IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY LEWIS Petitioner and Real Party in Interest

vs.

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

Respondents,

And
UNITED AUTOMOBILE INSURANCE COMPANY,

Respondent.

Supreme Court No. 78243

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

REPLY TO RESPONSE TO PETITION FOR WRIT OF MANDAMUS PURSUANT TO NRS§ 34.160

THOMAS F. CHRISTENSEN, ESQ.
Nevada Bar 2326
CHRISTENSEN LAW OFFICES
1000 S. Valley View Blvd.
Las Vegas, NV 89107
T: 702-870-1000
courtnotices@injuryhelpnow.com
Attorney for Third Party Plaintiff Gary Lewis

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I. INTRODUCTION

A. UAIC takes riskiest approach denying coverage and refusing to defend its insured.

UAIC claims that the insured third party plaintiff Lewis' arguments are surreal. UAIC has been litigating this case in bad faith for eleven years. UAIC initially denied coverage, did not communicate offers to settle to the insured, then refused to defend the insured. This refusal to protect or communicate with the insured then denying coverage and refusing a defense is risky path chosen by UAIC. "An insurer that refuses to tender a defense for "its insured takes the risk not only that it may eventually be forced to pay the insured's legal expenses but also that it may end up having to pay for a loss that it did not insure against." *Hamlin Inc. v. Hartford Acc. Indemnity Co.*, 86 F.3d 93 at 94 (7th Cir. 1996). Accordingly, the insurer refuses to defend at its own peril." *Century Sur. Co. v. Andrew*, 432 P.3d 180, 186 (Nev. 2018)

B. UAIC engages in bad faith litigation practices to attempt to avoid liability for harms to the insured and the claimant.

UAIC has enticed federal judges to reject clear Nevada law in order to rule in favor of UAIC. This error was reversed by the Ninth Circuit. The lower Court again rejected clear Nevada law expressed by this Court "we hold that the covenant of good faith and fair dealing includes a duty to adequately inform the insured of settlement offers." *Allstate Insurance v. Miller, 125 Nev. Adv. Op. No. 28, 49760 (2009)*, No. 49760, at *2 (Nev. 2009) This error by the Federal Court relieved UAIC of their burden granting summary judgment against the insured on bad faith claims contrary to clear Nevada Supreme Court precedent. The Ninth Circuit then certified a question to the Nevada Supreme Court. While that question is pending UAIC again brings a request in the Appellate court seeking relief for itself, not for the insured. This results in the second certified to this Court. This Court against the insured on an identical certified question in *Century Sur. Co*. At oral argument UAIC argues in bad faith that that question in *Century Sur. Co*. was somehow different than the very same question in the present case.

Because UAIC has suggested a need to further pursue the judgment Nalder hires new council to perform the very act UAIC claims Nalder should do. UAIC again responds by asking the courts to rule against all precedent to relieve UAIC of

their mistake to the detriment of the insured and injured claimant Nalder. Of course UAIC would call this bad faith denial of justice and fair play "a relief." (See Respondents Brief page 2) An undeserved and unconstitutional relief to the recalcitrant insurer UAIC and all recalcitrant insurers.

C. UAIC continues in bad faith to misrepresent the law and the factual record to avoid liability

UAIC hopes to benefit from a few bad decisions in the federal court where federal judges have smeared reputations, granted summary judgment against insureds by making factual findings against the insured and in favor of the insurer moving for summary judgment. Such practice is appalling. To rule in favor of UAIC the court will have to bend and break the law to continue to protect recalcitrant insurers so they can run over their own insureds and claimants and destroy the rule of law in Nevada.

II. STATEMENT OF FACTS

Without responding directly to each and every misstatement by UAIC in their brief Lewis will only point out that the correct statement of facts is contained in the original writ. Lewis will respond to the most egregious misstatements relevant to this writ before the court.

A. UAIC misstates both Certified Questions

The first certified question by the ninth circuit was:

> "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 insurers's breach?

This exact same question was answered by this court in the insured's favor in *Century Sur. Co.* Counsel for UAIC Daniel Polsenberg, tried to argue to this Court that this was not the same question and continues in the opposition brief to mischaracterize the first question.

