IN THE SUPREME COURT OF THE STATE OF NEVADA

CHEYENNE NALDER, an individual, and GARY LEWIS Petitioners and Real Parties in Interest, Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; THE HONORABLE DAVID M. JONES, DISTRICT JUDGE; AND THE HONORABLE ERIC JOHNSON, DISTRICT COURT JUDGE, Respondents, And UNITED AUTOMOBILE INSURANCE COMPANY, Real Party in Interest.	Supreme Court No. 78085
GARY LEWIS Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; THE HONORABLE ERIC JOHNSON, DISTRICT COURT JUDGE, Respondents, and UNITED AUTOMOBILE INSURANCE COMPANY; and CHEYENNE NALDER, Real Parties in Interest.	Supreme Court No. 78243

(Consolidated original petitions for writs of mandamus challenging district court orders granting intervention, consolidation and relief from judgment in tort actions.)

MOTION FOR ATTORNEY FEES AND COSTS AND FOR RECONSIDERATION

I. INTRODUCTION

Nalder and Lewis request an award of attorney fees and costs and that the Court reconsider and revise the Opinion issued on April 30, 2020, which strives to correct decisions made by Judge David Jones and Judge Eric Johnson. The lower court actions were improperly intervened and wrongly consolidated at UAIC's urging and have caused more than a year of ongoing litigation expenses for the real parties Lewis and Nalder. The Court's Opinion moved the parties closer to the positions they were in prior to the actions taken by UAIC. However, on the portion that was denied--allowing intervention by UAIC in the 2018 Action on the Judgment case (Case No. A-18-772220-C)--the Court overlooked or misapprehended material facts that should be corrected through reconsideration.

Specifically, the Court misstated what actually took place and is taking place in the Court below. There are three misstated facts in the Court's Opinion: 1) Lewis' Third-Party Complaint against UAIC is still pending and is subject to a motion for partial summary judgment. 2) In the Nalder v. Lewis cases below, Plaintiff Cheyanne Nalder is represented by David A. Stephens; and Defendant Gary Lewis is represented by E. Breen Arntz pursuant to *Cumis/Hansen* and, at the

time of intervention, he was also represented by Randall Tindall, who was appointed by UAIC. In the Third Party Complaint of Lewis v. UAIC, Third Party Plaintiff is represented by Thomas Christensen. 3) The settlement and judgment of the Nalder and Lewis dispute resulted from arm's length negotiation between David Stephens and E. Breen Arntz, counsel for the parties. The controversy was resolved. There was no collusion or fraud in the settlement reached between these represented parties.

Reconsideration is also warranted because the court overlooked, misapplied or failed to consider a statute, procedural rule and decision directly controlling a dispositive issue as follows: 1) The Court did not appropriately interpret NRS 12.130. 2) The court did not follow *Dangberg Holdings. v. Douglas Co.*, 115 Nev. 129, 139 (Nev. 1999). 3) The court mistakenly applied *Allstate Ins. Co. v. Pietrosh*, 85 Nev. 310, 454 P.2d 106 (1969), an uninsured motorist intervention to this liability carrier action. The Court should have applied the reasoning in *Hinton v. Beck*, 176 Cal. App. 4th 1378 (Cal. Ct. App. 2009) which held: "Grange [the liability insurer like UAIC here], having denied coverage and having refused to defend the action on behalf of its insured, did not have a direct and immediate interest to warrant intervention in the litigation."

The Court's April 30, 2020 Opinion, as written, will cause confusion for future litigants who are in the unfortunate position of having to stand up to their own insurance companies; and therefore the Opinion must be reheard and corrected.

II. FACTUAL HISTORY

UAIC'S LACK OF GOOD FAITH AND FAIR DEALING IN THIS LITIGATION

A. UAIC Acts in Bad Faith, Multiplying and Delaying the Litigation.

UAIC, in bad faith, intervened, consolidated and appealed the lower Court's ruling in a desperate effort to delay and discharge itself from the consequences of its own bad acts arising from its failure to defend Gary Lewis. UAIC began multiplying the litigation while the Ninth Circuit Court's First Certified Question was fully briefed before this court (see Docket 70504). Instead of doing a good faith investigation and acting to protect UAIC's insured Lewis, UAIC brought a baseless and untimely motion to dismiss the Ninth Circuit appeal for lack of standing. This was promoted by an affidavit of counsel for UAIC suggesting that Nalder needed to renew her judgment in case number 07A549111.

