., Ste. 220
Las Vegas, Nevada 89148
Attorneys for Defendant

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POINTS AND AUTHORITIES

I.

INTRODUCTION

This Court made a mistake of law based on incomplete/incorrect facts presented in an Ex Parte Motion to Amended Judgment, when entering the Order granting the Motion on March 28, 2018. The Judgment which Plaintiff, Cheyenne Nalder ("Cheyenne") moved to amend was entered on June 3, 2008. The judgment creditor, Cheyenne's guardian ad litem, James Nalder, did not renew the Judgment as required by Nevada law before it expired on June 3, 2104, six years after it was entered.

The Amended Judgment ostensibly revived the expired Judgment, despite the fact that Cheyenne presented this Court with no legal support for such revival. Cheyenne's Motion proposes that tolling provisions applicable to causes of action are also applicable to the deadlines

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to renew judgments. However, none of the authority cited in her Motion supports misappropriating tolling provisions applicable to certain causes of action to extend the time to renew a judgment, nor does any other authority. Pursuant to NRCP 60, the Court should declare that the Amended Judgment is void and that the original Judgment has expired, and therefore is not enforceable.

II.

STATEMENT OF FACTS

This case involves an accident which occurred on July 8, 2007. Cheyenne, who was then a minor, claimed that she suffered injuries from the accident. On October 9, 2007, Cheyenne, through her guardian ad litem, James Nalder, presumably a relative, filed a Complaint against Gary Lewis ("Lewis"). *See* Complaint attached hereto as Exhibit "A."

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

On March 22, 2018, nearly 10 years after the judgment was entered, and nearly four (4) years after it expired, Cheyenne filed an "Ex Parte Motion to Amend Judgment in the Name of Cheyenne Nalder, Individually" ("Ex Parte Motion"). Her Motion did not advise the Court that the Judgment she sought to amend had expired. Rather, it cited two statutes, NRS 11.280 and 11.300, without explaining why they were applicable to her request, and asked the Court to

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

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amend the Judgment to be in her name alone. In short, the Court was not put on notice that it was being asked to ostensibly revive an expired judgment.

With an incomplete account of the issues presented, the Court granted Cheyenne's Ex Parte Motion and issued an Amended Judgment on March 28, 2018. *See* Exhibit "C."

As the Judgment had expired and an Amended Judgment could not be issued to revive it. Lewis brings the instant Motion pursuant to NRCP 60(b), to void the Amended Judgment and declare that the original Judgment has expired.

III.

ARGUMENT

A. The Judgment Expired on June 3, 2014

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

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

The Nevada Supreme Court, in *Leven v. Frey*, 123 Nev. 399, 168 P.3d 712 (2007), held that judgment creditors must strictly comply with the procedure set forth in NRS 17.214 in order

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to validly renew a judgment. *Id.* at 405-408, 168 P.3d 717-719. There is no question that neither Cheyenne nor her guardian ad litem did so. Therefore the Judgment expired.

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

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

The introduction to NRS 11.090, the statute of limitation law, states that it applies to: " . . . actions other than those for the recovery of real property, unless further limited by specific statute . . ." The list which follows includes various causes of action for which suit can be brought. Nowhere in the list is renewing a judgment defined as or analogized to a cause of action.

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

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

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

> Legal disability prevents running of statute. **NRS 11.260 and 11.270 shall not apply to minors or others under any legal disability to sue at the time when**

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> **the right of action first accrues,** but all such persons may commence an action at any time within 1 year after the removal of the disability.

Emphasis added. NRS 11.260 applies to actions to recover a estate sold by a guardian. NRS 11.270 applies to actions to recover estates sold by an executor or administrator. Neither of those causes of action are at issue here. Therefore, NRS 11.280 would not authorize tolling the deadline for the renewal of a judgment while a judgment creditor was a minor. This statute would not apply in any instance because the judgment creditor, James, was not a minor, and so did not have a legal disability.

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

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

If tolling of deadlines to amend judgments were sanctioned, title to real property owned by anyone who had ever been a judgment debtor would be clouded, as a title examiner would not know whether a judgment issued more than six years prior had expired pursuant to statute, or was still valid, or could be revived when a real party in interest who was a minor reached the age of majority. As the Court held in *Leven*, one of the primary reasons for the need to strictly comply with NRS 17.214's recordation requirement is to "procure reliability of title searches for

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both creditors and debtors since any lien on real property created when a judgment is recorded continues upon that judgment's proper renewal." *Id.* At 408-409, 168 P.3d 712, 719. Compliance with the notice requirement of NRS 17.124 is important to preserve the due process rights of the judgment debtor. *Id.* If a judgment debtor is not provided with notice of the renewal of a Judgment, he may believe that the judgment has expired and he need take no further action to defend himself against execution.

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

Cheyenne's Ex Parte Motion next cites NRS 11.300, which provides "if, when the cause of action shall accrue against a person, the person is out of the State, the action may be commenced within the time herein limited after the person's return to the State; and if after the cause of action shall have accrued the person departs from the State, the time of the absence shall not be part of the time prescribed for the commencement of the action." Cheyenne's argument that the deadline to renew the Judgment are tolled by NRS 11.300 fails because, again, renewing a judgment is not a cause of action. As the Supreme Court of North Dakota, a state with similar statutes to Nevada regarding judgments, held in *F/S Manufacturing v. Kensmore*, 798 N.W.2d 853 (N.D. 2011), "Because the statutory procedure for renewal by affidavit is not a separate action to renew the judgment, the specific time period [provided to renew] cannot be tolled under [the equivalent to NRS 11.300] based on a judgment debtor's absence from the state." *Id.* at 858.

In addition, applying Cheyenne's argument that the time to renew a judgment was tolled because of the judgment debtor's absence from Nevada would have a similarly negative impact on the ability for property owners to obtain clear title to their property. Nothing on a judgment would reflect whether a judgment debtor was outside of the state and a facially expired judgment was still valid. Therefore, essentially, a responsible title examiner would have to list any judgment that had ever been entered against a property owner on the title insurance policy,

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because he could not be sure that judgments older than six years for which no affidavit of renewal had been filed were expired or the expiration was tolled.

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

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

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

Because the Ex Parte Motion was ex parte, it was not served on Lewis nor did he have an opportunity to make the Court aware that the Judgment had already expired on its own terms, and that Cheyenne's proposition that the deadline to renew the judgment was tolled was inapt. The Ex Parte Motion did not advise the Court that the Judgment had expired in 2014 and had not been properly renewed. Had the Court been fully apprised of the facts, it likely would not have granted the Ex Parte Motion. Since the Amended Judgment was entered on March 28, 2018, a motion to set aside the amended judgment on the basis of mistake is timely as it is made within six months of the entry of the judgment. This Court should rectify the mistake and void the Amended Judgment in accordance with NRCP 60(b)(1).

2. The Amended Judgment is void

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

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IV.

CONCLUSION

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

DATED this 27th day of September, 2018.

RESNICK & LOUIS, P.C.

RANDALL TINDALL
Nevada Bar No. 6522
8925 W. Russell Rd., Ste. 220
Las Vegas, Nevada 89148
Attorneys for Defendant

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CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(a), E.D.C.R. 7.26(a), and Rule 9 of the N.E.F.C.R., I hereby certify that I am an employee of Rogers, Mastrangelo, Carvalho & Mitchell, and on the _____ day of September, 2018, a true and correct copy of the foregoing **DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO NRCP 60** was served upon the following counsel of record as indicated below:

David A. Stephens, Esq. Stephens, Gourley & Bywater 3636 North Rancho Drive Las Vegas, Nevada 89130	____ Via First Class, U.S. Mail, Postage Prepaid ____ Via Facsimile ____ Via Hand-Delivery __X__ Via Electronic Service Pursuant to Rule 9 of the N.E.F.C.R. (Administrative Order 14-2)
Thomas Christensen, Esq. Christensen Law Firm 1000 S. Valley View Blvd. Las Vegas, Nevada 89107	____ Via First Class, U.S. Mail, Postage Prepaid ____ Via Facsimile ____ Via Hand-Delivery __X__ Via Electronic Service Pursuant to Rule 9 of the N.E.F.C.R. (Administrative Order 14-2)

Lyla B. Mill

An Employee of
Resnick & Louis, P.C.

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EXHIBIT "O"

A-18-772220-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Negligence - Auto | **COURT MINUTES** | **September 19, 2018**

A-18-772220-C Cheyenne Nalder, Plaintiff(s)
vs.
Gary Lewis, Defendant(s)

September 19, 2018 **3:00 AM** **UAIC's Motion to Intervene**

HEARD BY: Jones, David M **COURTROOM:** Chambers

COURT CLERK: Haly Pannullo

RECORDER: Melissa Murphy-Delgado

JOURNAL ENTRIES

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- Court noted this matter was previously handled and the Motion was granted.

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CLERK'S NOTE: This Minute Order was electronically served by Courtroom Clerk, Haly Pannullo, to all registered parties for Odyssey File & Serve *hvp/9/26/18*

EXHIBIT "P"

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CLERK OF THE COURT

MDSM
RANDALL TINDALL
Nevada Bar No. 6522
RESNICK & LOUIS, P.C.
8925 W. Russell Rd., Ste. 220
Las Vegas, Nevada 89148
Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

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

DEFENDANT'S MOTION TO DISMISS

Defendant, Gary Lewis, by and through his counsel, Randall Tindall, hereby brings his Motion to Dismiss Plaintiff's Complaint in its entirety. Plaintiff's personal injury claims have been previously litigated and judgment entered. Plaintiff's request for a second amended judgment should be dismissed because the original judgment expired in 2014, was not properly renewed, and cannot be revived via an amended judgment more than four years after it expired.

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This Motion is made and based upon NRCP 12(b)(5), the papers and pleadings on file herein, the Points and Authorities attached hereto, and such oral argument as the Court may permit.

DATED this 26th day of September, 2018.

RESNICK & LOUIS, P.C.

RANDALL TINDALL
Nevada Bar No. 6522
8925 W. Russell Rd., Ste. 220
Las Vegas, Nevada 89148
Attorneys for Defendant

NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that the foregoing DEFENDANT'S MOTION TO DISMISS will come on for hearing before the above-entitled Court on the ____ day of October 31, 2018 at 9:00 a.m. in Department 29 of the Eighth Judicial District Court, Clark County, Nevada.

DATED this 26th day of September, 2018

RESNICK & LOUIS, P.C.

RANDALL TINDALL
Nevada Bar No. 6522
8925 W. Russell Rd., Ste. 220
Las Vegas, Nevada 89148
Attorneys for Defendant

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POINTS AND AUTHORITIES

I.

INTRODUCTION

Cheyenne Nalder, ("Cheyenne") alleges in her Complaint that she was injured in an accident in 2007. Cheyenne was 11 years old at the time. She did not wait until she reached the age of majority to pursue her claim for damages against the alleged at-fault driver, Gary Lewis ("Lewis"). A guardian ad litem, James Nalder, was appointed to pursue her claim. He did so, filing a complaint on her behalf and obtaining a Judgment for $3.5 million. For unknown reasons, no payments other than Lewis' $15,000 auto insurance policy limit have been sought on the Judgment. It is unknown what efforts James Nalder made to enforce the Judgment, if any. What is known is that he did not renew the Judgment before it expired in 2014, while Cheyenne was still a minor.