UAIC also tries to mischaracterize the second certified question pending before the Court regarding the possibility that the insured and claimant can somehow lose standing on appeal of a decision finding no bad faith as a matter of law by the passage of time. The second question certified by the Ninth Circuit was:

> 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?

This Court rephrased the question inserting findings that were not made, and could not be made by the Ninth Circuit to:

> 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?

Neither question asks about " the expiration of the judgment" as UAIC claims in its opposition brief at page 5. This discrepancy is not accidental.

B. UAIC is the only party describing the judgment in the 2007 case as an "expired judgment."

UAIC is the only party describing the judgment in the 2007 case as an "expired judgment." This it does nearly 30 times in its opposition brief in an attempt to confuse the court by mixing its legal arguments with its factual recitations. Judgments in Nevada do not expire. If not tolled, the statute of limitations expires. If not tolled, writs of attachment expire. Judgments do not expire. The judgment in the 2007 case was a facially valid judgment signed and filed by the Court in case number 07A549111 on **March 28, 2018**. (See 2 P. app Exhibit 9 at 077-081)[1] This judgment was not an amendment of an expired judgment.

The application contained the following basis for amendment:

> Pursuant to ... NRS 11.300, Cheyenne now moves this court to issue the judgment in her name alone (See Exhibit 2) so

[1] UAIC claimed a right to intervene and contest this judgment. Intervention was allowed. Consolidation was allowed. The Court denied setting aside this judgment and now UAIC has appealed that denial.

> 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. (see 1 R. App. Exhibit 13 at 198-199)

It was an amendment of a still valid judgment pursuant to *Mandlebaum v. Gregovich,* 24 Nev. 154, 50 P. 849 (1897). *Mandlebaum* is directly on point confirming the continuing validity of the judgment and the common law right to an action on the judgment to obtain a **new judgment**. This right has never been taken away and certainly not changed by the ability to also **renew** a judgment pursuant to NRS 17.214. UAIC fails to distinguish, discuss, or even cite the *Mandlebaum* case. The principles set forth in *Mandlebaum* require this court to rule against UAIC on this writ. *Mandlebaum* also requires ruling against UAIC on the writ in case number 78085. *Mandlebaum* requires ruling against UAIC on the second certified question in case number 70504.

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

After Nalder's counsel, David Stephens, notified UAIC of the new action on a judgment,[2] UAIC unilaterally appointed counsel – Stephen Rogers -- to represent Lewis. Lewis welcomed an ethical, non-frivolous, not for purposes of delay

[2] Case number 18-A-772220 below.

representation by Rogers and asked that Rogers communicate through Christensen, who represents Lewis against UAIC. Christensen requested that Rogers explain the basis for the proposed defense, with the case law and the likelihood of success in overcoming the clear precedent in *Mandlebaum*. *Mandlebaum* holds that the 2008 judgment is valid because of Lewis' absence from the state of Nevada for eight years (where the *Mandlebaum* judgment was still valid after a fifteen year absence from the state.) (See Exhibit 12). Certainly, the 2018 amended judgment is still valid.

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

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

UAIC has also failed to recognize, E. Breen Arntz, Esq., who is representing Lewis as the defendant in both the 2007 and 2018 cases as

independent *Cumis/Hansen*[3] counsel. UAIC had no right to control any defense, given that UAIC breached its duties to Lewis long ago.

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

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

E. There was no stay of the entire litigation either orally or in writing. Lewis responds to an offer of judgment settling the case with Nalder. Lewis also settled with Tindall during this same time period.

There was no written stay and no oral stay of the entire proceedings. UAIC references 5 R. App. 1129, 1141-42 as support that an oral stay was ordered. UAIC does not quote from the transcript. There is no grant of a stay at that location or anywhere else in the transcript. Instead, the Court stated on the record it would review some of the issues again and some would be decided at the subsequent hearing date of January 23, 2019. (5 R. App. 1141 Lines 15-22)[4]

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

[4] Mr. Douglas:...we could stay that or grant that. The Court: it's on calendar for next week. Mr. Douglas: Oh, it's on calendar next week. Okay. Is that the 23rd?