Nalder sought instead through attorney David Stephens (see cases 07A549111 & 18-772220), to obtain an amended judgment because the statute of limitations had been tolled and new judgment under the clear precedent in *Mandlebaum v. Gregovich,* 24 Nev. 154, 50 P. 849 (1897) which holds that a

judgment is still a valid basis for an action on the judgment after ten years because of Lewis' absence from the state of Nevada for eight years (where the *Mandlebaum* judgment was still valid for that purpose after a fifteen year absence from the state.) In addition to the tolling statute applied by the court in *Mandlebaum,* NRS 11.300, other tolling statutes applied: NRS 11.200 (time period in NRS 11.190 runs from last payment); and NRS 11.250 (time period in NRS 11.190 is tolled during minority). Because of this clear on point black letter law in Nevada, a written settlement agreement was entered by the parties and filed with the court. [1]

UAIC was not candid with the courts and did not act in good faith by informing the 9th circuit and this Court that the second question was now moot and counsel's affidavit was false. UAIC improperly intervened and distorted the record and the law, obtaining clearly erroneous rulings allowing intervention to stand and consolidating both cases.[2]

B. UAIC Refuses to Provide an Ethical Defense to its insured, Lewis.

UAIC refused to pay *Cumis*[3] counsel, E. Breen Arntz. UAIC went behind

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

[2] These clearly improper rulings delayed the case caused greater expense and were eventually struck down by Writ in this Docket 78085 & 780243.

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

its insured's back disregarded reasonable requests from counsel for Gary Lewis and directed other attorneys to file unauthorized pleadings on behalf of its insured. UAIC without any supporting law requested and obtained a stay. Judge Johnson refused to set aside the judgment entered by the former judge on the case, Judge Jones.[4] UAIC, in bad faith and without a reasonable basis, appealed. UAIC had no good faith basis to appeal the lower Court's ruling.[5] This is also evident by UAIC's repetitive requests for extensions of time to file an Opening Brief itsbaseless appeal at Docket 79487.

C. UAIC Never Intended to File a Brief in that Appeal.

The mediation of the Docket 79487 appeal became an attempted global mediation of the entire dispute between the parties. The case was not resolved and originally the Opening Brief in that Appeal was due February 11, 2020. At the request of UAIC, it was extended to March 12, 2020 by Stipulation of the parties and Order of the Court pursuant to NRAP 31(b)(2).

The Court's Order dated February 12, 2020, stated "No further extensions of time shall be permitted, except upon motion clearly demonstrating good cause.

Cal Rptr. 494(1984).

[4] The one ruling consistent with the law.

[5] At the hearing in front of Judge Johnson on March 4, 2020 the court asked: What have you appealed? Mr Polsenberg responded at 8:55.30 "You want me to be candid? I don't know what I am going to be arguing ... I am not even entirely positive of how I am going to go ahead with that appeal."

NRAP 31(b)(2); NRAP 31(b)(3)(B)." Despite this, on March 12, 2020, UAIC did not file its Opening Brief, but instead filed a last minute Motion to Extend Time. In Opposition, Real Party in Interest, Gary Lewis, alerted this Court to the *modus operandi* of UAIC in seeking last minute extensions without good cause for purposes of delay. UAIC's primary motive was to seek further, unnecessary delay because UAIC had no good faith arguments for that appeal.

D. UAIC Obtained an Extension in that Appeal to File a baseless Petition for a Writ, Seeking Further Delay.

On April 3, 2020, the Court granted UAIC's Motion for Extension under NRAP 31(b)(3)(B), without specifically finding what good cause claimed by UAIC justified the extension. The Chief Justice ordered UAIC's Opening Brief and Appendix to be filed by April 13, 2020. Instead of working on its brief regarding the very narrow issue in that appeal, on April 10, 2020, counsel for UAIC, Lewis Roca, served an Emergency Writ Petition, a 15 Volume Appendix, and two Motions, creating another Docket in this Court. (See Docket 80965). That Writ requested a stay. It was filed on April 13, 2020, which was the very due date of the Opening Brief and Appendix in the appeal. The real parties in interest then had to oppose the two motions in expedited fashion because they were filed

on an emergent basis. Ultimately, UAIC's Writ and motions were denied by this Court.

E. UAIC Now Seeks Yet Another Delay.

On April 13, 2020, at 5:08pm, UAIC filed yet another last minute Motion to Extend Time to File Opening Brief and Appendix in the appeal. This was its third request for an extension. Again, no extraordinary circumstances for delay were cited, yet, the extension was granted through May 13, 2020.