Despite the fact that Lewis' liability for any injuries Cheyenne may have sustained in the 2007 accident have already been adjudicated and judgment entered, Cheyenne now re-asserts those claims in the instant Complaint. Those claims are subject to dismissal pursuant to the doctrine of claim preclusion.

Cheyenne also seeks a second amended judgment from the Court. Seeking an amended judgment is not a cause of action ; rather, it is a motion. Cheyenne's request for a second amended judgment should be dismissed and she should be directed to file a motion.

Finally, Cheyenne seeks a declaration from the Court that the statute of limitations to enforce an Amended Judgment (and the second amended judgment she seeks in her Complaint) was tolled because she was a minor and Lewis resides in California. Declaratory relief is not

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appropriate in this matter because there is no justiciable controversy and the issues upon which Cheyenne requests declaratory relief are unripe. In addition, since the Amended Judgment should not have been issued. The original judgment expired in 2014 and was not subject to revival, there is nothing for Cheyenne to enforce.

In summary, the Court should dismiss the Complaint as there are no facts under which Cheyenne is entitled to relief.

II.

STATEMENT OF FACTS

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

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

On March 22, 2018, nearly 10 years after the Judgment was entered, and nearly four (4) years after it expired, Cheyenne filed an "Ex Parte Motion to Amend Judgment in the Name of Cheyenne Nalder, Individually" ("Ex Parte Motion") in her personal injury case, Case No. A-07-549111-C, which is also assigned to this Court. Her Motion did not advise the Court that the Judgment she sought to amend had expired. The Court granted Cheyenne's Ex Parte Motion and issued an Amended Judgment on March 28, 2018. *See* Exhibit "C." Contemporaneous with the

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

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filing of the instant motion, Lewis has filed a Motion for Relief from Judgment in Case No. A-07-549111-C, detailing the reasons the Court should void the Amended Judgment.

On April 3, 2018, one day before the statute of limitations ran for Cheyenne to file a personal injury claim (but ten years after she already obtained a judgment), she filed a Complaint alleging identical injuries from the same accident. *See* Exhibit "A," the 2007 Complaint, and the 2018 Complaint, attached as Exhibit "D." In the 2018 Complaint, she does not explain why she believes she is entitled to damages for the same injuries for which she received a judgment in 2008. *See* Exhibit "D." However, the 2018 Complaint does acknowledge that she already received a judgment against Lewis. *Id.* at p. 3, ll. 10 - 11.

Finally, the 2018 Complaint seeks an amended judgment to add interest to the 2008 judgment, and declaratory relief that the statute of limitations to enforce the judgment was tolled because she was a minor and Lewis was a resident of California.

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III.

MOTION TO DISMISS STANDARD

A defendant is entitled to dismissal when a plaintiff fails "to state a claim up which relief can be granted." NRCP 12(b)(5). The Nevada Supreme Court has declared that the dismissal of a complaint is appropriate where "it appears beyond a doubt that [the plaintiff] could prove no set of facts which, if true, would entitle [the plaintiff] to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

In evaluating a motion to dismiss, courts primarily focus on the allegations in the complaint. *Id.* As the Nevada Supreme Court held in *Baxter v. Dignity Health*, 131 Nev. Adv. Op. 76, 357 P.3d at 930 (2015) "'the court is not limited to the four corners of the complaint.'" Citing 5B Charles Alan Wright & Arthur Miller, Federal Practice & Procedure: Civil § 1357, at 376 (3d ed.2004). The *Baxter* Court also held that a court "'may also consider unattached

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evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document.'" *Id.,* citing *United States v. Corinthian Colleges,* 655 F.3d 984, 999 (9th Cir.2011) (internal quotation omitted). The *Baxter* Court continued "[w]hile presentation of matters outside the pleadings will convert the motion to dismiss to a motion for summary judgment, Fed.R.Civ.P. 12(d); NRCP 12(b), such conversion is not triggered by a court's 'consideration of matters incorporated by reference or integral to the claim,'" *Id.*, citing 5B Wright & Miller, supra, § 1357, at 376.

While Defendant's Motion to Dismiss does rely on certain documents which were not attached to the Complaint, those documents are either incorporated by reference (the Judgment and Amended Judgment) or integral to the claim (the Complaint in the 2007 case). Therefore, this Court should consider this matter a motion to dismiss and not convert it to a motion for summary judgment. As discussed below, there is no doubt that there are no facts pursuant to which Cheyenne is entitled to the relief her 2018 Complaint seeks.

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IV.

ARGUMENT

A. The Doctrine of Claim Preclusion Mandates Dismissal of Plaintiff's Claims Related to the July 8, 2007 Accident

The October 9, 2007 Complaint filed by Cheyenne's guardian ad litem, James Nalder, alleged personal injuries caused by the July 8, 2007 accident. *See* Complaint attached hereto as Exhibit "A." When Lewis did not respond to that Complaint, a Default was entered against him. On June 3, 2008, a Judgment in the amount of $3.5 million was entered against Lewis. *See* Judgment, attached hereto as Exhibit "B." Plaintiff acknowledged this in Paragraph 10 of her 2018 Complaint. Because the personal injury claims in the 2018 Complaint have already been litigated, it should be dismissed.

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Cheyenne's claims should be dismissed pursuant to the doctrine of claim preclusion. In 2008, the Nevada Supreme Court set forth a three -part test to be applied to determine when claim preclusion applies. *Five Star Capital Corp. v. Ruby,* 124 Nev. 1048, 1054–55, 194 P.3d 709, 713 (2008), holding modified by *Weddell v. Sharp*, 131 Nev. Adv. Op. 28, 350 P.3d 80 (2015) (the modification is not applicable to this case). According to the *Five Star* test, claim preclusion applies when: (1) the parties or their privies are the same; (2) the final judgment is valid; and (3) the new action is based on the same claims that were or could have been brought in the first action. Cheyenne's claims for personal injury in the instant (2018) suit clearly meet the *Five Star* factors for dismissal under the doctrine of claim preclusion.

First, the parties are the same. The only difference between the 2007 suit and the 2018 suits is that Cheyenne is now an adult, so her claims need not be litigated via a guardian ad litem.

Second, the final judgment is valid. There is no question that the Judgment issued in 2008 was valid until it expired in 2014. It could have been renewed, and, if so, would have still been valid today. However, it was not renewed. Cheyenne's (or rather her guardian ad litem's) failure to fully execute on the Judgment while it was valid does not open the door for her to re-litigate her claims.

Third, the same claims are involved in both actions. A review of the 2008 Complaint and the 2018 Complaint reveal that the personal injury claims are identical.

As the *Five Star* Court noted, public policy supports claims preclusion in situations such as this. The *Five Star* Court cited Restatement (Second) of Judgments section 19, comment (a), noting that "the purposes of claim preclusion are 'based largely on the ground that fairness to the defendant, and sound judicial administration, require that at some point litigation over the particular controversy come to an end' and that such reasoning may apply 'even though the substantive issues have not been tried . . .'" *Id.* at 1058, 194 P.3d at 715. These policy reasons are

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applicable here. Lewis is entitled to finality. A Judgment was already entered against him. Renewing the Judgment was not Lewis' responsibility – that was the responsibility of Cheyenne's guardian ad litem, James Nalder. Lewis should not be exposed to judgment being entered against him a second time due to Nalder's failure to act.

Cheyenne's personal injury claims are the very type to which claims preclusion applies. The public policy considerations supporting claims preclusion cited with approval by the Court in *Five Star* apply to this action. The claims for personal injuries alleged in the Complaint should be dismissed.

B. Plaintiff's Request for A Second Amended Judgment Should Be Dismissed Because it is not a Cause of Action

Regarding Cheyenne's request that the Court enter another amended judgment, adding interest accrued through April 3, 2018, it is unclear why this was included in a Complaint. Seeking to amend a judgment is not a cause of action. Cheyenne has demonstrated that she knows how to properly petition the Court to amend a judgment, as she has already done so once. This claim is inappropriately included in the Complaint, and should be dismissed.

C. Cheyenne's Request for Declaratory Relief Should Be Dismissed

Cheyenne does not ask for relief relative to enforcing an amended judgment, which is a cause of action. Rather, she asks the Court to declare that the statute of limitations on her original judgment was tolled because of she was a minor and because the judgment debtor lived in another State: California. Presumably, Plaintiff means the statute of limitations to enforce the judgment, but that is not clear.

Declaratory relief is only available if: "(1) a justiciable controversy exists between persons with adverse interests, (2) the party seeking declaratory relief has a legally protectable interest in the controversy, and (3) the issue is ripe for judicial determination." *Cty. of Clark, ex rel. Univ. Med. Ctr. v. Upchurch*, 114 Nev. 749, 752, 961 P.2d 754, 756 (1998), citing *Knittle v.*

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Progressive Casualty Ins. Co., 112 Nev. 8, 10, 908 P.2d 724, 725 (1996). Here, declaratory relief is not available because the issue as to whether the Amended Judgment or any future amended judgment is enforceable, or whether the statute of limitations has expired, is not ripe.

The conditions under where a justiciable controversy exists were addressed by the Nevada Supreme Court in *Kress v. Corey*, 65 Nev. 1, 189 P.2d 352 (1948), where the Court noted a justiciable controversy does not exist, where damage " . . . is merely apprehended or feared. . . " *Id.* at 28-29, 189 P.2d at 365. As the Court in *Doe v. Bryan*, 102 Nev. 523. 728 P.2d 443 (1986) noted, "'the requirement of an actual controversy has been construed as requiring a concrete dispute admitting of an immediate and definite determination of the parties' rights.'" *Id.* at 526, 728 P.2d at 444. Cheyenne's concern that any effort to enforce the Amended Judgment will be thwarted by a determination that the applicable statute of limitations bars such action is "apprehended or feared" but not existing presently, because she has not taken any action to enforce the Amended Judgment. Likewise, there is no "concrete dispute" that the statute of limitations would bar an attempt by Cheyenne to collect on the Amended Judgment because she has not tried. Unless and until Cheyenne actually tried to enforce the Amended Judgment, there is no "immediate" need for a "definite" determination of the parties' rights. Therefore, there is no justiciable controversy regarding Cheyenne's ability to seek to enforce the Amended Judgment at this time.

"'Ripeness focuses on the timing of the action rather than on the party bringing the action . . . The factors to be weighed in deciding whether a case is ripe for judicial review include: (1) the hardship to the parties of withholding judicial review, and (2) the suitability of the issues for review.'" *Herbst Gaming, Inc. v. Heller*, 122 Nev. 887, 887, 141 P.3d 1224, 1230-31 (2006)(alteration in original)(quoting *In re T.R.*, 119 Nev. 646, 651, 80 P.3d 1276, 1279 (2003)).

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Cheyenne could seek to have a court address her statute of limitations concerns in an action to execute on the Amended Judgment. There is no need for such a determination at this time.