Even if a stay was ordered, which it was not, the parties retain the right to settle the litigation. In this very case the litigation between Gary Lewis and Randall Tindall was settled and judgment entered on February 1, 2019, after the stay in the minutes from the aborted January 23rd hearing.[5] Is that order of dismissal invalid? Should this Court invalidate that order too because it violated the non-existent oral stay? Daniel Polsenburg was the lawyer representing Randall Tindall in that settlement.

UAIC's strategy has, at all times, been to benefit UAIC at Lewis' expense. The recent state court proceedings have involved Lewis' continued efforts to protect himself and at the same time to preserve his claims against UAIC, which stem from its original bad faith refusal to defend. Despite these bad faith efforts by UAIC Nalder has been able to obtain three valid judgments against Lewis which UAIC must satisfy pursuant to *Century Sur. Co.* Continued failure by UAIC to act reasonably is only increasing the injury and damage to the insured and the amount that UAIC will ultimately have to pay because of its bad faith litigation tactics.

The Clerk: Yes. Mr. Douglas: Okay. Sorry. We'll deal with it then. The Court: Well, I'll look at it and -- Mr. Douglas: we'll deal with it then. The Court: But all right.

[5] 2 P. app Exhibit 13 at 110 and 111

Since its intervention, UAIC has made several strategic filings which have delayed and caused additional fees and costs in the previously resolved matter, including a Motion to Consolidate the 2018 action with this 2007 action. Both cases had been resolved, one by judgment the other by filed stipulation. UAIC's consolidation is a thinly veiled attempt to remove a judicial officer from the third party claim filed by Lewis against UAIC. This Writ is therefore necessary. Nalder and Lewis must be allowed to resolve their cases without further costs and fees. Lewis can then continue with his claim against UAIC in the proper forum, with the appropriate judicial officer.

III. STATEMENT OF THE LAW

A. Writ of Mandamus Authority

Counsel for UAIC does not contest the law applicable to this writ of Mandamus but instead clings to its unsupported exception for an "expired judgment." UAIC goes so far as to claim "No rule or case supports Lewis's contention that an expired judgment in one of the actions thwarts consolidation" This Court knows that Lewis does not contend that an expired judgment exists in either action. Judgments do not expire in Nevada. The 2008 judgment[6] is valid

[6] The 2008 judgment is not even the judgment that prevents intervention or consolidation as that is the amended judgment date March 28, 2018 upheld by the Court below and now the subject of an appeal by UAIC.

according to *Mandlebaum*, cited by Lewis and not discussed and therefor admitted as controlling by UAIC.

IV. ARGUMENT

E. Allowing Intervention was an Abuse of Discretion

Third Party Plaintiff Lewis hereby joins in the reply brief filed by Nalder and Lewis.

B. Allowing Consolidation was an Abuse of Discretion

It is apparent that UAIC's only defense is that the judgment expired and that Nalder is trying to revive it. Not only does this mischaracterize the actions below it also mischaracterizes the procedural posture of each action below. The 2007 action was concluded with a final judgment signed and filed by the Court on March 28, 2018. The 2018 action between Nalder and Lewis was settled by an agreement signed and filed in the 2018 case on September 13, 2018. (See 3 R. app Exhibit 17 at 595 - 598) Both actions regarding the judgments between Nalder and Lewis were concluded. Nothing was pending. The Nevada rule concerning consolidation is stated in NRCP 42(a):

> (a) Consolidation. When actions involving a common question of law or fact **are pending before the court**, it

> may order **a joint hearing or trial** of any or all the matters in issue in the actions; it may order **all the actions consolidated**; and it may make such orders concerning proceedings therein as may tend **to avoid unnecessary costs or delay**. (Emphasis added.)

The similar parts of the two cases are already completely resolved and the Lewis v. UAIC part of case no. 18-772220 has just begun. There is no overlap of discovery or proof. There is no judicial economy in consolidation in this situation. Consolidation in these circumstances is an abuse of discretion. UAIC cites no contrary authority. The validity of the underlying 2008 judgment was already established in both actions, nothing was pending in either action between Nalder and Lewis.