This Court issued a Writ of Mandamus on April 30, 2020 confirming that UAIC should not have been allowed to intervene in and delay the lower court case for nearly two years. Incredibly, on May 13, 2020, instead of doing the ethical thing, UAIC then filed a "Suggestion of Mootness" requesting the Court delay briefing indefinitely by a request to "suspend the briefing."[6] UAIC should have filed a voluntary dismissal of that Appeal, or its opening brief, or both. The fact that it did not voluntarily dismiss that appeal and that UAIC has also made other filings designed to delay these proceedings and multiply the casework of the counsel for the Real Parties in Interest, not in good faith and with a reasonable basis, are grounds for an award of fees and costs.

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[6] See footnote three on page 6 of Appellant's Suggestion of Mootness in Docket 79487 .

III. SUPPORTING LAW AND ARGUMENT

A. Even though this court did not properly apply *Dangberg* and NRS 12.130, UAIC's intervention presented claims and defenses that overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

The obviously improper intervention in case 07A549111 by UAIC spawned months of litigation expenses on a case that was already to judgment. In order to correct the Court's error brought on by UAIC's disingenuous litigation tactics, the parties had to file two writ petitions. As set forth below, this in itself requires granting of fees and costs to the parties below, Gary Lewis and CheyAnne Nalder.

The court should grant rehearing to properly apply Nevada Law.

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

> **(c) Scope of Application; When Rehearing Considered.**
> (1) Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing.
> (2) The court may consider rehearings in the following circumstances:
> (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
> (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

B. Proper application of NRS 12.130 and the case law interpreting it makes the need for fees and costs even more apparent

NRS 12.130 requires intervention to happen "before the trial," when there is still a controversy. All of the cases interpreting this statute do not allow intervention if there is no trial to be had. The statute reads:

NRS 12.130 Intervention: Right to intervention; procedure, determination and costs; exception.

1. Except as otherwise provided in subsection 2:
   (a) Before the trial, any person may intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both.
   (b) An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant.
   (c) Intervention is made as provided by the Nevada Rules of Civil Procedure.
   (d) The court shall determine upon the intervention at the same time that the action is decided. If the claim of the party intervening is not sustained, the party intervening shall pay all costs incurred by the intervention.
   (e) 2. The provisions of this section do not apply to intervention in an action or proceeding by the Legislature pursuant to NRS 218F.720.

Dangberg Holdings. v. Douglas Co., 115 Nev. 129, 139 (Nev. 1999) holds that:

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

The intervention was allowed in *Dangberg* not because a judgment would be required, but rather because there was no settlement agreement in the record.[7] That is not the case here. Not only was an agreement reached in the instant case, it was written, signed and filed with the court.[8] This was a reasoned settlement based on the available defenses, not collusive or in bad faith. This Court disregards Lewis' argument that parties can settle during a stay because he failed to cite authority. If a settlement is reached, at any time, however, it would not create case law. A case that is settled by the real parties in interest is not appealed. UAIC's intervention was after the resolution of the case to the satisfaction of the parties. Even in intervention, UAIC will be bound by that agreement.

The court mistakenly applies *Allstate Ins. Co. v. Pietrosh*, 85 Nev. 310, 454 P.2d 106 (1969) to this action. Allstate was an **uninsured motorist carrier** intervening in the underlying tort lawsuit. What we have below in this case is a **liability carrier** intervening in the tort lawsuit. When UAIC got around to requesting intervention in this case, Randall Tindall, who was an attorney paid by UAIC, and an attorney the insured picked that the carrier is refusing to pay under *Cumis/Hansen*, E. Breen Arntz, were already adequately representing the insured's

[7] And apparently no settlement agreement had been reached.
[8] See Petitioners' Appendix, Docket 78085, bates 0142-0143, Stipulation to Enter Judgment, dated September 13, 2018.

interests. Thus the decision in *Am. Home Ass. v. Eighth Dist. Ct.*, 122 Nev. 1229, 1233 (Nev. 2006) applies.

> "Because the insurer here failed to show that its interest was inadequately represented by the injured worker, we deny the insurer's request for extraordinary relief."

Also, UAIC refused to defend or intervene when the lawsuit was filed. The Court should have applied the reasoning in *Hinton v. Beck*, 176 Cal. App. 4th 1378 (Cal. Ct. App. 2009) which held: "Grange [the liability insurer like UAIC here], having denied coverage and having refused to defend the action on behalf of its insured, did not have a direct and immediate interest to warrant intervention in the litigation."