Regardless as to whether Cheyenne's request for declaratory relief is appropriate at this juncture, Cheyenne's request for declaratory relief should be dismissed because there is no valid judgment to enforce. The original Judgment issued on June 3, 2008 expired on June 3, 2014. No effort to renew the Judgment was undertaken prior to its expiration. Cheyenne obtained an Amended Judgment, entered on March 28, 2018. As demonstrated in Defendant's Motion for Relief From Judgment Pursuant to NRCP 60, the Court should not have entered and Amended Judgment, and no other amended judgments should be entered. Nevada law does not permit renewal of expired judgments by amendment.

Nor is the deadline to file the appropriate documents to renew a judgment tolled by any statute or rule. The time limit to renew the Judgment was not tolled by Cheyenne's minority because her guardian ad litem, an adult, was the judgment creditor. The time limit to renew the Judgment was not tolled by the judgment creditor's absence from the state, because the requirement that a judgment be renewed is not a cause of action to which such tolling provisions might apply. Because no valid judgment exists, Cheyenne's request for declaratory relief regarding the tolling of the time to enforce a judgment should be dismissed as a matter of law.

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V.

CONCLUSION

In her 2018 Complaint, Plaintiff sets forth no facts which, if true, would entitle her to the relief she seeks. Her Complaint should be dismissed in its entirety.

DATED this 26th day of September, 2018.

RESNICK & LOUIS, P.C.

RANDALL TINDALL
Nevada Bar No. 6522
8925 W. Russell Rd., Ste. 220
Las Vegas, Nevada 89148
Attorneys for Defendant

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CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(a), E.D.C.R. 7.26(a), and Rule 9 of the N.E.F.C.R., I hereby certify that I am an employee of Resnick & Louis, P.C, and on the _____ day of September, 2018, a true and correct copy of the foregoing DEFENDANT'S MOTION TO DISMISS was served upon the following counsel of record as indicated below:

David A. Stephens, Esq. Stephens, Gourley & Bywater 3636 North Rancho Drive Las Vegas, Nevada 89130	____ Via First Class, U.S. Mail, Postage Prepaid ____ Via Facsimile ____ Via Hand-Delivery __X__ Via Electronic Service Pursuant to Rule 9 of the N.E.F.C.R. (Administrative Order 14-2)
Thomas Christensen, Esq. Christensen Law Firm 1000 S. Valley View Blvd. Las Vegas, Nevada 89107	____ Via First Class, U.S. Mail, Postage Prepaid ____ Via Facsimile ____ Via Hand-Delivery __X__ Via Electronic Service Pursuant to Rule 9 of the N.E.F.C.R. (Administrative Order 14-2)

Lyia M. Bell

An Employee of
Resnick & Louis, P.C.

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EXHIBIT "Q"

From : dstephens@sgblawfirm.com
To : mdouglas@awslawyers.com
Sent : 10/03/2018 8:46AM
Subject : RE: Nalder v Lewis; Case No. 07A549111

Matt,

Thanks for the change.

David A. Stephens, Esq.
Stephens Gourley & Bywater
3636 N. Rancho Drive
Las Vegas, NV 89130
Phone: (702) 656-2355
Facsimile: (702) 656-2776
mailto:dstephens@sgblawfirm.com

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From: Matthew Douglas [mailto:mdouglas@awslawyers.com]
Sent: Tuesday, October 02, 2018 5:55 PM
To: 'David Stephens'
Cc: Victoria Hall
Subject: RE: Nalder v Lewis; Case No. 07A549111

Mssr. Stephens-

I have revised the draft Order to reflect, in the pre-amble, that the Court noted there was "no opposition" in its minute order. The minute Order did not state no opposition was "filed", only that there was no opposition. So, it may be the Court did not consider a late filed Opposition.

Regardless, I assume this change will suffice as I believe it preserves the potential for the argument you indicate you may raise, below. I will be in Mediation tomorrow so, if there is still any issue I need to know this evening before 7 p.m. – otherwise this revised Order shall go to court tomorrow.

Thanks,

Matt Douglas

From: David Stephens [mailto:dstephens@sgblawfirm.com]
Sent: Tuesday, October 02, 2018 4:56 PM
To: Matthew Douglas <mdouglas@awslawyers.com>
Subject: RE: Nalder v Lewis; Case No. 07A549111

Dear Matt,

I would like the order to include a finding that the motion was unopposed. I did in fact file an opposition and I dropped it in the Judge□s box. Thus, if I decide to do a motion for rehearing, I would like the finding to reflect that the judge thought the motion was unopposed.

Thanks,

David A. Stephens, Esq.
Stephens Gourley & Bywater
3636 N. Rancho Drive
Las Vegas, NV 89130
Phone: (702) 656-2355
Facsimile: (702) 656-2776
mailto:dstephens@sgblawfirm.com

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From: Matthew Douglas [mailto:mdouglas@awslawyers.com]
Sent: Thursday, September 27, 2018 1:50 PM
To: David Stephens
Cc: Victoria Hall
Subject: Nalder v Lewis; Case No. 07A549111

Mssr. Stephens,

As you are probably aware, the court entered a minute order granting my client, UAIC, Motion to intervene in the above-titled action. *A copy of the minute order is attached hereto.*

Accordingly, I have also *attached a proposed Order on my Motion to Intervene*. Please kindly review and let me know if you have any issues or would like to discuss.

In any event, as I note the attached minute Order is dated 9/19/18, the order would be due to the court within 10 judicial days or, by 10/3/18. **As such, if I do not hear anything prior to close of business on 10/2/18 I will send the Order over, as is.**

Thanks,

Matthew J. Douglas
Partner
1117 South Rancho Drive
Las Vegas, NV 89102
PHONE (702) 243-7000 | FAX (702) 243-7059
mdouglas@awslawyers.com

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EXHIBIT "R"

From : dstephens@sgblawfirm.com
To : mdouglas@awslawyers.com
Sent : 10/03/2018 8:46AM
Subject : RE: Nalder v Lewis; Case No. A-18-772220-C

Matt,

Thanks,

David A. Stephens, Esq.
Stephens Gourley & Bywater
3636 N. Rancho Drive
Las Vegas, NV 89130
Phone: (702) 656-2355
Facsimile: (702) 656-2776
mailto:dstephens@sgblawfirm.com

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From: Matthew Douglas [mailto:mdouglas@awslawyers.com]
Sent: Tuesday, October 02, 2018 5:57 PM
To: 'David Stephens'; 'breen@breen.com'; 'Breen Arntz'
Cc: Victoria Hall
Subject: RE: Nalder v Lewis; Case No. A-18-772220-C

Mssr. Stephens-

Thank you for replying. No need to sign the Order at this point. Based on your response we will send the proposed order to Court tomorrow.

Thanks,

Matt Douglas

From: David Stephens [mailto:dstephens@sgblawfirm.com]
Sent: Tuesday, October 02, 2018 4:58 PM
To: Matthew Douglas <mdouglas@awslawyers.com>
Subject: RE: Nalder v Lewis; Case No. A-18-772220-C

Dear Matt,

I am less likely to file a motion for rehearing in this matter in that intervention in an ongoing case is harder to stop. Thus, I can sign off on this order.

Let me know how you would like me to get it to you.

Thanks,

David A. Stephens, Esq.
Stephens Gourley & Bywater
3636 N. Rancho Drive
Las Vegas, NV 89130
Phone: (702) 656-2355
Facsimile: (702) 656-2776
mailto:dstephens@sgblawfirm.com

From: Matthew Douglas [mailto:mdouglas@awslawyers.com]
Sent: Thursday, September 27, 2018 1:48 PM
To: David Stephens; 'Breen Arntz'; breen@breen.com
Cc: Victoria Hall
Subject: Nalder v Lewis; Case No. A-18-772220-C

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Mssr.□s Stephens & Arntz,

As you are probably aware, the court entered a minute order granting my client, UAIC, Motion to intervene in the above-titled action. *A copy of the minute order is attached hereto.*

Accordingly, I have also *attached a proposed Order on my Motion to Intervene*. Please kindly review and let me know if you have any issues or would like to discuss.

In any event, as I note the attached minute Order is dated 9/19/18, the order would be due to the court within 10 judicial days or, by 10/3/18. **As such, if I do not hear anything prior to close of business on 10/2/18 I will send the Order over, as is.**

Thanks,

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Matthew J. Douglas
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EXHIBIT "S"

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Electronically Filed
10/19/2018 12:06 PM
Steven D. Grierson
CLERK OF THE COURT

MATTHEW J. DOUGLAS
Nevada Bar No. 11371
ATKIN WINNER & SHERROD
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Facsimile (702) 243-7059
mdouglas@awslawyers.com
Attorneys for Intervenor United Automobile Ins. Co.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES NALDER,

Plaintiff,

vs.

GARY LEWIS and DOES I through V, inclusive,

Defendants.

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

NOTICE OF ENTRY OF ORDER ON INTERVENOR UNITED AUTOMOBILE INSURANCE COMPANY'S MOTION TO INTERVENE

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

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

DATED this 19th day of October, 2018.

ATKIN WINNER & SHERROD

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

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CERTIFICATE OF SERVICE

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

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

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

An employee of ATKIN WINNER & SHERROD

ATKIN WINNER & SHERROD LTD
A NEVADA LAW FIRM

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Electronically Filed
10/19/2018 9:52 AM
Steven D. Grierson
CLERK OF THE COURT

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Facsimile (702) 243-7059
mdouglas@awslawyers.com

Attorneys for Intervenor United Automobile Insurance Company

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

~~CHEYANNE~~ James NALDER,

Plaintiff,

vs.

GARY LEWIS and DOES I through V, inclusive,

Defendants.

CASE NO.: 07A549111
DEPT. NO.: 29

ORDER

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

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

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

DATED this 11 day of October 2018

DISTRICT COURT JUDGE

Submitted by:

ATKIN WINNER & SHERROD

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

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10/19/2018 12:35 PM
Steven D. Grierson
CLERK OF THE COURT

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

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYANNE NALDER,

Plaintiff,

vs.

GARY LEWIS and DOES I through V, inclusive,

Defendants.

CASE NO.: A-18-772220-C
DEPT. NO.: XXIX

NOTICE OF ENTRY OF ORDER ON INTERVENOR UNITED AUTOMOBILE INSURANCE COMPANY'S MOTION TO INTERVENE

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

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

DATED this 19th day of October, 2018.