C. The Court Lacked Jurisdiction to Void the Judgment

Nalder served an Offer of Judgment on Lewis on January 11, 2019. This offer was accepted and judgment entered by the Court Clerk pursuant to NRCP 68 on January 22, 2019. This was not a mistake by the Clerk. It violated no written or oral stay order by Judge Johnson as none had been granted. The Court's ex-parte ruling, February 14, 2019, that the judgment was void because the case was stayed, at the time judgment was entered, is clearly erroneous.

Even if the case was stayed, which it clearly was not, the parties can still settle and resolve the case during a stay. In fact, third party plaintiff Lewis and third party Defendant Tindall resolved and dismissed their claims during this same time frame. UAIC did not contest this rule in there opposition and therefore admit that the judgment resulting from the acceptance of the offer of judgment was appropriately entered by the clerk. Writ relief must issue.

D. Due Process was Denied to Petitioner

UAIC again fails to address the clear authority cited by Lewis but rather seek an exception for the recalcitrant insurer by claiming all actions by the court below were only scheduling actions or correcting clerical mistakes. It is hard to fathom how voiding a $5,000,000 judgment is correcting a clerical error or a scheduling order. Further, UAIC makes the argument without support that lack of notice and opportunity to be heard can be corrected by subsequent hearings. If that were true all functions could be done by notification after the fact and the parties would just have to deal with a prejudiced tribunal. This writ must be granted. This court

should clarify that any motion together with its ex-parte application for order shortening time pursuant to EDCR 2.26 must be served on all parties prior to submitting the ex-parte application for shortened time to the judge for the judge's consideration. In the case at bar, the State of Nevada, via Judicial Officer Eric Johnson, has denied the parties due process by not allowing oppositions to be filed, cancelling hearings and ruling ex-parte.

V. CONCLUSION AND RELIEF SOUGHT

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

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

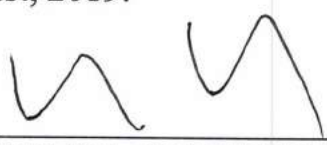
DATED this 26th day of August, 2019.

THOMAS F. CHRISTENSEN, ESQ.
Nevada Bar 2326
CHRISTENSEN LAW OFFICES
1000 S. Valley View Blvd.
Las Vegas, NV 89107
T: 702-870-1000
courtnotices@injuryhelpnow.com
Attorney for third party plaintiff Gary Lewis

CERTIFICATE OF COMPLIANCE

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

DATED this 26th day of August, 2019.



THOMAS F. CHRISTENSEN, ESQ.
Nevada Bar 2326
CHRISTENSEN LAW OFFICES
1000 S. Valley View Blvd.
Las Vegas, NV 89107
T: 702-870-1000
courtnotices@injuryhelpnow.com
Attorney for third party plaintiff Gary Lewis

CERTIFICATE OF SERVICE

Pursuant to NRAP 21(a)(1) and NRAP 25(c)(1), I hereby certify that I am an employee of CHRISTENSEN LAW OFFICES and that on the 26th day of August, 2019, I caused the foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS** to be served by e-service or mail as follows:

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

MATTHEW DOUGLAS, ESQ.
Atkin Winner & Sherrod
1117 South Rancho Drive
Las Vegas, NV 89102
mdouglas@awslawyers.com
eservices@awslawyers.com

Daniel F. Polsenberg
(SBN 2376)
Lewis Roca
Rothgerber Christie LLP
3993 Howard Hughes Pkwy
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

DAVID STEPHENS, ESQ.
Nevada Bar No. 00902
STEPHENS & BYWATER, P.C.
3636 North Rancho Drive
Las Vegas, Nevada 89130
Telephone: (702) 656-2355
dstephens@sgblawfirm.com
Attorney for Cheyenne Nalder

E. BREEN ARNTZ, ESQ.
Nevada Bar No. 3853
5545 Mountain Vista Ste. E.
Las Vegas, NV 89120
Telephone: (702) 384-8000
breen@breen.com
Attorney for defendant Gary Lewis

Employee of Christensen Law