C. UAIC compounded its bad faith intervention and made a frivolous appeal in Docket 79487.

UAIC suggests its still pending appeal should be dismissed because it is moot. The truth is that it was a frivolous appeal from the start, designed only to delay matters and UAIC should be reprimanded and sanctioned for abuse of process.

At the urging of UAIC, upon reaching her majority, CheyAnne consulted David A. Stephens, Esq. regarding the judgment CheyAnne held against Lewis. Stephens moved the trial court to amend the judgment, substituting in CheyAnne

because she had reached her majority and because the statute of limitations had been tolled on the judgment. Judge Jones granted the motion and signed an amended judgment in favor of CheyAnne Nalder and against Gary Lewis on March 26, 2018. Months later, UAIC moved to intervene, without serving its Motion on anyone. At the time UAIC was aware that CheyAnne was represented by David Stephens and Gary Lewis was represented by E. Breen Arntz. UAIC moved to set aside the judgment. The motion was correctly denied. The appeal in Docket 79487. The ruling was made January 9, 2019, the Notice of Appeal was filed on August 21, 2019, and the Court still has had no briefs filed.

D. UAIC has multiplied and complicated these proceedings needlessly.

By repeatedly delaying the filing of the Opening Brief on the appeal following intervention, UAIC has been allowed to use the process to avoid responsibility and inflict extraordinary pain on the real parties in this case. UAIC has never, and cannot, state any good faith basis for the appeal. Recently, in this Docket 78085 & 78243 this Court determined that UAIC's intervention in the lower court action was improper, as Nalder and Lewis had stated all along.

NRS 12.130 only permits intervention prior to trial. After judgment trial is clearly not pending and intervention is improper. Additionally, NRS 12.130(d) provides that "If the claim of the party intervening is not sustained, the party

intervening shall pay all costs incurred by the intervention." Additionally, NRS 34.270 allows Writ applicants Recovery of damages and states if judgment be given for the applicant, the applicant shall recover the damages which the applicant shall have sustained as found by the jury, or as may be determined by the court or master, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue, and a peremptory mandate shall also be awarded without delay.

This Court should award fees and costs in these writ petitions and in the other docket numbers[9] before this Court wherein UAIC has presented claims and defenses that overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

UAIC has been stringing along opposing counsel and this Court. "This court expects all appeals to be pursued with high standards of diligence, professionalism, and competence." *Barry v. Lindner*, 119 Nev. 661, 671, 81 P.3d 537, 543 (2003). " *Carroll v. Carroll*, No. 73534-COA, 17 (Nev. App. May. 7, 2019). NRAP 38(a) states that "If the Supreme Court or Court of Appeals

[9] Dockets 70504, 78085, 78243, 79487 and 80965. This Court, on its own, consolidated the two Writ Petitions of 78085 and 78243, then issued a Writ of Mandamus directing the lower Court to enter an Order and strike pleadings.

determines that an appeal is frivolous, it may impose monetary sanctions." Likewise, NRAP 38(b) states that "When an appeal has frivolously been taken or been processed in a frivolous manner; when circumstances indicated that an appeal has been taken or processed solely for purposes of delay, when an appeal has been occasioned through **respondent's imposition on the court below**; or whenever the appellate processes of the court have otherwise been misused, the court may, on its own motion, require the offending party to pay, as costs on appeal, such attorney fees as it deems appropriate to discourage like conduct in the future."

NRS 18.010 states: In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party. Section (b) states: Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. **The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations.** It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to

punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public. (Emphasis added.)

Under NRAP 38, this Court may award attorneys' fees, damages, costs, and such other relief as it may fashion. *Imperial Palace v. Dawson*, 715 P. 2d 1318 (1986), citing *In re Herrmann,* 100 Nev. 149, 152, 679 P.2d 246 (1984); *Varnum v. Grady,* 90 Nev. 374, 377, 528 P.2d 1027 (1974). In *City of Las Vegas v. Cragin Industries*, 86 Nev. 933, 478 P.2d 585, (1970), the Nevada Supreme Court stated "actions for declaratory or injunctive relief may involve claims for attorney fees as damages when actions were necessitated by the opposing party's bad faith conduct."