ATKIN WINNER & SHERROD

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

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CERTIFICATE OF SERVICE

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

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

Randall Tindall, Esq.
Carissa Christensen, Esq.
RESNICK & LOUIS, P.C.
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Breen Arntz, Esq.
5545 S. Mountain Vista St. Suite F
Las Vegas, NV 89120

An employee of ATKIN WINNER & SHERROD

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10/19/2018 9:55 AM
Steven D. Grierson
CLERK OF THE COURT

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Facsimile (702) 243-7059
mdouglas@awslawyers.com

Attorneys for Intervenor United Automobile Insurance Company

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

ORDER

Intervenor UNITED AUTOMOBILE INSURANCE COMPANY'S Motion to Intervene came on for hearing on the Chambers Calendar before the Honorable Judge David Jones, on September 19, 2018, and upon review of and consideration of the proceedings and circumstances of this matter, the papers and pleadings on file, and for good cause appearing,

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Case Number: A-18-772220-C

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

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

DATED this 11 day of October 2018

DISTRICT COURT JUDGE

Submitted by:

ATKIN WINNER & SHERROD

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

ATKIN WINNER & SHERROD LTD
A NEVADA LAW FIRM

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EXHIBIT "U"

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DISTRICT COURT

CLARK COUNTY, NEVADA

Cheyenne Nalder Plaintiff, vs. Gary Lewis, Defendant.	CASE NO. A-18-772220-C DEPT NO. XXIX
United Automobile Insurance Company, Intervenor,	
Gary Lewis, Third Party Plaintiff, vs. United Automobile Insurance Company, Randall Tindall, Esq. and Resnick & Louis, P.C, and DOES I through V, Third Party Defendants.	

THIRD PARTY COMPLAINT

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

Case Number: A-18-772220-C

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

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

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

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

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

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

6. This incident occurred on private property.

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

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

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

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

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

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

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

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

15. UAIC never filed a declaratory relief action.

16. UAIC rejected Nalder's offer.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

82. Gary Lewis filed a bar complaint against Tindall, but State Actors Daniel Hooge and Phil Pattee dismissed the complaint claiming they do not enforce the ethical rules if there is litigation pending.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Unreasonable conduct in investigating the loss;

b. Unreasonable failure to affirm or deny coverage for the loss;

c. Unreasonable delay in making payment on the loss;

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

e. Unreasonably compelling Gary Lewis to retain an attorney before affording coverage or making payment on the loss;

f. Failing to defend Gary Lewis;

g. Fraudulent and frivolous litigation tactics;

h. Filing false and fraudulent pleadings;

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

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

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

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

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

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

a. Unreasonable conduct in investigating the loss;

b. Unreasonable failure to affirm or deny coverage for the loss;

c. Unreasonable delay in making payment on the loss;

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

e. Unreasonably compelling Gary Lewis to retain an attorney before affording coverage or making payment on the loss;

f. Failing to defend Gary Lewis;

g. Fraudulent and frivolous litigation tactics;

h. Filing false and fraudulent pleadings;

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

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

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

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

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

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

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

a. Unreasonable conduct in investigating the loss;

b. Unreasonable failure to affirm or deny coverage for the loss;

c. Unreasonable delay in making payment on the loss;

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

e. Unreasonably compelling Gary Lewis to retain an attorney before affording coverage or making payment on the loss;

f. Failing to defend Gary Lewis;

g. Fraudulent and frivolous litigation tactics;

h. Filing false and fraudulent pleadings;

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

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

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

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

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

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

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

a. Unreasonable conduct in investigating the loss;

b. Unreasonable failure to affirm or deny coverage for the loss;

c. Unreasonable delay in making payment on the loss;

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

e. Unreasonably compelling Gary Lewis to retain an attorney before affording coverage or making payment on the loss;

f. Failing to defend Gary Lewis;

g. Fraudulent and frivolous litigation tactics;

h. Filing false and fraudulent pleadings;

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

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

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

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

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

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

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

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

a. Unreasonable conduct in investigating the loss;

b. Unreasonable failure to affirm or deny coverage for the loss;

c. Unreasonable delay in making payment on the loss;

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

e. Unreasonably compelling Gary Lewis to retain an attorney before affording coverage or making payment on the loss;

f. Failing to defend Gary Lewis;

g. Fraudulent and frivolous litigation tactics;

h. Filing false and fraudulent pleadings;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Attorney's fees; and

6. Costs of suit;

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

DATED THIS 24 day of October, 2018.

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CERTIFICATE OF SERVICE

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

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

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EXHIBIT "V"

OPPS

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

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

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

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

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

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POINTS AND AUTHORITIES

I. OPPOSITION TO UAIC'S MOTION

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

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

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

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

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

C. Claim Preclusion does NOT Apply

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. CLAIMS HANDLING LITIGATION

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

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

000914

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

The *Crisci* Court recognized that the insured's expectation of protection provides a basis for imposing strict liability in failure to settle cases because it will always be in the insured's best interest to settle within the policy limits when there is any danger, however slight, of a judgment above those limits. Crisci v. Security Insurance Company of New Haven, Conn. 426 P.2d 173, 66 Cal.2d 425, 58 Cal. Rptr. 13, (1967). And that there is more than a small amount of elementary justice in a rule that would require that, in this situation, where the insurer's and insured's interests necessarily conflict, the insurer, which may reap the benefits of its determination not to settle, should also suffer the detriments of its decision. *Id.*

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

> Can you honestly imagine a situation where an insurance company fails to settle within the policy limits, the policyholder gets stuck with an excess judgment, and this court *does not* require the insurance company to indemnify the policy holder? That will happen the same day the sun rises in the West! As far as I am concerned, even if the insurance company is run by angels, archangels, cherubim and seraphim, and the entire heavenly host sing of due diligence and reasonable care, I will *never*, under any circumstances, vote that a policyholder instead of an insurer pays the excess judgment when it was possible to settle a case within the coverage limits.

> When I buy insurance, I buy protection from untoward events. I do not object to an insurance company's vigorous defense of a claim, including going to jury trial and exhausting every appeal. Furthermore, as a policyholder, I will diligently assist my insurer to vindicate its rights and protect its reserves. However, I draw the line when the insurer decides that in the process of protecting its reserves, it will play "you bet *my* house." The insurance company can bet as much of its own money as it wants, and it can bet its own money at any odds that it wants, but it cannot bet one single penny of my money even when the odds are ten million to one in its favor!

Id. at 780.

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

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

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

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

000916

will bring particular harm to the insured. *Id., citing* Restatement (Second) of Torts Section 8A, comment B (1956).

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

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

Nevada has also established similar standards that apply in other types of failure to act in good faith situations. In *Pemberton v. Farmers Insurance Exchange*, 109 Nev. 789, 858 P.2d 380 (1993), the Nevada Supreme Court established standards to apply when an action is brought related to the lack or good faith in the denial of first-party benefits under uninsured or

000917

underinsured coverage. There, the court noted that numerous appellate court decisions affirm that an insurer's failure to deal fairly and in good faith with an insured's UM claim is actionable. *Id.* at 794 (citations omitted) The *Pemberton* Court ultimately held that an insured may institute an action for breach of the duty of good faith and fair dealing against his or her own insurer once the insured has established "legal entitlement" and conduct not based on reason and logic by the insurer concerning its obligations to the insureds. *Id.* at 797.

Perhaps most instructional in Nevada, however, on the standard to be applied when dealing with negative effects resulting from an insurer's failure to settle a claim is *Landow v. Medical Ins. Exchange*, 892 F.Supp. 239 (D.Nev. 1995). The Court's ruling is enlightening because although it does not involve a verdict above the policy limit, it does involve a first-party insured bringing a claim for stress and damage to his reputation related to ongoing litigation that could have exposed him to a verdict but was concluded prior to a verdict. The underlying plaintiffs in *Landow* sought damages above Landow's policy limit after previously offering to settle for that limit. Landow requested that his insurance company pay the limit and accept the plaintiff's offer to end the case, but the insurance company refused and forced litigation. The *Landow* Court, following the rationale of California courts in above limit verdict situations accepted that, "the litmus test ... is whether the insurer, in determining whether to settle a claim, gave as much consideration to the welfare of its insured as it gave to its own interests," citing, *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d. 809, 818, 169 Cal.Rptr. 691, 620 P.2d 141 (1979). Ultimately, the Landow Court decided that the insurer has a duty to consider injury to the insured, such as emotional distress and injury to business goodwill that proximately flow from its failure to settle. *Id.* at 241.

III. LEWIS' COUNTERMOTION FOR SUMMARY JUDGMENT

Pursuant to N.R.C.P. 56, Gary Lewis moves this Honorable Court for summary judgment as to liability and the minimum damages, for a finding that UAIC has breached its duty of good faith

000918

and fair dealing and is liable for the damages which were proximately caused by UAIC's breach, on the basis that the pleadings and documents on file show there is no genuine issue as to any material of fact and that Gary Lewis is entitled to judgment as a matter of law on this issue.

A. Standard for Granting Summary Judgment

Summary judgment is appropriate when a review of the record in the light most favorable to the nonmoving party reveals no genuine issues of material fact and judgment is warranted as a matter of law. *Butler v. Bogdanovich,* 101 Nev. 449, 451 (1985). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, admissions and affidavits on file, show there exists no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Bird v. Casa Royale*, 97 Nev. 67, 624 P.2d 17 (1981); *Montgomery v. Ponderosa Construction, Inc.*, 101 Nev. 416, 705 P.2d 652 (1985). Additionally, "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Wood v. Safeway*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005). As such, "The nonmoving party must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Id,* citing *Bulbman Inc. v. Nevada Bell*, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992). Finally, N.R.C.P. Rule 56(c) states Summary Judgment "may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

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

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

No reasonable interpretation of the facts could be construed by a finder of fact as placing liability anywhere but on UAIC for any judgment against Lewis in this case. In order to gain

intervention UAIC admitted: "As long as UAIC is obligated to ... pay any judgment against LEWIS, UAIC's interests are clearly at stake in this action." Based on this admission alone, Lewis is entitled to judgment against UAIC. It must pay any judgment Nalder obtains against Lewis.

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

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

Randall Tindall, Esq. now claims to be representing Gary Lewis based on a right that arises from that same policy of insurance. The same policy that UAIC breached in 2007. UAIC has already exhausted its policy limits because it paid the full policy amount (after the adverse finding from the Court). Although UAIC admits in this action that it will be liable for any

000920

judgment entered against Mr. Lewis, it has not paid anything over the $15,000 policy limit it was ordered to pay by the Federal District Court. It has not pursued negotiations to relieve Lewis of the judgment. It has not investigated ways to relieve Lewis of the judgment. These actions are a breach of the duty of good faith and fair dealing. See *Allstate Insurance Co. v. Miller*, 125 Nev. 300, 212 P.3d 318 (2009)

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

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

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forward and will probably result in an **increased judgment against Mr. Lewis** because of the conspiracy and actions taken by Mr. Tindall and UAIC.

UAIC argued that the issue is before the Nevada Supreme Court. This is also a falsehood. The issue before the Nevada Supreme Court is UAIC's responsibility for the judgment, not Gary Lewis'. UAIC and its co-conspirator in this action, Mr. Tindall, have made false claims to gain intervention and then filed fraudulent and frivolous pleadings that increase the cost of litigation. In fact, these are only a ruse designed to have the Court distracted from the very simple issue in the case at bar: whether the 2008 judgment is valid.

It is clear under *Mandelbaum* that the judgment is valid. (See Exhibit 1.) No contrary case law exists. The "defense" by UAIC and/or its co-conspirator, Mr. Tindall, is frivolous and the risk is all Mr. Lewis'. He will end up with an even larger judgment and has already incurred attorney fees that, so far, UAIC refuses to pay. Failure to pay for Cumis counsel is a breach of the duty of good faith and fair dealing. See *State Farm Mut. Auto. Ins. Co. v. Hansen*, 357 P.3d 338 (Nev. 2015) "Nevada law requires an insurer to provide independent counsel for its insured when a conflict of interest arises between the insurer and the insured." Lewis brought this action against UAIC so that whatever the outcome of Nalder's 2018 action against Lewis, responsibility will be shifted from Mr. Lewis to UAIC. Mr. Lewis complaint against UAIC seeks indemnity from UAIC for any judgment entered in the Nalder action. In order to gain intervention in this action, UAIC admitted: "As long as UAIC is obligated to … pay any judgment against LEWIS, UAIC's interests are clearly at stake in this action." Lewis is entitled to judgment against UAIC that they must pay any judgment Nalder obtains against Lewis.

Additionally, UAIC states "Mr. Tom Christensen, Counsel for Plaintiff, who claimed to represent Mr. Lewis (through assignment) and refused retained counsel from speaking with Mr. Lewis." Again, this is not factual. Mr. Lewis has requested that contact and communication be

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made through his attorney, Thomas Christensen, who is representing him against UAIC. This is because Mr. Lewis understands that Mr. Tindall has a conflict because he represents both Mr. Lewis and UAIC and their interests are not aligned. Mr. Lewis has now sued Mr. Tindall once and UAIC twice. Mr. Lewis has not waived that conflict. The disregarding of the requests by the insured for communication through his attorney is yet another new breach of the covenant of good faith and fair dealing. See *Powers v. USAA,* 114 Nev. 690, 962 P.2d 596 (1998) (USAA disregarded reasonable request by the insured and harrassed the insured)

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

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

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

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

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

UAIC refuses to provide Cumis counsel for Mr. Lewis and makes false allegations against Mr. Lewis' counsel. E. Breen Arntz was retained by Lewis when Mr. Rogers was hired by UAIC. Mr. Lewis asked that UAIC pay Mr. Arntz pursuant to CUMIS. Mr. Tindall was retained after Mr. Rogers and Mr. Arntz. Prior to UAIC hiring Tindall, Mr. Lewis asked UAIC that if other counsel was retained, that they contact him through his attorney in his claim against UAIC, Mr. Christensen. David Stephens is the only counsel who has represented Cheyenne Nalder in this case. He was retained after Cheyenne Nalder reached majority. Mr. Christensen represents

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neither Gary Lewis as a defendant nor Cheyenne Nalder as the plaintiff in the instant case. Failure to retain or listen to Cumis counsel is a new breach of the duty of good faith and fair dealing. See *Powers v. USAA,* 114 Nev. 690, 962 P.2d 596 (1998).

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

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

CONCLUSION

UAIC's motion to dismiss should be denied. Partial summary judgment should issue in favor of Lewis and against UAIC for breach of the covenant of good faith and fair dealing, and fraud, with a finding that the minimum damages are the amount of any judgment entered in this

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case against Lewis together with attorney fees and costs. The only issues left for trial would be additional compensatory damages and punitive damages.

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CERTIFICATE OF SERVICE

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

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

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

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EXHIBIT 1

No. 1514.
Supreme Court of Nevada

Mandlebaum v. Gregovich

50 P. 849 (Nev. 1897)

Decided October 1st, 1897

The facts sufficiently appear in the opinion.

By the Court, MASSEY, J.:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The judgment will therefore be affirmed.

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EXHIBIT 2

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

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

v.

UNITED AUTOMOBILE INSURANCE COMPANY,
Respondent.

RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF TO SECOND CERTIFIED QUESTION

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

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ARGUMENT

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

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

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

EXHIBIT 3

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DISTRICT COURT

CLARK COUNTY, NEVADA

Cheyenne Nalder Plaintiff, vs. Gary Lewis, Defendant.	CASE NO. A-18-772220-C DEPT NO. XIX
United Automobile Insurance Company, Intervenor,	
Gary Lewis, Third Party Plaintiff, vs. United Automobile Insurance Company, Randall Tindall, Esq. and Resnick & Louis, P.C, and DOES I through V, Third Party Defendants.	

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

AFFIDAVIT OF GARY LEWIS

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

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

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

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

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

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

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

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

8. This incident occurred on private property.

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

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

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

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

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

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

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

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

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

18. UAIC never filed a declaratory relief action.

19. UAIC rejected Nalder's offer.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FURTHER AFFIANT SAYETH NAUGHT.

GARY LEWIS

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

Notary Public in and for said County and State.

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

EXHIBIT "W"

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 70504

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

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

Argued and Submitted January 6, 2016
San Francisco, California

Filed December 27, 2017

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

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

18-01192

SUMMARY**

Certified Question to Nevada Supreme Court

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

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

ORDER

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

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

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

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

I

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

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

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

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

II

The question of law to be answered is:

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

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

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

III

A

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

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

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

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

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

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

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

B

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

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

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

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

IV

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

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

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

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

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

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

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

V

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

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

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

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

IT IS SO ORDERED.

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

Diarmuid F. O'Scannlain
Circuit Judge

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EXHIBIT "X"

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES NALDER, GUARDIAN AD LITEM ON BEHALF OF CHEYANNE NALDER; AND GARY LEWIS, INDIVIDUALLY,
Appellants,
vs.
UNITED AUTOMOBILE INSURANCE COMPANY,
Respondent.

No. 70504

FILED

FEB 23 2018

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

ORDER ACCEPTING SECOND CERTIFIED QUESTION AND DIRECTING SUPPLEMENTAL BRIEFING

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

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

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

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

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

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

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

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

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

It is so ORDERED.[1]

Douglas, C.J.

Cherry, J.

Gibbons, J.

Pickering, J.

Hardesty, J.

Stiglich, J.

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

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

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

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EXHIBIT "Y"

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

UNITED STATES DISTRICT COURT

DISTRICT OF Nevada

Nalder et al.,

Plaintiffs,

V.

United Automobile Insurance Company,

Defendant.

JUDGMENT IN A CIVIL CASE

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

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

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

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

IT IS ORDERED AND ADJUDGED

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

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

October 30, 2013
Date

/s/ Lance S. Wilson
Clerk

/s/ Summer Rivera
(By) Deputy Clerk

19

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES NALDER,

Plaintiff,

vs.

GARY LEWIS and DOES I through V, inclusive,

Defendants,

UNITED AUTOMOBILE INSURANCE COMPANY,

Intervenor.

CASE NO.: 07A549111
DEPT. NO.: 20

Consolidated with
CASE NO.: A-18-772220-C
DEPT. NO.: 20.

UAIC'S REPLY IN SUPPORT OF ITS MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO NRCP 60

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

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

DATED this 2nd day of JANUARY, 2019.

ATKIN WINNER & SHERROD

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Attorneys for Intervenor UAIC

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

At the outset, UAIC would like to point out to the Court two important issues in reply to Plaintiff's Opposition to this Motion. First, *despite 17 pages of argument*, nowhere in Plaintiff's Opposition does she dare suggest the original judgment herein, filed June 3, 2008, was ever timely renewed pursuant to N.R.S. 17.214. Accordingly, it is uncontroverted the judgment entered June 3, 2008 was not timely renewed per statute and, thus, expired. (See *Exhibit B to UAIC initial Motion).* The second issue is, despite Plaintiff's multitude of "kitchen sink" type arguments to try and "fix" this clear expiration of judgment, none of her arguments overcomes this clear fact.

Plaintiff's main arguments[1] to try and overcome her expired judgment are essentially these: (1) The judgment was tolled by 2 statutes of limitations relating to Plaintiff's minority and/or Lewis' residence out of state; (2) Plaintiff complied with the N.R.S. 17.214 by filing an action against UAIC; (3) that the judgment was tolled by UAIC's payment of policy limits in

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2015 in regard to the Federal Court's judgment in the case filed against UAIC.

The fact that Cheyanne was a minor when the cause of action giving rise to the default judgment accrued does not serve to extend or toll the deadline to renew the default judgment because the default judgment was not issued to Cheyanne, but rather Mr. Nalder, who was not a minor at the time the default judgment expired and so did not have a legal disability that would toll the six-year statute of limitations to renew the default judgment.

Additionally, Mr. Lewis' alleged absence from the State of Nevada also did not serve to toll the deadline for renewal of the default judgment under NRS 11.300 because renewal of a judgment is not a separate cause of action. Moreover, Mr. Lewis' alleged absence from the State of Nevada did not impede Mr. Nalder from attempting to either execute the default judgment, comply with the requirements for renewal under NRS 17.214, or bring an action on the judgment against Mr. Lewis because Mr. Nalder and his counsel Mr. Christensen (who, notably, also represents Mr. Lewis in the underlying proceedings and other related proceedings) were well aware of Mr. Lewis' location in California and assuredly would have had no difficulty serving Mr. Lewis with process in California. NRS 11.300 does not apply when the absent defendant is otherwise subject to service of process.

Next, the underlying action Plaintiff filed against UAIC (now on appeal) was not an action to collect on the default judgment because UAIC was not a judgment debtor thereon. In fact, prior to commencing the Federal Court action against UAIC (on appeal), Plaintiff did not hold any judgment against UAIC on which they could bring an action. Instead, Plaintiff sought to have a judgment entered against UAIC for the first time in the action on appeal. The default judgment *in this matter* instead served merely as evidence for Plaintiff's claims of damage allegedly caused by UAIC's breach of the duty to defend. And in order to continue to serve as

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[1] UAIC acknowledges Plaintiff makes other arguments and, UAIC will reply to each, but UAIC believes those other arguments do not deserve mention here.

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evidence for their consequential damages claim, this default judgment had to remain valid and enforceable, which required that the judgment be renewed pursuant to the requirements of NRS 17.214 or, alternatively, required Mr. Nalder to bring an action on the judgment against Mr. Lewis—neither of which were done by Plaintiff.

Finally, UAIC's satisfaction of the judgment (in the case on appeal) could not serve to extend the life of the 2008 default judgment – which had been previously entered in a wholly separate proceeding of which UAIC was not even a party.

II.

RESPONSE TO PLAINTIFF's "FACTS" SECTIONS

For her Opposition, Plaintiff Nalder refers to some of the pertinent facts in regard to the Motion at bar, but also adds in completely extraneous facts (*e.g.* claims handling) and resorts to pure argument to support her untenable position in regard to the expired judgment and, regarding her subsequent filed action, Case no. A-18-772220-C (which is not even relevant to this Motion and, is itself the subject of a separate Motion to dismiss before this Court). Accordingly, UAIC must respond to these, herein.