UAIC's improper filings, including its unwarranted Motions for intervention and consolidation, were in bad faith and necessitated a response by Nalder and Lewis. In all of these intertwined actions, UAIC has taken inconsistent positions in the various Courts. The only consistent argument UAIC has made has been the promotion and self-preservation, over that of its insured. UAIC has made desperate attempts to free itself from consequences arising from its breach of the duty to defend in 2007. The issue of what consequences it should

face remains before the Ninth Circuit, on appeal.[10] This amounts to bad faith conduct on the part of UAIC that has multiplied and delayed the litigation and necessitated the Respondents herein to incur additional costs and fees.

III. CONCLUSION

UAIC should pay attorneys fees and costs related hereto to Real Parties in Interest, Lewis and Nalder and the court should rehear and correct the decision.

Dated this 18th day of May, 2020.

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[10] UAIC's counsel has not corrected his Affidavit on file with that Court to reflect the action in the lower Court case since 2017, which is critical to the Ninth Circuit's understanding and analysis. Instead, UAIC has continually tried to prevent the Ninth Circuit from considering the truth.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing via the Court's eFlex system on May 18, 2020 and thereby served this document upon all registered users in this case.

/s/ Thomas Christensen

DECLARATION OF COUNSEL

I, THOMAS CHRISTENSEN, first being duly sworn hereby declares as follows:

1. I was admitted to the bar of Nevada in December of 1981; my bar number is 2326.
2. I am an attorney duly licensed to practice law in all Courts in the State of Nevada, Federal District Court for the District of Nevada, the United States Court of Appeals for the Ninth Circuit and The Supreme Court of the United States of America. I am the managing member of Christensen Law Offices, LLC and I am counsel of record for Plaintiffs/Appellants James Nalder and Gary Lewis in an action against UAIC pending in the Ninth Circuit. I also represent Gary Lewis as a Third Party Plaintiff in an action instituted in the Eighth Judicial District in 2018. I make this declaration based on my personal knowledge.
3. Regarding the representation of Nalder and Lewis, throughout, I have referred both Nalder and Lewis for independent representation when there is a conflict between them and I have not represented both sides in these actions.
4. UAIC has claimed, in the Nevada state court case, that its failure to act in good faith and treat its insured fairly in 2018 and 2019 are before the Ninth Circuit. This argument was made in an effort to escape liability in the Nevada state court.
5. Cheyanne Nalder is represented by David A. Stephens, Esq., in her amendment of the 2008 judgment and her action on a judgment filed against Gary Lewis in 2018. Gary Lewis, as a defendant in those lawsuits, is represented by E. Breen Arntz, Esq. pursuant to *Cumis/Hansen* because of the obvious conflict between UAIC and Lewis. (Although

UAIC has refused to pay for this representation and in fact sued E. Breen Arntz for damages.)

6. I have watched the video of the hearing that took place on March 4, 2020 before Judge Eric Johnson and the quote provided herein at footnote 4, page 3, accurately reflects the discussion between Judge Johnson and Dan Polsenberg, Esq., on behalf of UAIC at that hearing.

7. Any communications to the defense attorneys hired by UAIC to "defend" Gary Lewis against the Nalder judgment were consistent and were made under attorney client privilege. A privilege the defense attorneys did not always respect, because they reported the communication to UAIC, which is the adverse party to Gary Lewis. These communications were: 1) I represent Gary Lewis (not as a defendant in the Nalder v. Lewis litigation) and Nalder (not as a plaintiff in the Nalder v. Lewis litigation) in their claims against UAIC; 2) Gary Lewis welcomes your belated defense if it is likely of success, ethical and non-frivolous; 3) Before taking any action on behalf of Gary Lewis, please let me know the basis for your defense and your evaluation of the likelihood of success; 4) Gary Lewis does not want to use a frivolous or weak defense that may only increase his liability; 5) Nor does he wish to delay the inevitable and create more damage or exposure to him in the end; 6) Gary Lewis does not trust that UAIC is actually looking out for his best interests, so please communicate through me; after all, he has been in litigation with UAIC for ten years. He has been exposed to a multimillion dollar judgment for more than 10 years and is still exposed to it; 7) If UAIC will confirm that if its proposed defense fails, it will pay the judgment, then Gary Lewis does

not need to review your defense; 8) However, if UAIC's position is: if we lose, you are on your own (which has been its approach from the beginning), then Gary Lewis wants to at least be able to evaluate the strength of the defense before embarking on that path.

The undersigned, Thomas F. Christensen, Esq., declares and acknowledges, under penalty of perjury, that the information provided herein is correct to the best of his information and belief and can be supported by documentation if called upon to substantiate the information provided herein.

Dated this 18 day of May, 2020.

Thomas Christensen, Esq.