First, on *page 3 of her brief, lines 10-23*, Plaintiff attempts to explain her position in "amending" this expired judgment by suggesting her "intent", in amending the judgment, was "irrespective of [the judgment's] enforceability against UAIC." Besides being conclusory argument, this statement is an admission by Plaintiff that she knew full well her action in amending the judgment was an attempt to litigate issues already before the Nevada Supreme Court.[2] That is, by claiming the amended judgment was sought "irrespective" of the original judgment's enforceability against UAIC, *Plaintiff is admitting that she knew the issue of the*

[2] Although the Court is likely aware, UAIC notes that Plaintiff filed an action, via assignment of Lewis' claims, against UAIC which has been pending in the Federal District court, U.S. Court of Appeals for the Ninth Circuit and, now, the Nevada Supreme Court **for nearly 10 years**. A sufficient history of this case is attached hereto in to Order Certifying the 2nd certified question to the Nevada Supreme Court

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enforceability of the judgment was on appeal. Moreover, Plaintiff's statement that she merely amended the judgment to "get it in her own name" is a red-herring. She had already sued UAIC, with an assignment on the judgment, through her guardian ad litem (her father) and, as such, same guardian could take any other enforcement actions she needed in regard in regard to the judgment so, the "need" to put the judgment in her name is irrelevant. In short, it must be seen for what it was – *an attempt to resuscitate an expired judgment*. Similarly, her claims that she needed to suddenly institute a new action against Lewis in California is pure fancy. Plaintiff's own counsel in the Appellate matter against UAIC (Thomas Christensen) also, represents Lewis, on his third-party Complaint[3], in the case consolidated with this one, Case No. A-18-772220-C, and has answered discovery on his behalf citing his California address as far back as 2010.[4] Indeed, in his final supplemental disclosures, pursuant to F.R.C.P. 26, in the Federal Court action (on appeal), Mr. Christensen disclosed *his offices as the contact for Gary Lewis.*[5] Accordingly, as Plaintiff's own counsel was the contact for Lewis, was representing him and knew his California address since at least 2010 - nothing prevented Plaintiff from executing on the judgment in any way she saw fit against Lewis in California at any time and, thus, this argument is also a red herring.

Next, *on page 4, lines 4-28*, of the fact section of the opposition, Plaintiff launches into full argument by noting her 3 claims as to why her new action, consolidated herein, under Case No. A-18-772220-C, is not precluded by the prior action on appeal. First, each such "argument" is circular in nature or, just plain incorrect. Regardless, the fact is these arguments are absolutely

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and, the Nevada Supreme Court's Order accepting same certified question. See Order of Ninth Circuit and Nevada Supreme Court, attached hereto as Exhibits 'E' & 'F', respectively.

[3] See *Copy of Lewis' 3rd Party Complaint filed by Thomas Christensen, attached hereto as Exhibit 'G.'*

[4] See *Copy of Lewis' Answers to interrogatories in the Federal Court action attached hereto as Exhibit 'H.'*

[5] See *Copy of NAlder & Lewis' 12th supplement to FRCP 26 disclosures, attached hereto as Exhibit 'I.'*

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irrelevant to the Motion at bar and, instead relate to the consolidated action and a separate Motion to dismiss filed by UAIC and, thus, should be disregarded by the Court.

On *page 5, lines 1-11*, Plaintiff makes the completely incorrect argument that UAIC's "motivation" here is "not in good faith" as it is "to avoid paying damages arising from claims handling failures" in regard to the original judgment entered herein. First, two Federal District Court judges have already ruled UAIC **did not act in bad faith** in regard to the original judgment entered herein. Indeed, the judgment order in the case on Appeal specifically granted summary judgment in UAIC's favor on all extra-contractual claims for "bad faith."[6] Although that order is technically on appeal – the only issues that remain are (1) whether the original judgment here is expired; and, (2) if the judgment is not expired can Plaintiff recover the default judgment as a consequential damage. Regardless, the fact is that judgment order in the case on appeal also found UAIC has/had a duty to defend Lewis in regard to the July 2007 loss underlying this action. Accordingly, by intervening here and advancing a motion to vacate an improper attempt to amend an expired judgment against its insured – UAIC's actions must be found to be in "good faith" by trying to relieve its insured of same.

Finally, *at pps. 5-8*, Plaintiff's lengthy history of 'claims handling' is irrelevant to the issues in this motion, but moreover, show an attempt to re-litigate these issues that have already been decided in the original case. See *Exhibit 'E' & 'F', hereto.* It would appear Plaintiff states same in attempt to argue issues already before the Nevada Supreme Court. Regardless, not only are these arguments incorrect, but they also serve to underscore the inappropriateness of this argument as these issues are before the Nevada Supreme Court. *Id.* Moreover, Plaintiff's argument concerning the sufficiency of the proof made by UAIC to show the original judgment expired – **but makes no showing that she (or her Guardian Ad Litem) did comply with N.R.S. 17.124**. The reason for this is simple, Plaintiff did not comply and the judgment expired

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and this argument must be ignored as irrelevant to the Motion at bar.

III.

ARGUMENT

For her Opposition, Plaintiff incorrectly argues that UAIC has only moved for this court to vacate the judgment under N.R.C.P. 60(b)(3), for the judgment being "void." First, as can be seen from the initial Motion, UAIC has actually argued this Court can relieve a party from this amended judgment due to mistake, under NRCP 60(b)(1) or, because a judgment is void under NRCP 60(b)(4). UAIC continues to argue that both of these provisions apply. Moreover, Plaintiff's suggestion that UAIC provides no support that the judgment is void "unless they are arguing its expired" is confusing – *as that is exactly what UAIC has argued* – **that her original judgment was void and could not be amended.**

Further, as can be seen, N.R.C.P. 60(b)(3) *actually relates to the Court's power to relieve a party from judgment due to fraud (whether intrinsic or extrinsic).*[7] Accordingly, this appears to be an interesting Freudian slip by Plaintiff as UAIC argued has noted in other briefs before this court – it believes this Court can find such fraud here given other information that has come to light. As such, N.R.C.P. 60(b)(3) gives this Court another basis to set aside this amended judgment. Further, as also argued by UAIC in other briefs herein, District Courts have the inherent power to set aside judgments procured by extrinsic fraud. *Lauer v District Court,* 62 Nev. 78, 140 P.2d 953.

In short, UAIC believes all of the above noted basis under Rule 60 or, the *Lauer* case, offer ample grounds for this Court to vacate the amended judgment as will be discussed below. Moreover, none of Plaintiff's arguments in opposition to this Motion prevent such action by the Court and, thus, the Motion should be granted and the 2018 "Amended judgment", herein,

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[6] See *Copy of 10/30/13 Judgment Order in the Federal Action, attached hereto as Exhibit 'J.'*

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should be vacated.

The district court has wide discretion in such matters and, barring an abuse of discretion, its determination will not be disturbed. *Union Petrochemical Corp. v. Scott*, 96 Nev. 337, 609 P.2d 323 (1980). While equitable relief from a judgment is generally given only to the parties to the action or those in privity, relief may be granted to one who is not a party to the judgment if he demonstrates that he is directly injured or jeopardized by the judgment. *Pickett v. Comanche Constr., Inc.*, 108 Nev. 422, 836 P.2d 42 (1992). Given the issues on appeal, UAIC pleads it will be directly injured here should this court not set aside this amended judgment.

A. The Court made an Error of Law, Likely Based on Mistake of Fact, When it Granted the Ex Parte Motion to Amend Judgment or, Alternatively, the Judgment was Void as it has Expired or, Further in the Alternative, the Judgment was based upon a Fraud and, thus, the Amended Judgment should be Set Aside.

NRCP 60(b) allows this Court to relieve a party from a final judgment due to mistake {NRCP 60(b)(1)} or, due to fraud {NRCP 60(b)(3)} or, because a judgment is void {NRCP 60(b)(4)}. UAIC believes all 3 of these provisions apply and, ask this Court to relieve Lewis of this amended Judgment and/or vacate same amended judgment entered March 28, 2018. *Exhibit D to the Initial Motion.*

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

It must be noted that, in her Opposition, Plaintiff completely failed to address this basis to grant the Motion and, thus, this Court can assume Plaintiff has no response to this argument and, grant the Motion.

As noted in the original Motion, because the Motion to amend this judgment was done *Ex Parte*, it was not served on Lewis or UAIC nor did Lewis or Plaintiff inform UAIC. Accordingly, UAIC (on its own or, on behalf of Lewis) did not have an opportunity to make the Court aware that the Judgment had already expired on its own terms, and that Cheyenne's

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[7] It appears this error may stem from the Court relying on the sub-parts to Rule 60 as they existed

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position that the deadline to renew the judgment was tolled was inapt. Furthermore, the *Ex Parte* Motion did not advise the Court that the Judgment had expired in 2014 and had not been properly renewed. Moreover, the Plaintiff failed to advise this Court that these very issues were on appeal before the Nevada Supreme Court. UAIC contends that, had the court been fully apprised of these facts, it likely would not have granted the *Ex Parte* Motion.

As such, UAIC asks this Court to rectify the mistake and void the Amended Judgment in accordance with NRCP 60(b)(1).

2. *The Amended Judgment is void.*

As is clearly demonstrated in the Initial Motion, the original 2008 Judgment expired and, it was not renewed. Accordingly, there is simply no legal or equitable basis for the Court to revive it. The six-month deadline does not apply to requests for relief from a judgment because the judgment is void. Therefore, the instant motion is clearly timely. The Amended Judgment is void as based on an expired original judgment and, pursuant to NRCP 60(b)(4), this Court should declare it void and unenforceable.

The case Plaintiff relies on, *Misty Mgmt. Corp. v. First Judicial Dist. Court,* 83 Nev. 180, 426 P.2d 728 (1967), supports UAIC's argument. As stated by Plaintiff, the Court there held this provision is invoked when the court that entered the judgment was "disqualified from acting." Here, UAIC has put forth a demonstration that the original 2008 judgment expired and was not timely renewed. Plaintiff does not dispute this fact (rather, she makes tolling arguments which will be addressed below). Accordingly, as the original judgment expired in 2014, the original judgment was void when Plaintiff filed her *Ex parte* Motion for the "amended Judgment." As the judgment Plaintiff sought to amend was void, the Court here was 'disqualified from acting."

As such, UAIC argues this Court can vacate the Amended judgment as it was based upon

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in 1967, when the *Misty Mgmt. Corp.* case they rely on was published.

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a void original judgment pursuant to N.R.C.P.(b)(4).[8]

3. The Amended Judgment is based upon a fraud upon the Court.

Additionally, UAIC argues that the circumstances set forth above also offer grounds for this Court to hold a hearing on attempt to perpetrate a fraud upon the court and, thus vacate the amended judgment under N.R.C.P. 60(b)(3). Specifically, the clear conflict of interest by Plaintiff's counsel and, the evidence of collusion. This is based on new facts which were not all known at the time this Motion was initially filed.

As noted above, Plaintiff is represented by Mr. Christensen in the matter against UAIC now on appeal. Mr. Christensen also purports to be counsel for Lewis and has informed UAIC's first retained counsel for Lewis that he may not appear and attempt to vacate this judgment. See *Correspondence and emails from Tom Christensen to Steve Rogers, Esq., attached hereto as Exhibit 'K.'* Then, after counsel retained by UAIC for Lewis files a Motion for Relief from this 'amended judgment', Counsel secured by Mr. Christensen for Lewis, Mr. Arntz[9], files a Motion to Strike claiming Lewis does not want this multi-million dollar judgment vacated. So, per Plaintiff, UAIC's retained defense counsel cannot move to vacate this amended judgment and her counsel has actively interfered with UAIC's duty to defend its insured and vacate the amended judgment – *all for the sole benefit of Plaintiff and her counsel*. This is clearly an attempt at a fraud upon the court solely to benefit Plaintiff and her counsel - and same should not

[8] It must be noted that, should Plaintiff argue UAIC cannot seek to vacate the Judgment as it is the insurance carrier, UAIC would point out that, besides other reasons to allow same (*e.g.* fraud upon the Court and direct injury to UAIC) it is also true that the case Plaintiff may rely on, *Lopez v Merit,* only noted that a carrier should not be considered a party under rule that allows the district court to relieve party from a final judgment, order, or proceeding upon a showing of mistake, inadvertence, surprise, or excusable neglect. *Lopez v. Merit Ins. Co.*, 109 Nev. 553, 853 P.2d 1266 (1993). Accordingly, for the requested relief under Rule 60 for a void judgment or, fraud, this holding would not be a bar. Indeed, as a further distinguishing factor, UAIC is not contesting the original 2008 judgment or, its amount.

[9] UAIC directs this Court to the email from Tom Christensen, dated 9/6/18, *attached as part of Exhibit 'K'*, explaining to Steve Rogers, Esq. that "we" would like Breen Arntz, Esq. to represent Lewis.

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be tolerated.

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

> **"The most widely accepted definition, which we adopt, holds that the concept embrace[s] only that species of fraud which does, or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases … and relief should be denied in the absence of such conduct.**
>
> *Id* at 654.

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

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other, prevent anyone from contesting it – **by representing both sides.** ***This is the definition of a conflict of interest.*** After all, Plaintiff's is attempting to improperly "fix" an expired multi-million judgment, while at the same time Counsel for Plaintiff is also claiming to represent the judgment-debtor (Lewis) and advising retained counsel not to vacate the amended judgment. *How could this possibly benefit Mr. Lewis*? Is having a multi-million dollar judgment against him which had expired be resurrected by an improper amendment of the judgment to his benefit? Is preventing anyone from vacating or setting aside this improper amended judgment to his benefit? In short, it does not – **it only benefits Plaintiff and her counsel**. UAIC argues this is clear fraud and collusive conduct and, accordingly, the Court should therefore exercise its equitable power and vacate the amended judgment based on this fraud.

B. Further in the alternative, This Court may exercise is Equitable Authority and vacate the Amended Judgment on the Court's own Motion.

UAIC further pleads, in the alternative, that this Court vacate the 2018 "amended judgment" on its own Motion given the clear fraud that appears to have been perpetrated and is set forth above.

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

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

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

C. Plaintiff's Arguments that the Original Judgment is not Expired are and, Serve as No Bar to the Instant Motion.

1. The Judgment Expired on June 3, 2014

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

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

The Nevada Supreme Court, in *Leven v Frey,* 123 Nev.399,168 P.3d 712 (2007), held that judgment creditors must strictly comply with the procedure set forth in NRS 17.214 in order to validly renew a judgment. *Id.* At 405-408, 168 P.3d 717-719. There is no question that neither

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Cheyenne nor her guardian ad litem did so. Therefore the Judgment expired.

1. *Payments by UAIC on a judgment entered against it, in a separate action, do not toll the expiration of the 2008 judgment entered against Lewis.*

Contrary to Plaintiff's assertion, the payments made by UAIC in 2015 were not "payments on [this] judgment." *Plaintiff's Opposition, p. 9, line 24.* Instead, the payments made by UAIC went toward satisfaction of the judgment entered by the district court in the action against UAIC, now on appeal. And because the action against UAIC was not an action upon the original default judgment here[10] but in a separate action under assignment against UAIC, *UAIC did not acknowledge the validity of the original default judgment by satisfying the judgment entered against it by the district court.* As such, UAIC's satisfaction of the judgment against it in a separate action could not serve to extend the life of this default judgment previously entered in a wholly separate proceeding of which UAIC was not even a party.

Instead, UAIC's satisfaction of the underlying judgment against it merely reflected its acknowledgment that an implied insurance policy existed that afforded coverage for Mr. Lewis' accident, as the Federal district court ultimately concluded, and that the underlying judgment reflected an obligation on its part to pay the policy limits of Mr. Lewis' policy. *See Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 275 (1935). This in no way can be considered an acknowledgment of the default judgment's continuing validity, especially given UAIC's continued opposition to Plaintiff's efforts in the herein and on appeal to collect on the excess judgment. Accordingly, the payments were not made on this judgment and, this argument serves

[10] An action upon a judgment is one that seeks to collect upon a debt owed. *See, e.g., Fid. Nat'l Fin. Inc. v. Friedman*, 225 Ariz. 307, 310, 238 P.3d 118, 121 (2010) ("Our post-statehood case law confirms that every judgment continues to give rise to an 'action to enforce it, called an action upon a judgment.' . . . As was true at common law, *the defendant in an action on the judgment under our statutory scheme is generally the judgment debtor*, and the amount sought is the outstanding liability on the original judgment. The judgment debtor cannot deny the binding force of the judgment, but can assert such defenses as satisfaction or partial payment. If indebtedness remains on the original judgment, the action results in a new judgment in the amount owed.") (internal citations omitted and emphasis added). Appellants' action against UAIC, however, was not an action to collect on the default judgment, as UAIC was not a judgment debtor thereon.

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as no bar to the Motion.

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

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

The introduction to NRS 11.090, the statute of limitation law, states that it applies to: "...actions other than those from the recovery of real property, unless further limited by specific statute..." The list which follows includes various causes of action for which suit can be brought. Nowhere in the list is renewing a judgment defined as or analogized to a cause of action.

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

a. <u>The deadline to renew the Judgment was not tolled by Cheyenne's minority</u>

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

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

Emphasis added. NRS 11.260 applies to actions to recover an estate sold by a guardian. NRS

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

NRS 11.250 clearly speaks in terms of "bring[ing]" a cause of action, the "accru[al]" of a cause of action, and "commencement" of a cause of action, all of which do not apply to the renewal of a default judgment resulting from a cause of action that has already been brought. Renewal of a default judgment in order to prevent its expiration does not constitute a cause of action. *See F/S Manufacturing v. Kensmore*, 798 N.W.2d 853, 858 (N.D. 2011) ("Because the statutory procedure for renewal by affidavit is not a separate action to renew the judgment, the specific time period [provided to renew] cannot be tolled under [the equivalent to NRS 11.300] based on a judgment debtor's absence from the state.").

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

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

If tolling of deadlines to amend judgments were sanctioned, title to real property owned

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

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

Cheyenne's Ex Parte Motion next cites NRS 11.3000, which provides "If, when the cause of action shall accrue against a person, the person is out of State, the action may be commenced within the time herein limited after the person's return to the State; and if after the cause of action shall have accrued the person departs from the State, the time of the absence shall not be part of the time prescribed for the commencement of the action." Cheyenne's argument that the deadline to renew the Judgment are tolled by NRS 11.300 fails because, again renewing a judgment is not a cause of action. As the Supreme Court of North Dakota, a state with similar statutes to Nevada regarding judgments, held in *F/S Manufacturing v Kensmore*, 789 N.W.2d 853 (N.D. 2011), "Because the statutory procedure for renewal by affidavit is not a separate action to renew the judgment, the specific time period[provided to renew] cannot be tolled under [the equivalent to NRS 11.300] based on a judgment debtor's absence for the state." *Id.* At 858.

Furthermore, Mr. Lewis' alleged absence from the State of Nevada did not impede Mr. Nalder from attempting to execute the default judgment or comply with the requirements for

renewal under NRS 17.214, as Mr. Nalder and his counsel Mr. Christensen (who, notably, also represents Mr. Lewis in the underlying proceedings and other related proceedings) were well aware of Mr. Lewis' location in California and assuredly would have had no difficulty serving Mr. Lewis with process in California. For example, as early as March of 2010, Mr. Lewis' executed verified answers to interrogatories through Mr. Christensen's office that provided his address in California. *See* D.E. 16-17699, 87, 95, 165-166; D.E. 16-17698, 0082. Thus, as early as four years before the expiration of the default judgment, Mr. Nalder and his counsel were well aware of Mr. Lewis' location in California and fully capable of taking the necessary steps to prevent expiration of the default judgment under the requirements of NRS 11.190 and NRS 17.214.

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

3. The Time to Renew the Judgment has run.

Inexplicably, Plaintiff also argues that the time to renew the judgment, under N.R.S. 17.214, has not run because the statute "provides that renewal must be brought within 90 days of expiration of the statute." Although unclear, it appears Plaintiff is suggesting she has until 90 days prior to the expiration of her *original statute of limitations on her injury claim* (i.e. 2 years after she reaches majority) to renew the judgment. Besides being ridiculous because she has already brought said injury claims, it is also the case that this argument is based on a complete

mis-statement of the statute and, thus, must be dismissed.

The pertinent sections of N.R.S. 17.214 are, as follows:

> NRS 17.214 Filing and contents of affidavit; recording affidavit of renewal; notice to judgment debtor.
>
> 1. A judgment creditor or a judgment creditor's successor in interest may renew a judgment which has not been paid by:
>
> (a) Filing an affidavit with the clerk of the court where the judgment is entered and docketed, within 90 days before the date the judgment expires by limitation. The affidavit must specify:
>
> ***
>
> 4. Successive affidavits for renewal may be filed within 90 days before the preceding renewal of the judgment expires by limitation.

Under the plain reading of this statute, it is clear that in both places the statute references the 90 day time frame, *it is in relation to the date of the expiration of the judgment*. Nowhere does the statute even mention any statute of limitations. Obviously, the 90 day time frame in paragraph 1(a) clearly states that an affidavit to renew the judgment must be filed *within 90 days before the judgment expires by limitation.* As such, this refers to the 90 day period before expiration of a judgment under N.R.S. 11.190, or 6 years from June 2008, which has clearly passed here. Next, under paragraph 4, the statute further notes that *successive renewals* must also be filed *within 90 days before the receding judgment expires by limitation*. Again, this is referencing the next successive 6 year period under N.R.S. 11.190.

Accordingly, in this case, as this 90 day period prior to expiration of the June 2008 judgment passed some time back in 2014, the judgment has clearly expired and cannot be revived.

4. *The Renewal statute is Mandatory – unless the party would like to allow his/her judgment to expire.*

Here too, Plaintiff's argument is somewhat baffling. Despite the clear limitation of 6 years under N.R.S. 11.190, Plaintiff suggests that because N.R.S. 17.214 states a creditor "may"

renew his/her judgment, this process is not mandatory. This argument also should be dismissed.

It is clear N.R.S. 11.190 provides a 6 year statute of limitations for enforcement of judgments. It is also absolutely clear that, a party *may* renew a judgment under the procedures set forth in N.R.S. 17.214. However, the use of "may" in paragraph 1 of 17.214 is not there to suggest failing to renew under 17.214 will have no effect and the judgment and it will remain valid beyond 6 years. Instead, it is merely stating that a creditor has the option to renew a judgment – however, if he/she fails to do so, the judgment still expires.

As this Court held in *Leven v. Frey*, 168 P.3d 712 (Nev. 2007), one of the primary reasons for the need to strictly comply with NRS 17.214's recordation requirement is to "procure reliability of title searches for both creditors and debtors since any lien on real property created when a judgment is recorded continues upon that judgment's proper renewal." *Id.* at 719. Compliance with the notice requirement of NRS 17.214 is important to preserve the due process rights of the judgment debtor. *Id.* If a judgment debtor is not provided with notice of the renewal of a judgment, he may believe that the judgment has expired and he need take no further action to defend himself against execution. To accept Plaintiff's argument would defeat this purpose as there would never be any finality to a judgment.

Finally, any reliance by Plaintiff on the Court's holding in *Mandlebaum* that the judgment creditor's and assignee's action was timely brought because the statute of limitations was tolled due to the judgment debtor's absence from the State of Nevada, is misplaced because, as discussed above, the action against UAIC on appeal is not an action on the judgment sufficient to satisfy the requirements of NRS 11.190. Furthermore, the Nevada Supreme Court has more recently held that NRS 11.300 "does not apply when the absent defendant is otherwise subject to service of process." *Simmons v. Trivelpiece*, 98 Nev. 167, 168, 643 P.2d 1219, 1220 (1982). As discussed above, Mr. Nalder and his counsel Mr. Christensen were not prevented from pursuing an action on the judgment against Mr. Lewis due to his absence from the State of Nevada

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because they were well aware of his location in California and assuredly would have had no difficulty serving Mr. Lewis with process in California, pursuant to NRCP 4(e)(2) for example. *See, e.g., Simmons*, 98 Nev. at 168, 643 P.2d at 1219.

Accordingly, for all of the above, this argument also cannot save Plaintiff.

5. *The California Statute of limitations on Sister State Judgments cannot Save Plaintiff as it is Irrelevant, Inapplicable and Immaterial.*

First, the statute of limitations for bringing an action on a judgment or renewing a judgment in California is irrelevant to this Court's determination of the Nevada default judgment's continuing viability under Nevada law. Second, because the Nevada default judgment was expired as a matter of Nevada law at the time Mr. Nalder domesticated it in California, *the resulting California Judgment based on a Sister-State Judgment rendered against Mr. Lewis is also invalid. See* Cal Code Civ Proc § 1710.40 ("A judgment entered pursuant to this chapter may be vacated on any ground which would be a defense to an action in this state on the sister state judgment[.]").

The above argument by UAIC would appear to confirmed by the decision in *Friedson v Cambridge Enters.*, 2010 LEXIS 116 (NV. 2010). In *Friedson* the creditor had obtained a judgment, in California, in 1997 which was domesticated in Nevada the same year. In 2005 the creditor attempted to amend the judgment to name add a party as an alter ego of the debtor. Thereafter, the District Court granted the debtor's motion to dismiss all enforcement actions on the ground that the 6 year limitation on actions on a judgment had expired. The Supreme Court affirmed, despite the fact that the original judgment in California had yet to expire and, further, stated the creditor could no longer renew the now expired sister state judgment in Nevada. *Friedson v Cambridge Enters.*, 2010 LEXIS 116 (NV. 2010).

Accordingly, because the Judgment based on a Sister-State Judgment obtained by Mr. Nalder against Mr. Lewis in California is invalid, the statute of limitations on such judgments in

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California is, again, irrelevant, inapplicable, and immaterial.

6. Plaintiff failed to file an action on the Original Judgment nor, Renew the original judgment and, thus, this also cannot save Plaintiff.

For her final argument, although not entirely clear, it appears Plaintiff first claims that she had the choice, under N.R.S. 11.190 to *either* file an action on the original 2008 judgment or, to file a timely renewal under N.R.S. 17.214. UAIC agrees and, this is not disputed. What is also undisputed, however, is Plaintiff failed to do either. Next, it appears Plaintiff may also be actually be making the strained argument that she could either file an action on the judgment *or,* that she has until 90 days prior to expiration of the latest limitation under N.R.S. 11.200, N.R.S. 11.250 or N.R.S. 11.300. *Plaintiff's Opposition p. 14, lines 12-25.* Quite simply, this argument is a complete mis-statement of the statutes and, should be disregarded by this Court.

First, it is clear Plaintiff failed to file an action on the original default judgment within 6 years of June 2008, when it was entered. An action upon a judgment is one that seeks to collect upon a debt owed. *See, e.g., Fid. Nat'l Fin. Inc. v. Friedman*, 225 Ariz. 307, 310, 238 P.3d 118, 121 (2010) ("Our post-statehood case law confirms that every judgment continues to give rise to an 'action to enforce it, called an action upon a judgment.' . . . As was true at common law, *the defendant in an action on the judgment under our statutory scheme is generally the judgment debtor*, and the amount sought is the outstanding liability on the original judgment. The judgment debtor cannot deny the binding force of the judgment, but can assert such defenses as satisfaction or partial payment. If indebtedness remains on the original judgment, the action results in a new judgment in the amount owed.") (internal citations omitted and emphasis added). As such, Plaintiff's action against UAIC, was not an action to collect on the default judgment, as UAIC was not a judgment debtor thereon. As Plaintiff has presented no action filed on the judgment before June 2014, she has not met this option to satisfy N.R.S. 11.190.

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Accordingly, in a last ditch attempt to save her clearly expired judgment, Plaintiff makes the convoluted argument that this court do "back flips" to reach an untenable reading of N.R.S. 17.214 to equate the language noting "expiration of judgment" in that statute with separate statutes of limitations in N.R.S. 11.200, N.R.S. 11.250 or N.R.S. 11.300. Quite simply, as noted, above this argument is incorrect.

Notably, the case relied on by Plaintiff for this convoluted proposition, *Piroozi v. Eighth Jud. Dist. Court*, 2015 Nev. LEXIS 119, 363 P.3d 1168 (2015), has absolutely no bearing on this argument. In *Piroozi* the Court was examining the effect of conflicting comparative negligence statutes. Specifically, the interplay between N.R.S. 41.141 and N.R.S. 41A.045 controls in assessing comparative negligence amounts in a case involving medical professionals. *Id.* Specifically, the court was resolving a conflict when these two statutes were read together and, determined that in such an instance the specialized statute, relating to medical malpractice would apply. *Id.* Nothing in this case stands for the proposition Plaintiff asserts here. Here, Plaintiff is asking this Court to ignore the clear language of N.R.S. 17.214 and extend the time to renew a judgment based on wholly separate limitations statutes.

As noted above, under the plain reading of N.R.S. 17.214, it is clear that in both places the statute references the 90 day time frame to renew a judgment, *it is in relation to the date of the expiration of the judgment*. Nowhere does the statute even mention any other statute of limitations. Obviously, the 90 day time frame in paragraph 1(a) clearly states that an affidavit to renew the judgment must be filed *within 90 days before the judgment expires by limitation.* As such, this refers to the 90 day period before expiration of a judgment under N.R.S. 11.190, or 6 years from June 2008, which has clearly passed here. To suggest the Court should read in an open ended time frame based on any possible statutory limitation period is to ignore the plan meaning. Similarly, Next, under paragraph 4, the statute further notes that *successive renewals* must also be filed *within 90 days before the receding judgment expires by limitation*. Again, this

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is referencing the next successive 6 year period under N.R.S. 11.190.

Moreover, as noted above, it is clear that the statutes of limitation Plaintiff clings to, N.R.S. 11.200, N.R.S. 11.250 or N.R.S. 11.300, do not apply herein. See *Section C.2., of this Reply, above.*

Accordingly, in this case, as this 90 day period prior to expiration of the June 2008 judgment passed some time back in 2014, the judgment has clearly expired and cannot be revived and the Court need not accept Plaintiff's pained attempt to alter the plain meaning of a statute to do so.

7. *Plaintiff's Argument that this Court may Equitably toll the time to file Renewal in this Instance has Absolutely no Support.*

In yet another attempt to save her expired judgment, Plaintiff further argues that the Nevada Supreme Court has stated "the time for renewal under N.R.S. 17.214 is subject to statutory and equitable tolling provisions." *Plaintiff's Opposition, p. 15, lines 4-9.* However, the support provided for this argument simply does not stand for the proposition asserted and, thus, must also be dismissed.

Specifically, Plaintiff cites *O'Lane v Spinney,* 110 Nev. 496, 874 P.2d 754 (1994), in support of the above argument. However, besides the issues in that case being completely dissimilar - that case involved a parties alleged mistaken belief they could not timely renew the judgment because of a Bankruptcy Stay for the debtor – it is also true that the case did not even unequivocally hold equitable tolling applied. *Id.* The Court found that the creditor was mistaken in her belief that she could not renew the judgment and, in any event, could have petitioned to lift the stay for such purpose if there was a question. *Id.* Further the Court stated the following:

> "Although there is no basis in law for legally preserving or resuscitating the judgment, there would be a basis for invoking the doctrine of equitable tolling during the period of O'Lane's bankruptcy proceedings if it could be shown that O'Lane had no legitimate basis for seeking protection under the Bankruptcy Act. In other words, if it could be demonstrated that O'Lane's bankruptcy petitions offered no legitimate prospect or intention of a discharge of his indebtedness, and

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> that the filings were simply a subterfuge to avoid satisfying Spinney's judgment, then the district court could properly conclude that the Spinney judgment was subject to preservation and continuing validity based upon the doctrine of equitable tolling. **Because this court is in no position to determine whether the requisite support for invoking an equitable tolling exists, we must remand this matter to the district court to provide Spinney an opportunity to prove, if she can, that an evidentiary foundation exists for equitable relief and the continuation of the receivership. In the event Spinney is unable to prove the requisite factual and legal basis for equitable relief, the receivership must be terminated**"

Id. at 501, 757 (internal citations omitted) (emphasis added).

As can be seen, not only did the Court not decide whether equitable tolling even applies, it is also clear the issues there are completely distinguishable from the case at bar. As noted, *O'Lane* dealt with a creditors slight delay in renewal due to a Bankruptcy stay and, thus, the interplay and – potential pre-emption by – Federal Bankruptcy law. None of these facts exist here. Lewis has not filed Bankruptcy, there is no stay and, it had been nearly 4 years since the judgment expired.

Accordingly, this argument offers no bar to granting UAIC's Motion as Plaintiff can offer no such facts to even consider equitable tolling.

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IV.

CONCLUSION

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

DATED this 2nd day of January, 2018.

ATKIN WINNER & SHERROD

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CERTIFICATE OF SERVICE

I certify that on this 2nd day of January, 2019, the foregoing **UAIC'S REPLY IN SUPPORT OF ITS MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO NRCP 60** was served on the following by **[X]** Electronic Service pursuant to NEFR 9 [ ] Electronic Filing and Service pursuant to NEFR 9 [ ] hand delivery [ ] overnight delivery [ ] fax [ ] fax and mail [ ] mailing by depositing with the U.S. mail in Las Vegas, Nevada, enclosed in a sealed envelope with first class postage prepaid, addressed as follows:

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EXHIBIT "E"

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

Argued and Submitted January 6, 2016
San Francisco, California

Filed December 27, 2017

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

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